

1 BEFORE THE LAND USE BOARD OF APPEALS
2 OF THE STATE OF OREGON

3
4 MAX HELLBERG,
5 *Petitioner,*

6
7 vs.

8
9 MORROW COUNTY,
10 *Respondent.*

11
12 LUBA No. 2004-200

13
14 FINAL OPINION
15 AND ORDER

16
17 Appeal from Morrow County.

18
19 Steven R. Schell, Portland, filed the petition for review and argued on behalf of petitioner.
20 With him on the brief was Black Helterline LLP.

21
22 Mark J. Greenfield, Portland, filed the response brief and argued on behalf of respondent.

23
24 HOLSTUN, Board Chair; BASSHAM, Board Member; DAVIES, Board Member,
25 participated in the decision.

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27 REMANDED 05/17/2005

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

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NATURE OF THE DECISION

Petitioner appeals a county court decision that denies his application for a permit to mine aggregate on 52 acres of a 126-acre property that is zoned for exclusive farm use.

FACTS

On January 20, 2004, petitioner submitted an application to (1) amend the Morrow County Comprehensive Plan to designate 52 acres of his property as a significant aggregate resource site under OAR 660-023-0180(3) and (2) issue a permit to allow petitioner’s proposed operation to mine, crush and stockpile aggregate on his property. Record II 394-405.¹ The planning commission conducted three evidentiary public hearings on the application and recommended that the county court approve the application. The county court conducted four more public hearings on the proposal, three of which were evidentiary. In its decision at the conclusion of the October 13, 2004 public hearing, the county court voted to approve the request to designate the 52 acres as a significant aggregate resource site. However, the county court also voted to deny the request to conduct an aggregate mining operation on the property. On October 27, 2004, the county court issued an ordinance and an order. The ordinance amends the comprehensive plan to designate the 52 acres as a significant aggregate resource and amends the county zoning ordinance to apply a Significant Resource Overlay Zone to the property.² The order denies petitioner’s request for a mining permit. The order is the subject of this appeal.

¹ Petitioner’s application was considered first by the planning commission, which made a recommendation to the county court. The challenged decision was adopted by the county court. The county has submitted a two-volume record. Volume I is the record of the local proceeding before the county court, and Volume II is the record of the local proceeding before the planning commission. Because those volumes have overlapping page numbers, all record citations in this opinion include a citation to the appropriate volume number.

² That decision has not been appealed and is not before us in this appeal.

1 **FIRST ASSIGNMENT OF ERROR**

2 **A. Introduction**

3 There is no dispute that the Land Conservation and Development Commission’s Goal 5
4 (Open Spaces, Scenic and Historic Areas, and Natural Resources) administrative rule applies in this
5 case, specifically the part of the rule concerning mineral and aggregate resources that is codified at
6 OAR 660-023-0180. There is also no dispute that the version of OAR 660-023-0180 that existed
7 on the date the application was submitted on January 20, 2004 is the applicable version of the rule.
8 That rule mandates a highly structured, step-by-step approach to reviewing applications for post
9 acknowledgment plan amendments to determine whether an aggregate resource site is significant
10 and, if it is significant, whether to allow mining on that site. We briefly describe those steps before
11 turning to the county court’s decision and petitioner’s assignments of error.

12 The first step under OAR 660-023-0180 is to determine whether the proposed aggregate
13 site is significant, within the meaning of OAR 660-023-0180(3). There is no dispute concerning the
14 first step. The second step is to identify an impact area, for purposes of the conflicts determination
15 that is required in step three. In this case the county identified a 1,500-foot impact area, and we do
16 not understand petitioner to dispute that impact area. The parties’ dispute begins with the third step,
17 under which the county must determine whether there are any conflicts with the proposed mining.
18 The required analysis under step three is limited and structured.³ If conflicts are identified, the fourth

³ OAR 660-023-0180(4)(b) provides, in part:

