

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

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

12
13 vs.

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15 LANE COUNTY,
16 *Respondent,*

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18 and

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

23
24 LUBA No. 2002-068

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26 FINAL OPINION
27 AND ORDER

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29 On remand from the Court of Appeals.

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31 Frank M. Flynn and Steven L. Pfeiffer, Portland, represented petitioner.

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33 Frank M. Parisi and Todd S. Sadlo, Portland, represented intervenor-petitioner.

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35 Stephen L. Vorhes, Assistant County Counsel, Eugene, represented respondent.

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37 Daniel J. Stotter, Eugene, represented intervenor-respondent Thistledown Farm. Lee D.
38 Kersten, Eugene, represented intervenor-respondent Lone Pine Farms, Ltd. Karen W. Reed,
39 Eugene, represented herself.

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

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REMANDED

01/16/2004

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

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INTRODUCTION

This matter is before us on remand from the Court of Appeals. *Eugene Sand and Gravel v. Lane County*, 44 Or LUBA 50, *aff'd in part and rev'd and remanded in part*, 189 Or App 21, 74 P3d 1084 (2003). We set out below the Court’s statement of the relevant facts:

“The property at issue, which borders the Willamette River, is zoned for exclusive farm use and is within a flood plain. Historically it has been used for agricultural and forest purposes. A portion of the property’s western boundary is at River Road, and the property’s northern boundary is at Lone Pine Drive. The property contains a significant amount of alluvial aggregate. Petitioner Eugene Sand & Gravel wishes to use a portion of the property to mine and process aggregate and conduct related activities involving the production of concrete and asphalt. It intends to gain access to the property from River Road.

“The property is surrounded by land used for agricultural and rural residential purposes and is near an area designated as sensitive bird habitat. Respondents Thistledown Farm and Lone Pine Farms are located near the property. Both sell produce at farm stands, which can be reached from River Road. Lone Pine Farms also has a conditional use permit to conduct other commercial activities, including selling local crafts and conducting seasonal festivals.

“In April 2000, Eugene Sand & Gravel submitted an amended application to amend Lane County’s comprehensive plan to add the property to the inventory of aggregate sites, to rezone the property, and to permit mining on a portion of the property. * * *

“The county denied the application, making extensive findings. [T]he county found that the property was a significant Goal 5 mineral and aggregate resource, *see* OAR 660-023-0180(3), but that the application did not meet all of the conflict minimization requirements of OAR 660-023-0180(4).^[1] In particular, the county

¹ OAR 660-023-0180(3) and (4) provide, in relevant part:

“(3) An aggregate resource site shall be considered significant if adequate information regarding the quantity, quality, and location of the resource demonstrates that the site meets any one of the criteria in [OAR 660-023-0180(3)(a)-(c)], except as provided in subsection (d)] * * *

“(4) For significant mineral and aggregate sites, local governments shall decide whether mining is permitted. For a [post-acknowledgement plan amendment] application involving a significant aggregate site, the process for this decision is set out in

subsections (a) through (g) of this section. For a PAPA involving a significant aggregate site, a local government must complete the process within 180 days after receipt of a complete application that is consistent with section (6) of this rule, or by the earliest date after 180 days allowed by local charter. The process for reaching decisions about aggregate mining is as follows:

“(a) The local government shall determine an impact area for the purpose of identifying conflicts with proposed mining and processing activities. The impact area shall be large enough to include uses listed in subsection (b) of this section and shall be limited to 1,500 feet from the boundaries of the mining area, except where factual information indicates significant potential conflicts beyond this distance. * * *

“(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 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

1 found that, while certain conflicts could be minimized under the standards set forth in
2 OAR 660-023-0180(4), certain conflicts resulting from flooding discharges and
3 impacts on riparian resources could not be minimized under that rule. The county
4 further noted that the rule provided that conflicts with agricultural practices were to
5 be evaluated under the standards set forth in ORS 215.296.^[2] It further found that
6 conflicts with agricultural practices from the proposed mining would result from the
7 generation of dust, the lowering of groundwater resources, increased flooding, and
8 traffic impacts. In its consideration of conflicts with agricultural practices, the county
9 considered the effect that the proposed mining operation would have on farm
10 stands, and concluded that it would have a negative impact on them. Ultimately, the
11 county denied the application on the ground that the benefits of allowing the mining
12 would not outweigh the impacts of the identified conflicts.

13 “Eugene Sand & Gravel petitioned LUBA for review of the county’s final order.
14 [Oregon Concrete and Aggregate Producers Association (OCAPA)] intervened
15 and also petitioned for review of the order. Eugene Sand & Gravel and OCAPA
16 argued that the county erred in analyzing the conflicts between the proposed mining
17 and agricultural practices in a different manner than the county analyzed the conflicts

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.”

