BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

CHARLES HEGELE,
Petitioner,

vs.

CROOK COUNTY,
Respondent,

and

ALAN RUSSELL, JOYCE RUSSELL,
TOM STRAND, CAROL STRAND,
JONEEN CALHOUN, TERRY C. SMITH,
PATRICIA L. SMITH, TY FEHRENBACHER,
LINDA FEHRENBACHER, GERALD A. COFFMAN,
MARION COFFMAN, PAUL KASBERGER,
ANN KASBERGER, MICHAEL DUGGAN,
DIANN DUGGAN, RODD CLARK and
JENNIFER CLARK,
Intervenors-Respondent.

LUBA No. 2002-139

FINAL OPINION
AND ORDER

Appeal from Crook County .

Bruce W. White, Bend, filed the petition for review and argued on behalf of petitioner.

Jeff M. Wilson, Prineville, filed a response brief and argued on behalf of respondent.

Alan Russell and Joyce Russell, Terrebonne, filed a response brief on their own behalf.

Tom Strand, Terrebonne, filed a response brief on his own behalf

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

REMANDED 04/08/2003

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

Opinion by Bassham.

NATURE OF THE DECISION

Petitioner appeals a county decision denying his application to place a proposed mining site on the county's comprehensive plan inventory of mineral sites.

MOTIONS TO INTERVENE

Alan Russell, Joyce Russell, Tom Strand, Carol Strand, Joneen Calhoun, Terry C. Smith, Patricia L. Smith, Ty Fehrenbacher, Linda Fehrenbacher, Gerald A. Coffman, Marion Coffman, Paul Kasberger, Ann Kasberger, Michael Duggan, Diann Dugan, Rodd Clark, and Jennifer Clark move to intervene on the side of respondent. There is no opposition to these motions, and they are allowed.

MOTION TO FILE REPLY BRIEF

Petitioner moves for permission to file a reply brief, to address two alleged "new matters" in the response briefs. OAR 661-010-0039. There is no opposition to the reply brief, and we agree with petitioner that a reply brief is warranted. The reply brief is allowed.

MOTIONS TO STRIKE RESPONSE BRIEFS

Petitioner moves to strike the response brief of intervenors-respondent Alan Russell and Joyce Russell, and the response brief of intervenor-respondent Tom Strand. With respect to the Russells' brief, petitioner argues that it consists mostly of personal opinions that are not based on the record and that constitute, in effect, an attempt to provide original testimony to LUBA. Petitioner argues that LUBA's review is limited to the local record and the arguments of the parties based on the record. ORS 197.835(2)(a).

Similarly, petitioner argues that the Strand brief consists almost entirely of original testimony. In the alternative, petitioner argues that if the Strand brief is allowed, then the names of all intervenors-respondent other than its author must be stricken. Petitioner notes that the Strand brief is signed only by intervenor-respondent Tom Strand, the lead intervenor for a number of intervenors-respondent. However, petitioner points out, the Strand brief

appears to argue on behalf of intervenors-respondent other than its author. For example, the Strand brief lists each intervenor-respondent and states that "[t]he above named intervenors respectfully request that LUBA uphold the Crook County Court's decision * * *" Strand Brief 2. According to petitioner, the intervenors-respondent named in the Strand brief are not represented by an attorney, and may file a response brief before LUBA only on their own behalf. OAR 661-010-0075(6) and (7). Because Tom Strand is not an attorney, petitioner argues, he cannot represent the other intervenors-respondent.

We agree with petitioner that the bulk of the intervenors-respondent's briefs appear to consist of original evidentiary testimony, not based on the record. However, we do not grant the motions to strike those briefs in their entirety, as both briefs contain some references to the record and some portions offer legal arguments in support of the county's denial. Rather than attempt a line-by-line separation of wheat from chaff, we will simply grant the motions to strike in part, and do our best to ignore in our review statements in either briefs that appear to constitute original evidentiary testimony. We also agree with petitioner that the author of the Strand brief may not represent the other named intervenors-respondent before LUBA, and therefore we regard the Strand brief to represent the views of its author only. Petitioner's motions to strike are granted, in part.

