BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

RICKREALL COMMUNITY WATER ASSOCIATION, DAVID SETNIKER, JOAN SETNIKER, LEO MULLER, SARAH MULLER, TOM MULLER, TRACY MULLER, TOM LOWE and JOANNA LOWE,
Petitioners,

and

MADJIC FARMS, INC., MICHAEL S. CALEF and SUSAN D. CALEF,
Intervenors-Petitioner,

vs.

POLK COUNTY,
Respondent,

and

J.C. COMPTON COMPANY and ADRIAN VANDERHAVE,
Intervenors-Respondent.

LUBA Nos. 2006-028, 2006-029, 2006-031 and 2006-032

FINAL OPINION
AND ORDER

Appeal from Polk County.

David C. Noren, Hillsboro, filed a petitioner for review and argued on behalf of petitioner Rickreall Community Water Association.

William H. Sherlock, Eugene, filed a petition for review and argued on behalf of petitioners Setniker *et al*. With him on the brief were Zack Mittge and Hutchinson, Cox, Coons, DuPriest, Orr & Sherlock, PC.

Corinne C. Sherton, Salem, filed a petition for review and argued on behalf of intervenors-petitioner. With her on the brief was Johnson & Sherton, PC.

David Doyle, Dallas, filed a joint response brief and argued on behalf of respondent. With him on the brief were Wallace W. Lien and Wallace W. Lien, PC.

Wallace W. Lien, Salem, filed a joint response brief and argued on behalf of intervenors-respondent. With him on the brief were David Doyle, and Wallace W. Lien, PC.

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

REMANDED 12/08/2006

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

Petitioners appeal Ordinance 06-02, which amends the comprehensive plan inventory of significant aggregate resources, and Ordinance 06-03, which amends the county zoning map to apply a Mineral and Aggregate (MA) Overlay, with respect to a 124-acre site and an impact area extending 750 feet outward from the site.

MOTION TO FILE REPLY BRIEF

Petitioner Rickreall Community Water Association (RCWA) moves to file a reply brief to address alleged new matters raised in the response brief, specifically whether RCWA's petition for review advances procedural or non-procedural assignments of error. We agree with RCWA that a reply brief is warranted, and allow the motion.

FACTS

Intervenors-respondent (intervenors) propose a sand and gravel extraction and processing facility, and a concrete cement and a hot mix asphalt concrete (HMAC) processing plant, on a 124-acre portion of a 704-acre parcel zoned for exclusive farm use (EFU). The subject parcel is located approximately two miles north of the City of Independence, adjacent to Hayden Slough and Hayden Lake, a little less than one mile west of the Willamette River. In 2001, intervenors filed applications for planning and zoning map amendments to allow the proposed operations.

To identify uses that may conflict with the proposed resource site, as required by Statewide Planning Goal 5 (Natural Resources, Scenic and Historic Areas, and Open Spaces), the county required intervenors to evaluate uses within 750 feet of the 124-acre extraction site. This impact area combined with the extraction area totals approximately 336 acres, and includes property owned by intervenors-petitioner Madjic Farms, Inc., Michael Calef and Susan Calef (together, Madjic), and several petitioners. The Madjic farm currently produces grass seed, grain and blueberries within the impact area, including 16 acres of

blueberries adjacent to the extraction area. The irrigation well serving the farm is also within the impact area. Petitioners David Setniker and Joan Setniker own property adjacent to the 704-acre parcel. Petitioner RCWA has two of its principal wells located on the Setnicker property, approximately 4,000 feet from the extraction site.

Proposed access to the extraction site is via Highway 51, a two-lane district highway that runs north from the City of Independence to intersect with Highway 22, a five-lane highway. The Highway 51/22 intersection is currently controlled by stop signs at the northbound approach. Highway 22 is the primary link between Polk County and the City of Salem to the east. Intervenors propose to access Highway 51 by constructing a private 2.75-mile long, partially paved, partially graveled haul road that borders Hayden Slough for approximately 1500 feet before crossing a new bridge over the slough, then running along Hayden Lake until it reaches the extraction site.

A county hearings officer conducted hearings in 2001, after which there was a considerable delay to allow intervenors to submit additional traffic studies. Hearings resumed in 2004, and in September 2005 the hearings officer issued a recommendation of approval. The board of county commissioners (BOCC) then conducted additional hearings on the recommendation, and voted to adopt the plan and zoning amendments, with conditions. This appeal followed.

FIRST ASSIGNMENT OF ERROR (RCWA)

The county processed intervenors' comprehensive plan application as a "non-legislative comprehensive plan amendment," pursuant to Polk County Zoning Ordinance (PCZO) 115.[1] As relevant here, PCZO 115.020(A) defines a non-legislative plan

[1] PCZO 115.020 provides:

> "A comprehensive plan amendment is any amendment to the Polk County Comprehensive Plan which deletes, supplements, or changes the text, land use map designations, or urban growth boundaries.

amendment as an amendment that (1) is initiated by the affected property owners and (2) changes the land use designation for one or more properties. With two exceptions not relevant here, all other comprehensive plan amendments, including text changes, are legislative in character and thus subject to the procedures and standards applicable to legislative plan changes. PCZO 115.020(B).

Petitioner RCWA argues that the challenged comprehensive plan amendment adds the 124-acre extraction site and 212-acre impact area to the plan inventory of significant aggregate sites, including lands not owned by the applicant. According to RCWA, PCZO 115.030, which sets out the procedures governing non-legislative plan amendments, specifies that the "property owners" may file a petition for a non-legislative plan amendment, which petition must include the "signatures of the property owners for the area to be reclassified."[2] RCWA argues that, because only the owner of the 124-extraction site signed

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> "(A) A non-legislative comprehensive plan amendment is a comprehensive plan amendment initiated by the affected property owners that includes either: (1) a change to the land use designation for one or more properties, (2) a text amendment that demonstrates why the building(s) for a specific commercial use defined by the Zoning Ordinance as 'small-scale, low impact,' within an unincorporated community, should exceed 4,000 square feet in size; or (3) a text amendment that demonstrates why the building(s) for a specific industrial use defined by the Zoning Ordinance as 'small-scale, low impact,' within an unincorporated community, should exceed 10,000 square feet in size;
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> "An amendment to an adopted urban growth boundary which is non-legislative in nature may be initiated by a property owner(s) who request inclusion in or exclusion from the urban growth boundary, subject to any applicable comprehensive plan or intergovernmental agreement pertaining to the urban growth boundary and urbanizable land.
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> "(B) A legislative comprehensive plan amendment is all comprehensive plan amendments other than non-legislative amendments, initiated by the Board of Commissioners or the Planning Commission. A legislative amendment to an adopted urban growth boundary may be initiated by Polk County or by the affected city as specified by any applicable comprehensive plan or intergovernmental agreement pertaining to the urban growth boundary and urbanizable land."

[2] PCZO 115.030(A) provides:

> "Property owners, or persons purchasing property under contract, if they state in writing that they are purchasing the property under contract, may file a plan amendment petition. The

the petition, the plan amendment does not qualify as a non-legislative plan amendment. Therefore, RCWA argues, the county can only process the application as a legislative plan amendment, subject to the different procedures and standards set out at PCZO 115.040 and 116.060. RCWA further argues that this issue was raised below, but the county failed to adopt any findings addressing the issue or explaining the basis for treating the plan amendment application as non-legislative.

The county and intervenors (together, respondents) argue that the plan amendment application is non-legislative in character under the PCZO 115.020 definition, because it was initiated by a property owner, and changes the land use designation for one or more properties, specifically by adding the 336-acre area to the plan inventory of significant aggregate sites.[3] With respect to the PCZO 115.030(A)(6) requirement that the petition include the "signatures of the property owners for the area to be reclassified," respondents argue that the plan amendment did not "reclassify" or redesignate any property; it simply

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> petition shall be in writing on forms provided by the Planning Director and shall be filed with the Planning Division not less than 45 days prior to the date of the hearing. The petition shall contain the following information:
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> "(1) The present comprehensive plan designation;
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> "(2) The proposed comprehensive plan designation;
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> "(3) The street address, or where none exists, the location of the property;
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> "(4) The legal description of the property sought to be reclassified;
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> "(5) The names, addresses and zip codes of the owner(s) of the property sought to be reclassified; and
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> "(6) The signatures of the property owners for the area to be reclassified."

