

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

3
4 CHARLES HEGELE,
5 *Petitioner,*

6
7 vs.

8
9 CROOK COUNTY,
10 *Respondent,*

11
12 and

13
14 REBECCA JULIAN, GRETCHEN BROOKS, TOM STRAND,
15 CAROL STRAND, PATTY SMITH, TERRY SMITH, SID EVES,
16 SARA EVES, PAUL KASBERGER, ANN KASBERGER,
17 MIKE DUGGAN, DIANN DUGGAN, RODD CLARK, JENNIFER CLARK,
18 LINDA FEHRENBACHER, TY FEHRENBACHER, MARION COFFMAN,
19 MICHAEL BROWNLEE, MARSHA BROWNLEE, LYNN NICHOLSON,
20 WALTER R. MILLER, SALLY N. MILLER, ROBERT DUNN, THERESA DUNN,
21 JOYCE COATS, RON DUNN, SANDY DUNN, MARGAURITE KASBERGER,
22 KEN SHOCKEY, MARYANNE SHOCKEY, BRIAN BLAKE, ANGIE BLAKE,
23 DON FEARRIEN, JOYCE FEARRIN, JOANNE GREGG, DONETTA GREGG,
24 EDWARD GREGG, RON WILEY, SUZANNE WILEY, JACQUES WILLIAMS,
25 BETH WILLIAMS and ROBBI PRUITT,
26 *Intervenor-Respondents.*

27
28 LUBA No. 2007-078

29
30 FINAL OPINION
31 AND ORDER

32
33 Appeal from Crook County.

34
35 Bruce W. White, Bend, filed the petition for review and argued on behalf of
36 petitioner.

37
38 David M. Gordon, Prineville, filed a joint response brief and argued on behalf of
39 respondent.

40
41 Edward P. Fitch, Redmond, filed a joint response brief and argued on behalf of
42 intervenor-respondents Rebecca Julian and Gretchen Brooks.

43
44 Daniel Kearns, Portland, filed a joint response brief and argued on behalf of
45 intervenor-respondents Tom Strand, Carol Strand, Patty Smith, Terry Smith, Sid Eves, Sara

1 Eves, Paul Kasberger, Ann Kasberger, Mike Duggan, Diann Duggan, Rodd Clark, Jennifer
2 Clark, Linda Fehrenbacher, Ty Fehrenbacher, Marion Coffman, Michael Brownlee, Marsha
3 Brownlee, Lynn Nicholson, Walter R. Miller, Sally N. Miller, Robert Dunn, Theresa Dunn,
4 Joyce Coats, Ron Dunn, Sandy Dunn, Margaurite Kasberger, Ken Shockey, MaryAnne
5 Shockey, Brian Blake, Angie Blake, Don Fearrien, Joyce Fearrien, Joanne Gregg, Donetta
6 Gregg, Edward Gregg, Ron Wiley, Suzanne Wiley, Jacques Williams, Beth Williams and
7 Robbi Pruitt.

8
9 RYAN, Board Member; HOLSTUN, Board Chair; BASSHAM, Board Member,
10 participated in the decision.

11
12 REMANDED

02/08/2008

13
14 You are entitled to judicial review of this Order. Judicial review is governed by the
15 provisions of ORS 197.850.

NATURE OF THE DECISION

Petitioner appeals a decision granting in part and denying in part an application for an amendment to the county comprehensive plan, and denying a conditional use permit to allow mining of petitioner’s property.

MOTION TO FILE OVERLENGTH RESPONSE BRIEF

Respondent and intervenor-respondents (together, respondents) move for permission to file a response brief that exceeds the 50-page limit set forth in OAR 661-010-0030(2)(b). No party opposes the motion, and it is granted.

FACTS

The present appeal is an appeal from a county decision following our remand in *Hegele v. Crook County*, 44 Or LUBA 357 (2003) (*Hegele I*). We take the facts from our decision in *Hegele I*:

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

“The surrounding land, also zoned EFU-2, generally consists of irrigated farms on the valley floor and dry hillsides used for limited grazing. Within one mile of the subject property are 20 farm dwellings. A quarrying operation for the purpose of field leveling is located immediately west of the subject property across Lone Pine Road, which provides access to the subject property. Another aggregate operation is located on a ranch one mile south, and a third is located one mile to the northeast.