FACTS

The subject property is a 276-acre parcel zoned Exclusive Farm Use (EFU-2), situated in the Lone Pine Valley. Approximately 100 acres of the property are on the flat valley floor, and are irrigated and cultivated for alfalfa. The remaining 176 acres consist of nonirrigated sidehill along the eastern slope of the valley. A farm dwelling and several outbuildings are currently located in the approximate center of the subject property, where the valley floor meets the hillside.

The surrounding land, also zoned EFU-2, generally consists of irrigated farms on the valley floor and dry hillsides used for limited grazing. Within one mile of the subject

property are 20 farm dwellings. A quarrying operation for the purpose of field leveling is located immediately west of the subject property across Lone Pine Road, which provides access to the subject property. Another aggregate operation is located on a ranch one mile south, and a third is located one mile to the northeast.

Petitioner applied to the county for a comprehensive plan amendment to place a 24-acre portion of the subject property on the county's Statewide Planning Goal 5 (Natural Resources, Scenic and Historic Areas, and Open Spaces) inventory of significant mineral sites. The proposed mining site is located along the toe of the eastern slope of the hillside, in the south-central area of the property. The proposed excavation site is approximately 1,500 feet from Lone Pine Road and the closest neighboring dwelling. Petitioner also filed a related conditional use permit application to operate the proposed mine.

The county planning commission denied petitioner's applications, on the grounds that (1) petitioner failed to establish the quantity of the aggregate available; (2) the proposed mining was not compatible with surrounding agricultural uses; and (3) Lone Pine Road is too narrow to accommodate truck traffic associated with mining.

Petitioner appealed the planning commission decision to the county court, which conducted a *de novo* hearing. At the hearing, petitioner submitted additional geotechnical information showing that there are 505,270 tons of aggregate at the site, which exceeds aggregate quality standards set by the Oregon Department of Transportation. On October 2, 2002, the county court adopted a decision denying petitioner's applications, on the grounds that, considering the location, quantity and quality of the aggregate resource, petitioner had failed to demonstrate that the proposed resource site was significant enough to warrant inclusion on the county's inventory of significant mineral sites. This appeal followed.

INTRODUCTION

The challenged decision finds, and no party disputes, that petitioner's application to place the proposed mining site on the county's comprehensive plan Goal 5 inventory of

significant mineral sites is governed by local regulations that implement OAR chapter 660, division 16, a largely superseded administrative rule that implements Goal 5. Accordingly, the county concluded that the application is not governed by OAR chapter 660, division 23, the rule that has for most purposes replaced OAR chapter 660, division 16.[1]

OAR 660-016-0000 sets forth the process and standards under which a local government determines whether a Goal 5 resource should be placed on a comprehensive plan inventory of Goal 5 resources. As relevant here, OAR 660-16-0000 requires the local government to determine the "location, quality and quantity" of the resource and whether the resource is "important" or "significant" enough to warrant inclusion on the county's Goal 5 inventory.[2]

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[1] That conclusion is based on OAR 660-023-0180(7), which 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 [post-acknowledgment plan amendments] concerning aggregate resources. Until such local regulations are adopted, the procedures and requirements of this rule shall be directly applied to local government consideration of a PAPA concerning mining authorization, unless the local plan contains specific criteria regarding the consideration of a PAPA proposing to add a site to the list of significant aggregate sites, provided:
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> "(a) Such regulations were acknowledged subsequent to 1989; and
>
> "(b) Such regulations shall be amended to conform to the requirements of this rule at the next scheduled periodic review * * *."

The county found that Crook County Ordinance 51 (Ordinance 51), a comprehensive plan amendment that adopts provisions governing the county's compliance with Goal 5, was adopted and acknowledged in 1991, and that the county has not subsequently entered into periodic review. Accordingly, the county concluded that standards for consideration of a PAPA concerning aggregate resources under OAR chapter 660, division 23 do not apply to petitioner's application. As discussed below, the county applied Ordinance 51 and OAR chapter 660, division 16 to petitioner's application.

[2] OAR 660-016-0000 provides, in relevant part:

> "(1) The inventory process for Statewide Planning Goal 5 begins with the collection of available data from as many sources as possible including experts in the field, local citizens and landowners. The local government then analyzes and refines the data and determines whether there is sufficient information on the location, quality and quantity of each resource site to properly complete the Goal 5 process. * * * Based on the evidence and local government's analysis of those data, the local government

Once the local government has determined that a Goal 5 resource site is "significant" and hence must be included on its Goal 5 inventory, the local government must then identify conflicting uses. If no conflicting uses are found, the local government must preserve the resource site. If conflicting uses are found, the local government must conduct an analysis of the economic, social, environmental and energy (ESEE) consequences of the conflicting

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then determines which resource sites are of significance and includes those sites on the final plan inventory.

