

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

3
4 OREGON DEPARTMENT OF TRANSPORTATION,
5 *Petitioner,*

6
7 vs.

8
9 GRANT COUNTY,
10 *Respondent,*

11
12 LUBA Nos. 2018-135 and 2019-007

13
14 FINAL OPINION
15 AND ORDER

16
17 Appeal from Grant County.

18
19 Stacy C. Posegate, Senior Assistant Attorney General, Salem, filed the
20 petition for review and argued on behalf of petitioner. With her on the brief was
21 Ellen Rosenblum, Attorney General.

22
23 Dominic M. Carollo, Roseburg, filed a response brief and argued on behalf
24 of respondent. With him on the brief was Yockim Carollo LLP.

25
26 RYAN, Board Chair; RUDD, Board Member; ZAMUDIO, Board
27 Member, participated in the decision.

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29 REMANDED 08/08/2019

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

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NATURE OF THE DECISION

Petitioner appeals a post-acknowledgement plan amendment that adds petitioner’s property to the county’s inventory of significant aggregate sites, and adopts an economic, social, environmental and energy (ESEE) analysis for the site.

REPLY BRIEF

Petitioner filed a motion to file a reply brief and a reply brief. No party opposes the motion and it is allowed.¹

MOTION TO DISMISS

In its response brief, the county moves to dismiss this appeal on the basis that petitioner failed to serve the Notices of Intent to Appeal (NITAs) on the county’s governing body.² In its reply brief, petitioner explains that while the petitioner erred in failing to serve the county’s governing body within the time required for service under OAR 661-010-0015(2), petitioner did serve the NITAs on county’s counsel in a timely manner. Petitioner points out that the county’s

¹ These consolidate appeals were filed in 2018 and 2019 and therefore are governed by both LUBA’s 2017 rules and LUBA’s 2019 rules. OAR 661-010-0039 (2019) allows the filing of a reply brief.

² OAR 661-010-0015(2) provides that “[t]he Notice shall be served on the governing body, the governing body’s legal counsel, and all persons identified in the Notice as required by subsection (3)(f) of this rule on or before the date the notice of intent to appeal is required to be filed.”

1 counsel has represented the county throughout this appeal and has been timely
2 served with all pleadings. After receiving the county's motion to dismiss,
3 petitioner also served the county governing body with both NITAs.

4 We consider petitioner's untimely service on the governing body to be a
5 technical violation of our rules that will not result in dismissal of an appeal unless
6 that untimely service results in prejudice to a party's substantial rights. OAR 661-
7 010-0005. The county has not established that petitioner's violation of OAR 661-
8 010-0015(2) prejudiced the county's substantial rights or its ability to fully and
9 timely participate in this proceeding.

10 The county's motion to dismiss is denied.

11 **BACKGROUND**

12 On November 6, 2017, the Oregon Department of Transportation (ODOT
13 or petitioner) applied for a post-acknowledgement plan amendment (PAPA) to
14 add a 20.26-acre quarry site, the Meadow Brook Quarry, to the county's
15 inventory of significant resource sites under Statewide Planning Goal 5 (Natural
16 Resources, Scenic and Historic Areas, and Open Spaces), and for a zoning map
17 amendment to add a significant resource overlay zone to the site. We briefly
18 describe the Goal 5 process that applies to our resolution of this appeal before
19 turning to the facts and petitioner's assignments of error.

1 **A. The Goal 5 Identification and ESEE Process**

2 There is no dispute that the PAPA is required to comply with Goal 5
3 because it amends a previously adopted resource list.³ As the Court of Appeals
4 explained recently in *Central Oregon Landwatch v. Deschutes County*, 294 Or
5 App 317, 318, 431 P3d 457 (2018):