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

1 also filed a related conditional use permit application to operate the proposed
2 mine.” 44 Or LUBA 361-62.

3 In *Hegele I*, we remanded the county’s decision denying petitioner’s application to
4 place the aggregate mine on the county’s Goal 5 inventory of significant aggregate sites.¹
5 Following our remand, the county held additional public hearings on the applications and
6 approved petitioner’s application to place the aggregate mine on the county’s Goal 5
7 inventory of significant aggregate sites.² However, the county denied petitioner’s
8 application for an amendment to the Crook County Comprehensive Plan (CCCP) to allow
9 mining of the site, and denied petitioner’s conditional use permit application to mine the site.
10 Petitioner appeals those denials.

11 **FIRST THROUGH SIXTH ASSIGNMENTS OF ERROR**

12 In *Hegele I*, we summarized the process set forth in OAR 660-016-0005 *et seq.* by
13 which a local government that has decided to place a mine on its Goal 5 inventory must act
14 following that determination:

15 “Once the local government has determined that a Goal 5 resource site is
16 ‘significant’ and hence must be included on its Goal 5 inventory, the local
17 government must then identify conflicting uses. * * * If conflicting uses are
18 found, the local government must conduct an analysis of the economic, social,
19 environmental and energy (ESEE) consequences of the conflicting uses,
20 pursuant to OAR 660-016-0005. Based on the ESEE analysis, the local
21 government must then determine whether to (1) fully protect the resource site
22 against conflicting uses; (2) allow conflicting uses fully; or (3) limit
23 conflicting uses while protecting the resource to some extent, pursuant to
24 OAR 660-016-0010.” *Hegele I*, 44 Or LUBA 357, 365 (2003) (footnote
25 citation omitted).

¹ Petitioner appealed our decision in *Hegele I* to the Court of Appeals, which affirmed our disposition, but disagreed with our analysis of the method for identifying conflicts with the proposed Goal 5 resource under OAR 660-016-0005. *Hegele v. Crook County*, 190 Or App 376, 379, 78 P3d 1254 (2003) (*Hegele II*).

² As explained in the petition for review, after the Court of Appeals’ decision in *Hegele II*, in 2004 the county made a second decision on petitioner’s application. That 2004 decision was appealed to LUBA, but was subsequently remanded to the county based on a stipulated motion for voluntary remand from the parties. The record for that 2004 county decision is included in the record for this appeal and is identified by the parties and in our opinion as “2004 Record.” Petition for Review 4.

1 See also *1000 Friends of Oregon v. LCDC (Tillamook County)*, 303 Or 430, 433-35, 737 P2d
2 607 (1987) (discussing Goal 5 and its requirements). Petitioner’s first through sixth
3 assignments of error contain various challenges to the methodology and the result of the
4 county’s identification of conflicting uses under OAR 660-016-0005; we address them here
5 together.

6 OAR 660-016-0005(1) provides in relevant part:

7 “It is the responsibility of local government to identify conflicts with
8 inventoried Goal 5 resource sites. This is done primarily by examining the
9 uses allowed in broad zoning districts established by the jurisdiction (e.g.,
10 forest and agricultural zones). *A conflicting use is one which, if allowed, could*
11 *negatively impact a Goal 5 resource site.* Where conflicting uses have been
12 identified, Goal 5 resource sites may impact those uses. These impacts must
13 be considered in analyzing the economic, social, environmental and energy
14 (ESEE) consequences: * * *” (Emphasis added).³

15 Thus, the first step in identification of conflicting uses necessarily requires identification of
16 the impacts that the conflicting use would have on the resource site.

17 **A. Identifying Impacts on the Goal 5 Resource**

18 In the second and third assignments of error, petitioner argues that the county
19 misconstrued applicable law in considering merely “speculative” impacts on the resource site
20 from conflicting uses, and that there is not substantial evidence in the record to support the

³ The remainder of the text of the OAR 660-016-0005 is set out below:

“(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.