² ORS 215.296(1) provides:

“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.”

1 with other activities, and that the county erred in concluding that the conflicts with
2 agricultural practices could not be minimized. They also argued that the county erred
3 in considering the impacts that the mining would have on farm stands. In particular,
4 Eugene Sand & Gravel and OCAPA asserted that farm stands do not constitute
5 ‘agricultural practices’ for purposes of OAR 660-023-0180(4)(b)(E). Finally, they
6 asserted that, even if the county were correct in applying a different standard for
7 conflicts with agricultural practices, the county’s findings were insufficient to support
8 its conclusions.

9 “LUBA agreed with the county that conflicts with ‘agricultural practices’ needed to
10 be evaluated under the standards set forth in ORS 215.296(1). * * * However,
11 LUBA agreed with petitioners that farm stands could not be considered ‘agricultural
12 practices.’ LUBA also concluded that, as petitioners urged, certain of the county’s
13 findings with respect to riparian resources and wetlands were inconsistent with one
14 another. LUBA therefore affirmed in part but remanded the case to the county for
15 reconsideration of the issues described above.” 189 Or App at 24-26 (footnotes
16 omitted and added.)

17 At the Court of Appeals, respondents argued that we erred in concluding that farm stands
18 may not be included in an evaluation of mining conflicts with agricultural practices under OAR 660-
19 023-0180(4)(b)(E). Reviewing the phrase “agricultural practices” in context with ORS
20 215.203(2)(b), (c), 215.213(1), and 215.296, the Court held, in relevant part:

21 “An activity can be an ‘agricultural practice’ for purposes of OAR 660-023-
22 0180(4) even if it is not itself a ‘farm use’ within the meaning of ORS 215.203(2).
23 Further, in a related sense, the listing of ancillary farm-related activities in ORS
24 215.213(1) * * * does not preclude those activities from being deemed, properly,
25 as ‘agricultural practices’ within the purview of OAR 660-023-0180(4).” 189 Or
26 App at 32.

27 The Court remanded our decision to us to reevaluate petitioner’s challenges to the county’s
28 findings, given the Court’s conclusion that the impact of mining activities on farm stands may be
29 considered for the purposes of evaluating compliance with OAR 660-023-0180(4)(b)(E). The
30 Court’s remand requires us to reconsider petitioner’s third and tenth assignments of error, and
31 OCAPA’s eighth assignment of error.

32 **MINE-RELATED TRAFFIC CONFLICTS WITH AGRICULTURAL PRACTICES**

33 Based on a traffic analysis provided by petitioner, the county found that the proposed
34 mining activities would comply with transportation standards and therefore conflicts would be

1 minimized for uses and activities other than agricultural activities. However, the county relied on data
2 generated for a 1995 parking study for Lone Pine Farms and testimony and other evidence
3 provided by opponents to conclude that the trucks entering and leaving River Road from the subject
4 property would result in unacceptably long exit delays from the Thistledown Farm’s farm stand and,
5 to a lesser extent, interfere with entry to and exit from Lone Pine Farms’ farm stand. In addition, the
6 findings conclude that the additional traffic generated by petitioner’s proposed mining operations
7 would conflict with the farm equipment on River Road.³

³ The county’s findings state, in relevant part:

- “a. As discussed in [petitioner]’s June 22, 1999 Traffic Impact Analysis [(TIA)] * * * 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 Farm[s] 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.
- “b. During all phases of the proposed aggregate site operation, the percentage of farm stand patrons for both Thistledown Farm and Lone Pine Farms exiting to the north was assumed at 10 percent while the percentage to the south was 90 percent. Therefore, the northbound right-turn into the parking area and westbound left-turn traffic to and from the parking area was assumed to be 65 (the maximum hourly ingress to and egress from the farm stand) times 90 percent. The southbound left-turn and westbound right-turn traffic to and from the parking area was assumed to be 65 times 10 percent. Considering a higher left-turn volume out of the farm stand creates a worst-case scenario since left-turn traffic has fewer available gaps in the major-street traffic stream than right-turns (left-turn vehicles must find a suitable gap in both northbound and southbound traffic.)
- “c. The underlying traffic volume at the farm stands was assumed to be equal to that manually collected on River Road in front of the proposed haul road, with applicable growth rates applied to obtain future-year volume estimates. The northbound and southbound through movement volumes include the sum of the underlying traffic and that added by the proposed aggregate mining and processing facility (the farm stand analysis considered a maximum round-trip truckload per hour rate of 65; after subsequent review of historical records from the existing plant, the maximum rate was reduced to 45). Given these assumptions, the greatest increase in traffic will be to the south of the proposed haul road. Therefore, only Thistledown Farm was analyzed by the applicant for impacts from the proposed project.
- “d. The worst-case analysis, described above [which] is found by the Board [of Commissioners] to be [a] reasonable [scenario], shows a significant increase in

