BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

DAVID SETNIKER and JOAN SETNIKER,
Petitioners,

and

RICKREALL COMMUNITY WATER ASSOCIATION,
MADJIC FARMS, INC., MICHAEL S. CALEF,
SUSAN D. CALEF and E.M. EASTERLY,
Intervenors-Petitioners,

vs.

POLK COUNTY,
Respondent,

and

CPM DEVELOPMENT CORPORATION,
Intervenor-Respondent.

LUBA No. 2010-057

FINAL OPINION
AND ORDER

Appeal from Polk County.

William H. Sherlock and Zack P. Mittge, Eugene, filed a petition for review and argued on behalf of petitioners. With them on the brief was Hutchinson, Cox, Coons DuPriest, Orr and Sherlock P.C.

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

E.M. Easterly, Salem, filed a petition for review and argued on his own behalf.

Corinne C. Sherton represented intervenors-petitioners Madjic Farms, Inc., Michael S. Calef and Susan D. Calef.

David Doyle, Dallas, filed a joint response brief and argued on behalf of respondent.

Wallace W. Lien, Salem, filed a joint response brief and argued on behalf of

intervenor-respondent.

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

REMANDED 02/18/2011

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 a county decision on remand approving comprehensive plan amendments and a zoning map amendment, and granting conditional use approval to allow an aggregate mine on agricultural land.

MOTION TO DISMISS INTERVENORS-PETITIONERS

Intervenors-petitioners Madjic Farms, Inc., Michael S. Calef and Susan D. Calef did not file a petition for review in this appeal. Citing OAR 660-010-0030(1), intervenor-respondent CPM Development Corp. (intervenor) moves to dismiss intervenors-petitioners from this appeal.[1] Counsel for intervenors-petitioners responds, and we agree, that the sanctions in OAR 660-010-0030(1) for failing to file a timely petition for review are directed at the petitioner, the party initiating the appeal by filing a notice of intent to appeal, not an intervenor-petitioner. The motion to dismiss intervenors-petitioners is denied.

REPLY BRIEF

Petitioners move to file a 14-page reply brief to respond to a number of waiver and other alleged "new matters" raised in the 80-page response brief.[2] Intervenor objects that the reply brief should be denied because it was not filed within the seven-day period specified by OAR 660-010-0039 (2010). Further, intervenor argues that if the reply brief is accepted, the request to exceed the five-page limit specified in the rule should be denied, because much of the reply brief is not limited to "new matters" raised in the response brief.

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[1] OAR 661-010-0030(1) provides, in relevant part:

> "* * * Failure to file a petition for review within the time required by this section, and any extensions of that time under OAR 661-010-0045(9) or OAR 661-010-0067(2), shall result in dismissal of the appeal and forfeiture of the filing fee and deposit for costs to the governing body. See OAR 661-010-0075(1)(c)."

[2] In a previous order, we allowed respondents to file an overlength consolidated response brief to respond to the three petitions for review, which together are over 100 pages long.

This appeal was filed on June 29, 2010, and is therefore governed by OAR chapter 661, Division 10 (2002), not the current rules that became effective July 1, 2010, which impose a new seven-day deadline to file a reply brief and delete the previous "as soon as possible" deadline. OAR 661-010-0039 (2002) provided:

> "A reply brief may not be filed unless permission is obtained from the Board. A request to file a reply brief shall be filed with the proposed reply brief together with four copies as soon as possible after respondent's brief is filed. A reply brief shall be confined solely to new matters raised in the respondent's brief. A reply brief shall not exceed five pages, exclusive of appendices, unless permission for a longer reply brief is given by the Board. * * *"

The proposed reply brief was filed on January 18, 2011, eleven days after the response brief was filed on January 7, 2011, and nine days before January 27, 2011, the date set for oral argument. While the reply brief may not have been filed "as soon as possible after the respondent's brief was filed," as required by OAR 661-010-0039 (2002), intervenor has not demonstrated that any delay prejudiced its or any other party's substantial rights, given that the reply brief was filed nine days before oral argument, which gave intervenor apparently ample opportunity to file a 20-page objection to the 14-page reply brief. OAR 661-010-0005 (technical violations of LUBA's rules not affecting the substantial rights of the parties shall not interfere in the review proceeding).

With respect to the overlength reply brief, we understand intervenor to argue that approximately eight pages of the 14-page reply brief do not concern "new matters" raised in the response brief, but are largely refinements of arguments already made in the petition for review. Intervenor argues that the request to file an overlength brief should be denied, and LUBA should confine its review only to the remainder of the reply brief that addresses "new matters," approximately six pages. However, in our view a large majority of the arguments in the reply brief are warranted as responding to "new matters," and with one exception discussed in the text below we allow and consider the entirety of the overlength brief.

We note that intervenor's 20-page objection to the reply brief includes *at least* five pages of substantive responses and surreplies that exceed the proper scope of an objection to the reply brief, and which effectively constitute a surreply brief on the merits, which is not authorized by our rules. Petitioners do not object to our consideration of such surreplies, but do object to an affidavit of a county planner attached to the objection and arguments based on the affidavit, contending that the attachment is evidence outside the record, and that intervenor has not filed a motion to take evidence outside the record under OAR 661-010-0045. The objection to the affidavit and associated argument is sustained. Because petitioners do not object to the remainder of the arguments in intervenor's 20-page objection, we shall consider those arguments to the extent they have a bearing on the issues in this appeal.

FACTS

The county's decision is on remand from LUBA. *Rickreall Community Water Assoc. v. Polk County*, 53 Or LUBA 76 (2006) (*Rickreall I*). In our opinion we described the proposed use as a sand and gravel extraction mine and processing facility, with a cement and asphalt processing plant, on a 124-acre portion of a 704-acre parcel zoned for exclusive farm use. Petitioners own property adjacent to the 704-acre parcel. Intervenor-petitioner Rickreall Community Water Association (RCWA) has two of its principal wells located on the Setnicker property, approximately 4,000 feet from the extraction site. Access to the property is via a proposed haul road connecting to Oregon State Highway 51, a north/south two-lane district highway, which intersects with east/west Oregon State Highway 22 a short distance north of the property. Hwy 22 is a five-lane statewide highway. The Hwy 51/22 intersection is controlled by stop signs on the northbound and southbound approaches only. Westbound truck traffic on Hwy 22 seeking to access the site via the haul road would utilize the middle, unsignalized turn lane on Hwy 22 to turn south onto Hwy 51 and travel the relatively short distance to the haul road's intersection with Hwy 51.

In 2001, intervenor filed an application for (1) a comprehensive plan text amendment to add the site to the county's inventory of significant mineral and aggregate resources, (2) a zoning map amendment to add a Mineral and Aggregate (MA) overlay zone to the mining site and surrounding area, totaling 336 acres, and (3) a conditional use application to mine the site. After various delays requested by the applicant, the county board of commissioners approved all three elements of the application in 2006. That approval was appealed to LUBA, and in the *Rickreall I* decision we remanded, after sustaining some assignments of error and denying others. As relevant here, the bases for remand included (1) failure to apply the county procedures and code standards applicable to the proposed comprehensive plan text amendment, and (2) failure to demonstrate compliance with the Transportation Planning Rule (TPR), at OAR 660-012-0060. The other bases for remand are no longer at issue.

On March 31, 2009, the county planning commission held an evidentiary hearing to address the correct code standards for the plan text amendment. The remaining bases for remand were reserved for action by the board of commissioners. On June 2, 2009, the planning commission recommended that the board of commissioners approve the requested plan text amendment. On March 10, 2010, the board of commissioners held an evidentiary hearing on all matters remanded by LUBA, and to consider several changes in the applications that were proposed by intervenor. On June 9, 2010, the board of commissioners issued an ordinance that again approved the three applications, based on additional findings and incorporated findings from the county's 2006 decision. This appeal followed.

FIRST ASSIGNMENT OF ERROR (Petitioners)

Petitioners challenge the county's findings of compliance with the TPR, alleging six sub-assignments of error. OAR 660-012-0060 requires local governments to evaluate impacts to existing or planned transportation facilities from uses allowed under amendments to an acknowledged comprehensive plan or land use regulations, including a zoning map amendment, to determine if these impacts will "significantly affect" a transportation facility.