“(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.”

1 county's conclusion that the mine would engender the types of impacts that the county
2 identified.

3 In *Hegele II*, the court explained that the types of impacts that could result from
4 conflicting uses are varied:

5 "[Negative impacts on the aggregate use] could include, among others, legal,
6 social, or economic ones. That understanding is reflected expressly in OAR
7 660-016-0005(2), which provides that, once the conflicting uses have been
8 identified, and negative impacts are to be balanced, the local government must
9 consider the 'economic, social, environmental and energy' impacts of the
10 Goal 5 resource and the competing uses alike. Legal consequences potentially
11 qualify as economic and social ones, and curtailing use of a resource site
12 through a nuisance or trespass action therefore readily falls within the range of
13 contemplated impacts. But so do a wide variety of other impacts, such as
14 social pressures that could come to bear within the zoning district in an effort
15 to restrict, confine, or limit activity on the Goal 5 resource site. In other
16 words, when the negative impacts *of* the Goal 5 resource likely will create
17 social, legal, or other pressures that can result in negative impacts *on* the Goal
18 5 resource."⁴ 190 Or App at 384-85 (footnote omitted; emphasis original)

19 In the omitted footnote, the court explained that some types of formal or organized
20 opposition to the resource could be deemed a negative impact on the resource:

21 "For example, if operation of an aggregate mine (a Goal 5 resource) were
22 predicted to engender social protests or economic boycotts because of
23 perceived negative impacts of the resource on local residents, such activity
24 might be deemed a 'negative impact' on the Goal 5 resource itself." *Id.* at 384
25 n 4.

26 Respondents contend that the county's findings regarding the impacts from the mine
27 site and the result of those impacts on the mine site are consistent with the court's opinion in
28 *Hegele II*. Respondents also contend that the identified impacts are supported by extensive
29 evidence and testimony in the record that a reasonable decision maker would rely on to
30 identify uses that may negatively impact the Goal 5 resource.

⁴ The court rejected 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. *Id.*

1 The county relied in part on testimony from residents and others that live near the
2 mine regarding the noise levels and visual impact of the mine and concluded that the
3 evidence demonstrated that certain impacts from the mine could not be entirely mitigated.
4 Based on that conclusion, the county determined that nearby residents opposed to the mine
5 would negatively impact the mine by bringing legal action and economic and social pressure
6 and political pressure to bear on the mine.⁵

7 As respondents note, the record demonstrates that “[a] significant and large number
8 of Lone Pine Valley residents have appeared at the many public hearings on this matter
9 spanning five years and have vigorously opposed this proposed quarry.” Response Brief 22.
10 Record 176-78, 2004 Record 263-68. Given the evidence of the long term and consistent
11 opposition to the mine, a reasonable decision maker could conclude, as the county did, that

⁵ The county found:

“* * * The record is replete with compelling testimony from most of the residents, property owners and farmers within sight and sound of the site that the operation of this mine site will produce negative impacts in the form of noise, dust, vibrations, visual blight, traffic and commotion. The record is replete with testimony about the beautiful scenic value of the valley to the residents, property owners, recreational visitors, motorists and bicyclists on the Lone Pine Valley Road. This testimony of the mine operation’s negative impact on these values and qualities leads us to conclude that negative impacts on the property owners, residents, visitors, motorists and bicyclists will result from this mine. This, the Court is convinced, will give rise to social, legal, economic and political pressures on the resource site in a collective effort to restrain mining operations at this particular site. These witnesses testified that, because of these negative impacts from the mine operation, they will be tireless in their efforts to monitor the site’s compliance with all applicable standards for these types of impacts to enforce all statutory, code-based and common law requirements, and to eliminate all of these negative impacts from this mine operation. The Court also finds that noise and dust impacts of the proposed site and its operation might be mitigated through conditions imposed upon the applicant in the conditional use permit process, but for reasons discussed below, such mitigation cannot address the impact on scenic values.

