



1 governed by the provisions of ORS 197.850.

**NATURE OF THE DECISION**

Petitioners appeal a decision approving comprehensive plan and zoning map amendments to facilitate aggregate mining.

**FACTS**

In 2014, intervenor-respondent Sunny Valley Sand and Gravel, Inc. (intervenor) filed applications with the county for post-acknowledgment plan text amendments (PAPA), corresponding comprehensive plan and zoning map amendments, and site plan review, to facilitate aggregate mining on a 112-acre portion of a 212-acre parcel. The subject parcel includes two creeks that are inventoried in the county comprehensive plan as significant natural resources under Statewide Planning Goal 5 (Natural Resources, Scenic and Historic Areas, and Open Spaces), and is subject to the county Flood Hazard Overlay zone, at Josephine County Rural Land Development Code (RLDC) Article 69. To comply with flood hazard and riparian requirements, intervenor proposed to avoid construction within the 100-year floodplain or a 50-foot riparian buffer.

The county's initial decision determined that the aggregate resource on the site is a significant resource as determined under OAR 660-023-0180(3), part of an administrative rule that implements Goal 5 with respect to aggregate mineral resources. The initial decision identified existing or approved conflicting uses within a 1,500-foot impact area, and ultimately determined to allow mining at the site pursuant to OAR 660-023-0180(5).

1           The county’s initial decision was appealed to LUBA, which remanded in  
2 part for the county to comply with OAR 660-023-0180(7), which requires the  
3 county to conduct an analysis of the Economic, Environmental, Social and  
4 Energy (ESEE) consequences of allowing, prohibiting or limiting *new*  
5 conflicting uses. *Rogue Advocates v. Josephine County*, 72 Or LUBA 275  
6 (2015) (*Rogue Advocates I*). In *Rogue Advocates I*, LUBA did not reach a  
7 challenge to the county’s findings regarding conflicts with the protected creek  
8 riparian area on the property. *Id.* at 289.

9           On remand, the board of county commissioners held a new evidentiary  
10 hearing, and adopted new findings, including an ESEE analysis to address new  
11 or future conflicting uses, to support the approval. This appeal followed.

12           **FIRST ASSIGNMENT OF ERROR**

13           In four sub-assignments of error, petitioners challenge the county’s  
14 findings and the ESEE analysis adopted on remand, regarding new conflicting  
15 uses.

16           **A.     Impact Area**

17           The legal issue under the first subassignment of error is what is meant by  
18 “the impact area” for purposes of OAR 660-023-0180(7). To understand that  
19 issue, we first set out the relevant background.

20           The Goal 5 rule, at OAR chapter 660, division 023, includes a “standard”  
21 process for inventorying, evaluating and protecting natural resources, at OAR  
22 660-023-0030 through -0050. That generic standard process includes rules for

1 evaluating the ESEE consequences of allowing, limiting, or prohibiting uses  
2 that conflict with a natural resource site, including (1) identifying conflicting  
3 uses, (2) determining an impact area to analyze the identified conflicting uses,  
4 (3) analyzing the ESEE consequences, and (4) developing a program to achieve  
5 Goal 5 with respect to the resource site.<sup>1</sup>

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<sup>1</sup> OAR 660-023-0040 provides, in relevant part:

“(1) Local governments shall develop a program to achieve Goal 5 for all significant resource sites based on an analysis of the economic, social, environmental, and energy (ESEE) consequences that could result from a decision to allow, limit, or prohibit a conflicting use. \* \* \* The steps in the standard ESEE process are as follows:

“(a) Identify conflicting uses;

“(b) Determine the impact area;

“(c) Analyze the ESEE consequences; and

“(d) Develop a program to achieve Goal 5.

“(2) Identify conflicting uses. Local governments shall identify conflicting uses that exist, or could occur, with regard to significant Goal 5 resource sites. \* \* \*

“\* \* \* \* \*

“(3) Determine the impact area. Local governments shall determine an impact area for each significant resource site. The impact area shall be drawn to include only the area in which allowed uses could adversely affect the identified resource. The impact area defines the geographic limits within which to conduct an ESEE analysis for the identified significant resource site.

1       The Goal 5 rule also includes special standards and procedures for  
2 specific types of Goal 5 resources, including those that govern aggregate  
3 mineral resources, at OAR 660-023-0180. As OAR 660-023-0020(1) explains,  
4 sometimes both the standard process and a special process apply; sometimes  
5 the special process supersedes the standard process in part or in whole.<sup>2</sup> In  
6 case of conflict, OAR 660-023-0020(1) provides that the specific process  
7 controls.

