

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

3  
4 MARK LATHAM EXCAVATION, INC,  
5 *Petitioner,*

6  
7 vs.

8  
9 DESCHUTES COUNTY,  
10 *Respondent,*

11 and

12  
13 ERIC HOFFMAN, RONNA HOFFMAN,  
14 OREGON PARKS AND RECREATION  
15 DEPARTMENT, SANDERS NYE,  
16 DANIELLE NYE and  
17 CASCADES ACADEMY OF  
18 CENTRAL OREGON.  
19 *Intervenors-Respondents.*

20  
21 LUBA No. 2011-078

22  
23 FINAL OPINION  
24 AND ORDER

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26  
27 Appeal from Deschutes County.

28  
29 Bruce W. White, Bend, filed the petition for review and argued on behalf of  
30 petitioner.

31  
32 Laurie E. Craghead, Assistant County Counsel, Bend, filed a response brief and  
33 argued on behalf of respondent.

34  
35 Paul D. Dewey, Bend, filed a response brief and argued on behalf of Eric Hoffman  
36 and Ronna Hoffman.

37  
38 Erin L. Donald, Assistant Attorney General, Salem, filed a response brief and argued  
39 on behalf of Oregon Parks and Recreation Department. With her on the brief were Steven E.  
40 Shipsey, Assistant Attorney General, and John Kroger, Attorney General.

41  
42 Alison G. Hohengarten, Bend, filed a response brief and argued on behalf of Sanders  
43 Nye, Danielle Nye and Cascades Academy of Central Oregon. With her on the brief was  
44 Francis, Hansen and Martin, LLP.

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

3

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REMANDED

01/17/2012

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

**NATURE OF THE DECISION**

Petitioner appeals a county decision that grants site plan and conditional use approval to expand an existing mining operation.

**FACTS**

**A. Introduction**

This is the second time we have reviewed a county decision granting conditional use and site plan approval for a mining operation on the subject 80 acre property. In *Hoffman v. Deschutes County*, 61 Or LUBA 173, *aff'd* 237 Or App 531, 240 P3d 79 (2010), *rev den* 349 Or 479 (2010) (*Hoffman*), both petitioner in the present appeal (the applicant) and intervenors in the present appeal (the opponents) appealed the county’s initial decision approving petitioner’s application. That appeal was complex, and LUBA’s slip opinion deciding the appeal was 67 pages long. The parties’ arguments in this appeal of the county’s decision on remand have achieved a level of complexity and abstraction that is unusual, even for mining cases under Statewide Planning Goal 5 (Natural Resources, Scenic and Historic Areas, and Open Spaces) and comprehensive plans and land use regulations adopted to comply with Goal 5. We have tried to simplify where possible and eliminate unnecessary duplication of our analysis of similar arguments the parties made in *Hoffman*.

The record in this appeal of the county’s decision on remand includes the record in *Hoffman*.<sup>1</sup> We cite to the record in *Hoffman* as “Hoffman Record” and to the record compiled on remand as “Remand Record,” to distinguish between the two.

**B. The County’s Program to Meet Statewide Planning Goal 5 for Site 303**

The Land Conservation and Development Commission’s (LCDC’s) Goal 5 administrative rule requires a somewhat regimented three-step planning process. The

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<sup>1</sup> The county only transmitted a digital copy of the Hoffman record on a compact disk, and that record is missing pages 961-1274.

1 county’s comprehensive plan was acknowledged under a prior version of LCDC’s Goal 5  
2 administrative rule. In our decision in *Hoffman*, we explained the county’s Goal 5 planning  
3 for the subject property in some detail, and do not repeat that detail here. *Hoffman*, 61 Or  
4 LUBA 179-92. The county’s Goal 5 planning for the subject property was done in 1990 and  
5 that planning was adopted as part of the county’s comprehensive plan. The county included  
6 the subject property on its comprehensive plan inventory of significant mineral and aggregate  
7 sites (step 1). That inventory identified Bend Pumice (pumice) and some aggregate and sand  
8 on the site, but the inventory identified no Tumalo Tuff (tuff). The county then identified  
9 uses that might conflict with mining if mining were allowed on the subject property and  
10 considered the economic, social, environmental and energy (ESEE) consequences of  
11 protecting the mineral resource (allowing it to be mined) versus the ESEE consequences of  
12 not protecting the mineral resource (allowing the conflicting uses to limit or preclude  
13 mining) (step 2). Finally, the county adopted a program to meet the goal (PTMG), in which  
14 the county determined it would extend partial protection to the mineral resource, allowing it  
15 to be mined under specified restrictions to limit the impacts on conflicting uses (step 3).<sup>2</sup>

