BEFORE THE LAND USE BOARD OF APPEALS

01/08/18 PM 2:43 LUBA

OF THE STATE OF OREGON

SAVE TV BUTTE and KATHERINE POKORNY,
Petitioners,

vs.

LANE COUNTY,
Respondent,

and

OLD HAZELDELL QUARRY, LLC,
Intervenor-Respondent.

LUBA No. 2017-031

FINAL OPINION
AND ORDER

Appeal from Lane County.

Zack P. Mittge, Eugene, filed the petition for review and argued on behalf of petitioners. With him on the brief was Hutchinson Cox.

No appearance by Lane County.

Seth J. King, Portland, filed the response brief and argued on behalf of intervenor-respondent. With him on the brief were Steven L. Pfeiffer and Perkins Coie LLP.

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

REMANDED 01/08/2018

You are entitled to judicial review of this Order. Judicial review is

1 governed by the provisions of ORS 197.850.

Opinion by Holstun.

NATURE OF THE DECISION

Petitioners appeal comprehensive plan inventory and map amendments, zoning map amendments and a site plan approval for a proposal to mine and process aggregate on 107 acres of a 183-acre property.

REPLY BRIEF

Petitioners move for permission to file a reply brief to respond to new issues raised in the intervenor-respondent's (intervenor's) response brief. The motion is granted.

FACTS

The subject 183-acre property is located east of the city of Oakridge, in Lane County. Petitioners appeal Ordinance No. PA 1343, which does four things:

1. Amends the Lane County Comprehensive Plan Inventory of Significant Mineral and Aggregate Sites (CP Significant Aggregate Sites Inventory) to add 107 acres of intervenor's 183-acre property to the CP Significant Aggregate Sites Inventory. Supplemental Record (Supp. Rec.) 29.

2. Amends the existing Lane County Comprehensive Plan Map (Plan Map) designation for the 107-acres from F (Forest) to NR:M (Natural Resource: Mineral). Supp. Rec. 29, 38-39.

3. Amends the existing Lane County Zoning Map designation for the 107 acres from F-1 (Non-Impacted Forest) and F-2 (Impacted Forest) to QM/RCP (Quarry and Mine Operations Zone/Rural Comprehensive Plan). Supp. Rec. 29, 31, 40-41.

4. Grants site review approval for mining and processing.[1]

We include two maps as appendices to this opinion. The first map is Supp. Rec. page 31, which shows the 107 acres that are included on the Plan Inventory and rezoned QM/RCP (portions of TL 1900, TL 502 and TL 100). The remaining acres that make up the 183-acre property (shown in cross-hatch) are to remain zoned F-1 and F-2 and will be buffers (TL 104 and TL 401, and portions of TL 100 and 1900). The dashed line shows the mining impact area, which we discuss later in this opinion. The second map is Supp. Rec. page 34, which shows the 46-acre portion of the 107 acres that intervenor proposes to mine and the proposed processing area that adjoins the mining area to the southwest.

INTRODUCTION

The required planning process for adopting and amending measures to protect Statewide Planning Goal 5 (Natural Resources, Scenic and Historic Areas, and Open Spaces) resources, such as mineral and aggregate resource sites, is set out at OAR chapter 660, division 23. We briefly summarize relevant parts of that planning process below before turning to petitioners' assignments of error.

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[1] The map at Supp. Rec. 34 shows the portion of the QM/RCP zoned property that is approved for mining and processing.

A. Inventory

Goal 5 planning for significant mineral and aggregate resource sites begins with the "Inventory Process." OAR 660-023-0030. The required Goal 5 inventory process includes multiple steps and is set out in great detail at OAR 660-023-0030. That inventory process concludes with a comprehensive plan list or inventory of "significant resource sites." OAR 660-023-0030(5).

For mineral and aggregate resources, the required inventory process is set out in even more detail at OAR 660-023-0180. OAR 660-023-0180(3) and (4) set out quantity and quality requirements for the aggregate resource that must be met to qualify as a "significant" aggregate resource site. Those requirements vary depending on location in the state and the quality of the overlying soil.

B. Economic, Social, Environmental and Energy (ESEE) Process

Once Goal 5 resources are inventoried, OAR 660-023-0040(1) directs that local governments develop a program to protect inventoried significant Goal 5 resource sites, based on an economic, social, environmental, and energy (ESEE) analysis of the consequences of allowing, limiting or prohibiting uses that might conflict with inventoried significant Goal 5 resource sites. The ESEE process is a multi-step process that requires the local government to:

"(a) Identify conflicting uses;

"(b) Determine the impact area;

"(c) Analyze the ESEE consequences [of allowing, limiting or prohibiting conflicting uses]; and

"(d) Develop a program to achieve Goal 5 [which is to protect Goal 5 resources]." *Id.*

OAR 660-023-0180(5) and (6) elaborate considerably on how local governments are to go about the ESEE process of determining whether mining at an inventoried significant mineral and aggregate site will be allowed and how any conflicts will be minimized.

With that general overview, we turn to petitioners' assignments of error.

FIRST ASSIGNMENT OF ERROR

Petitioners contend that only 46 acres of the 107 acres the county added to the CP Significant Aggregate Sites Inventory actually qualify as a "significant aggregate resource site," under the quality and quantity standards set out at OAR 660-023-0180(3)(a).[2] Specifically, petitioners contend only the aggregate resource that underlies those 46 acres meets the required Oregon Department of Transportation (ODOT) specifications; but the aggregate resource that underlies the remaining 61 acres added to the inventory and planned NR:M and zoned QM/RCP does not. Petitioners contend it was

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[2] The subject property is located in the Willamette Valley and OAR 660-023-0180(3)(a) sets out the following requirements for an aggregate resource to be considered "significant:"

> "A representative set of samples of aggregate material in the deposit on the site meets applicable Oregon Department of Transportation (ODOT) specifications for base rock for air degradation, abrasion, and soundness, and the estimated amount of material is more than 2,000,000 tons in the Willamette Valley, or more than 500,000 tons outside the Willamette Valley[.]"

therefore error to include the entire 107-acre property on the CP Significant Aggregate Sites Inventory. Petitioners contend that only the 46 acres that actually qualify as a significant aggregate resource under OAR 660-023-0180(3)(a) should have been included on the CP Significant Aggregate Sites Inventory. Petitioners go further and argue that all "mining," which includes both "extraction" and "processing," must take place within the 46 acres that qualify as a significant aggregate resource site under OAR 660-023-0180(3)(a).[3]

The challenged decision offers the following explanation for rejecting petitioners' contention that only 46 acres of the site should be included on the Plan Inventory of Significant Aggregate Resource Sites:

> "[O]pponents suggest that the area covered by the pending PAPA [post acknowledgment plan amendment] application should be limited to the significant aggregate resource footprint only and, accordingly, not include the related and wholly necessary processing and operation areas. This position is wholly unsupported by the applicable regulatory provisions governing aggregate PAPAs authorizations. Specifically, OAR 660-023-0180(1)(h), (i) and (j) define (1) 'mining' as the area necessary for extraction and processing, (2) 'mining area' as the area within which mining is permitted or proposed, and (3) 'processing' is as defined in ORS 517.750(11), which includes, but is not limited to, crushing, washing, milling and screening as well as the batching

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[3] OAR 660-023-0180(1)(h) provides the following definition of mining:

> "'Mining' is the extraction and processing of mineral or aggregate resources, as defined in ORS 215.298(3) for farmland, and in ORS 517.750 for land other than farmland."

> and blending of mineral aggregate into asphalt and Portland cement concrete located within the operating permit area. Taken together, these definitions establish that the acknowledged map and text provisions required to protect and allow utilization of significant aggregate resources, which is achieved here by the application of the proposed QM[/RCP] designation and related plan text amendments, appropriately includes the land area necessary for both extraction and a wide range of processing requirements including setbacks and buffer areas." Supp. Rec. 100.

Both petitioners and the county erroneously conflate separate and distinct questions. The first question concerns the scope of the site to be included on the CP Significant Aggregate Sites Inventory. We agree with petitioners that the site that is to be included on the CP Significant Aggregate Sites Inventory is the 46 acres where the significant aggregate resource is located. The other 61 acres (the processing area and a sizable area where there apparently is no mining or processing proposed) do not include a significant aggregate resource and should not have been included on the CP Significant Aggregate Sites Inventory.

