

1 BEFORE THE LAND USE BOARD OF APPEALS

2 OF THE STATE OF OREGON

3  
4 EUGENE SAND AND GRAVEL, INC.,  
5 *Petitioner,*

6  
7 and

8  
9 OREGON CONCRETE AND AGGREGATE  
10 PRODUCERS ASSOCIATION,  
11 *Intervenor-Petitioner,*

12  
13 vs.

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15 LANE COUNTY,  
16 *Respondent,*

17  
18 and

19  
20 THISTLEDOWN FARM, LONE PINE  
21 FARMS, LTD., and KAREN REED,  
22 *Intervenors-Respondent.*

23  
24 LUBA No. 2002-068

25  
26 FINAL OPINION  
27 AND ORDER

28  
29 Appeal from Lane County.

30  
31 Steven L. Pfeiffer and Frank M. Flynn, Portland, filed a petition for review and  
32 Steven L. Pfeiffer argued on behalf of petitioner. With them on the brief was Perkins Coie  
33 LLP.

34  
35 Frank M. Parisi and Todd S. Sadlo, Portland, filed a petition for review and Todd S.  
36 Sadlo argued on behalf of intervenor-petitioner. With them on the brief was Parisi and Parisi  
37 PC.

38  
39 Stephen L. Vorhes, Assistant County Counsel, Eugene, filed a response brief and  
40 argued on behalf of respondent.

41  
42 Daniel J. Stotter, Eugene, filed a response brief and argued on behalf of intervenor-  
43 respondent Thistledown Farm. With him on the brief was Daniel Stotter and Associates PC.

44  
45 Lee D. Kersten, Eugene, filed a response brief and argued on behalf of intervenor-

1 respondent Lone Pine Farms, Ltd.

2

3 Karen W. Reed, Eugene, filed a response brief on her own behalf.

4

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

7

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REMANDED

02/25/2003

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

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**I. NATURE OF THE DECISION**

Petitioner challenges a county decision that denies an application to add 575 acres to the county’s inventory of significant aggregate sites and to allow mining on 240 of those 575 acres.

**II. FACTS**

**II. A. Characteristics of the Subject Property**

The subject property is zoned Exclusive Farm Use (E-30) and Floodplain Combining Zone (FP). The eastern portion of the property borders the Willamette River and is located within the Willamette River Greenway. The property contains inventoried wetlands, and portions of the property contain riparian resources. The subject property is bordered on the north, west and south by property zoned and used for agricultural purposes. Beacon Landing, a 60-acre parcel owned and managed by the Oregon Parks and Recreation Department, is located to the southeast of the subject property on the Willamette River. A Great Blue Heron rookery is located in the vicinity of the subject property and is identified in the county’s sensitive bird habitat inventory. Ninety-two percent of the soils on the property are Class I or Class II agricultural soils. According to petitioner’s estimates, approximately 45 million tons of quality alluvial aggregate are located on the subject property in a layer that is approximately 78 feet deep.<sup>1</sup> Petitioner estimates that the property contains a 20-30 year supply of aggregate, based on current market demand.

A portion of the subject property’s western boundary fronts River Road, a major collector connecting the cities of Eugene and Junction City. Beacon Road, an arterial road,

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<sup>1</sup> We refer to petitioner Eugene Sand and Gravel as “petitioner.” We refer to intervenor-petitioner Oregon Concrete and Aggregate Producers Association as “OCAPA.” We refer to petitioner and OCAPA together, when appropriate, as petitioners. Because most of the arguments in the response briefs have been incorporated by reference by the respondents and intervenors-respondent, we refer to respondents together as a group unless it is appropriate to identify the individual parties by name.

1 intersects with River Road approximately 1.5 miles to the south of the subject property.  
2 River Road intersects with Oregon State Highway 99 approximately 6 miles north of the  
3 subject property. The subject property is accessed by Lone Pine Drive, a local road, which  
4 borders the subject property to the north and connects to River Road to the west.

5 The property is generally flat and is developed with two dwellings and several  
6 agricultural buildings. The most prominent feature of the property is an oxbow in the  
7 Willamette River that creates a “C” shaped channel in the center portion of the eastern  
8 border. A Class I stream (Spring Creek) flows from the south and feeds into the channel. The  
9 property has been in agricultural and forest use for much of the last 40 years.

10 **II. B. The Mining Proposal**

11 Petitioner proposes to mine approximately 240 acres of the 575-acre property. The  
12 remainder of the property would be used to process aggregate, stockpile product, and for  
13 offices, weigh scales, employee parking, product recycling and buffer areas. As proposed,  
14 processing activities include rock crushing/screening, and the establishment of a concrete  
15 manufacturing facility and an asphalt batch plant. The application anticipates that over time  
16 much of the mining, processing and stockpile activities that currently exist on other  
17 properties owned by petitioner would be transferred to the subject property. The transfer of  
18 the mining activities would occur gradually over a 12-year period, as aggregate reserves in  
19 petitioner’s existing facilities are depleted and it becomes more cost-effective to establish  
20 new processing facilities on the subject property.

21 The proposed mining would occur sequentially, in three separate areas.<sup>2</sup> Each area is  
22 expected to contain several cells where mining would occur. Preliminary excavation would  
23 precede mining, to remove overburden and to build protective berms. Because the property is  
24 located on the Willamette River, the water table is very high. Petitioner proposes to conduct

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<sup>2</sup> None of the mining would occur within the boundaries of the Willamette Greenway.

1 wet mining operations during the first mining phase. In wet mining, rock is extracted “below  
2 the water table without dewatering the excavation” area. Record 8697. Water turbidity during  
3 this phase is expected to be minimized by constructing holding ponds and trenches, so that as  
4 water moves away from the mining area, the suspended particulates in the water are  
5 gradually filtered out. Petitioner also anticipates that water will be filtered in the areas  
6 designated as setbacks, so that water that leaves the site will not contain significant levels of  
7 suspended particulates. In addition, during high water events some water will be pumped  
8 from the mining cells directly into the holding ponds. Record 8697-8698, 9963.

9         Some of the water on the site will be diverted for use in aggregate processing. Water  
10 used in the processing facilities will be discharged into the settling ponds and then into the  
11 infiltration trenches so that suspended particulates are filtered from the water before it enters  
12 the aquifer.

13         During the second and major extraction phase, petitioner plans to dry mine. Dry  
14 mining involves shunting most of the water that would enter the pit area into diversion  
15 channels. The water that does enter the pit will be pumped to settling ponds or infiltration  
16 trenches. During this phase, the most likely impact will be water drawdown. Petitioner  
17 asserts that the mining activities will be engineered to ensure that there will be no change in  
18 the current levels of the water table and that minimal increases in flood water levels will  
19 occur during flood events. Record 8705-8706.

20         Petitioner explains that it does not intend to mine the entire site at once. Different  
21 phases would occur at different times depending on market needs and the location of each  
22 cell in relation to other excavated cells. According to petitioner, as each cell is depleted, it  
23 will be reclaimed, so that reclamation will be an ongoing activity on the property. Petitioner  
24 proposes to reclaim the site for open water, riparian areas, and wildlife habitat. Record 8881.

25         Petitioner also proposes to construct a haul road so that access to the property will be  
26 directly from River Road. To minimize the effect that trucks would have on the more

1 congested areas of River Road to the south, petitioner proposes a secondary haul route that  
2 limits travel on River Road to one approximately 1.5 mile segment before turning off onto  
3 less-traveled roads. Record 5465.

#### 4 **II. C. Land Uses in the Vicinity of the Subject Property**

5 As mentioned earlier, the subject property is surrounded by agricultural uses on three  
6 sides. In addition, there is a rural residential area located across River Road, approximately  
7 one-half mile west of the proposed mining site. Beacon Landing, the state-owned property, is  
8 used for recreational purposes, including primitive camping, birdwatching, and boating.  
9 Beacon Landing is accessible only from the Willamette River.

10 Crops grown in the area consist of nuts, flowers, holly, fruits and vegetables,  
11 including but not limited to: filberts, pumpkins, strawberries, statice, gladiolas, berries,  
12 peaches, apples, grapes and hay. A boarding stable for horses is located to the north of the  
13 subject property. In the near vicinity of the subject property, Thistledown Farm and Lone  
14 Pine Farms operate retail farm stands. Retail activities conducted on those farms include the  
15 sale of produce grown on the subject farms. In 1999, Lone Pine Farms received conditional  
16 use approval to conduct commercial activities in conjunction with farm use on its property.  
17 These uses include an open air buffet and special seasonal events, such as a Strawberry  
18 Festival and a Harvest Festival, to market produce grown on Lone Pine Farms and other  
19 farms in the vicinity as well as to sell local crafts. Farms in the vicinity also promote the sale  
20 of their products by operating “U-Pick” patches for berries, pumpkins and flowers.

#### 21 **II. D. The Local Proceedings**

22 Petitioner submitted its initial application to the county on July 21, 1999. Additional  
23 evidence and revisions to the application were submitted in response to county and other  
24 agency comments. The revised application was presented to the planning commission in  
25 April 2000. The planning commission held the record open until September 15, 2000, to  
26 allow the parties additional time to submit written materials. On October 18, 2000, the

1 planning commission determined that the property contained significant aggregate resources,  
2 as that term is defined in OAR 660-010-0180(1). However, the planning commission  
3 concluded that mining should not be permitted, because mining would result in noise, dust  
4 and traffic conflicts that could not be minimized. The planning commission also concluded  
5 that the proposed mining would conflict with agricultural practices on adjacent and nearby  
6 properties. The planning commission voted 4-2 to recommend to the Board of  
7 Commissioners that the application be denied.

8 The application was then forwarded to the Board of Commissioners for review. After  
9 additional hearings were held, the Board of Commissioners denied the application,  
10 concluding that petitioner had failed to demonstrate that conflicts due to flooding and  
11 groundwater discharges could be minimized. The Board of Commissioners also concluded  
12 that the mining activities would significantly increase the cost of agricultural practices in the  
13 area and would cause significant changes in those agricultural practices. The Board of  
14 Commissioners adopted an economic, social, environmental and energy (ESEE) analysis  
15 pursuant to OAR 660-023-0180(4)(d). The ESEE analysis concluded that the benefits of  
16 allowing mining did not outweigh the negative impacts of the identified conflicts, and that  
17 mining should not be allowed. This appeal followed.