[3] There is some uncertainty as to whether the county intended to place only the 124-acre extraction site on the inventory, or both the extraction site and impact area, totaling 336 acres. Section 2 of Ordinance 06-02 suggests that it intended to place only the 124-acre extraction site on the inventory. However, the ESEE analysis caption incorporated into the comprehensive plan by Section 2 states that the proposal is to place both the extraction site and impact area on the inventory, a suggestion supported by the fact the county applied the mineral aggregate overlay to the entire 336-acre area. Petitioners and RCWA assert that the county placed both areas on the plan inventory, and respondents do not dispute that assertion. We assume for purposes of this opinion that the county placed the entire 336-acre extraction site and impact area on the inventory.

adds a new designation to the existing and otherwise unchanged "Agriculture" plan map designation applicable to the affected properties. Therefore, respondents contend, the signatures of other affected property owners were unnecessary.

In any case, respondents argue, even if the county erred in failing to apply the procedures and standards applicable to legislative amendments, that failure is a procedural error, and RCWA does not allege that that error prejudiced RCWA's substantial rights. ORS 197.835(9)(a)(B). Consequently, respondents argue, this assignment of error does not provide a basis for reversal or remand.

Respondents are correct that Ordinance 06-02 did not change the plan *map* designation for the affected properties. Instead, it apparently added the 124-acre extraction site and the 212-acre impact area to the inventory of significant mineral and aggregate resources. Further, it amended the comprehensive plan to include the hearings officer's analysis of economic, social, environmental and energy (ESEE) consequences, as a background document. Both amendments are *text* amendments, as far as we can tell. As we understand PCZO 115.020 and 115.030, references to the "land use designation" concern the comprehensive plan *map* designation. *See* PCZO 115.030 (defining plan amendment as "any amendment" that "deletes, supplements, or changes the text, land use *map* designations, or urban growth boundaries"). All amendments that are not changes to the plan map designation are either text amendments or urban growth boundary amendments. The only two text amendments that can be processed non-legislatively under PCZO 115.030(A) involve small-scale, low impact commercial and industrial uses not present here. Unless we are missing something, the challenged plan amendments cannot be non-legislative amendments, for that reason alone.

Further, even if the challenged plan amendments in fact involved only a change to the land use map designations, we agree with RCWA that PCZO 115.020 and 115.030 clearly contemplate that non-legislative plan map amendments be initiated by the owner of the

property that is redesignated or reclassified, and that the owners of all property redesignated must sign the petition initiating the non-legislative amendment.

For these reasons, we agree with RCWA that the county erred in approving the plan amendments under the procedures and standards applicable to non-legislative amendments, rather than legislative amendments. If there were only procedural differences between the two types of amendments, we might agree with respondents that the county's error is a procedural error that would require RCWA to demonstrate prejudice to its substantial rights. However, different approval standards apply to the two types of amendments, and we cannot say that application of the wrong set of substantive approval standards is a procedural error.

The first assignment of error (RCWA) is sustained.

SECOND ASSIGNMENT OF ERROR (RCWA)

RCWA faults the county's findings and ESEE analysis for failing to address issues raised below regarding impacts on RCWA's wells. Specifically, RCWA argues that it raised issues regarding whether the *perceived* risk of contamination to the aquifer from the proposed aggregate operation might discourage municipalities from future use of RCWA's wellfield, effectively precluding use of the aquifer as a future water supply source. RCWA argues that the aquifer accessed by its wellfield is the only groundwater resource identified as a potential new source of municipal water in the county other than Willamette River, and the proposed use of that river river has engendered significant opposition. RCWA contends that no contrary evidence was submitted, and the county adopted no findings addressing the issue.

Respondents argue that the county was not required to address the issue of any impacts on RCWA's wellfield, because such impacts are not "conflicting uses" that must be identified or evaluated under Goal 5. Respondents explain that the county applied the standards set out in the old Goal 5 rule at OAR chapter 660, division 016 to identify conflicting uses. OAR 660-016-0005 states that a conflicting use is one that, if allowed,

"could negatively impact a Goal 5 resource site."[4] According to respondents, even if it is assumed that the proposed aggregate operation negatively impacts RCWA's wellfield, such impacts do not "negatively impact" the *aggregate operation* and therefore RCWA's present or future use of the aquifer is not a "conflicting use" that must be identified and evaluated under the Goal 5 rule. In any case, respondents argue, the hearings officer rejected arguments that there is any risk of contamination to the aquifer, and RCWA does not challenge that finding. According to respondents, a mere *perceived* risk, or the reluctance of municipalities to use the aquifer due to that perceived risk, cannot rise to a "conflicting use" for purposes of the rule.

Respondents are correct that the first step under OAR 660-016-0005 is to identify conflicting uses, which are uses present or allowed in the area that "could negatively impact a Goal 5 resource site." At that step of the analysis, if the only identified negative impact is *from* the resource *to* an allowed use, then that allowed use is not a "conflicting use" as the term is defined in the rule. *Hegele v. Crook County*, 190 Or App 376, 382-83, 78 P3d 1254

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[4] OAR 660-016-0005 provides:

> "(1) 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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> "(2) 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 ensure preservation of the resource site.
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> "(3) 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. The applicability and requirements of other Statewide Planning Goals must also be considered, where appropriate, at this stage of the process. 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." (Emphasis added).

(2003). Such negative impacts *on* the allowed use are considered only at the second step, in conducting the ESEE analysis. *Id.*; *see also* OAR 660-016-0005(2) ("[b]oth the impacts on the resource site and on the conflicting use must be considered in analyzing the ESEE consequences").[5]

The county's findings do not take the position advocated by respondents in this appeal, that impacts on RCWA's wells cannot possibly be a "conflicting use" for purposes of OAR 660-016-0005. The county's ESEE analysis addresses the risk of contamination to RCWA's wells, and concludes there is no risk. Record 213-16. We therefore need not resolve respondents' contentions regarding the scope of "conflicting uses." RCWA does not challenge the findings that there is no risk of contamination to groundwater or to the wells. Instead, RCWA argues only that municipalities may *perceive* a risk and opt not to contract with RCWA for future use of the wells as a municipal water supply, and that the county erred in failing to adopt findings addressing that "conflict." We agree with respondents that absent

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[5] The court went on, however, to reject the petitioner's argument that the only way a residential use could negatively impact an aggregate operation is if the impacts of the mining gave rise to some legal action that could cause the mining activity to be curtailed, such as common law actions for nuisance or trespass. According to the court:

> "[Negative impacts on the aggregate use] could include, among others, legal, social, or economic ones. That understanding is reflected expressly in OAR 660-016-0005(2), which provides that, once the conflicting uses have been identified, and negative impacts are to be balanced, the local government must consider the 'economic, social, environmental and energy' impacts of the Goal 5 resource and the competing uses alike. Legal consequences potentially qualify as economic and social ones, and curtailing use of a resource site through a nuisance or trespass action therefore readily falls within the range of contemplated impacts. But so do a wide variety of other impacts, such as social pressures that could come to bear within the zoning district in an effort to restrict, confine, or limit activity on the Goal 5 resource site. In other words, when the negative impacts *of* the Goal 5 resource likely will create social, legal, or other pressures that can result in negative impacts *on* the Goal 5 resource." 190 Or App at 384-85 (footnote omitted; emphasis original)

In the omitted footnote, the court explained:

> "For example, if operation of an aggregate mine (a Goal 5 resource) were predicted to engender social protests or economic boycotts because of perceived negative impacts of the resource on local residents, such activity might be deemed a 'negative impact' on the Goal 5 resource itself." *Id.* n 4.

some evidence of an *actual* risk of contamination, the county was not obligated to adopt findings addressing the possibility that potential users of RCWA's wells may perceive a risk and act contrary to RCWA's economic interests. That possibility is too tenuous and indirect to constitute a "negative impact" for purposes of OAR 660-016-0005 and 660-016-0010.

The second assignment of error (RCWA) is denied.

FIRST ASSIGNMENT OF ERROR (MADJIC)

As noted, intervenors-petitioner Madjic own a large farm parcel abutting the proposed extraction site to the south and west, and currently grow grass seed, grain and blueberries adjacent or proximate to the extraction site. In applying the MA overlay zone, the county adopted findings addressing whether the proposed aggregate operation would "[f]orce a significant change in accepted farm or forest practices" or "[s]ignificantly increase the cost of accepted farm or forest practices" on surrounding lands devoted to farm or forest use. PCZO 136.060.[6] The hearings officer recommended creation of a 60-foot wide buffer on the west and south sides of the extraction site adjacent to the Madjic farm, to be planted with "vegetative screening." The hearings officer also imposed Condition C, which requires that where landscaping is used for the required screening, it must be at least six feet in height and 80 percent opaque. Further, the operator must "maintain the landscaping" during the term of the operation to help screen the site from houses to the west. Record 200.[7] The BOCC ultimately adopted Condition C without change.

