BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

ROGUE ADVOCATES,
WILLIAM M. CORCORAN II
and ELIZABETH A. CORCORAN,
Petitioners,

vs.

JOSEPHINE COUNTY,
Respondent,

and

SUNNY VALLEY SAND AND GRAVEL, INC.
Intervenor-Respondent.

LUBA Nos. 2014-095/096

FINAL OPINION
AND ORDER

Appeal from Josephine County.

Courtney Johnson, Portland, filed the petition for review and argued on behalf of petitioner Rogue Advocates. With her on the brief was CRAG Law Center.

Sean T. Malone, Eugene, filed the petition for review and argued on behalf of petitioners William M. Corcoran II and Elizabeth A. Corcoran.

No appearance by Josephine County.

Steven L. Pfeiffer and Corinne S. Celko, Portland, filed the response brief and argued on behalf of intervenor-respondent. With them on the brief was Perkins Coie LLP.

BASSHAM, Board Chair; HOLSTUN, Board Member; RYAN Board

Member, participated in the decision.

REMANDED 10/15/2015

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 that adopts findings supporting an application for comprehensive plan text amendments, plan and zoning map amendments, and a site plan review, to allow development of an aggregate mine.

MOTION TO FILE OVERLENGTH BRIEF

Intervenor-respondent Sunny Valley Sand and Gravel, Inc. (intervenor) moves to file an overlength 66-page brief to respond to the two petitions for review filed in this appeal, which together total 73 pages. The motion is allowed.

FACTS

The subject property is a 212-acre tract, located at the southwest corner of the intersection of Placer Road and Daisy Mine Road, approximately three miles from Interstate Highway 5. The property is zoned Woodlot Resource (WR), Rural Residential (RR-5) and Serpentine (S). A majority of the property is located within a deer winter range habitat area, with an identified access corridor inventoried in the north-central portion of the property. A buried high-pressure natural gas pipeline crosses the property from north to south. Two fish-bearing streams run through and adjacent to the property: Graves Creek and Shanks Creek, both inventoried Class I streams under Statewide Planning Goal 5 (Natural Resources, Scenic and Historic Areas and Open Space). Surrounding lands are also zoned a mix of WR, RR-5, and S, with the dominant land use pattern a mix of residential, farm and forest uses. The surrounding neighborhood includes approximately 48 houses within 1,500 feet

of the site, most located along Placer Road along the north border of the subject property.

Intervenor proposed to mine 112 acres of the site over a period of 20 to 40 years. Excavated material would be crushed and processed in the southeastern portion of the site, then transported three miles along Placer Road and via other roads to Interstate 5. At the intersection of Placer Road and Sunny Valley Loop is the Graves Creek Covered Bridge, a historic covered bridge that is listed on the National Register of Historic Places. Intervenor projected that, on average, there would be 55 roundtrips per day, 5 days per week, 52 weeks per year for up to 40 years. To access the site, intervenor proposed to construct a bridge from Placer Road across Grave Creek, and to construct two crossings of Shanks Creek. In addition, intervenor proposed to construct elevated conveyance systems to transport rock from the excavation pits to operations areas, in part to limit creek crossings. After mining is completed, intervenor proposes to reclaim the property to a series of ponds and lakes.

On April 28, 2014, the planning commission held a hearing on the applications, which was continued for three additional hearings. On June 2, 2014, the planning commission voted to recommend adding the site to the county's inventory of significant mineral and aggregate sites, but tied 3-3 on recommendations to plan and zone the property to allow the proposed mining operation.

The county board of commissioners held a hearing on June 23, 2014, that was continued to June 27, 2014. The commissioners left the record open until July 14, 2014, for additional evidence, and until July 21, 2014, for intervenor to submit final written argument. On July 21, 2014, intervenor submitted final

written argument, accompanied by five letters from intervenor's experts, including geotechnical, wildlife and air quality consultants.

At the final July 28, 2014 proceeding, planning staff discussed a letter dated July 25, 2014, that staff solicited and received from a representative of the Williams Northwest Pipeline, LLC, the owner of the natural gas pipeline that crosses the subject property. Staff placed the letter into the record as part of exhibit LLLLLL. Record 128-30. The commissioners then proceeded to deliberate, and voted to approve the applications by a vote of 2-0. On October 8, 2014, the commissioners issued the final decision approving the applications.

This appeal followed.

FIRST ASSIGNMENT OF ERROR (Corcorans)
FIFTH ASSIGNMENT OF ERROR (Rogue Advocates)

The Corcorans and Rogue Advocates (collectively, petitioners) argue that the county committed procedural errors in accepting and relying upon new evidence after the evidentiary record had closed, without providing petitioners an opportunity to respond or rebut that new evidence.

As noted, on July 21, 2014, one week after the close of the evidentiary record, intervenor submitted along with its final written argument five letters from its expert consultants, labeled as Exhibits DDDDDD, EEEEEE, GGGGGG, HHHHHH, and IIIIII. Petitioners contend that the five letters include new evidence, and therefore should not have been accepted, considered or relied upon, without providing opponents a chance to respond and offer rebuttal. Petitioners argue that the county's findings expressly cite and rely upon four of the letters.

Further, petitioners argue that the county erred in accepting Exhibit LLLLLL, the July 25, 2014 letter from the natural gas company, because that letter includes new evidence and was submitted at the final proceeding July 28, 2014, long after the evidentiary record closed.