8       OAR 660-023-0180 sets forth a specific process for aggregate resources  
9 that in part modifies, supplements or supersedes the “standard” process. OAR  
10 660-023-0180(2). OAR 660-023-0180(5)(a) requires the local government to

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“(4) Analyze the ESEE consequences. Local governments shall  
analyze the ESEE consequences that could result from  
decisions to allow, limit, or prohibit a conflicting use.  
\* \* \*”

<sup>2</sup> OAR 660-023-0020(1) provides:

“The standard Goal 5 process, OAR 660-023-0030 through 660-023-0050, consists of procedures and requirements to guide local planning for all Goal 5 resource categories. This division also provides specific rules for each of the fifteen Goal 5 resource categories (see OAR 660-023-0090 through 660-023-0230). In some cases this division indicates that both the standard and the specific rules apply to Goal 5 decisions. In other cases, this division indicates that the specific rules supersede parts or all of the standard process rules (i.e., local governments must follow the specific rules rather than the standard Goal 5 process). In case of conflict, the resource-specific rules set forth in OAR 660-023-0090 through 660-023-0230 shall supersede the standard provisions in OAR 660-023-0030 through 660-023-0050.”

1 identify conflicts with existing and approved uses located within a determined  
2 “impact area” limited in size to 1,500 feet from the boundaries of the mining  
3 area, unless factual information indicates “significant potential conflicts”  
4 beyond 1,500 feet.<sup>3</sup> In the present case, the county’s initial decision used an  
5 impact area of 1,500 feet to evaluate conflicts with existing and approved uses,  
6 after concluding that the record included no factual information indicating  
7 “significant potential conflicts” beyond 1,500 feet. The county then  
8 determined under the standards in OAR 660-023-0180(5) to allow mining, after  
9 minimizing all identified conflicts or despite remaining conflicts with identified  
10 existing or approved uses within the impact area.

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<sup>3</sup> OAR 660-023-0180(5) provides, in relevant part:

“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. For a proposed expansion of an existing aggregate site, the impact area shall be measured from the perimeter of the proposed expansion area rather than the boundaries of the existing aggregate site and shall not include the existing aggregate site.”

1           However, as we held in *Rogue Advocates I*, after the county has decided  
2 to allow mining under OAR 660-023-0180(5), the county must also go on to  
3 consider whether to allow, limit, or prevent *new* or future conflicting uses  
4 within the impact area, pursuant to OAR 660-023-0180(7), which provides in  
5 relevant part:

6           “[L]ocal governments shall follow the standard ESEE process in  
7 OAR 660-023-0040 and 660-023-0050 to determine whether to  
8 allow, limit, or prevent new conflicting uses within the impact area  
9 of a significant mineral and aggregate site. (This requirement does  
10 not apply if, under section (5) of this rule, the local government  
11 decides that mining will not be authorized at the site.)”

12 For this limited inquiry regarding whether to allow, limit or prevent new or  
13 future conflicting uses, the rule requires the county to conduct the analysis  
14 pursuant to the standard ESEE process in OAR 660-023-0040 and 660-023-  
15 0050.

16           The standard ESEE process at OAR 660-023-0040(3) provides for  
17 determination of an impact area under a somewhat different standard than OAR  
18 660-023-0180(5)(a). *See* ns 1 & 3. As noted, OAR 660-023-0040(3) requires  
19 local governments to “determine an impact area for each significant resource  
20 site. The impact area shall be drawn to include only the area in which allowed  
21 uses could adversely affect the identified resource.” Thus, unlike an impact  
22 area determined under OAR 660-023-0180(5)(a), an impact area determined  
23 under OAR 660-023-0040(3) is not initially limited to 1,500 feet, and the  
24 geographic extent of the impact area is determined by evaluating whether



1 “allowed uses could adversely affect the identified resource,” rather than  
2 evaluating whether there is factual information indicating “significant potential  
3 conflicts” beyond an initial 1,500 feet.