16 The subject property is identified as Site 303 on the county’s Goal 5 Mineral and  
17 Aggregate Inventory. We described the PTMG for Site 303 in our decision in *Hoffman*:

18 “In its ‘[PTMG],’ the county determined that it would apply the [Surface  
19 Mine (SM)] zone to the site. That zone imposes a number of limitations on  
20 mining to reduce off-site impacts, including setbacks, screening, noise, and  
21 operational limitations. The adopted program to meet the goal limits existing  
22 and new conflicting uses by applying the [Surface Mining Impact Area  
23 (SMIA)] combining zone to the area within ½ mile of the SM zoned subject  
24 property. The SMIA restricts construction of new uses that might conflict  
25 with mining on the subject property. Although the SM and SMIA zones  
26 appear to be the heart of the county’s Goal 5 programs to meet the goal for  
27 significant mineral and aggregate sites, those programs for individual mineral

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<sup>2</sup> A document entitled “ESEE Findings and Decision” for Site 303 appears at Hoffman Record 4180-4194. That document represents steps 2 and 3 for Site 303. Goal 5 planning terminology can be confusing. In this opinion when we refer to the Goal 5 planning for Site 303 we are referring to all three steps. We refer to step 2 as “Conflict Resolution/ESEE Analysis.” We refer to step 3 as the “PTMG.”

1 and aggregate sites are not identical and include additional limitations that  
2 appear to be based on the particular conditions present at individual sites.”  
3 *Hoffman*, 61 Or LUBA at 183.

4 The SM zone is codified at Deschutes County Code (DCC) 18.52. As noted above, the SM  
5 zone was applied to the entire 80-acre site and that zone allows mineral extraction and  
6 processing, subject to the operational and other limitations set out in the SM zone. DCC  
7 18.52.130 requires approval of a site reclamation plan by the Department of Geology and  
8 Mineral Industries or the county before mining can begin. The PTMG for Site 303 includes  
9 six “ESEE conditions,” which are conditions that apply specifically to Site 303.<sup>3</sup> None of  
10 those conditions or any other part of the PTMG for Site 303 prohibits mining on any part of  
11 the site.

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<sup>3</sup> The part of the PTMG that adopts the ESEE conditions for Site 303 is set out below:

“The Board finds that in order to protect both the aggregate resource and the conflicting resources and uses, the site will be zoned for surface mining, subject to the following ESEE conditions:

- “(a) Setbacks shall be required for potential conflicting residential and other development;
- “(b) Noise and visual impacts shall be mitigated by buffering and screening, with particular attention paid to screening from Tumalo State Park, or the eastern, northeastern and southeastern boundaries;
- “(c) Hours of operation shall be consistent with DEQ standards and applicable county ordinances;
- “(d) Wildlife restrictions set forth in ODFW’s letter of August 10, 1989, shall apply;
- “(e) Excavation shall be limited to five acres with ongoing incremental reclamation (subject to DOGAMI review and approval);
- “(f) Mining operations, including placement of processing operations and equipment and excavation and transport of material shall meet all applicable DEQ noise and dust standards.

“The Board finds that processing on site will be allowed.” *Hoffman* Record 1807.

1           **C.     The Site**

2           The subject property includes a layer of pumice that is approximately 20 feet thick.  
3           In the southern half of the property, the pumice layer is relatively close to the surface.  
4           Although the parties disagree about the thickness of the tuff layer in the southern half of the  
5           property, the tuff overburden layer on the southern half of the property ranges from  
6           approximately 20 feet thick to much less than 20 feet. The southern half of the property is  
7           essentially a hill of tuff with a plateau that at the top is elevated approximately 100 feet  
8           above the lower, northern half of the site. As the existing mining on the property has  
9           extended to the south, it has cut into the increasingly thick layer of tuff in the southern part of  
10          the property, removing both the increasingly thick layer of tuff (the hill) and the 20 foot thick  
11          layer of pumice, creating a headwall in the process. That headwall is currently a more or less  
12          vertical wall of tuff that is approximately 30 feet high and 600 feet long. Under petitioner's  
13          proposal, that headwall would become taller and longer as the mine is extended south into  
14          the hill to remove the pumice and the increasingly thick layer of tuff. The increasingly thick  
15          layer of tuff, which overlays an approximately 20 foot thick layer of pumice is graphically  
16          displayed by three north/south site profiles in the record. One of those profiles is in the east  
17          part of the property, one in the approximate middle and one in the western part of the  
18          property. Remand Record 263-65. The most dramatic of those profiles is the one located in  
19          the eastern part of the property, and that profile is included as an appendix to this opinion.