A. Exhibits DDDDDD, EEEEEE, GGGGGG, HHHHHH, and IIIIII

With respect to these five letters, intervenor responds that petitioners failed to object or adequately raise an issue below regarding the alleged procedural violations, despite opportunity to do so. ORS 197.763(1) provides that an issue which may be the basis for appeal to LUBA must be raised no later than the close of the record at or following the final evidentiary hearing, and further that such issues "shall be raised and accompanied by statements or evidence sufficient to afford" the decision maker and the parties "an adequate opportunity to respond to each issue."[1]

In a letter dated July 24, 2014, petitioner Rogue Advocates objected that the five letters that accompanied the applicant's final written argument included new evidence and should be rejected. Record 123. Intervenor argues that the July 24, 2014 letter was insufficient to raise an "issue" regarding new evidence, because the objector failed to identify the specific portions of the five letters that include the alleged new evidence. Therefore, intervenor contends that the "issue" of new evidence in the letters was not raised below with the specificity required by ORS 197.763(1), sufficient to allow the county and

[1] Even where ORS 197.763(1) does not apply, LUBA has long held that to assign error to a procedural error, a petitioner must establish that a participant objected to the error during the proceedings below, if there was reasonable opportunity to do so. *Mazeski v. Wasco County*, 26 Or LUBA 226, 232 (1993).

intervenor an opportunity to respond. Further, intervenor argues that the county is obligated to provide rebuttal to new evidence only if the objector requests it, and intervenor notes that the objector requested only that the new evidence be rejected, not for an opportunity to rebut the new evidence.

ORS 197.763(6)(e) and corresponding code provisions limit the applicant's final written argument to "argument," which may not include "new evidence."[2] ORS 197.763(9)(b) defines "evidence" to include "facts, documents, data or other information offered to demonstrate compliance or noncompliance with the standards believed by the proponent to be relevant to the decision."

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[2]ORS 197.763 provides in relevant part:

> "(6)(e)Unless waived by the applicant, the local government shall allow the applicant at least seven days after the record is closed to all other parties to submit final written arguments in support of the application. The applicant's final submittal shall be considered part of the record, but shall not include any new evidence. * * *
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> "* * * * *
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> "(9) For purposes of this section:
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> "(a) 'Argument' means assertions and analysis regarding the satisfaction or violation of legal standards or policy believed relevant by the proponent to a decision. 'Argument' does not include facts.
>
> "(b) 'Evidence' means facts, documents, data or other information offered to demonstrate compliance or noncompliance with the standards believed by the proponent to be relevant to the decision."

Intervenor does not dispute that the five letters at Exhibits DDDDDD, EEEEEE, GGGGGG, HHHHHH, and IIIIII include "new evidence." We disagree with intervenor that opponents waived their procedural objection to consideration of the new evidence, by failing to specify exactly which portions of the consultants' letters constituted "new evidence." This is not a circumstance where an opponent simply alleged below that a new factual assertion is buried somewhere in the applicant's final written argument, without identifying what that new factual assertion is or where it is found. Intervenor chose to submit after the close of the evidentiary record five letters that consist of expert testimony. Expert testimony is, by its nature, intended to present technical evidence or professional opinion to the decision maker in order to demonstrate that approval criteria are met. Presenting expert testimony after the record is closed will frequently, if not inevitably, introduce "new" technical evidence or professional opinion, even if the expert is simply commenting on evidence already in the record. Under these circumstances, a general objection that expert testimony that was improperly submitted after the record is closed includes new evidence is sufficient to provide the decision maker and other parties a reasonable opportunity to respond and, if necessary, take corrective action or explain why the expert testimony does not include new evidence, if that is the case. Where, as here, there is no dispute that the improperly submitted expert testimony includes new evidence, the local government has only two options consistent with ORS 197.763(6): either (1) reject the improperly submitted expert testimony in its entirety, or (2) accept the testimony, but reopen the record to provide other parties the opportunity to

respond and rebut. Neither option requires specific identification of new evidence.[3] The July 24, 2014 e-mail objecting to acceptance of the new evidence in the five letters was sufficient to afford the county and intervenor an adequate opportunity to respond to the objection.

Intervenor also argues that petitioners have failed, on appeal, to adequately identify the new evidence included in the five letters. *See City of Damascus v. Metro*, 51 Or LUBA 210, 228 (2006) (a party before LUBA objecting to new evidence improperly received after the close of the evidentiary record must (1) adequately identify the evidence, (2) explain why it constitutes new evidence, and (3) offer some substantial reason to believe that the evidence had some effect on the final decision, in order to obtain remand). In its petition for review, Rogue Advocate discusses four of the five letters, and identifies at least one statement in each letter that constitutes new evidence. Rogue Advocates also notes that the findings cite to and expressly rely on the evidence provided in Exhibits DDDDDD, EEEEEE, HHHHHH, and IIIIII. Intervenor does not dispute that the four letters include new evidence or that the county relied on those letters. On appeal, petitioners have adequately identified new evidence in Exhibits DDDDDD, EEEEEE, HHHHHH, and IIIIII, and established a substantial reason to believe that the new evidence had some effect on the decision.

Exhibit GGGGGG is a letter from intervenor's engineering consultant. Record 156-59. The Corcorans allege that Exhibit GGGGGG includes new

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[3] If the applicant disputes below that expert testimony that was submitted at the time the record is limited to final written argument includes "new evidence," the local government has the third option of resolving that dispute and taking the appropriate action based on that resolution.

evidence, but do not explain why. The Corcorans also do not allege that the county cited to or relied upon Exhibit GGGGGG. Accordingly, we agree with intervenor that petitioners have failed to establish that any procedural error the county committed in accepting Exhibit GGGGGG prejudiced petitioners' substantial rights or provides an independent basis for reversal or remand.

