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

SAVE TV BUTTE, LINDA MCMAHON,
and KATHERINE POKORNY,
Petitioners,

vs.

LANE COUNTY,
Respondent,

and

OLD HAZELDELL QUARRY, LLC,
Intervenor-Respondent.

LUBA No. 2019-002

FINAL OPINION
AND ORDER

Appeal from Lane County.

Zack P. Mittge, Eugene, filed the petition for review and reply brief 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 was Perkins Coie LLP.

RYAN, Board Member; RUDD, Board Member, participated in the decision.

ZAMUDIO, Board Chair, did not participate in the decision.

REMANDED 10/16/2019

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

Opinion by Ryan.

NATURE OF THE DECISION

Petitioners appeal a board of county commissioners decision that (1) amends the county's comprehensive plan inventory of significant aggregate resources to add 46 acres to the inventory; (2) adopts comprehensive plan and zone map amendments to redesignate 107 acres from Forest to Natural Resource: Mineral (NR:M), and rezone the same 107 acres from Impacted Forest (F-2) and Non-Impacted Forest (F-1) to Quarry and Mine Operations Zone/Rural Comprehensive Plan (QM/RCP), and (3) approves a site plan for a quarry to mine and process aggregate on a portion of the property.

FACTS

The subject property is located east of the city of Oakridge, in Lane County. The challenged decision is the county's decision on remand from *Save TV Butte v. Lane County*, 77 Or LUBA 22, 25 (2018) (*Save TV Butte I*). In *Save TV Butte I*, we remanded the county's decision that added 107 acres to the Lane County Comprehensive Plan Inventory of Significant Mineral and Aggregate Sites (CP Significant Aggregate Sites Inventory) on several bases.[1] In part, we

[1] The proposal that the county approved in *Save TV Butte I* included 183 acres on five tax lots. Portions of tax lots 1900, 502 and 100 were included in the 107 acres that was proposed to be added to the CP Significant Aggregate Sites Inventory. The remaining 76 acres, located on tax lots 104 and 401, and portions of tax lots 100 and 1900, were included as "buffers" that would remain zoned F-1 and F-2. 77 Or LUBA at 25.

concluded that 61 of the 107 acres did not qualify for inclusion on the CP Significant Aggregate Sites Inventory under the quality and quantity standards set out at OAR 660-023-0180(3)(a).[2]

Following our decision, in May 2018 the applicant, Old Hazeldell Quarry, LLC (intervenor) requested that the county commence proceedings on remand. On September 11, 2018, the board of county commissioners held the first reading of Ordinance 1363, the Ordinance the county proposed to effect the amendments to the CP Significant Aggregate Sites Inventory and the county's comprehensive plan map (Plan Map) and zoning map (Zoning Map). Record 1343. The first draft of Ordinance 1363 described the property that is the subject of the proposed amendment as the same five tax lots and 183 acres that were included in the

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[2] As we explained in *Save TV Butte I*:

> "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).
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> "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." 77 Or LUBA at 26.

proposal that the county approved and that we remanded in *Save TV Butte I*. *See* n 1. Record 1382-92.

On September 25, 2018, the board of county commissioners held a public hearing on Ordinance 1363. At the conclusion of the hearing, the board of county commissioners closed the public hearing, but left the evidentiary record open until October 9, 2018 for submission of new evidence, until October 23, 2018 for responsive evidence, and until October 30, 2018 for intervenor's final rebuttal. Record 250.

On October 12, 2018, the county provided notice of Ordinance 1363 to the Department of Land Conservation and Development (2018 DLCD Notice). Record 422-25. On November 27, 2018, the board of county commissioners held a third reading and deliberated, and at the conclusion of the hearing continued deliberations to its December 18, 2018 hearing. At the conclusion of the December 18, 2018 hearing, the board of county commissioners voted to approve the application and to adopt Ordinance 1363. This appeal followed.