The applicable rules could certainly be clearer on this point, but the Goal 5 "inventory" of aggregate "resource sites" is to include the "'resource site' or 'site,'" which "is a particular area where resources are located."[4] While the

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[4] OAR 660-023-0010 provides the following definitions (underscoring and bold face added):

> "(4) 'Inventory' is a survey, map, or description of one or more **resource sites** that is prepared by a local government, state or federal agency, private citizen, or other organization and that

rule's language is not always consistent, OAR 660-020-0180(2)(b) makes it reasonably clear that the inventory of aggregate resource sites is to be an inventory of "significant" aggregate resource sites. As has already been mentioned, OAR 660-023-0180(3)(a) sets out the test for significance that applies here. Under petitioners' view the only part of a property that may be included on the Plan Significant Aggregate Sites Inventory is the part of the property where a significant aggregate resource is located. Under the county's view any part of property where mining or processing might be carried out is properly included on the CP Significant Aggregate Sites Inventory, without regard to whether that part of the property qualifies as a significant aggregate

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includes information about the resource values and features associated with such sites. As a verb, 'inventory' means to collect, prepare, compile, or refine information about one or more resource sites. (**See resource list.**)"

"(9) 'Resource list' includes the description, maps, and other information about **significant Goal 5 resource sites** within a jurisdiction, adopted by a local government as a part of the comprehensive plan or as a land use regulation. * * *.

"(10) 'Resource site' or 'site' is a particular area where resources are located. A site **may consist of a parcel or lot or portion thereof** or may include an area consisting of two or more contiguous lots or parcels."

resource site under OAR 660-023-0180(3)(a).[5] We agree with petitioners and disagree with the county.

But moving to the second question, whether all mining (which includes processing) necessarily must be conducted within the significant aggregate resource site, we do not agree with petitioners. Certainly under the OAR 660-023-0180(1)(h) definition of "mining" and the OAR 660-023-0180(1)(i) definition of "mining area," processing *could* be carried out within the site that is included on the plan's significant aggregate resource sites inventory.[6] But that does not mean processing can *only* be carried out within the inventoried site (petitioners' position). And that does not mean all areas where there will be "processing" *necessarily also qualify as significant aggregate resource sites* (the county's apparent position).

How to plan and zone an inventoried significant mineral and aggregate resource site, and how to plan and zone any adjoining areas that may be needed for processing or buffers or to otherwise mitigate identified conflicts is a separate question from what property is properly included on the CP

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[5] As previously noted, for a significant number of the 107 acres included on the CP Significant Aggregate Sites Inventory neither mining nor processing is proposed or approved.

[6] The OAR 660-023-0180(1)(h) definition of "mining" was set out earlier at n 3. The 660-023-0180(1)(i) definition of "mining area" is set out below:

> "'Mining area' is the area of a site within which mining is permitted or proposed, excluding undisturbed buffer areas or areas on a parcel where mining is not authorized."

Significant Aggregate Sites Inventory. It may well be that such adjoining properties are properly assigned the same plan or zoning map designations as the area to be mined, or assigned other plan or zoning map designations to allow them to be put to appropriate uses to allow mining and processing to occur and identified conflicts to be mitigated, but those adjoining properties are only properly included on the CP Significant Aggregate Sites Inventory if they qualify under OAR 660-023-0180(3) or (4). There is no dispute that 61 of the 107 acres the county included on the CP Significant Aggregate Sites Inventory do not qualify under OAR 660-023-0180(3) or (4), and the county therefore erred by including those acres on the CP Significant Aggregate Sites Inventory.

The first assignment of error is sustained, in part.

SECOND ASSIGNMENT OF ERROR

Under their second assignment of error, petitioners contend that in addition to adopting a program that authorizes mining on the subject property under Goal 5 and the Goal 5 administrative rule, the county must approve a Statewide Planning Goal 2 (Land Use Planning) exception to Statewide Planning Goal 4 (Forest Lands), since the subject property is inventoried forest land previously subject to the county's F-1 and F-2 zones, zones that were adopted to comply with Goal 4.

Goal 4, among other things, imposes the following requirements:

> "Comprehensive plans and zoning provide certainty to assure that forest lands will be available now and in the future for the growing and harvesting of trees. Local governments shall inventory, designate and zone forest lands. Local governments shall adopt

zones which contain provisions to address the uses allowed by the goal and administrative rule and apply those zones to designated forest lands.

"Zoning applied to forest land shall contain provisions which limit, to the extent permitted by ORS 527.722, uses which can have significant adverse effects on forest land, operations or practices. Such zones shall contain numeric standards for land divisions and standards for the review and siting of land uses. Such land divisions and siting standards shall be consistent with the applicable statutes, goal and administrative rule. *If a county proposes a minimum lot or parcel size less than 80 acres*, the minimum shall meet the requirements of ORS 527.630 and conserve values found on forest lands. Siting standards shall be designed to make allowed uses compatible with forest operations, agriculture and to conserve values found on forest lands." (Emphasis added.)

ORS 215.780(1)(c) also imposes a "minimum lot or parcel size[]" of "at least 80 acres" on "land designated forestland."[7]

OAR 660-006-0025(2) identifies five pages of uses that either must be allowed or may be allowed in Goal 4 forest zones. OAR 660-006-0025(2) identifies uses that "shall be allowed in forest zones:"

"The following uses pursuant to the Forest Practices Act (ORS chapter 527) and Goal 4 shall be allowed in forest zones:

"(a) Forest operations or forest practices including, but not limited to, reforestation of forest land, road construction and maintenance, harvesting of a forest tree species, application of chemicals, and disposal of slash;

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[7] OAR 660-006-0026(1)(a) also requires "[a]n 80-acre or larger minimum parcel size," although OAR 660-006-0026(1)(b) authorizes smaller minimum parcel sizes provided certain standards set out in the rule are met.

"(b) Temporary on-site structures that are auxiliary to and used during the term of a particular forest operation;

"(c) Physical alterations to the land auxiliary to forest practices including, but not limited to, those made for purposes of exploration, mining, commercial gravel extraction and processing, landfills, dams, reservoirs, road construction or recreational facilities[.]"

The QM/RCP zone allows "forest use." Lane Code (LC) 16.216(4)(f). LC 16.090 provides the following definition of "forest uses:"

"Forest Uses. Are (1) the production of trees and the processing of forest products; (2) open space, buffers from noise and visual separation of conflicting uses; (3) watershed protection and wildlife and fisheries habitat; (4) soil protection from wind and water; (5) maintenance of clean air and water; (6) outdoor recreational activities and related support services and wilderness values compatible with these uses; and (7) grazing land for livestock."

Petitioners contend that although the QM/RCP zone authorizes "forest uses," it does not explicitly authorize all of the uses that OAR 660-006-0025(2) requires to be allowed on forest lands. Moreover, petitioners contend the QM/RCP zone does not impose the 80-acre minimum lot or parcel size that is required by Goal 4 and ORS 215.780(1)(c).

In *Gonzalez v. Lane County*, 24 Or LUBA 251 (1992) LUBA affirmed a county decision that changed a property's comprehensive plan designation from Forest to Natural Resource and its zoning map designation from F-2/RCP to QM/RCP to permit mining. We rejected an argument that in redesignating and rezoning the property the county must take an exception to Goal 4, finding that the petitioner had not demonstrated that the Natural Resource designation

or the QM/RCP zone failed to conserve forest land as required by Goal 4 and failed to "contend that particular provisions of the county's Natural Resource plan designation and QM/RCP zone are inconsistent with the Goal 4 Rule." *Gonzalez*, 24 Or LUBA at 256.

Here petitioners do contend that the QM/RCP zone is inconsistent with Goal 4 and the Goal 4 rule and argue that the QM/RCP zone *prohibits* uses that Goal 4 and the Goal 4 rule require to be allowed in forest zones, simply because the QM/RCP zone authorization of "forest uses," as defined in the code, is not worded in precisely the same way as Goal 4 and the Goal 4 rule. That argument is a hyper-technical and inadequately developed argument, and for those reasons we reject it. *Deschutes Development v. Deschutes Cty.*, 5 Or LUBA 218, 220 (1982). However, petitioners apparently are correct that the QM/RCP zone does not impose an 80-acre minimum parcel size, as required by Goal 4, OAR 660-006-0026(1)(a) and ORS 215.780(1)(c) on forest land.

Intervenor contends that difference between the QM/RCP zone and Goal 4, OAR 660-006-0026(1)(a) and ORS 215.780(1)(c) is harmless, because ORS 215.780(1)(c) imposes an 80-acre minimum parcel size, even if the QM/RCP zone does not. But ORS 215.780(1)(c) only imposes an 80-acre minimum parcel size on "land designated forest land." It is at least questionable if the portion of the subject property now designated NR:M by the comprehensive plan and zoned QM/RCP still qualifies as "land designated forest land."

For purposes of this opinion, we will assume that in other circumstances applying comprehensive plan and zoning map designations (which do not impose an 80-acre minimum lot or parcel size) to "land designated forest land" would require approval of an exception under ORS 197.732, Goal 2 (Part II), and OAR chapter 660, division 4.

Initially, we agree with petitioners that the county's reliance on OAR 660-004-0010(2) to conclude an exception to Goal 4 is unnecessary is misplaced.[8] OAR 660-004-0010(2) simply makes it clear that if an ESEE program decision to allow conflicting uses and not to protect a Goal 5 resource is justified under Goal 5, an exception to Goal 5 is not necessary.

