

1 BEFORE THE LAND USE BOARD OF APPEALS
2 OF THE STATE OF OREGON
3

4 LOST CREEK ROCK PRODUCTS, LLC,
5 *Petitioner,*

6
7 vs.
8

9 LANE COUNTY,
10 *Respondent,*

11 and

12
13 DEXTER LOST VALLEY
14 COMMUNITY ASSOCIATION,
15 *Intervenor-Respondent.*

16
17 LUBA No. 2012-072

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19 DEXTER LOST VALLEY
20 COMMUNITY ASSOCIATION,
21 *Petitioner,*

22 vs.
23

24 LANE COUNTY,
25 Respondent,

26 and
27

28
29 LOST CREEK ROCK PRODUCTS, LLC,
30 *Intervenor-Respondent.*

31 LUBA No. 2012-075

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33 FINAL OPINION
34 AND ORDER
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36
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38 Appeal from Lane County.

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40 Bill Kloos, Eugene, filed a petition for review and a response brief and argued on
41 behalf of Lost Creek Rock Products LLC.
42

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44 Daniel J. Stotter, Corvallis, filed a petition for review and response brief and argued

1 on behalf of Dexter Lost Valley Community Association.

2

3 No appearance by Lane County.

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

7

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REMANDED

02/06/2013

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

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NATURE OF THE DECISION

Petitioners appeal a county hearings official decision that grants site review approval for a mining operation.

MOTIONS TO INTERVENE

Lost Creek Rock Products, LLC (Lost Creek) was the applicant below. Dexter Lost Valley Community Association (DLVCA) opposed the application. Both Lost Creek and DLVCA appeal the hearings official’s decision, and both move to intervene on the side of respondent in the other’s appeal. Those motions are granted. The appeals have been consolidated for LUBA review. Therefore Lost Creek and DLVCA are both petitioners and intereვენors-respondents. To minimize confusion, we generally refer to them by name rather than by party status.

REPLAY BRIEF

DLVCA, petitioner in LUBA No. 2012-075, moves for permission to file a reply brief to respond to new issues raised in Lost Creek’s response brief. Lost Creek objects that DLVCA’s reply brief does not respond to new issues and is instead an attempt to elaborate on arguments DLVCA presented in its petition for review. We agree with Lost Creek that most of the reply brief is not limited to responding to new issues in the response brief. However, given our disposition of this consolidated appeal, we decline to attempt to separate the parts of the reply brief that are limited to responding to new issues and the parts that are not. The reply brief is allowed.