### 18 **III. GOAL 5 RULE**

19 We have summarized the process set out in the Goal 5 rule for reviewing applications  
20 for mining in several opinions and will not repeat the general summary here. *See Mollala*  
21 *River Reserve Inc. v. Clackamas County*, 42 Or LUBA 251, 254-256 (2002). For the  
22 purposes of this appeal, the most relevant provisions of the Goal 5 rule are OAR 660-023-  
23 0180(1)(f) and OAR 660-023-0180(4), which govern conflicts with mining.<sup>3</sup>

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<sup>3</sup> OAR 660-023-0180(1) provides, in relevant part:

“(1) For purposes of this rule, the following definitions apply:

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“\* \* \* \* \*

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

OAR 660-023-0180(4) provides, in relevant 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. \* \* \* 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. \* \* \*

“(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;

“(B) Potential conflicts to local roads used for access and egress to the mining site within one mile of the entrance to the mining site unless a greater distance is necessary in order to include the intersection with the nearest arterial identified in the local transportation plan. Conflicts shall be determined based on clear and objective standards regarding sight distances, road capacity, cross section elements, horizontal and vertical alignment, and similar items in the transportation plan and implementing ordinances. Such standards for trucks associated with the mining operation shall be equivalent to standards for other trucks of equivalent size, weight, and capacity that haul other materials;

“\* \* \* \* \*

“(D) Conflicts with other Goal 5 resource sites within the impact area that are shown on an acknowledged list of significant resources

1 **IV. INTRODUCTION**

2 Three overriding themes permeate petitioners’ briefs. First, petitioners argue that the  
3 county erred in analyzing conflicts with agricultural uses under OAR 660-023-0180(4)(b)(E)  
4 and (4)(c) differently from the way conflicts with other uses were analyzed. The county  
5 concluded that the proposed mining activities would violate the standard for evaluating  
6 impacts to agricultural uses set out in ORS 215.296 and, therefore, even though petitioner’s  
7 proposed mitigation would otherwise minimize those identified conflicts, the particular  
8 impacts those conflicts would have on agricultural uses would violate the standard set out in  
9 ORS 215.296 and could not be minimized.<sup>4</sup>

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and for which the requirements of Goal 5 have been completed at the time the PAPA is initiated; [and]

“(E) Conflicts with agricultural practices[.]”

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

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

<sup>4</sup> OAR 660-023-0180(4)(c) provides that, in addressing conflicts between mining and agricultural practices, “the requirements of ORS 215.296 shall be followed, rather than the requirements of this section.” See n 3. ORS 215.296 provides, in relevant part:

1 Second, petitioners challenge the county’s consideration of the impacts the proposed  
2 mining would have on the farm stands operated by Thistledown Farm and Lone Pine Farms.  
3 Petitioners contend that the county erred in considering the impacts mining trucks would  
4 have on access to the farm stands, and the impact additional dust from mining would have on  
5 the sales of products from those stands, as impacts on “agricultural practices.” Petitioners  
6 argue that the farm stand activities are not “agricultural practices” as that term is used in  
7 OAR 660-023-0180(4)(b)(E).

8 Third, petitioners argue that, to the extent the county could interpret ORS 215.296 to  
9 impose a stricter standard for evaluating the impact of dust, traffic and other discharges on  
10 agricultural practices, the county’s findings do not satisfy the standard for adequate findings  
11 set out in *Commonwealth Properties, Inc. v. Washington County*, 35 Or App 387, 400, 582  
12 P2d 1284 (1978).

13 **IV. A. Standards for Evaluating Conflicts with Agricultural Practices**

14 OAR 660-023-0180(4)(b)(A) provides that the county shall consider conflicts with  
15 existing and approved uses that are attributable to dust, noise and other discharges from the  
16 proposed mining activities. If the applicant demonstrates that it can meet applicable  
17 standards that regulate those impacts, such as DEQ air quality, noise or water quality  
18 standards, OAR 660-023-0180(1)(f) and (4)(c) effectively provide that those conflicts are, as

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“(1) A use allowed under ORS 215.213 (2) or 215.283 (2) may be approved only where the local governing body or its designee finds that the use will not:

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

“(2) An applicant for a use allowed under ORS 215.213(2) or 215.283(2) may demonstrate that the standards for approval set forth in subsection (1) of this section will be satisfied through the imposition of conditions. Any conditions so imposed shall be clear and objective.”

1 a matter of law, minimized. Similarly, if an applicant demonstrates that the traffic impact of  
2 the proposed mining activities would not violate applicable standards set out in a local  
3 transportation systems plan or in the Transportation Planning Rule with regard to the  
4 intersections required to be considered under OAR 660-023-0180(4)(b)(B), satisfaction of  
5 those standards means that the impacts are minimized. Any conflicts for which applicable  
6 standards are met may not be used as a basis for denying the mining application. However,  
7 conflicts with agricultural practices are, as we stated earlier, governed by the “requirements”  
8 of ORS 215.296. OAR 660-023-0180(4)(c). *See* n 4. In this case, the county found that the  
9 evidence supported a conclusion that the conflicts associated with the proposed mining  
10 activities would “force a significant change in accepted farm \* \* \* practices on surrounding  
11 lands devoted to \* \* \* farm use” and would also “significantly increase the cost of accepted  
12 farm \* \* \* practices on surrounding lands,” even though the minimization efforts proposed  
13 by petitioner would allow the proposal to meet relevant air quality and traffic standards.

14         Petitioners contend that the county cannot apply two standards to address the same  
15 conflicts, especially when one of those standards is as subjective as the standard set out in  
16 ORS 215.296. According to petitioners, OAR 660-023-0180(4)(b)(E) should be read to allow  
17 the county to consider only those conflicts with agricultural practices that are not otherwise  
18 addressed by OAR 660-023-0180(4)(b). Even if the conflicts generated by the proposed  
19 mining activities could be separately addressed under OAR 660-023-0180(4)(b)(E),  
20 petitioners contend that once an applicant demonstrates that the conflict can be minimized by  
21 satisfying applicable standards, conflicts with agricultural practices are deemed to be  
22 minimized as well. OCAPA argues that OAR 660-023-0180(4)(b) and (c) should not be read  
23 to protect agricultural practices, which are themselves a major producer of dust, to a greater  
24 extent than dust sensitive uses like homes and schools.

25         Respondents counter that nothing in OAR 660-023-0180(4) limits the county’s  
26 consideration of conflicts that may arise between mining activities and agricultural practices.

1 According to respondents, the “applicable” standards for addressing the impact of dust, noise  
2 and other discharges described in OAR 660-023-0180(4)(b)(A) were adopted to limit the  
3 impact of those discharges on human activities. For example, respondents argue, the  
4 standards for dust control are based on particulate discharges that affect human lungs, and do  
5 not address the larger particulates that may not affect humans, even though such discharges  
6 may affect animals and crops. In addition, respondents argue that regulating the general  
7 impact of traffic on transportation system performance under OAR 660-023-0180(4)(b)(B)  
8 does not address the impact on agriculture that results from slow gravel trucks entering River  
9 Road. According to respondents, the gravel trucks will add additional traffic on River Road  
10 that interferes with use of the road to transport agricultural equipment. Respondents argue  
11 that OAR 660-023-0180(4)(b)(E) and (4)(c), when read together with ORS 215.296, provide  
12 that the standard for reviewing the impact of mining activities on agricultural practices is  
13 whether the proposed mining activities will “[f]orce a significant change in” or “significantly  
14 increase the cost of” accepted agricultural practices, not whether the applicant can satisfy  
15 unrelated air or traffic standards that were not adopted to limit impacts with agricultural  
16 practices.

17 We agree with respondents. Although petitioner has demonstrated, and the county has  
18 found, that the proposed mining activities will meet relevant air and traffic standards for the  
19 purposes of compliance with OAR 660-0230180(4)(b)(A) and (B), alleged conflicts between  
20 proposed mining activities and agricultural practices may nevertheless violate the standard  
21 set out at ORS 215.296(1). OAR 660-023-0180(4)(c) states that for the purposes of “this  
22 section” (meaning section OAR 660-023-0180(4)) conflicts with agricultural practices are  
23 addressed by meeting the requirements of ORS 215.296. OAR 660-023-0180(4), therefore,  
24 treats conflicts with agricultural practices differently from all other uses and activities with  
25 which mining activities may conflict. While the same ultimate legal standard (“minimize  
26 conflicts”) is nominally applied to mining-related conflicts with agricultural practices, the

1 manner in which the county is directed to demonstrate that the “minimize conflicts” standard  
2 is met is to apply ORS 215.296. ORS 215.296 requires that there be no “significant change  
3 in” or “significant increase in the cost of” accepted farm practices. Petitioners do not contend  
4 that there are any local, state or federal standards that have been adopted to regulate mining-  
5 related conflicts with agricultural practices. That there may be such standards to protect  
6 human health or environmental concerns generally does not obviate the rule’s directive that  
7 the requirements of ORS 215.296 must be met. The county did not err in considering whether  
8 the applicant adequately demonstrated that mining related impacts will not cause a  
9 “significant change in” or “significant increase in the cost of” accepted farm practices,  
10 notwithstanding the applicant’s demonstration that DEQ air quality, noise and water quality  
11 standards and relevant transportation standards will be met.<sup>5</sup>

12 **IV. B. Impact of Proposed Mining Activities on Farm Stands**

13 Petitioners argue that conflicts between mining activities and farm stands may not be  
14 considered under OAR 660-023-0180(4)(b)(E). According to petitioners, farm stands do not  
15 fall under the definition of farm use set out at ORS 215.203(2), because the use is separately  
16 and more distinctly defined in ORS 215.213(1)(u).<sup>6</sup> Petitioners concede that farm stands are

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<sup>5</sup> Accordingly, petitioner’s second assignment of error is denied in part. OCAPA’s fourth assignment of error is denied and its ninth assignment of error is denied in part.