4 In the present case, on remand the county determined the impact area for  
5 purposes of OAR 660-023-0180(7) in the same way it had determined the  
6 impact area in its initial decision, when it addressed OAR 660-023-0180(5)(a):  
7 by considering uses allowed on land within 1,500 feet of the mining area, and  
8 considering whether there is factual information indicating “significant  
9 potential conflicts” with the resource use beyond the 1,500-foot distance.  
10 Record 45. The county concluded that there was no factual information in the  
11 record indicating “significant potential conflicts” beyond the 1,500-foot  
12 distance. *Id.* The county also found that conditions of approval imposed to  
13 minimize potential conflicts with existing or approved uses within the 1,500-  
14 foot impact area would ensure that “locations that are even farther away are  
15 also adequately protected.” *Id.*

16 Petitioners do not challenge the finding that there is no factual  
17 information indicating significant potential conflicts from new conflicting uses  
18 beyond the 1,500-foot impact area, or the finding that measures imposed to  
19 minimize conflicts within the impact area will also minimize conflicts with  
20 uses beyond the impact area. Instead, petitioners argue that the county erred in  
21 determining the impact area for purposes of OAR 660-023-0180(7) in the same  
22 way that it determined the impact area for purposes of OAR 660-023-

1 0180(5)(a). According to petitioners, OAR 660-023-0180(7) plainly requires  
2 the county to follow the ESEE process at OAR 660-023-0040 and -0050, which  
3 necessarily entails determining the impact area pursuant to OAR 660-023-  
4 0040(3), and to use that impact area to evaluate whether to allow, limit or  
5 prohibit new conflicting uses. According to petitioners, an impact area  
6 determined under OAR 660-023-0040(3) could be different, and perhaps  
7 larger, than one determined under OAR 660-023-0180(5)(a), because the  
8 standards are worded differently. As noted, OAR 660-023-0040(3) requires  
9 that an impact area be determined based on an area in which uses “could  
10 adversely affect the identified resource,” which petitioners argue is a more  
11 sensitive standard than “significant potential conflicts.”

12 Intervenor responds that “the impact area” for purposes of OAR 660-  
13 023-0180(7) is determined under OAR 660-023-0180(5)(a), and to the extent  
14 there are conflicting rule provisions on this point, the specific rules in OAR  
15 660-023-0180 control over the standard ESEE process, citing OAR 660-023-  
16 0020(1). *See* n 2.

17 As petitioners argue, the plain text of OAR 660-023-0180(7) requires  
18 local governments to evaluate whether new conflicting uses should be allowed,  
19 limited or prevented based on the standard ESEE analysis at OAR 660-023-  
20 0040 and -0050, a range that encompasses the standard process for determining  
21 the impact area at OAR 660-023-0040(3). We disagree with intervenor that the  
22 relevant rule provisions conflict on this point. OAR 660-023-0180 calls for a

1 mix of specific and standard processes, and OAR 660-023-0180(7) very plainly  
2 invokes the standard ESEE process for the limited purposes of OAR 660-023-  
3 0180(7), including the standard process for determining the impact area. While  
4 the drafters of the rule could have chosen to allow or require local governments  
5 to determine the impact area for purposes of that rule in the same way the  
6 impact area is determined under OAR 660-023-0180(5)(a), for some reason the  
7 drafters instead chose to rely upon the standard ESEE process, without any  
8 express qualifications or reservations.

9         The reason for that choice may be as petitioners argue: that the standard  
10 ESEE process for determining an impact area is potentially more sensitive (*i.e.*,  
11 protective of the aggregate resource) than would be an impact area determined  
12 under OAR 660-023-0180(5)(a). It is important to remember that at this point  
13 in the analysis the local government has already decided to allow mining  
14 notwithstanding any unmitigated conflicts with existing and approved uses,  
15 based on a limited evaluation of certain types of conflicts between the  
16 aggregate use and existing and approved uses within a circumscribed impact  
17 area. By contrast, OAR 660-023-0180(7) is not at all concerned with  
18 protecting surrounding uses from the adverse impacts of the mine; it is  
19 concerned only with protecting the now-approved mining use against adverse  
20 impacts from *new* conflicting uses that might be established or approved in the  
21 surrounding area. The subset of *existing and approved* uses analyzed under  
22 OAR 660-023-0180(5) is presumably smaller than the set of uses that

1 potentially *could be* established or approved in the surrounding area. It is  
2 possible that the much larger set of uses that could be established or approved  
3 in the zoning districts surrounding the mining site include uses that will have  
4 greater adverse impacts on the allowed mining site, at a greater distance, than  
5 does the smaller set of existing or approved uses analyzed under OAR 660-  
6 023-0180(5). Correspondently, the size of the impact area for purposes of  
7 OAR 660-023-0180(7) might well need to be larger (and hence more protective  
8 of the mining use) than the size of the impact area employed for purposes of  
9 OAR 660-023-0180(5).