Under OAR 660-012-0060(1)(c), a plan or land use regulation amendment "significantly affects" a transportation facility if it would:

> "As measured at the end of the planning period identified in the adopted transportation system plan:
>
> "(A) Allow land uses or levels of development that would result in types or levels of travel or access that are inconsistent with the functional classification of an existing or planned transportation facility;
>
> "(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."

Where the local government determines there will be a significant effect, the local government must adopt one or more of the measures described in OAR 660-012-0060(2) and/or OAR 660-012-0060(3), including adoption of measures or conditions of approval that demonstrate that allowed land uses are consistent with the function, capacity and performance standards of the affected facility, or that at least avoid further degradation to the performance of an already failing facility.[3]

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[3] OAR 660-012-0060(2) and (3) provide, in relevant part:

> "(2) 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.
>
> "* * * * *
>
> "(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

A. End of the Planning Period

As explained, OAR 660-012-0060(1)(c) requires that the county evaluate impacts "[a]s measured at the end of the planning period identified in the adopted transportation system plan[.]" When the county adopted its original decisions in 2006, the county's transportation system plan (TSP) had a planning horizon to the year 2020, and the original traffic studies accordingly projected impacts to the end of the 2020 planning period. In 2009, however, the county adopted a new TSP with a planning horizon that extends to 2030. Petitioners first argue that the county erred in failing to evaluate impacts of the proposed amendments on nearby transportation facilities through 2030, the planning horizon under the 2009 TSP.[4]

The county rejected that argument below, relying on the so-called "goal-post rule" at ORS 215.427(3)(a), which provides in relevant part that if the "county has a comprehensive plan and land use regulations acknowledged under ORS 197.251, approval or denial of the

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> amendment specify when measures or improvements provided pursuant to this subsection will be provided.
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> "(3) Notwithstanding sections (1) and (2) of this rule, a local government may approve an amendment that would significantly affect an existing transportation facility without assuring that the allowed land uses are consistent with the function, capacity and performance standards of the facility where:
>
> "(a) The facility is already performing below the minimum acceptable performance standard identified in the TSP or comprehensive plan on the date the amendment application is submitted;
>
> "(b) In the absence of the amendment, planned transportation facilities, improvements and services as set forth in section (4) of this rule would not be adequate to achieve consistency with the identified function, capacity or performance standard for that facility by the end of the planning period identified in the adopted TSP;
>
> "(c) Development resulting from the amendment will, at a minimum, mitigate the impacts of the amendment in a manner that avoids further degradation to the performance of the facility by the time of the development through one or a combination of transportation improvements or measures[.]"

[4] Many of the nearby transportation facilities are state highways, which are subject to the Oregon Highway Plan (OHP). The parties do not discuss the relevant planning horizon under the OHP and we consider the question no further.

application shall be based upon the standards and criteria that were applicable at the time the application was first submitted." Petitioners argue, however, that ORS 215.427(3) applies only to applications for permits, zone changes and limited land use decisions, not comprehensive plan amendments. *Rutigliano v. Jackson County*, 42 Or LUBA 565, 571 (2002). Further, petitioners argue that LUBA has held that the goal-post rule does not apply to a zone change or a permit decision that is dependent upon a contemporaneous comprehensive plan amendment. *Friends of the Applegate v. Josephine County*, 44 Or LUBA 786, 790 (2003); *Columbia Riverkeeper v. Clatsop County*, 58 Or LUBA 190, 208 (2009).

The county and intervenor-respondent (together, respondents) argue that the TPR does not apply to the comprehensive plan text amendment portion of the consolidated applications, because the text amendment simply adds the subject property to the county's inventory of significant aggregate sites, an act which itself authorizes no uses and generates no traffic. Respondents further argue that the zone change to add the MA overlay does not itself authorize any mining or generate any traffic. Only the conditional use permit actually authorizes mining and generates traffic, respondents argue, but the conditional use permit is not subject to the TPR and is protected under the goal-post rule, which locks in the standards and criteria in effect when the application was filed. In any event, respondents question whether the 2009 TSP and the changed planning horizon therein is properly viewed as a "standard" or "criteria." According to respondents, the applicable standard is the TPR, which has not changed. The 2009 TSP, in relevant part, simply changes the planning horizon from 2020 to 2030.

The TPR applies to amendments to an acknowledged comprehensive plan or land use regulations, and the latter category of amendment includes zoning map changes. Respondents may be correct that, under the county's plan and zoning scheme, the comprehensive plan text amendment to add the site to the inventory of significant sites does

not, in itself, trigger application of the TPR in any of the ways described in OAR 660-012-0060(1).[5] Under the county's scheme, it is the zone change to MA that appears to be the most proximate plan or land use regulation amendment to authorize a new use of the property, mining. The TPR clearly applies to the zone change.

Turning to the goal-post rule at ORS 215.427(3)(a), petitioners are correct that the goal-post rule does not operate to "freeze" standards that apply to a zone change application, if that zone change is consolidated with, and dependent upon, a comprehensive plan amendment. *Columbia Riverkeeper*, 58 Or LUBA at 208. Here, the zone change application was consolidated with, and clearly is dependent upon, the comprehensive plan amendments necessary under the Goal 5 rule. Only sites deemed a significant mining resource site under the Goal 5 process can be zoned MA. Polk County Zoning Ordinance (PCZO) 174.110. Therefore, the goal-post rule does not apply to the zone change application, and any "standards and criteria" applicable to the proposed plan/zone change amendments that were adopted after the consolidated applications were filed must be applied to approve or deny the plan/zone change applications.

Under OAR 660-012-0060(1)(c), the planning period to be applied plays an important role in determining whether the proposed amendments "significantly affect" a transportation facility. The 2009 TSP changed the relevant planning period from 2020 to 2030, for purposes of the TPR, and was the adopted and acknowledged TSP in 2010 when the county commissioners conducted its proceedings on remand to address, among other things, the issue of whether the proposal complies with the TPR. Accordingly, in applying OAR 660-012-0060(1)(c), the county was required to determine whether the plan and zoning

[5] As discussed below, the Goal 5 rules at OAR 660-016-0010 and OAR 660-023-0180 both require a local government to develop a program to achieve the goal with respect to a particular resource site, which embodies the local government's decision to protect the resource site, allowing conflicting uses fully, or limit conflicting uses. Under both Goal 5 rules, plan and regulation amendments may be necessary to implement the program beyond merely adding the site to the inventory of significant resource sites. If so, such amendments could easily require evaluation under the TPR.

amendments significantly affect transportation facilities "[a]s measured at the end of the planning period identified in the adopted transportation system plan," *i.e.* the 2009 TSP, which has a planning period of 2030. The county erred in failing to do so. This subassignment of error is sustained.

B. Failure to Update the Traffic Study

OAR 660-012-0060(1) in general requires the county consider impacts on existing and planned facilities, and as noted where OAR 660-012-0060(1)(c) applies it requires that the county evaluate impacts on the performance of existing and planned facilities through the end of the planning period. Typically, this is accomplished by conducting a traffic study of existing conditions, projecting growth in background traffic to the end of the planning period, and then adding the net new traffic generated by the uses allowed under the proposed amendments, and evaluating the resulting projected traffic against the applicable functional classification or performance standard for the affected facilities.

We understand petitioners to argue that implicit in OAR 660-012-0060(1)(c) is the requirement to base the projection of background traffic to the end of the planning period on a study of the traffic conditions that exist around the time the proposed amendment is adopted. In the present case, petitioners argue, the original traffic study was conducted in 2001, and was supplemented by additional studies in late 2004 and early 2005, more than five years prior to the county's decision on remand. It is inconsistent with OAR 660-012-0060(1)(c), petitioners argue, to rely on such stale data as the basis to project impacts to the end of the planning period, and the decision should be remanded for the county to require an updated study of traffic conditions.

In addition, petitioners argue that relying on stale traffic data is inconsistent with the county's own road standards, which require that a transportation impact analysis include existing traffic volumes "within the previous 12 months" and accident data "for the most

recent three-year period." Petitioners contend that the traffic study used in the present case relied on accident data from the period 1995 to 2000.