"(2) A 'valid' inventory of a Goal 5 resource under subsection (5)(c) of this rule must include a determination of the location, quality, and quantity of each of the resource sites. Some Goal 5 resources (e.g., natural areas, historic sites, mineral and aggregate sites, scenic waterways) are more site-specific than others (e.g., groundwater, energy sources). For site-specific resources, determination of *location* must include a description or map of the boundaries of the resource site and of the impact area to be affected, if different. For non-site-specific resources, determination must be as specific as possible.

"(3) The determination of *quality* requires some consideration of the resource site's relative value, as compared to other examples of the same resource in at least the jurisdiction itself. A determination of *quantity* requires consideration of the relative abundance of the resource (of any given quality). The level of detail that is provided will depend on how much information is available or 'obtainable.'

"* * * * *

"(5) Based on data collected, analyzed and refined by the local government, as outlined above, a jurisdiction has three basic options:

"(a) Do Not Include on Inventory: Based on information that is available on location, quality and quantity, the local government might determine that a particular resource site is not important enough to warrant inclusion on the plan inventory, or is not required to be included in the inventory based on the specific Goal standards. No further action need be taken with regard to these sites. The local government is not required to justify in its comprehensive plan a decision not to include a particular site in the plan inventory unless challenged by the Department, objectors or the Commission based upon contradictory information;

"(b) Delay Goal 5 Process * * *; [or]

"(c) Include on Plan Inventory: When information is available on location, quality and quantity, and the local government has determined a site to be significant or important as a result of the data collection and analysis process, the local government must include the site on its plan inventory and indicate the location, quality and quantity of the resource site (see above). Items included on this inventory must proceed through the remainder of the Goal 5 process."

uses, pursuant to OAR 660-016-0005. *See* n 9, below. Based on the ESEE analysis, the local government must then determine whether to (1) fully protect the resource site against conflicting uses; (2) allow conflicting uses fully; or (3) limit conflicting uses while protecting the resource to some extent, pursuant to OAR 660-016-0010.

In the present case, the county court concluded that, after considering the "location, quantity and quality" of the aggregate resource on the site, petitioner's site is not important or significant enough to warrant inclusion on the comprehensive plan inventory. That conclusion was not based on the quantity or quality of the aggregate found at the site. Instead, that conclusion was based on (1) conflicts between proposed mining and surrounding uses; and (2) a finding that there is no evidence of a "public need" for an additional aggregate site in the county. The "public need" standard is not part of OAR 660-016-0000, but is based on language in the county comprehensive plan or Ordinance 51. We now turn to petitioner's 21 assignments of error, which challenge those conclusions.

FIRST ASSIGNMENT OF ERROR

The county adopted findings explaining why it denied petitioner's applications. Nonetheless, citing to language in OAR 660-016-0005(a), the county's decision states that the county need not justify a decision not to include a particular site in the comprehensive plan inventory. Record 12-13. Petitioner disputes that statement, arguing that the county court misconstrued OAR 660-016-0005(a) and that, properly understood, that rule does not relieve the county of its obligation to explain, in findings, the basis for its decision.

We agree with petitioner that the county court misunderstands OAR 660-016-0005(a). In relevant part, the rule states that a local government is "not required to justify *in its comprehensive plan* a decision not to include a particular site in the plan inventory." (Emphasis added.) In other words, a local government need not *amend its comprehensive plan* to include language justifying a decision not to include a particular site in the plan inventory. However, that provision says nothing about the county's obligation to support

with adequate findings its quasi-judicial decision regarding petitioner's applications.[3] To the extent the county views OAR 660-016-0005(a) as relieving it of that obligation, the county erred. However, that misconstruction of law itself provides no basis for reversal or remand, because the county nonetheless adopted findings explaining why it denied petitioner's applications. The remainder of petitioner's assignments of error challenge those findings.

The first assignment of error is denied.