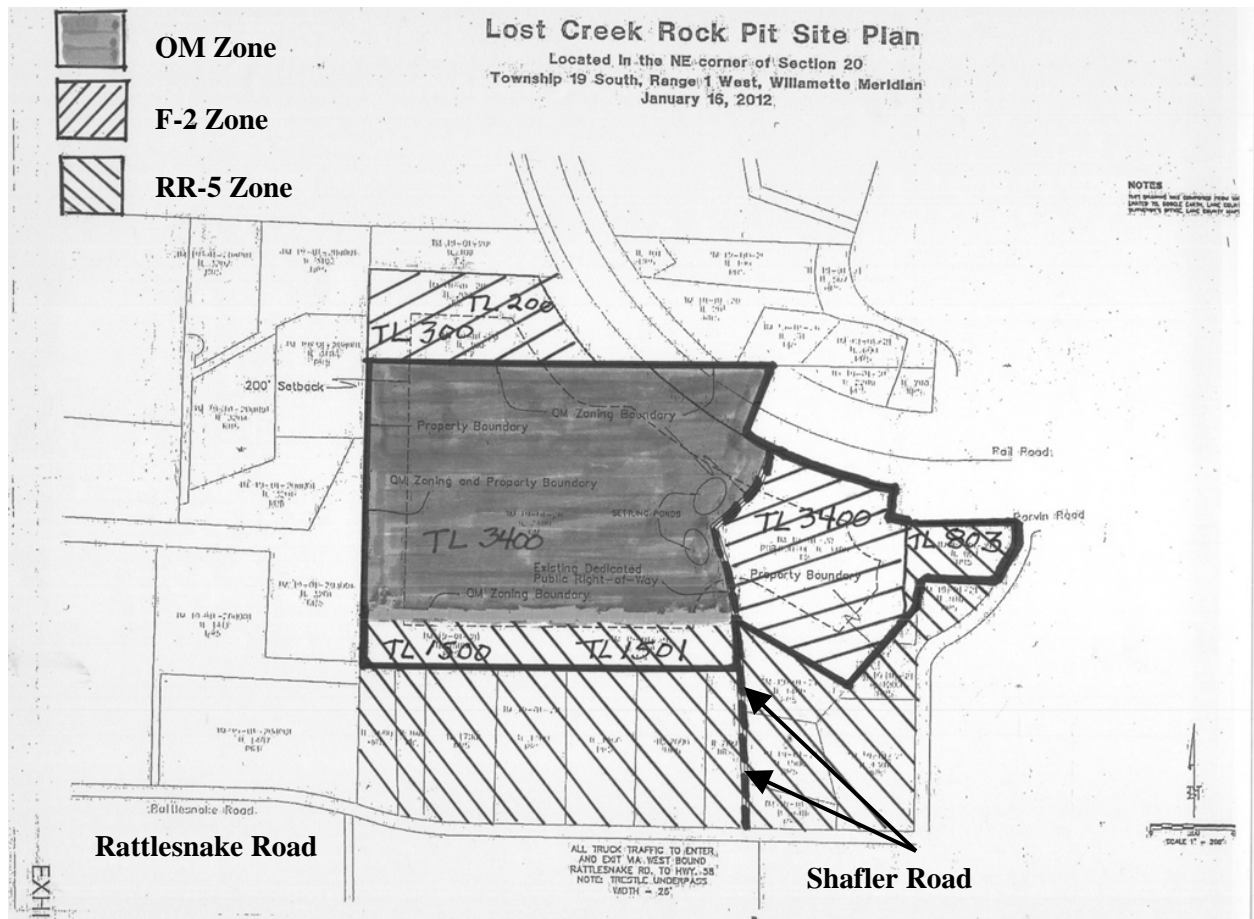
FACTS

The subject property is located near the rural community of Dexter, which is located approximately 20 miles southeast of the Cities of Eugene and Springfield on State Highway 58. The subject property adjoins the Southern Pacific Railroad right-of-way, and a quarry was first operated on the property in the early 1950s when that railroad right-of-way was

1 being relocated. At that time there were relatively few homes in this rural area; today there
2 are many more.

3 The subject property includes approximately 87 acres, in six parcels or tax lots. The
4 largest tax lot is tax lot 3400, which is split zoned. Approximately 47 acres of tax lot 3400
5 are zoned Quarry Mining (QM). The proposed mine and aggregate processing would be
6 carried out on this QM zoned 47 acres. The remainder of the subject property is zoned
7 Impacted Forest Lands (F-2) or Rural Residential (RR-5). Access to the subject property is
8 provided by Shafler Road. Shafler Road is not part of the county road system, but is
9 dedicated for public use. A map from page 1194 of the record is set out below. Zoning and
10 tax lot numbers have been added to the map to make it easier to describe the relevant facts.

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1 Although it is difficult to see on the above map, Lost Creek proposes a 200-foot
2 setback from the exterior boundary of the subject property, and with one exception all
3 mining-related activity would be limited to the QM-zoned property. Mining and processing
4 of rock would all occur on the 47-acre, QM-zoned portion of Tax Lot 3400 inside the 200-
5 foot setback. Mine related traffic, including the trucks that would remove rock and
6 aggregate, would access Shafler Road on tax lot 3400 inside the 200-foot setback. However,
7 that traffic would pass along the portion of Shafler Road that crosses the 200-foot setback as
8 those trucks enter or leave the property via Shafler Road and Rattlesnake Road to the south.
9 To summarize, trucks leaving the subject property would access Shafler Road on Tax Lot
10 3400, inside the 200 foot setback, and then travel south through the 200 foot setback on
11 Shafler Road to Rattlesnake Road. Those trucks would then turn west on Rattlesnake Road,
12 a county rural major collector road, and travel approximately four miles to Highway 58 and
13 on to wherever individual loads of rock and aggregate are destined.