The county rejected these arguments below, finding based on the goal-post rule that it is sufficient to rely on data gathered within 12 months of filing the application, and that there is no requirement under its road standards manual to require a new traffic study if the county's proceedings on the application happen to take longer than 12 months.[6]

As far as the TPR is concerned, the TPR does not explicitly require a traffic study or transportation impact analysis, although we agree with petitioners that where an amendment allows uses that potentially generate more traffic than allowed under the prior plan or zone designation, as in the present case, then as a practical necessity some kind of traffic study may be necessary to evaluate whether proposed amendments "significantly affect" a transportation facility within the meaning of OAR 660-012-0060(1)(c).

However, we do not agree with petitioners that a traffic study relied upon for purposes of OAR 660-012-0060(1)(c) must necessarily be updated if the proceedings on the application continue for a lengthy period of time. The focus of OAR 660-012-0060(1)(c) is on the "end of the planning period," which generally requires collecting data on existing traffic conditions at some point in time, and then projecting the growth of that base background traffic to the end of the planning period, based on reasonable assumptions about growth under acknowledged plan and zoning designations. As long as the assumed growth rates are reasonable, and there have been no substantive changes to the acknowledged plan and zoning designations in the area during the interval between the traffic study and the final decision that would render the initial traffic study unreliable, we do not see that it makes

[6] Initially, respondents move to strike all references to the county's road manual, and the excerpts of the manual that are attached to the petition for review, as being outside the record. Petitioners reply that the manual was adopted by ordinance, and is subject to official notice under Oregon Evidence Code 202. We agree with the petitioners that the road manual is subject to official notice and deny respondents' motion to strike.

much difference for purposes of OAR 660-012-0060(1)(c) whether the base traffic data represents conditions existing in 2005 or conditions existing in 2010. In the present case, petitioners do not question the assumed growth rates, or identify any intervening plan or zoning amendments in the area that would affect the reliability of the projections from 2005 to the end of the planning period.

With respect to the county's road manual, the county interpreted the road manual to require only that existing traffic volumes be measured within the 12 months prior to the application, and accident data be gathered within three years prior to the application. Respondents argue that that interpretation is consistent with the language of the road manual and must be affirmed under ORS 197.829(1)(a). We agree with respondents. The portions of the road manual cited to us do not specify when the 12 month or three-year period begins or ends, or expressly require that the traffic study be updated if the application process happens to extend longer than the relevant periods. We cannot say that the board of commissioners' interpretation of the road manual's provisions is inconsistent with the express language of those provisions. This subassignment of error is denied.

C. Impacts on Affected Transportation Facilities

Petitioners next argue that the county erred in evaluating impacts on affected transportation facilities, in three respects.

1. Hwy 51/ 22 Intersection

As previously noted, access to the property is via a proposed haul road connecting to Hwy 51, a two-lane district highway, which intersects with Hwy 22 several miles north of the property. The Hwy 51/22 intersection is controlled by stop signs at the northbound and southbound approaches. The traffic study found that the intersection is currently failing during peak hours between 4:00 and 6:00 p.m. for left turns southbound onto Hwy 51 from Hwy 22. Under projected growth in background traffic, by 2020 failure of this turning

movement would worsen to include the a.m. peak hour and then extend to the "off-peak" hour of 3:00 to 4:00 p.m. Record 10-233.

Because there are as yet no funded planned improvements for the intersection during the planning period, the county on remand relied on two conditions of approval to ensure that traffic allowed under the plan/zone amendments would not worsen or further degrade the performance of the intersection. OAR 660-012-0060(3)(c).[7] The two conditions, an alternate route and an entry gate, are discussed in detail below, but for present purposes it suffices to note that both conditions expressly operate only during the p.m. peak hours of 4:00 to 6:00 p.m. Petitioners argue under this subassignment of error that the county erred in failing to require similar mitigation or conditions during the a.m. peak hour and the extended off-peak hour of 3:00 to 4:00 p.m.

Respondents argue that on remand the county incorporated by reference findings in its 2006 decision, at Record 06-138, concluding that the intersection operates acceptably at all hours except the 4:00 to 6:00 p.m. peak hours. However, that incorporated finding addresses only current conditions, and does not evaluate conditions at the end of the 2020 planning period (much less the now applicable 2030 planning period). All evidence we are cited to in the record indicates that by 2020 the southbound left turn movement will also be failing at other hours. We agree with petitioners that the county erred in failing to address the impacts of development on that turning movement at other hours and impose any necessary mitigation or conditions of approval. This sub-subassignment of error is sustained.

2. State Farm Road

As discussed below, part of the proposal is to ship raw material to the subject property from a nearby mining site also owned by intervenor called Hayden Island for processing. The route from Hayden Island to the subject property is via easements except for

[7] *See* n 3.

a short stretch along State Farm Road, which is a public road that formerly connected to Highway 22, but is now disconnected to any other public road, due to removal of two condemned bridges that are not likely to be replaced in the future. Petitioners argue that the county erred in failing to address impacts of traffic between the two sites on State Farm Road.

Respondents argue that this issue could have been raised in the 2006 appeal, but was not and is therefore waived, under *Beck v. City of Tillamook*, 313 Or 148, 153, 831 P2d 678 (2002). Petitioners dispute that the issue could have been raised, but we need not resolve that dispute, because we agree with respondents that petitioners have not demonstrated that the county was required to evaluate impacts on State Farm Road. As we understand it, State Farm Road is a short dead-end road that, due to bridge removal, no longer connects to or has any intersections with other public roads. The county found that "[r]ealistically, there is no traffic on State Farm Road[.]" Record 10-082. A reasonable person could conclude in these circumstances that the TPR does not require an evaluation of traffic impacts on a facility like State Farm Road. This sub-subassignment of error is denied.

3. Hayden Island Processing

Petitioners argue that the traffic study did not consider the extra traffic generated by trips on Hwy 51 or Hwy 22 that result from transporting Hayden Island aggregate after it is processed on the subject property. Instead, petitioners argue, the traffic study considered only traffic generated by trips generated by mining and processing rock from the subject property.

Respondents argue this issue could have been raised in the appeal of the 2006 decision and is therefore waived, and also argue that the traffic study and its supplements properly took into account trips associated with transporting processed Hayden Island aggregate. Petitioners dispute that the issue could have been raised, and again we do not resolve that dispute. The county adopted findings on remand concluding in essence that

there would be no "extra" trips associated with transporting processed Hayden Island aggregate from the site. Record 10-081-082. Petitioners do not challenge that finding. As far as we can tell, the traffic study and its supplements assumed certain traffic volumes based on transporting processed aggregate that was mined from both sites. Petitioners have not demonstrated otherwise, or that transporting processed Hayden Island aggregate represents "extra" trips that are not accounted for in the traffic study. This sub-subassignment of error is denied.

Sub-assignment of error C is sustained, in part.

D. Reliance on Conceptual Interchange to Hwy 22/51

One basis for our remand of the 2006 decision was the county's reliance on conceptual, unfunded improvements to the Hwy 22/ 51 intersection to eliminate current and projected deficiencies. As explained above, on remand, the county instead chose to rely on two conditions, an alternate route and a gate, both of which conditions are operative only during the 4:00 to 6:00 p.m. peak hours. Intervenor's traffic consultant noted that if the Hwy 22/51 intersection is not improved, then there would be additional impacts at other times by the end of the 2020 planning period. We understand petitioners to argue that the county erred in declining to address or mitigate those non-peak hour failures, by relying on the mere hope that the Hwy 22/51 intersection would be improved before the end of the planning period.

This argument is a variant of the one addressed above. As explained, the county erred in failing to address non-peak hour impacts on the Hwy 22/51 intersection by the end of the planning period. The county's failure to do so does not constitute reliance on unplanned improvements to the intersection. This sub-assignment of error provides no additional basis for reversal or remand, and is denied.

E. Mitigation of Impacts on the Hwy 51/22 intersection

As noted, the county imposed two conditions of approval intended to ensure that traffic from the proposed development would not worsen or degrade further certain turning movements in the Hwy 51/22 intersection. The first is to prohibit intervenor's employees and contract haulers traveling west on Hwy 22 from turning south onto Hwy 51 at the intersection during the 4:00 to 6:00 p.m. period, and instead require haulers to use an eight-mile long alternate route that continues west to Hwy 99W, south to the 99W/Clows Corner or 99W/Hoffman Road intersections, east to Hwy 51, and then north on Hwy 51 to the subject property. The second condition is intended to discourage any haulers who violate the first condition and approach the site access southbound via the Hwy 51/22 intersection, by requiring a gate or chain be placed across the entrance between 4:00 and 6:00 p.m. to block the entrance onto the haul road that would normally be used by southbound traffic on Hwy 51. The gate or chain would not physically prevent entry to the site from a determined southbound hauler, but it would make entry more difficult.