“This testimony and evidence convinces us that these witnesses will use law suits, civil enforcement, the County’s code enforcement, social protests, economic boycotts, the political and legislative process and similar efforts to curb the mine site’s negative impacts with associated costs (physical, emotional and financial) to the parties and taxpayers because the site is on the hillside, and screening from view or noise will be minimally effective at best. Based on this credible and compelling testimony, the court finds that these social, economic, political and legal efforts will have significant negative impacts on the operation of the resource site. * * *” Record 9-10.

1 the impacts from the mine on nearby residents would engender legal action and social and
2 economic pressure on the mine.

3 The second and third assignments of error are denied.

4 **B. Identification of Conflicting Uses**

5 Following its identification of the impacts on the mine from organized and persistent
6 opposition to the mine, the county identified the following as conflicting uses:

7 “* * * We conclude that all residents, residences, properties, recreational
8 visitors, motorists and bicycles that currently exist or could in the future exist
9 within sight and sound of this mine site are ‘conflicting uses’ under the Rule.”
10 Record 10 (footnote omitted).

11 **1. Definition of Conflicting Uses**

12 In his first assignment of error, petitioner argues that the county misconstrued
13 applicable law in identifying conflicting uses because the county did not apply or adopt
14 findings regarding the definition of “conflicting uses” found in the CCCP.⁶ Respondents
15 answer that the CCCP definition of conflicting uses is not an approval criterion that the
16 county was required to address in its findings. We agree with respondents that the definition
17 of “conflicting uses” found in the CCCP is not an approval criterion that the county was
18 required to find was met. Petitioner does not explain why the county is required to adopt
19 findings addressing the definition.

20 The first assignment of error is denied.

21 **2. Recreational Use by Non-residents**

22 In his fifth assignment of error, petitioner argues that the county misconstrued
23 applicable law in its identification of conflicting uses because the only uses that are to be

⁶ CCCP’s Mineral and Aggregate Resource Element contains the following definition of “conflicting uses”:

“Conflicting uses are those existing or potential uses, allowed outright or conditionally within a zoning district which, if allowed within the impact area surrounding a resource site, could negatively impact that Goal 5 resource site by impeding the extraction of the resource, or which could impose limitations on efficient and economic mining activities.”

1 considered in the identification step are those referenced in OAR 660-016-0005 as “uses
2 allowed in broad zoning districts” that are subject to county land use regulations. Petitioner
3 argues that “recreational visitors, motorists, and bicycles” are not conflicting uses, because
4 none of those uses are specifically listed as permitted or conditionally allowed uses in the
5 county’s zoning districts. Petition for Review 19.⁷

6 Respondents dispute petitioner’s view that only permitted or conditional uses in the
7 relevant zoning districts can be considered in identifying conflicting uses. Respondents
8 argue that the Court of Appeals interpreted the rule more broadly in *Hegele II*. In *Hegele II*,
9 the court explained that “[t]he primary – *but not exclusive* – way that local governments are
10 to [identify conflicts with the Goal 5 resource] is to examine ‘allowed’ uses – that is, legally
11 permissible ones,” and that “* * * the range of Goal 5 resources and allowed uses that may
12 exist in broad zoning districts is so vast as to be all but impossible to catalog or describe in
13 advance, ***.” 190 Or App at 382-84 (emphasis added).

14 Respondents also note that even if petitioner’s interpretation of the rule is correct, the
15 residential uses that the county identified as conflicting uses are allowed outright or
16 conditionally in the relevant EFU zoning district. Respondents argue that the challenged
17 decision includes within the scope of those conflicting residential uses any uses that are
18 incidental to those uses, such as the residents’ use of nearby roads for recreation (such as
19 bicycle or horseback riding) or travel. Thus, respondents argue, petitioner’s argument that
20 the county erred in considering “recreational visitors, motorists, and bicycles” to be
21 conflicting uses fails to recognize that many of those conflicts will involve residents rather
22 than casual visitors to the area.

23 We generally agree with respondents that the language of the rule and the Court of
24 Appeals’ interpretation of that rule in *Hegele II* does not support the limited reading of the

⁷ Respondents note, correctly, that petitioner does not challenge the county’s identification of “residents, residences, properties * * *” as conflicting uses. Record 10.