In this case the decision to apply the QM/RCP zone to the subject property was the product of a decision under Goal 5 to allow mining on the site. That Goal 5 decision making process involved identification of a Goal 5

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[8] OAR 660-004-0010(2) provides as follows:

> "The exceptions process is generally not applicable to those statewide goals that provide general planning guidance or that include their own procedures for resolving conflicts between competing uses. However, exceptions to these goals, although not required, are possible and exceptions taken to these goals will be reviewed when submitted by a local jurisdiction. These statewide goals are:
>
> (a) Goal 5 'Natural Resources, Scenic and Historic Areas, and Open Spaces';
>
> "* * * * *."

resource on the subject property and adding that property to the CP Significant Aggregate Sites Inventory. The decision also involved identification of conflicting uses and an ESEE analysis under Goal 5 to determine whether to allow, limit or prohibit those conflicting uses. The ultimate program decision under Goal 5 was to allow mining with conditions and apply the QM/RCP zone. The QM/RCP zone is expressly intended to apply only to lands that are subject to the Goal 5 process to approve mining. LC 16.216(2). And the QM/RCP zone says nothing about requiring an exception to Goal 4 to apply the QM/RCP zone to forest lands. While we are aware of no other case that presented or answered this question, we conclude a Goal 4 exception is not required in that circumstance even though the decision to apply the QM/RCP zone arguably "[d]oes not comply with some [Goal 4] requirements applicable to the subject propert[y]," namely the Goal 4 requirement for an 80-acre minimum parcel size. *See* n 7 and related text.

We reach the above conclusion because the standards that must be satisfied for an exception to Goal 4 easily could preclude application of the QM/RCP zone to implement the county's decision under Goal 5 because, among other things, those exception standards (designed to protect forest land from conflicting non-forest uses) would require a showing that there are not alternative sites for QM/RCP zoning that would not require an exception and that applying the QM/RCP zoning to the subject property would not have ESEE consequences that are significantly more adverse than other areas

requiring a Goal 4 exception.[9] Requiring such an exception to Goal 4 would effectively impose a policy to favor Goal 4 protection for forest use over a policy to protect Goal 5 resources from conflicting uses, which could easily include forest uses.

Because of the way Goals 4 and 5 are written and operate in practice, we believe it would be improper to elevate Goal 4 over Goal 5 in the circumstances presented in this appeal. Goal 4 protection of forest lands flows automatically after land is identified as forest land, and lands can be identified as forest lands before the location, quantity and qualify of Goal 5 resources are known, as was the case here. Imposing the protections required by statute, Goal 4 and the Goal 4 rule for forest lands need not be justified in any way; those

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[9] ORS 197.732(2)(c) sets out the following standards for a "Reasons" exception:

> "(A) Reasons justify why the state policy embodied in the applicable goals should not apply;
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> "(B) Areas that do not require a new exception cannot reasonably accommodate the use;
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> "(C) The long term environmental, economic, social and energy consequences resulting from the use at the proposed site with measures designed to reduce adverse impacts are not significantly more adverse than would typically result from the same proposal being located in areas requiring a goal exception other than the proposed site; and
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> "(D) The proposed uses are compatible with other adjacent uses or will be so rendered through measures designed to reduce adverse impacts.

Goal 4 protections flow automatically once land is identified as forest land. In contrast, under Goal 5 and the Goal 5 rule, no protections may be imposed until the impact of those restrictions on conflicting uses (which presumably could include forest uses where forest lands are involved) have been considered. The Goal 5 process requires an ESEE analysis to justify prohibiting or limiting conflicting uses or allowing them fully notwithstanding the impact on the Goal 5 resource site. Given the nature of the Goal 5 planning process, we conclude requiring an exception to Goal 4 would in some ways duplicate the Goal 5 planning process and potentially preclude implementation of the program developed under that Goal 5 planning process. We conclude the Land Conservation and Development Commission (LCDC) could not have intended to impose such a requirement or to elevate Goal 4 over Goal 5. The complexity that can be encountered in the Goal 5 planning process is frequently already daunting. Requiring the program that is developed under that Goal 5 planning process to also take an exception through the statutory, Goal 2 and administrative rules that govern exceptions is not clearly mandated by the language of the statute, goal and rule, and we decline to interpret them to impose such a duplicative and potentially negating requirement.

The second assignment of error is denied.

THIRD AND FOURTH ASSIGNMENTS OF ERROR

A. Introduction

As noted earlier, OAR 660-023-0180(5) elaborates considerably on how a local government must go about determining whether mining will be allowed at an inventoried significant mineral and aggregate resource site. Specifically, OAR 660-023-0180(5) requires identification of (1) an impact area and (2) uses in that impact area that may conflict with mining. We set out the relevant text from OAR 660-023-0180(5) below, before turning to petitioners' third and fourth assignments of error.

> "For significant mineral and aggregate sites, local governments shall decide whether mining is permitted. For a PAPA application involving an aggregate site determined to be significant under section (3) of this rule, the process for this decision is set out in subsections (a) through (g) of this section. * * *
>
> "(a) The local government shall determine an impact area for the purpose of identifying conflicts with proposed mining and processing activities. The impact area shall be large enough to include uses listed in subsection (b) of this section and shall be limited to 1,500 feet from the boundaries of the mining area, except where factual information indicates significant potential conflicts beyond this distance. * * *
>
> "(b) The local government shall determine existing or approved land uses within the impact area that will be adversely affected by proposed mining operations and shall specify the predicted conflicts. For purposes of this section, 'approved land uses' are dwellings allowed by a residential zone on existing platted lots and other uses for which conditional or final approvals have been granted by the local government. For determination of conflicts from proposed mining of a significant aggregate site, the local government shall limit its consideration to the following:

> "(A) Conflicts due to noise, dust, or other discharges with regard to those existing and approved uses and associated activities (e.g., houses and schools) that are sensitive to such discharges;
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> "* * * * *
>
> "(D) Conflicts with other Goal 5 resource sites within the impact area that are shown on an acknowledged list of significant resources and for which the requirements of Goal 5 have been completed at the time the PAPA is initiated;
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> "* * * * *."

Petitioners' third assignment of error concerns OAR 660-023-0180(5)(b)(D) ("[c]onflicts with other Goal 5 resource sites"). Petitioners' fourth assignment of error concerns OAR 660-023-0180(5)(b)(A) ("[c]onflicts due to noise, dust, or other discharges").

B. Third Assignment of Error (Inventoried Significant Elk Habitat).

For reasons that we do not understand, petitioners divide their third assignment of error into two subassignments of error. In their first subassignment of error, petitioners argue that "[e]lk habitat is an existing and approved use within the impact boundary." Petition for Review 20. But for OAR 660-023-0180(5)(b)(D), which we discuss next, we would agree with the county and intervenor that inventoried elk habitat does not qualify as an "approved land use[]" "for which conditional or final approvals have been granted by the local government." OAR 660-023-0180(5)(b). The fact that those lands are or were inventoried as forest lands and the fact that under Goal

4 and the Goal 4 administrative rule "forest lands * * * maintain * * * wildlife resources," does not mean big game habitat is an approved land use "for which conditional or final approvals have been granted by the local government." Goal 4; OAR 660-006-0005(7)(b); OAR 660-023-0180(5)(b).

However, despite that description of "approved land uses" in the text of OAR 660-023-0180(5)(b) set out above, the rule goes on to direct that "the local government shall limit its consideration" to the conflicts listed in OAR 660-023-0180(5)(b)(A) through (F). Among those listed conflicts are "[c]onflicts with other Goal 5 resource sites within the impact area that are shown on an acknowledged list of significant resources and for which the requirements of Goal 5 have been completed at the time the PAPA is initiated[.]" OAR 660-023-0180(5)(b)(D). Apparently, the drafters of OAR 660-023-0180(5)(b) considered Goal 5 resources sites for which a completed ESEE analysis and program existed at the time a PAPA was initiated to qualify as "approved uses," notwithstanding suggestions in the text of OAR 660-023-0180(5)(b) that some sort of existing permit approval is required. We therefore turn to the critical question—whether there is inventoried "significant" big game range within the impact area for which "the requirements of Goal 5 have been completed at the time the PAPA [was] initiated," within the meaning of OAR 660-023-0180(5)(b)(D).

Intervenor initially argues this assignment of error should be denied because petitioners' challenge is limited to the 107-acre area zoned QM/RCP

and OAR 660-023-0180(5) is only concerned with conflicting uses in the impact area. *Setniker v. Polk County*, 63 Or LUBA 38, *aff'd in part, rev'd in part on other grounds*, 244 Or App 618, 260 P3d 800, *rev den* 351 Or 216, 262 P3d 402 (2011). Intervenor is mistaken. Petitioners' first subassignment of error is "Elk habitat is an existing and approved use within the impact area." Petition for Review 20. Petitioners' arguments are clearly not limited to the QM/RCP-zoned 107 acres: "Property within the impact boundary, including the applicant's 107-acre property, is inventoried forest land, a classification that consist[s] of both land suitable for commercial forest uses * * * and 'fish and wildlife resources.'" Petition for Review 22.