6 “Statewide Planning Goal 5 is a land use planning goal to protect
7 natural resources and conserve scenic and historic areas and open
8 spaces. OAR 660-015-0000(5). Local governments are required to
9 apply Goal 5 and the requirements in OAR chapter 660, division 23,
10 when considering a ‘post-acknowledgment plan amendment,’ *see*
11 OAR 660-023-0010(5) (defining ‘post-acknowledgement plan
12 amendment’ or ‘PAPA’), if the amendment affects a Goal 5
13 resource, including by ‘allow[ing] new uses that could be conflicting
14 uses with a particular Goal 5 resource site on an acknowledged
15 resource list.’ OAR 660-023-0250(3)(b). Under OAR 660-023-
16 0040, the local government must analyze ‘the economic, social,
17 environmental, and energy (ESEE) consequences that could result
18 from a decision to allow, limit, or prohibit a conflicting use.’ OAR
19 660-023-0040(1). The term ‘ESEE consequences’ is defined as ‘the
20 positive and negative economic, social, environmental, and energy
21 (ESEE) consequences that could result from a decision to allow,
22 limit, or prohibit a conflicting use.’ OAR 660-023-0010(2). Based

³ OAR 660-023-0250(3) provides, in relevant part:

“Local governments are not required to apply Goal 5 in consideration of a PAPA unless the PAPA affects a Goal 5 resource. For purposes of this section, a PAPA would affect a Goal resource only if:

“(a) The PAPA creates or amends a resource list or a portion of an acknowledged plan or land use regulation adopted in order to protect a significant Goal 5 resource or to address specific requirements of Goal 5[.]”

1 on the ESEE analysis, the local government is required to
2 ‘determine whether to allow, limit, or prohibit identified conflicting
3 uses for significant resources sites.’ OAR 660-023-0040(5).”
4 (Footnote omitted.)

5 Once conflicting uses are identified, OAR 660-023-0040(5) requires the
6 local government to “[d]evelop a program to achieve Goal 5” and allow, limit or
7 prohibit the identified conflicting uses as follows:

8 “(a) A local government may decide that a significant resource site
9 is of such importance compared to the conflicting uses, and
10 the ESEE consequences of allowing the conflicting uses are
11 so detrimental to the resource, that the conflicting uses should
12 be prohibited.

13 “(b) A local government may decide that both the resource site and
14 the conflicting uses are important compared to each other,
15 and, based on the ESEE analysis, the conflicting uses should
16 be allowed in a limited way that protects the resource site to
17 a desired extent.

18 “(c) A local government may decide that the conflicting use
19 should be allowed fully notwithstanding the possible impacts
20 on the resource site. The ESEE analysis must demonstrate
21 that the conflicting use is of such importance relative to the
22 resource site, and must indicate why measures to protect the
23 resource to some extent should not be provided, as per
24 subsection (b) of this section.”⁴

⁴ OAR 660-023-0040(5) describes the required decision for the determination of whether to allow, limit, or prohibit identified conflicting uses as follows:

“This decision shall be based upon and supported by the ESEE analysis. A decision to prohibit or limit conflicting uses protects a resource site. A decision to allow some or all conflicting uses for a particular site may also be consistent with Goal 5, provided it is supported by the ESEE analysis.”

1 In approving the challenged PAPA, the county conducted the analysis
2 described above to identify conflicting uses within a 1500-foot impact area
3 surrounding the quarry site, and determined that residential uses within that
4 impact area would conflict with the quarry. At issue in this appeal is the county's
5 subsequent determination under OAR 660-023-0040(5).

6 Petitioner requested that the county limit the conflicting residential use
7 under OAR 660-023-0040(5)(b) (a "(5)(b) designation"), by requiring a waiver
8 of remonstrance against the quarry from new residential development in the
9 impact area, and requiring that ODOT be notified of any development and be
10 given an opportunity to object and request a hearing on whether the use would
11 conflict with the quarry. Instead, as we explain in more detail below, the county
12 decided under OAR 660-023-0040(5)(c) to fully allow the conflicting use (a
13 "(5)(c) designation").