“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

1 step requires that the county determine whether there are “reasonable and practical measures that
2 would minimize the conflicts.” OAR 660-023-0180(4)(c).⁴ Finally, if conflicts are identified under
3 step three and the county finds that there are no reasonable and practical measures by which those
4 conflicts can be minimized, the county must proceed to step five and determine the ESEE
5 (economic, social, environmental and energy) consequences of “either allowing, limiting, or not
6 allowing mining at the site.”⁵

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;

- “(C) Safety conflicts with existing public airports due to bird attractants, i.e., open water impoundments. This paragraph shall not apply after the effective date of commission rules adopted pursuant to Chapter 285, Oregon Laws 1995;
- “(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;
- “(E) Conflicts with agricultural practices; and
- “(F) Other conflicts for which consideration is necessary in order to carry out ordinances that supersede Oregon Department of Geology and Mineral Industries (DOGAMI) regulations pursuant to ORS 517.780[.]”

⁴Step four is also highly structured. OAR 660-023-0180(1)(f) provides the following definition:

“‘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.”

⁵ In performing this ESEE analysis the local government is required to consider 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.” OAR 660-023-0180(4)(d).

1 **B. The County Court’s Decision**

2 The county court adopted the following findings to fulfill its obligation under steps three
3 through five:

4 “1. An impact area for the purpose of identifying conflicts with mining and
5 processing activities [is] set at 1,500 feet from the boundaries of the mining
6 area.

7 “2. Existing and approved land uses within the impact area that will be
8 adversely affected by mining operations are dwellings within a residential
9 zone on existing platted lots and agricultural practices within Exclusive Farm
10 Use zoned land.

11 “3. Conflicts from the proposed mining operations include:

12 “a) conflicts due to noise, dust and other discharges;

13 “b) potential conflicts to local roads used for access and egress to the
14 mining site within one mile of the entrance to the mining site; and

15 “c) conflicts with agricultural practices.

16 “4. There are no reasonable and practicable measures that would minimize the
17 stated conflicts.

18 “5. Allowing mining would create adverse effects on the livability, value and
19 enjoyment of residential uses within the impact area.

20 “6. Mining should not be allowed at the proposed site based upon the
21 economic, social, environmental, and energy (ESEE) consequences of
22 allowing, limiting or not allowing mining at the proposed site, the degree of
23 adverse effect on existing land uses within the impact area, the lack of
24 reasonable and practicable measures that could be taken to reduce the
25 identified adverse effects and the probable duration of the mining and post-
26 mining use.

27 “BASED UPON THE FOREGOING FINDINGS OF FACT, NOW,
28 THEREFORE, THE COUNTY COURT OF MORROW COUNTY DOES
29 HEREBY MAKE THE FOLLOWING ORDER:

30 “The application for authorization and permitting of mining activities and operations
31 on the subject site be and is hereby DENIED.” Record I 4-5.

1 **C. Petitioner’s Challenge**

2 The statutory standard for county findings in support of a permit decision is set out at ORS
3 215.416(9), which provides:

4 “Approval or denial of a permit * * * shall be based upon and accompanied by a
5 brief statement that explains the criteria and standards considered relevant to the
6 decision, states the facts relied upon in rendering the decision and explains *the*
7 *justification for the decision based on the criteria, standards and facts set*
8 *forth.*” (Emphasis added.)

9 Petitioner contends that if the county’s findings are judged by this standard, they are inadequate:

10 “[T]he findings in this matter are conclusory and inadequate. The County Court’s
11 findings simply do not analyze, weigh evidence, or even address standards related
12 to the specific issues.” Petition for Review 11.