20          The parties' main dispute focuses on the headwall, or more accurately whether  
21          petitioner should be allowed to continue excavating south into the increasingly thick tuff  
22          layer to remove and export both pumice and tuff. If petitioner is allowed to do so, the  
23          exposed headwall will become taller and wider under petitioner's plan for mining. Although  
24          the parties do not really directly address the issue, if petitioner is allowed to remove and  
25          export not only the 20 foot thick layer of pumice but also some or all of the layer of tuff that  
26          overlies the pumice, which is as much as 100 feet thick, the exposed headwall presumably

1 will be far taller and far more visible to surrounding properties that lie at a considerably  
2 lower elevation, than would be the case if the tuff is removed in order to extract and export  
3 the pumice, but retained on site and used for site reclamation.

#### 4 **FIRST AND SECOND ASSIGNMENTS OF ERROR**

##### 5 **A. Introduction**

6 One of the central disputes in *Hoffman* was whether the county's existing,  
7 acknowledged Goal 5 planning for Site 303 permits mining and export of the tuff on Site 303  
8 or whether a post acknowledgement plan amendment to add tuff to the acknowledged  
9 inventory, and a new Conflict Resolution/ESEE Analysis and PTMG would be required to  
10 mine and export the tuff. In its initial decision in this matter, the county found that no post  
11 acknowledgment plan amendment would be required to extract and export the tuff, and that  
12 as far as the adopted Goal 5 plan for Site 303 is concerned, the tuff can be mined and  
13 exported along with the pumice. We remanded in large part because the acknowledged  
14 inventory makes no mention of tuff on Site 303, and the Conflict Resolution/ESEE Analysis  
15 did not appear to contemplate the possible visual and other impacts of removal of such a  
16 large amount of tuff from Site 303, which would result in a large visible head wall. *Hoffman*,  
17 61 Or LUBA at 191-92.

18 The county in its decision on remand and the parties in their arguments in this second  
19 appeal conflate two different issues, and in doing so make this case a great deal more  
20 complicated. The first issue is whether the county's Goal 5 planning for Site 303 authorizes  
21 mining and export of tuff. Our decision in *Hoffman* admittedly did not foreclose the  
22 possibility that the county could interpret its Goal 5 planning for Site 303 to authorize mining  
23 and removal of tuff. However, any objective reading of our decision in *Hoffman* would make  
24 clear that the county would have an exceedingly difficult time adopting a supportable  
25 decision that the existing Goal 5 planning for Site 303, which does not mention tuff and only  
26 inventories 700,000 cubic yards of pumice and 100,000 cubic yards of aggregate, also

1 permits mining and export of 3.4 million cubic yards of tuff. Whether the county could have  
2 adopted and defended such an interpretation is academic in this appeal, since the county on  
3 remand concluded that the existing Goal 5 planning for Site 303 does not authorize mining  
4 and export of the tuff. Petitioner nominally assigns error to that conclusion in its eighth  
5 assignment of error, and we address that issue there.

6 The second issue (the issue presented in the first and second assignments of error) is a  
7 different issue. It is also an issue that was not presented in *Hoffman*, but arises in this appeal  
8 based on petitioner's first two assignments of error challenging a condition of approval in the  
9 remand decision and findings the county adopted to support imposing that condition. That  
10 issue is whether the county's Goal 5 planning for Site 303 authorizes mining and export of  
11 pumice, if that pumice mining will require excavation into the increasingly thick layer of tuff  
12 that overlies the southern half of Site 303 (where the headwall is located), even if the tuff is  
13 not exported and is retained on site and used to reclaim the site after the pumice is excavated  
14 and exported.