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[6] Madjic also cites ORS 197.296(1), which PCZO 136.060 presumably implements. In addition, Madjic cites to PCZO 111.275(C), which is a zone change criterion requiring a finding that the uses allowed in the proposed zone "will not significantly adversely affect allowed uses on adjacent lands[.]" Respondents argue in part that PCZO 111.275(C) is a general criterion for any type of zone change, and that petitioners' citation to that standard adds nothing to petitioners' arguments under the more specific PCZO 136.060 standard. We agree with respondents that discussion of PCZO 111.275(C) does little to advance resolution of this assignment of error, and we follow the parties in focusing on PCZO 136.060.

[7] Condition C states, in relevant part:

> "The operator shall provide vegetative screening on the west and south sides of the extraction area. Where landscaping is used for required screening, it shall be at least 6 ft in height and at least 80 percent opaque, as seen from a perpendicular line of sight, within 18 months

Before the BOCC, Madjic requested that as a condition of approval the county require the operator to control weeds within the buffer strip, so that the strip does not become a seed source for contamination of Madjic's crop fields, particularly its grass seed crop.[8] According to Madjic, the BOCC erred in failing to either (1) adopt the requested condition or (2) adopt findings addressing the concerns raised, concerns that Madjic contends relate to compliance with PCZO 136.060.

Respondents argue that Madjic failed to cite PCZO 136.060 or advise the county that the requested condition is necessary to ensure compliance with that code standard. The issue raised under this assignment of error is thus waived, respondents argue, pursuant to ORS 197.763(1).[9] To the extent Madjic's testimony at Record 893 can be construed to raise an issue regarding compliance with PCZO 136.060, respondents argue that the county in fact complied with Madjic's request by requiring the operator to "maintain the landscaping"

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following establishment of mineral and aggregate operation. * * * The operator shall maintain the landscaping during the term of the use including the existing vegetation along Hayden Slough that help screen the extraction and processing areas from Highway 51 and houses west of the subject property." Record 200.

[8] Petitioners Calef testified as follows:

"The second condition also involves the 60 foot buffer strip that contains the vegetative screen and that is located between our property and the excavation area. We request that the applicant be required to control all weeds on the Oregon Noxious Weed List as well as hard to control perennial weeds such as blackberry, morning glory and Canada thistle in this 60 foot buffer strip. If this is not done the buffer strip will be a seed source for contamination of our crop fields that will require extra monitoring and spraying to maintain the quality of our crops, especially seed crops. We also request that any volunteer trees that sprout in the buffer strip be controlled to prevent increasing the bird habitat around our blueberries. Since the primary purpose of an EFU zone is to protect agricultural land for the production of crops any other activity in the zone that makes growing those crops more difficult or expensive should be minimized as much as possible." Record 893.

[9] ORS 197.763(1) provides:

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

within the buffer. According to respondents, the obligation to "maintain the landscaping" within the buffer area entails the obligation to control weeds within the buffer.

The gravamen of this assignment of error is the county's alleged error in failing to either adopt the requested condition or adopt findings addressing the issue raised below that explain why no such condition is necessary. Compliance with PCZO 136.060 is more of the background to that issue, rather than the essential issue itself. Consequently, we disagree with respondents that Madjic's failure to cite PCZO 136.060 in its testimony regarding the requested condition is necessarily fatal. Further, the Calefs' testimony at Record 892-93 is replete with references to significant impacts on its farming practices and concerns regarding increased costs. As respondents point out, the BOCC adopted or amended other conditions as requested by the Calefs in that same testimony. The BOCC apparently had no trouble discerning that the testimony at Record 892-93 raised issues that required a response under the applicable approval criteria, notwithstanding failure to cite any specific criterion.

It is not clear why the BOCC addressed or responded to other issues raised in petitioners' testimony, but failed to address the weed control issue. It may have simply overlooked the issue. It may also be that the BOCC believed, as respondents assert, that the hearings officer's Condition C, particularly the obligation to "maintain the landscaping" within the buffer, was sufficient to address the concern raised. Or it may be the BOCC disagreed with the Calefs that any condition regarding weed control was warranted. The absence of any responsive findings makes it difficult to tell. Madjic argues that the hearings officer intended the vegetative buffer required by Condition C to address only visual impacts, and it is not clear that the obligation to "maintain" that landscaping carries with it the additional obligation to control weeds that might contaminate petitioners' crops. We agree with Madjic that remand is necessary to either adopt the requested condition or to adopt findings explaining why such a condition is not warranted.

The first assignment of error (Madjic) is sustained.

SECOND ASSIGNMENT OF ERROR (MADJIC)

PCZO 174.060 provides standards for mining operations in the MA overlay zone.[10] In relevant part, PCZO 174.060(C)(2) limits hours of operation to those between 7:00 a.m. to 6:00 p.m. Monday through Friday, and 8:00 a.m. to 5:00 a.m Saturday. PCZO 174.060(C)(3) states that an "increase in operating time limits shall be granted" in circumstances where there are sensitive uses within 750 feet, if the increased activity (1) will not exceed established noise standards and (2) the operator notifies the owners and occupants of sensitive uses at least 96 hours prior to the date and approximate time of the activity for which the operator receives an exception.

The challenged decisions allow operations to occur between 5:30 a.m. to 10 p.m. Monday through Saturday. The county apparently justified the expanded hours under PCZO 174.060(C)(3)(a), adopting a finding that "[t]here are no non-owner owned [sic] Sensitive Uses within 750 feet of the mining site so an increase in operating time limits has

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[10] PCZO 174.060(2) and (3) provide:

> "(2) Mineral and aggregate extraction, processing and equipment operation located within 750 feet or as established by the ESEE analysis of any Sensitive Use is restricted to the hours of 7:00 am to 6:00 pm Monday through Friday, and 8:00 am to 5:00 pm Saturday. All other sites are limited to operating hours of 7:00 am to 10:00 pm Monday through Saturday. No operation shall occur on Sundays or recognized legal holidays.
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> "(3) An increase in operating time limits shall be granted for all activities except blasting if:
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> "(a) There are no Sensitive Uses within 750 feet of the mining site; or if
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> "(b) There are Sensitive Uses within 750 feet, the increased activity will not exceed noise standards established by the County or DEQ; and
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> "(c) The operator shall notify the owners and occupants of all Sensitive Uses within 750 feet or the distance established by the ESEE analysis by first class mail which is mailed at least 96 hours prior to the date and approximate time of the activity for which the operator receives an exception.
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> (4) The operating time limits may be waived in the case of an emergency as determined by the County governing body."

been granted to the applicant." Record 185.[11] Madjic challenges that justification, arguing that there is no dispute that there is a sensitive use, a dwelling, located on the subject property within 750 feet of the extraction site. Therefore, Madjic argues, the county can justify the expanded hours only under PCZO 174.060(C)(3)(b) and (c), based on a demonstration that the increased activity will not exceed applicable noise standards and a requirement that the operator provide notice to owners and occupants of the sensitive use.

Respondents argue that the county understood that the dwelling is a sensitive use, and correctly proceeded to approve the expanded hours under PCZO 174.060(C)(3)(b) and (c).[12] Respondents cite to a finding in the ESEE analysis that "[t]he applicant has indicated that all noise levels from the site will meet the Oregon Department of Environmental Quality ('DEQ') standards." Record 155. As for the notice requirement of PCZO 174.060(C)(3)(c), respondents argue that the county imposed a condition requiring the owner of the dwelling, who is one of the applicants, to sign a waiver of remonstrance. According to respondents, the condition was imposed to address the possibility that there may someday be separate ownership of the dwelling and extraction site, by means of a lot line adjustment.

The findings addressing PCZO 174.060(C)(3) do not indicate whether the county is proceeding under (a) or under (b) and (c). Those findings do not discuss DEQ noise standards, notice or the waiver of remonstrance. The only pertinent finding is that "[t]here are no non-owner owned Sensitive Uses within 750 feet of the mining site[.]" That finding suggests that the county believed that it was proceeding under PCZO 174.060(C)(3)(a), which only applies when there is no sensitive use within the impact area. However, there is no dispute that the dwelling on the subject parcel is a "sensitive use" as that term is defined

[11] Presumably the county meant something like "no non-applicant owned" sensitive uses.

[12] Respondents also argue that any issue regarding the expanded hours was not raised below and is waived. At oral argument, Madjic cited to testimony at Record 890, and argued that the issue under this assignment of error was raised there. We agree with Madjic.

in the code. That definition does not turn on ownership, and the significance of the fact that there are "no non-owner owned" dwellings is unexplained. Respondents assign significance to the fact that the dwelling is owned by one of the applicants for the mining operation, but as Madjic points out, PCZO 174.060(C)(3)(c) requires notice to the owner *and* the occupant. According to Madjic, the applicant is not the current occupant of the dwelling, and there is no guarantee that in the future the house will be occupied by the applicant or owner. With respect to the waiver of remonstrance, Madjic argues that the waiver protects only the county and aggregate operator, not the owner or occupant of the noise sensitive use. With respect to compliance with DEQ standards, Madjic argues that nothing in the findings addressing PCZO 174.060(C)(3) discusses those standards, and the ESEE finding that respondents cite to is at best conclusory.