SECOND, THIRD AND TWELFTH ASSIGNMENTS OF ERROR

As noted in the introduction, OAR 660-016-0000 provides that a decision to include or not to include a Goal 5 resource site on the Goal 5 inventory must be based on evidence regarding the "location, quality and quantity" of the resource. If the evidence shows that the resource is "significant," then the resource site must be placed in the inventory. The local government then identifies any conflicting uses and, if conflicts are found, engages in a ESEE analysis, under which it will determine whether or not to protect the resource. In the context of an aggregate resource site, to "protect" the resource against conflicting uses means to allow the aggregate to be extracted.

The county's decision did not follow that template. The county apparently viewed the OAR 660-016-0000 requirement for identification of the resource "location" as allowing consideration of the impacts of aggregate extraction on surrounding uses, within an identified "impact area."[4] In other words, in the course of identifying the resource "location" for

[3] In addition, OAR 660-016-0010 provides that "[r]easons that support this decision must be presented in the comprehensive plan" when the county makes a decision to allow, limit or prohibit conflicting uses under that rule. As explained below, the county erred in concluding that the subject property is not a "significant" resource and need not be added to the county's Goal 5 inventory of significant aggregate sites. Because the site is indisputably a "significant" Goal 5 resource within the meaning of OAR 660-016-0000, the county cannot avoid the obligation to amend its comprehensive plan to include "reasons" that support its decision to allow, limit or prohibit conflicting uses.

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

purposes of OAR 660-016-0000, the county appears to have engaged in a limited version of the conflict identification and ESEE analysis required by OAR 660-016-0005 and 0010. Based in part on that analysis, the county then denied the application to place the proposed site on the county's inventory.

Petitioner argues, and we agree, that the county's approach misconstrues the applicable law. The information required by OAR 660-016-0000(2) regarding the location of the resource site may be useful in any subsequent analyses under OAR 660-016-0005 and 0010, but the primary purpose of that information is to assist the local government in

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> "After considering the evidence presented, the County Court finds that considering its location, quantity, and quality, applicant's resource site is not important (significant) enough to warrant inclusion on the Plan inventory.
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> "Location. The Court rejects applicant's argument that the definition of location is limited to identifying the site's physical location by means of a map or otherwise. The Court also rejects applicant's statement that [the county may not consider] ESEE impacts outside of the county's 500 foot impact area [required by county code]. * * *
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> "* * * * *
>
> "Testimony from both the applicant and from opponents identified impacts within the 'Lone Pine Valley floor.' Therefore, it is reasonable to conclude, given the topography of the area, that the relevant 'impact area' includes the entire Lone Pine Valley. The intent of identifying the impact area in this manner is to achieve the goal of screening mining operations from the North Lone Pine Road and from the valley floor. * * *
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> "* * * * *
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> "According to the applicant, the proposed mining site is located on the side of a hill visible from Lone Pine Road. The upper limits of the mining operation will be visible above the valley floor. The nature of the mining operation itself will be to remove the trees and natural vegetation in 4-acre cells from the surface to enable extraction of the resource. The proposed mining site is located in a pristine valley floor located in Lone Pine, Oregon, which this court finds to be a scenic area of outstanding value. The court rejects applicant's argument that only those scenic areas that have been identified as Goal 5 resources may be considered.
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> "The proposed mining site would be accessed by way of North Lone Pine Road, a two-lane County Road with a driving surface of approximately [24] feet. According to the County Roadmaster, * * * the existing roadway is deteriorating due to the presence of truck traffic from the already operating quarries. According to the County Roadmaster, additional trips generated by applicant's quarry would contribute to the existing deterioration. Crook County Ordinance 51 provides that increased truck traffic or road deterioration from mining that may occur inside the identified impact area (Lone Pine Valley) may be considered in the ESEE Consequences Analysis." Record 8-11.

determining the "significance" of the resource, and hence whether it should be placed on the county's Goal 5 inventory, pursuant to OAR 660-016-0000(5). Identification of conflicts and an ESEE analysis under OAR 660-016-0005 and 0010 play no role in that determination.

Further, we agree with petitioner that the county's conclusion that, based on the "location, quality and quantity" of resource the proposed resource site is not "significant," is not supported by substantial evidence. There appears to be no dispute that aggregate resource on the site is substantial and of high quality, and that the site is comparable to the quality and quantity of the other quarries that the county has allowed in the Lone Pine Valley and placed on its Goal 5 inventory of significant aggregate sites. Consequently, we agree with petitioner that the county erred in failing to include petitioner's site on the county's Goal 5 inventory of significant aggregate sites.