The record is frankly confusing regarding whether the county has an "acknowledged list of significant" big game habitat and whether "the requirements of Goal 5 [were] completed at the time the PAPA [in this appeal was] initiated." Petitioners contend there is inventoried "significant" big game habitat on the subject property, citing to the map that appears at Supp. Rec. 4791. The map that appears at Supp. Rec. 4791 shows much of the subject property and impact area is inventoried as Major Big Game Habitat.

The challenged decision takes the position that while there is inventoried major big game habitat on the subject property and in the impact area, that big game habitat was never inventoried as "significant," within the meaning of OAR 660-023-0180(5)(b)(D):

> "[T]he Board of Commissioners finds, as documented in the record (*see* March 30, 2016 Response to Incompleteness Letter

> and November 1, 2016 Big Game Range Letter from Arnold Gallagher) the County did not classif[y] Big Game Range as a 'significant' Goal 5 resource during the Lane County Rural Comprehensive Plan adoption process. In 1984 when [the Oregon Department of Land Conservation and Development] DLCD acknowledged the RCP, it determined that Lane County's inventory of resources was complete, adequate and complied with Goal 5, despite not identifying Big Game Range as a significant resource. Big Game Range was not identified as significant because other policies and restrictions on zones where Big Game Range was present made this categorization unnecessary. Pursuant to OAR 660-023-0180(5)(b)(D), the County may only review Goal 5 resource sites within the impact area that are included on an acknowledged list of significant Goal 5 resources. Neither the Lane County Rural Comprehensive Plan (RCP) or Flora and Fauna Working Paper designated Big Game Range areas as '1C' 'significant' resource." Supp. Rec. 75.

The November 1, 2016 letter referenced in the above findings includes a statement by a long-time county planner who participated in the preparation and acknowledgment of the Lane County Rural Comprehensive Plan (RCP):

> "RCP Goal 5, Flora and Fauna Policies 9, 10 and 11 were developed as part of a complex effort by Lane County in 1983 and 1984 to address the concerns of the Oregon Department of Fish and Wildlife (ODOFW) about the impacts of residential development on Big Game Habitat [i.e., Big Game Range] areas. The discussions in the 1982 Flora and Fauna Working Paper and the requirements in Policies 9, 10 and 11 are about limiting residential densities and siting requirements in the resource zones in order to minimize the impacts of new residential development on Big Game Habitat areas. As part of Lane County's concurrent effort to comply with Goal 4 for Forest Lands, Lane County adopted Goal 4, Policy 5 that prohibited new dwellings on nonimpacted forest lands zoned F-1. This prohibition was unique to Lane County and substantially addressed the residential impact concerns raised under Goal 5 by the ODOFW. *It is noteworthy that in the 1982 Flora and Fauna Working Paper and in Policies*

> *9, 10 and 11, there is no mention of designating any Big Game Habitat areas as 1C significant.* This was because Lane County focused instead on limiting residential development in Big Game Habitat areas and did not need to further restrict development in Big Game Habitat areas. Big Game Habitat was not categorized. Based on the above information, the Old Hazeldell Quarry property and the surrounding property in the Impact Area do not contain any significant Big Game Habitat areas." Supp. Rec. 932 (underlining in original; italics added).

Petitioners dispute the significance of the county's apparent failure to expressly inventory the big game habitat as a "significant or important" "1C" resource:

> "The applicant did not provide evidence to address its conflict with this significant Goal 5 resource. Instead, the applicant contended that the resource was not significant because * * * it was not labeled as '1C.' Rec. 5455 ('There is no mention of designating any Big Game Habitat areas as 1C significant.') The County relied on this labeling issue to conclude that the site was not significant. Rec. 75. However, this label is not dispositive as '1C' designation is a product of Division 23 Goal 5 standards that came into effect in 1996, several years after the acknowledgement of the County's plan. See OAR 660-023-0030(1)(c)." Petition for Review 25.

Petitioners are incorrect about when the initial Goal 5 rule, which set out the 1A (do not include on the inventory), 1B (only include on inventory as a special category and delay Goal 5 process) and 1C (determine site to be significant or important and complete Goal 5 process) options, was first adopted. The initial Goal 5 administrative rule was adopted in 1981, and was in effect when the county's RCP was acknowledged by LCDC in 1984. *See Delta Property Company LLC v. Lane County*, 69 Or LUBA 305, 309-17

(2014), *rev'd and rem'd in part, aff'd in part*, 271 Or App 612, 352 P3d 86 (2015) (discussing the evolution of the Goal 5 rule and the acknowledgement of the Lane County RCP at length). But petitioners also contend that because the county in fact adopted an inventory, identified conflicting uses and identified measures that would protect big game habitat to some extent, "Big Game Habitat was clearly a 'signficant' resource under the Goal 5 rules in effect at [the] time [of acknowledgment]." Petition for Review 25.

It is an understatement to say the Goal 5 planning process is complicated. The Goal 5 rule was adopted in 1981 to give guidance to local governments that were struggling to comply with Goal 5's open-ended charge to "[t]o protect natural resources." If the planner's statement is to be believed, and we have no reason to doubt the statement, the Big Game Habitat inventory was never expressly labeled as a 1C inventory. But even if that statement is accurate, it is not necessarily dispositive.

As we explained in *Delta Property Company*, a county's attempt to inventory natural resource sites such as big game habitat under the Goal 5 rule could lead to a 1A decision "that a particular resource site is not important enough to warrant inclusion on the plan inventory." 69 Or LUBA at 316 (quoting Beaver State Sand and Gravel v. Douglas Co., 187 Or App 241, 65 P3d 1123 (2003). Or the attempt to inventory natural resource sites could lead to 1B decision that a resource site may exist, "but that the information is not adequate to identify with particularity the location, quality and quantity of the

resource site[.]" *Id.* at 317. If a 1B inventory decision is made, the resource site is only included on the "comprehensive plan inventory as a special category." *Id* at 318. And the local government is to "proceed through the Goal 5 process in the future" and "include a time frame for this review." *Id* at 317. Finally, if the inventory information is sufficient to "determine[] a site to be significant or important," the local government makes a 1C decision and "include[s] the site on its plan inventory and indicate[s] the location, quality and quantity of the resource site * * *," and "proceed[s] through the remainder of the Goal 5 process." *Id.*

The county's Flora & Fauna Working Paper (1) identifies the Lane County Wildlife Inventory Maps that were developed based on ODFW big game range maps, (2) identifies the location, quality and quantity of the big game range, (3) identifies conflicts with big game range and (4) explains how those conflicts are to be mitigated by existing zoning. Supp. Rec. 4785-89. Based on what the county did in the Flora & Fauna Working Paper, it is most accurate to say the county adopted a 1C inventory decision, *i.e.*, that the inventoried big game habitat is "significant or important." While one can question whether the Flora & Fauna Working Paper complies fully with the Goal 5 rule, it is quite clear the county did not adopt a 1A decision, and despite the planner's suggestions to the contrary, it did not adopt a 1B decision either, because it adopted in the Flora & Fauna Working Paper, which explains how the county will go about implementing ODFW's density recommendations in

big game ranges. We agree with petitioners that the county erroneously determined that its adopted inventory of big game habitat is not "an acknowledged list of significant resources * * * for which the requirements of Goal 5 have been completed at the time the PAPA [in this case was] initiated," within the meaning of OAR 660-023-0180(5)(b)(D).

The third assignment of error is sustained.

C. Fourth Assignment of Error (Conflicts Due to Noise, Dust, or Other Discharges

As already noted, OAR 660-023-0180(5)(b)(A) requires consideration of "[c]onflicts due to noise, dust, or other discharges with regard to those existing and approved uses and associated activities (e.g., houses and schools) that are sensitive to such discharges[.]" Once conflicting uses in the impact area have been identified, OAR 660-023-0180(5)(c) directs local governments to "determine reasonable and practicable measures that would minimize the conflicts identified under" OAR 660-023-0180(5)(b).[10] OAR 660-023-

[10] The text of OAR 660-023-0180(5)(c) is set out below:

> "The local government shall determine reasonable and practicable measures that would minimize the conflicts identified under subsection (b) of this section. To determine whether proposed measures would minimize conflicts to agricultural practices, the requirements of ORS 215.296 shall be followed rather than the requirements of this section. If reasonable and practicable measures are identified to minimize all identified conflicts, mining shall be allowed at the site and subsection (d) of this section is not applicable. If identified conflicts cannot be minimized, subsection (d) of this section applies."