14 **B. The Meadow Brook Quarry and Surrounding Lands**

15 ODOT acquired the Meadow Brook Quarry site, which includes 20.26
16 acres, through a condemnation settlement in 2011 from an adjacent landowner.
17 At the time ODOT acquired the subject property, it was zoned Primary Forest
18 (PF). The PF zone allows residential dwellings as permitted uses, and allows
19 aggregate mining and processing, limited residential dwellings, private seasonal
20 accommodations, such as hunting lodges, and destination resorts as conditional
21 uses. The surrounding property is also zoned PF. The Grant County Zoning and
22 Development Ordinance (GCZDO) includes standards for aggregate mining that

1 apply in all zones for which aggregate use or processing is permitted or
2 conditionally permitted.⁵

3 In December 2017, the county planning department issued a draft staff
4 report that included the required ESEE analysis evaluating the consequences to
5 and from the quarry if development was prohibited, limited or allowed.
6 Following two public hearings on the PAPA, in January and February, 2018, the
7 planning commission issued a recommendation to the county court to approve
8 the application and impose limitations on the development of new residential
9 dwellings on the PF-zoned property adjacent to the quarry, under a 5(b)
10 designation. Specifically, the planning commission proposed that the landowner
11 would be required to sign a waiver of remonstrance recognizing the mine as an
12 existing superior use, which would be recorded with the deed. Second, the

⁵ GCZDO 91.010 – Purpose states:

“The purpose of this Article is to implement and supplement the Zones where aggregate use or processing is allowed as a Permitted, Administrative, or Conditional Use. This Article sets out the standards for the development and operation of aggregate or other mineral site(s). These standards shall be used in the Site Plan Review process and when a land use application is pending. Grant County recognizes the importance of protecting and utilizing the mineral and aggregate resources in the County. Residents of this Zone should recognize that the intent of the Zone is to protect resource activities and that in the event of a conflict between residential use and resource practices this Code will be interpreted in favor of the resource practice.”

1 planning commission proposed that ODOT would be notified of any
2 development proposed for the adjacent property, and be given an opportunity to
3 request a hearing on whether the proposed development would conflict with the
4 quarry.

5 The county court considered the planning commission's recommendation
6 at a hearing in March 2018. Following public testimony, the county court voted
7 to send the application back to the planning commission "with specific
8 instructions to try to attempt to justify a 5(c) designation," which would allow
9 conflicting uses on adjacent property without restriction. Record 128. In
10 response, the draft staff report was revised to include an ESEE analysis that
11 evaluated potential ESEE impacts to the adjacent residential uses, and
12 recommended that conflicting residential uses within the 1500-foot impact area
13 be fully allowed under a 5(c) designation.

14 At a September 2018 planning commission hearing, ODOT's counsel
15 argued that the recommended ESEE finding that a limitation on adjacent uses
16 would reduce property values was not supported by evidence because the
17 limitations requested by ODOT and included in the initial planning commission
18 recommendation were already required under the GCZDO. Following the
19 hearing, the planning commission recommended that the aggregate site be added
20 to the county's inventory of significant aggregate resources and recommended a
21 5(c) designation.

1 The county court then provided notice that it would conduct a *de novo*
2 public hearing on the planning commission’s revised recommendation on
3 October 17, 2018.⁶ Through its counsel, ODOT submitted written testimony prior
4 to the hearing (on October 4, 2018), and submitted oral testimony at the October
5 17, 2018 hearing. In both its written and oral testimony, among other issues,
6 ODOT requested that the county court reject the planning commission’s ESEE
7 analysis because it failed to identify any positive or negative consequences to
8 ODOT’s quarry property, and only identified positive and negative consequences
9 to adjacent properties from allowing aggregate mining at the quarry.

10 Following ODOT’s testimony, the county court approved the application
11 with a 5(c) designation. That action was memorialized as the final order that
12 petitioner appealed in LUBA No. 2018-135 (Final Order). The Final Order was
13 later implemented through the County’s adoption of Zoning Ordinance 2019-10,
14 which adds the Meadow Brook Quarry to the county’s Significant Aggregate
15 Resource Inventory, places a Significant Resource Overlay zone on the site and

⁶ The Notice of the Public Hearing included the following statement:

“Any person may provide comment at a public hearing, either in person or in writing. Written testimony may be submitted prior to or at a public hearing. The proposed amendment and its effect on property may change during the hearing and prior to adoption, as the County Court will take into account testimony and evidence presented at the public hearings from the public, Planning Commission and Planning Staff.” Replacement Record 145.

1 the impact area and fully allows future uses in the impact area. Petitioner
2 appealed the ordinance in LUBA No. 2019-007.