Petitioners argue that both conditions are inadequate to ensure that development impacts will not worsen or further degrade the performance of the Hwy 51/22 intersection through the end of the planning period. For the reasons set out above, we partially agree. As explained, the traffic study and supplements did not evaluate impacts to the end of the applicable planning period, and the county failed to address or mitigate impacts on projected-to-fail turning movements outside the 4:00 to 6:00 p.m. peak hour.

That said, we agree with respondents that intervenor has the authority to require its employees and contract haulers to avoid the left turn movement onto Hwy 51 during any particular part of the day, and petitioners have not demonstrated that the condition of approval imposed here requiring intervenor to exercise that authority is likely to be ineffective. Petitioners argument to the contrary is based on *K&B Recycling, Inc. v. Clackamas County*, 41 Or LUBA 29, 43-44 (2001). That case involved approval of a

recycling facility, and a condition that left it up to the applicant to craft means to persuade private contract and noncontract haulers bringing recyclable material to the site to avoid a failing intersection by taking a much longer alternative route. We found that condition inadequate and unenforceable. The present circumstances are significantly different, not least in that the affected turning movements appear to involve empty home-bound trucks, where there is presumably less commercial imperative for short hauling distances. In addition, whether and how aggregate is hauled *from* the processing site is completely within intervenor's control, whereas in *K&B Recycling, Inc.* the applicant had little control over whether and how private haulers brought recycling material *to* the facility. It appeared that the most the applicant could do in some circumstances was to refuse to accept a noncompliant delivery and send the hauler off to a competing recycling facility, but that option seemed so contrary to the applicant's economic interests that we concluded no reasonable person could rely on the condition to prevent impacts on the failing intersection.

Petitioners argue next that the re-routing condition does not constitute sufficient or permissible mitigation under either OAR 660-012-0060(2)(e) or OAR 660-012-0060(3). *See* n 3. According to petitioners, OAR 660-012-0060(2)(e) allows mitigation provided as a "condition of development" only if the mitigation assures that the allowed land uses are "consistent with the identified function, capacity and performance standards" of the transportation facility. Petitioners argue that the re-routing condition will at best offset impacts of the proposed development on the Hwy 51/22 intersection, but the intersection will nonetheless continue to fail due to existing and background traffic, and therefore the proposed mitigation is not sufficient under OAR 660-012-0060(2)(e). In effect, petitioners argue that the county can only mitigate in these circumstances via OAR 660-012-0060(3), which expressly authorizes approving an amendment "without assuring that the allowed land uses are consistent with the function, capacity and performance standards of the facility" in specified circumstances. *See* n 3. However, petitioners argue, one of the required

circumstances is that the facility is already performing below the minimum acceptable performance standard identified in the TSP or comprehensive plan "on the date the amendment application is submitted." Petitioners contend that in 2001 when the application was first submitted the Hwy 51/22 intersection was not performing below the minimum acceptable performance standard, although by the time traffic studies were made in 2004 and 2005, it apparently was failing. Because no mitigation is authorized under either OAR 660-012-0060(2)(e) or (3), we understand petitioners to argue, compliance with the TPR is impossible and the county must deny the application.

We disagree with petitioners that there is some kind of gap between OAR 660-012-0060(2)(e) and (3), such that no mitigation or condition of approval to mitigate impacts is authorized or possible in the present case. Where traffic from uses allowed by a proposed amendment will significantly affect a facility that is or will be failing within the relevant planning period, one or both provisions will apply.[8] Where petitioners go astray is in their apparent understanding that OAR 660-012-0060(2)(e) requires the applicant to provide "other measures as a condition of development" sufficient to mitigate even failures caused solely by growth in background traffic. The basic commandment of OAR 660-012-0060(1) and (2) is to ensure that the *proposed amendment* is "consistent with" the function, capacity and performance standards of transportation facilities. If conditions of approval are sufficient to completely mitigate or eliminate impacts from the proposed amendment on a that is facility projected to fail, then the amendments will not "worsen" the projected failure for purposes of OAR 660-012-0060(1)(c) and the TPR is satisfied, notwithstanding that the facility is failing or will still fail by the end of the planning period due to growth in

[8] Both provisions could apply to the same facility, for example if on the date of the application one turning movement in an intersection is failing, but by the end of the planning period additional movements are projected to fail, and both failures would be worsened by the amendment. Moreover, we see no reason why a single mitigation or improvement under either OAR 660-012-0060(2)(e) or (3), or both, could not be employed to rectify both sets of impacts.

background traffic. In short, OAR 660-012-0060(2)(e) and (3) work together to provide means to ensure that the proposed amendment is "consistent with" the function, capacity and performance standards of the facility, and the two provisions are neither mutually exclusive nor subject to some kind of gap in their coverage.

Finally, petitioners argue with respect to the condition requiring installation of a gate to close the site entrance to traffic southbound from the Hwy 51/22 intersection during the p.m. peak hours that the condition is ineffective because a determined hauler could find a way around the gate, for example by driving past the entrance lane open to southbound traffic on Hwy 51, making a U-turn, and turning in the unblocked entrance lane for northbound traffic. While petitioners are correct that the gate on the entrance lane for southbound traffic on Hwy 51 could be thus avoided, its purpose is not to independently prevent haulers from using the Hwy 51/22 left turn lane during the p.m. peak hours, but to discourage haulers from doing so, in concert with other measures. Those measures, considered together, seem reasonable and adequate means to ensure that employees and contract haulers will not use failing movements of the Hwy 51/22 intersection during particular times of the day. As explained above, remand is necessary with respect to the Hwy 51/22 intersection for other reasons, but petitioners' challenges to the two conditions of approval provide no additional basis for reversal or remand, and are denied. This sub-assignment of error is denied.

F. Highway 99W/Clow Corner Intersection

Fifteen percent of the traffic generated by the proposed mine will pass through the unsignalized Hwy 99W/Clow Corner Road intersection several miles south and west of the property. The 2007 supplement concluded that with growth in background traffic by 2020 the eastbound and westbound approaches to Hwy 99W on Clow Corner Road would fail during both the a.m. and p.m. peak hours. The 2007 supplement also indicated that, based on projected background growth, it is likely that signal warrants will be met before 2020 and the

intersection will be signalized before then. The 2007 supplement assumed that the intersection would be signalized by 2020. Record 10-234. With that assumption, the study found that the intersection would operate within its performance measurement at the end of the 2020 planning period. Record 10-241.

Petitioners argue that the county erred in relying on unplanned, unfunded signalization of the 99W/Clow Corner Road intersection to conclude that the proposed development will not significantly affect the intersection within the meaning of OAR 660-012-0060(1)(c). Respondents argue that this issue could have been raised in the appeal of the 2006 decision, and the issue is therefore waived under *Beck*. Petitioners reply, and we agree, that the issue is not waived. As far as we can tell, the 2007 supplement submitted on remand was the first time the traffic study projected impacts to the intersection at the end of the 2020 planning period, and the first time the study relied on signalization to avoid the conclusion that the projected impacts would not worsen projected failure of the intersection during the a.m. and p.m. peak hours. Because the relevant evidence and the county's approach to complying with the TPR changed so significantly on remand, we do not see that petitioners could have reasonably challenged the county's reliance on signalization during the 2006 appeal.