B. July 25, 2014 Letter from Williams Pipeline Company

As noted, county staff solicited a letter from the owner of the natural gas line that crosses the property, to obtain input from the owner regarding issues raised regarding impacts of the mining operation on the line's safety.[4] Staff entered the letter into the record before the county commissioners on July 28, 2014, shortly before the commissioners entered into deliberations and voted to approve the applications. Record 128-30. Petitioners argue that the county erred in accepting and relying upon this new evidence, which was submitted long after the close of the evidentiary record. Petitioners also argue that at the time staff introduced the letter the opponents had no further opportunity to speak or submit testimony, and had no reasonable opportunity to present objections.

Intervenor responds that petitioners had an opportunity to object to the letter at the July 28, 2014 hearing, but failed to do so. Intervenor notes that shortly after planning staff introduced the Williams letter, an opponent raised a

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[4] The minutes of the July 28, 2014 meeting state, in relevant part:

> "[Planning staff] reviewed the response from Williams Northwest Pipeline. Planning staff contacted them because of the concerns raised as a serious safety issue. Williams met with staff, at the end of the meeting staff asked for a letter of clarification and received the letter included in Exhibit LLLLLL." Record 119.

point of order to the effect that planning staff was "arguing for the applicant rather than presenting." Record 119. Intervenor argues that raising this point of order demonstrates that it was still possible to raise procedural objections at that point in the July 28, 2014 meeting.

We disagree with intervenor. Staff entered the Williams letter into the record just before the commissioners entered into deliberations, after the close of argument from all parties. The record does not reflect that any participant, other than staff, had an opportunity to read the letter to determine if it included new evidence, in the short interval before the commissioners entered into deliberations. At that point in the meeting there was no subsequent formal opportunity for opponents to speak, present testimony or raise objections. While one opponent briefly raised a "point of order" that in the final staff oral presentation staff argued for the applicant rather than presenting options to the commissioners, that objection does not demonstrate that participants had a reasonable opportunity to also object to new evidence presented in the Williams letter. As noted, the record does not reflect that any participant had a reasonable opportunity to read the Williams letter, prior to the close of testimony.

Intervenor also argues that petitioners have not established that the county relied upon the Williams letter, and thus that any procedural error in accepting the Williams letter had some effect on the decision and prejudiced their substantial rights. ORS 197.835(9)(a)(B). Intervenor notes that the county's findings under the heading of the "Pipeline and Transmission Towers" do not refer to the Williams letter. Further, intervenor notes that the findings state that the record before the county includes "Written testimony set forth in

Exhibits 1-29 and Exhibits A – IIIIII," thus indicating that the county did not consider the Williams letter, which was labeled Exhibit LLLLLL.

However, as Rogue Advocates notes, the minutes of the July 28, 2014 meeting reflect that after receiving the Williams letter the commissioners "agreed if the owners of the multi-million dollar pipeline were not concerned with collapse they were confident." Record 119. Rogue Advocates argues, and we agree, that that statement suggests that the commissioners relied upon the Williams letter to conclude that the proposed mining operation presented no safety issues with respect to the gas line, a contentious point below.

We agree with Rogue Advocates that the record suggests that the commissioners relied upon the Williams letter, even if that reliance did not express itself in the findings or the list of exhibits that the findings state are considered part of the record. There is no dispute that the Williams letter was entered into the record, and the commissioners appeared to have relied on that letter in part to conclude that safety issues regarding the natural gas pipeline are resolved. Accordingly, petitioners have demonstrated that the county's error in accepting the Williams letter without providing participants an opportunity to review the letter and offer a response or rebuttal thereby prejudiced petitioners' substantial rights.

C. Conclusion

The first assignment of error (Corcorans) and the fifth assignment of error (Rogue Advocates) is sustained. Remand is necessary for the county to provide petitioners with an opportunity to respond to or rebut any new evidence presented in Exhibits DDDDDD, EEEEEE, HHHHHH, IIIIII, and LLLLLL. Because remand may result in adoption of new findings and review of a new evidentiary record regarding certain issues addressed in the above

exhibits, for purposes of the present appeal LUBA will resolve only those remaining assignments of error that do not appear to concern issues likely to be revisited on remand to correct the county's procedural errors. As explained below, as far as we can tell, a portion of Rogue Advocates' third assignment of error, the Corcorans' second assignment of error, and a portion of the Corcorans' third assignment of error concern issues likely to be revisited on remand as necessary to correct the county's procedural errors. Accordingly, we do not address those assignments of error or portions thereof. We will resolve the remaining assignments of error. ORS 197.835(11)(a).

FIRST AND SECOND ASSIGNMENTS OF ERROR (Rogue Advocates)

Josephine County Rural Land Development Code (RLDC) 46.040(D)(1) requires the county to conduct a "detailed review" and determine whether the uses allowed under the proposed comprehensive plan amendments are "consistent with the character of the surrounding area."[5] Alternatively, under

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[5] RLDC 47.040(D) requires a finding that the "density and uses authorized by the proposed plan and zoning designations are appropriate based on the requirements of subsection [1] or [2] below:

> "1. The change in designations at the location is consistent with the character of the surrounding area. Consistency shall be demonstrated by a detailed review of the relationship between the area covered by the proposed change in designations and the surrounding area, subject to the following rules.
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> "a. The detailed review shall describe the similarities or dissimilarities between the area of proposed change and the surrounding area based upon parcel size and ownership patterns, zoning, existing or authorized land uses and structures, public facilities and services, and natural or man-made features.