10 That said, petitioners have not established that the county's failure to  
11 determine an impact area for purposes of OAR 660-023-0180(7) pursuant to  
12 the standard ESEE process at OAR 660-023-0040(3) is more than harmless  
13 error, or otherwise warrants remand. First, it is not at all clear that an impact  
14 area determined under OAR 660-023-0040(3) would be larger or different than  
15 the one the county established under OAR 660-023-0180(5)(a). The county's  
16 evaluation was not limited to 1,500 feet, but considered impacts from 180  
17 potential new uses beyond that distance, and concluded that there were none.  
18 Petitioners challenge those findings as inadequate under other subassignments  
19 of error, but for present purposes petitioners have not identified any new  
20 conflicting uses within a more expansive impact area that could adversely  
21 impact the mining site and that therefore should have been limited or prevented  
22 based on the arguably more sensitive OAR 660-023-0040(3) test, compared to

1 the “significant potential conflict” test that the county employed under OAR  
2 660-023-0180(5)(a).

3 Second, given that the purpose of the OAR 660-023-0180(7) inquiry is  
4 to protect the now-approved mining use from new conflicting uses, and not to  
5 protect new conflicting uses from the mining use, the only party with a real  
6 interest in expanding the impact area for purposes of OAR 660-023-0180(7) is  
7 the applicant. If the applicant is the only party that could possibly be harmed  
8 by employing a potentially smaller impact area as determined under OAR 660-  
9 023-0180(5)(a), and the applicant is not challenging that potentially smaller  
10 impact area but rather is actively defending it on appeal, then the county’s error  
11 in using an impact area determined under OAR 660-023-0180(5)(a) seems  
12 particularly harmless.

13 For the foregoing reasons, petitioners’ arguments under this  
14 subassignment of error do not provide a basis for reversal or remand.

15 The first sub-assignment of error is denied.

16 **B. Program to Achieve Goal 5**

17 The county adopted a 13-page ESEE analysis, ultimately concluding that  
18 no new uses allowed within the impact area would conflict with the aggregate  
19 mine, and thus determined to allow all new conflicting uses under existing  
20 zoning. Under the second sub-assignment of error, petitioners argue that the  
21 relevant provisions of OAR 660-023-0040 and -0050 require the county to  
22 adopt a “program” to achieve the goal, in the form of adopting new

1 comprehensive plan or land use regulations, and that the county failed to do so,  
2 but instead simply relied upon existing zoning.

3 Intervenor responds that OAR 660-023-0040(2)(a) provides that “[i]f no  
4 uses conflict with a significant resource site, acknowledged policies and land  
5 use regulations may be considered sufficient to protect the resource site.” We  
6 agree with intervenor that in the context of a post-acknowledgment plan  
7 amendment to inventory a significant aggregate site and allow mining of that  
8 site, if the local government concludes based on its ESEE analysis that new  
9 conflicting uses should be allowed within the impact area under the existing  
10 comprehensive plan and land use regulations, the local government’s program  
11 to achieve the goal in that regard may consist of simply relying on its  
12 acknowledged comprehensive plan and land use regulations to protect the  
13 resource site from new conflicting uses. The local government is not obligated  
14 to adopt a new “program” that needlessly duplicates the provisions of its  
15 existing acknowledged land use legislation.

16 The second sub-assignment of error is denied.

17 **C. Economic, Environmental, Social and Energy (ESEE) Analysis**

18 Petitioners argue that some of the county’s findings under the ESEE  
19 analysis are not supported by substantial evidence in the record. For example,  
20 in evaluating the “social” consequences, the county listed among the positive  
21 consequences of allowing new conflicting uses within the impact area the  
22 “positive social esteem” of workers employed at such uses and the “positive

1 social esteem” of the property owners establishing such uses. Record 96. The  
2 Board found no negative social consequences from allowing conflicting uses,  
3 but noted the loss of positive social benefits if new conflicting uses were  
4 limited or prevented. *Id.*

5 Petitioners contend that, to support such findings, the record must  
6 include direct testimony from workers or property owners attesting to a sense  
7 of positive social esteem from working at or owning a future agricultural or  
8 other enterprise within the impact area and, without such testimony, the record  
9 includes no substantial evidence to support the county’s findings regarding  
10 positive social esteem.