1 range of possible conflicting uses that petitioner urges, and that conflicting uses may be uses
2 that, while not specifically listed in the zoning district as allowed *land uses*, are nevertheless
3 uses that could conflict with a Goal 5 resource. Further, although the county’s decision
4 could certainly be clearer on this point, we understand the county to have identified, in part,
5 residential uses and uses incidental to those uses as conflicting uses with the Goal 5 resource.
6 Such incidental uses presumably include the residents’ use of nearby roads for recreation or
7 travel. We agree with the county that conflicts with the proposed resource resulting from
8 such incidental uses can be considered, notwithstanding that such incidental uses are not
9 specifically listed as permitted or conditional uses in the EFU zone.

10 Moreover, under the Court’s broad understanding of conflicting uses articulated in
11 *Hegele II*, it may be recreational uses that are independent of the nearby residential uses
12 could still conflict with the *Goal 5* resource, if, for example, the evidence supported a
13 conclusion by the county that the resource use would engender the negative social and
14 economic consequences described by the court in *Hegele II*. However, we tend to agree with
15 petitioner that to the extent the county identified as conflicting uses “recreational visitors,
16 motorists, and bicycles” that are not linked to the nearby residential uses, we are not directed
17 to any evidence in the record to support the county’s identification of such independent
18 recreational uses as conflicting uses. The evidence in the record that we are directed to by
19 respondents supports the county’s conclusion that nearby *residents* will likely continue their
20 opposition to the mine site, and we reject petitioner’s challenge to the decision regarding
21 conflicts from residents. However, we are cited to no evidence that recreational visitors
22 would mount organized or prolonged opposition to the mine of the type the court described
23 in *Hegele II*. For that reason, we agree with petitioner that the county erred to the extent it
24 identified “recreational visitors, motorists, and bicycles” that are not incidental to or
25 associated with the nearby residential uses as uses that conflict with the Goal 5 resource.

26 The fifth assignment of error is sustained.

1 **3. Official Notice of Scenic Qualities**

2 In the fourth and sixth assignments of error, petitioner argues that the county
3 committed procedural error in purporting to take “official notice” of the scenic beauty of the
4 Lone Pine Valley and of the use of Lone Pine Valley Road by recreational bicyclists. In the
5 portion of the decision identifying uses that conflict with the mine, the decision contains the
6 following footnote:

7 “The Court takes official notice of the scenic qualities of the Lone Pine Valley
8 and the fact that recreational bicyclists use, and could use in the future, the
9 Lone Pine Valley Road for recreational purposes.” Record 10.

10 It is not clear what the county meant by taking “official notice” of the valley’s scenic
11 qualities and the fact that recreational bicyclists use and could use the valley’s road for
12 recreational purposes. To the extent the county purported to take “official notice” of
13 evidence under Oregon Evidence Code 201, we agree with petitioner that the county erred.
14 The county’s decision must be based on “substantial evidence,” and no authority is cited to
15 us supporting the notion that material aspects of the county’s decision can instead be based
16 on “official notice” of evidence that is not in the record. *See McNulty v. City of Lake*
17 *Oswego*, 15 Or LUBA 283, 291 n 8 (1987) (city’s judicial notice of prior approvals does not
18 encompass the evidence submitted supporting those approvals).

19 We agree with petitioner that the county erred in basing its decision on “official
20 notice” of evidence that is not in the record. If there is evidence in the record to support the
21 county’s findings that the Lone Pine Valley possesses scenic qualities and that recreational
22 visitors and bicyclists use and may continue to use the Lone Pine Valley Road in the future,
23 the county should rely on that evidence rather than attempting to take “official notice” of
24 those facts.

25 The fourth and sixth assignments of error are sustained.

26 Remand is necessary to adopt amended findings free of the above identified errors
27 and/or conduct an evidentiary hearing to allow evidence regarding “recreational visitors,

1 motorists, and bicycles” that are not incidental to or associated with the nearby residential
2 uses.