RLDC 46.040(D)(2), the county can demonstrate how the introduction of inconsistent uses into an area is "justified."

In its findings, the county did not conduct a detailed review or attempt to demonstrate that the proposed mining is consistent with the character of the surrounding area, for purposes of RLDC 46.040(D)(1). Instead, the county chose the alternative path of attempting to demonstrate that the introduction of inconsistent uses in the area are "justified," under RLDC 46.040(D)(2). The county's findings identify three reasons why the proposed mining is "justified," notwithstanding inconsistency with the character of the surrounding area.

> "b. The detailed review shall include a written statement explaining the rationale used to include or exclude areas from study, and be supported by zoning maps, aerial photographs, contour maps, and any other public or private records, statistics or other documents necessary or helpful to establish the character of the area and show how the change will be consistent.
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> "2. Demonstrate how the introduction of inconsistent density or uses into an area is justified. This demonstration may be based upon changes in the area resulting from rezonings, new residential, commercial, industrial or resource development, the introduction or improvement of public facilities and services, changes in demographics, changes in plan inventories, and other similar circumstances. The application shall show how the proposed change in designations, in the context of the foregoing circumstances, implements applicable state and/or county goals and policies. The more the change introduces inconsistent densities and uses into an area, the greater the burden on the applicant to justify the basis for the change." (Footnotes omitted).

Under its first assignment of error, Rogue Advocates argues that the county failed to conduct a "detailed review" as required by RLDC 46.040(D)(1) or adopt adequate findings that the proposed mining operation is consistent with the character of the surrounding area. However, as intervenor notes, the findings instead address the alternative path at RLDC 46.040(D)(2) and attempt to demonstrate that uses inconsistent with the character of the surrounding area are justified. Under that alternative, the county need not address RLDC 47.040(D)(1). Therefore, Rogue Advocates' challenges under RLDC 47.040(D)(1) do not provide a basis for reversal or remand.

Under the second assignment of error, Rogue Advocates challenges the county's alternative findings under RLDC 46.040(D)(2) that the introduction of inconsistent uses into the area is justified. The county identified three reasons why allowing inconsistent uses is justified: (1) the site is rich in aggregate, an essential component for needed public road improvements, (2) the county lacks other permitted aggregate sites, and (3) conditions will mitigate off-site impacts on the surrounding area.[6] To address the RLDC 47.040(D)(2) requirement to

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[6] The county's findings state, in relevant part:

> "The Board finds that the introduction of the proposed mineral and aggregate resource use into the area is justified for three (3) reasons. First, the Board finds that the Site is rich in high-quality sand and gravel (aggregate) resources, which provides the foundation for base rock, which, in turn, is an essential component for many needed public road improvements. The Site contains an abundance of aggregate resources that far exceed the quantity threshold under OAR 660-023-0180. Secondly, the Board finds that there is a lack of permitted sand and gravel sites in Josephine County of any magnitude, and this Site will provide needed aggregate for future private developments as well as public needs. The Board further finds that designating the Site as a significant

demonstrate how the proposed designations implement applicable state and/or county goals and policies, the county found that the plan amendment to allow mining implements Statewide Planning Goal 5, OAR 660-023-0180, and related county policies protecting aggregate resources. *See* n 6.

Rogue Advocates contends that the county's findings are inadequate and not supported by substantial evidence. However, Rogue Advocates focuses on only one justification: the finding that "there is a lack of permitted sand and gravel sites in Josephine County of any magnitude[.]" Rogue Advocates argues that that finding is not supported by any evidence in the record, and is contradicted by testimony that there is an over-supply of available and

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> resource and allowing the proposed use will serve the public interest. Finally, the Board finds that the Applicant will be subject to conditions of approval ensuring that Applicant will mitigate any off-site impacts associated with mine operations, including by incorporating screening and barriers, following best management practices, limiting hours for mining activities, establishing voluntary setbacks, and by implementing a reclamation plan. The Board finds that these mitigation measures will ensure that the development poses no more than an insignificant impact on surrounding existing or allowed uses within the impact area or to the public at large.
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> "Finally, and most importantly, the Board finds that application of the [mining] designation, which allows aggregate mining and processing uses upon demonstration of significant aggregate resource, implements Statewide Planning Goal 5 and the Basic Mineral and Aggregate Policies adopted pursuant to Ordinance No. 2006-002. The record includes substantial evidence that the Site includes significant aggregate deposit which may be made available to meet the demand for aggregate resources in the County through application of the [aggregate] designation, as proposed." Record 75-76 (citations omitted).

permitted aggregate in the county, including an existing mining operation located nearby. Record 595, 2129, 2141-44.

Rogue Advocates argues that the county did not address this testimony, other than to assert that the local supply or demand of aggregate "is not applicable to any approval criterion." Record 97. Rogue Advocates contends, however, that the county cannot have it both ways: cite the alleged lack of local aggregate resources as one of the justifications for allowing inconsistent uses for purposes of RLDC 46.040(D)(2), while rejecting evidence that there is an oversupply of aggregate in the county.

Intervenor responds that Rogue Advocates' challenge to one of the three justifications cited in the decision does not provide a basis for reversal or remand, because Rogue Advocates does not challenge the remaining justifications. According to intervenor, each justification independently demonstrates that it is appropriate to allow the proposed mining, despite inconsistency with the character of the surrounding area. However, while the county may have intended that each of the justifications function as an independent and sufficient justification for allowing uses inconsistent with the character of the surrounding area, the findings quoted at n 6 do not express or necessarily imply such an intent. Indeed, the alleged need or unmet demand for more aggregate in the county appears to underpin other justifications, not just the second justification. Accordingly, we disagree with intervenor that we may ignore Rogue Advocates' challenge to the second justification and reject this assignment of error based on other, independent justifications.