0180(1)(g) provides the following definition of what it means to "[m]inimize a conflict," within the meaning of ORS chapter 660, division 23, section 180:

> "'Minimize a conflict' means to reduce an identified conflict to a level that is no longer significant. For those types of conflicts addressed by local, state, or federal standards (such as the Department of Environmental Quality standards for noise and dust levels), to 'minimize a conflict' means to ensure conformance to the applicable standard.

1. Noise Study and Condition of Approval

Petitioners contend the noise study that intervenor's engineer prepared to demonstrate that the proposed mine would comply with Oregon Department of Environmental Quality (DEQ) noise standards was not prepared in the manner required by DEQ rules and therefore cannot be relied upon to find that the proposed mine will meet DEQ noise standards.

The applicable DEQ noise standard is set out at OAR 340-035-0035(1)(b)(B)(i), which provides:

> "No person owning or controlling a new industrial or commercial noise source located on a previously unused industrial or commercial site shall cause or permit the operation of that noise source if the noise levels generated or indirectly caused by that noise source increase the ambient statistical noise levels, L10 or L50, by more than 10 dBA in any one hour, or exceed the levels specified in Table 8, *as measured at an appropriate measurement point, as specified in subsection (3)(b) of this rule*, except as specified in subparagraph (1)(b)(B)(iii)." (Emphasis added.)

OAR 340-035-035(3)(b)(B)(iii) provides that sound measurement is to be measured 25 feet from the noise sensitive building or from the point on the noise sensitive property line nearest the noise source.

There is no dispute that the sound study did not strictly adhere to the sound measuring points required by OAR 340-035-035(3)(b)(B)(iii). Intervenor's expert offered a number of explanations for why he did not do so, including the following:

> "[W]hen selecting an ambient noise measurement location for residences of interest, one needs to think about the noise sources that can influence the ambient noise at a residence and as long as the location selected does not result in noise levels that are higher than would be found at a residence in question, the data measured at the location can be considered representative of the ambient noise at the residence. This was the approach used by DSA [the applicant's engineer] in selecting the ambient noise measurement locations for the Old Hazeldell Quarry noise study and based on the professional experience we have in conducting ambient noise measurements in various settings across the Northwest, the data collected at the various measurement locations would be sufficiently representative of the ambient noise levels found at the residences referenced in the report.
>
> "In addition to using our professional experience to determine locations for ambient noise measurements around the proposed Old Hazeldell Quarry site, DSA utilized that experience in deciding when the measurements would be made, how long they would be made and the number of measurements that would be necessary at each location to obtain representative data that could be used to establish the appropriate noise criteria at each residence of concern. The lowest hourly ambient noise levels are the most important noise levels to capture when conducting a noise study for a 'previously unused industrial or commercial site' because, with the 'ambient noise degradation rule,' the noise criteria at a residence is the lower of the ambient noise plus 10 dB or the maximum allowable levels specified in the DEQ regulation.
>
> "* * * * *
>
> "In conclusion, ambient noise levels used to assess noise radiating from the Old Hazeldell Quarry were measured in a way that would

> provide the lowest hourly statistical noise levels that could reasonably be expected at residences around the quarry site. The results of those measurements were then used to define the noise criteria that would be applicable at the 22 residences considered in the study." Supp. Rec. 112-13.

We have previously declined to find fault with noise studies that did not adhere strictly to DEQ procedures for measuring noise. *Scott v. City of Jacksonville*, 60 Or LUBA 307, 313 (2010) (selected "measuring point results in more noise protection for adjoining nose sensitive properties than would be the case under ORS 340-035-035(3)(b)"); *Ray v. Josephine County*, 51 Or LUBA 443, 451 (2006) (no error where sound measuring procedures were generally consistent with DEQ requirements and petitioner does not identify any way in with the procedure used varied in any material way from DEQ requirements).

Petitioners do not explain why they think the procedure followed by intervenor's expert may have inflated the measurement of ambient statistical noise level or rendered measurement of the noise generated by the mining operation inaccurate at the noise sensitive uses. Petitioners simply argue:

> "None of the applicant's 'measurement locations' conformed to the regulation or the requirements of NPCS-1. Rec. 3693-95. Accordingly, this report does not establish the ambient statistical noise level as a matter of law, and could not be relied upon as the basis to evaluate either the noise conflicts or minimization under the DEQ rules." Petition for Review 31.

As in *Scott* and *Ray*, we conclude that it is not sufficient for petitioners to simply point out that the sound study does not measure noise in precisely the

manner required by DEQ rules, without any attempt to show that any deviations from required sound measuring locations could have the effect of allowing noise levels that violate DEQ standards. In this case, we understand intervenor's expert to take the position that the selected sound measuring locations did not have the effect of inflating the ambient noise level or otherwise render those sound measurements inaccurate. At least some effort to challenge the intervenor's expert's position is required to show the deviations may have led to inaccurate sound readings for purposes of determining if DEQ noise standards will be met.

Finally, the county found that with proposed mitigation measures, the proposed mine would comply with DEQ noise standards. Supp. Rec. 53-58. The county relied in part on conditions of approval to mitigate noise conflicts. One of those conditions of approval (Condition of Approval 25) requires intervenor to offer to measure noise levels at any house located in the impact area after mining and processing operations have begun. Supp. Rec. 57. A report is required based on those measurements. *Id.* If the report based on those future measurements shows DEQ noise standards are being violated at any residence, "changes must be made at the quarry within 30 days of the date when the report was provided to the County to reduce the amount of noise radiating to the residence(s) to a level of compliance with applicable DEQ regulations." *Id.* Follow-up sound measurements are required. If the follow-up sound measurements show DEQ noise standards are still not being met,

additional changes are required "until full compliance is demonstrated at all residences in the Old Hazeldell Quarry Impact Area." *Id.* Once measurement show DEQ standards are being met at all residences, monitoring may cease until "excavation operations move from Phase I excavation area to Phase II excavation area." Supp. Rec. 58.

Petitioners contend this trial and error approach to correcting possible future violations of DEQ noise standards is inadequate to "ensure conformance to the applicable standard," as is required by OAR 660-023-0180(1)(b) to "minimize a conflict:"[11]

> "[I]f the initial noise compliance measurements – taken at some point during the 90-day period after excavation begins – reveal a violation of the DEQ standards that applicant is permitted to continue operations, while it attempts to reduce noise through a series of trial-and-error attempts that are only 90-days later under condition 25(d) & (e). Rec. 57. Moreover, once a positive result is obtained, this noise monitoring ceases until the applicant moves to the next phase of excavation, and regardless of whether there are additional impacts * * *. *Id.* These conditions do not 'ensure' that the applicant would not be permitted to operate a noise source in excess of the applicable standards, and would permit ongoing violations of the DEQ rules to continue over an extended period of time." Petition for Review 33.

OAR 660-023-0180(1)(b) does not require the impossible, *i.e.*, an absolute guarantee that the proposed mining operation, once operational, will never violate DEQ noise standards. Based on the intervenor's noise study the

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[11] The OAR 660-023-0180(1)(b) definition of "[m]inimize a conflict" was set out at the beginning of our discussion of the fourth assignment of error.

county found DEQ noise standards will be met. To protect against possible violations in the future, once the mining operation has begun and the actual noise source can be measured, Condition of Approval 25 requires additional noise monitoring. That condition requires that "changes must be made at the quarry" until "full compliance is demonstrated at all residences in the Old Hazeldell Quarry Impact Area." Supp. Rec. 57. We fail to see how that condition is inadequate to "ensure conformance to the applicable standard," as is required by OAR 660-023-0180(1)(b) to "minimize a conflict." Petitioners cite no legal support for their suggestion that the mining operation should be shut down if a noise standard violation is detected in the future, and that suggestion ignores the reality that making the required changes to the mining operation and follow-up monitoring likely would require continued operation of mining to determine if the changes have been successful. Similarly, petitioners object to allowing future monitoring to cease once the future monitoring shows Phase I of the mining complies with DEQ noise standards, until Phase II is begun, but cite no legal authority for requiring continuous sound monitoring during Phase I once additional testing during Phase I shows DEQ standards are being met.

Petitioners' subassignment of error 1 concerning the noise study and Condition of Approval 25 provides no additional basis for remand.

2. Silica Dust and Particulate Matter

a. Silica Dust

The andesite rock that will be mined on the property contains silica, which can be dispersed during blasting and crushing. A doctor testified:

> "[S]ilica dioxide which will be released during the crushing process will invariably end up in the lungs of our citizens. This will also be blown off the trucks, even with covers over the rock in the bed of the truck. This would be dispersed through the middle of town as trucks travel on Highway 5 8. Silicosis is a significant pulmonary disease." Petition for Review 34-35.

Petitioners contend intervenor's plans to limit particulate fallout will be ineffective to limit silica, as those efforts are directed at matter larger than 250 microns, and silica is smaller than 250 microns. Petitioners also contend intervenor's efforts to comply with OSHA [State and Federal Occupational and Safety Hazard Administration] standards are inadequate, because those standards are designed to protect on-site employees, not the general public or sensitive populations.