11 Intervenor responds that the county’s findings are based on a draft ESEE  
12 prepared by intervenor’s counsel, which cited the positive social benefits of  
13 allowing new conflicting uses within the impact area, among other benefits.  
14 Record 1353. Intervenor contends that the county commissioners could  
15 reasonably rely on the draft ESEE, as well as their own experience, to conclude  
16 that allowing a farmer, for example, to establish a farming operation within the  
17 impact area, and provide employment to farm workers, would result in greater  
18 positive social benefits than would limiting or preventing such new conflicting  
19 uses. Petitioners respond that the statements of the applicant’s counsel  
20 speculating as to the social esteem and feelings of future workers and  
21 employers are not probative evidence on that point.

1           However, we agree with intervenor that a reasonable decision-maker  
2 could rely on the draft ESEE analysis to support findings regarding the positive  
3 social consequences of allowing new conflicting uses in the impact area. It is  
4 important to recall again that the ESEE analysis under OAR 660-023-0180(7)  
5 is not concerned with the positive or negative social consequences of allowing  
6 *mining*; that has already been decided. OAR 660-023-0180(7) is concerned in  
7 relevant part only with the positive or negative social consequences of  
8 allowing, limiting or preventing new conflicting uses in the impact area. Given  
9 the inherent fuzziness of evaluating “social” consequences, it does not take  
10 detailed or direct testimony to support a finding that there would be net  
11 positive social benefits from allowing landowners to develop their property as  
12 allowed under the zoning code, as compared to limiting or preventing such  
13 development.

14           The third sub-assignment of error is denied.

15           **D.    Decision to Allow Conflicting Uses without Limits**

16           The county’s ESEE analysis lists 180 different use categories that are  
17 allowed or conditionally allowed in the zoning districts within the impact area.  
18 Petitioners argue, however, that the findings are inadequate because they  
19 discuss only a few of those 180 use categories. Petitioners concede that, under  
20 OAR 660-023-0040(4), the ESEE analysis may address a group of similar  
21 conflicting uses together, or establish a matrix of commonly occurring



1 conflicting uses and apply the matrix to facilitate the analysis.<sup>4</sup> However,  
2 petitioners contend the findings do not in fact group any similar uses together  
3 or rely upon a matrix of uses to facilitate analysis. Accordingly, petitioners  
4 argue that the county must evaluate each individual use.

5 Petitioners are correct that the county's findings do not expressly  
6 evaluate the 180 identified uses in groups or as part of a matrix, and  
7 individually address only a few uses. Nonetheless, petitioners have not  
8 demonstrated that any inadequacy in the ESEE analysis warrants remand. The  
9 county concluded that none of the 180 identified new conflicting uses will have  
10 a substantially negative impact on the aggregate mining site, and thus  
11 determined to allow all new conflicting uses. Record 86-98. Essentially, the  
12 county treated all 180 identified uses as a single group, that can be treated  
13 together because the county concluded that none of them would significantly

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<sup>4</sup> OAR 660-023-0040(4) provides, in relevant part:

“Analyze the ESEE consequences. Local governments shall analyze the ESEE consequences that could result from decisions to allow, limit, or prohibit a conflicting use. The analysis may address each of the identified conflicting uses, or it may address a group of similar conflicting uses. A local government may conduct a single analysis for two or more resource sites that are within the same area or that are similarly situated and subject to the same zoning. The local government may establish a matrix of commonly occurring conflicting uses and apply the matrix to particular resource sites in order to facilitate the analysis. A local government may conduct a single analysis for a site containing more than one significant Goal 5 resource. \* \* \*”

1 impact the mining resource. With the limited exception discussed below,  
2 petitioners do not challenge that broad conclusion, or cite examples of specific  
3 uses that require a more individuated evaluation.

4         Petitioners argue that the findings are inadequate because they do not  
5 address petitioners' testimony regarding naturally occurring asbestos (NOA),  
6 which is found in certain soils in the county. Petitioners argued to the county  
7 below that NOA could be present on the subject property, because soil samples  
8 of adjacent public land indicated the presence of NOA, and mining of the  
9 subject property could release NOA into the air, potentially harming persons on  
10 nearby lands. The county rejected that argument, finding that samples  
11 "allegedly taken from adjacent public land" are "not indicative of the existence  
12 of NOA deposits" on the mining site. Record 58. On appeal, petitioners  
13 reframe the issue in terms of allowing, limiting or preventing new conflicting  
14 uses, and argue that the county failed to analyze whether new mining or similar  
15 activities that disturb subsurface soils could release NOA particles into the air  
16 within the impact area, which could drift to the subject property and negatively  
17 impact the mine workers. For example, petitioners note that exploration for  
18 mineral and aggregate resources is allowed on lands within the impact area,  
19 and argue that such new subsurface exploration could release NOA particles  
20 into the air, causing harm to the mine workers on the subject property, and thus  
21 conflicting with the Goal 5 resource.