13 We agree with petitioner. Although ORS 215.416(9) does make reference to a “brief
14 statement,” that reference must be read in concert with the requirement that the county’s findings
15 explain “the justification for the decision based on the criteria, standards and facts set forth.” As we
16 have already explained, the standards imposed by OAR 660-023-0180 are not simple and
17 straightforward. The rule mandates a regimented step-by-step analysis that, while expressly limited
18 in some ways, nevertheless requires (1) significant fact finding, (2) application of the facts found to
19 highly regimented criteria and (3) articulation of the reasoning that led the county to deny a permit to
20 mine under those highly regimented criteria. The county’s findings do not come close to providing
21 the required level of detail in fact finding, application of facts to legal standards and explanation of
22 the county’s reasoning in making its decision under those legal standards.

23 **D. The County’s Response**

24 The member of the county court that moved to deny the request to permit mining prepared
25 a three-page statement (hereafter the Statement) in which he explains his concerns about the
26 proposal and why he believes the proposal should be denied. The Statement is written in a way that
27 to some extent parallels the OAR 660-023-0180 step three, four and five analysis described earlier
28 in this opinion. The county argues in its brief that the challenged decision is “accompanied by” the

1 Statement, within the meaning of ORS 215.416(9), and therefore the findings and reasoning in the
2 Statement should be read to provide the explanation of the county's justification for its decision that
3 is required by ORS 215.416(9).

4 There are at least two problems with the county's argument. First, the Statement was not
5 adopted as the county's findings in support of its decision. While the other county court member
6 that voted to deny the requested mining permit indicated that he generally agreed with the
7 Statement, neither he nor the authoring county court member moved to adopt that document as part
8 of the decision findings. The county court's failure to adopt the Statement with the findings it
9 actually adopted cannot be viewed as harmless error. Second, the county's failure to adopt the
10 Statement also cannot be overlooked as a procedural error that did not prejudice any party's
11 substantial rights. The subjects of petitioner's first assignment of error are the findings the county
12 actually adopted. It is clear that petitioner also disputes some of the factual and legal conclusions
13 that are presented in the Statement, but the adequacy of those factual and legal conclusions to
14 comply with steps three, four and five is not challenged in the first assignment of error, because the
15 Statement was not adopted by the county court as findings. To the extent the county argues that
16 petitioner should have anticipated in its petition for review that the Statement that was not adopted
17 as part of the county's decision might be relied upon by the county to support its decision, we do
18 not agree.

19 **E. Conclusion**

20 For the reasons explained above, the county's decision must be remanded for adequate
21 findings. The parties devote much of their briefs to presenting arguments concerning their respective
22 views of the meaning, quality and significance of the evidence that was submitted to the county court
23 and the facts that could reasonably be found based on that evidence. Given the county's court's
24 inadequate findings concerning its view of the facts, we do not consider those arguments here. The
25 required fact finding and analyses under steps three, four and five of OAR 660-023-0180 is for the
26 county court in the first instance. The first assignment of error is sustained.

1 **SECOND ASSIGNMENT OF ERROR**

2 Under this assignment of error, petitioner first challenges the county court’s finding 5, in
3 which the county court bases its decision to deny the requested mining permit in part on “adverse
4 effects on the livability, value and enjoyment of residential uses within the impact area.” Record I 5.
5 As we have already explained, the county court’s findings are inadequate to demonstrate that the
6 county court properly reviewed the application under steps three, four and five of OAR 660-023-
7 0180. While identified adverse effects on the livability, value and enjoyment of residential uses
8 within the impact area might play some role in the required considerations under steps three, four
9 and five, we agree with petitioner that the finding 5 is not, in and of itself, either a proper
10 consideration under OAR 660-023-0180 or a sufficient basis for denying the requested permit.
11 *See Morse Bros. Inc., v. Columbia County*, 37 Or LUBA 85, 99 (1999), *aff’d* 165 Or App 512,
12 996 P2d 1023 (2000) (consideration of road conflicts under OAR 660-023-0180(4)(b)(B) is
13 limited to local roads).