<sup>6</sup> In relevant part, “farm use” is defined in ORS 215.203(2)(a) as:

“the current employment of land for the primary purpose of obtaining a profit in money by raising, harvesting and selling crops or the feeding, breeding, management and sale of, or the produce of, livestock, poultry, fur-bearing animals or honeybees or for dairying and the sale of dairy products or any other agricultural or horticultural use or animal husbandry or any combination thereof. ‘Farm use’ includes the preparation, storage and disposal by marketing \* \* \* of the products or by-products raised on such land for human or animal use. \* \* \*”

ORS 215.203(2)(c) provides:

“As used in this subsection, ‘accepted farming practice’ means a mode of operation that is common to farms of a similar nature, necessary for the operation of such farms to obtain a profit in money, and customarily utilized in conjunction with farm use.”

ORS 215.213(1) provides, in relevant part:

1 permitted in an EFU zone. *See Brentmar v. Jackson County*, 321 Or 481, 900 P2d 1030  
2 (1995) (uses listed in ORS 215.213(1) and 215.283(1) must be permitted in EFU zones).  
3 However, petitioners argue that the “agricultural practices” that must be considered under  
4 OAR 660-023-0180(4)(b)(E) are limited to those agricultural practices listed in ORS  
5 215.203(2)(b) and do not include ancillary activities that are allowed as permitted nonfarm  
6 uses under ORS 215.213(1). Petitioners argue that the fact that the proposed mining activity  
7 may have some impact on access to the Thistledown Farm and Lone Pine Farms farm stands  
8 and may cause dust that impairs the quality of the products displayed and sold at those farm  
9 stands does not provide a basis for denying the mining application under 660-023-  
10 0180(4)(b)(E) because the types of activities that must be considered under 660-023-  
11 0180(4)(b)(E) are only those agricultural practices that are listed in ORS 215.203(2)(b).<sup>7</sup>

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“In counties that have adopted marginal lands provisions \* \* \* the following uses may be established in any area zoned for exclusive farm use:

“\* \* \* \* \*

“(u) Farm stands if:

“(A) The structures are designed and used for the sale of farm crops or livestock grown on the farm operation, or grown on the farm operation and other farm operations in the local agricultural area, including the sale of retail incidental items and fee-based activity to promote the sale of farm crops or livestock sold at the farm stand if the annual sale of incidental items and fees from promotional activity do not make up more than 25 percent of the total annual sales of the farm stand; and

“(B) The farm stand does not include structures designed for occupancy as a residence or for activity other than the sale of farm crops or livestock and does not include structures for banquets, public gatherings or public entertainment.”

<sup>7</sup> We understand petitioners to argue only that the impact of dust and traffic on farm stands or on other farm-related commercial events permitted pursuant to ORS 215.213(2)(c) may not be considered under 660-023-0180(4)(b)(E). We do not understand petitioners to argue that conflicts caused by mining dust and traffic on those activities may not be considered under 660-023-0180(4)(b)(A) or (B). However, because the standard for reviewing conflicts between mining and agricultural practices is different from the standard used for evaluating dust and traffic conflicts under 660-023-0180(4)(b)(A) and (B), the question of whether the impact of mining on farm stands may be used to determine whether the proposed mine will significantly increase the cost of accepted farm practices or result in significant changes to accepted farm practices is important for determining whether the county correctly analyzed conflicts with agricultural practices.

1 Respondents argue that much of the farm income from Thistledown Farm and Lone  
2 Pine Farms is derived from the farm stands and farm-related special events. Respondents  
3 contend that those activities are farm uses because they involve the “preparation, storage and  
4 disposal by marketing or otherwise of the products or by-products raised on such land for  
5 human or animal use” within the meaning of ORS 215.203(2)(b) and are “accepted farming  
6 practice[s]” within the meaning of ORS 215.203(2)(c).

7 We disagree. The uses that are listed under ORS 215.213(1) and 215.283(1) are  
8 nonfarm uses. *Collins v. Klamath County*, 148 Or App 515, 521, 941 P2d 559 (1997). We  
9 have held that when a use falls within the general definition of “farm use” in ORS  
10 215.203(2)(b) but is specifically listed as a use subject to regulation under ORS 215.215(2)  
11 or 215.283(2), the specific provision controls the general provision, and the use thus becomes  
12 subject to local approval standards under ORS 215.283(2). *Tri-River Investment Company v.*  
13 *Clatsop County*, 37 Or LUBA 195 (1999), *aff’d* 165 Or App 315, 995 P2d 598 (2000). In *Tri-*  
14 *River Investment Company*, we held that although a proposed kennel for raising and selling  
15 dogs may fall within the general definition of “animal husbandry” under ORS 215.203(2),  
16 kennels are separately and more specifically listed as a use subject to statutory and local  
17 review criteria under ORS 215.283(2), and the county did not err in applying local review  
18 standards or by basing its denial of the application on a failure to comply with those local  
19 standards. 37 Or LUBA at 205-206.

20 The legislature has chosen to differentiate between “farm use,” “farm stands” and  
21 “commercial activities that are in conjunction with farm use” and place each of those uses in  
22 separate categories, subject to different levels of regulation. *See* ORS 215.203(2)(a), ORS  
23 215.213(1)(u) and ORS 215.213(2)(c). Uses identified as nonfarm uses under ORS  
24 215.213(1) are not farm uses or agricultural practices that must be evaluated under OAR  
25 660-023-180(4)(b)(E). Therefore, the county erred when it considered conflicts between the

1 proposed mining activities and farm stands in concluding that OAR 660-023-0180(4)(b)(E)  
2 was not satisfied.<sup>8</sup>

3 **IV. C. Standard for Evaluating Findings**

4 In *Commonwealth Properties, Inc. v. Washington County*, 35 Or App 387, 582 P2d  
5 1284 (1978), the Court of Appeals reviewed a county decision that denied an application for  
6 a tentative subdivision plat. The county’s decision was based in part on a conclusion that the  
7 proposed subdivision design did not comply with broadly worded comprehensive plan  
8 policies. The applicant challenged the county’s decision, arguing that the decision did not  
9 satisfy ORS 215.416(6), which provided that

10 “approval or denial of a permit shall be based upon and accompanied by a  
11 brief statement that explains the criteria and standards considered relevant to  
12 the decision, states the facts relied upon in rendering the decision and explains  
13 the justification for the decision based on the criteria, standards and facts set  
14 forth.” 35 Or App at 396.

15 The Court agreed with the applicant that the county’s decision did not adequately  
16 explain why the applicant failed to meet relevant approval criteria. The Court held that

17 “the grounds [for denial] must be articulated in a manner sufficiently detailed  
18 to give [an applicant] reasonably definite guides as to what it must do to  
19 obtain \* \* \* final approval, or inform the [applicant] that it is unlikely [the  
20 application] will be approved.” 35 Or App at 400.

21 According to petitioners, *Commonwealth Properties, Inc.* requires that the county  
22 evaluate each conflict with respect to agricultural practices independently and adopt findings  
23 that: (1) set out and particularly define the relevant evaluation standard; (2) identify the  
24 particular conflicts that must meet that evaluation standard; (3) identify the conflicts with  
25 each affected agricultural practice that can be minimized by reasonable and practicable  
26 measures; and (4) determine whether the defined standard is violated, after those impacts that  
27 can be minimized are removed from the evaluation equation. Petitioners contend that, with

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<sup>8</sup> Accordingly, petitioner’s third and ninth assignments of error are sustained in part. OCAPA’s fifth assignment of error is sustained in part.

1 respect to conflicts with agricultural practices, the county’s findings fall far short of the  
2 *Commonwealth Properties, Inc.* standard. Petitioners argue that without findings that  
3 establish the baselines for analysis and explain why the subject application fails to meet those  
4 baselines, petitioner does not know whether it can modify its application in order to meet the  
5 established standards or whether the county believes it is unlikely that the proposed mining  
6 activities will be approved.

7 We disagree with both petitioners’ characterization of the *Commonwealth Properties,*  
8 *Inc.* standard and their argument that the county’s findings with respect to conflicts with  
9 agricultural practices violate that standard. In our view, *Commonwealth Properties, Inc.*  
10 stands for the principle that a decision that denies a permit application must identify the  
11 standards that it considered to deny the application, and must also identify the facts that it  
12 relies upon to reach the conclusion that the applicable standards are not met. The county is  
13 not required, by *Commonwealth Properties Inc.* or ORS 215.296, to establish a numerical or  
14 otherwise definite threshold of significance for each component conflict. Nor is the county  
15 required to identify the type of evidence or quantum of evidence that is required to establish  
16 that the standard is met. *See Von Lubken v. Hood River County*, 118 Or App 246, 250, 46  
17 P2d 1178 (1993) (the word “significant in ORS 215.296 “connotes a question of degree that  
18 is more a matter of fact than of law”).

19 Contrary to petitioners’ argument, the county’s findings here show that the county  
20 concluded that discharges from the property as a result of the mining activity, including dust,  
21 groundwater discharges and flooding, violate ORS 216.296, the applicable standard, either  
22 by forcing a significant change in or by significantly increasing the cost of agricultural  
23 practices that are occurring on surrounding farms. The county’s decision specifically  
24 identifies relevant agricultural practices, and identifies the impacts that the proposed mining  
25 operation will have on those practices. It also identifies the evidence it relied upon to  
26 conclude that, despite minimization, the proposed mining activities would not satisfy ORS

1 215.296. From the decision, petitioner is reasonably apprised of the county's understanding  
2 of what the standards require and the evidence needed to demonstrate that the standards are  
3 satisfied.<sup>9</sup> *Commonwealth Properties, Inc.* does not require more.<sup>10</sup>

4 With these points in mind, we now turn to petitioners' specific assignments of error.

#### 5 **V. DUST IMPACTS**

6 In its second assignment of error, petitioner argues that Lane Regional Air Pollution  
7 Agency (LRAPA) regulations provide the applicable standard for controlling dust.  
8 According to petitioners, LRAPA Titles 32 and 48 require that petitioner's operations emit  
9 no more than 3.5 grams per square meter per month (g/m<sup>2</sup>/month) of dust. Petitioner  
10 contends that (1) it provided evidence, including concurring opinions from LRAPA staff, that  
11 petitioner's operations will meet that standard; (2) the county accepted that evidence with  
12 respect to dust conflicts under OAR 660-023-0180(4)(b)(A), and (3) no evidence from  
13 opponents undermines that evidence. Petitioner contends that it met dust control standards as  
14 a matter of law and therefore, conflicts with dust may not be used as a basis for denying its  
15 application.