Intervenor cites the following findings that respond to petitioners' silica concerns:

> "Silica is naturally present in the soils that will be disturbed for the mining operation, and dust containing silica is primarily an occupational health hazard. As such, the mining operation will be subject to regulation by Oregon OSHA and Oregon MSHA [Mine Safety and Health Administration], and subject to fine, penalties and other actions for poor performance in controlling silica dust. The Lane Regional Air Protection Agency ('LRAPA') also regulates fugitive dust emissions, including emissions of dust that contain silica. Per the condition of approval 44 and LRAPA's

> requirements, the project will fully comply with air quality standards imposed by a LRAPA General Air Contaminant Discharge Permit. The applicant's consultant Arctic Engineering, LTD also prepared an additional Fugitive Dust Mitigation and Daily Reporting Plan that the applicant will be required to implement through conditions of approval. This Plan imposes additional requirements beyond the LRAPA permits to ensure that fugitive dust, including silica dust, does not impact land uses in the impact area." Supp. Rec. 59.

Intervenor contends the above findings and cited conditions are an adequate response to petitioner's silica concerns.

We understand petitioners to contend that the regulations and condition cited in the above-quoted findings are concerned with visible dust and are not concerned with smaller silica particles. The findings suggest that such may not be the case, and that the regulations and condition are also sufficient to minimize silica fugitive dust emissions. But the findings provide no way for LUBA to confirm that such is the case. On remand the county must do so.

Subassignment of error 2(a) is sustained.

b. Particulate Matter

i. Air Pollutant Dispersion Modeling

The subject property and impact area are in air quality non-attainment areas for $PM_{2.5}$ and PM_{10}.[12] The applicant is required to comply with both ambient air quality standards and new source standards. In Class II air quality

[12] $PM_{2.5}$ and PM_{10} are references to atmospheric particulate matter with a diameter of less than 2.5 and 10 micrometers, respectively.

limited areas such as Oakridge, OAR 340-202-0210(1)(b)(A) imposes a limit on increased $PM_{2.5}$ from new sources to 4 micrograms per meter, and a 24-hour maximum of 9 micrograms per cubic meter. In Class II air quality limited areas, OAR 340-202-0210(1)(b)(B) limits the increase in PM_{10} to an annual arithmetic mean of 17 micrograms per cubic meter and a 24-hour maximum of 30 micrograms. In addition, OAR 340-202-0110(3) limits maximum particle fall-out to no more than "5.0 grams per square meter per month in residential and commercial areas." To ensure these standards are met, OAR 340-225-0040 and 340-225-0050 require air dispersion modeling that meets certain standards specified in the rule.[13] Petitioners argue:

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[13] OAR 340-225-0040 provides:

> "All modeled estimates of ambient concentrations required under this division must be based on the applicable air quality models, data bases, and other requirements specified in 40 CFR part 51, Appendix W, 'Guidelines on Air Quality Models (Revised).' Where an air quality impact model specified in 40 CFR part 51, Appendix W is inappropriate, the methods published in the FLAG are generally preferred for analyses in PSD Class I areas. Where an air quality impact model other than that specified in 40 CFR part 51, Appendix W is appropriate in PSD Class II and III areas, the model may be modified or another model substituted. Any change or substitution from models specified in 40 CFR part 51, Appendix W is subject to notice and opportunity for public comment and must receive prior written approval from DEQ and the EPA [Environmental Protection Agency]."

OAR 340-225-0050 sets out detailed requirements for air quality monitoring.

> "The applicant did not prepare or provide the requisite air dispersion modeling to address its impacts on ambient air quality, and, in fact, its analysis of ambient air quality impacts is limited to a discussion of diesel engine emissions, and a qualitative comparison with an unspecified aggregate crushing operation somewhere in Southern Oregon." Petition for Review 37.

Intervenor's entire response to petitioners' contention that the required air pollutant dispersal modeling is necessary to establish that expected particulate impacts on ambient air quality is set out below:

> "[T]he modeling requirement is not a standard; it is a procedural requirement. Accordingly, non-compliance with this procedural requirement does not mean [intervenor] has not minimized particulate matter conflicts." Intervenor-Respondent's Brief 27.

Intervenor's response is inadequate. We reject intervenor's contention that the OAR 340-225-0040 and OAR 340-225-0050 modeling requirements are mere procedural requirements that intervenor is free to ignore. And unlike its decision to deviate from DEQ's requirements for measuring noise at noise sensitive uses, where intervenor's expert explained why the sound measurements that were made were sufficient to ensure compliance with applicable noise standards, intervenor provides no explanation for why it believes the modeling required by OAR 340-225-0040 and OAR 340-225-0050 is unnecessary to demonstrate compliance with particulate standards.

On remand intervenor will either need to produce the required modeling, or offer a better explanation for why the required modeling is unnecessary to demonstrate the proposal will comply with standards that protect ambient air quality.

Subassignment of error 2(b)(i) is sustained.

ii. State New Source Review

In the paragraph that begins on the bottom of page 37 of the petition for review and continues through the only complete paragraph on page 38, petitioners make a detailed argument that the proposal does not demonstrate that "it will offset impacts on ambient air quality under OAR 340-224-0250(2)(b) and OAR 340-22[4]-510 and 530." Petition for Review 37.[14]

In its brief, intervenor cites to some conclusory findings that do not really respond to the argument petitioners make regarding OAR 340-224-0250(2)(b) and OAR 340-22[4]-510 and 530. On remand the county and

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[14] OAR 340-224-0250(2)(b) provides:

> "Net Air Quality Benefit: The owner or operator of the source must satisfy the requirements of paragraph (A), (B), or (C), as applicable:
>
> "(A) For ozone nonattainment areas, OAR 340-224-0510 and 340-224-0520;
>
> "(B) For sources located in non-ozone nonattainment areas, that will emit 100 tons per year or more of the nonattainment pollutant, OAR 340-224-0510 and 340-224-0530(2) and (4);
>
> "(C) For sources located in non-ozone nonattainment areas, that will emit less than 100 tons per year of the nonattainment pollutant, OAR 340-224-0510 and 340-224-0530(3) and (4)."

intervenor will need to more directly confront the issues petitioners raise in subassignment of error 2(b)(ii).

Subassignment of error 2(b)(ii) is sustained.

iii. Water Spray Mitigation

Petitioners' final particulate argument concerns water spray for dust control. Petitioners contend the intervenor failed to demonstrate that water spray is a feasible measure for dust control and points out intervenor has not yet successfully drilled a well.

Intervenor contends the challenged decision adequately explains why water spray for dust control is feasible:

> "In conjunction with the application, the applicant's technical consultants have provided evidence and analysis demonstrating that water spray measures are a feasible, acceptable industry standard and an effective best management practice for dust control, including silica dust. As support for this conclusion, the Board of Commissioners relies upon (1) the Response to Hearing Comments letter and Old Hazeldell Quarry, Response to Opposition submittals through November 1, 2016 letter, both from Kuper Consulting LLC; (2) the Rebuttal Letter and Response Submittal regarding Testimony regarding Air Quality and Permitting Assessment Compliance for Old Hazeldell Quarry, both from Arctic Engineering, LTD, and (3) the October 29, 2016 Letter regarding Old Hazeldell Quarry - Quarry Water Usage from Katie Jeremiah of Aggregate Resources Industries, Inc." Supp. Rec. 79.

Intervenor contends that because petitioners neither acknowledge nor directly challenge the above findings or the evidence cited in those findings, this subassignment of error should be denied. We agree with intervenor.

Subassignment of error 2(b)(iii) is denied.

3. Airblast and Ground Vibration

Petitioners fault the county and intervenor for failing to identify air blast and ground vibration as conflicts that need to be minimized, separate and apart from noise from blasting. Intervenor cites the following part of Condition of Approval 25; which intervenor claims was adopted to "minimize conflicts associated with airblasting and quality of life issues associated with vibration:"

> "25. The applicant/owner must comply with the Noise Compliance Monitoring Plan set forth at pages 8-9 of the correspondence submitted by Daly-Standlee and Associates [the applicant's engineer] dated June 20, 2016 which states:
>
> "* * * * *
>
> "i. A blast-monitoring program to physically measure ground vibration and airblast energy must be used for all blasts occurring in the first year of operations at the quarry. Measurements of the ground movement in terms of peak-particle velocity must be made. Airblast measurements must be made in terms of the C-weighted, slow response sound pressure level. Measurements must be made at all residences located within the Old Hazeldell Quarry Impact Area where written permission has been given to have measurements made. Blast measurement reports to include the limits applicable to the blast energy must be provided to the County within 10 business days of the blast event." Supp. Rec. 57-58, 104-05.