14 **INTRODUCTION**

15 The parties have different views about whether the current mining on the subject
16 property requires site review and, if site review is required, the scope of that required site
17 review. In addition to the present consolidated appeal, that dispute has led to two other
18 appeals. A brief discussion of those other appeals is warranted to place this appeal in
19 context.

20 **A. The County Enforcement Appeal**

21 Sometime in 2010, the county sent Lost Creek notice that county site review was
22 required to operate a mine on the property. In December 2011, the county entered a Notice
23 of Failure to Comply, which imposed a daily fine. On December 21, 2011, Lost Creek filed
24 an application for site review under protest, which led to the hearings official decision that is
25 the subject of the current consolidated appeal. Contemporaneously, Lost Creek appealed the
26 Notice of Failure to Comply to the county hearings official. The hearings official initially

1 agreed with Lost Creek and dismissed the Notice of Failure to Comply, concluding that Lost
2 Creek's mining operation does not require site review. But the hearings official subsequently
3 reconsidered that initial decision. The hearings official reaffirmed that the portions of Lost
4 Creek's mining operations that are carried out on Tax Lot 3400 and comply with the 200-foot
5 setback from the exterior property line do not require site review. However, in his
6 reconsidered opinion he concluded that a portion of Lost Creek's mining operation that
7 occurs within the 200-foot setback does require site review and that Lost Creek's failure to
8 secure that site review approval has resulted in a violation of the Lane County Code (LC).
9 The hearings official entered a penalty of \$1,170 per day.

10 The county disagreed with aspects of its hearings official's decision on
11 reconsideration and appealed to LUBA. That appeal is LUBA No. 2012-031. Lost Creek
12 also disagreed with the hearings official's decision on reconsideration and filed a writ of
13 review in Lane County Circuit Court to challenge the hearings official's decision. With the
14 writ of review proceeding and the application for site plan review pending, LUBA
15 determined that it should not proceed with the county's appeal of the hearings official's
16 decision on reconsideration, because the pending decision on the site review application
17 might render that appeal moot and, further, contemporaneous challenges in LUBA and Lane
18 County Circuit Court would present jurisdictional questions and could result in inconsistent
19 rulings by LUBA and the Lane County Circuit Court.¹ Over DLVCA's objection, LUBA
20 issued an order suspending the county's LUBA appeal challenging the hearings official's
21 enforcement action decision. *Lane County v. Lane County*, ___ Or LUBA ___ (LUBA No.
22 2012-031, Order Suspending Appeal, July 11, 2012).

¹ In Lane County's appeal of the hearings officer's enforcement decision, Lost Creek challenged the county's standing to appeal its own decision to LUBA, and that challenge remains pending.

1 **B. Bridge Appeal**

2 Apparently in hopes of obtaining approval for an alternate access to the subject
3 property to Parvin Road to the east that would minimize opposition to the proposal, Lost
4 Creek sought approval for riparian modification and a floodplain development permit
5 necessary to construct a road and build a bridge across a creek in the eastern part of the
6 property to permit access to Parvin Road to the east. The county hearings official approved
7 the applications, and DLVCA appealed that decision to LUBA. DLVCA's petition for
8 review in that appeal was filed on August 13, 2012. On August 27, 2012, the county moved
9 for voluntary remand of the hearings official's decision. Over DLVCA's objection, LUBA
10 granted the motion and issued a final opinion and order remanding the hearings official's
11 decision. *Dexter Lost Valley Community Association v. Lane County*, ___ Or LUBA ___
12 (LUBA No. 2012-044, October 16, 2012). DLVCA appealed LUBA's decision to the Court
13 of Appeals, and as far as we are informed that appeal remains pending at the Court of
14 Appeals (A152839).

15 **FIRST ASSIGNMENT OF ERROR (Lost Creek and DLVCA)**

16 In their first assignments of error, Lost Creek and DLVCA both challenge the
17 hearings official's interpretation of the relevant Lane Code (LC) standards in the
18 circumstances presented in this case, to require site review for the anticipated truck traffic on
19 Shafler Road. Lost Creek's position is that the LC does not require site review for any part
20 of the mining operation, including the truck traffic on Shafler Road. DLVCA's position is
21 that the LC requires site review for the entire mining operation.