15 We have no idea whether it is possible or practical to (1) remove a layer of tuff that is  
16 up to 100 feet thick, (2) store that tuff on site while the underlying 20-foot thick layer of  
17 pumice is mined and exported, and (3) then use that stored layer of tuff in the reclamation  
18 process to minimize the size of the exposed headwall that would remain after the 20 foot  
19 thick layer of pumice is mined and exported. *See* Appendix. To the extent it is not possible  
20 or practical to do so, our resolution of the first and second assignments of error may be a  
21 pointless exercise. However, no party argues mining and removing only the pumice is not  
22 possible or practical and we are in no position to assume that it is not. Petitioner assigns  
23 error to the condition that the county imposed that would foreclose that option and challenges  
24 the findings that support the condition. We therefore turn to petitioner's arguments under the  
25 first and second assignments of error.

1           **B.       Petitioner’s Arguments**

2           The county approved petitioner’s application with a condition of approval, Condition  
3 20, which states “[f]urther mining of the headwall is prohibited unless and until a Post  
4 Acknowledgement Plan Amendment is submitted and approved for that use.” Remand  
5 Record 19. Petitioner argues that the county’s Goal 5 planning for Site 303 (1) inventories  
6 pumice, (2) applies SM zoning to the entire 80 acres, (3) authorizes mining of Site 303 to  
7 excavate and export pumice, and (4) does not preclude mining headwalls or otherwise limit  
8 the areas of Site 303 that can be mined to extract and export pumice, so long as that  
9 extraction and export of pumice can be done in conformance with the requirements of the  
10 SM zone. We understand petitioner to argue that Condition 20 is inconsistent with the  
11 county’s Goal 5 planning for Site 303, because it would require petitioner to seek a post  
12 acknowledgment plan amendment to engage in pumice mining that is already allowed by the  
13 acknowledged Goal 5 planning for Site 303.

14           **C.       The County’s Findings**

15           The county’s findings regarding the issue presented in the first two assignments of  
16 error are difficult to sort out, because the county addressed both the issue presented in the  
17 first and second assignments of error (whether a post acknowledgment plan amendment is  
18 needed to mine the headwall to extract and export pumice only) and the issue presented in  
19 the eighth assignment of error (whether a post acknowledgment plan amendment is needed to  
20 mine the headwall to extract and remove the uninventoried tuff overburden). As previously  
21 noted, petitioner’s application that was under consideration by the county did not propose to  
22 retain the tuff overburden and use it for reclamation, and it may well be impractical to do so.  
23 However, in advancing its first two assignments of error, we understand petitioner to argue it  
24 was error for the city to prohibit any expansion of the headwall in the absence of a post-  
25 acknowledgment plan amendment, if that would effectively require petitioner to seek a post  
26 acknowledgment plan amendment to mine and export only the pumice on Site 303. The

1 county's findings do not seem to consider in any direct way whether extraction and removal  
2 of pumice only, with retention of the tuff overburden for reclamation, would be consistent  
3 with the acknowledged Goal 5 plan for Site 303. That is likely because the application did  
4 not propose to retain the tuff for reclamation. On the contrary, the application proposed to  
5 mine and export 3.4 million tons of tuff. If the tuff were instead retained and used to reclaim  
6 the site, the headwall would almost certainly be much smaller, and it might be that retaining  
7 the tuff for reclamation would result in a reclaimed slope that might eliminate the headwall  
8 entirely. *See* Appendix. With that observation regarding the county's findings, we turn to  
9 the findings challenged by petitioner.

10           The county's findings in support of Condition 20 note that the owner of the property,  
11 Cascade Pumice, represented in 1989 that it only intended to mine approximately 25 acres of  
12 Site 303. From that 1989 representation, the county infers that the Goal 5 plan for the  
13 property that the county adopted in 1990 anticipated that only the flatter portion of the  
14 property in the north was to be mined. Remand Record 7, 158-59. The county's findings  
15 also point out that the 1990 Conflict Resolution/ESEE Analysis findings (1) refer to "the  
16 opening of a pit in the ground," (2) refer to mining as a "transient use," (3) express concern  
17 with dust and visual impacts of mining on nearby Tumalo State Park, the adjacent Deschutes  
18 River Scenic Area, and other surrounding properties and (4) make no mention of a highly  
19 visible headwall. In imposing Condition 20, the county reasons that opening a pit in the  
20 ground has quite different impacts from mining into the side of a hill to create a large  
21 headwall that will not be "transient" and will have significant visual and other impacts on  
22 Tumalo State Park, the adjacent Deschutes River Scenic Area, and other surrounding  
23 properties. The county reasons that because no headwall was discussed in the 1990 Conflict  
24 Resolution/ESEE Analysis findings, mining in a way that will produce a large headwall is  
25 not authorized by the Goal 5 plan for Site 303.