We agree with Madjic that remand is necessary to adopt findings justifying the expanded hours of operation under PCZO 174.060(C)(3)(b) and (c). The one-sentence ESEE finding at Record 155 regarding compliance with DEQ standards is conclusory, and it is not obvious to us that it says anything about whether the *expanded* a.m. and pm. hours of operation comply with DEQ standards for those time periods. We further agree with Madjic that nothing in the challenged decision establishes that a waiver of remonstrance is a sufficient substitute for the notice required by PCZO 174.060(C)(3)(c). As Madjic points out, a waiver of remonstrance is required under PCZO 174.090(B) for *new* noise-sensitive uses proposed within the impact area. Nothing in the code cited to us suggests that a waiver can replace the notice to existing sensitive uses required by PCZO 174.060(C)(3)(c) when justifying an increase in the hours of operation.

The second assignment of error (Madjic) is sustained.

THIRD ASSIGNMENT OF ERROR (MADJIC)

As explained above, the county's Goal 5 analysis proceeded under OAR 660-016-0005 and OAR 660-016-0010 and code provisions implementing those rules. The county's

ultimate determination under that analysis was to "limit conflicting uses" under OAR 660-016-0010(3), which requires in relevant part that "[r]easons which support this decision must be presented in the comprehensive plan[.]"[13]

Madjic argues that to comply with OAR 660-016-0010(3), the county adopted Exhibit F, titled "Economic, Social, Environmental and Energy (ESEE) Analysis" and found at Record 206-40, and made Exhibit F a part of the comprehensive plan as a "background report document." Record 39. According to Madjic, the county did not incorporate any other findings into the comprehensive plan, including those adopted as Exhibits A, B and C to the decisions. Madjic then challenges the adequacy of Exhibit F, arguing that the exhibit fails to adequately address issues raised below regarding adverse economic consequences to their farming operation due to increased dust, increased turbidity in their irrigation wells, increased requirements for pesticides and weed control activities, and increased damage due

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[13] OAR 660-016-0010 provides, in relevant part:

> "Based on the determination of the economic, social, environmental and energy consequences, a jurisdiction must 'develop a program to achieve the Goal.' Assuming there is adequate information on the location, quality, and quantity of the resource site as well as on the nature of the conflicting use and ESEE consequences, a jurisdiction is expected to 'resolve' conflicts with specific sites in any of the following three ways listed below. * * *
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> "(1) Protect the Resource Site[.]" * * *
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> "(2) Allow Conflicting Uses Fully[.] * * *"
>
> "(3) Limit Conflicting Uses: Based on the analysis of ESEE consequences, a jurisdiction may determine that both the resource site and the conflicting use are important relative to each other, and that the ESEE consequences should be balanced so as to allow the conflicting use but in a limited way so as to protect the resource site to some desired extent. To implement this decision, the jurisdiction must designate with certainty what uses and activities are allowed fully, what uses and activities are not allowed at all and which uses are allowed conditionally, and what specific standards or limitations are placed on the permitted and conditional uses and activities for each resource site. Whatever mechanisms are used, they must be specific enough so that affected property owners are able to determine what uses and activities are allowed, not allowed, or allowed conditionally and under what clear and objective conditions or standards. Reasons which support this decision must be presented in the comprehensive plan, and plan and zone designations must be consistent with this decision."

to bird depredation. Because Exhibit F does not adequately address these issues, Madjic argues, the county failed to include in its comprehensive plan a sufficient statement of "[r]easons which support" the decision to limit conflicting uses.

Respondents dispute Madjic's premise that the county adopted only Exhibit F into the comprehensive plan. According to respondents, the county included all of Ordinance 06-02, with all its exhibits and findings, in the comprehensive plan. While Exhibit F was specifically included as a "background report document," respondents argue that that specific reference does not mean that other exhibits and findings, specifically Exhibits A, B and C, were also not included in the plan.[14]

Section 3 of Ordinance 06-02 states that Exhibit F "shall be adopted and made a part of the Comprehensive Plan as a background report document." Record 39. Section 1 of the ordinance states that the county "adopts the findings" in Exhibits A, B and C, but does not state or imply that such findings are incorporated into the comprehensive plan. We disagree with respondents that Exhibits A, B and C were incorporated into the comprehensive plan in response to the OAR 660-016-0010(3) requirement to adopt into the plan "[r]easons which support" the decision to limit conflicting uses. It seems relatively clear that the county incorporated only Exhibit F into the comprehensive plan.

That said, we question the premise for Madjic's argument that the "reasons" that are incorporated into the comprehensive plan under OAR 660-016-0010(3) must include findings that address every specific allegation of adverse economic consequence to conflicting uses. If OAR 660-016-0010(3) is intended to require local governments to adopt into the comprehensive plan the entire ESEE analysis developed under OAR 660-016-0005(3), together with any other supplementary findings, that intent is not clearly stated in

[14] Exhibit A is the hearings officer's recommendation. Exhibit B is the planning staff's recommendation to the hearings officer. Exhibit C is a set of findings adopted by the BOCC. All three exhibits include analyses of ESEE consequences, and are apparently intended to be a part of the ESEE analysis required by OAR 660-016-0005(2), in addition to the ESEE analysis in Exhibit F.

the rule. OAR 660-016-0010(3) is part of a rule section that focuses on developing the program to achieve the goal, once the ESEE analysis is completed. Once the local government has determined whether to protect the resource site, allow conflicting uses fully, or limit conflicting uses, it must develop the program to achieve that determination. For example, under OAR 660-016-0010(3), the local government must " designate with certainty what uses and activities are allowed fully, what uses and activities are not allowed at all and which uses are allowed conditionally, and what specific standards or limitations are placed on the permitted and conditional uses and activities for each resource site." Read in that context, it seems to us that the "reasons" that must be incorporated into the comprehensive plan must be sufficient to support the ultimate decision and the program developed to achieve that decision. However, OAR 660-016-0010(3) does not require the local government to incorporate the entire ESEE analysis itself into the comprehensive plan as its "reasons."[15] It is permissible for the "reasons" statement to consist of a summary of the reasons why the county made the decision to protect the resource site, allow conflicting uses fully, or limit conflicting uses.

Viewed in that light, we agree with respondents that Exhibit F is more than sufficient to state the "[r]easons which support" the decision to limit conflicting uses, for purposes of OAR 660-016-0010(3). Among many other topics, Exhibit F includes discussion of dust impacts on crops (Record 229), impacts on irrigation wells (Record 209, 233-34), and impacts of bird depredation (Record 225-26), and explains how the county resolves those issues. Thus, even under Madjics' view of what is required in a "reasons" statement, Exhibit F appears to address and resolve at least those issues raised by petitioners.

The only exception is Madjic's allegations regarding weed control within the buffer zone. We have already concluded that the county erred in failing to address the issue of

[15] Madjic does not directly challenge the adequacy of the ESEE analysis under OAR 660-016-0005(2), that is, the adequacy of the entire 200-plus pages of documents that are included in Exhibits A, B, C and F.

weed control in applying PCZO 136.060. Exhibit F does not address that issue directly, and apparently neither do any of the ESEE analyses or findings in Exhibits A, B or C. However, under this assignment of error Madjic challenges only the alleged inadequacy of the "reasons" statement that the county incorporated into the comprehensive plan as required by OAR 660-016-0010(3), not the adequacy of other findings required under other rule or code provisions. For the reasons stated above, we do not believe that OAR 660-016-0010(3) requires the county to include in the "reasons" statement incorporated into the comprehensive plan specific findings addressing the details of how particular potential conflicts are resolved, such as request by a neighboring farmer that the aggregate operator be required to control weeds within a proposed buffer zone.

The third assignment of error (Madjic) is denied.

FIRST ASSIGNMENT OF ERROR (PETITIONERS)

Under this assignment of error, petitioners in LUBA No. 2006-031 and 2006-032 (petitioners) challenge the county's findings under Statewide Planning Goal 12 (Transportation) and the Transportation Planning Rule (TPR) at OAR 660-012-0060, and related county code provisions.[16]

A. OAR 660-012-0060

As relevant here, OAR 660-012-0060(1) provides that a plan amendment "significantly affects" an existing transportation facility if it would reduce the performance of the facility below the minimum acceptable standard identified in the relevant transportation system plan, or worsen the performance of a facility otherwise projected to perform below that minimum acceptable standard, as measured at the end of the planning period identified in the transportation system plan.[17] If an amendment "significantly affects"

[16] These petitioners include all petitioners other than petitioner RCWA.