On the merits, we generally agree with petitioners that for purposes of OAR 660-012-0060(1)(c) the county cannot rely on improvements that are not planned and funded, or otherwise are not provided for under OAR 660-012-0060(4), to support a conclusion that impacts of the proposed development will not worsen a facility projected to fail at the end of the relevant planning period.[9] Aside from the unfortunate problem that the applicable

[9] Respondents suggest that the only relevant impacts involve p.m. peak hour impacts of only one or two trucks re-routed from the Hwy 51/HWY 22 intersection that turn left from Hwy 99W onto Clow Corner Road toward the mining site. However, as we understand the evidence, the proposed development will worsen failing eastbound and westbound approaches by 2020 in both the a.m. and p.m. peak hours, and moreover those failures appear to involve different turning movements than those used by the re-routed trucks. Record 10-230, 10-239-40.

planning period is now 2030, remand is necessary for the county to evaluate impacts on the 99W/Clow Corner Road intersection without assuming signalization or other improvements that do not have the funding or other commitments that are required by OAR 660-012-0060(4) before such transportation facilities or improvements can be considered "planned facilities or improvements."[10]

Relatedly, petitioners argue that the county erred in concluding that any projected deficiencies in the 99W/Clows Corner road intersection are not a problem, because any re-routed p.m. peak hour truck traffic to the site can simply drive through the intersection and reach the site via a longer alternative route using the intersection of Highway 99W and Hoffman Road, south of the 99W/Clow Corner intersection. According to petitioners, the 2007 supplement did not evaluate the 99W/Hoffman Road intersection. Respondents argue that the 2007 traffic supplement did evaluate that intersection, and concluded that the proposed amendment would not "significantly affect" the intersection as measured at the end of the 2020 planning period. Record 10-241.

Respondents are correct that the 2007 supplement addressed impacts on the 99W/Hoffman Road intersection through 2020. As noted above, however, petitioners argue and we agree that the traffic study must evaluate impacts at the end of the applicable planning period, which is 2030. Based on the 2007 supplement, it appears that the 99W/Hoffman Road intersection is projected in 2020 to be at or near capacity during the p.m. peak hour, and it may be the case that a the proposal will have a significant effect on the 99W/Hoffman Road intersection if impacts are projected to 2030. Further, we agree with petitioners that the county's finding that any unmitigated impacts on the 99W/Clows Corner

[10] Outside interstate interchange areas, OAR 660-012-0060(4)(b) provides that for purposes of determining whether a proposal has a significant affect that "planned facilities, improvements and services" include only facilities and improvements that are funded or have a funding mechanism in place, or, in the case of improvements to state highways, "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."

Road intersection are not a problem for purposes of OAR 660-012-0060—because re-routed trucks could drive south through that intersection and reach the subject property via the alternate 99W/Hoffman Road intersection—is not supported by substantial evidence. As noted, the relevant impacts on the 99W/Clows Corner Road intersection do not appear to involve re-routed southbound trucks on Hwy 99W turning east onto Clows Corner Road during the p.m. peak hour. *See* n 9. On remand, the county should take up that question and the question of impacts on the Hwy 99W/Hoffman Road intersection through 2030. This subassignment of error is sustained, in part.

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

SECOND ASSIGNMENT OF ERROR (Petitioners)

Petitioners argue that the county erred in concluding that the subject site is a "significant" resource site under PCZO 136.050(N), which limits a finding of significance on land with high-quality farm soils to sites that exceed 2 million tons of resource and 25 feet of depth. PCZO 136.050(N) apparently implements a similar requirement at OAR 660-023-0180(3) that was promulgated in 2004. According to petitioners, the record does not support a finding that the depth and quantity of aggregate on the site satisfy PCZO 136.050(N).

Respondents argue, and we agree, that this issue could have been raised in the 2006 appeal, but was not, and therefore cannot be raised on appeal of the county's decision on remand. *Beck*, 313 Or at 154. PCZO 136.050(N) was adopted by ordinance in 2004, and petitioners offer no reason why the issue of compliance with PCZO 136.050(N) could not have been raised in the appeal of the 2006 decision. Petitioners argue that the county failed to send to the Department of Land Conservation and Development (DLCD) a notice of adoption for the 2004 ordinance, and therefore PCZO 136.050(N) is not "an acknowledged land use regulation governing the proposal." Reply Brief 8. The county disputes that it failed to mail the notice of adoption to DLCD, but we need not resolve that dispute. Even assuming petitioners are correct on that point, petitioners do not explain why any failure to

send notice to DLCD means the issue of compliance with PCZO 136.050(N), or compliance with the underlying Goal 5 rule requirement it implements, could not have been raised in the 2006 appeal. This issue is waived.[11]

The second assignment of error (Petitioners) is denied.

THIRD ASSIGNMENT OF ERROR (Petitioners)

Petitioners argue that the county committed procedural error in accepting new evidence as part of the applicant's final written argument, without allowing other parties an opportunity to address that new evidence, citing three examples at Record 10-112. Respondents argue that petitioners have not demonstrated that the alleged new evidence is indeed new evidence that was not already included in the record.

ORS 197.763(6)(e) provides that the applicant's final written argument "shall not include any new evidence." "Evidence" is defined as "facts, documents, data or other information offered to demonstrate compliance with or noncompliance with the standards believed by the proponent to be relevant to the decision." ORS 197.763(9)(b). During the open record period, petitioners submitted six mining permits issued by a state agency for mining sites within the county, in support of their argument that there is no need for an additional aggregate mining site in the county, an issue that the parties seem to agree is relevant under PCZO 115.060(C), discussed below. In the final written argument, intervenor's attorney responded to that evidence by discussing each of the mining sites that petitioners argued satisfied the county's need for aggregate, arguing that these sites have various limitations such as lack of capacity, and asserting that the evidentiary support for the existence of these limitations is based on "documents already in this record[.]" Record 10-

[11] The county adopted alternative findings of compliance with PCZO 136.050(N), and petitioners challenge the evidentiary support for those findings, which are based on a sample and estimates by intervenor's engineer. We need not address those evidentiary challenges.

111. The county's findings includes a mostly verbatim recitation of intervenor's final written argument on this issue. Record 10-077, 078.

In the petition for review, petitioners argue that intervenor's discussion of three of the mining sites includes new evidence not in the record. Petition for Review 42. In the response brief, respondents argue that almost all of the information in the discussion was based on the county's inventory of significant resource sites, a copy of which is in the record. Record 10-1220, 1221. In their reply brief, petitioners dispute that assertion, citing examples of information regarding a number of mining sites that petitioners allege are not supported by the inventory in the record. In their objection to the reply brief, respondents identify other record cites, besides the inventory, for much of the disputed information.

Based on our review of the pleadings and record, all of the information cited in the final written argument regarding the three disputed mining sites that petitioners allege is "new evidence" not in the record is in fact supported by information that was already in the record, or falls within the category of permissible commentary on evidence in the record. In the reply brief, petitioners cite to additional examples of alleged new evidence, involving mining sites other than the three sites raised in the petition for review. However, no issues were raised in the petition for review regarding those other sites and such new issues cannot be raised in the reply brief. In this circumstance, it is petitioners' obligation to adequately identify the alleged new evidence in the petition for review, demonstrate that it constitutes new evidence not in the record, and further demonstrate that there is a substantial reason to believe the alleged new evidence had some effect on the ultimate decision. *City of Damascus v. Metro*, 51 Or LUBA 210, 228 (2006). Petitioners have not met that obligation.

The third assignment of error (Petitioners) is denied.

FOURTH ASSIGNMENT OF ERROR (Petitioners)

Petitioners contend that the county erred in allowing aggregate extracted from the nearby Hayden Island site to be processed on the subject site, contrary to ORS 517.750(11) and PCZO 174.050.

ORS 517.750(11) defines the term "processing" for purposes of a statutory section regarding reclamation of mining areas to include "crushing, washing, milling and screening as well as the batching and blending of mineral aggregate into asphalt and portland cement concrete located within the operating permit area." PCZO 174.050(C) authorizes "processing" within the MA extraction area, including "crushing, washing, milling, screening, sizing, batching of portland cement," among other things. Petitioners argue that under the statute and code any processing must be limited to minerals extracted from the mining site, and cannot include minerals extracted from other sites.

Contrary to petitioners' argument, ORS 517.750(11) definition of "processing" does not include any express or implied limitation on processing to materials that are extracted on site.

With respect to PCZO 174.050(C), the county similarly interpreted that provision to allow processing without limitation as to the source of the materials processed. Record 10-075. Petitioners argue that the county's interpretation ignores context provided by PCZO 174.050(G), which authorizes within the MA extraction area "[s]ale of products extracted and processed on-site from a mineral and aggregate operation." According to petitioners, the county found that Hayden Island aggregate processed on the mining site will be "ultimately sold to the public." Record 10-080. Because PCZO 174.060(G) authorizes sale only of aggregate that is extracted and processed on-site, petitioners argue, the code impliedly prohibits on-site processing of aggregate extracted off-site.