1           It is appropriate for the county to consider the legislative history of its Goal 5 plan for  
2 Site 303. *State v. Gaines*, 346 Or 160, 165-73, 206 P3d 1042 (2009). However, relying on  
3 findings in the Conflict Resolution/ESEE Analysis, which are a precursor of the regulatory  
4 program that is adopted in the PTMG, rather than relying on the PTMG itself, is somewhat  
5 problematic. In *Hoffman*, we rejected petitioners Hoffmans’ second, sixth and seventh  
6 assignments of error, where they argued that findings in the Conflict Resolution/ESEE  
7 Analysis for Site 303 regarding the quantity of pumice resource on the property, and dust and  
8 noise impacts on neighboring uses, should be given regulatory effect to limit the maximum  
9 amount of the resource that could be extracted and impose additional restrictions on noise  
10 and dust, where those Conflict Resolution/ESEE Analysis findings would have had the effect  
11 of regulating mining more stringently than the regulations that applied under the SM zone  
12 that was adopted as part of the regulatory PTMG for Site 303. *Hoffman*, 61 Or LUBA 192-  
13 98, 217-18, 223-24. To the extent the county’s findings noted above and discussed below are  
14 an attempt to give similar regulatory effect to the Conflict Resolution/ESEE Analysis  
15 findings to prohibit expansion of the headwall, we reject the attempt.

16           Of course explaining the meaning of the Goal 5 plan for Site 303 could call for  
17 interpretation. When it is interpreting the meaning of its land use legislation, the board of  
18 county commissioners’ interpretation is entitled to a deferential standard of review under  
19 ORS 197.829(1) and *Siporen v. City of Medford*, 349 Or 247, 259, 243 P3d 776 (2010).<sup>4</sup>

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<sup>4</sup> ORS 197.829(1) provides:

“The Land Use Board of Appeals shall affirm a local government’s interpretation of its comprehensive plan and land use regulations, unless the board determines that the local government’s interpretation:

- “(a) Is inconsistent with the express language of the comprehensive plan or land use regulation;
- “(b) Is inconsistent with the purpose for the comprehensive plan or land use regulation;

1 Under that standard of review, the board of commissioners’ interpretation must be affirmed  
2 on appeal if it is “plausible.” *Siporen*, 349 Or at 259; *Foland v. Jackson County*, 215 Or App  
3 157, 164, 168 P3d 1238 (2007). Nevertheless, even under the deferential standard of review  
4 required under *Siporen*, the board of county commissioners may not insert words of  
5 limitation into its PTMG for Site 303 that are not there. ORS 174.010.<sup>5</sup> For the reasons  
6 explained below, we conclude that the county has effectively inserted words of limitation  
7 into its PTMG for Site 303 by finding that it categorically precludes mining that creates or  
8 enlarges a headwall.

9 It is entirely appropriate for the board of county commissioners to look to the Conflict  
10 Resolution/ESEE Analysis findings as context, to assist in resolving any ambiguities that are  
11 present in the PTMG regulatory part of the Goal 5 planning for Site 303 regarding whether  
12 headwall mining is categorically prohibited. *PGE v. Bureau of Labor and Industries*, 317 Or  
13 606, 611, 859 P2d 1143 (1993). However, before it is appropriate to engage in an exercise of  
14 interpretation there must be an ambiguity. The PTMG in this case includes the ESEE  
15 conditions and SM zone. As relevant here, the PTMG also provides as follows:

16 “The Board will protect the mineral or aggregate resource by zoning the site  
17 SM to allow for surface mining activities. The Board finds that [the SM zone]  
18 allows mining activities such as extraction, processing, crushing, batching,  
19 and other mining-dependent uses as permitted or conditional uses and  
20 activities in the zone. \* \* \*.” Hoffman Record 4192.

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“(c) Is inconsistent with the underlying policy that provides the basis for the comprehensive plan or land use regulation; or

“(d) Is contrary to a state statute, land use goal or rule that the comprehensive plan provision or land use regulation implements.”