[17] OAR 660-012-0060(1) provides, in relevant part:

a transportation facility, the local government must put in place one or more measures specified in OAR 660-012-0060(2).[18]

The Highway 22/51 interchange is located approximately two miles north of the subject property. The interchange is currently an at-grade intersection controlled by a stop

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"Where an amendment to a functional plan, an acknowledged comprehensive plan, or a land use regulation would significantly affect an existing or planned transportation facility, the local government shall put in place measures as provided in section (2) of this rule to assure that allowed land uses are consistent with the identified function, capacity, and performance standards (e.g. level of service, volume to capacity ratio, etc.) of the facility. A plan or land use regulation amendment significantly affects a transportation facility if it would:

"* * * * *

"(c) As measured at the end of the planning period identified in the adopted transportation system plan:

"* * * * *

"(B) Reduce the performance of an existing or planned transportation facility below the minimum acceptable performance standard identified in the TSP or comprehensive plan; or

"(C) Worsen the performance of an existing or planned transportation facility that is otherwise projected to perform below the minimum acceptable performance standard identified in the TSP or comprehensive plan."

[18] OAR 660-012-0060(2) provides:

"Where a local government determines that there would be a significant effect, compliance with section (1) shall be accomplished through one or a combination of the following:

"(a) Adopting measures that demonstrate allowed land uses are consistent with the planned function, capacity, and performance standards of the transportation facility.

"(b) Amending the TSP or comprehensive plan to provide transportation facilities, improvements or services adequate to support the proposed land uses consistent with the requirements of this division; such amendments shall include a funding plan or mechanism consistent with section (4) or include an amendment to the transportation finance plan so that the facility, improvement, or service will be provided by the end of the planning period.

"* * * * *

"(e) Providing other measures as a condition of development or through a development agreement or similar funding method, including transportation system management measures, demand management or minor transportation improvements. Local governments shall as part of the amendment specify when measures or improvements provided pursuant to this subsection will be provided."

sign on northbound Highway 51 where it intersects with Highway 22. Petitioners' arguments focus on two aspects of that intersection: (1) the northbound left-turn/through movement from Highway 51 onto 22, and (2) the westbound left turn movement from Highway 22 onto 51. According to petitioners, intervenors' transportation impact analysis (TIA) shows that both movements currently operate in violation of the minimum acceptable weekday p.m. peak period standard identified in the applicable transportation system plan, the Oregon Highway Plan. Record 1546.

The county adopted essentially alternative findings with respect to the Highway 22/51 interchange. First, the county found that with imposed conditions the aggregate operation authorized by the plan amendment would not worsen the westbound left turn movement from Highway 22 onto 51. Second, the county relied on testimony from intervenors' traffic consultant that the Highway 22/51 interchange is likely to be improved with a grade-separated interchange by the end of the relevant planning period, which ends in 2020. That improvement, the county found, will alleviate all existing or interim deficiencies at the interchange. Petitioners challenge both alternatives.

1. Planned Improvements to the Highway 22/51 Interchange

The county's findings state, in relevant part:

> "The applicant has also demonstrated that it will be in compliance with OAR 660-012-0060 because the impacted transportation facility at the intersection of Hwy. 22/Hwy. 51 will be improved to meet compliance standards, even with the proposed development, by the end of the planning period. OAR 660-012-0060(2)(b). According to [the traffic consultant's] letter dated April 20, 2005, both Polk County's Transportation System Plan (TSP) and the Oregon Department of Transportation's (ODOT) 'OR 22 Expressway Refinement Plan' identify a long-range plan to upgrade the existing Hwy. 22/Hwy. 51 intersection to a grade-separated interchange. According to [the consultant], the improved intersection will easily resolve the deficiency at the intersection. As long as the planned transportation facilities are adequate to achieve consistency with the identified functions, capacity or performance standards for that facility by the end of the planning period identified in the adopted TSP (i.e. year 2020) then the local government may approve an amendment that would significantly affect an existing transportation facility. OAR 660-012-0060(2)." Record 179-80.

The findings then cite to a newspaper article stating that approximately $7.2 million of the projected $32 million project has been identified, and that preliminary frontage road design could begin in 2006, although construction of the interchange itself could not begin until 2012. *Id.*

Petitioners cite to testimony from their traffic consultant stating that the proposed improvement is merely a "conceptual" improvement in the early stages of planning for which funding has not been programmed. Record 1502-03. The newspaper article is not sufficient evidence, petitioners argue, that the improved interchange will be constructed before the end of the planning period. More importantly, petitioners argue, OAR 660-012-0060(4) limits the planned improvements that may be considered in place at the "end of the planning period" for purposes of OAR 660-012-0060(1)(c) to those for which a funding mechanism is in place or, in the case of state highways, to circumstances where ODOT provides a written statement that the improvements are reasonably likely to be provided by the end of the planning period.[19] Petitioners argue that there is no funding mechanism in place, nor any

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[19] OAR 660-012-0060(4) provides, in relevant part:

> "(a) In determining whether an amendment has a significant effect on an existing or planned transportation facility under subsection (1)(c) of this rule, local governments shall rely on existing transportation facilities and services and on the planned transportation facilities, improvements and services set forth in subsections (b) and (c) below.
>
> "(b) Outside of interstate interchange areas, the following are considered planned facilities, improvements and services:
>
> "(A) Transportation facilities, improvements or services that are funded for construction or implementation in the Statewide Transportation Improvement Program or a locally or regionally adopted transportation improvement program or capital improvement plan or program of a transportation service provider.
>
> "(B) Transportation facilities, improvements or services that are authorized in a local transportation system plan and for which a funding plan or mechanism is in place or approved. * * *
>
> "* * * * *

written statement in the record from ODOT indicating that the improvements are "reasonably likely" to be provided by the end of the planning period.

Respondents do not argue that a "funding plan or mechanism is in place or approved" for the proposed improvements, or that ODOT has provided the written statement required by OAR 660-012-0060(4)(b)(D). We agree with petitioners that the county erred to the extent it relied upon the conceptual improvements to the Highway 22/51 interchange to conclude that the challenged amendments will not significantly affect that facility.

Relatedly, petitioners also argue that the county erred in failing to evaluate the impact of the plan amendment on the Highway 22/51 interchange "at the end of the planning period," that is, year 2020, apparently under the assumption that the conceptual improvement to the interchange before the end of that period would resolve any current or projected deficiencies. Respondents do not respond to this argument. Petitioners appear to be correct that the TIA evaluated only the current and the 2007 traffic levels (when the mine operation was projected to begin), and made no effort to evaluate traffic conditions at the intersection at the end of the planning period, or the impacts of the plan amendment at that time, as OAR 660-012-0060(1) requires. If the TIA or any of its supplements make such an evaluation, respondents have not cited it to us. As discussed below, the only mitigation the county required is with respect to one turning movement in the intersection that is currently

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> "(D) Improvements to state highways that are included as planned improvements in a regional or local transportation system plan or comprehensive plan when ODOT provides a written statement that the improvements are reasonably likely to be provided by the end of the planning period.
>
> "* * * * *
>
> "(e) For purposes of this section, a written statement provided pursuant to paragraphs (b)(D), (b)(E) or (c)(A) provided by ODOT, a local government or transportation facility provider, as appropriate, shall be conclusive in determining whether a transportation facility, improvement or service is a planned transportation facility, improvement or service. In the absence of a written statement, a local government can only rely upon planned transportation facilities, improvements and services identified in paragraphs (b)(A)-(C) to determine whether there is a significant effect that requires application of the remedies in section (2)."

failing. The TIA apparently did not consider whether the challenged plan amendment may cause other turning movements in the intersection that currently meet performance standards to fail by the end of the planning period.

2. Condition Y

To address the p.m. peak hour impact on the west-bound left-turn movement from Highway 22 onto 51, intervenors proposed and the county accepted Condition Y, requiring that the operator's employees avoid that left-turn movement during the weekday period from 4:00 pm to 6:00 p.m. and instead drive from the Salem area to the site via a circuitous 8.8-mile route that continues west through the intersection several miles to Highway 99W, turns south for approximately two miles to Clow Corner Road, proceeds east and south for several miles over that county road and Rogers Road to Highway 51, and then proceeds north on Highway 51 for approximately two miles to the extraction site access road.

Petitioners argue first that Condition Y does not address the failing northbound left turn movement on Highway 51/22 at all, and that nothing in the county's decision purports to address or mitigate the impacts of the amendments on that turning movement. Respondents do not specifically respond to that argument, and no findings are cited to us that address that issue.[20] Petitioners are correct that Condition Y limits only the westbound left-turn movement, not northbound left-turn movements from Highway 51 onto 22.