Intervenor next argues that the county's findings regarding the need for more aggregate in the county are supported by substantial evidence, and that the record supports a finding of need for more aggregate, regardless of whether

other aggregate sites exist in the county, or the supply or demand of aggregate in the county. However, intervenor does not identify any evidence in the record supporting the finding that "there is a lack of permitted sand and gravel sites in Josephine County of any magnitude[.]" Intervenor cites to testimony that aggregate is essential for many construction projects, but cites to no evidence suggesting lack of supply or unmet demand for aggregate in the county. Rogue Advocates, by contrast, cites to testimony that there is an oversupply of aggregate in the county. That testimony, if accurate and unrebutted, would appear to undermine the county's conclusion that designating land to allow a new mining operation, notwithstanding inconsistency with surrounding uses, is "justified" for purposes of RLDC 46.040(D)(2).

Intervenor complains that it cannot "prove a negative." Response Brief 17. However, it is intervenor that asserted there was an unmet need for more aggregate as a seemingly important justification for the plan amendment, but without supplying any evidence to support that assertion. In this respect, we note that RLDC 46.040(D)(2) provides that "[t]he more the change introduces inconsistent densities and uses into an area, the greater the burden on the applicant to justify the basis for the change." *See* n 5. The findings presume inconsistency with surrounding uses, but do not attempt to describe the size or scale of that inconsistency, so it is difficult to say how great is intervenor's corresponding burden to justify the basis for the change. But whatever the scale of that burden, it requires some supporting evidence.

Intervenor also argues, as the county found, that there is no approval criterion that requires a demonstration of market demand or need for aggregate. However, as noted, it is intervenor who asserted the need for more aggregate

sites as a seemingly important justification for the plan amendment, in order to satisfy RLDC 46.040(D)(2). If that assertion is essential to a finding of compliance with RLDC 46.040(D)(2), then there must be substantial evidence in the record to support it.

The second assignment of error (Rogue Advocates) is sustained. As explained, Rogue Advocates' first assignment of error does not provide a basis for reversal or remand, and that assignment of error is accordingly denied.

THIRD ASSIGNMENT OF ERROR (Rogue Advocates)

Under the third assignment of error, Rogue Advocates advances two sub-assignments of error. The first sub-assignment of error argues that the county failed to properly identify conflicts with other Goal 5 resources on the property, such as riparian resources, and identify measures to minimize those conflicts, as required by OAR 660-023-0180(5).

As explained above, the county erred in accepting new evidence from intervenor's expert consultants after the close of the evidentiary record, including Exhibit EEEEEE, which addresses impacts on Goal 5 riparian resources on the subject property. On remand, the county must provide petitioners with the opportunity to respond to and rebut those letters, and adopt new or revised findings as necessary. It is possible that on remand the county will adopt new or revised findings regarding OAR 660-023-0180(5) and riparian resources. Accordingly, it is premature to resolve Rogue Advocates' first sub-assignment of error, which challenges the existing findings addressing riparian resources.

The second sub-assignment of error alleges that the county misconstrued OAR 660-023-0180(7), which requires in relevant part that the county "shall follow the standard ESEE [economic, social, environmental and energy],

process in OAR 660-023-0040 and 660-023-0050 to determine whether to allow, limit, or prevent new conflicting uses within the impact area[.]" However, the county declined to conduct an ESEE analysis "at this time." Record 64.[7] Rogue Advocates argues that the county misconstrued OAR 660-023-0180(7) to allow the county the discretion to conduct the ESEE analysis, or not, as the county chooses.

As far as we can tell, none of the evidence the county erred in accepting after the close of the evidentiary record concerns OAR 660-023-0180(7) or the legal question of whether the county erred in interpreting the rule to give the county the discretion to conduct the ESEE analysis, or not, as it chooses. Accordingly, we will resolve the second sub-assignment of error.

Initially, intervenor responds that no party raised any issue below regarding the need to conduct an ESEE analysis to determine whether to allow, limit, or prevent new conflicting uses within the impact area, and therefore all challenges to the county's finding quoted at n 7 that the county need not conduct an ESEE analysis are waived. ORS 197.763(1).

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[7] The county's findings state:

> "The Board finds that this provision outlines the procedures for the County to follow if the County, in its discretion, intends to allow, limit, or prevent new conflicting uses within the Impact Area of the Project. In this case, neither the Applicant nor any other parties are requesting that the County engage in this discretionary determination at this time. Further, the Board finds that the uses in the Impact Area would be subject to the requirements of the current RLDC and County Ordinance 2006-002 (Article 66.150 B. Impact Area Agreement, if applicable). Therefore, the Board declines to conduct an ESEE analysis to allow, limit, or prevent new conflicting uses within the Impact Area of the Project." Record 64.

In its petition for review, Rogue Advocates argues that it raised general issues regarding compliance with OAR 660-023-0180(7), but was not required to anticipate the specific finding the county adopted in its challenged decision, or that the county would interpret the rule to not require an ESEE analysis. Petition for Review 14 (citing *League of Women Voters v. City of Corvallis*, 63 Or LUBA 432, 436 (2011), which in turn cites *Lucier v. City of Medford*, 26 Or LUBA 213, 216 (1993)).