22 All parties agree the critical LC standards appear at LC 16.216 and 16.257. LC
23 16.216 sets out the requirements imposed by the QM zone. LC 16.216(4) and (5) are the
24 controlling sections of LC 16.216.² There is no question that at least some of the proposed

² As relevant, LC 16.216 provides:

1 mining uses fall within the uses described in LC 16.216(4)(a) through (e). That being the
2 case, there is also no question that under LC 16.216(5), Lone Creek’s mining operation is
3 “subject to the provisions of LC 16.257 (Site Review).” But the “provisions of LC 16.257”
4 do not require site review for all uses that are potentially subject to site review, in all
5 circumstances.

6 LC 16.257 includes four critical sections. LC 16.257(1) sets out the purpose of site
7 review.³ LC 16.257(4) sets out the criteria for site review.⁴ Despite the broadly stated

“16.216 Quarry and Mine Operations Zone (QM-RCP).

“* * * * *

“(4) Permitted Buildings and Uses. In the Quarry and Mine Operations District, the following types of buildings and uses are permitted as hereafter specifically provided for by this section, subject to the provisions of the Quarry and Mining Operations Reclamation Permit and additional Conditions and exceptions set forth in this Chapter:

- “(a) Extracting and storing of minerals, including equipment and materials necessary to carry out these functions.
- “(b) Plants for the processing of minerals from quarry and mine extraction operations.
- “(c) Sale of products generated from the quarrying and mining operation.
- “(d) Activities permitted or required as part of the reclamation process provided for in the Reclamation Plan.
- “(e) Structures and buildings used in conjunction with the extracting and storing of minerals or related equipment as defined in LC 16.216(4)(a) above.

“* * * * *

“(5) Site Review Required. Uses permitted by LC 16.216(4)(a), (b), (c), (d) and (e) above shall be subject to the provisions of LC 16.257 (Site Review).”

³ LC 16.257(1) provides:

“Purpose. It is the purpose of this section to establish a Site Review Permit procedure for specified uses or applications requiring comprehensive review of proposed site development in order to encourage the most appropriate development of the site compatible with the neighborhood, to prevent undue traffic and pedestrian hazards or congestion, to reduce

1 purpose and site review criteria, LC 16.257(2) sets out circumstances where site review is
2 required, while LC 16.257(3) describes circumstances where site review is *not* required. The
3 relevant text of LC 16.257(2) and (3) is set out below:

4 “(2) Site Review Permits Required. A Site Review Permit shall be required
5 when:

6 “(a) Nonresidential uses * * * are proposed for properties where *the*
7 *proposed uses and/or structures are within 200 feet of the*
8 *boundaries of an RR-RCP; RA-RCP; R-2-RCP; RG-RCP or*
9 *RP-RCP zone.*

10 “* * * * .

11 “(3) Site Review Permits Not Required. It is not necessary to require a Site
12 Review Permit when:

13 “* * * * .

14 “(c) The proposed uses or improvements are located at least 200
15 feet from all exterior boundaries of the subject property.”
16 (Emphasis added.)

17 There are at least two ambiguities in the above quoted portions of LC 16.257(2) and
18 (3), which we address below in turn.

19 **A. The Truck Traffic on Schafer Road is not Part of the Mining Use**

20 The first ambiguity in LC 16.257(2) and LC 16.257(3)(c) is the meaning of the term
21 “proposed uses” in LC 16.257(3)(c). If the “proposed uses” include the truck traffic on
22 Shafler Road that will pass through the 200-foot buffer or setback on its way to deliver
23 aggregate and other mined material to distant sites, then that part of the proposed mining use
24 (1) would not be “located at least 200 feet from all exterior boundaries of the subject

adverse impacts upon public facilities and services, and to provide a healthful, stable, efficient
and pleasant on-site environment.”

⁴ LC 16.257(4) sets out a number of criteria to ensure that uses that are subject to site review are compatible with the surrounding area and that the public facilities necessary to serve the uses are adequate. For the sake of brevity we do not set out those criteria in their entirety.

1 property,” and (2) would pass within 200 feet of RR-5 zoned property as it passed through
2 the 200 foot buffer and continued along Shafler Road onto Rattlesnake Road. The result
3 would be that the LC 16.257(2)(a) requirement for site review applies at least to that aspect
4 of the proposal and the LC 16.257(3)(c) exemption from site review for uses that are set back
5 at least 200 feet from RR-5 zones does not apply.