14 Similarly, we agree with petitioner that even if there are conflicts that cannot be mitigated,
15 the county is obligated under OAR 660-023-0180(4)(d) to perform the ESEE analysis that is
16 required under step five before it may deny the requested mining permit. We have already
17 concluded under the first assignment of error that the county’s findings are not adequate to
18 demonstrate that it carried out that obligation. We agree with petitioner that, to the extent the
19 county believed it was not required to perform step five in denying the requested mining permit, the
20 county erroneously construed the law.

21 Petitioner’s remaining arguments under the second assignment of error fall into two
22 categories. First, petitioner suggests the county erroneously construed the law by not applying
23 certain objective standards, which he contends are satisfied. As the county’s response makes clear,
24 this dispute is actually a dispute about the facts. In responding to our remand under the first
25 assignment of error, the county will be required to find the relevant facts in the first instance. These
26 arguments under the second assignment of error provide no additional basis for remand.

1 Under the second assignment of error, and under other assignments of error, the parties
2 appear to have a disagreement regarding the county’s obligations under steps four and five of OAR
3 660-023-0180. Petitioner’s brief can be read to rely on our decision in *Molalla Reserve v.*
4 *Clackamas County*, 42 Or LUBA 251, 275 (2002) for the principle that the county is obligated to
5 produce the evidence that may be necessary to develop reasonable and practicable measures to
6 minimize conflicts to perform its obligation under OAR 660-023-0180(4)(c) (step four) and
7 perform the ESEE analysis that is required by OAR 660-023-0180(4)(d) (step five). Petition for
8 Review 3, 14-15. If that is how petitioner reads our decision in *Molalla Reserve*, he misreads our
9 decision.

10 As the permit applicant, petitioner has the burden of presenting substantial evidence to
11 support findings of compliance with all relevant approval standards and approval of his application.
12 Any permit opponents are entitled to present rebutting and opposing evidence, and county planning
13 staff’s presentations may also include relevant evidence. The county’s obligation under steps four
14 and five is a *findings* obligation; it is not an *evidentiary* obligation. The county is entitled to base its
15 decision on the evidence that is placed before it by the parties to this permit proceeding. We reject
16 petitioner’s contentions to the contrary.

17 The second assignment of error is sustained in part.

18 **THIRD AND FOURTH ASSIGNMENTS OF ERROR**

19 ORS 197.835(10)(a) provides that LUBA must reverse a county decision if it determines
20 the county acted “outside the range of discretion” allowed under the county’s comprehensive plan
21 and land use regulations.⁶ Petitioner’s underlying premise in both the third and fourth assignments of

⁶ As relevant, ORS 197.835(10) provides:

“(a) [LUBA] shall reverse a local government decision and order the local government to grant approval of an application for development denied by the local government if the board finds:

1 error appears to be that the record is sufficient to demonstrate that petitioner’s application complies
2 with the requirements of OAR 660-023-0180 and that LUBA can therefore conclude that the
3 county court acted outside its range of discretion under the law. For that reason, petitioner
4 contends, the application must be approved as a matter of law.⁷ ORS 197.835(10)(a).

5 In his third assignment of error, petitioner contends that the county is obligated “to seek out
6 and determine” measures to minimize conflicts under OAR 660-023-0180 step four.⁸ We have
7 already agreed with petitioner that the county’s findings are inadequate to demonstrate that it
8 properly performed the obligation that is imposed by step four. However, we do not agree with
9 petitioner that the evidentiary record in this case permits us to conclude that the county court *could*
10 *not* adopt findings that demonstrate that the proposed mining would produce conflicts that cannot
11 be minimized. In addition, we do not agree with petitioner that the evidentiary record in this case
12 permits us to conclude that even if conflicts cannot be minimized, the county court could not adopt
13 an ESEE analysis under step five that might nevertheless support a decision to deny a permit for
14 mining on the site. Finally, we have already rejected petitioner’s contention that the county is
15 obligated to shoulder both the evidentiary burden in this case in addition to the findings obligation
16 that is imposed by steps four and five. To the extent petitioner continues to suggest otherwise under
17 these assignments of error, we reject the suggestion.