16 Similarly, OCAPA argues in its sixth assignment of error that the county's findings  
17 with respect to dust are inconsistent and are therefore inadequate. According to OCAPA, the  
18 county cannot conclude that dust conflicts under OAR 660-023-0180(4)(b)(A) are  
19 minimized, but then conclude that dust generated by the mining operations will significantly  
20 affect agricultural practices because the evidence supporting that impact on agriculture is

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<sup>9</sup> Our analysis of the county's decision in light of the findings standard articulated in *Commonwealth Properties, Inc.* does not mean that the county's findings in this case are necessarily invulnerable to challenge on other grounds. We merely conclude that *Commonwealth Properties, Inc.*, does not impose the findings or evidentiary burdens petitioners ascribe to it.

<sup>10</sup> Petitioner's eighth assignment of error is therefore denied. Petitioner's ninth assignment of error is denied in part. OCAPA's fifth assignment of error is denied in part and its ninth assignment of error is denied.

1 based on much higher levels of dust emissions than are predicted to occur on the subject  
2 property.

3 Respondents concede that the county's findings rely on evidence showing that it is  
4 possible for the proposed mining operations to meet LRAPA standards to conclude that dust  
5 conflicts under OAR 660-023-0180(4)(b)(A) are minimized. However, respondents argue  
6 that there is also evidence that the mining activities will not meet LRAPA standards at all  
7 times, and there is also evidence that *any* increase in dust levels, including dust levels as low  
8 as 3.5 g/m<sup>2</sup>/month, will result in the significant impacts to agriculture that are discussed in  
9 the county's findings. Finally, respondents argue that the LRAPA standards do not address  
10 all dust impacts on agriculture, particularly those dust impacts on agricultural activities that  
11 are caused by particle sizes and types of dust emissions that are not regulated under LRAPA  
12 rules.

13 The county also argues that petitioners do not challenge the five pages of findings  
14 that explain the specialized impacts the proposed mining activities will have on existing  
15 agricultural activities on the area, or the evidence on which those findings are based.  
16 Therefore, the county argues that even if we conclude some findings questioning the  
17 methodology used in petitioner's dust study do result in conflicting findings, other findings  
18 are sufficient to explain why the county believes that the anticipated dust impacts will have a  
19 significant impact on farm practices even if the LRAPA standard is met, and those findings  
20 are supported by substantial evidence.

21 The county's findings with respect to the conflicts between mining and agriculture  
22 are found at Record 59 through 65 and incorporate by reference a 19-page document that  
23 describes the types of agricultural practices within the impact area. The concluding findings  
24 state, in relevant part:

25 "[T]he following significant conflicts from dust will result in a significant  
26 change or a significant increase in the cost of accepted farming practices in  
27 the impact area: increased need for agro-chemical application and produce

1 washing; affected plant growth from reduced photosynthesis; reduction in the  
2 effectiveness of applied herbicides, fungicides and insecticides; impacts to  
3 greenhouse translucency; reduced marketability of crops from the visual  
4 impacts of dust on crops; increased heating requirements due to reduced light  
5 transmission; inability to commercially wash raspberries, blackberries,  
6 marionberries, boysenberries, blueberries, and strawberries, increased impacts  
7 to the health of the apple orchard due to alleged increased in the population of  
8 dust mites; increased production costs for new investment in sprays for dust  
9 mites and apple washing equipment; and impacts to bees that are necessary  
10 for pollination.” Record 65.

11 We have already stated that the county did not err in interpreting OAR 660-023-  
12 0180(4)(c) or OAR 660-023-0180(1)(f) to impose a different standard for evaluating dust  
13 emission conflicts and agricultural activities than it applied in considering dust emission  
14 conflicts with other uses and activities. However, there must be substantial evidence to  
15 support a finding that the conflicts between mining activities and agricultural practices  
16 violate ORS 215.296. Here, the county relied upon evidence of dust impacts from farmers in  
17 the area, agricultural extension agents familiar with agricultural practices in the area, and an  
18 environmental scientist to conclude that *any* increase in ambient dust levels from the  
19 proposed mining activities would force a significant change in the operation of farms that  
20 grow or raise a broad variety of minimally processed agricultural products. The changes in  
21 agricultural practices include: a need to wash berries that are not amenable to machine  
22 washing, modifications to pest management strategies and changes in the availability and use  
23 of bees for pollination. Those findings are supported by substantial evidence notwithstanding  
24 testimony from petitioner’s experts that its proposed minimization measures will eliminate  
25 dust impacts on agricultural practices. *See Molalla River Reserve, Inc. v. Clackamas County*,  
26 42 Or LUBA at 268 (a local government may rely on the opinion of an expert if, considering  
27 all the relevant evidence in the record, a reasonable person could have chosen to rely on the  
28 expert’s conclusions). Accordingly, petitioner’s second assignment of error and OCAPA’s  
29 sixth assignment of error are denied.

1 **VI. TRANSPORTATION IMPACTS**

2 Petitioner’s third assignment of error and OCAPA’s seventh and eighth assignments  
3 of error challenge the county’s legal analysis and the evidentiary basis for the county’s  
4 conclusion that the proposed mining activities would result in increases in traffic volume that  
5 would violate ORS 215.296. Petitioners first argue that the county improperly relied on  
6 evidence regarding the impact of the increased traffic on the Thistledown Farm and Lone  
7 Pine Farms farm stands. Petitioners also argue that to the extent the county found that the  
8 proposed mining activities would interfere with other agricultural practices, those practices  
9 are not identified, and the impact is not supported by substantial evidence.

10 Based on a traffic analysis provided by the applicant, the county found that the  
11 proposed mining activities would comply with transportation standards and would therefore  
12 be minimized for uses and activities other than agricultural activities. However, the county  
13 relied on a transportation impact analysis supplied by Lone Pine Farms to conclude that the  
14 trucks entering and leaving River Road from the subject property would result in  
15 unacceptably long exit delays from the Lone Pine Farms farm stand and, by inference, the  
16 Thistledown Farm farm stand. In addition, the findings indicate that the additional traffic  
17 generated by petitioner’s proposed mining operations would interfere with the use and  
18 transport of farm equipment across River Road.<sup>11</sup>

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<sup>11</sup> The county’s findings state, in relevant part:

“As discussing in the applicant’s June 22, 1999 Traffic Impact Analysis \* \* \* a parking study was performed for Lone Pine Farm[s] in 1995. The parking study indicated that Lone Pine Farm[s] could attract as many as 1,750 patrons per weekday. Given the close proximity, similar size and land-use characteristics of Thistledown Farm, a trip generation rate equal to that at Lone Pine Farms was assumed. Given a 9-hour business day and assuming an average carload of three patrons, the hourly flow is a rate of 65 vehicles per hour. These same assumptions were employed in the Lone Pine Farm[s] parking study and the Board [of Commissioners] finds those findings and assumptions reasonable.

“\* \* \* \* \*

“\* \* \* The worst-case analysis, \* \* \* [which] is found by the Board [of Commissioners] to be [a] reasonable [scenario], shows a significant increase in average vehicle delay for existing

1 We agree with petitioners that the county improperly relied on the impact of the  
2 proposed mining traffic on the farm stands to conclude that the proposed mining activities  
3 would violate ORS 215.296. The county may examine the impacts of the proposed mining  
4 operations on the use and transport of farm equipment or on access to the farms for other  
5 agricultural practices. However in this case, the county’s findings with respect to those  
6 transportation conflicts are so inextricably linked to their analysis of the traffic conflicts with  
7 farm stands that we agree with petitioners that the findings are inadequate to explain why the  
8 proposed mining operations will violate ORS 215.296. Accordingly, petitioner’s third  
9 assignment of error and OCAPA’s seventh and eighth assignments of error are sustained in  
10 part.

11 **VII. GROUNDWATER IMPACTS**

12 The county concluded that the proposed mining activities would affect groundwater,  
13 and analyzed conflicts between the proposal and groundwater pursuant to OAR 660-023-  
14 0180(4)(b)(A) and (E). The county concluded that petitioner’s groundwater studies were  
15 inadequate to establish that the proposed mining impacts would result in no change to water  
16 levels or would not result in discharges to the groundwater. Petitioner’s fourth, fifth and  
17 seventh assignments of error and OCAPA’s first assignment of error challenge the county’s  
18 conclusions.

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vehicles from Thistledown Farm given the proposed development and future background traffic volumes. Based on the traffic analysis \* \* \* the Board [of Commissioners] finds that traffic from the proposed project will create a significant traffic conflict with patrons of the Thistledown Farm retail stand traffic as well as farm equipment. To a lesser degree, there exists a conflict with the Lone Pine Farms retail stand. The record lacks a proposal from the applicant to minimize the effect of the increased traffic on the retail stands. Based upon all the testimony and evidence in the record regarding the expected levels of traffic, the Board [of Commissioners] concludes that the applicant has failed to establish that the predicted traffic conflict with existing retail stands and other agricultural practices will not force a significant change [in] or significantly increase the cost of accepted farm practices on surrounding lands devoted to farm use.” Record 66.



1 Petitioner’s experts identified the impact that dewatering mining areas may have on nearby  
2 wells. Record 8704, 8706-8707. Petitioner’s representatives also testified that they did not  
3 believe that any potential discharges into the groundwater would have a significant impact on  
4 the quality or quantity of water in the area. That testimony was rebutted by respondents and  
5 others. *See e.g.*, Record 3386-3388 (Seltzer analysis of petitioner’s groundwater evidence).  
6 Therefore, we agree with respondents that petitioners cannot now argue that (1) groundwater  
7 is not a discharge within the meaning of OAR 660-023-0180(4)(b)(A); or (2) that  
8 groundwater impacts may only be considered a conflict pursuant to OAR 660-023-  
9 0180(4)(b)(D). If petitioners believed that groundwater impacts must be analyzed in that  
10 limited manner, they were required to take that position below. Their failure to do so means  
11 that issue is waived in this appeal. ORS 197.835(2).