6 The hearings official acknowledged that the applicant established that Shafler Road is
7 a public road.⁵ The hearings official adopted the following findings to explain his conclusion
8 that the truck traffic on Shafler Road is nevertheless properly viewed as part of the mining
9 use and is therefore subject to site review:

10 “The applicant’s position is that because Shafler Road is a public road used
11 for travel, it is therefore not a ‘use’ of land that can trigger site review. This
12 theory is based upon several cases where LUBA distinguishes between a
13 private access that is considered part of the use itself and a public road that, by
14 definition, may cut through many disparate zoning districts. *Wilson v.*
15 *Washington County*, 63 Or LUBA 314 (* * * 2011). I believe this line of
16 cases can be distinguished from the present situation. In *Wilson*, and its
17 progeny, the issue was a practical one. LUBA opined that a host of zoning
18 incompatibility issues would be created if dedicated right-of-ways that
19 provided access to a principal use were considered as part of the principle use.
20 That is not the situation here where the issue is whether site review provision
21 must be applied to the use of Shafler Road. The site review permit process
22 does not concern the approval or denial of a land use, only the application of
23 conditions to make it compatible with affected properties.

24 “Lane County Transportation Planning Staff and those opposed to this
25 application have argued that the site review permit process should also be
26 applied to Rattlesnake Road and that the applicant should be required to
27 improve that Major Rural Collector to standards of Lane Code 15.703. While
28 I agree that the proposed use will have the potential to significantly impact the
29 use and safety of Rattlesnake Road, I believe that the site review permit
30 inquiry must be restricted to impacts from the use of Shafler Road. The

⁵ Shafler Road is apparently located on an easement that was dedicated to the public for roadway purposes, as opposed to a dedicated public right-of-way. No party argues that that distinction is legally important or that Shafler Road is any less a public road that is fully open to use by the public because it is located on an easement rather than a right-of-way.

1 reasoning for this conclusion is discussed below in the analysis of LC
2 16.257(4)(f).”⁶ Record 127.

3 While we agree that LUBA’s decision in *Wilson* is not necessarily controlling,
4 because it applies in a different factual context, the principle at issue in that case would seem
5 to be applicable here. In this case, because we do not have an interpretation from the board
6 of county commissioners, the interpretive question to be resolved is whether the hearings
7 official’s view of the truck traffic on Shafler Road as being part of the mining use is legally
8 correct. *Tonquin Holdings, LLC v. Clackamas County*, 247 Or App 719, 722-23, 270 P3d
9 397 (2012). Viewed in context, we conclude the hearings official’s understanding of the
10 relevant LC language is incorrect.

11 If trucks that transport aggregate and other material from the site are accurately
12 characterized as part of the mining use, even after those trucks enter a public road (Shafler
13 Road), the next question would be when do the trucks hauling aggregate and other material
14 cease to be part of the mining use? The hearings official apparently concluded they remain
15 part of the mining use as the trucks travel down Shafler Road into the 200-foot setback and
16 along RR-5 zoned lands south of the subject property. But if that truck traffic is accurately
17 viewed as part of the mining use on Tax Lot 3400 until the aggregate and other material is

⁶ LC 16.257(4)(f) is among the considerations that apply in site review. The hearings officer later rejected contentions that LC 16.257(4)(f), which may allow the county to require roadway improvements if needed for “traffic safety and [to] reduce traffic congestion,” should be applied to require improvements along Rattlesnake Road. The hearings official concluded that LC 16.257(4)(f) does not apply to Rattlesnake Road because LC 16.257(4)(f) is limited to “abutting streets” like Shafler Road, and Rattlesnake Road is not an abutting street. The text of LC 16.257(4)(f) is set out below:

“That, based on anticipated traffic generation, adequate additional right-of-way, road improvements, and on-site vehicular, bicycle and pedestrian improvements connecting directly to off-site roads, paths and sidewalks must be provided by the development in order to promote traffic safety and reduce traffic congestion.

“Consideration shall be given to the need and feasibility of widening and improving abutting streets to specifications of LC Chapter 15, ‘Roads,’ and also to the necessity for such additional improvements as lighting, sidewalks, bicycle lane and path connections, and turn and deceleration/acceleration lanes. Improvements shall be consistent with access management, spacing standards, and other requirements of LC Chapter 15.”