3 **SEVENTH ASSIGNMENT OF ERROR**

4 In the seventh assignment of error, petitioner argues that the county’s identification of
5 the impact area from the mine site is not supported “in law or in fact.” Petition for Review
6 25. Petitioner argues that because the county failed to properly identify conflicting uses, the
7 county’s findings regarding the impact area are also defective.

8 In *Hegele I*, we sustained petitioner’s argument that the county had improperly
9 identified the impact area, finding that the county had not adequately explained its designated
10 impact area in light of a provision of the county’s comprehensive plan (Ordinance 43) that
11 limits the county to a 500-foot impact area.⁸ On remand, the county explained that it was
12 relying on the provision of subsection (b) of Ordinance 43 that allows it to designate a
13 different impact area. Based on the identified impacts on the mine site from “residents,
14 property owners and ranchers within sight and sound of the proposed mine site,” the county
15 designated an impact area that encompasses the entire Lone Pine Valley.

16 Petitioner’s challenge to the impact area is derivative of petitioner’s challenges to the
17 identification of conflicting uses. The only error we found with respect to the identification
18 of conflicting uses is the lack of evidence supporting the county’s findings regarding non-
19 residential recreational users of the county roads. As quoted above, the county determined

⁸ Ordinance No. 43, Crook County Goal 5 Resources (Mineral and Aggregate Elements), provides in relevant part:

- “a. Definition of Impact Area. The impact area is that area surrounding and near a Goal 5 mineral and aggregate resource site wherein the presence or application of a conflicting use that is allowed outright or conditionally in the surrounding broad zoning district would adversely impact the resource site by limiting the mining or processing of the resource.

- “b. Description of Impact Area. Unless otherwise indicated in the text of this Plan or on the respective resource site and impact area map, the impact area is that property extending outward from the resource site boundary to a distance of five hundred (500) feet.”

1 the impact area based on identified impacts from “residents, property owners and ranchers
2 within sight and sound of the proposed mine site.” It does not appear that the county
3 identified the impact area based on non-residential recreational users of the county roads.
4 Accordingly, petitioner’s arguments under this assignment of error do not provide a basis for
5 reversal or remand.

6 The seventh assignment of error is denied.

7 **EIGHTH THROUGH TWELFTH AND FIFTEENTH THROUGH SEVENTEENTH**
8 **ASSIGNMENTS OF ERROR**

9 Petitioner’s eighth through twelfth assignments of error challenge the county’s ESEE
10 analysis. In the eighth assignment of error, petitioner argues that the county’s findings
11 regarding the ESEE consequences of allowing the conflicting uses are inadequate because,
12 petitioner argues, the county did not adequately review the negative ESEE consequences of
13 allowing the conflicting uses, and instead focused almost all of its analysis on the negative
14 ESEE consequences of allowing the mine. Petition for Review 25-26. Petitioner also argues
15 that the county erred in failing to address petitioner’s evidence that the rock found at the
16 resource site, Columbia River basalt, is unique and highly desirable for road paving projects
17 because it is easy to extract. Petition for Review 26-27. Finally, petitioner argues that the
18 county’s finding that other comparable quarries exist in Deschutes County is not supported
19 by substantial evidence in the record. Petition for Review 28.

20 Petitioner’s fifteenth through seventeenth assignments of error challenge the county’s
21 analysis of the applicability and requirements of Statewide Planning Goal 3 (Agricultural
22 Lands), Goal 6 (Air, Land and Water Resources), and Goal 8 (Recreational Needs) in
23 conducting the ESEE analysis.

24 The county’s determination of ESEE consequences of the mine on conflicting uses
25 and of conflicting uses on the mine is adequate under the rule “if “* * * it enables a
26 jurisdiction to provide reasons to explain why decisions are made for specific sites.” OAR

1 660-016-0005(2). *See Williams v. LCDC*, 154 Or App 195, 213-214, 961 P2d 269 (1998) (the
2 rule simply requires the local government to present “reasons” that support its decisions
3 about resource sites and conflicting uses). In performing an ESEE consequences analysis,
4 the local government is not required to quantify every conceivable conflict between the
5 resource use and every conflicting use. *Sanders v. Yamhill County*, 34 Or LUBA 69, 106-07,
6 *aff’d* 154 Or App 448, 963 P2d 755 (1998). *See also Columbia Steel Castings Co. v. City of*
7 *Portland*, 314 Or 424, 431-32, 840 P2d 71 (1992) (findings must show that the local
8 government was aware of the general nature and scope of the identified conflicts and their
9 interplay).