12 **VII. B. Consideration of Proposed Minimization Measures**

13 Petitioner argues that it identified reasonable mining practices that would minimize  
14 any impact the proposed mining activities would have on groundwater. Petitioner argues in  
15 its fourth assignment of error that, because it agreed to conduct mining activities on the  
16 property in accordance with those reasonable mining practices, the county could not consider  
17 groundwater as a conflict under OAR 660-023-0180(4)(b) at all. According to petitioner,  
18 OAR 660-023-0180(1)(f), (4)(b) and (4)(c), when read together, require the county to  
19 identify actual and potential conflicts, but if there are reasonable and practicable measures  
20 that will minimize the conflict, the conflict no longer exists.

21 Respondents concede that, if the county finds that there are reasonable and  
22 practicable measures that will ensure that a conflict is minimized, that conflict may not form  
23 a basis for denial of a mining application. However, respondents argue that the county is not  
24 obligated to blindly accept petitioner’s assertions that the minimization measures are  
25 reasonable or practicable. Even if proposed minimization measures are reasonable and  
26 practicable, respondents argue that it is the county’s responsibility to weigh the evidence and

1 conclude whether that mining will cause a significant impact on groundwater  
2 notwithstanding those proposed minimization measures. Respondents argue that in this case,  
3 the county considered petitioner's evidence, but concluded, based on evidence presented by  
4 opponents, that the proposed minimization measures were either unlikely to achieve the  
5 desired result or were impracticable.

6 It is the applicant's burden to demonstrate that all applicable standards are met.  
7 *Knapp v. City of Jacksonville*, 20 Or LUBA 189, 200 (1990). If opponents present evidence  
8 that tends to undermine the evidence an applicant relies on to demonstrate that a standard is  
9 met, it is the local government's responsibility to review and weigh the evidence presented  
10 and determine, based on the conflicting evidence, whether the application complies with  
11 relevant approval standards. *Molalla River Reserve Inc. v. Clackamas County*, 42 Or LUBA  
12 at 268; *Harwood v. Lane County*, 23 Or LUBA 191, 198 (1992); *Bright v. City of Yachats*, 16  
13 Or LUBA 161 (1987). We do not believe that OAR 660-023-0180(4) changes either the  
14 applicant's evidentiary burden or the local government's responsibility for determining  
15 whether proposed minimization measures are reasonable, practicable and achievable. The  
16 county did not err in considering: (1) whether and to what extent the proposed mining  
17 activities would affect groundwater; (2) whether and to what extent reasonable and  
18 practicable measures were available to minimize the impact, and (3) whether it is likely that  
19 the identified water quality measures would result in minimization that would satisfy relevant  
20 standards or would not violate ORS 215.296.

### 21 VII. C. Adequacy of the County's Findings

22 Petitioner argues in its fourth and seventh assignments of error that the county's  
23 findings are inadequate because they fail to take into account the minimization that petitioner  
24 proposed to ensure that groundwater would not be affected and because they do not identify  
25 why the mining activities would result in increased costs to or force significant changes in  
26 agricultural practices. We disagree. The county's findings identify the context in which the

1 Board of Commissioners considered the impact of groundwater, identify the evidence  
2 presented by both proponents and opponents, and identify the evidence they consider to be  
3 more credible. In addition, the findings identify the impacts mining activities are likely to  
4 have on agricultural practices as a result of conflicts to groundwater.<sup>12</sup> The county is not  
5 obligated to do more.

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<sup>12</sup> The county's findings state, in relevant part:

“15. Groundwater Discharge Conflict

- “a. Groundwater impacts have been identified as a discharge from the proposed mining area that conflicts with nearby dwellings and other existing and approved uses. The portion of the operation that produces the conflicts is the de-watering within mining cells “A” through “G” shown on the proposed mining plan map \* \* \* below the water table. The predicted conflicts consist of the lowering of the water table accessed by nearby residential wells and farm irrigation wells, recirculating water coming into the mining area, potential contamination of the groundwater, and disposal of pumped water.
- “b. The groundwater impact area is identified on Figure 4 of the Addendum Groundwater Model \* \* \*. The predicted impact to groundwater levels would occur for a distance of 2500 feet in the southeast direction and more than 3300 feet in the western direction.
- “c. The applicant's groundwater study \* \* \* contains the details regarding the water table impacts to be expected at certain distances from the operation. Figure 4 of the Addendum Groundwater Model \* \* \* documents that, without mitigation, the groundwater table would be lowered 11 feet within the mining area. Specific impacts to nearby properties would conform to the drawdown contours of Figure 4. Without mitigation measures, wells immediately adjacent to the excavation and 20 feet deep or less may need to be deepened to preserve existing quantities of water supply. Based upon all the evidence and testimony in the record, the Board [of Commissioners] finds that conflicts caused by the reduction in groundwater levels represent significant conflicts with existing residential and farm uses within the impact area.
- “d. Conflicts regarding groundwater are not addressed by any local, state or federal standards so minimization must reduce the conflict to a level that is no longer significant.
- “e. The applicant proposes to minimize the conflict with neighboring wells by the construction of infiltration trenches between the excavation and the wells. The Addendum Groundwater Model \* \* \* concludes that potential drawdowns in neighboring wells can be reduced to negligible amounts (less than 1 foot) by use of the infiltration trench[es.]

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“f. Evidence submitted by Joel Massman Ph.D., \* \* \* with concurrence from John Selker, Ph.D., demonstrates that the applicant’s groundwater studies are not accurate enough to find that the conflict has been minimized. The Board [of Commissioners] finds the evidence presented by Dr. Massman regarding transmissivity and quantities of water within the aquifer to be credible and it undermines the reliability of applicant’s evidence. Based upon this and all the evidence in the record, the Board [of Commissioners] finds that the applicant failed to establish the conflict will be reduced to a level where the groundwater impacts are not significant. Based upon the testimony and evidence in the record regarding the physical characteristics of the aquifer, the Board [of Commissioners] finds that the proposed development of interceptor trenches along the perimeter of the proposed mining cells to minimize the conflict is not reasonable or practical and will not sufficiently reduce the level of the predicted conflicts.” Record 56-57 (underscoring in original).

“18. Conflicts with Goal 5 Resources

“\* \* \* \* \*

“h. Conflicts with riparian resources consist of lowering of the water table causing impacts to the riparian vegetation[.] \* \* \* Based upon the evidence and testimony in the record, the Board [of Commissioners] finds that the predicted conflicts caused by the reduction in groundwater levels \* \* \* represent significant conflicts with Goal 5 riparian vegetation and resource sites within the impact area.”

“\* \* \* \* \*

“j. Impacts to riparian resources from the lowering of the groundwater adjacent to a Class 1 stream [(Spring Creek)] are not addressed under any applicable standards so minimization must reduce the conflict to a level that is no longer significant.

“k. The applicant proposes to discharge clear water into infiltration trenches or directly into the oxbow to maintain water levels in the oxbow and minimize impacts to riparian resources.

“l. Evidence submitted by Joel Massman Ph.D., \* \* \* demonstrates that the applicant’s groundwater studies are not accurate enough to support a finding that the conflict with riparian resources can be minimized. The Board [of Commissioners] finds the evidence presented by Dr. Massman regarding transmissivity and quantities of water within the aquifer to be credible and it undermines the reliability of the evidence presented by the applicant. Based upon this and all the evidence in the record, the Board [of Commissioners] finds that the applicant failed to establish the conflict can be reduced to a level where the groundwater impacts to riparian resources vegetation are not significant. Based upon the testimony and evidence in the record regarding the physical characteristics of the aquifer, the Board [of Commissioners] finds that the proposed development of interceptor trenches along the perimeter of the proposed mining cells to minimize the conflict is not reasonable or practical and will not sufficiently reduce the

1           **VII. D.           Substantial Evidence**

2           According to petitioner, OAR 660-023-0180(4)(b)(A) provides a basis for  
3 considering conflicts that are attributable to mining activities only if (1) the mining activities  
4 will result in “discharges” into the groundwater, or (2) mine water will discharge into the  
5 aquifer. According to petitioner, even if discharges from mining activities will enter the  
6 groundwater, those discharges would be governed by DEQ water quality standards, and in  
7 the case of mining water being discharged into the water table, those discharges would be  
8 regulated by the Department of Geology and Mineral Industries (DOGAMI). In any event,  
9 petitioners argue that there is no evidence that there will be any discharges from mining that  
10 will enter the groundwater or that any water from the mine will be discharged off-site.

11           Petitioner also argues in its fourth and seventh assignments of error that to the extent  
12 there is evidence that challenges petitioner’s evidence with respect to discharges into the  
13 groundwater, that evidence is not substantial evidence, because there is no evidence that  
14 discharges from mining equipment will significantly affect water quality. With respect to  
15 water drawdown and turbidity, petitioner asserts that it provided the only evidence a

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level of the predicted conflicts with the Goal 5 riparian resource sites located within the impact area.” Record 58-59.

“19.   Conflicts with Agricultural Practices

“\* \* \* \* \*

“[e.]2.   Impacts to Ground Water Resources – Thistledown Farm depends upon wells for both crop watering and drinking water. The predicted conflicts will lead to the following:

- “▪       Need to deepen wells
- “▪       Change to turbine pumps with a higher horsepower rating
- “▪       Greater electricity consumption;
- “▪       Loss of water rights; and
- “▪       Direct infiltration of chemicals used in the extraction and processing of gravel (xylene, benzene and other solvents) into water.” Record 60-61 (underscoring in original).