<sup>5</sup> ORS 174.010 provides:

“In the construction of a statute, the office of the judge is simply to ascertain and declare what is, in terms or in substance, contained therein, *not to insert what has been omitted*, or to omit what has been inserted; and where there are several provisions or particulars such construction is, if possible, to be adopted as will give effect to all.” (Emphasis added.)

1 The county’s findings identify no language in the PTMG text, the ESEE conditions or the  
2 SM zone that can be read to suggest a limitation on mining the side of the hill to create a  
3 headwall, or that limits mining to any particular location on the 80-acre parcel zoned SM.  
4 Indeed, that the county zoned the entire 80-acre parcel SM suggests the contrary.

5 That is not to say that under the PTMG that is embodied in the ESEE conditions and  
6 the provisions of the SM zone, the county could not determine that a site plan that proposes  
7 to greatly increase the size of the headwall, even if the proposal were to be modified to  
8 propose extraction and export of only the inventoried pumice, could not be approved because  
9 it runs afoul of one or more of the screening or other standards imposed by the SM zone or  
10 that it fails to confirm with ESEE condition b for Site 303. *See* n 3. However, we have not  
11 been able to locate any text in the PTMG that suggests a limitation on mining the site to  
12 create or expand a headwall, and on that issue the PTMG seems unambiguous.<sup>6</sup>

13 Of course it is possible that the text of the PTMG is unambiguous when read in  
14 isolation but ambiguous when read in context with other parts of the Goal 5 planning for Site  
15 303 or its legislative history. As petitioner pointed out during the proceedings below, relying  
16 on the references in the Conflict Resolution/ESEE Analysis findings to “opening of a pit in  
17 the ground” to conclude that the Goal 5 plan for Site 303 does not allow mining of the hill on  
18 the property is unsupportable. Petitioner noted that Goal 5 plans for other sites that proposed  
19 excavations into the side of cinder cones refer to the excavation as a “pit.” Remand Record

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<sup>6</sup> In contrast, there is an ambiguity in the PTMG about whether it allows mining of both pumice and tuff. As previously noted, the SM zone is codified at DCC Chapter 18.52. DCC 18.52.040(A) allows extraction of minerals without any express limitation on the kinds of minerals that may be extracted, which could mean any minerals located on a site may be extracted and exported. But DCC 18.52.010(B) expressly provides that the purpose of the SM zone is “[t]o allow the development and use of *identified* deposits of mineral and aggregate resources consistent with *Statewide Planning Goal 5*.” If DCC 18.52.040(A) is read together with DCC 18.52.010(B), the SM zone does not unambiguously allow mining tuff, since the purpose of the SM zone is to allow mining of “identified deposits of minerals.” Therefore, to determine whether the PTMG authorizes removal of tuff, it is appropriate to consider the inventory and Conflict Resolution/ESEE Analysis findings to determine whether extraction and export of tuff is allowed. As previously noted, petitioner challenges the county’s findings that the PTMG does not permit extraction and export of tuff in its eighth assignment of error.

1 46.<sup>7</sup> It is also worth noting that the Conflict Resolution/ESEE Analysis also states that one  
2 of the consequences of the allowed mining will be “physical scarring of the landscape.”  
3 Hoffman Record 4184. That description seems more appropriate for visible mining, such as  
4 mining into a hill, as opposed to mining on flat land that is largely not visible from adjoining  
5 properties after reclamation.

6 Finally, the lack of any consideration of a large headwall in the Conflict  
7 Resolution/ESEE Analysis findings and the concern the county expresses in its remand  
8 decision that such a large headwall would have adverse visual and other impacts on Tumalo  
9 State Park, the adjacent Deschutes River Scenic Area, and other surrounding properties and  
10 be something other than a “transient” use provides no basis for inferring that the PTMG  
11 categorically prohibits headwall mining. First, based on this record, the county cannot  
12 assume that mining the pumice only and reclaiming Site 303 with the Tuff overburden will  
13 produce a large visible headwall. As previously noted, depending on whether the tuff is used  
14 to reclaim the site, there would almost certainly be a much smaller headwall and there might  
15 not be a headwall at all after reclamation, just a slope up to the top of the plateau. Second,  
16 any inferences that may be drawn from the failure in the Conflict Resolution/ESEE Analysis  
17 to expressly consider headwall mining or the reference to mining as transient use fall far  
18 short of creating a textual ambiguity in the PTMG, which otherwise authorizes mining of  
19 pumice and does not geographically limit the area of Site 303 that can be mined.