The second, third and twelfth assignments of error are sustained.

FOURTH THROUGH ELEVENTH ASSIGNMENTS OF ERROR

In these assignments of error, petitioner challenges the county's conclusion that the "quantity and quality" of the resource site do not warrant inclusion on the county's Goal 5 inventory. As noted, that conclusion is not based on the actual quantity and quality of the resource, but rather on the county's finding that petitioner had failed to establish that there is a "public need" to mine the subject site.[5]

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

> "Quantity and Quality. According to applicant's geotechnical investigation, * * * approximately 24 acres of the Southwest corner of the parcel are to be developed as a quarry with an estimate of 505,270 tons of aggregate available. The aggregate is of a quality similar to that in quarries being operated on the Butler and Coats ranches. Applicant points out that the Crook County Comprehensive Plan states that an abundance of a Goal 5 Mineral or Aggregate Resource shall not be used as the sole basis to deny placement on the County Inventory List. Nevertheless, the evidence presented fails to establish a 'public need' to preserve additional aggregate sites or to provide for a long-term competitive supply. Crook County Ordinance 51 creates a Regional Needs Analysis stating that:
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> > '[T]he county shall participate in a Regional Needs Analysis when adjoining counties agree upon such an approach and sufficient funding is available to complete

The "public need" requirement stems from two sources, as noted in the findings: (1) Ordinance 51, a comprehensive plan amendment adopted in 1991 that sets forth a number of comprehensive plan policies governing mineral and aggregate extraction; and (2) a statement in the Agricultural element of the county comprehensive plan. As quoted in the findings, Policy 6 of Ordinance 51 contemplates that the county will participate with other counties in adopting a regional needs analysis, "to assist local governments in determining whether additional inventory sites need to be designated." Record 249. The unnumbered agricultural policy states, in full:

> "It shall further be the policy of the county that nonagricultural development in the rural areas shall be based, whenever possible, upon a demonstrated public need; and in all cases, such development shall avoid conflicts with the agricultural community. Therefore, the county shall not permit subdivisions on agriculturally productive lands; and in the case of such developments on non-agricultural lands in close proximity to such lands shall require setbacks, restrictions, and minimum lot sizes as deemed necessary to afford the greatest possible protection for said agricultural lands." Crook County Comprehensive Plan 45.

Petitioner argues that "public need" is not a requirement under Goal 5 in order to place an aggregate site on a county's Goal 5 inventory. *McCoy v. Linn County*, 16 Or LUBA 295, 310 (1987), *aff'd* 90 Or App 271, 752 P2d 323 (1988). Further, petitioner argues that under Goal 5 the county has

> "no authority to add a public need requirement to the Goal 5 mineral and aggregate inventory criteria in the guise of interpreting a local implementing plan policy. Such implementing provisions should be interpreted narrowly to avoid conflicting with Goal 5 requirements." Petition for Review 12.

> such a project. The analysis shall only be used as a tool to assist local governments in determining whether additional inventory sites need to be designated.'
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> "Given the subjective nature of 'public need' and the policies set forth in Ordinance 51, this court finds that the analysis of 'public need' is required in addition to the issue of quantity. The Crook County Comprehensive Plan states that 'non-agricultural [development] in rural areas shall be based whenever possible upon a demonstrated 'public need.'' * * *
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> "* * * In view of the considerable discretion county governing bodies have under OAR 660, these findings are adequate to support the county's determination that applicant's site is not 'significant.' * * *" Record 11-12.

Petitioner goes on to argue that both Policy 6 and the unnumbered Agricultural Lands policy are inapplicable to the subject application, for a number of reasons. We first address the threshold issue of whether the county has the authority under Goal 5 to apply a "public need" or similar requirement to a proposed post-acknowledgment plan amendment to place an aggregate resource site on the county's Goal 5 inventory.