1 reasonable person would believe. Petitioner contends that opponents' experts are not reliable  
2 because: (1) the opponents' geologists are not registered to practice or testify in Oregon; (2)  
3 the opponents' geologists did not visit the site and are not experienced with mining in the  
4 Eugene-Springfield area; (3) petitioner's proposed water recharge program has been proven  
5 empirically and in the field, and (4) DOGAMI has approved petitioner's groundwater  
6 minimization strategy.<sup>13</sup>

7 Respondents argue that there is evidence from the Environmental Protection Agency  
8 that lists the types of chemicals that are used in asphalt and concrete processes, including  
9 xylene, benzene and other solvents. Respondents argue that there is testimony in the record  
10 from the owner of Thistledown Farm that such residue, if it enters the groundwater and  
11 reaches the farm property, will affect crop growth. Respondents also point to evidence from  
12 petitioner that some petroleum residue may be discharged from equipment used to extract  
13 aggregate. Respondents concede that there is evidence that petitioner anticipates that any  
14 such discharges will be quickly addressed to ensure that groundwater is not affected.  
15 However, respondents also argue that the county could conclude, based on the evidence, that  
16 petitioner has not produced enough evidence to satisfy the county that chemical discharges  
17 from the mining operations will not enter the groundwater and will not affect neighboring  
18 agricultural operations.

19 With respect to groundwater recharge and turbidity, respondents argue that  
20 opponents' experts are bioresource civil engineers with specializations in groundwater  
21 studies. According to respondents, the experts are well qualified to review petitioner's  
22 groundwater analyses and provide expert opinions as to whether and how petitioner's

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<sup>13</sup> According to petitioners, OAR 809-050-0030 requires that persons who present testimony on geologic issues in the State of Oregon must be registered as geologists in the State of Oregon. Petitioners contend that because opponents' geologists are not registered in Oregon, their testimony should be disregarded. Respondents argue that OAR 809-050-0030 has been repealed because it is unconstitutional and, therefore, failure to register as a geologist is not a basis for disregarding the challenged testimony. Because petitioners do not identify any legal requirement that we disregard testimony provided by unregistered geologists, we decline to do so.

1 proposed mining activities will affect groundwater in the area and whether petitioner's  
2 proposed minimization measures will be effective. In this case, respondents assert that two  
3 experts independently concluded that petitioner's infiltration trench system is unlikely to  
4 work as petitioner's experts predict.

5 Respondents further argue that opponents' experts' opinions were based on on-site  
6 measures of permeability. Respondents argue that petitioner's groundwater modeling that  
7 supports a conclusion that mining will not affect the water table is not supported by field  
8 studies, in that none of the other mining areas that petitioner uses as examples have had to  
9 deal with the sheer volume of water that travels through the aquifer at this site. In addition,  
10 respondents argue that there is testimony and evidence in the record that agricultural wells in  
11 the vicinity of petitioner's existing operations have gone dry or are much less productive than  
12 they were prior to petitioner's mining activities. That evidence, respondents argue,  
13 undermines petitioner's evidence that its recharge efforts will be successful.

14 Finally, respondents argue that DOGAMI's conceptual approval of petitioner's  
15 groundwater program is just that: conceptual. Respondents emphasize that DOGAMI relies  
16 on remedial efforts to address impacts rather than assess those impacts prior to mining.  
17 Respondents argue that because DOGAMI's conceptual approval is not intended to assure  
18 that ORS 215.296 is met, the fact that such approval has been granted is not particularly  
19 relevant. In all, respondents contend that the conflicting evidence and opinion is a "battle of  
20 the experts" and the Board of Commissioners could reasonably conclude, as it did, that  
21 opponents' experts were more credible.

22 As a review body, we are authorized to reverse or remand the challenged decision if it  
23 is "not supported by substantial evidence in the whole record." ORS 197.835(9)(a)(C).  
24 Substantial evidence is evidence a reasonable person would rely on in reaching a decision.  
25 *Carsey v. Deschutes County*, 21 Or LUBA 118, *aff'd* 108 Or App 339, 815 P2d 233 (1991).  
26 In reviewing the evidence, however, we may not substitute our judgment for that of the local

1 decision maker. Rather, we must consider all the evidence in the record to which we are  
2 directed, and determine whether, based on that evidence, the local decision maker's  
3 conclusion is supported by substantial evidence. *Younger v. City of Portland*, 305 Or 346,  
4 358-60, 752 P2d 262 (1988); *1000 Friends of Oregon v. Marion County*, 116 Or App 584,  
5 588, 842 P2d 441 (1992).

6 In this case, there is substantial evidence in the record to support the county's  
7 findings that the proposed mining activities could result in chemical discharges into the  
8 groundwater that, if transmitted to neighboring farms, would adversely affect farm  
9 operations. In addition, there is substantial evidence to support a finding that the proposed  
10 mining activities would lower the groundwater levels and would cause conflicts agricultural  
11 practices that require reliable sources of irrigation water. We believe that the county could  
12 conclude that the opponents' experts testimony undermined petitioner's evidence to such an  
13 extent that petitioner failed to demonstrate that applicable water quality standards were  
14 satisfied. *Molalla River Reserve Inc. v. Clackamas County*, 42 Or LUBA at 268.  
15 Accordingly, petitioner's fourth and fifth assignments of error are denied. Petitioner's  
16 seventh assignment of error is denied in part. OCAPA's first assignment of error is denied.

17 **VIII. FLOODING IMPACTS**

18 In petitioner's sixth, seventh and ninth assignments of error, and in OCAPA's fifth  
19 and tenth assignments of error, petitioners challenge the findings and evidence supporting the  
20 county's conclusion that the proposed mining activities would affect flood levels in the area  
21 and, as a result, create a significant conflict with existing and approved uses and violate ORS  
22 215.296.

23 **VIII. A. Consideration of Flooding Impacts Pursuant to OAR 660-023-**  
24 **0180(4)(b)(A)**

25 OCAPA argues that, like groundwater impacts, flooding is not a "discharge" that  
26 must be considered under OAR 660-023-0180(4)(b)(A). To the extent the county concluded

1 that flooding would cause discharges, OCAPA argues that the county’s findings with respect  
2 to that conclusion are inadequate and not supported by substantial evidence.

3 Respondents argue that petitioner identified flooding and the impact of petitioner’s  
4 proposed mining operation on flood water levels as a “discharge,” because earthen berms  
5 that will be constructed on the subject property will change the paths flood water is likely to  
6 travel over and away from the property during flood events. Record 3959. In addition,  
7 respondents argue that no party argued below that flooding was not a conflict to be  
8 considered pursuant to OAR 660-023-0180(4)(b)(A).

9 We agree with respondents that OCAPA and petitioner waived the issue of whether  
10 flooding impacts are a “discharge.” Therefore, we consider the other arguments petitioners  
11 make with respect to flooding.

12 **VIII. B. Relevant Approval Standards**

13 The parties appear to agree that, with respect to all flood-related conflicts except  
14 flood-related conflicts with agriculture, LC 16.244(7)(c)(ii) establishes the relevant standard.  
15 It provides, in relevant part:

16 “Where base flood elevations have been provided but floodways have not, the  
17 cumulative effect of any proposed development, when combined with all  
18 other existing and anticipated development, shall not increase the water  
19 surface elevation of the base flood more than one foot at any point.”

20 In this case, base flood elevations (BFE) have been established for the 100-year  
21 flood, but no floodways have been mapped. The county found that, without minimization, the  
22 proposed mining activities would violate LC 16.244(7)(c)(ii) because the mining activities  
23 would increase flood levels 0.39 feet in the main reach of the Willamette River and 1.93 feet  
24 within the oxbow. Record 55.

25 With respect to flood-related conflicts with agriculture, the county found that ORS  
26 215.296 provides the relevant standard. The county found that the anticipated increase in  
27 flood levels caused by the proposed mining activities during the 100-year flood and other

1 high water events that did not reach the level of the 100-year flood would violate ORS  
2 215.296(1), because increases in flood water levels would adversely affect nursery stock and  
3 other crops grown in flood-prone areas, and would also increase soil erosion. Record 67.

4 Petitioners argue that LC 16.244(7)(c)(ii) provides the only relevant standard and  
5 therefore the county erred in denying the application based on evidence that smaller  
6 increases in BFE or increases in BFE for other than 100-year flood events would violate  
7 ORS 215.296(1). For the same reasons we discussed earlier in the opinion, we agree with  
8 respondents that ORS 215.296 provides the relevant approval standard for determining  
9 whether flood-related conflicts with agriculture will be minimized.

#### 10 **VIII. C. Adequacy of Findings**

11 OCAPA argues in its fifth assignment of error that the county failed to consider  
12 petitioner’s proposed minimization measures when it concluded that mining activities would  
13 either cause a significant change in agricultural practices in the area or would result in  
14 significant increases in the cost of current agricultural practices. In addition, OCAPA argues  
15 that the county’s findings are inadequate to explain which proposed mining activities will  
16 cause an increase in flood levels that will result in the identified impacts.

17 Respondents argue that the county adopted findings, based on expert testimony, that  
18 conclude that petitioner failed to demonstrate that its mining operations, even with proposed  
19 minimization measures, would ensure that flood levels on nearby property would not  
20 increase more than one foot over BFE.<sup>14</sup> Even if petitioner did establish that the proposed

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<sup>14</sup> The county’s findings with respect to flood impacts state, in relevant part:

“14. Flooding as a Discharge Conflict

“a. Under the proposal, the placement of earthen berms around mining cells is identified as a method to minimize noise impacts. This leads to another predicted discharge conflict, the displacement of water onto adjacent properties during flood events. Water that would normally be conveyed northward across the subject property will be displaced by the proposed berms. The predicted discharge is identified as a conflict with existing

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nearby residences, farms, and roads in the flood hazard area. The applicant's Flood Impact Analysis \* \* \* contains the details regarding the flood impacts to be expected from the operation. Based on the evidence in the record, the Board finds the portions of the operation that produce the conflict consist of: the placement of fill for the processing plant area, earthen berms for flood control and sound control, and the fill placed to elevate the access road. The impact area determined to be affected by increased floodwaters, \* \* \* consists of all flood hazard areas extending 4,500 feet south and 6,500 feet east of the subject property. The predicted maximum potential off-site increases are 0.39 foot increase in the main reach of the Willamette River and 1.93 feet increase within the oxbow. Based upon all the evidence and testimony in the record, the Board [of Commissioners] finds that the conflicts caused by increased flood levels represent significant conflicts with existing residential and farm uses within the impact area.