1 delivered to its point of use, the mining use could easily extend as far as the cities of Eugene
2 and Springfield 20 miles away, or further. While the hearings official may have avoided
3 some of the problems that obviously arise under such an expansive view of the mining use by
4 narrowly interpreting LC 16.257(4)(f) to apply only to abutting streets, *see* n 6, other site
5 review criteria would not be so easily limited.⁷

6 *Wilson*, which is cited by the hearings official, and the cases that *Wilson* cites and
7 relies on, simply stand for the proposition that a driveway that is located on the same lot or
8 parcel as the use that it serves, or is located on other private property rather than a public
9 right-of-way, is properly viewed as part of the use. In that circumstance the driveway is
10 necessary to provide access to a public right-of-way and properly viewed as part of the use.
11 *Wilson*, 63 Or LUBA at 318-19 (citing *Bowman Park v. City of Albany*, 11 Or LUBA 197
12 (1984) and *Roth v. Jackson County*, 38 Or LUBA 894 (2000)). By contrast, existing or
13 extended public rights-of-way that provide access to the property or properties where a use is
14 to be developed are not properly viewed as part of the use. *Wilson*, 63 Or LUBA at 318
15 (citing *Central Oregon Landwatch v. Deschutes County*, 56 Or LUBA 280 (2008)).
16 Admittedly those cases concern whether the driveways or rights-of-ways were properly
17 zoned for the proposed use, but the principle at issue here is quite similar, *i.e.*, whether the
18 driveway or right-of-way (or more precisely the truck traffic on that driveway or right-of-
19 way) must be viewed as part of the use and thus subject to site review under the LC.

20 Applying the principles described in *Wilson* here, the truck traffic on Tax Lot 3400
21 will comply with the 200-foot buffer while being loaded with aggregate and other material
22 and will comply with the 200-foot buffer until *after* that truck traffic crosses onto the Shafler
23 Road, a public road. Until the truck traffic passes onto the public roadway, it is properly

⁷ For example LC 16.257(4)(a) requires in part “[t]hat the location * * * of the uses * * * are compatible with the surrounding vicinity.”

1 viewed as part of the mining use and potentially subject to site review. But at the point it
2 crosses onto the first public road that connects the property to the larger public road system,
3 it ceases to be part of the mining use and is no longer subject to the zoning that might apply
4 to Shafler Road or other public roads, which might not allow mining as a use. We agree with
5 Lost Creek that at that point the mining related truck traffic ceases to be part of the mining
6 use and becomes truck traffic. We also agree that after it becomes truck traffic, it is no more
7 a mining use than a Walmart truck traveling down a public road is a Walmart. Similarly that
8 truck traffic, because it ceases to be part of the mining use, is no longer subject to the site
9 review standards that would apply if the truck traffic were properly viewed as part of the
10 mining use.

11 Before turning to DLVCA's contrary arguments, we note that if site review was
12 required under LC 16.216 and 16.257, one of the site review criteria clearly authorizes the
13 county to regulate the impacts of off-site truck traffic. LC 16.257(4)(f). *See* n 6. But LC
14 16.257(4)(f) applies only if the threshold issue regarding whether site review is even required
15 has already been answered in the affirmative. The regulation of truck traffic under LC
16 16.257(4)(f) once site review is required does not depend on whether mining related truck
17 traffic on public rights-of-way is correctly viewed as part of the mining use. LC 16.257(4)(f)
18 specifically authorizes such regulation in site review without regard to whether that truck
19 traffic is on a public right-of-way. But the threshold issue in this case (whether site review is
20 required at all) does turn on whether the truck traffic on a public road after that traffic has left
21 the mining site is properly viewed as part of the mining use.

22 DLVCA advances a number of arguments against our conclusion that the truck traffic
23 ceases to be part of the mining use once it enters a public road, none of which are persuasive.
24 First, DLVCA cites the broad definition of "Mining" at LC 16.090.⁸ The first paragraph of

⁸ LC 16.090 defines "Mining" as follows:

1 the definition, which is the only paragraph that DLVCA quotes in its brief, does not support
2 its position that mining includes trucks traveling on public roads after departing the site
3 where the mine is located. The second paragraph, which DLVCA omits from the quotation
4 in its brief, lends some support for the opposite conclusion.