We agree with Rogue Advocates that it was not required to anticipate that the county would adopt a finding concluding, essentially, that no ESEE analysis is required by the rule in order to approve the proposed plan amendment. In *Lucier*, we held that a petitioner who raises issues below regarding compliance with an approval criterion is not required to anticipate the actual findings a local government ultimately adopts with respect to that approval criterion, in order to challenge those findings at LUBA. Intervenor does not dispute that compliance with OAR 660-023-0180(7) was raised below as an issue. Accordingly, on appeal Rogue Advocates can challenge the specific finding the county adopted in its final decision.

On the merits, intervenor argues that the county correctly interpreted OAR 660-023-0180(7) to require the county to conduct an ESEE analysis to determine whether to allow, limit or prevent new conflicting uses in the area, only if the applicant or another property owner proposes new conflicting uses within the impact area. Intervenor contends that if, in the future, some person proposes a new use in the impact area that conflicts with the approved mining use, the county will then undertake the appropriate analysis to determine whether to allow, limit or prevent that conflicting use.

We agree with Rogue Advocates that the county misconstrued OAR 660-023-0180(7) to grant the county the discretion to conduct an ESEE analysis, or not, as it chooses, or, as intervenor suggests, to postpone that ESEE analysis to some future date when a new conflicting use is proposed. Where OAR 660-023-0180(7) applies, it requires that a county, once it has decided to allow mining of a significant aggregate resource, must conduct an ESEE analysis "to determine whether to allow, limit, or prevent new conflicting uses within the impact area of a significant mineral and aggregate site." There is nothing in that language that suggests the county need not conduct an ESEE analysis and make the required determination, or may postpone that analysis and determination to some future date.[8] If under the applicable zoning new uses are allowed (e.g. new residential uses) that could conflict with the mining operation, the county must determine, in the decision that approves the mining operation, whether to allow, limit or prevent such future uses.

The second sub-assignment of error to the third assignment of error is sustained. We do not reach the first sub-assignment of error.

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[8]At oral argument, intervenor cited to OAR 660-023-0180(9), which provides essentially that the Goal 5 rule applies directly to post-acknowledgment plan amendments to allow aggregate mining until the county adopts regulations implementing the rule. We understand intervenor to suggest that the county has adopted land use regulations that implement OAR 660-023-0180(7) in ways that adequately address future conflicting uses, and that those local regulations apply instead of OAR 660-023-0180(7), or are sufficient to ensure compliance with OAR 660-023-0180(7). However, that argument is not made within the response brief, and we do not consider it further.

FOURTH ASSIGNMENT OF ERROR (Rogue Advocates)
FOURTH ASSIGNMENT OF ERROR (Corcorans)

Petitioners argue that the county failed to adopt findings to address an issue raised below, namely, concerns that the mining operation could uncover cultural and archeological artifacts from Indian tribes that formerly occupied the area. While the subject property has no inventoried or known cultural or archeological resources, petitioners note that, if any such resources are discovered in the course of mining, then several state and federal laws would apply to require the property owner to take certain protective steps, including consultation with tribal and state officials. Petitioners contend that the county must adopt findings that "address compliance with laws for the protection of cultural resources and include conditions of approval to ensure compliance will occur." Rogue Advocates' Petition for Review 23; *see also* the Corcorans' Petition for Review 3 (county must impose conditions requiring compliance with state and federal laws).

Intervenor responds, and we agree, that petitioners identify no land use regulation or other applicable law that requires the county to adopt findings addressing compliance with state and federal laws concerning preservation of cultural and archeological resources, or to adopt conditions of approval requiring compliance with such laws. The state and federal preservation laws will apply or not based on their own terms. Absent a land use regulation or other applicable law that requires the county to address compliance with state and federal preservation laws in approving the application, or impose a condition of approval requiring compliance with such laws, the county's failure to adopt such findings or impose conditions is not legal error.

The fourth assignment of error (Rogue Advocates) and the fourth assignment of error (Corcorans) are denied.

SECOND ASSIGNMENT OF ERROR (Corcorans)

OAR 660-023-0180(5) requires the county to identify conflicts between the proposed mining and other inventoried Goal 5 resources, within the impact area. Identified conflicts must be minimized. If identified conflicts cannot be minimized, the county must conduct an ESEE analysis to determine the ESEE consequences of allowing, limiting or not allowing mining at the site.

The subject property and surrounding lands are within a Goal 5 inventoried deer winter range, which protects low-elevation lands as winter range for deer and elk. Opponents below raised concerns regarding conflicts between truck traffic and deer and elk movement across Placer Road, the haul road between the subject property and Interstate 5. As noted, the mining operation would involve up to 55 roundtrip heavy truck trips per day, five days per week, 52 weeks per year, for up to 40 years. Opponents testified that the local elk herd of 2-3 dozen animals "are on the haul route in the impact area. * * * To add over a hundred heavy truck trips a day to cross their natural route is a tragedy waiting to happen." Record 2843.

The county's finding do not address the impacts of truck traffic on deer and elk crossing the haul route as part of winter range movements. The findings discuss only impacts from the mining operation itself on deer and elk use of the subject property, and discount those impacts as "short-term." Record 56 ("[s]hort-term impacts [to deer winter range] include temporary deterrence of daytime use due to activity on the site. Those impacts from disturbance would be short-term as deer are quick to habituate or adapt to routine activity. No long-term adverse effects are anticipated."); Record 57 (finding that

"wildlife do not alter their natural habitats in response to noise being generated at a mining site so long as there is no threat to their well-being"). Petitioners argue that the county's conflicts analysis is inadequate, because the county failed to address impacts resulting from truck collisions with deer and elk on the haul road off the property, but within the impact area. Further, petitioners argue that while deer and elk may acclimate to mining noise that causes them no harm, it is not clear how deer and elk will acclimate to collisions or near-collisions with heavy trucks, or that 40 years of continuous heavy truck traffic will cause only "short-term impacts."