3 **FIRST ASSIGNMENT OF ERROR**

4 In three subassignments of error under the first assignment of error,
5 petitioner challenges the county’s ESEE analysis and the findings in support of
6 the county’s decision to adopt a 5(c) designation for the quarry.

7 **A. First Subassignment**

8 In its first subassignment of error under the first assignment of error,
9 petitioner alleges that the ESEE analysis is incomplete and that the county’s
10 findings are inadequate to explain why the PAPA complies with OAR 660-023-
11 0180(7) and OAR 660-023-0040(4).⁷ Petitioner argues that the ESEE analysis,

⁷ OAR 660-023-0180(7) states in relevant part that “local governments shall follow the standard ESEE process in OAR 660-023-0040 and 660-023-0050 to determine whether to allow, limit or present new conflicting uses within the impact area of a significant mineral and aggregate site.”

OAR 660-023-0040(4) provides:

“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

1 and the county’s findings in reliance on the ESEE analysis, do not adequately
2 analyze the ESEE consequences to the quarry of the county’s decision to fully
3 allow conflicting residential uses in the impact area. Specifically, petitioner
4 argues that the county was required to, but did not, evaluate the impacts to the
5 Goal 5 resource site from fully allowing the conflicting use, and instead analyzed
6 only the impacts to the conflicting residential use from protecting the Goal 5
7 resource site.

8 The county responds that the county’s findings are adequate to address the
9 issue of the impacts to the resource site from a 5(c) designation. Response Brief
10 6. As we understand it, the county’s response appears to be that in performing
11 the evaluation that OAR 660-023-0040(4) requires, the county has substantial
12 discretion in determining the scope of the required analysis, and that in exercising
13 that discretion, its findings fully comply with the requirements of OAR 660-023-
14 0040. See n 7.

15 We agree that the scope of the consequences the county may consider is
16 broad. *Central Oregon Landwatch v. Deschutes County*, 77 Or LUBA 395, 404-
17 05, *aff’d*, 294 Or App 317, 431 P3d 457 (2018). However, the county’s argument
18 appears to conflate the evaluation of the *scope* of the impacts with the *source* of
19 the impacts. They are not the same evaluation. Regardless of the scope of the

government may conduct a single analysis for a site containing more
than one significant Goal 5 resource.”

1 impacts, an analysis of the impacts of the quarry on the conflicting use is not the
2 same as an analysis of the impacts of the conflicting use *on the quarry*.

3 The discretion afforded under OAR 660-023-0040 does not allow the
4 county to fail to evaluate the impacts on the resource site from conflicting uses.
5 Fundamental to the rule itself is that the ESEE analysis must evaluate the impacts
6 of the conflicting use *on* the resource site. The findings adopted by the county
7 court do not include any analysis of the impact of the conflicting use *on* the quarry
8 itself. The only finding the county cites as reflecting its consideration of the
9 impacts to the quarry is that “the quarry is much more likely to co-exist
10 harmoniously from a social and economic perspective under a 5(c) designation
11 than a 5(b) designation.” Record 3. That finding, however, does not evaluate the
12 impacts of the conflicting use on the quarry. We agree with petitioner that the
13 county’s findings are inadequate.

14 Petitioner also argues that the county did not adequately consider the
15 evidence presented by petitioner regarding the impacts to the quarry from
16 conflicting uses. The county’s findings do not analyze both the positive and
17 negative ESEE consequences on the Goal 5 resource and, therefore, fail to
18 comply with the requirements of OAR 660-023-0040(4) and OAR 660-023-
19 0180(5). Without the required analysis of the consequences of the conflicting use
20 on the quarry, it seems likely that the county also failed to consider evidence
21 presented by petitioner regarding the consequences to the quarry from conflicting

1 uses. However, we cannot tell for certain whether that is the case, and
2 accordingly, we do not address petitioner’s argument at this stage.

3 The first sub-assignment of error is sustained, in part.

4 **B. Second Sub-Assignment of Error**

5 Petitioner next argues that the County’s decision to adopt a 5(c)
6 designation and fully allow the conflicting residential uses improperly construes
7 OAR 660-023-0040(4) because, according to petitioner, the consequences to the
8 conflicting uses from petitioner’s preferred 5(b) designation that would limit
9 those uses are “based on consequences that that do not exist.” Petition for Review
10 24.