10 We sustained, in part, petitioner’s argument set forth in the fifth assignment of error
11 that the county improperly identified casual recreational uses not associated with the nearby
12 residential uses as conflicting uses, because the evidence in the record did not support the
13 county’s conclusion that such casual recreational users exist or are likely to mount an
14 organized opposition to the mine. The county’s ESEE findings and the county’s ultimate
15 decision to fully allow conflicting uses at the expense of mining both rely in part on conflicts
16 with casual recreational users.⁹ It follows that to the extent the county’s ESEE analysis
17 considered those improperly identified conflicting uses, the ESEE analysis is defective,
18 based on the current record. Remand is therefore necessary to (1) supplement the record

⁹ The county found:

“While additional or other factors could have been discussed in the foregoing findings that might possibly favor preservation of this proposed mine site, it would serve no useful purpose, and besides the Court is not aware of any such factors. The impact testimony the Court heard from residents of the Lone Pine Valley about the visual, aesthetic, noise and traffic safety issues is compelling, complete and substantial. *Based on this testimony and the significant negative impacts to the identified, lawful, existing and future conflicting uses, the Court concludes that preservation of these uses (the conflicting uses) is more important as a matter of public policy than the addition and protection of one more rock pit in the Lone Pine Valley.* Based on the foregoing ESEE consequences, the Court again comes down in favor of fully protecting the identified conflicting uses in the Lone Pine Valley and not protecting this resource site.* * *” Record 24.

1 with substantial evidence that “recreational visitors, motorists, and bicycles” constitute
2 conflicting uses, or (2) adopt an amended ESEE analysis free of the above-identified errors.

3 Because the county may be required to adopt an amended ESEE analysis on remand,
4 we need not discuss in detail petitioner’s challenges to the existing ESEE analysis. However,
5 we generally agree with petitioner that the county’s ESEE analysis gives relatively short
6 shrift to the ESEE consequences of allowing the conflicting uses. The county’s analysis of
7 the ESEE consequences of prohibiting the proposed mining operation is two paragraphs in
8 length, and appears to discuss only economic consequences.¹⁰ The county’s analysis of the
9 ESEE consequences of allowing the mining use are, by contrast, more than 10 pages long
10 and discuss in detail various economic, social, environmental, and energy consequences. At
11 a minimum, the analysis of the ESEE consequences of prohibiting the mining operation
12 should address the four ESEE factors (economic, social, environmental and energy), and
13 should address the evidence petitioner submitted on those points. For example, we generally

¹⁰ The county’s findings regarding the ESEE consequences of allowing conflicting uses provide:

“ESEE Consequences of Allowing Conflicting Uses. Goal 5 and its implementing Rule requires sufficient analysis of the consequences of allowing conflicting uses on the site and in the impact area as contrasted with the consequences of permitting the aggregate mining to justify the decision on whether to allow, limit or preclude conflicting uses. As a starting point, the Court recognizes the importance of inexpensive and available rock and aggregate resources in our society. The Court recognizes there is at least a market demand, if not a ‘need,’ for inexpensive and easily available rock for construction and road building in Central Oregon. The Court finds that this site could produce a significant volume of suitable quality rock close to major transportation routes. The most likely economic and social consequences of allowing these conflicting uses would be the elimination of this site as a commercial rock source. However, in light of the large number of other rock pits in Crook and Deschutes Counties, and in the Lone Pine Valley, it does not appear that preclusion of rock mining at this site will have a significant or noticeable impact on the price of availability of rock in the region.