20 Even if there were some ambiguity in the PTMG regarding a limitation on headwall  
21 mining, the legislative history cited by the county fall far short of demonstrating a legislative  
22 intent to impose a limitation on headwall mining. The representations of the prior property  
23 owner in 1989 that it only intended to mine 25 acres of the property fall far short of

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<sup>7</sup> The ESEE analyses for Sites 331 and 336 both refer to the proposed mining as a “pit,” even though the proposal on those sites was to mine into the side of cinder cone. Remand Record 89, 106. The ESEE analysis for the proposal to excavate into an above surface cinder cone on Site 336 actually uses the identical language that is used in the Site 303 ESEE analysis, “opening of a pit in the ground.” Remand Record 106.

1 establishing that there was a legislative intent that the PTMG limit mining to 25 acres on the  
2 flat northern part of Site 303. First, it is the adopted and acknowledged Goal 5 plan for site  
3 303 that is controlling, not the oral representations of a prior property owner that may or may  
4 not have been important in the decision making that led to the decision to adopt the PTMG.  
5 Second, for other sites where the county wished to limit the areas of an inventoried site that  
6 could be mined, it added ESEE conditions as part of the PTMG to so limit mining.<sup>8</sup> The  
7 county’s decision to apply SM zoning to all 80 acres of Site 303 and failure to impose any  
8 condition limiting the geographic area of Site 303 that could be mined, despite apparently  
9 being told by the owner that it only intended to mine 25 acres, supports a conclusion that  
10 there is no such limitation.

11 The above requires that we sustain petitioner’s first and second assignment of error.  
12 In doing so, we again emphasize that in finding that the PTMG for Site 303 imposes no  
13 categorical prohibition on excavating into the hill on the southern part of the site we do not  
14 consider here whether a proposal to mine in a way that would create a temporary or  
15 permanent headwall on Site 303 might run afoul of ESEE condition b or the screening or  
16 other requirements of the SM zone.

17 The first and second assignments of error are sustained.

18 **THIRD ASSIGNMENT OF ERROR**

19 Under its third assignment of error, petitioner alleges it was error for the county to  
20 impose condition 20 because “it is unclear to what extent pumice mining can go forward on  
21 the property.” Petition for Review 24. We have sustained petitioners’ first and second

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<sup>8</sup> For example, the ESEE conditions in the PTMG for Site 364 provide in part:

“To implement this decision, Site No. 368 will be zoned for surface mining (‘SM’), subject to the following ESEE conditions:

- “(1) Extraction of aggregate materials will be allowed only on Terraces No. 2 and No. 4, subject to the terms of the proposed surface mining operation plan[.]” Petition for Review Appendix 126.

1 assignment of error which challenge condition 20. The third assignment of error provides no  
2 additional basis for remand.

3 The third assignment of error is denied.

4 **EIGHTH ASSIGNMENT OF ERROR**

5 As we have already noted, one of the central questions in *Hoffman* was whether the  
6 existing Goal 5 planning for Site 303, which does not mention tuff and only inventories  
7 700,000 cubic yards of pumice and 100,000 cubic yards of aggregate, also permits mining  
8 and export of 3.4 million cubic yards of tuff. In affirming petitioners Hoffmans' first  
9 assignment of error in *Hoffman*, we concluded the county's findings were inadequate to  
10 establish that the Goal 5 planning for Site 303 allows such mining and export of tuff. On  
11 remand, the county changed its position and adopted approximately eight single-spaced  
12 pages of findings explaining why it concluded that the existing Goal 5 planning for Site 303  
13 would have to be amended to authorize excavation and export of 3.4 million cubic yards of  
14 tuff. We set out some of those findings below:

15 "The Board finds that, as a result of reviewing the arguments presented to  
16 LUBA, LUBA's decision and the more narrow focus of the remand hearings,  
17 it better understands the nature and volume of the tuff the applicant is  
18 proposing to mine and the potential impacts from mining this non-inventoried  
19 resource. \* \* \* Therefore, the Board no longer finds that mining and selling  
20 the tuff is incidental to the mining of the inventoried pumice at Site 303. This,  
21 then, necessitates a new ESEE or an amendment to the existing ESEE to  
22 evaluate the tuff and any impacts with conflicting uses that mining the mineral  
23 may cause.