11 As petitioner correctly points out, a decision to not protect a Goal 5
12 resource and fully allow conflicting uses must be based on a legitimate
13 consequence. *Central Oregon Landwatch*, 77 Or LUBA at 407. Petitioner argues
14 that the county’s ESEE analysis, and the county’s findings, improperly
15 characterized its request for a waiver of remonstrance for new development in
16 the impact area as a negative consequence, and that such a waiver cannot be a
17 negative consequence because it is already required under GCZDO 91.040(C).⁸

⁸ GCZDO 91.040(C) provides:

“(C) Before a development permit will be issued on any lot adjacent to a significant aggregate site, the owner of the adjacent lot shall sign and file a notarized statement recognizing that in the event of a conflict between the proposed use and the aggregate operation, the aggregate

1 Accordingly, petitioner argues, the county’s finding—that a requirement for a
2 waiver of remonstrance would be a negative impact on the conflicting residential
3 use—is not a legitimate negative consequence.

4 The county responds, and we agree, that the county properly considered
5 the requested limitation of a waiver of remonstrance as a negative ESEE
6 consequence to the conflicting use. As the county explains, the GCZDO could be
7 amended in the future to remove the requirement of a waiver of remonstrance for
8 new development in the impact area, but including such a limitation in an adopted
9 program to meet the goal would embed that requirement in the comprehensive
10 plan, and thus it would apply even in the absence of the GZLDO provision.
11 Accordingly, we agree with the county that such a restriction is a legitimate
12 negative consequence that the county could consider in its ESEE analysis.

13 Petitioner’s second sub-assignment of error is denied.

14 **C. Third Sub-Assignment of Error**

15 OAR 660-023-0040(5) requires, when deciding on a 5(c) designation “the
16 ESEE analysis must demonstrate that the conflicting use is of sufficient
17 importance relative to the resource site, and must indicate why measures to
18 protect the resource to some extent should not be provided, as per subsection (b)

operation shall take precedence and normal operations will
not be considered a nuisance. The notarized statement will be
recorded on the deed for that parcel or lot.”

1 of this section.” Petitioner next argues that the county’s findings are inadequate
2 to meet the requirements of OAR 660-023-0040(5)(c) because the findings do
3 not demonstrate why the conflicting use is of sufficient importance relative to the
4 resource site, and why measures to protect the resource “to some extent should
5 not be provided” as OAR 660-023-0040(5) requires in order to support a (5)(c)
6 designation. Petitioner argues that the county did not consider any potential
7 solutions, such as a waiver or notice requirement for the neighboring property.

8 As we explain above under the first sub-assignment of error, the county
9 has not completed the required analysis of the consequences to the Goal 5
10 resource of fully allowing conflicting uses. The results of that required analysis
11 may affect the County’s conclusions and rationale relative to compliance with
12 OAR 660-023-0040(5), and in turn with OAR 660-023-0180(5). Because the
13 county will be required to adopt an amended ESEE analysis on remand, we do
14 not reach petitioner’s third subassignment of error.

15 The first assignment of error is sustained, in part.

16 **SECOND ASSIGNMENT OF ERROR**

17 In its second assignment of error, petitioner alleges that the county’s (5)(c)
18 designation is not supported by substantial evidence in the record. As we
19 determined above, the county’s findings are inadequate to support its (5)(c)
20 designation decision because the ESEE analysis failed to evaluate positive and
21 negative consequences to the quarry of a decision to allow conflicting uses.
22 Accordingly, on remand the county must adopt findings, supported by substantial

1 evidence in the whole record, that demonstrate that the county evaluated the
2 positive and negative ESEE consequences to the quarry from the conflicting uses.
3 Until the county completes the analysis required under OAR 660-023-0040 and
4 adopts those findings, it would be premature for us to evaluate whether the
5 county's inadequate findings are based on substantial evidence in the record.
6 Consequently, we do not reach the second assignment of error.