“Balanced against this potential, and in the Court’s view *de minimis*, loss of one rock source, the court balances the importance of preserving the existing qualities (aesthetic, visual, peace, quiet, rural, and the like) of the Lone Pine Valley for the existing residents, property owners, recreational visitors, motorists and bicyclists, as well as future generations of these people. On balance the Court finds that the conflicting uses are more important than this one rock source site. The specific issues involved in this balancing, and the Court’s resolution of them, are described in more detail in the [findings regarding the ESEE consequences of allowing the mining use].” Record 12.

1 agree with petitioner that the county must address petitioner’s evidence that the resource at
2 the site has unique economic and energy virtues due to the ease and low cost of extraction.¹¹
3 Finally, to the extent the county’s findings regarding Goals 3, 6, and 8 also considered casual
4 recreational uses as conflicting uses, the portion of the county’s ESEE analysis that addresses
5 those goals must consider only properly identified conflicting uses.¹²

6 The eighth through twelfth and fifteenth through seventeenth assignments of error are
7 sustained, in part.

8 **THIRTEENTH AND FOURTEENTH ASSIGNMENTS OF ERROR**

9 OAR 660-016-0010 provides in relevant part:

10 “Based on the determination of the economic, social, environmental and
11 energy consequences, a jurisdiction must ‘develop a program to achieve the
12 Goal.’ Assuming there is adequate information on the location, quality, and
13 quantity of the resource site as well as on the nature of the conflicting use and
14 ESEE consequences, a jurisdiction is expected to ‘resolve’ conflicts with
15 specific sites in any of the following three ways listed below. * * *

16 “(1) Protect the Resource Site[.] * * *

17 “(2) Allow Conflicting Uses Fully: Based on the analysis of ESEE
18 consequences and other Statewide Goals, a jurisdiction may determine
19 that the conflicting use should be allowed fully, notwithstanding the
20 possible impacts on the resource site. This approach may be used
21 when the conflicting use for a particular site is of sufficient
22 importance, relative to the resource site. Reasons which support this
23 decision must be presented in the comprehensive plan, and plan and
24 zone designations must be consistent with this decision.

25 “(3) Limit Conflicting Uses[.] * * *”

¹¹ We do not mean to suggest the county necessarily must adopt findings that address every item of evidence that petitioner submitted. However, given the nature and extent of the evidence petitioner submitted, the county must make more of an effort in its findings to address that evidence, if it expects its decision to survive a substantial evidence challenge or a challenge to the adequacy of its findings.

¹² The county’s findings regarding Goal 8 seem particularly defective because they emphasize the adverse impacts of the mine on recreational bicycle traffic on the Lone Pine Valley road in the context of recreational visitors to the area. Record 21.

1 Based on its identification of the impacts from the proposed mine on the conflicting
2 residential uses, the county’s choice of “program to achieve the Goal” was to “allow
3 conflicting uses fully” under OAR 660-016-0010(2) and consequently, not allow mining on
4 the site.

5 Petitioner’s thirteenth and fourteenth assignments of error argue that the county’s
6 findings regarding its program to achieve the Goal are inadequate because the county’s
7 ESEE analysis was based on improperly identified conflicting uses. For the reasons
8 explained above under our resolution of the eighth through twelfth and fifteenth through
9 seventeenth assignments of error, we agree with petitioner. The county’s program to achieve
10 the Goal is legally defective if the county’s ESEE analysis on which that program was based
11 is flawed due to its improper identification of conflicting uses. As we have already
12 explained, based on the current record, the county’s identification of conflicting uses and
13 ESEE analysis is defective. Therefore, we sustain the thirteenth and fourteenth assignments
14 of error in part, based on the errors identified above.

15 **EIGHTEENTH ASSIGNMENT OF ERROR**

16 Petitioner challenges the county’s denial of petitioner’s application for a conditional
17 use permit. The county’s denial of the conditional use permit was wholly derivative of its
18 decision to adopt a program to fully allow conflicting uses. For the reasons set forth above,
19 the county’s program to achieve the Goal is legally defective, based on the current record.
20 Therefore, we sustain the eighteenth assignment of error, based on the identified errors
21 above.

22 The county’s decision is remanded.