5 DLVCA next points out that among the activities authorized by LC 16.216(4) in the
6 QM zone is “[s]ale of products generated from the quarrying and mining operation.”
7 Presumably DLVCA is suggesting that trucks hauling aggregate or other mined material
8 from the site down Shafler Road and Rattlesnake Road are engaged in the sale of mined
9 products. While that may be partially true in some larger abstract sense, the sale of aggregate
10 and other mined material is much more likely completed either on Tax Lot 3400, at the point
11 of delivery or at some other place where offers to sell aggregate and other material are
12 accepted and consideration is paid. If DLVCA is suggesting that sale of aggregate or other
13 material must be viewed as completed as trucks are traveling down Shafler Road and
14 Rattlesnake Road, we reject the suggestion.

15 DLVCA next cites Lost Creek’s own description of the proposed mining use:

16 “The scope and component of the use are as described in the applicant’s
17 previous submissions. In summary, the use includes mining, quarrying,
18 blasting, crushing, processing, *hauling and other ingress and egress*
19 *associated with the above.*” Record 1464 (emphasis added).

“All or any part of the process of mining by the removal of overburden and the extraction of natural mineral deposits thereby exposed by any method including open-pit mining operations, auger mining operations, processing, surface impacts of underground mining, production of surface mining refuse and the construction of adjacent or off-site borrow pits except those constructed for use as access roads.

“The term does not include excavations of sand, gravel, clay, rock or other similar materials conducted by a landowner or tenant on the landowner’s or tenant’s property for the primary purpose of reconstruction or maintenance of access roads and excavation or grading operations conducted in the process of farming or cemetery operations, onsite road construction or other onsite construction or nonsurface impacts of underground mines.”

1 We understand DLVCA to rely on the emphasized text quoted above to contend that even
2 Lost Creek described the use as including the hauling of mined rock. DLVCA reads too
3 much into the emphasized language. It certainly is not necessary to read that language to
4 take the position that the trucks hauling aggregate and other material down Shafler Road,
5 Rattlesnake Road and other public roads are part of the mining use. The language could just
6 as well be a reference to the necessity to haul the rock and aggregate from the areas on Tax
7 Lot 3400 (set back 200 feet from the property line) onto Shafler Road (at a point that is also
8 set back 200 feet from the subject property's boundary), which provides ingress to and egress
9 from Tax Lot 3400. At that point while the truck traffic is properly viewed as part of the
10 mining use, it is set back at least 200 feet from the subject property's property line. It is only
11 after that truck traffic travels down Shafler Road through the adjoining RR-5 zoned property
12 that it is closer than 200 feet from adjoining RR-5 zoned property. As we have already
13 explained, we agree with Lost Creek that at that point the truck traffic is no longer correctly
14 described as part of the mining uses.

15 **B. The Proposed Mining Operation on Tax Lot 3400 is within 200 Feet of**
16 **RR-5 Zoned Tax Lots 1500 and 1501.**

17 Finally, a second ambiguity concerns whether, pursuant to LC 16.257(2)(a), Lost
18 Creek's mining operation is subject to site review even if the truck traffic on Shafler Road is
19 not properly viewed as part of the mining use. Referring to (1) the map that was included in
20 our earlier discussion of the facts, which shows the subject property, and (2) the text of LC
21 16.257(2)(a) and 16.257(3)(c), which was set out in the beginning of our discussion of the
22 first assignments of error, the ambiguity concerns a possible conflict between LC
23 16.257(2)(a) and 16.257(3)(c) in the circumstances presented in this appeal. Staff appears to
24 have taken the position that under LC 16.257(2)(a) the 200-foot setback that would avoid the
25 requirement for site review should be measured from RR-5 zoned Tax Lots 1500 and 1501
26 included within Lost Creek's six parcel tract rather than from the exterior boundary of Lost