As noted, the county has not yet adopted regulations implementing OAR 660-023-0180 requirements for consideration of an application for a post-acknowledgement plan amendment with respect to aggregate or mineral resources. Under such circumstances, we have held, the rule requirements apply directly and the local regulations that would otherwise apply are preempted, pursuant to OAR 660-023-0180(7). *Morse Bros., Inc. v. Columbia County*, 37 Or LUBA 85, 89 (1999), *aff'd* 165 Or App 512, 996 P2d 1023 (2000). OAR 660-023-0180(7) provides one limited exception: where "the local plan contains specific criteria regarding the consideration of a PAPA proposing to add a site to the list of significant aggregate sites," if those criteria were adopted and acknowledged subsequent to 1989. *See* n 1. In the present case, the county relies upon that exception in order to apply Ordinance 51 to petitioner's application rather than the requirements of OAR 660-023-0180, after finding that Ordinance 51 was adopted and acknowledged subsequent to 1989. However, the county fails to appreciate how limited that exception is. It allows the county to apply only "specific criteria regarding the consideration of a PAPA proposing to add a site to the list of significant aggregate sites" contained in the local plan, in lieu of the requirements of OAR 660-023-0180. All other criteria that might otherwise apply are preempted. As far as we are informed, the only "specific criteria" in the county's plan related to proposals to amend the list of significant aggregate sites are in Ordinance 51. Nothing in Ordinance 51 purports to make consistency with other comprehensive plan provisions, such as the unnumbered Agricultural Lands policy, an approval criterion with respect to an amendment to the

county's Goal 5 aggregate inventory.[6] Accordingly, application of that policy to petitioner's request to add the subject site to the county's inventory of significant aggregate sites is preempted by OAR 660-023-0180(7).[7]

Policy 6 of Ordinance 51 is not so preempted. However, we agree with petitioner that Policy 6 cannot be read, either alone or in context, to impose a requirement that petitioner establish a "public need" for aggregate in order to place the subject property on the county's inventory. On its face, Policy 6 merely states that the county plans to participate with other counties in a regional needs analysis, when funding is available. That analysis "shall only be used as a tool to assist local governments in determining whether additional inventory sites need to be designated." Nothing in Policy 6 suggests that it independently requires that applicants to amend the county's aggregate inventory establish a "public need" for aggregate. To the extent that suggestion can be read into Policy 6, it is refuted by Policy 5, which states that "[a]n abundance of a Goal 5 mineral or aggregate resource shall not be used as the basis to deny placement on the County plan inventory list." No reasonable person could interpret Policy 6 as the county has, to impose a "public need" prerequisite to placing an aggregate site on the county's inventory of significant aggregate sites. ORS 197.829(1); *Huntzicker v. Washington County*, 141 Or App 257, 917 P2d 1051 (1996).[8]

The fourth through eleventh assignments of error are sustained.

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[6] Once a site is placed on the county's Goal 5 inventory of significant aggregate sites, the applicant may obtain a mining permit pursuant to Crook County Zoning Ordinance Article 11. As far as we can tell, nothing in Article 11 makes compliance with any part of the county comprehensive plan a criterion for mining permit approval.

[7] The response brief argues that petitioner failed to raise any objection to application of the unnumbered Agricultural Lands policy below, and thus that issue is waived, pursuant to ORS 197.763(1). Petitioner responds that the county failed to identify the policy as an approval criterion in any notice, and no mention of the policy was made during the proceedings below. Petitioner argues, and we agree, that failure to list the policy as an approval criterion means that petitioner may raise issues regarding that policy notwithstanding failure to raise such issues below. ORS 197.835(4)(a).

[8] Although it is not entirely clear, the county's response brief appears to concede that Policy 6 is not a basis to apply a "public need" standard to petitioner's application. Respondent's Brief 6. The county relies instead on the unnumbered Agricultural Lands policy.

THIRTEENTH THROUGH TWENTY-FIRST ASSIGNMENTS OF ERROR

Under these assignments of error, petitioner argues that to the extent the county's decision purports to identify conflicts and conduct an ESEE analysis pursuant to OAR 660-016-0005 and 0010, the county's analysis misconstrues the applicable law, and is not supported by adequate findings and substantial evidence.[9]

The county's findings, quoted in relevant part at n 4, deny the application to place the subject site on the county's inventory for two reasons: (1) proposed mining will affect scenic values in the "impact area," which the county defines to include the entire Lone Pine Valley; and (2) increased truck traffic related to proposed mining will contribute to the deterioration of the county road that accesses the property. As we have explained, the county erred in refusing to place the proposed mining site on the county's inventory. The two reasons cited above have no bearing on that question. The two cited reasons involve conflicts that must be addressed under OAR 660-016-0005 and 0010. As noted, we assume that the findings quoted at n 4 are the county's attempt to address OAR 660-016-0005 and 0010.