Intervenor responds that, while the findings do not directly address impacts from truck traffic, intervenor's wildlife consultant, whose testimony the county found to be credible, testified regarding impacts from "increased traffic":

> "Although the proposed project would conflict with inventoried Deer Winter Range, proposed and extended riparian corridor setbacks and mitigation measures are anticipated to result in no-long term adverse effects to winter range. *Short-term conflicts include daytime mining, processing activities and increased traffic which may temporarily deter daytime use of the Property*. Any impacts from disturbance would be short-term, as deer are very quick to habituate or adapt to routine activity." Record 4303-04 (emphasis added).

Intervenor contends that this testimony demonstrates that conflicts between truck traffic and deer and elk crossings on the haul road will be short-term, because deer and elk will adapt by staying away from the haul road during the day, because, intervenor tells us, "they do not like being struck and killed by trucks." Response Brief 49.

We agree with petitioners that the county's findings are inadequate to address the issue raised below regarding potential impacts to deer and elk

winter range movements resulting from the proposed heavy truck traffic on Placer Road. The findings are silent on that issue. The testimony intervenor cites that mentions "increased traffic" appears to be focused on noise and other non-lethal impacts to deer and elk present on the subject property, not on potential collisions between trucks and deer and elk on Placer Road, which is located off of the property but within the impact area. Further, it is not clear to us how such collisions can be viewed as "short-term" impacts, or "routine activity" to which deer and elk will become acclimatized. The findings cite the testimony of intervenor's wildlife consultant to the effect that mining noise does not cause wildlife to alter habits unless there is a threat to their well-being, which suggests that activities that *do* cause a threat to their well-being could cause alterations to behavior or migratory patterns. Record 57. Even if there were evidence or testimony in the record to support intervenor's speculation in its brief that deer and elk will respond to collisions or potential collisions with truck traffic on Placer Road by changing migration patterns across the road from daytime to night-time, that change would last for the life of the mining operation, up to 40 years. We agree with petitioners that it would be difficult to call a change that lasts 40 years a "short-term" or "temporary" impact.

We recognize that it may be that the added truck traffic on Placer Road, most of which will occur during daytime hours when collisions with deer or elk are presumably less likely, will not materially increase the danger that is already posed to deer and elk from the existing traffic on that existing road. However, there is no evidence in the record regarding what increased danger the proposed truck traffic on Placer Road will pose to deer or elk or the likely impacts on migration patterns within the winter range. Since the issue was

raised, the county needs to address the issue and adopt adequate responsive findings that are supported by substantial evidence.

The second assignment of error (Corcorans) is sustained.

THIRD ASSIGNMENT OF ERROR (Corcorans)

Under the third assignment of error, the Corcorans argue that the county adopted inadequate findings, not supported by substantial evidence, with respect to two county comprehensive plan policies and a land use regulation governing plan and zoning map amendments.

A. Goal 7, Policy 1E

Josephine County Comprehensive Plan (JCCP) Goal 7, Policy 1E concerns aggregate resources, and provides in relevant part that it is county policy to address conflicts between aggregate mining and nearby existing and future land uses and public facilities. The county's findings of consistency with JCCP Goal 7, Policy 1E, include the statement that "although there is sensitive wildlife habitat on the Site, the impacts to such habits will be minimized to a level that is insignificant through the implementation of mitigation measures." Record 70.

Under the first sub-assignment of error, the Corcorans challenge the foregoing finding, arguing that it fails to address issues raised regarding potential collisions between deer and elk and heavy truck traffic on Placer Road.

Intervenor responds, initially, that no person raised any issues below under JCCP Goal 7, Policy 1E regarding impacts on deer and elk, and therefore the issue raised under this sub-assignment of error is waived. ORS 197.763(1). On the merits, intervenor argues that the above-quoted finding under JCCP

Goal 7, Policy 1E are sufficient to address the issue of collisions between trucks and deer and elk on Placer Road.

In their petition for review, petitioners cite to a number of places where issues were raised regarding conflicts with deer and elk under other approval standards, including OAR 660-023-0180(5). However, petitioners cite no place in the record where any party argued that the county must address under JCCP Goal 7, Policy 1E the issue of potential collisions between deer and elk and heavy truck traffic on Placer Road. Absent some reference to JCCP Goal 7, Policy 1E, a reasonable person would not have understood that issues raised under the Goal 5 rule were also meant to raise issues under JCCP Goal 7, Policy 1E. Accordingly, that issue is waived. This sub-assignment of error is denied.

B. Goal 7, Policy 3 and Impacts on the Graves Creek Covered Bridge

JCCP Goal 7, Policy 3 requires the county to "ensure that incompatible uses are not established adjacent to sites identified in the National Register of Historic Sites and places." Opponents raised concerns below regarding impacts on the Graves Creek Covered Bridge, an historic site located about two miles from the subject property at the intersection of Placer Road and Sunny Valley Loop. While the haul route along Placer Road does not cross over the bridge, truck traffic from the mining operation will pass close by on the adjacent road. Citing JCCP Goal 7, Policy 3, opponents argued that "proposed heavy truck traffic adjacent to the Covered Bridge is incompatible with tourism," because truck traffic would make it unsafe for tourists and school tours to park and view the bridge. Record 134-35.