Respondents argue that PCZO 174.050(G) authorizes as a permitted use in the MA zone direct commercial sales from the property, limited to material extracted and processed

on-site, but PCZO 174.050(G) does not impliedly limit processing of material from other sites, if that material is transported off-site and ultimately sold to a customer.

The county did not address the meaning of PCZO 174.050(G), but we agree with respondents that it authorizes a limited commercial use within the MA zone, but is probably not intended to proscribe on-site processing of material that was extracted off-site, where that material is then sold to customers off-site. As far as we are informed, the applicant did not request and the county did not authorize under PCZO 174.050(G) direct commercial sales of aggregate on the property, of whatever origin.

The fourth assignment of error (Petitioners) is denied.

FIFTH ASSIGNMENT OF ERROR (Petitioners)

PCZO 115.060(C) requires a finding that the proposed plan amendment is "in the public interest and will be of general public benefit[.]" The county found that it is in the public interest and to the public benefit to place the subject site on the county's plan inventory and allow for development of an additional source for extracting and processing aggregate in the county, citing limitations affecting a number of other mining sites already on the inventory, including the nearby Hayden Island site owned by applicant. Record 10-077, 080.

Petitioners argue that the county failed to weigh against any public benefit from an additional mining and processing site in the county the adverse impacts of the mine, including loss of agricultural land, environmental consequences and transportation impacts. However, petitioners do not explain why the "public interest/public benefit" standard must be interpreted to require a weighing or balancing of positive and negative impacts. The cited adverse impacts are addressed under other applicable standards, including the TPR and the analysis of economic, social, environmental and energy (ESEE) consequences. While the county presumably could have interpreted PCZO 115.060(C) to require a balancing of positive against negative impacts, based on its three pages of findings the county clearly

believes that the "public interest/public benefit" standard is concerned solely with whether there is a public need for the use allowed under plan amendment, in this case a long-term need for an additional aggregate supply in the county. Petitioners have not demonstrated that that view of PCZO 115.060(C) is inconsistent with its express language or otherwise reversible.

Finally, petitioners challenge the evidentiary basis for the county's conclusion that extracting and processing at the Hayden Island site is limited due to seasonal flooding and lack of access. Petitioners suggest that any challenges caused by seasonal flooding and lack of access could be overcome. However, even if that is the case, petitioners do not explain why greater productivity from the Hayden Island site would necessarily undermine the evidentiary support for the county's finding that establishing an additional extraction and processing site is in the public interest and to the public benefit.

The fifth assignment of error (Petitioners) is denied.

FIRST ASSIGNMENT OF ERROR (RCWA)

In the 2006 proceedings, the county evaluated the ESEE consequences of fully protecting the resource site from conflicting uses, *i.e.*, to allow mining, to fully protect conflicting uses, or to limit conflicting uses to some extent and allow mining to some extent, apparently pursuant to the old Goal 5 rule at OAR 660-012-0010.[12] OAR 660-012-0010 is part of the original Goal 5 administrative rule. The original Goal 5 rule has been superseded in most instances by the new Goal 5 rule, at OAR Chapter 660, division 023, which was adopted in 1996. OAR 660-023-0250(1) and (2).

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[12] OAR 660-016-0010(3) provides, in relevant part:

> "* * * 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. * * * *Reasons which support this decision must be presented in the comprehensive plan*, and plan and zone designations must be consistent with this decision." (Emphasis added.)

Based on its ESEE analysis, the county chose in 2006 to limit conflicting uses to some extent and allow mining to some extent. In the ordinance adopting its 2006 decision, the county adopted its ESEE analysis as a comprehensive plan text amendment, possibly because OAR 660-016-0010(3) requires that "[r]easons which support this decision must be presented in the comprehensive plan[.]" In *Rickreall I*, we rejected a challenge to the adequacy of the ESEE analysis under OAR 660-016-0005 and 660-016-0010, but no issue was raised regarding its adoption into the comprehensive plan.

On remand, the county re-adopted most of its findings from the 2006 decision, but for some reason the ordinance adopted on remand did not amend the comprehensive plan to include the ESEE analysis or any other document as the "reasons" supporting the decision, as did the 2006 ordinance. RCWA argues that the county's failure to amend its comprehensive plan to include a "reasons" statement is inconsistent with OAR 660-016-0010(3).

Respondents argue that the old Goal 5 rule is implemented by PCZO chapter 174, the provisions governing the MA overlay zone, and PCZO chapter 174 does not include any express requirement that a "reasons" statement supporting the decision be included in the comprehensive plan. Citing OAR 660-023-0180(9), which is part of the new Goal 5 rule, respondents argue that because PCZO chapter 174 was acknowledged subsequent to 1989 to comply with Goal 5 and the old Goal 5 rule, that PCZO chapter 174 exclusively governs the post-acknowledgement plan amendment (PAPA) application, and therefore the OAR 660-016-0010(3) "reasons statement" requirement does not apply.[13]

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[13] Respondents actually cite OAR 660-023-0180(7), but subsection (7) has no apparent relevance to this question. Respondents later clarify that they are citing an earlier version of OAR 660-023-0180(9), which was codified in 2001 in subsection (7), under their theory (rejected above) that the goal post rule freezes the standards that govern the consolidated applications as of 2001. Response Brief 72 n 58. OAR 660-023-0180(9) provides:

> "Local governments shall amend the comprehensive plan and land use regulations to include procedures and requirements consistent with this rule for the consideration of PAPAs concerning aggregate resources. Until such local regulations are adopted, the procedures and requirements of this rule shall be directly applied to local government consideration of a

We are not sure we understand the positions of either RCWA or respondents. For starters, it is not clear to us that PCZO chapter 174 constitutes a "local plan" that contains "specific criteria regarding the consideration of a PAPA proposing to add a site to the list of significant aggregate sites" within the meaning of OAR 660-023-0180(9). Aside from the problem that it is a zoning chapter and not a "local plan," PCZO Chapter 174 seems mostly concerned with authorizing mining under the MA overlay zone. But even if PCZO chapter 174 is a "local plan" within the meaning of OAR 660-023-0180(9), the rule exempts only direct application of "this rule," *i.e.* the new Goal 5 rule, in specified circumstances. It says nothing about application of Goal 5 itself or the old Goal 5 rule. Although the old Goal 5 rule no longer directly applies to PAPA applications filed after 1996, as explained below in addressing intervenor-petitioner's eighth assignment of error, the county took the position in *Rickreall I* that the conflicting use and ESEE analysis was developed under OAR 660-016-0005 and 660-016-0010, and LUBA rejected a challenge to the ESEE analysis based on the old Goal 5 rule. 53 Or LUBA at 86-87. In short, during the 2006 proceedings the county appears to have directly applied the old Goal 5 rule in determining whether to allow mining and limit conflicting uses, pursuant to the ESEE analysis and program to achieve the goal developed under OAR 660-016-0005 and 660-016-0010. That is consistent with the county's action in 2006 to amend the comprehensive plan to include the ESEE analysis, apparently as the reasons statement required by OAR 660-016-0010(3). No objection was raised during the 2006 proceedings regarding the county's application of the old Goal 5 rule,

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PAPA concerning mining authorization, *unless the local plan contains specific criteria regarding the consideration of a PAPA proposing to add a site to the list of significant aggregate sites*, provided:

"(a) Such regulations were acknowledged subsequent to 1989; and

"(b) Such regulations shall be amended to conform to the requirements of this rule at the next scheduled periodic review after September 1, 1996, except as provided under OAR 660-023-0250(7)." (Emphasis added.)

and under *Beck* the county is arguably constrained against now taking the contrary position that OAR 660-016-0010 does not apply.

Respondents suggest in their brief that the county's failure to amend the plan to include the ESEE analysis as it did in 2006 was an oversight rather than a deliberate choice by the county. Response Brief 78. If that is the case, and because this decision must be remanded in any event, the simplest solution to this conundrum is for the county on remand to again amend the comprehensive plan to include the ESEE analysis, as it did in 2006.

The first assignment of error (RCWA) is sustained.

SECOND ASSIGNMENT OF ERROR (RCWA)

RCWA challenges the conditional use permit authorizing mining of the subject property under the MA overlay zone, on the grounds that the permit improperly authorizes activities other than mining, such as truck parking, fueling and maintenance. Respondents argue, and we agree, that this issue could have been raised in the 2006 appeal, but was not, and is therefore waived under *Beck*.