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[9] OAR 660-016-0005 provides, in relevant part:

> "It is the responsibility of local government to identify conflicts with inventoried Goal 5 resource sites. This is done primarily by examining the uses allowed in broad zoning districts established by the jurisdiction (e.g., forest and agricultural zones). A conflicting use is one which, if allowed, could negatively impact a Goal 5 resource site. Where conflicting uses have been identified, Goal 5 resource sites may impact those uses. These impacts must be considered in analyzing the economic, social, environmental and energy (ESEE) consequences:
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> "(1) Preserve the Resource Site: If there are no conflicting uses for an identified resource site, the jurisdiction must adopt policies and ordinance provisions, as appropriate, which insure preservation of the resource site.
>
> "(2) Determine the Economic, Social, Environmental, and Energy Consequences: If conflicting uses are identified, the economic, social, environmental and energy consequences of the conflicting uses must be determined. Both the impacts on the resource site and on the conflicting use must be considered in analyzing the ESEE consequences. * * * A determination of the ESEE consequences of identified conflicting uses is adequate if it enables a jurisdiction to provide reasons to explain why decisions are made for specific sites."

A. Scenic Values

Petitioner first argues that the county erred in designating the entire Lone Pine Valley, an area approximately three miles by five miles in extent, as the "impact area." Petitioner argues that the county's Mineral and Aggregate Element requires a 500-foot impact area, and notes that other mining sites in the valley were approved under a 500-foot impact area.[10] Petitioner contends that the county failed to justify the much larger impact area identified here. If it is permissible for the county to adopt the entire valley as the impact area, petitioner argues, the county failed to provide notice to petitioner that it would depart from the 500-foot impact area it has consistently applied to other aggregate operations in the area, and thus remand is necessary to afford petitioner an opportunity to submit evidence responsive to the much larger impact area.

Second, petitioner argues that under OAR 660-016-0005 and 0010 the analysis is confined to conflicting *uses*, which the rule defines as a use that "if allowed, could negatively impact a Goal 5 resource." OAR 660-016-0005. According to petitioner, the "scenic values" of the Lone Pine Valley are not land *uses* that can be considered for purposes of identifying conflicting uses. Petitioner concedes that the county could consider conflicts with the valley's scenic values if the valley were a Goal 5-designated scenic resource;

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[10] Petitioner cites to the "Crook County Mineral and Aggregate Element" dated December 14, 1990. Petition for Review 34. On file at LUBA is a document entitled "Appendix A, Ordinance No. 43, Crook County Goal 5 Resources (Mineral and Aggregate Elements), December 14, 1990." The document includes a detailed 34-page set of procedures and standards for adopting a Goal 5 aggregate inventory. Assuming that that document is the same document petitioner refers to, it does appear to limit the county's discretion in identifying an impact area. Page 6-7 of the document states in relevant part:

> "a. Definition of Impact Area. The impact area is that area surrounding and near a Goal 5 mineral and aggregate resource site wherein the presence or application of a conflicting use that is allowed outright or conditionally in the surrounding broad zoning district would adversely impact the resource site by limiting the mining or processing of the resource.
>
> "b. Description of Impact Area. Unless otherwise indicated in the text of this Plan or on the respective resource site and impact area map, the impact area is that property extending outward from the resource site boundary to a distance of five hundred (500) feet."

however, petitioner argues that the valley is not a Goal 5-designated resource, and therefore the county simply may not consider conflicts with scenic values.

Further, petitioner argues that even if the reference to "scenic values" is understood as a reference to residential uses in the valley, the county erred in considering such residential uses to be "conflicting uses" for purposes of OAR 660-016-0005. According to petitioner, the focus of OAR 660-016-0005 in the context of a PAPA to mine mineral or aggregate resources is not to identify surrounding uses impacted *by* extraction of the resource, but rather to identify surrounding uses that could "negatively impact" extraction of the resource. To the extent impacts on residential uses can be considered, petitioner argues, the threshold for such impacts must be high enough to involve negative impacts to the proposed mining itself. In other words, petitioner argues, impacts on residential uses must rise to the level of nuisance or trespass claims that might be filed against the proposed mining, before residential uses may be said to be "conflicting uses." Petitioner submits that the visual impacts identified in the county's decision do not rise to that threshold.