FIRST ASSIGNMENT OF ERROR

Petitioners' first assignment of error presents a case of first impression regarding ORS 197.610(6), which was enacted by the legislature in 2011. ORS 197.610(6) provides:

> "If, after submitting the materials described in subsection (3) of this section, the proposed change is altered to such an extent that the materials submitted no longer reasonably describe the proposed change, the local government must notify the Department of Land

> Conservation and Development of the alterations to the proposed change and provide a summary of the alterations along with any alterations to the proposed text or map to the director at least 10 days before the final evidentiary hearing on the proposal. The director shall cause notice of the alterations to be given in the manner described in subsection (4) of this section. Circumstances requiring resubmission of a proposed change may include, but are not limited to, a change in the principal uses allowed under the proposed change or a significant change in the location at which the principal uses would be allowed, limited or prohibited."

In their first assignment of error, petitioners argue that the county was required and failed to comply with ORS 197.610(6), and that the 2018 DLCD Notice was insufficient to comply with ORS 197.610(6) for a number of reasons that warrant remand. Intervenor responds that the changes to its original proposal did not require a new notice to DLCD under ORS 197.610(6), and that in any event, if it applied, the 2018 DLCD Notice satisfied ORS 197.610(6).

In order to resolve this assignment of error, we begin with a discussion of the notice requirements in ORS 197.610(1) and (3), and a summary of the Court of Appeals and LUBA decisions regarding the legal effect of the failure to satisfy the notice obligations in ORS 197.610(1) and (3). Those decisions provide guidance for how we resolve petitioners' challenge under ORS 197.610(6).

ORS 197.610(1) requires the county to submit a proposed post-acknowledgement plan amendment (PAPA) to DLCD at least 20 days before the county holds the first evidentiary hearing on adoption of the proposed change. ORS 197.610(3) requires the notice to include the text of the proposed change, a

brief narrative summary of the proposed change, and the date set for the first evidentiary hearing.[3]

In 2011, the legislature enacted House Bill (HB) 2129, which added what is now subsection (6) to ORS 197.610. HB 2129 was introduced by the Governor as a result of a legislative concept developed by DLCD. The legislative history of HB 2129 reveals that one of the main aims of the legislation was "to clarify what happens when a local government makes a major change to a proposed plan or zoning amendment (often in response to citizen input)." Exhibit 1, House Committee on General Government and Consumer Protection, HB 2129, Mar 1, 2011 (accompanying statement of DLCD Director Richard Whitman (Whitman)). DLCD's summary of the legislation explains that the intent of the legislation was to clarify procedures for PAPAs "to prevent unreasonable delay" and "to make sure that notices serve their intended purposes." *Id.* At the March 1, 2011 hearing, Whitman explained that a local government's failure to follow the procedures in ORS 197.610 will result in remand by LUBA. Audio Recording, House Committee on General Government and Consumer Protection, HB 2129, Mar 1, 2011 at 5:30, https://olis.leg.state.or.us (accessed October 15, 2019). Whitman also explained that DLCD is a "clearing-house statewide,"

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[3] On April 4, 2016, the county planning department submitted to DLCD notice of and the text of the changes that were originally proposed in 2016, to add 107 acres to the CP Significant Aggregate Sites Inventory, amend the Plan Map designation for those 107 acres, and amend the Zoning Map designation of those 107 acres. Record 286.

providing notices of proposed changes to a plan or zone map to the public, and also reviewing proposed amendments and providing advice and comments to local governments. *Id.* at 4:00. Whitman explained that the legislation added a new requirement in ORS 197.610 to address the local government's obligation when the local government makes a major change to a proposed PAPA. *Id.* at 6:30. After ORS 197.610(6) took effect, the Land Conservation and Development Commission (LCDC) subsequently amended its existing administrative rules to implement ORS 197.610(6), at OAR 660-018-0045.[4]

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[4] OAR 660-018-0045 provides:

"Alterations to a Proposed Change

"(1) If, after initially submitting the notice and accompanying materials under OAR 660-018-0020, a proposed change to an acknowledged comprehensive plan or land use regulation is altered to such an extent that the materials submitted no longer reasonably describe the proposed change, the local government must, at least 10 days before the final evidentiary hearing on the proposal:

"(a) Notify the department of the alterations to the proposed change, and

"(b) Provide a summary of the alterations along with any alterations to the proposed text or map and other materials described in OAR 660-018-0020.