1           Petitioners' argument relies upon a chain of suppositions (there are  
2 significant amounts of NOA in soils on lands within the impact area,  
3 subsurface activities on those lands could release NOA into the air, and the  
4 released NOA could negatively impact mine workers on the subject property)  
5 for which there is little or no cited support in the record. Further, as intervenor  
6 argues, mining and similar subsurface disturbances are subject to a number of  
7 state and local regulations intended to limit airborne contaminants and dust  
8 from mining. Intervenor argues that any approved new mining activities on  
9 lands within the impact area would be reviewed under these regulations, which  
10 would tend to limit airborne contaminants that might harm mine workers on the  
11 subject property. We agree with intervenor that petitioners have not  
12 demonstrated that the county's ESEE analysis is deficient for failing to address  
13 the possibility that new mining or subsurface activities on nearby lands could  
14 release NOA in a manner that negatively impacts mine workers on the subject  
15 property.

16           Finally, petitioners argue that the county's analysis of the social  
17 consequences of allowing new conflicting uses is inadequate, because it fails to  
18 take into account the negative social regard that new residents, owners and  
19 workers on lands within the impact area would direct toward mining activity on  
20 the subject property if that activity disturbs NOA that might be found in soils  
21 on the subject property and releases that NOA into the air in a manner that  
22 negatively affects new residents, owners and workers on nearby lands.

1 However, the county rejected the premise for this argument: that soils on the  
2 subject property have NOA. Record 58. Without a challenge to that premise,  
3 petitioners' attenuated arguments regarding negative social regard for mining  
4 activities on the subject property do not demonstrate any inadequacy in the  
5 county's ESEE analysis.

6 The fourth sub-assignment of error is denied.

7 The first assignment of error is denied.

## 8 **SECOND ASSIGNMENT OF ERROR**

9 As noted, the subject property includes two creeks that are inventoried  
10 Goal 5 resources. The creeks are subject to the provisions of the county Flood  
11 Hazard Overlay Zone at RLDC Article 69, which apparently is based on the  
12 100-year floodplain as drawn on Flood Insurance Rate Maps (FIRM) published  
13 by the Federal Emergency Management Agency (FEMA). In its initial  
14 application, intervenor proposed to avoid development and mining within the  
15 floodplain, in part by constructing a bridge across Graves Creek above the  
16 floodplain. The county's initial decision found compliance with Article 69  
17 based on this proposal to avoid development within the 100-year floodplain. In  
18 *Rogue Advocates I*, LUBA remanded the decision on six grounds, none of  
19 which involved RLCD Article 69 or the Flood Hazard Overlay Zone. On  
20 remand, the county limited its proceedings to the six issues identified in

1 LUBA's opinion. The county's decision on remand again concluded that the  
2 application satisfied RLCD Article 69.<sup>5</sup>

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<sup>5</sup> The county's findings on remand state, in relevant part:

“Based on the Flood Study by Thornton (Appendix K of Applications), the Board finds that mining will occur on the Site ABOVE the 100-year floodplain, and that the access road and bridge to be constructed over Grave Creek will include embankment fill within the floodplain, but not the floodway. The Board further finds that placement of this fill will not increase the water surface of the 100-year flood event more than one foot.

“The Board relies on the July 25, 2016 letter from Applicant's expert, Thornton Engineering, Inc. (Exhibit A-5), and its original Flood Study (Appendix K of Applications), and the Board finds that the project is located within a FEMA A Zone, where no Base Flood Elevations or Floodway has been determined. Accordingly, the Board finds that the project will not modify the existing floodway or the effective Base Flood Elevations because FEMA has not determined them. Furthermore, the Board finds that the record shows that Thornton Engineering, Inc. properly established the floodway boundary on the site, and the Board also finds that substantial evidence in the record demonstrates that no permanent structures are proposed within the floodway of Grave Creek or Shanks Creek and that the project will not modify the Special Flood Hazard Area. \* \* \* Therefore, the Board finds that a Conditional Letter of Map Revision, and/or a FEMA map amendment are not required and are not applicable to this project. Additionally, the Board finds that the Applications' narrative, Plate 2, shows the bridge crossing Grave Creek, which will span the floodplain of the creek. Since the Flood Study demonstrates that the proposed bridge abutments are outside of the calculated Floodway boundary, the Board finds that a 'no-rise' analysis is not required and is not applicable to this project. Therefore, the Board finds that this Article is met.” Record 125-26.