In anticipation of that challenge, RCWA argues that *Beck* applies only to remand proceedings on the *same* application, and because the county initiated a different proceeding to apply the plan amendment criteria at PCZO 115.060 instead of the plan amendment criteria in PCZO 115.050, the proceedings on remand concerned a *different* application. We disagree. Just because on remand the county applied a different set of plan amendment criteria, which required that the application be first evaluated by the planning commission, does not mean that the remand proceedings involved a different application for purposes of *Beck*. The different plan amendment criteria that the county applied on remand did not affect the conditional use permit, or otherwise permit RCWA to raise new challenges to the conditional use permit that could have been raised in the first proceedings.

The second assignment of error (RCWA) is denied.

THIRD ASSIGNMENT OF ERROR (RCWA)

In *Rickreall I*, we rejected RCWA's assignment of error arguing that the ESEE analysis failed to address perceived risk to RCWA's groundwater wells in the vicinity of the mining site. The county had adopted unchallenged findings that there was no actual risk to RCWA's groundwater wells, and we held that "absent 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." 53 Or LUBA at 87. No issues related to RCWA's wells were the basis for remand.

During the proceedings on remand, RCWA cited to evidence from one of its experts that there was an actual risk of well contamination, evidence that the county had rejected during the first appeal, and argued based on that evidence that the county is now obligated to address in its ESEE analysis conflicts with RCWA's economic interests based on its customers perceptions of risk. The county rejected that argument, finding that the issue was resolved contrary to RCWA in *Rickreall I* and is waived. Record 10-065.

On appeal, RCWA cites to its expert's testimony and attempt to challenge the county's initial finding, confirmed on remand, that there is no actual risk of well contamination. If that finding is challenged, RCWA argues, the county is thereby obligated to address conflicts arising from perceived risk of contamination. We agree with respondents that the initial finding of no actual risk could have been challenged in the first appeal, and therefore under *Beck* that issue and the subsidiary issue of perceived risk is not within our scope of review.

The third assignment of error (RCWA) is denied.

FIRST ASSIGNMENT OF ERROR (Easterly)

Intervenor-petitioner Easterly argues that the county erred in rejecting Easterly's efforts to raise new issues on remand. According to intervenor-petitioner, because he did not

participate in the initial proceedings leading up to the 2006 decision, the issues that he can raise on remand are not limited to the remand issues or issues that could not have been raised in the initial proceeding.

Intervenor-petitioner is wrong. The law of the case doctrine embodied in *Beck* prohibits revisiting issues on appeal of a decision on remand that were raised and resolved during the first appeal, or that could have been raised in the first appeal, but were not. The doctrine operates even against persons who did not participate in the first appeal. *See Beck*, 313 Or at 153, n 2 (a party who chose not to participate in the first appeal is precluded from later raising a new issue in the same manner as a party who did participate but neglected to raise the issue). The county did not err in determining that, as a general proposition, its proceedings on remand were limited to the remand issues and any issues that could not have been raised during the initial appeal.

The first assignment of error (Easterly) is denied.

SECOND AND TENTH ASSIGNMENTS OF ERROR (Easterly)

Intervenor-petitioner argues that the county failed to adequately identify the specific acreage that was added to the inventory of significant resource sites, or provide an adequate legal description.

Respondents argue, and we agree, that this issue could have been raised during the initial proceedings, but was not, and therefore is waived under *Beck*.

The second and tenth assignments of error (Easterly) are denied.

THIRD ASSIGNMENT OF ERROR (Easterly)

Intervenor-petitioner contends that the plan amendment under Goal 5 is inconsistent with Goal 3 (Agricultural Lands), because it fails to preserve and maintain agricultural land.

Respondents argue, and we agree, that Goal 3 does not take precedence over Goal 5, as intervenor-petitioner suggests, and that the Goal 5 ESEE process balances Goal 3's policy objective to protect agricultural land and Goal 5's policy objective to protect significant

mineral resources, where appropriate, from conflicting uses. Intervenor-petitioner's arguments under this assignment of error do not provide a basis for reversal or remand.

The third assignment of error (Easterly) is denied.

FOURTH ASSIGNMENT OF ERROR (Easterly)

Under the fourth assignment of error, intervenor-petitioner argues that the county failed to address the requirements of ORS 215.296, which requires findings that the proposed use will not significantly change or significantly increase the cost of farm or forest practices on surrounding resource lands.

Respondents note that in its 2006 decision the county found compliance with PCZO 136.060, which implements and mirrors the requirements of ORS 215.296, and those findings were readopted in the challenged decision on remand. Respondents contend, and we agree, that the alleged lack of findings separately addressing ORS 215.296 could have been raised in the 2006, but was not, and is therefore waived under *Beck*.

The fourth assignment of error (Easterly) is denied.

FIFTH ASSIGNMENT OF ERROR (Easterly)

A. Re-Adopted Findings

In *Rickreall I*, LUBA held that the county erred in applying the plan amendment criteria at PCZO 115.050(A)(3), and should have instead applied the plan amendment criteria at PCZO 115.060. In relevant part, PCZO 115.050(A)(3) includes three plan amendment approval standards, which the county found to be satisfied in the 2006 decision.[14] PCZO

[14] PCZO 115.050(A)(3) permits a plan amendment based on findings that:

> "The purpose of the Comprehensive Plan will be carried out through approval of the proposed Plan Amendment based on the following:
>
> "(a) Evidence that the proposal conforms to the intent of relevant goals and policies in the Comprehensive Plan and the purpose and intent of the proposed land use designation.

115.060 has four plan amendment approval standards, three of which are similar or identical to the three PCZO 115.050(A)(3) criteria. PCZO 115.060(C) requires the additional finding that the plan amendment is in the public interest and to the public benefit.[15]

On remand, the county readopted the findings from the 2006 decision that addressed PCZO 115.050(A)(3) as its principal means to address the similar or overlapping criteria in PCZO 115.060. As discussed elsewhere in this opinion, the county also adopted additional findings to address the public interest/public benefit standard at PCZO 115.060(C). Under this assignment of error, intervenor-petitioner first argues that the county erred in re-adopting findings addressing the overlapping criteria, and should have adopted entirely new findings expressly addressing all of the criteria in PCZO 115.060. However, we generally agree with respondents that intervenor-petitioner has not demonstrated that any of the minor wording differences between the overlapping sets of criteria require an entirely new set of findings.

> "(b) Compliance with Oregon Revised Statutes, statewide planning goals and related administrative rules which applies to the particular property(s) or situations. If an exception to one or more of the goals is necessary, the exception criteria in Oregon Administrative Rules, Chapter 660, Division 4 shall apply; and
>
> "(c) Compliance with the provisions of any applicable intergovernmental agreement pertaining to urban growth boundaries and urbanizable land."

[15] PCZO 115.060 provides:

> "A legislative plan amendment may be approved provided that the request is based on substantive information providing a factual basis to support the change. In amending the Comprehensive Plan, Polk County shall demonstrate:
>
> "(A) Compliance with Oregon Revised Statutes, and the statewide planning goals and related administrative rules. If an exception to one or more of the goals is necessary, Polk County shall adopt findings which address the exception criteria in Oregon Administrative Rules, Chapter 660, Division 4;
>
> "(B) Conformance with the Comprehensive Plan goals, policies and intent, and any plan map amendment criteria in the plan;
>
> "(C) That the proposed change is in the public interest and will be of general public benefit; and
>
> "(D) Compliance with the provisions of any applicable intergovernmental agreement pertaining to urban growth boundaries and urbanizable land."

The only specific difference intervenor-petitioner emphasizes is between PCZO 115.050(A)(3)(a), which requires "[e]vidence that the proposal conforms to the intent of relevant goals and policies in the Comprehensive Plan," and PCZO 115.060(B), which requires "[c]onformance with the Comprehensive Plan goals, policies and intent[.]" Intervenor-petitioner argues that there is a meaningful difference between conforming to the "intent" of "relevant" plan goals and policies and conforming with plan "goals, policies and intent." We understand intervenor-petitioner to argue that under PCZO 115.050(A)(3)(a) the county need address only the "intent" of "relevant" plan goals and policies, whereas under PCZO 115.060(B) the county must ensure strict conformance with all plan goals and policies, whether relevant or not.