“\* \* \* \* \*

“c. The applicant proposed to minimize the conflict by the creation of an overflow channel across Area 2 and relocating the proposed Spring Creek bridge crossing 150 feet to the south. The studies prepared by the applicant predicted a maximum increase in flood waters of 0.25 foot in the oxbow, 0.47 foot in the overflow channel, and 0.38 foot in the Willamette River when those minimization measures are taken.

“d. Evidence submitted by Catherine Petroff Ph.D. \* \* \* demonstrates that the applicant's flood studies are not accurate enough to find that the conflict has been minimized. The Board [of Commissioners] finds the evidence presented by Dr. Petroff regarding the use of presumed 'n' (Manning) values and overbank volumes in the applicant's studies to be credible and it undermines the reliability of the applicant's evidence. Based upon this and other evidence, the Board [of Commissioners] finds that the applicant has failed to establish the conflict will be reduced to a level where the less than 1 foot increase in flood levels standard can be achieved[.] Based upon the testimony and evidence in the record regarding the failure of dikes along the Willamette River due to flooding in 1996, the Board [of Commissioners] finds that the proposed development of an overflow channel to minimize the conflict is not reasonable or practical and cannot ensure conformance to the applicable standard.

“e. The Board [of Commissioners] concludes that the predicted conflicts due to flooding discharges considered under OAR 660-023-0180(4)(b)(A) have not been minimized.” Record 55-56.

“23. Flooding Conflicts with Agricultural Practices

“a. Based upon evidence and testimony in the record, the Board [of Commissioners] finds that the conflicts caused by increased flood levels represent significant conflicts with accepted agricultural practices within the impact area.

“b. The Board [of Commissioners] finds that the following significant conflicts from flooding will result in a significant change or a significant increase in

1 minimization would ensure compliance with LC 16.244(7)(c)(ii), respondents argue that the  
2 county could, and did, find that the evidence supported a conclusion that the proposed  
3 mining would violate ORS 215.296 because the mining activities would increase flood water  
4 levels and adversely affect certain agricultural practices in a way that would cause a  
5 significant change in or significantly increase the cost of those agricultural practices.

6 We agree with respondents that the county’s findings are adequate to explain the  
7 reasons why the county believed that LC 16.244(7)(c)(ii) would be violated, despite  
8 petitioner’s evidence to the contrary. We also agree with respondents that the county’s  
9 findings adequately explain why the county believed the proposed mining activities would  
10 affect the identified agricultural practices in such a way as to violate ORS 215.296.

11 **VIII. D. Substantial Evidence**

12 Petitioners argue that the county’s findings that opponents’ evidence undermined  
13 petitioner’s evidence with respect to flood water levels is not supported by substantial  
14 evidence. Petitioner recognizes that it must establish that its evidence must be believed as a  
15 matter of law in order to overturn a local decision maker’s evidentiary choice. *Wickwire v.*

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[the] cost of accepted farming practices: [l]oss of topsoil and associated nutrients, collar rot on apple trees, death of over-wintering vegetables such as cabbage and sugar beets for seed, and extended saturation time of root zones in peach and apple orchards and row crops.

“c. Evidence submitted by Catherine Petroff Ph.D. \* \* \* demonstrates that the applicant’s flood studies fail to establish that the conflict can be minimized. The Board [of Commissioners] finds the evidence presented by Dr. Petroff regarding the use of presumed ‘n’ (Manning) values and overbank volumes in the applicant’s studies to be credible and it undermines the reliability of the evidence and analysis presented by the applicant. Based upon this and other evidence and testimony in the record, the Board [of Commissioners] finds that the applicant has failed to establish that the conflict can be demonstrated to be reduced to a level where the flooding impacts are not significant. Based upon all the testimony and evidence in the record regarding the predicted flooding conflicts with agricultural practices, the Board [of Commissioners] finds that the proposed development of an overflow channel to minimize the conflict is not reasonable or practical and will not sufficiently reduce the predicted conflicts to the level where they will not force a significant change [in] or significantly increase the cost of accepted farm practices on surrounding lands devoted to farm use.” Record 67-68.

1 *Clackamas County*, 21 Or LUBA 278, 284 (1991). Petitioner asserts that it has met this  
2 burden because: (1) opponents’ testimony merely commented on petitioner’s evidence and  
3 was not based on independent studies; (2) petitioner’s evidence was generated by Oregon  
4 experts who are familiar with mining operations on the Willamette River and are familiar  
5 with local conditions and standard mining practices; (3) even if opponents’ experts’  
6 testimony is to be believed, evidence from petitioner’s experts demonstrates that LC  
7 16.244(7)(c)(ii) will be met, and (4) none of the opponent farmers demonstrated what  
8 increase in flood level will cause the anticipated effects or that the anticipated increase in  
9 flood level from petitioner’s mining operation will result in additional flooding of  
10 neighboring fields. Petitioner argues that it was not

11 “[r]easonable for the county to rely on the testimony of engineers unlicensed  
12 in Oregon that was categorically rebutted by Oregon certified engineers with  
13 demonstrated expertise in this particular field \* \* \* using site specific  
14 information, where Petitioner’s testimony remains unrebutted and  
15 unchallenged, and was effectively supported by testimony \* \* \* from  
16 representatives from DOGAMI, the state agency responsible for regulating  
17 aggregate mining in Oregon.” Petition for Review 27.

18 OCAPA also argues that to the extent the county relied on subjective statements from  
19 neighboring farmers and their representatives: (1) that the proposed mining would shift flood  
20 waters onto neighboring property; (2) that the increase in flood levels attributable to the  
21 mining operations would change agricultural practices, and (3) that even minute increases in  
22 BFE would result in the claimed impacts, those statements do not constitute evidence that  
23 may be used to deny petitioner’s application. According to OCAPA, the evidence in the  
24 record demonstrates that the proposed minimization would: (1) either contain flood water on  
25 the property or divert flood water to the main stem of the Willamette River, away from  
26 abutting properties; (2) ensure that berms will be constructed to deflect noise and not water,  
27 so that most flood water will continue to follow established travel patterns, and (3) ensure  
28 that mining on the subject property will minimally affect nearby agricultural practices.  
29 OCAPA argues that the contrary testimony is merely anecdotal evidence regarding past flood

1 events and does nothing to undermine petitioner’s evidence regarding the specific impact of  
2 the proposed mining operations on this site.

3 Respondents argue that the county’s findings rely on testimony by an expert in flood  
4 water analysis, who testified that she believed that the variables used in petitioner’s flood  
5 modeling did not accurately depict current conditions and, as a result, were less likely to  
6 accurately predict flood impacts during mining. Respondents also argue that petitioner’s  
7 evidence did not take into account the effect its proposed minimization measures would have  
8 on flood levels on agricultural land across the Willamette River from the mine. Respondents  
9 argue that petitioners are asking LUBA to independently reweigh the evidence and substitute  
10 its view of the evidence for that of the Board of Commissioners. According to respondents,  
11 the county reviewed the evidence that petitioner presented in light of opposing testimony,  
12 and made the evidentiary call that petitioner’s evidence was either insufficient to ensure that  
13 the applicable standards will be met or that the evidence was not credible.

14 We agree with respondents that petitioners have not established, as a matter of law,  
15 that only its evidence is to be believed. We may not reweigh the evidence the county relied  
16 upon and the evidence relied upon by the Board of Commissioners is sufficient for a  
17 reasonable person to conclude that it undermined petitioner’s evidence. Accordingly,  
18 petitioner’s sixth and seventh assignments of error are denied. Petitioner’s ninth assignment  
19 of error is denied in part. OCAPA’s fifth and tenth assignments of error are denied.

## 20 **IX. RIPARIAN RESOURCES**

### 21 **IX. A. Conflicts with a Goal 5 Resource**

22 OCAPA argues in its second assignment of error that the county erred in considering  
23 the impacts that petitioner’s proposed mining activities would have on inventoried riparian  
24 habitat associated with the Willamette River and Spring Creek. OCAPA explains that the  
25 Board of Commissioners concluded that two maps in the county’s comprehensive plan  
26 identify the Willamette River and Spring Creek as riparian areas and that the county adopted

1 a program pursuant to OAR 660-016-0050 (1980) (Old Goal 5 Rule) to protect those areas.  
2 OCAPA argues that the two maps cannot have the effect that the decision says they have,  
3 because Goal 5 did not identify riparian areas as a Goal 5 resource until 1996. *See* OAR 660-  
4 023-0090 (riparian corridor rules). In addition, OCAPA argues that conflicts with riparian  
5 areas cannot be considered under OAR 660-023-0180(4)(b)(D), because nothing in the  
6 county’s plan for “protection” of the two waterways identifies aggregate mining as a conflict.  
7 According to OCAPA, the county’s Goal 5 protection program must identify mining as a  
8 conflict and, after conducting an ESEE analysis, the county must conclude that mining  
9 should be prohibited in order to protect the resource. OCAPA argues that absent such an  
10 identification and conclusion in the acknowledged comprehensive plan, the impact on  
11 riparian areas *cannot* be considered a conflict in this proceeding.

12 Respondents argue that OCAPA waived this issue by failing to raise it below.  
13 OCAPA provides no citations to the record to show that it raised the issue before the county.  
14 Accordingly, that issue is waived and OCAPA’s second assignment of error is denied.

15 **IX. B. Adequacy of Findings**

16 In its third assignment of error, OCAPA argues that even if the two maps properly  
17 identify the two areas as waterways to be protected under Goal 5, the county’s findings that  
18 water drawdown from mining will affect the riparian areas is inconsistent with other county  
19 findings that the proposed minimization measures will ensure that no other Goal 5 resources,  
20 including wetlands and wildlife areas, will be significantly affected. OCAPA contends that it  
21 is not logical to assume that mining will significantly affect riparian areas next to Spring  
22 Creek and the Willamette River, but will not significantly affect wetlands when those areas  
23 are all hydrologically connected.