1           In the present appeal of the decision on remand, petitioners argue that the  
2 county erred in determining the location of the boundaries of the 100-year  
3 floodplain based on a “flood study” submitted by intervenor, rather than on the  
4 FIRM map. According to petitioners, the FIRM map is the only authorized  
5 basis under RLCD Article 69 for determining the location of the 100-year  
6 floodplain on the property.

7           Intervenor responds initially that petitioners could have raised these  
8 challenges under RLCD Article 69, the FIRM map and the Flood Hazard  
9 Overlay zone in the appeal of the county’s first decision, and that petitioners’  
10 failure to do so means that these issues are therefore waived under the  
11 reasoning in *Beck v. City of Tillamook*, 313 Or 148, 153, 831 P2d 678 (1992).  
12 At oral argument, petitioners responded that issues regarding protection of  
13 riparian resources under Goal 5 were raised in its petition for review in *Rogue*  
14 *Advocates I*, but LUBA did not reach those arguments because the county  
15 committed procedural error by accepting new evidence from intervenor’s  
16 expert regarding riparian resources, and the county’s initial decision was  
17 remanded in part to allow petitioners to respond to that new evidence and to  
18 challenge new findings adopted on remand.

19           It is not clear to us that the issues raised in *Rogue Advocates I* regarding  
20 riparian resources are the same issues raised in the second assignment of error  
21 in this appeal. We have reviewed the petitions for review filed in *Rogue*  
22 *Advocates I*, and do not see any issues raised under RLCD Article 69, the

1 FIRM maps, or the Flood Hazard Overlay zone. It is also not clear that the  
2 limited issues considered on remand opened the door to allow petitioners to  
3 raise new issues under RLCD Article 69 in this appeal. As far as we can tell,  
4 the proposal to establish compliance with RLCD Article 69 by constructing the  
5 bridge outside the floodplain has remained unchanged from the original  
6 application and decision. However, we will assume without deciding that the  
7 issue raised under this sub-assignment of error was preserved in *Rogue*  
8 *Advocates I*, and not resolved in that appeal, and thus the issue remains live, for  
9 purposes of *Beck*.

10 On the merits, intervenor argues that, as the county's findings explain,  
11 the subject property is located within an "Approximate Floodplain," or FEMA  
12 "Unnumbered 'A' Zone," meaning that the location of the base flood elevation  
13 and floodway have not yet been determined. RLDC 11.030 (defining  
14 "Approximate Floodplain (or Unnumbered 'A' Zone)" as that "area of the 100-  
15 year floodplain in which base flood elevations and flood hazard factors have  
16 not been determined[.]"). Intervenor argues that RLDC 69.140, which  
17 addresses development in Approximate Floodplain areas, provides that the  
18 applicant shall obtain a statement from a licensed professional certifying that  
19 development is "reasonably safe from flooding," which necessarily requires  
20 determining actual base flood elevations and evaluating flood hazard factors.  
21 According to intervenor, the board of commissioners' findings quoted at n 5  
22 implicitly determined that in order to evaluate a proposal to comply with RLCD

1 Article 69 by keeping development entirely out of the floodplain, it is  
2 permissible to use the floodplain boundaries delineated in the flood study  
3 submitted pursuant to RLDC 69.140.

4 We agree with intervenor that based on the findings quoted at n 5 it is  
5 clear that the commissioners believe that locating the floodplain boundary to  
6 ensure that proposed development is located outside the floodplain can be  
7 based on the flood study submitted pursuant to RLDC 69.140, and need not be  
8 based on the “approximate” locations reflected on the FIRM maps. Petitioners  
9 have not established that that understanding of the relevant code provisions is  
10 inconsistent with the express language, purpose or policy underlying any  
11 RLDC provision or comprehensive plan provision, or otherwise “implausible,”  
12 under ORS 197.829(1) as interpreted by *Siporen v. City of Medford*, 349 Or  
13 247, 243 P3d 776 (2010).