With respect to the west-bound left turn movement from Highway 22 onto 51, petitioners cite to evidence that that movement will also fail during the a.m. peak hour (7:00 to 8:00 a.m.) and the mid-day peak hour (3:00 to 4:00 p.m.) in 2010 and 2009, respectively, failures that Condition Y does not purport to mitigate or avoid. Again, respondents do not

[20] As far as we are informed, the only place in the record where that issue is addressed is in the April 20, 2005 letter from intervenors' consultant, which dismisses that concern based on the assumption that the improvements discussed above will be in place by the end of the planning period. Record 1468. As noted above, that assumption is unwarranted.

specifically respond to this issue or identify findings that address it.[21] Petitioners are correct that Condition Y does not purport to mitigate or avoid those failures.

In addition, petitioners argue that Condition Y is inadequate to address even the p.m. peak hour failure, because (1) it applies only to the operator's employees, not third parties such as customers, suppliers, private haulers, etc., and (2), in any case, the condition is unmonitored, impossible to enforce, and unlikely to succeed, because it is contrary to the operator's economic interests. Petitioners cite to evidence that shipping costs and distances have a dramatic effect on the competitiveness of an aggregate mining operation. According to petitioners, it is unrealistic to expect that the operator and its employees will abide by an unmonitored and unenforceable condition that requires them to choose a circuitous 8.8-mile route over county roads instead of the much shorter, direct route south down Highway 51, when doing so is directly against the operator's commercial interests. *See K.B. Recycling, Inc. v. Clackamas County*, 41 Or LUBA 29, 43-45 (2001) (sustaining an evidentiary challenge to a similar condition requiring contract waste haulers to use a longer route to avoid a failing intersection).

The county adopted a finding that distinguishes *K.B. Recycling, Inc.* on the grounds that the disputed condition in that case applied to private contract haulers over which the operator had limited control, while in the present case the condition applies to the operator's employees, over which the operator has sufficient authority to enforce the condition. Record 139. Petitioners argue that that factor is insufficient to distinguish the circumstance in *K.B.*

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[21] At two points, respondents cite to a statement in the staff report that "[t]he applicant states that the level of service (LOS) at the Highway 51/Highway 22 intersection would not change as a result of the proposal, nor would the Volume to Capacity V/C at the intersection approach the 0.80 maximum." Record 91. There are several problems in respondents' reliance on that statement. First, while the BOCC adopted the findings in the staff report as part of its findings, the quoted statement is part of the section describing the applicant submittals, not the findings. While the statement may be an accurate summary of what the applicant represented to the county, it is not a staff finding adopted by the BOCC. Second, that statement is contradicted by BOCC findings (and intervenors' own traffic consultant) to the effect that at least one turning movement in the intersection currently violates the applicable V/C standard. Record 177-78.

Recycling, Inc. from the present case, and fails to take into account non-employee traffic generated by the proposed use, or the fact that intervenors may use or sell to private haulers not subject to the condition.[22]

K.B. Recycling, Inc. turned on the specific facts of that case, and therefore is not controlling in the present case. Nonetheless, we generally agree with petitioners that Condition Y is insufficient to ensure that the aggregate operation authorized by the plan amendment will not "significantly affect" the Highway 22/51 intersection, with respect to the p.m. peak hour west-bound left-turn movement. The condition applies only to intervenors' employees, and does not purport to take into account non-employee traffic generated by the proposed use, including any private haulers. Respondents do not dispute petitioners' assertion that the site will generate significant non-employee traffic. Absent some evidence that non-employee traffic is *de minimis,* or some other basis to conclude that such traffic will not significantly affect the intersection, Condition Y is insufficient to ensure compliance with OAR 660-012-0060(1), for that reason alone.[23]

In sum, we agree with petitioners that the county's findings of compliance with OAR 660-012-0060(1) are not supported by the record. This subassignment of error is sustained.

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[22] Petitioners cite a passage from *J.C.Compton Co. v. Brewster*, 185 Or App 382, 385, 59 P3d 1288 (2002), a case that apparently involved intervenor J.C. Compton Co.'s existing aggregate operation south of the subject property, for the proposition that intervenor's existing operation uses private haulers or sells product that is hauled off-site by private haulers. Petitioners surmise that operations on the new site will similarly use private haulers. Respondents do not dispute that surmise.

[23] We need not address petitioners' argument that it is unrealistic to expect the operator's employees to travel 8.8 miles out of direction to avoid the left-hand turn and the short, direct route to the site. However, we tend to agree with petitioners that there is at least a question whether Condition Y would be effective, given evidence of the commercial imperatives for quick, direct hauls, and the fact that the operator proposes no method to monitor compliance of its employees, and has no incentive to do so. There may be evidence in the record supporting the county's apparent confidence in the efficacy of Condition Y, but we are not cited to it.

B. PCZO 111.275 and Trip Generation Estimates

PCZO 111.275(D) provides that a zone change may be approved only if the county finds that "[a]dequate public facilities, services, and transportation networks are in place, or are planned to be provided concurrently with the development of the property." Under this subassignment of error, petitioners challenge the county's quantification of traffic generated by the proposed use.[24]

Intervenor J.C. Compton Company currently operates an aggregate mine (the Krauger site) south of the City of Independence, with processing facilities within the city. The Krauger site is apparently close to exhaustion, and intervenor intends that its existing operations will terminate eventually and be continued and combined on the subject property. The only new facility to be operated on the subject site that is not part of the current operation is the HMAC plant. The subject site is considerably closer to the urban area of Salem than the Krauger site. Based on estimates of annual production and the location of markets supplied by the applicants, the TIA and its supplements determined how many daily trips the new site would generate, which transportation facilities and intersections would be affected and the extent of those impacts.

Petitioners contend that the trip generation figures that the TIA and findings rely on are erroneous because they fail to take into account (1) the new HMAC plant; (2) growth in the operation due to the new site's more proximate location to urban centers; (3) the additive effect of traffic from the new site combined with continued operation of the Krauger site during any overlap period; (4) the fact that all truck traffic will now be concentrated on Highway 51; and (5) the most-traffic intensive use allowed under the plan amendment.

[24] It is not entirely clear from the petition for review whether these traffic-generation issues are raised only with respect to PCZO 111.275, or also with respect to the TPR.

1. HMAC Plant and New Growth

The TIA was based on estimates supplied by intervenor J.C. Compton Company that the total average aggregate production from the new site over the next 15 to 20 years would be approximately 300,000 tons per year. Respondents cite to findings that reject petitioners' contentions that the estimate failed to include trips generated by the sale of asphalt produced by the HMAC plant. Record 142-43. Respondents appear to be correct that the estimate of 300,000 tons annual production includes production and sales of asphalt mix. *Id.*; *see also* Record 2198 (supplemental TIA stating that trip generation figures include asphalt trucks). While petitioners appear to argue that those estimates of asphalt production are too low, petitioners have not demonstrated that the cited findings are not supported by substantial evidence.

Respondents cite to the same findings to argue that the estimates cover the "next 15 to 20 years," and thus include any potential new growth in the operation due to the proximity of the new site to urban markets. It is not clear to us whether the estimate of 300,000 tons over the "next 15 to 20 years" incorporates any assumptions regarding growth of the operation. However, as far as we can tell petitioners' assumption that the more competitive location of the site will cause an increase in production and trips generated over time is based solely on speculation. That speculation is insufficient to demonstrate that the estimate of 300,000 tons production is not based on substantial evidence.

However, petitioners also argue that 10 to 20 percent of the production from the HMAC plant is intended to come from recycled asphalt, which must to be brought onto the site. Petitioners argue that the TIA failed to account for these new and additional trips to the site. Respondents do not respond to this argument, and we are cited to nothing that clarifies whether the TIA trip generation estimates included additional trips to bring recycled asphalt to the site. It seems possible, if not likely, that an important source of recycled asphalt will be the City of Salem urban area east of the site, which would mean that trips from that area

would pass through the Highway 22/51 intersection, potentially using the westbound left-turn movement discussed above. For that additional reason, we agree with petitioners that remand is necessary to adopt findings addressing whether trip generation estimates include trips related to bringing recycled asphalt to the site.

2. Overlap Traffic

Petitioners argue that the county's transportation analysis assumed that traffic generated by the new operation would essentially replace traffic generated by the Krauger quarry, which would ultimately close. However, petitioners argue that the county erred in assuming that the two quarries would not operate simultaneously during an overlap period, and the county thus failed to take into account the additive effect of both operations during that period.