24 "\* \* \* The current economic value of the tuff is irrelevant for purposes of  
25 determining whether or not the Board in 1990 would have balanced the  
26 conflicts in the same manner as it did for the pumice. Thus, the lack of a  
27 description of the removal of large volumes of tuff as part of the then existing  
28 mining activities indicates to the Board that the Board in 1990 was likely  
29 unaware of the non-inventoried material being mined and removed, let alone  
30 the volume of the material, and, thus, unaware of the resulting impacts to the  
31 conflicting uses to be protected.

32 "\* \* \* \* \*

1           “\* \* \* The Applicant’s arguments ignore the fact that the Board in 1990 was  
2 actually aware of the physical relationship between this site and Tumalo State  
3 Park because it required screening. Had the Board known that an additional  
4 3.4 million cubic yards of material was going to be mined and removed  
5 (nearly five times the volume of material identified in the ESEE), then it is  
6 likely the Board’s attention would have been drawn to potential impacts.”

7           “\* \* \* \* \*

8           “The applicant also argues that other ESEEs for pumice do not mention the  
9 mining of tuff because it is a given that tuff must be removed in order to  
10 access the pumice. The Board does not find that argument persuasive for Site  
11 303. It is one thing where the overlay of tuff is only about 30 feet as it is in  
12 the flatter area of the mine and where the mining of tuff may be considered  
13 incidental. It is quite another matter where the proposed mining of tuff  
14 completely dwarfs the proposed mining of pumice and would result in such an  
15 extensive headwall that would obviously conflict with surrounding sensitive  
16 uses.” Remand Record 6-11.

17           Petitioner argues that if LUBA agrees with petitioner that the county erred in  
18 concluding that an amended Conflict Resolution/ESEE Analysis is required to mine in the  
19 area of the headwall to extract and export pumice (only), “it is possible that the County  
20 Board would have made a different decision on the question of whether the tuff could be  
21 mined as incidental to mining the Bend pumice.” Petition for Review 40.

22           We cannot improve on intervenors-respondents’ response to petitioner’s eighth  
23 assignment of error:

24           “The potential that a local governing body might change its position on an  
25 issue is not a legal basis for an assignment of error. Latham has presented no  
26 basis for a remand requiring the County to reexamine the question of whether  
27 mining and removal of the tuff was included in the 1990 ESEE. It has not  
28 assigned [error to] any particular County findings regarding tuff \* \* \*.”  
29 Intervenor-Respondents Hoffmans’ Brief 27.

30           We agree with intervenors-respondents. The county set forth a number of reasons why it  
31 concluded that an amended Conflict Resolution/ESEE Analysis would be required to  
32 excavate and export 3.4 million cubic yards of tuff. Petitioner’s eighth assignment of error  
33 makes no attempt to challenge the reasoning set out in those findings, and we find that  
34 reasoning to be persuasive.

1           The eighth assignment of error is denied.

2           **PETITIONER’S REMAINING ASSIGNMENTS OF ERROR**

3           Petitioners remaining assignments of error are exceedingly complicated and to a  
4 significant extent present largely hypothetical issues that will likely, in most cases, ultimately  
5 be irrelevant or moot. If petitioner decides to seek approval of an amended Conflict  
6 Resolution/ESEE Analysis, so that the tuff can be extracted and removed, or requests the  
7 county to consider a proposal to mine only the pumice on the property, the parts of the  
8 decision that petitioner challenges in the remaining assignments of error will almost certainly  
9 be amended. We therefore remand based on our resolution of the first, second and eighth  
10 assignments of error, without reaching the remaining assignments of error. If petitioner  
11 wishes to request that the county approve its application to mine pumice on Site 303, with a  
12 condition that the tuff be retained and used to reclaim the property, it can make that request  
13 of the county. If petitioner only wishes to proceed if it can mine and export the tuff as well  
14 as the pumice, it will have to seek prior or concurrent approval for an amended Goal 5  
15 program for Site 303. In either event, petitioner may raise any of the issues raised in  
16 petitioner’s remaining assignments of error that are not rendered irrelevant or moot and the  
17 county can address those issues in the context of an application for site plan and conditional  
18 use approval that can be approved.

19           We do not reach petitioner’s fourth, fifth, sixth, seventh, and ninth assignments of  
20 error.

21           The county’s decision is remanded.

Appendix