7 We do not reach the second assignment of error.

8 **THIRD ASSIGNMENT OF ERROR**

9 In its third assignment of error, petitioner argues that the county failed to
10 follow applicable procedures in a manner that prejudiced its substantial rights, by
11 refusing to consider timely comments submitted by ODOT. ORS
12 197.835(9)(a)(B) (LUBA shall reverse or remand a land use decision if the local
13 government fails to follow applicable procedures in a manner that prejudices
14 petitioner's substantial rights).

15 As we explain above, the public notice of the county court's October 18,
16 2018 hearing stated that the county court would consider new evidence during
17 the public hearing (*i.e.*, that it would be a *de novo* hearing). Petitioner's counsel
18 filed written testimony prior to the public hearing, and both petitioner's regional
19 manager and its counsel provided testimony during the public hearing.

20 Following the public testimony, a member of the county court read a
21 motion into the record that began:

22 "The County Court finds that it is not required to consider the new

1 testimony submitted by DOJ on October 4, 2018 because it raises
2 assertions of facts, and makes requests for findings that should have
3 been raised first before the Planning Commission. Raising them now
4 not only precluded the Planning Commission from considering this
5 new information but it also hinders the public's ability to remain
6 fully informed and fully participate in the process." Record 3.

7 Based on this motion and the county's finding included in the Final Order
8 that includes that motion language, petitioner now argues that the county failed
9 to follow applicable procedures by rejecting its testimony and evidence.

10 The county responds that the county court did in fact accept and consider
11 petitioner's written and oral testimony. While petitioner is correct that that
12 county's finding that it was "not required to consider" petitioner's new testimony
13 is not correct, we agree with the county that the county court did in fact consider
14 that testimony. Immediately following the disputed paragraph above, paragraphs
15 2 and 3 of the motion and adopted findings address petitioner's evidence and
16 arguments.⁹ Those findings reflect that the county court did accept the evidence

⁹ The county found:

- "1. The County Court finds that it is not required to consider the new testimony submitted by DOJ on October 4, 2018 because it raises assertions of facts, and makes requests for findings that should have been raised first before the Planning Commission. Raising them now not only precluded the Planning Commission from considering this new information, but it also hinders the public's ability to remain fully informed and fully participate in the process;
- "2. Even if the County Court were required to consider new testimony, the County Court finds that the bare, unverified

and unsupported assertions made in the DOJ October 4 letter do not constitute substantial evidence of impacts to the quarry. DOJ's assertions are not supported by any testimony from any qualified staff from ODOT, nor by any study or data;

- “3. Even accepting the assertions made by DOJ in the October 4 letter, the County Court finds that the impacts DOJ asserts primarily focuses on impacts to ODOT, not economic, environmental or social consequences to the broader community. Further, to the extent that DOJ asserts possible economic, environmental or social consequences beyond the impacts to ODOT, the impacts appear to be clearly overstated or exaggerated based on the limited information provided. Therefore, the County Court finds the social and economic consequences of limiting conflicting uses are of far greater magnitude, and of far greater importance to the community at large, than the possible impacts asserted by DOJ.
- “4. Finally, based on the significant and substantial public testimony opposing ODOT's PAPA application with a 5(b) designation, as recognized in the Planning Department's ESEE analysis, the County Court finds that limiting conflicting uses would likely engender legal, economic or social pressures, protests, or possibly even lawsuits against the quarry, or the county, that further would be of greater magnitude and consequence, and far outweigh, any possible social or economic consequences of not providing protections to the resource site. Put simply, the quarry is much more likely to co-exist harmoniously from a social and economic perspective under a 5(c) designation than a 5(b) designation. Therefore, the County Court finds that the weight of the potential economic, environmental, and social impacts identified by the Planning Department, Planning Commission, and the County Court supports a 5(c) designation and protections to the resource should not be provided.” Record 2-3.

1 and arguments and, at least on a cursory level, consider them. Accordingly, the
2 county's erroneous statement in the findings that it was not required to consider
3 petitioner's testimony does not establish that the county committed a procedural
4 error, because other findings establish that the county did consider that testimony.

5 The third assignment of error is denied.

6 The county's decision is remanded.