Petitioners cite to evidence that the Krauger site will be exhausted in five to seven years, *i.e.*, by 2011 and 2013, and that the new site may open in late 2007, which implies that operations at both sites may overlap for several years. However, petitioners contend that there is no condition requiring the operator to cease work at the Krauger site when the new site opens. According to petitioners, during any overlap period at least some of the operators' trucks may be on the county's roads at the same time as trucks from the new site. While any combined operation during the overlap period might simply split production and traffic impacts between the two sites, petitioners argue that nothing would prevent the operator from increasing production, increasing fleet size and otherwise increasing trips during the overlap period, far beyond the 300,000 tons of annual production and associated truck trips estimated for operation of the subject site.

PCZO 111.275(D) requires that the county evaluate the adequacy of transportation facilities with respect to "the development of the property" being rezoned, not other properties. Petitioners do not explain why PCZO 111.275(D) requires evaluation of trips generated by other aggregate operations the applicant happens to own, whether those

operations are supposed to phase out or continue. The question under PCZO 111.275(D) is whether the transportation network is adequate to handle the traffic generated by operations at the new site. As far as we can tell, the TIA's trip generation analysis for the new site did not assume or rely on the elimination of traffic generated by the Krauger site, in determining how much traffic would be generated at the new site, and how that traffic would impact nearby transportation facilities. Instead, as explained above, the TIA used production estimates and route information supplied by the applicants to determine how many daily trips the *new site* would generate and where those trips would go.

In any case, the apparent focus under PCZO 111.275(D), like the TPR, is how traffic generated by particular development impacts specific transportation facilities, such as nearby intersections, not the total sum of traffic on county roads. The new site and the Krauger site are located miles apart, and almost certainly impact different intersections and to different degrees. Petitioners offer no basis to believe that simultaneous operation of the two sites during any overlap period is likely to adversely impact any particular intersection or transportation facility.

3. Highway 51

Petitioners argue that the county erred in failing to take into account the fact that the proposed site will concentrate 100 percent of its traffic on Highway 51, compared to the Krauger site, which apparently disperses traffic over various roads.

The TIA and county evaluated operations at the Krauger site as the most reliable indicator of the scope of the operation and trip-generation at the new site. Petitioners cite to nothing in the TIA or findings reflecting an assumption that the routes taken by traffic generated at the new site will be dispersed as at the Krauger site. As far as petitioners have established, the TIA and county understood that traffic generated by the new site will concentrate on Highway 51, and used that understanding in evaluating how generated traffic will impact highway operations and affected intersections.

4. Most Intensive Use Allowed in the Mineral and Aggregate Overlay Zone

Petitioners contend that the county erred in assuming that the intensity and pace of aggregate extraction and other operations at the new site will be similar to those at the Krauger site. However, petitioners argue, nothing in the decision limits the pace or scale of production or the associated traffic trips generated at the new site. According to petitioners, the TPR requires the county to assume the most traffic intensive use of the property, among the list of allowed uses. *See Griffiths v. City of Corvallis*, 50 Or LUBA 588, 595-96 (2005) (OAR 660-012-0060 generally requires evaluation of traffic impacts based on the most-traffic intensive uses allowed in the new zone, not the particular use that is proposed); *Mason v. City of Corvallis*, 49 Or LUBA 199, 219 (2005) (same).

Petitioners are correct that the focus of analysis under the TPR is on *allowed* uses in the new zone or plan designation, compared to the previous zoning or designation, not necessarily the actual use that is proposed among the list of new uses allowed by the plan or zoning amendment. However, that distinction is not helpful in the present case, because the MA overlay zone allows only one new permitted use, compared to the underlying EFU base zone: an aggregate mine. The new allowed use and the proposed use are the same, and petitioners have not established that there is a more traffic-intensive *type of use* allowed in the MA zone other than the proposed use.

Petitioners appear to argue that under the TPR the county must assume the maximum theoretically possible *intensity* of the most traffic-intensive allowed use. We have never held that the TPR requires that assumption. A common approach in estimating traffic generated by a particular use is to rely on published data, such as the Institute of Transportation Engineers Trip Generation Handbook. Such data are usually based on average or typical intensities for particular categories of uses. Another common approach is to examine similar developed uses in the vicinity, and to base trip generation estimates on the traffic levels generated by such similar uses. We have never held that either approach requires an

estimation of the highest theoretical intensity of a particular use category, and it is difficult to see how that theoretical intensity could be calculated with any accuracy. In the present case, petitioners offer no principled way to estimate how much more intense aggregate production or sales could become on the subject site over any given period of time.

In short, we disagree with petitioners that OAR 660-012-0060 requires the county to assume that the only use allowed by the MA zone (aggregate mining and processing) will be more intense than the actual proposed use.

This subassignment of error is sustained, in part.

The first assignment of error (petitioners) is sustained, in part.

SECOND ASSIGNMENT OF ERROR (PETITIONERS)

As explained above, in conducting the OAR 660-016-0005 ESEE analysis, the county evaluated conflicting uses within a 750-foot impact area of the extraction site. PCZO 174.015 provides that the impact area is determined on a case-by-case basis through the ESEE analysis, but must be a minimum of 750 feet from the extraction site. PCZO 174.020(B) provides that the impact area shall be applied to properties or portions of properties that are "adjacent to and immediately surrounding an Extraction Area[.]" PCZO 174.015 defines the "extraction area" as "the area within which mineral and aggregate extraction, processing and storage may take place[.]" PCZO 174.015 further defines "processing" to include "conveying * * * and transportation of mineral and aggregate materials."[25]

Petitioners argued to the county that the 2.75-mile haul road must be included in the impact area and therefore evaluated in the ESEE analysis, with respect to dust, noise and potential environmental contamination from construction and use of the access road

[25] PCZO 174.015 defines "processing" such that it "[i]ncludes, but is not limited to, extraction, washing, crushing, milling, screening, handling, conveying, batching and blending into asphalt or portland cement, and transportation of mineral and aggregate materials."

alongside and over Hayden Slough and Hayden Lake.[26] The lake and slough are listed in the national wetland inventory, and are identified in the county comprehensive plan as significant Goal 5 resources. Petitioners argued that the obligation to include the haul road in the impact area and ESEE analysis stems from the PCZO 174.015 definitions of "extraction area" and "processing." According to petitioners, the "transportation of mineral and aggregate materials" that is part of the definition of "processing" necessarily includes the use of the haul road to transport finished aggregate offsite. Therefore, petitioners argue, the impact area must be expanded to include an area 750 feet laterally from both sides of the haul road.

The county rejected petitioners' interpretation of the relevant PCZO 174.015 definitions.[27] According to the county, the handling, conveying and transportation of aggregate materials in the definition of "processing" refers to the conveyance or transport of raw materials as part of processing those materials into finished product. Petitioners repeat their argument before LUBA, but do not explain why the county's interpretation of PCZO 174.015 is reversible under the somewhat deferential review we must apply to a

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[26] As discussed more below, the county did adopt findings evaluating potential environmental impacts on the lake and slough related to construction or use of the haul road, pursuant to various code provisions. Among other things, the county apparently applied a Significant Resource Areas Overlay Zone to protect at least part of the lake and slough, pursuant to PCZO 174.060(G), which requires that conflicts between the mineral site and inventoried significant natural areas be balanced as determined by a "site-specific ESEE." However, it is not clear to us what the county considered under PCZO 174.060(G), and we assume for purposes of this assignment of error that the county did not conduct an ESEE analysis with respect to the lake and slough.

[27] The county found, in relevant part:

> "* * * Under the clear language [of the PCZO 174.015 definition of extraction area], the extraction area does not include the access road. Under the definition of processing, it does include the handling, conveying and transportation of mineral and aggregate materials which of course is necessary for the processing of those materials in the processing area. Therefore, the [PCZO] makes it clear that the extraction area includes the processing area. If the code had intended to include the access road in the definition of the extraction area, it would have been easy to clearly do this, and obviously the clear language of the code does not include it. We find, based on our interpretation of the ordinance, that the impact area does not have to extend perpendicular from the entire length of the private access road. We find that the impact area should extend 750 feet from the extraction area as shown on the applicant's site plan." Record 169-70.

governing body's interpretation of local regulations, under ORS 197.829(1) and *Church v. Grant County*, 187 Or App 518, 69 P3d 759 (2003).[28] OAR Chapter 660, Division 016 does not specify how local governments must determine the scope of the relevant impact area; that task is left to the county's code. While the relevant PCZO 174.015 definitions certainly could be interpreted as petitioners do, such that "processing" includes the transportation of a finished aggregate product offsite as well as the internal handling, conveyance and transportation of raw aggregate as part of the finishing process, we cannot say that the county's more limited interpretation is inconsistent with the plain language, purpose or underlying policy of that code provision.