The county responds that it correctly identified the entire valley as the "impact area." According to the county, the location of the proposed mining site on a hillside over the flat valley means that it will be visible from most of the valley. While the county concedes that the valley is not a "use" and its scenic values are not a Goal 5-designated resource, the county cites to language in the county comprehensive plan calling for preservation of rimrocks along the Crooked River, which is located in the vicinity. The county argues that it may preserve scenic values that are not (or have not yet been) designated as Goal-5 scenic resources. Further, the county cites to Record 257, which is an appendix to Ordinance 51 that includes a generic ESEE analysis for a number of aggregate sites that have no identified existing conflicting uses within the impact area. The ESEE analysis examines potential future conflicting uses, and notes that such future uses could experience a number of different impacts from mining, including "loss of visual attractiveness." According to the

county, its Goal 5 aggregate inventory evaluated impacts to scenic values, and thus the county may consider such impacts in evaluating an application to add a site to the inventory.

1. Impact Area

The county does not respond to petitioner's argument that the county's Mineral and Aggregate Element limits the county to a 500-foot impact area. *See* n 10. It is not clear to us whether or how the language quoted at n 10 applies to petitioner's application. It is possible that that language has been superseded by other ordinances, or is applicable only to the county's initial Goal 5 inventory. Absent a response from the county on this point, we agree with petitioner that remand is necessary for the county to address the Element and its requirements, and either apply those requirements or explain why they do not apply.

2. Conflicting Uses

Assuming that the county finds that the 1990 Mineral and Aggregate Element's limitation to a 500-foot impact area does not apply, we generally agree with the county that nothing in OAR 660-016-0005 limits either the size of the impact area or the types of conflicting uses that can be considered. The county evidently considers visual impacts of the proposed mining on residential use in the valley to be a "conflicting use." While such conflicts may be considered under OAR 660-023-0180 only if they involve a Goal 5-designated scenic resource, OAR 660-016-0005 is not so limited. We disagree with petitioner that conflicts with residential uses may be considered under OAR 660-016-0005 only if they rise to the level of nuisance or trespass claims against the proposed mining. OAR 660-016-0005(2) makes it clear that both "impacts on the resource site and on the conflicting uses must be considered in analyzing the ESEE consequences," and does not impose any explicit threshold on either set of impacts. The ESEE analysis examines economic, social, environmental, and energy consequences of the conflicts between the resource site and other uses. The scope of analysis under OAR 660-016-0005(2) is quite

broad, which suggests that the scope of conflicts that may be considered is far broader than the nuisance or trespass concerns that petitioner cites as the applicable threshold.

That said, we agree with petitioner that if the county determines on remand that the entire valley is properly considered the impact area, the county must reopen the record to allow petitioner an opportunity to submit evidence and argument responsive to that impact area. The county does not dispute petitioner's contention that the staff report and planning commission decision focused on the area around the subject property, and that the county first identified the entire 15-square mile valley as the impact area in the county court's final written decision. We also generally agree with petitioner that the county's findings, assuming they are intended to address OAR 660-016-0005 and 0010, are grossly inadequate. The findings quoted at n 4 make only the most minimal effort to analyze economic, social, environmental and energy consequences, and make no attempt to "develop a program to achieve the goal" as OAR 660-016-0010 requires.

B. Road Impacts

Policy 9 of Ordinance 51 provides that:

> "Increased truck traffic or road deterioration from mining that may occur inside the identified impact area may be considered in the ESEE consequences analysis."

The county relied upon Policy 9 as one basis for declining to place the proposed mining site on the county's Goal 5 aggregate inventory. *See* findings quoted at n 4. As we have explained, Policy 9 does not provide a basis to deny the application to place the subject site on the county's Goal 5 inventory. As Policy 9 states, it is a consideration only in the ESEE analysis. For the reasons explained above, the county's ESEE analysis, if that is what its findings are intended to be, is inadequate. Remand is necessary for the county to adopt appropriate findings addressing the requirements of OAR 660-016-0005 and 0010.

The thirteenth through twenty-first assignments of error are sustained, in part.

The county's decision is remanded.