14 The first sub-assignment of error is denied.

#### 15 **B. Goal 5 Riparian Corridors**

16 As noted, in *Rogue Advocates I*, LUBA did not reach a sub-assignment  
17 of error alleging that the county’s decision had failed to sufficiently protect  
18 inventoried Goal 5 riparian resources, as required under RLDC Article 72. On  
19 remand, the county again found that a proposed 50-foot buffer from the banks  
20 of Grave and Shanks Creeks satisfied RLDC 72.040(B), which prohibits  
21 locating any structure within 50 feet from the banks of a Class I stream, with



1 exceptions for certain structures, including bridges.<sup>6</sup> RLDC 72.040(B)  
2 implements the Goal 5 rule at OAR 660-023-0090. The findings also rely on  
3 the fact that the applicant proposes to avoid all development inside the 100-  
4 year floodplain. *Id.*, see also Record 73-74 (general findings addressing  
5 allegations of impacts to the two creeks). Under this subassignment of error,  
6 petitioners challenge the latter finding, repeating their argument that the county  
7 erred in relying on the flood study, rather than the FIRM maps, to identify the  
8 location of the floodplain and ensure that development is located outside the  
9 floodplain. However, we understand petitioners to couch that argument in  
10 terms of RLDC Article 72 and protection of Goal 5 riparian resources, rather  
11 than or in addition to RLDC Article 69 and the Flood Hazard Overlay zone,  
12 which serve different regulatory purposes than RLDC Article 72 and Goal 5.

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<sup>6</sup> The county's findings regarding RLDC 72.040(B) state, in relevant part:

“Based on the Mining Plan (Plate 3 of Applications), the Board finds that the Project maintains a minimum setback of 50 feet from any creek, stream or ephemeral ditch on the Site. The Board finds that no development will take place within those setbacks and vegetation will not be disturbed, except as allowed by the site-specific mining program applicable to the Property. As explained in detail above, Applicant is proposed to span Graves and Shanks Creeks with a bridge or conveyance system to avoid direct impact to the jurisdictional boundaries of those waters. \* \* \* Additionally, Applicant has proposed 50-foot buffers from all Class I and II streams and water courses. The Board finds that since bridges and other conveyance systems are excluded from the stream setback requirements, the Project meets the standards set forth in this subsection.” Record 127.

1           Intervenor again argues that the issue of what source to use to identify  
2 the location of the floodplain for purposes of RLDC Article 72 was not an issue  
3 raised or preserved in *Rogue Advocates I*. That may be correct, but petitioners  
4 raised issues under RLDC Article 72 concerning impacts on Goal 5 riparian  
5 resources in *Rogue Advocates I*, and LUBA remanded for new evidentiary  
6 procedures regarding a document that had some bearing on that issue. On  
7 remand, the county adopted findings, quoted at n 5, that rely in part on the  
8 location of development outside the floodplain to assure compliance with  
9 RLDC Article 72. Again we will assume, without deciding, that the issues  
10 raised under this subassignment of error were preserved in *Rogue Advocates I*.

11           On the merits, the county established compliance with RLDC 72.040(B),  
12 and Goal 5, by prohibiting development within a 50-foot buffer, except for  
13 certain structures allowed in riparian areas, including bridges. Petitioners do  
14 not challenge those findings or dispute that a 50-foot buffer is sufficient to  
15 protect riparian resources for purposes of RLDC Article 72 and Goal 5.  
16 Instead, petitioners focus on the findings regarding the proposed location of the  
17 bridge outside the 100-year floodplain, and argue that until the floodplain  
18 boundary is delineated according to the FIRM maps, the county has not  
19 established that the bridge footings will in fact be outside the floodplain.

20           It is not clear to us, and petitioners do not explain, what relationship if  
21 any exists between the 50-foot buffer required to comply with RLDC  
22 72.040(B) and the 100-year floodplain boundary that is an important feature of

1 the Flood Hazard Overlay zone. The two boundaries serve different regulatory  
2 purposes and may have no physical or legal relationship to each other. While  
3 the county's findings cite the fact that the bridge will be located outside the  
4 floodplain as delineated in the flood study, apparently as a secondary basis for  
5 concluding that RLCD 72.040(B) is met, those findings appear to be  
6 surplusage, if not irrelevant. As far as petitioners have established, whether the  
7 bridge is located outside the floodplain, or how the floodplain is delineated, has  
8 no bearing whatsoever on compliance with RLDC 72.040(B) and Goal 5,  
9 which in relevant part are concerned with protecting riparian resources, not the  
10 functioning of a floodplain. Accordingly, petitioners' arguments under this  
11 subassignment of error do not provide a basis for reversal or remand.

12 The second sub-assignment of error is denied.

13 The second assignment of error is denied.

14 The county's decision is affirmed.