24 Respondents argue:

25 “The county decision made adequate findings describing the various conflicts  
26 with the Goal 5 resource, including lowering the water table, thereby affecting  
27 riparian vegetation, constructing a bridge, placing berms, removing vegetation

1 and the effects of flooding to establish that the proposed mining activities  
2 would result in various conflicts with the identified Goal 5 resource,  
3 including: lowering the water table, thereby affecting riparian vegetation,  
4 constructing a bridge, placing berms, removing vegetation and the effects of  
5 flooding erosion. In particular, the county decision concluded predicted  
6 conflicts from the reduction of groundwater levels and increased flooding  
7 represented significant conflicts with the identified Goal 5 riparian resource.  
8 Those impacts to riparian vegetation are very different than the impacts to  
9 wetlands that might be expected, assuming there were listed Goal 5 wetlands  
10 in the same area. Destruction of riparian vegetation could occur without  
11 necessarily affecting the wetlands or waterfowl and bird habitats as  
12 significantly.” Brief of Respondent Lane County 26.

13 The county’s findings with respect to riparian resources are set out in part at n 12.  
14 The findings suggest that, except for the lowering of groundwater levels, riparian area  
15 protections set out in the LC are adequate to ensure that development within the riparian  
16 setback will not interfere with the resource. Thus, the only apparent reason for the county’s  
17 determination that conflicts with riparian resources will not be minimized is the county’s  
18 conclusion that groundwater drawdown will result in lower water levels. Given that  
19 petitioner proposes to divert water from its operations into Spring Creek and the oxbow, it is  
20 difficult to imagine that water drawdown will lower water levels in either the creek or the  
21 river. In addition, there is an identified wetland area between the oxbow and the Willamette  
22 River. Presumably, if drawdown from mining operations will affect Spring Creek and the  
23 Willamette River, it will likewise affect the wetlands. We agree with OCAPA that county’s  
24 findings with respect to riparian resources and wetlands are inconsistent and that the county’s  
25 findings are inadequate to explain why it believes that water drawdown will affect riparian  
26 areas and not wetlands.

27 OCAPA’s third assignment of error is sustained.

28 **X. ESEE ANALYSIS**

29 Petitioner argues in its tenth assignment of error that, because the county erred in its  
30 analysis of conflicts under OAR 660-023-0180, the county’s ESEE analysis is necessarily  
31 flawed because it includes matters that are not properly included in the analysis. According

1 to petitioner, the impact of the proposed mining practices on the farm stands in the area  
2 played a major role in the county’s decision that the benefits of preserving existing uses in  
3 the vicinity outweighed the benefits of allowing mining. Petitioner argues that because we  
4 cannot be sure that the Board of Commissioners would reach the same conclusion if the  
5 impact on farm stands was removed from the analysis, we must remand the decision for the  
6 county to apply the ESEE analysis to the proper factors.

7 The county based its decision in large part on the impact that the proposed mining  
8 activities would have on agriculture and on the neighboring farm stands in particular.  
9 Therefore, we agree with petitioner that the challenged decision must be remanded to allow  
10 the county to conduct a new ESEE analysis that does not include consideration of conflicts  
11 with farm stands. The tenth assignment of error is sustained.

12 **XI. APPLICABILITY OF LOCAL APPROVAL CRITERIA**

13 The county denied petitioner’s application under OAR 660-23-0180(4). The county  
14 also denied petitioner’s application in part because it failed to satisfy local approval  
15 standards that address applications to amend comprehensive plan maps and zoning maps.<sup>15</sup>  
16 Petitioner in its first assignment of error, and OCAPA in its eleventh assignment of error,  
17 argue that the county erred in applying local approval criteria to the mining application and  
18 basing the denial of the application in part on petitioner’s failure to satisfy local code  
19 requirements. Petitioners contend that it is clear from the text and context of the Goal 5 rule,

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<sup>15</sup> Lane Code (LC) 16.400(6)(h)(iii) sets out the criteria for amending the Rural Comprehensive Plan. It provides, in relevant part:

“The Board [of Commissioners] may amend or supplement the Rural Comprehensive Plan upon making the following findings:

“(aa) For Major \* \* \* Amendments \* \* \* the Plan component or amendment meets all applicable requirements of local and state law, including Statewide Planning Goals and Oregon Administrative Rules.

“(bb) For Major \* \* \* Amendments \* \* \* the Plan amendment or component is:

1 especially OAR 660-023-0180(2)(c) and (7), that LCDC intended that its administrative rule  
2 preempt all local regulations pertaining to the approval of aggregate mining.<sup>16</sup> According to  
3 petitioners, LUBA has held that OAR 660-023-0180(7) does not permit a local government  
4 to apply local code provisions to deny a post-acknowledgement plan amendment for mining.  
5 *See Morse Bros., Inc. v. Columbia County*, 37 Or LUBA 85, 89 (1999), *aff'd* 165 Or App  
6 512, 996 P2d 1023 (2000) (“\* \* \* OAR 660-023-0180(7) has the legal effect of preempting  
7 county comprehensive plan and land use regulation provisions that would otherwise apply to  
8 a post-acknowledgement plan amendment \* \* \*”).

- 
- “(i-i) necessary to correct an identified error in the application of the Plan; OR
  - “(ii-ii) necessary to fulfill an identified public or community need for the intended result of the component or amendment; OR
  - “(iii-iii) necessary to comply with the mandate of local, state or federal policy or law; OR
  - (iv-iv) necessary to provide for the implementation of adopted Plan policy or elements; OR
  - “(v-v) otherwise deemed by the [B]oard [of Commissioners], for reasons briefly set forth in its decision, to be desirable, appropriate or proper.”

“\* \* \* \* \*

LC 16.252(2) sets out the requirements for rezoning property. It provides, in relevant part that

“rezonings \* \* \* shall be enacted to achieve the general purpose of this Chapter and shall not be contrary to the public interest.”

<sup>16</sup> OAR 660-023-0180(2)(c) provides, in relevant part:

“Local governments shall follow the requirements of [OAR 660-023-0180(4)] in deciding whether to authorize the mining of a significant mineral or aggregate resource site[.]”

OAR 660-023-0180(7) provides, in relevant part:

“Local governments shall amend the comprehensive plan and land use regulations to include procedures and requirements consistent with this rule for the consideration of PAPAs concerning aggregate resources. Until such local regulations are adopted, the procedures and requirements of this rule shall be directly applied to local government consideration of a PAPA concerning mining authorization[.]”

1 Respondents argue first that the language that petitioners rely on in *Morse Bros., Inc.*  
2 is *dicta*, because the issue in that case was whether the county could use its surface mining  
3 ordinance to impose criteria that are in addition to those set out at OAR 660-023-0180. Even  
4 if the language is not *dicta*, respondents contend that LUBA’s and the Court of Appeals’  
5 decisions merely recognize that OAR 660-023-0180(2)(c) and (7) prohibit local governments  
6 from using local standards to add to the list of conflicts that must be considered under OAR  
7 660-023-0180(4), or from adding standards of approval that are not identified in the rule.  
8 According to respondents, OAR 660-023-0180(2)(c) and (7) do not categorically prohibit  
9 what the county has done in this case: conclude that because petitioner has not satisfied OAR  
10 660-023-0180 requirements, neither a plan map amendment nor a zoning amendment is  
11 justified.<sup>17</sup>

12 The Goal 5 rule for aggregate establishes a comprehensive regulatory scheme that is  
13 intended to supersede local review standards for aggregate. Here, the county appears to have  
14 based its denial of the application in part on local code provisions that are not intended to  
15 implement OAR 660-023-0180, and its reasons for denial are based in part on considerations  
16 that are not set out in the rule. For example, the county found that LC 16.252(2) had not been  
17 met because the rezoning is “contrary to the public interest.” Record 75 (*see* n 17, setting out  
18 the finding). Therefore, the county erred to the extent it based its denial on those local code

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<sup>17</sup> The county’s findings state, in relevant part:

“33. Based upon the evaluation that the proposed mining plan does not meet the requirements of the Goal 5 Rule for mineral and aggregate resources in OAR 660-023-0180 and the proposal fails to meet the other listed reasons for amending the Rural Comprehensive Plan, the Board concludes that the Rural Comprehensive Plan should not be amended.” Record 74.

“35. [With respect to LC 16.252(2), the Board of Commissioners] finds that the requirements for rezoning the property to Sand, Gravel and Rock Products Zone (SG) are not met because the proposal fails to meet the requirements of Lane Code 16.400 to receive a Rural Comprehensive Plan designation of Natural Resource: Mineral. The proposal also fails to meet the requirements of the Goal 5 rule for mineral and aggregate resources \* \* \* and the Board [of Commissioners] concludes rezoning would be contrary to the public interest.” Record 75.

1 provisions. Petitioner’s first assignment of error and OCAPA’s eleventh assignment of error  
2 are sustained.

3 **XII. CONCLUSION**

4 We conclude that most of the conflicts that the county considered and found the  
5 applicant failed to demonstrate could be minimized were properly considered by the county.  
6 We also conclude that the county’s findings concerning those conflicts are adequate and  
7 supported by substantial evidence. However, we conclude that the county improperly  
8 considered dust and traffic conflicts with farm stands as conflicts with “agricultural  
9 practices” that may be analyzed under OAR 660-023-0180(4)(c) for compliance with ORS  
10 215.296. Because we conclude that dust and traffic conflicts with the farm stands are not  
11 properly analyzed as conflicts with “agricultural practices,” those conflicts with the farm  
12 stands may not be considered by the county on remand as “significant conflicts \* \* \* that  
13 cannot be minimized” in considering “the ESEE consequences of either allowing, limiting, or  
14 not allowing mining at the site,” under OAR 660-023-0180(4)(d). In addition, the county’s  
15 decision and the record in this appeal do not adequately explain the county’s conclusion that  
16 the proposed mining will lower groundwater level in a way that results in a significant  
17 conflict with riparian areas. Accordingly, the county must adopt findings that better explain  
18 its conclusion that conflicts between mining and riparian areas will not be minimized.  
19 Finally, on remand, the county must not consider or apply comprehensive plan and land use  
20 regulation criteria that go beyond OAR 660-023-0180 in reviewing the application.

21 The county’s decision is remanded.