Noise from blasting was identified as a conflict that must be minimized. The issue presented in this subassignment of error is whether the intervenor and county erred by not also identifying airblast and ground vibration from

blasting as a conflict that arises from blasting. The above finding is not responsive to the issue raised in this subassignment of error. Also, it not clear to us what "limits applicable to the blast energy" the above findings are talking about. On remand the county will need to consider whether airblast and ground vibration from blasting should be identified as a conflict that must be minimized and, if so, whether reasonable and practical measures are available to do so. OAR 660-023-0180(5)(c).

Subassignment of error 3 is sustained.

4. Groundwater Impacts

The proposed crusher will be located within the former Dunning Road Dump, which was the Oakridge municipal dump for 17 years until 1968. There is evidence in the record below that the former Dunning Road dump site likely contains a number of contaminants and that if water is diverted to the old dump site, leaching to ground water may occur. According to petitioners, the May 18, 2016 storm water and grading plan at Supp. Rec. 4209 would result in sheet flow of water into the former dump site.

The county adopted the following findings to address this issue:

> "Opponents also raised concerns regarding infiltration of stormwater into the landfill area and resultant impacts to groundwater. Westlake Consultants recommended installation of upgradient berms to direct and divert overland rainfall and stormwater around the landfill to stormwater conveyance ditches/treatment areas. The Board of Commissioners finds that adoption of COA [Condition of Approval] 8 which requires these berms and capture areas, will prevent potential impacts to the landfill from stormwater inundation." Supp. Rec. 62.

Petitioners argue that rather than requiring the upgradient berms discussed in the findings, Condition of Approval 8 instead requires construction according to the May 18, 2016 storm water and grading plan, which does not show the berms.

Intervenor is probably correct that the reference in Condition of Approval 8 to the May 18, 2016 storm water and grading plan was a scrivener's error and may be correct that other findings and other aspects of the proposal would be sufficient to ensure that no surface water is directed into the site of the old land fill. However, the decision must be remanded for other reasons and it would be relatively easy to correct the error in Condition of Approval 8 so that there will be no question about whether surface water will be directed to the old landfill site.

Subassignment of error 4 is sustained.

Assignment of error 4 is sustained, in part.

FIFTH ASSIGNMENT OF ERROR

OAR 660-023-0180(7) requires that the county "follow the standard ESEE 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 of a significant mineral and aggregate site." (Emphasis added.) The applicant took conflicting positions about whether the county needed to adopt findings concerning OAR 660-023-0180(7). Supp. Rec. 2482; 3031. The county adopted findings addressing OAR 660-023-0180(7) after the close of the

evidentiary hearing. Petitioners contend the county's findings regarding OAR 660-023-0180(7) are inadequate.

Intervenor argues initially that petitioner waived the challenge presented under this assignment of error because it raised no issue about OAR 660-023-0180(7) below. The issue of the applicability of OAR 660-023-0180(7) was raised below before the close of the evidentiary hearing. Petitioners are entitled to challenge the adequacy of findings that were prepared and adopted after the evidentiary hearing closed. *Lucier v. City of Medford*, 26 Or LUBA 213, 216 (1993).

On the merits, the county identified the five county zoning districts and one city zoning district that apply to lands in the impact area, and identified the uses authorized in those zoning districts as conflicting uses, as OAR 660-023-0040(2) requires. Supp. Rec. 83. The county determined the impact area, as OAR 660-023-0040(3) requires. *Id.* The county then discussed the ESEE consequences of allowing, limiting or prohibiting those potential new conflicting uses, as required by OAR 660-23-0040(4). Supp. Rec. 84-86. And the county then developed a program to achieve Goal 5, as required by OAR 660-023-0040(5), deciding to allow potential new uses fully. The challenged decision explains the decision to adopt that program as follows:

> "Having identified these ESEE consequences, the Board of Commissioners must weigh them and develop a program to achieve Goal 5. Based on the ESEE analysis provided above, the Board of Commissioners determines that future conflicting uses should be allowed fully, notwithstanding the possible impacts on

> the resource site. The Board of Commissioners finds that none of the possible future conflicting uses will have a substantially negative impact on the aggregate mining site.
>
> "As explained in the above findings, the Board of Commissioners finds that the post-mining uses of the Property are those allowed as of right and conditionally under a current map designation or such other uses as may be allowed under future alternative designation, or allowed by law. Thus, the Board of Commissioners finds that the mining operation is of limited duration, and the proposed post-mining use of the site will be consistent with the law and surrounding uses.
>
> "Based on the foregoing analysis, the Board of Commissioners finds that, on balance, the positive economic, social, environmental, and energy consequences associated with allowing future conflicting uses outweigh any negative consequences both in number and degree. For these reasons, the Board of Commissioners finds that the ESEE analysis supports allowing future conflicting uses on the property and within the impact area." Supp. Rec. 86.

Petitioners first fault the county for simply identifying all the uses allowed by the zoning applied to properties in the impact area as conflicting uses, and not analyzing each of those uses separately. But OAR 660-023-0040 specifically authorizes consideration of groups of similar conflicting uses. Without a more developed argument, petitioners have not established that it was error to consider all allowed uses together.

The county's ESEE analysis is admittedly cursory and very general, as are the findings justifying the decision to allow future conflicting uses fully. But petitioners simply argue "the County's ESEE analysis does not describe any of these conflicting uses or account for their potential interaction with the

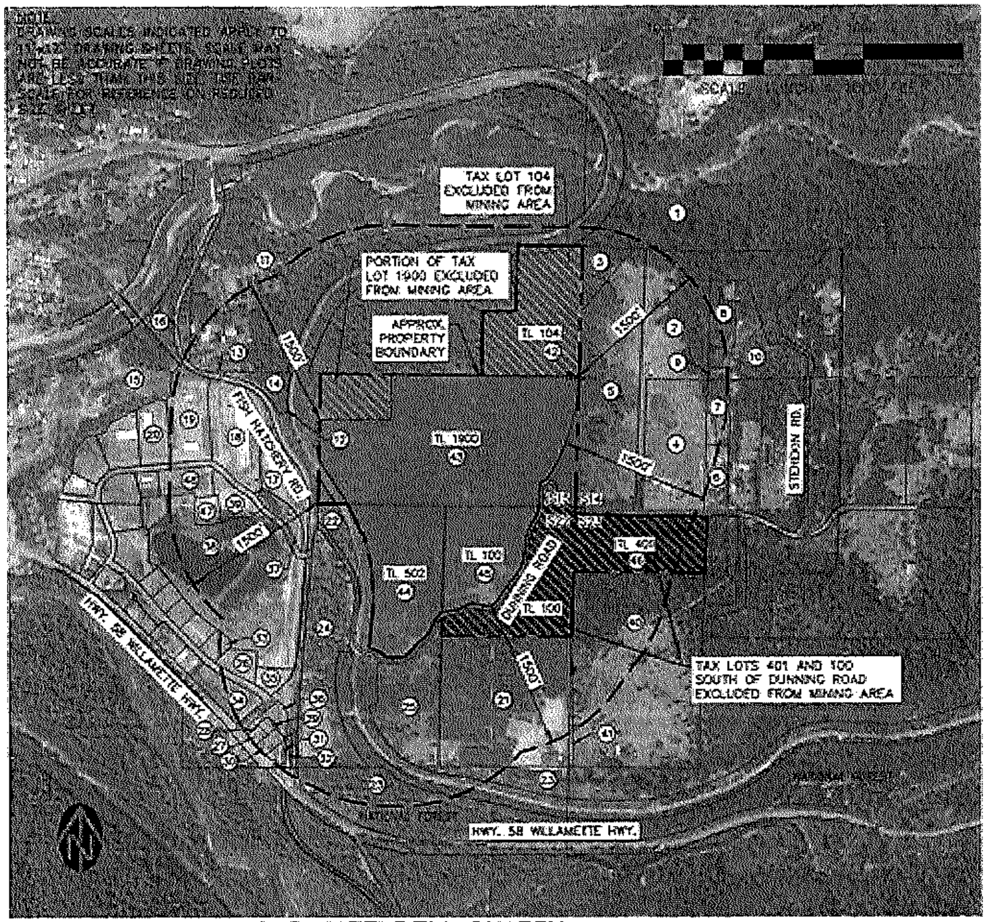
proposed quarry operation." Petition for Review 47. However, while not particularly detailed, the findings do discuss the economic, social, environmental and energy consequences of allowing, preventing or limiting conflicting uses, and sometimes identify particular uses or activities:

> "The Board of Commissioners finds that the economic consequences of allowing the full range of future conflicting uses are myriad and positive. For example, forestry and farming have, and will continue to, contribute significantly to the economy of the region. * * *" Supp. Rec. 84.

And the findings justifying the program point out the mining operation will be limited in time and the proposed post-mining use will be consistent with post-mining uses. We conclude petitioners' arguments are not sufficiently developed to require that we sustain its general challenge to the specificity of the county's findings concerning OAR 660-023-0180(7).

The fifth assignment of error is denied.

The county's decision is remanded.