1 Petitioner’s third assignment of error and OCAPA’s eighth assignment of error (together
2 “petitioners”) challenge the county’s findings that the proposed mining activities would result in traffic
3 volumes that would violate ORS 215.296 because they would conflict with vehicles entering and
4 leaving Thistledown Farm’s and Lone Pine Farms’ farm stands. Petitioners argue that the county’s
5 findings do not explain why anticipated conflicts and the measures proposed by petitioner to
6 address those conflicts are inadequate to minimize the anticipated conflicts between gravel trucks
7 and agricultural practices. Petitioners also argue that to the extent the county found that traffic from
8 the proposed mining activities would conflict with agricultural practices, the findings are not
9 supported by substantial evidence.

10 Respondents respond that the findings adequately explain the basis for the county’s
11 conclusion that petitioner failed to show that conflicts attributable to mining-related traffic could be
12 minimized to avoid significantly affecting agricultural activities. Respondents contend that there is
13 ample evidence in the record to support the county’s findings because petitioner’s TIA (1)
14 considered the impact of truck traffic on patrons visiting Thistledown Farm, but did not consider the
15 impact of truck traffic on patrons visiting Lone Pine Farms; (2) did not consider conflicts between
16 gravel truck traffic and additional trips generated by vehicles traveling from one farm stand to the
17 other along River Road; (3) underestimated the number of vehicles entering and exiting Thistledown
18 Farm’s farm stand; (4) did not consider the impact of gravel truck traffic on traffic generated by
19 special events conducted in conjunction with farm uses, such as harvest festivals; and (5) did not
20 identify measures to minimize conflicts between gravel trucks and the use of River Road to transport

average vehicle delay for exiting vehicles from Thistledown Farm given the proposed development and future background traffic volumes. Based on the [TIA] * * * 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 agricultural equipment, such as tractors and hay wagons. Respondents argue that these impacts are
2 specific to agricultural practices and have not been addressed by petitioner's TIA and, therefore,
3 even if petitioner's TIA is adequate to demonstrate that the proposal satisfies the Transportation
4 Planning Rule and the county's applicable transportation policies and standards, it is inadequate to
5 show that the conflict with agricultural practices can be minimized.

6 Petitioner's TIA estimates that, during the relevant planning period, additional trips
7 generated by petitioner's proposal will cause an average peak hour increase in driver delay for
8 vehicles exiting from Thistledown Farm onto River Road from 20.3 seconds to 25.4 seconds. The
9 TIA concludes that that impact will reduce the level of service at the intersection of the Thistledown
10 Farm's farm stand parking lot and River Road from C to D. Record 6654. Petitioner proposed to
11 minimize that conflict by adding unspecified procedures to its driver's training manual. Record 6647.
12 Petitioner also considered, but abandoned the idea of using Lone Pine Road as its primary access
13 route to the subject property. This decision was reached, in part, because the Lone Pine Road
14 access would require southbound trucks, which comprise 90 percent of petitioner's trips, to pass
15 both Lone Pine Farms' farm stand and Thistledown Farm's farm stand, and the use of the new haul
16 road would limit the impact of southbound truck traffic to just the Thistledown Farms' farm stand.
17 Record 6659.

18 Despite the conflicting evidence that respondents identify, the county found that petitioner's
19 TIA adequately identified the impact the proposed hauling activity would have on farm stands.
20 Nevertheless, the county concluded that the proposed minimization was not sufficient to ensure that
21 the anticipated haul trips would not significantly affect traffic entering or exiting from the Thistledown
22 Farm farm stand parking lot, and completely failed to address the impact on Lone Pine Farms' farm
23 stand or the impacts on the use of River Road for the transport of agricultural equipment. As a
24 result, the county concluded that petitioner had not met its burden of showing that the anticipated
25 additional traffic would not violate ORS 215.296(1). We believe that the findings are adequate to
26 explain why the county believed that OAR 660-023-0180(4)(b)(E) was not met with respect to

1 mining-related traffic conflicts with agricultural practices, and those findings are supported by
2 substantial evidence.