1 Creek’s tract, as Lost Creek proposes. Staff reasoned that because LC 16.257(2)(a) requires
2 site review where “[n]onresidential uses * * * are proposed for properties where the proposed
3 uses * * * are within 200 feet of the boundaries of an RR * * * zone,” and Lost Creek
4 proposes mining uses within 200 feet of the RR-5 zoned Tax Lots 1500 and 1501 that are
5 part of Lost Creeks six parcel tract, site review is required under LC 16.257(2)(a). The
6 hearings officer appears to have agreed in part with staff on this point.⁹

7 But the hearings official seems to have determined that LC 16.257(2)(a) does not
8 apply in isolation. The hearings official went on to conclude that the requirement for site
9 review in LC 16.257(2)(a) in this case conflicted with LC 16.257(3)(c), which states
10 circumstances where site review is *not* required. The hearings official ultimately concluded
11 that in that circumstance the more restrictive provision is LC 16.257(3)(c) and it applies in
12 place of LC 16.257(2)(a):

13 “Staff argues that the ‘subject property’ should be restricted to the portion of
14 the applicant’s property that is zoned QM and that the 200-foot setback should
15 be measured from the boundaries of the QM zone. The rationale for this
16 position is that the most intensive activities from the proposed use occur
17 within the QM boundary and because that boundary is conterminous with the
18 applicant’s DOGAMI permit. This position begs the question, however, as to
19 how [LC] 16.257(2)(a) and [LC] 16.257(3)(c) should be reconciled.

20 “The two provisions are similar in that they recognize the principle that a 200-
21 foot wide buffer may preclude the need for a site review permit. They are
22 different in that Lane Code 16.257(3)(c) is more restrictive in that it requires
23 that the 200-foot buffer be applied to all exterior boundaries, not just those
24 boundaries that are adjacent to residentially zoned property. Thus, the buffer

⁹ The hearings official explained:

“[LC] 16.257(2)(a) requires a site review permit for nonresidential uses that are within 200 feet of the boundaries of a residential zone. This provision does not distinguish between adjacent residential [zoned property] owned by the applicant and [properties] that are not [owned by the applicant] so it cannot be said that the proposal [falls outside the requirement for site review in LC16.257(2)(a)] * * *. If the inquiry into the applicability of site review to the proposed use stopped at this point, all of the quarrying operations on the subject property would be subject to a site review permit.” Record 31.

1 in Lane Code 16.257(3)(c) is defined in terms of the boundaries of the ‘subject
2 property’ not adjacent zoning. It seems clear that the Board of
3 Commissioners believed that a 200-foot buffer would be sufficient to protect
4 surrounding properties from [a] proposed use to the point that a site review
5 permit was not necessary. It is unclear why that principal is not operative if
6 the buffer occurs on residential and impacted forest land instead of land zoned
7 for quarry mining.” Record 126.

8 We need not determine whether the hearings official correctly concluded that the LC
9 16.257(3)(c) 200-foot setback from the subject property’s property line applies in place of the
10 LC 16.257(2)(a) 200-foot setback from RR zoning. DLVCA does not assign error to the
11 hearings official’s resolution of this issue in its appeal in LUBA No. 2012-075, and did not
12 file a cross petition for review to challenge the hearings official’s resolution of this issue in
13 Lost Creek’s appeal in LUBA No. 2012.072. We therefore do not consider this issue further.

14 Based on the above, we sustain Lost Creek’s first assignment of error. As explained,
15 site review is not required pursuant to LC 16.257(3)(c) so long as the proposed mining use is
16 set back more than 200 feet from the subject property’s boundary, and the hearings official
17 erred in treating the truck traffic on Shafler Road as part of the mining use and erred in
18 subjecting that truck traffic to site review. It follows that we deny DLVCA’s first assignment
19 of error, in which it alleges the hearings officer should have subjected Lost Creek’s entire
20 mining operation to site review.

21 Lost Creek first assignment of error is sustained. DLVCA’s first assignment of error
22 is denied.

23 **SECOND THROUGH SIXTH ASSIGNMENTS OF ERROR (DLVCA)**

24 These assignments of error all contend that the hearings officer erred in applying the
25 criteria that must be applied and found satisfied in cases where site review is required.
26 Because we have already concluded that site review is not required, the second through sixth
27 assignments of error provide no basis for reversal or remand and are denied.

28 The county’s decision is remanded so that the hearings official can enter a decision
29 consistent with our resolution of Lost Creek’s first assignment of error.