(1) MAP 21-35-14 TAX LOT 100, ZONE F1	(17) MAP 21-35-15 TAX LOT 4000, ZONE I2	(33) MAP 21-35-22.20 TAX LOT 2800, ZONE I2
(2) MAP 21-35-14 TAX LOT 200, ZONE RR10	(18) MAP 21-35-15 TAX LOT 4100, ZONE I2	(34) MAP 21-35-22.20 TAX LOT 2900, ZONE I2
(3) MAP 21-35-14 TAX LOT 201, ZONE F2	(19) MAP 21-35-15 TAX LOT 4200, ZONE I2	(35) MAP 21-35-22.20 TAX LOT 3000, ZONE I2
(4) MAP 21-35-14 TAX LOT 202, ZONE RR10	(20) MAP 21-35-15 TAX LOT 4300, ZONE I2	(36) MAP 21-35-22.20 TAX LOT 3200, ZONE I2
(5) MAP 21-35-14 TAX LOT 203, ZONE F2	(21) MAP 21-35-22 TAX LOT 200, ZONE F2	(37) MAP 21-35-22.20 TAX LOT 3300, ZONE I2
(6) MAP 21-35-14 TAX LOT 400, ZONE RR10	(22) MAP 21-35-22 TAX LOT 300, ZONE F2	(38) MAP 21-35-22.20 TAX LOT 3400, ZONE I2
(7) MAP 21-35-14 TAX LOT 500, ZONE RR10	(23) MAP 21-35-22 TAX LOT 400, ZONE F1	(39) MAP 21-35-15 TAX LOT 3900, ZONE I2
(8) MAP 21-35-14 TAX LOT 601, ZONE RR10	(24) MAP 21-35-22 TAX LOT 500, ZONE I2	(40) MAP 21-35-23 TAX LOT 500, ZONE F2
(9) MAP 21-35-14 TAX LOT 602, ZONE RR10	(25) MAP 21-35-22 TAX LOT 501, ZONE F2	(41) MAP 21-35-23 TAX LOT 501, ZONE F2
(10) MAP 21-35-14 TAX LOT 900, ZONE RR10	(26) MAP 21-35-22.20 TAX LOT 105, ZONE I2	(42) MAP 21-35-15 TAX LOT 104, ZONE F1
(11) MAP 21-35-15 TAX LOT 100, ZONE F1	(27) MAP 21-35-22.20 TAX LOT 1700, ZONE CA	(43) MAP 21-35-15 TAX LOT 1900, ZONE F1
(12) MAP 21-35-15 TAX LOT 605, ZONE I2	(28) MAP 21-35-22.20 TAX LOT 1701, ZONE CA	(44) MAP 21-35-22 TAX LOT 502, ZONE F2
(13) MAP 21-35-15 TAX LOT 606, ZONE I2	(29) MAP 21-35-22.20 TAX LOT 1800, ZONE RR2	(45) MAP 21-35-22 TAX LOT 100, ZONE F2
(14) MAP 21-35-15 TAX LOT 1701, ZONE I2	(30) MAP 21-35-22.20 TAX LOT 1900, ZONE RR2	(46) MAP 21-35-23 TAX LOT 401, ZONE F2
(15) MAP 21-35-15 TAX LOT 2000, ZONE I2	(31) MAP 21-35-22.20 TAX LOT 2000, ZONE CA	(47) MAP 21-35-15 TAX LOT 3600, ZONE I2
(16) MAP 21-35-15 TAX LOT 2100, ZONE I2	(32) MAP 21-35-22.20 TAX LOT 2001, ZONE I2	(48) MAP 21-35-15 TAX LOT 3800, ZONE I2

PROPERTY DESCRIPTION:

TAX LOTS 104 AND 1900 MAP 21-35-15
TAX LOTS 100 AND 502 MAP 21-35-22
TAX LOT 401 MAP 21-35-23
IN LANE COUNTY

ZONING LEGEND:

F1 – NONIMPACTED FOREST LANDS
F2 – IMPACTED FOREST LANDS
RR2 – RURAL RESIDENTIAL, 2 ACRES
RR10 – RURAL RESIDENTIAL, 10 ACRES
CA – RURAL COMMERCIAL
I2 – HEAVY INDUSTRIAL (CITY OF OAKRIDGE)

PROPOSED ZONING LEGEND:

F1 – NONIMPACTED FOREST LANDS
F2 – IMPACTED FOREST LANDS
QM – QUARRY AND MINE OPERATIONS

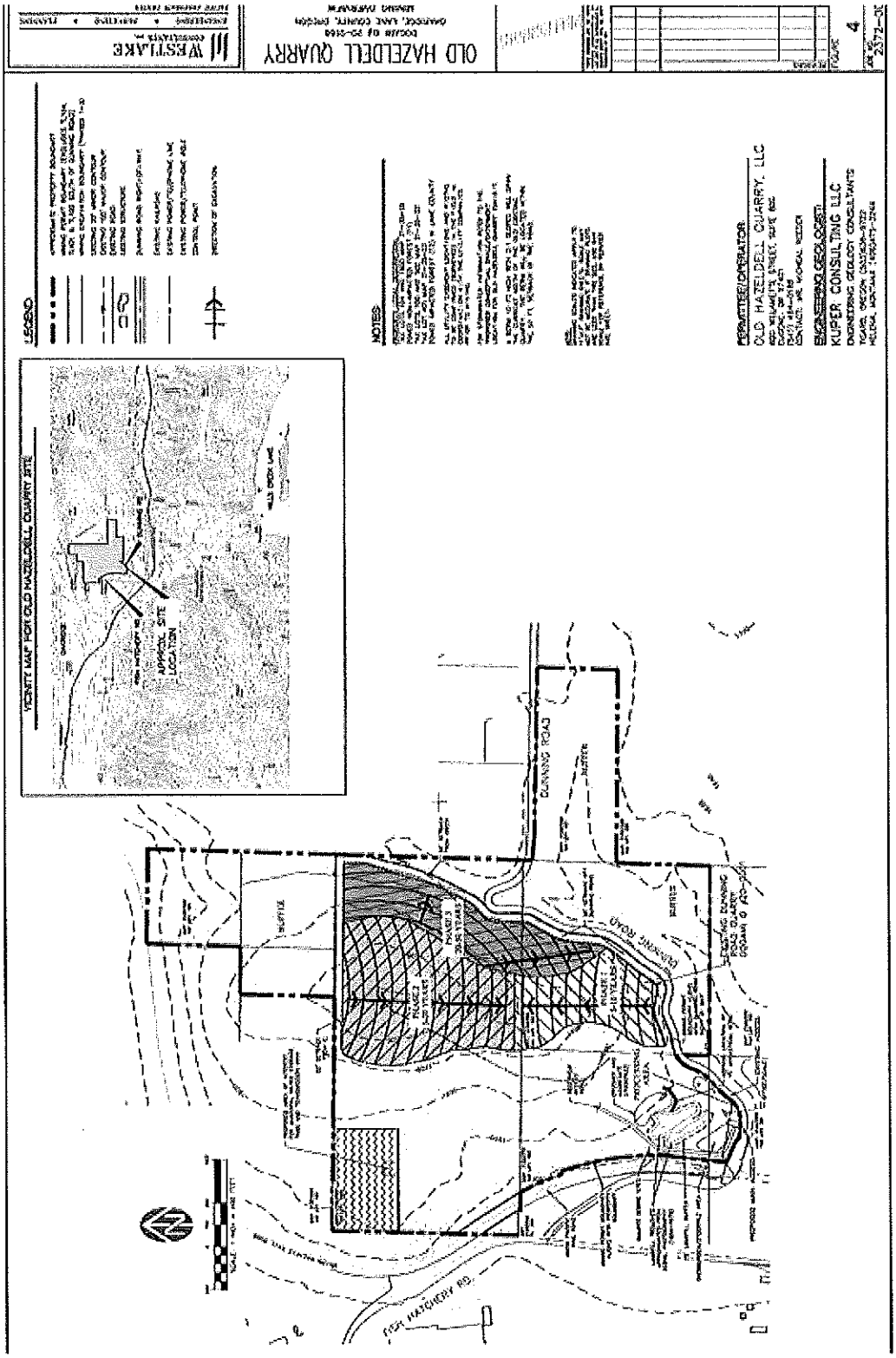
OLD HAZELDELL QUARRY
TAX LOT MAP, IMPACT AREA AND PROPOSED ZONE CHANGES
PORTIONS OF SECTIONS 14, 15, 22, AND 23, T.21S. R.3E. W.M.

KUPER CONSULTING LLC
ENGINEERING GEOLOGY CONSULTANTS
TIGARD, OREGON (503)628-9722
HELENA, MONTANA (406)475-3244

DATE 03/2016
DRAWN BY CMH
CHECKED BY BEM

WESTLAKE CONSULTANTS INC
ENGINEERING • SURVEYING • PLANNING

Attachment 1



Attachment 1

1