The county adopted findings under OAR 660-023-0180(5) addressing conflicts with the bridge, and concluded that there would be no conflicts, because as a condition of approval trucks from the mining operation would not be allowed to use the bridge. However, the county adopted no findings regarding JCCP Goal 7, Policy 3, or the issues raised below regarding impacts on use of the bridge.

Intervenor responds that the county was not required to address Goal 7, Policy 3, because that policy only applies to proscribe incompatible *uses* that are "adjacent" to historic resources. Intervenor argues that the mining operation is the only "use" in question, and the covered bridge is not "adjacent" to the mining site or even within the 1500-foot impact area. While the portion of Placer Road used for a haul route may be adjacent to the covered bridge, intervenor argues that allowing truck traffic to use Placer Road, an existing county road, does not constitute the "establishment" of an "incompatible use" within the meaning of Goal 7, Policy 3. Finally, intervenor argues that Goal 7, Policy 3 is concerned with incompatibility with the historic resource itself, not impacts on tourists or school groups who visit the historic resource.

The county did not adopt any of the three interpretations of Goal 7, Policy 3 embodied in intervenor's responses, or any findings or interpretations regarding that plan policy. Under ORS 197.829(1), where the local government provides no reviewable interpretation of a local regulation, LUBA may interpret the regulation in the first instance. However, where the challenged decision must be remanded for other reasons, the better practice is to remand the decision to allow the local government to interpret the regulation in the first instance. *Green v. Douglas County*, 245 Or App 430, 441-42, 263 P3d 355 (2011). Accordingly, on remand the county should address Goal 7,

Policy 3 with respect to the alleged impacts on the covered bridge, and adopt any findings and interpretations necessary to resolve that remand issue. This sub-assignment of error is sustained.

C. RLDC 46.040(C)(2)

RLDC 46.040(C) is a plan and zoning map amendment standard that requires the applicant to "demonstrate the land has adequate carrying capacity to support the densities and types of uses allowed by the proposed plan and zone designations." The adequacy of carrying capacity is determined by application of six criteria, set out at RLDC 46.040(C)(1)-(6), with the intent of determining "whether the geography of the land is suited to support the kind of development associated with the proposed designations." One of the criteria, RLDC 46.040(C)(2), requires the county to consider whether:

> "Other physical characteristics of the land and surrounding area make the land suitable for the proposed density and types of uses, to include consideration of existing or potential hazards (flood, wildfire, erosion), the degree of slopes, the presence of wetlands, geologic formations, mineral deposits *and any other similar natural or man-made conditions or circumstances*." (Emphasis added).

Citing to the emphasized language above, the Corcorans argue that deer winter range that applies to the property and surrounding area is one of the "physical characteristics" or "natural or man-made conditions or circumstances" that the county must consider, in determining whether the subject property has the carrying capacity to support the proposed mining use. However, the Corcorans argue that the county's findings under RLDC 46.040(C) do not consider whether the subject property has the "carrying capacity" to allow aggregate mining in considering the presence of deer winter range and its limitations.

Intervenor responds that no issue was raised below under RLDC 46.040(C) that the county must consider deer winter range when determining whether the subject property has the "carrying capacity" to support the proposed mining use. On the merits, intervenor argues that RLDC 46.040(C) does not list wildlife habitat or anything similar among the considerations or criteria used to determine whether the subject property has carrying capacity to support the proposed use.

While issues were raised regarding deer winter range below, primarily under OAR 660-023-0180(5), petitioners have not established that any party argued below that the deer winter range must be evaluated under RLDC 46.040(C)(2) in determining the carrying capacity of the subject property to support the proposed use. The issue raised under this sub-assignment of error is therefore waived.

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

FIFTH ASSIGNMENT OF ERROR (Corcorans)

OAR 660-023-0180(5)(b) requires the county to identify conflicts with "dwellings allowed by a residential zone" within the impact area. The Winslow residence is located on tax lot 401, a 12-acre parcel located along Placer Road opposite the proposed entrance to the subject property. The Winslows raised a number of issues regarding noise impacts on their dwelling. To address noise impacts on residences within the impact area, intervenor commissioned a noise study that estimated noise levels at 14 representative dwellings within the impact area. The county found, based on that study, that with conditions of approval intended to reduce noise impacts that all noise conflicts with residential uses would be minimized.

The Corcorans argue that the noise study failed to include the Winslows' residence as one of the 14 dwellings evaluated. According to the Corcorans, the Winslow residence is one of the closest dwellings to the mining operation, and should have been included in the noise study.

Intervenor responds that the record indicates that the Winslow residence was one of the 14 residences evaluated for noise impacts, corresponding to the location of "R6," one of the receiver locations used in the noise study. Intervenor contends that the noise study showed that noise levels at R6 would be in compliance with Department of Environmental Quality (DEQ) noise level limits. Therefore, intervenor argues, the county properly found, based on substantial evidence, that noise from the mine will comply with DEQ noise standards for all residences within the impact area, including the Winslow residence.

Record 4400, Figure 4 of the noise study, shows the R6 receiver located at what appears to be the northwestern corner of tax lot 401, site of the Winslow residence. As far as we can tell, intervenor is correct that the noise study did evaluate noise impacts on the Winslow residence. Petitioners have not established that the county failed to evaluate noise impacts on the Winslow residence, or identified any other error in the county's findings regarding noise.

The fifth assignment of error (Corcorans) is denied.

The county's decision is remanded.