3 Petitioner's third assignment of error and OCAPA's eighth assignment of error are denied.

4 **ESEE ANALYSIS**

5 OAR 660-023-0180(4)(d) requires the county to consider the economic, social,
6 environmental and energy (ESEE) consequences of allowing mining, if the county determines that a
7 mining proposal will result in significant conflicts that cannot be minimized. *See* n 1. The county
8 found that the ESEE consequences of allowing mining outweighed the benefits, focusing in particular
9 on the proposal's conflict with existing and approved agricultural practices.⁴

10 In our initial opinion we sustained petitioner's tenth assignment of error, which challenged
11 the county's ESEE analysis because the county improperly considered some conflicts in performing
12 its ESEE analysis. In particular, we concluded that the county erroneously considered conflicts
13 between mining and farm stands under OAR 660-023-0180(4)(b)(E), and therefore we could not

⁴ The county adopted five pages of findings to address OAR 660-033-0180(4)(d). Those findings state, in relevant part:

"The impact areas, existing and approved land uses, conflicts minimization efforts and evidence and testimony identified [in earlier findings addressing OAR 660-033-0180(4)(b)] are incorporated here[in] by this reference and have been utilized by the Board [of Commissioners] for the ESEE analysis below. The Board [of Commissioners] further reviewed all the evidence and testimony provided in the record in reaching its conclusions about the ESEE consequences of allowing, limiting or not allowing mining at the site. By weighing the positive and negative consequences of allowing, limiting or not allowing mining, the Board [of Commissioners] considered the relative importance of mining when compared to the existing and approved uses identified [in prior findings] as being subject to significant conflicts that could not be minimized. In particular, the Board [of Commissioners] concludes the ESEE consequences of allowing mining are so detrimental to the conflicting uses that mining should not be allowed. Further, the Board [of Commissioners] considered the efforts to limit mining in ways that would minimize the predicted significant conflicts with the existing and approved uses in the impact area and concluded those efforts did not adequately establish protection of those uses to the desired extent. The Board [of Commissioners] concludes the existing and approved uses, *particularly the agricultural practices*, are of sufficient importance relative to the proposed mining site that mining must not be allowed." Record 69 (emphasis added.)

The findings go on to analyze the economic effects, the social effects, the environmental effects and the energy effects independently and conclude in each case that the impact of mining on existing and approved uses, and on agricultural practices in particular, is so great that mining should not be allowed. *See* Record 71 (economic and social); 72-73 (environmental); 73 (energy).

1 tell whether the county would reach the same conclusion if the conflict from farm stands was
2 removed from the analysis. For that reason, we remanded for the county to conduct its ESEE
3 analysis without considering conflicts with farm stands. 44 Or LUBA at 93.

4 In view of the Court of Appeals' decision in this matter and our decision that petitioners
5 have not demonstrated that the county erred in finding that mining related conflicts with agricultural
6 practices cannot be minimized to ensure that the standards set out in ORS 215.296 can be met, our
7 decision to sustain petitioner's tenth assignment of error must be modified. It was not error for the
8 county to consider conflicts with agricultural practices that it found were not adequately minimized,
9 including identified conflicts with farm stands. The only remaining conflicts that the county may have
10 improperly considered in performing its ESEE analysis are mining related conflicts with riparian
11 resources. We sustained OCAPA's third assignment of error, which challenged the county's
12 findings that there were conflicts with riparian resources that could not be minimized. 44 Or LUBA
13 91-92. If the county is unable on remand to adopt adequate findings that are supported by
14 substantial evidence, which establish that there would be significant mining related conflicts with
15 riparian resources that cannot be minimized, conflicts with riparian resources may not be considered
16 in the ESEE analysis. In that event, the county must adopt a revised ESEE analysis that omits any
17 consideration of riparian area conflicts.

18 Our disposition of the tenth assignment of error is modified and petitioner's challenge is
19 sustained in part.

20 **CONCLUSION**

21 In light of the Court of Appeals' decision, we have denied petitioners' challenge to the
22 county's findings with respect to conflicts between mining-related traffic and agricultural practices.
23 We continue to sustain petitioner's tenth assignment of error pertaining to the county's ESEE
24 analysis, as modified in this opinion. The Court of Appeals' decision did not disturb our resolution of
25 petitioner's first assignment of error and OCAPA's eleventh assignment of error, which sustained
26 petitioners' allegations that the county erred in applying its own local approval criteria in considering

1 an application to mine pursuant to OAR 660-023-0180. Therefore, the county must consider
2 petitioner's application under only the rule provisions. 44 Or LUBA at 96-97.

3 The county's decision is remanded.