We disagree with intervenor-petitioner that PCZO 115.060(B) requires the county to adopt findings addressing plan goals and policies that are irrelevant to the proposed amendment. If there is some difference between PCZO 115.050(A)(3)(a) and 115.060(B) regarding how conformance or intent is evaluated, it is a subtle difference. In any case, intervenor-petitioner makes no effort to demonstrate that any specific readopted findings addressing PCZO 115.050(A)(3)(a) are inadequate to address PCZO 115.060(B). Absent a more focused challenge, the arguments on this point do not provide a basis for reversal or remand.

On remand, the county adopted a matrix that lists over 100 plan goals and policies and determines which goals and policies are applicable and require findings, with a brief comment explaining why some goals and policies are deemed inapplicable. Record 10-068, 074. Intervenor-petitioner focuses on two sets of plan policies deemed inapplicable, and argues that the county failed to adequately explain why those policies are not applicable.

The first is Agricultural Policy 1.1, which states that "Polk County will endeavor to conserve for agriculture those areas which exhibit a predominance of agricultural soils, and an absence of nonfarm use interference and conflicts." The county deemed Policy 1.1

inapplicable, with the comment "[d]eals with soil and non-farm uses." Record 10-068. Intervenor-petitioner contends that removing agricultural soils to extract aggregate implicates Policy 1.1. Respondents argue, and we agree, that Policy 1.1 appears to be an aspirational statement used for general zoning and planning purposes, and not an applicable goal or policy to which the proposed amendment must conform.

Intervenor-petitioner next argues that the county deemed applicable Energy Conservation Policy 3.3, which provides that the county "will promote energy efficient design, siting and construction of transportation systems," but did not similarly deem Energy Conservation Policy 2.1 applicable. Policy 2.1 provides that the county "will encourage energy efficient design, siting and construction of all commercial, industrial, public and residential development." Respondents note that intervenor-petitioner does not argue that Policy 2.1 *is* applicable, only that the county allegedly treated the two policies inconsistently. In any case, respondents argue, the county deemed Policy 3.3 to be applicable because the application proposed significant transportation improvements (haul road, etc.), but it is not clear why a policy that encourages energy efficient design, siting and construction of industrial "development" is applicable to a mining operation. We agree with respondents.

B. OAR 660-023-0180(5)(b)

Intervenor-petitioner next argues that the county inadequately addressed OAR 660-023-0180(5)(b),[16] part of the new Goal 5 rule, which requires the county to "determine existing or approved land uses within the impact area that will be adversely affected by proposed mining operations and * * * specify the predicted conflicts." We understand intervenor-petitioner to argue that the county inadequately evaluated adverse impacts of losing productive agricultural land on the subject property to mining activities.

[16] Intervenor-petitioner actually cites OAR 660-023-0180(4)(c), but quotes 660-023-0180(5)(b). We assume he meant to cite the latter.

To the extent we understand this argument, we agree with respondents that it does not provide a basis for reversal or remand. OAR 660-023-0180(5)(c) is concerned with identifying conflicts between mining and existing or approved uses within the impact area, not the issue of losing agricultural land to mining within the mining area itself. The county's 2006 conflicts analysis was remanded in *Rickreall I* for reasons that had nothing to do with the issue raised here, and intervenor-petitioner offers no cognizable challenge to the conflicts analysis as amended on remand.

The fifth assignment of error (Easterly) is denied.

SIXTH ASSIGNMENT OF ERROR (Easterly)

The arguments under this assignment of error are particularly confusing and poorly-developed. The main theme seems to be the contention that the county failed to protect the agricultural soils on the mining site from being removed. Intervenor-petitioner argues that the county gave greater weight to the statutes that authorize mining on agricultural lands than it did to preserving agricultural soils, that the county erred in failing to treat agricultural soils as "resources" for purposes of Goal 5, and that the county gave short shrift to Agricultural Plan Policy 3, which is to "preserve and protect those resources considered essential for the continued stability of agriculture" within the county.

Respondents argue, and we agree, that intervenor-petitioner's arguments do not demonstrate a basis for remand. The legislature and LCDC have made a series of policy choices that in effect balance competing objectives in preserving agricultural soils and protecting Goal 5 mineral resources, generally in favor of the latter. Under the applicable goals, statutes and rules, the county is authorized to allow mining on agricultural lands, even if that entails removal of agricultural soils on the mining site. Intervenor-petitioner's apparent disagreement with those policy choices does not provide a basis for remand.

With respect to Policy 3, the county found that policy inapplicable, because "stability [is] not at issue." Record 10-068. While that finding is terse, intervenor-petitioner does not

explain why it is erroneous, other than to suggest that Policy 3 is concerned with preserving agricultural soils from removal to allow mining. However, the focus of Policy 3 is the "stability of agriculture" in the county, and it seems concerned only tangentially, if at all, with preserving agricultural soils from uses otherwise allowed in the EFU zone.

The sixth assignment of error (Easterly) is denied.

SEVENTH ASSIGNMENT OF ERROR (Easterly)

Under this assignment of error, intervenor-petitioner argues that there is not substantial evidence supporting a finding that the proposed mining site is a "significant" Goal 5 resource site. According to intervenor, the county should not have relied on the sampling and testimony of the applicant's engineer regarding the quantity and quality of the aggregate resource on the property, but should have instead relied on the testimony of the petitioners' engineer, who criticized aspects of the sampling performed by the applicant's engineer.

Respondents argue, and we agree, that at best we have conflicting expert testimony regarding whether the aggregate resource on the property is a "significant" resource under Goal 5. The county chose to rely on the applicant's engineer, and intervenor-petitioner has not demonstrated that a reasonable decision maker, viewing all the evidence, could not have made that choice.

The seventh assignment of error (Easterly) is denied.

EIGHTH ASSIGNMENT OF ERROR (Easterly)

Intervenor-petitioner argues that the county erred in conducting its ESEE analysis pursuant to PCZO chapter 174 rather than via the new Goal 5 rule at OAR 660-023-0180.

Respondents argue that pursuant to OAR 660-023-0180(9), quoted above at n 13, that the county is entitled to conduct the ESEE analysis pursuant to PCZO chapter 174 rather than directly apply the process described in OAR 660-023-0180(3) or (4), because the "local plan contains specific criteria regarding the consideration of a PAPA proposing to add a site to the

list of significant aggregate sites," which was adopted after 1989. Intervenor-petitioner disputes whether PCZO chapter 174 constitutes such a local plan.

We need not decide whether PCZO chapter 174 constitutes a "local plan" that contains specific criteria regarding the consideration of a PAPA proposing to add a site to the list of significant aggregate sites, within the meaning of OAR 660-023-0180(9), because the adequacy of the ESEE analysis was an issue raised and resolved in *Rickreall I*, and we do not understand how this variant of that issue can be raised again in this appeal, consistent with *Beck*. In *Rickreall I*, the county took the position that the ESEE analysis was conducted pursuant to the old Goal 5 rule, and no party questioned that position. We then reviewed and rejected a challenge to the adequacy of the ESEE analysis, applying various provisions of the old Goal 5 rule. 53 Or LUBA at 86-87. Clearly, the issue of whether the ESEE analysis must be conducted pursuant to the *new* Goal 5 rule at OAR 660-023-0180 could have been raised in *Rickreall I*, but was not. Nothing in our decision allowed that new issue be raised on remand. As far as we can tell, the issue raised under this assignment of error is not within our scope of review under *Beck*.[17]

The eighth assignment of error (Easterly) is denied.

NINTH ASSIGNMENT OF ERROR (Easterly)

Under the ninth assignment of error, intervenor-petitioner challenges the findings addressing the public interest/public benefit standard. According to petitioners, the findings are inadequate in that they fail to address negative impacts of mining and failed to demonstrate a "need" because other mining sites owned by the applicant are not exhausted.

We rejected similar arguments under petitioners' fifth assignment of error. Intervenor-petitioner's arguments similarly do not provide a basis for reversal or remand.

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[17] For reasons we do not understand, respondents do not cite *Beck* or argue law of the case waiver with respect to this assignment of error, although that principle is frequently invoked elsewhere in the response brief. Nonetheless, the conclusion seems inescapable that the issue raised in this assignment of error is not within our scope of review, and we so hold.

The ninth assignment of error (Easterly) is denied.

The county's decision is remanded.