“(A) Based on the evidence in the record, that the local government decision is
outside the range of discretion allowed the local government under its
comprehensive plan and implementing ordinances[.]”

“(b) If the board does reverse the decision and orders the local government to grant
approval of the application, the board shall award attorney fees to the applicant and
against the local government.”

⁷ For purposes of this opinion, we assume without deciding that ORS 197.835(10)(a) could apply to require that LUBA reverse the county’s decision based on approval standards that are found in OAR 660-023-0180 rather than the county’s “comprehensive plan and implementing ordinances.”

⁸ Petitioner also cites ORS 197.522 as a source of authority for this obligation. However, in *Oien v. City of Beaverton*, 46 Or LUBA 109, 126 (2003), we concluded that while ORS 197.522 may obligate a local government to consider and approve reasonable conditions of approval that are proposed by an applicant, that statute does not obligate a local government to seek out reasonable conditions on its own.

1 Petitioner makes other arguments under the fourth assignment of error. However, none of
2 those argument overcome petitioner’s failure to establish that the evidentiary record in this case
3 demonstrates that the county court’s decision is “outside the range of discretion allowed the
4 [county] under its comprehensive plan and implementing ordinances,” which would require reversal
5 of the county’s decision and an order to approve the permit under ORS 197.835(10)(a). Neither
6 do those arguments demonstrate that the county court’s decision to deny the permit “violates a
7 provision of applicable law and is prohibited as a matter of law,” which would justify a decision by
8 LUBA to reverse the county court’s decision under OAR 661-010-0073(1)(c). The parties
9 dispute the facts that are necessary to determine whether the county court acted “outside the range
10 of discretion allowed the [county] under its comprehensive plan and implementing ordinances,” or
11 took an action that “violates a provision of applicable law and is prohibited as a matter of law.” In
12 such a circumstance, it is not appropriate to reverse the county’s decision or to order the county to
13 approve the permit.⁹

14 The third and fourth assignments of error are denied.

15 **FIFTH ASSIGNMENT OF ERROR**

16 In his final assignment of error, petitioner contends that if LUBA remands the county court’s
17 decision, rather reversing the decision, the remand should include an order for additional evidentiary
18 proceedings on all issues. In support of this assignment of error, petitioner contends that the county
19 court is requiring a level of evidentiary support for the requested permit that is at odds with what the
20 county has required in other permit proceedings. Petitioner goes on to suggest that the county is
21 effectively changing the standards that he must comply with, which justifies his request for an
22 expanded evidentiary presentation.

⁹ Petitioner weaves into his arguments under the third and fourth assignment of error, and elsewhere in his brief, suggestions that the county was not impartial in this matter and that this suggested lack of impartiality warrants reversal. We generally agree with the county’s response to these suggestions. Most of the cited statements are not statements that were made by members of the county court. Just as importantly, petitioner does not assign error on the basis of a lack of impartiality by the members of the county court.

1 We agree with the county that the cited comments do not establish that petitioner is being
2 subjected to a different evidentiary burden in this case than other similarly situated applicants for
3 mining permit approval under OAR 660-023-0180. We similarly agree that petitioner has not
4 demonstrated that the county changed the applicable standards after his opportunity for an
5 evidentiary presentation concluded. Petitioner has not demonstrated that the six evidentiary public
6 hearings in this matter provided an inadequate opportunity for him to present evidence to
7 demonstrate that his request for a mining permit under OAR 660-023-0180 should be approved.
8 Again, we agree with petitioner that the county court's findings in support of its decision to deny the
9 requested mining permit are inadequate. However, petitioner has not demonstrated that the county
10 failed to provide him with an adequate opportunity to carry his evidentiary burden in this matter.
11 While the county court is certainly free to allow an additional evidentiary presentation on remand,
12 we do not agree with petitioner that the county court is obligated to do so.

13 The fifth assignment of error is denied.

14 The county's decision is remanded.