Petitioners next cite to PCZO 136.050(S)(1), part of the general conditional use standards applicable to uses allowed on EFU lands, which provides for approval of "[a]ccessory transportation improvements for an authorized land use to provide safe and efficient access to the use." PCZO 136.050(S)(1) further specifies that "[s]uch accessory transportation improvements are subject to the same requirements applicable to the land use to which they are accessory." Under PCZO 136.050(S)(1), petitioners argue, because the extraction site itself is subject to the ESEE impact area analysis, the accessory haul road must also be included in the impact area and subjected to the ESEE analysis.

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[28] ORS 197.829(1) provides:

> "[LUBA] shall affirm a local government's interpretation of its comprehensive plan and land use regulations, unless the board determines that the local government's interpretation:
>
> "(a) Is inconsistent with the express language of the comprehensive plan or land use regulation;
>
> "(b) Is inconsistent with the purpose for the comprehensive plan or land use regulation;
>
> "(c) Is inconsistent with the underlying policy that provides the basis for the comprehensive plan or land use regulation; or
>
> "(d) Is contrary to a state statute, land use goal or rule that the comprehensive plan provision or land use regulation implements."

Respondents argue that PCZO 136.050(S)(1) has nothing to do with determining the scope of the impact area for a mineral and aggregate operation, for purposes of conducting the ESEE analysis under OAR 660-016-0005 and PCZO chapter 174. Respondents also note that the county adopted findings that address PCZO 136.050(S)(1) and issued a conditional use approval for the access road, findings that petitioners do not acknowledge or challenge. Record 196-99.

We agree with respondents that petitioners have not established that PCZO 136.050(S)(1) requires the county to include the haul road within the impact area and subject it to the ESEE analysis. PCZO 136.050(S)(1) is part of the general standards for all conditional uses allowed in EFU zones. As discussed below, the county apparently approved a conditional use permit for the mineral and aggregate operation, under applicable conditional use standards. The county also appears to have approved the haul road under the same conditional use standards. *See* Record 197 ("[t]he proposed access road complies with the conditional use criteria under PCZO chapter 119 as follows"). It seems relatively clear that the county interprets PCZO 136.050(S)(1) to require that internal roads providing access to conditional uses in the EFU zone be subject to the same *conditional use* "requirements" that apply to the primary use, *i.e.*, those in PCZO chapter 119. PCZO 136.050(S)(1) does not state or suggest that access roads are also subject to other standards that apply only when the county comprehensive plan or zoning ordinance is amended, such as statewide planning goals or administrative rules.

Because petitioners have not identified anything in the county code or elsewhere that requires that the haul road be included in the impact area and addressed in the ESEE analysis, petitioners' arguments under this assignment of error do not provide a basis for reversal or remand.

The second assignment of error (petitioners) is denied.

THIRD ASSIGNMENT OF ERROR (PETITIONERS)

Petitioners contend that the county erred in failing to require the operator to obtain a conditional use permit in order to commence the aggregate operations authorized under the mineral and aggregate overlay zone. According to petitioners, "mineral and aggregate operations" are permitted on lands zoned EFU only as a conditional use, under the county code. PCZO 136.050(N). Further, petitioners argue that ORS 215.298 mandates that local governments allow mining in EFU zones only pursuant to a land use permit.[29] Application of the Mineral and Aggregate Overlay zone does not obviate that requirement, petitioners argue, citing to PCZO 174.020 ("[n]othing in this Chapter shall constitute a waiver or suspension of the provisions of any underlying zone or concurrent overlay zone").

Respondents advance a number of arguments, but we need address only one. Respondents argue that the county in fact applied the code conditional use permit standards at PCZO 119 to approve the proposed mineral and aggregate operation. Record 81-82. Petitioners apparently dispute that the county actually issued a conditional use permit, noting that the findings at Record 81-82 are phrased hypothetically ("would be in compliance with applicable conditional use criteria"). The findings at Record 81-82 findings are part of the hearings officer's recommendation to the BOCC, which may account for the phrasing. However, it seems relatively clear that the BOCC believed that it was in fact approving "the conditional use of mining aggregate" in the extraction area. Record 242 (Section 3 of

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[29] ORS 215.283(2)(b)(B) allows in EFU zones, subject to the approval of the governing body, "[m]ining, crushing or stockpiling of aggregate and other mineral and other subsurface resources subject to ORS 215.298[.]" ORS 215.298 provides, in relevant part:

> "(1) For purposes of ORS 215.213 (2) and 215.283 (2), a land use permit is required for mining more than 1,000 cubic yards of material or excavation preparatory to mining of a surface area of more than one acre. A county may set standards for a lower volume or smaller surface area than that set forth in this subsection.
>
> "(2) A permit for mining of aggregate shall be issued only for a site included on an inventory in an acknowledged comprehensive plan."

Ordinance 06-03); *see* also Record 241 (Section 1 of the ordinance stating that the county adopts the hearings officer's findings, including "a conditional use within the Exclusive Farm Use Zoning District"). Because petitioners' arguments under this assignment of error are premised on the belief that the county did not approve the mining as a conditional use, petitioners' arguments do not provide a basis for reversal or remand.

The third assignment of error (petitioners) is denied.

FOURTH ASSIGNMENT OF ERROR (PETITIONERS)

This assignment of error challenges the findings and evidence supporting the county's conclusions under PCZO 136.060 and related statutes and rules, that the proposed mining operation would not force a significant change in accepted farm practices, or significantly increase the cost of accepted farm practices on petitioners' nearby farms.

Petitioners argue first that the county ignored evidence that emissions from the HMAC plant could adversely affect especially sensitive crops such as mint that petitioners Setniker and others grow within one mile of the subject property. Petitioners cite to evidence that mint absorbs and concentrates volatile organic compounds from the air, and that the absorption of foreign organic compound may render mint oil unacceptable to manufacturers. Relatedly, petitioners argue that the Setniker farms uses Hayden slough for irrigation, and that the county failed to adequately address the impact of petroleum or asphalt chemical releases into the slough on the farm's irrigation use, particularly for sensitive crop species.

Second, petitioners note that ORS 215.301 and PCZO 174.050(C) prohibit asphalt batch plants within two miles of a planted vineyard. While there are no planted vineyards within two miles of the property, petitioners contend that the statute and related code provisions create a presumption that HMAC plants are incompatible with crops that have qualities that may be degraded by exposure to chemical depositions from batch plants.

Respondents argue that the county's findings adequately address impacts of the HMAC plant on a wide range of crops grown in the surrounding area, including mint and

other especially sensitive crops petitioners cite. However, the findings respondents cite to do not address the impact of HMAC emissions on crops in general, much less the allegedly sensitive crops that petitioners raise, such as mint. As far as we can tell, none of the findings under PCZO 136.060 appear to address that issue. The closest we can find is a recitation in one of the ESEE analyses, at Record 157, that the HMAC plant will comply with all DEQ standards. If that statement is intended to address the issue petitioners raised regarding the impacts of HMAC emissions on sensitive crops, it falls short. While there may be findings somewhere in the several hundred pages of the adopted decisions that address the issue petitioners raised, without some assistance from respondents we have no basis to disagree with petitioners that the county failed to address the issue.

With respect to petitioners' arguments under ORS 215.301 and PCZO 174.050(C), we do not understand petitioners to dispute that the statute and code govern only circumstances where asphalt batch plants are proposed within two miles of a planted vineyard, a circumstance not present here. The statute and code do not embody a general presumption that asphalt batch plants are harmful to other types of crops. While the statute and code perhaps bolster petitioners' contention that asphalt batch plants *can* harm other types of crops such as mint, a contention we agreed above the county must address, petitioners' citation to ORS 215.301 and PCZO 174.050(C) does not add anything to that contention, or provide an independent basis for reversal or remand.

The issue of petroleum or asphalt releases into the Hayden Slough is more complicated. The county adopted findings addressing the possibility of petroleum spills on Hayden Lake and Hayden Slough, concluding with respect to the latter that no petroleum spill at the extraction site could reach the slough. Record 164. The findings also address the possibility of spills from trucks along the haul road, concluding that any such spills would be easily contained and would dissipate rapidly without harming the slough ecology. Record 164-65. Other findings note that the applicant agreed to have all petroleum deliveries to the

site travel across a different access road that does not adjoin the lake and slough. Record 192. With respect to asphalt releases, the county adopted findings rejecting concerns that potential spills from asphalt trucks could reach the lake or slough. Record 149. Those findings appear to be focused on the natural resource values of the slough, not its value as an irrigation source. However, petitioners do not acknowledge or challenge them, and it is not clear why those findings are insufficient to address petitioners' concerns that petroleum or asphalt releases into the slough may adversely affect the quality of irrigation water from the slough. Without a more focused argument from petitioners, we decline to remand to the county to adopt more adequate findings on this issue.

The fourth assignment of error (petitioners) is sustained, in part.

The county's decisions are remanded.