"(2) When the department receives a notification of alteration of a proposal as described in section (1) of this rule, the department shall issue a new notice to persons that have

No cases have addressed the legal effect of a local government's inadequate provision of or failure to provide notice to DLCD under ORS 197.610(6), and the statute itself does not address this issue. However, several Court of Appeals and LUBA decisions have addressed the legal effect of a local government's inadequate provision of or failure to provide notice under ORS 197.610(1) and (3). A close connection exists between the information required to be provided by ORS 197.610(1), (3), and (6), the timing requirements for providing that information, the purpose that the notice requirements serve, and DLCD's role as a "clearing-house statewide" for PAPAs. Accordingly, we conclude those decisions are relevant to our disposition of this assignment of error. We describe them before turning to the parties' arguments.

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requested notice in the manner described [in] OAR 660-018-0025.

"(3) Circumstances requiring resubmission of a proposed change to a comprehensive plan or land use regulation under this rule may include, but are not limited to:

"(a) Alteration of the proposed principal uses that would be allowed under the proposed change to the comprehensive plan or land use regulations;

"(b) A significant change in the location at which the principal uses would be allowed, limited or prohibited; or

"(c) A significant change in the conditions or restrictions that would be applied to a proposed use."

In *Oregon City Leasing, Inc. v. Columbia County*, 121 Or App 173, 177, 854 P2d 495 (1993), the Court of Appeals held that a complete failure to provide the notice required by a prior version of ORS 197.610(1) was not correctly characterized as a "procedural error." The court left unanswered the question of whether partial or substantial compliance with ORS 197.610(1) would necessarily require the same result, *i.e.*, whether any deviation from the requirements of ORS 197.610(1) is a substantive error that will result in remand, without regard to whether the deviation results in prejudice to a party's substantial rights. In *Stallkamp v. City of King City*, 43 Or LUBA 333, 352 (2002), *aff'd*, 186 Or App 742, 66 P3d 1029 (2003), we held that "not every deviation from the requirements of ORS 197.610(1) or its implementing rule is a 'substantive' error that must result in remand." In *Stallkamp*, the city failed to identify in its notice to DLCD certain property that it proposed to rezone from rural residential zoning to a recreational open space (ROS) zone. The materials submitted to DLCD, however, included a map depicting the properties that would be subject to the ROS zone. We held that any error in failing to include the proposals to amend the comprehensive plan map designations in the notice was procedural error, and the petitioners' failure to attempt to demonstrate prejudice to a substantial right precluded remand. *Id.* at 352. *See also Bryant v. Umatilla County*, 45 Or LUBA 653, 656-57 (2003) (the county's failure to provide a full 45-days notice to DLCD as required by the then-applicable version of ORS 197.610(1) and only providing 22 days' notice does not provide a basis for

reversal or remand where petitioner participated during the proceedings below, and did not allege any prejudice to his substantial rights); *No Tram to OHSU v. City of Portland*, 44 Or LUBA 647, 653-56 (2003) (a corrected notice received by DLCD only 26 days prior to the initial evidentiary hearing was sufficient to apprise those parties who may have relied on notice from DLCD, and would not otherwise receive notice from the city, of the nature and scope of the matters under review by the planning commission, where the notice set out when the initial evidentiary hearing would be held and the date the notice was mailed, explained that notice of the proposed action that was previously sent, briefly described the amendments, and included copies of the proposed text and maps).

In *OCAPA v. City of Mosier*, 44 Or LUBA 452 (2003), we held that inadequate provision of the notice required under ORS 197.610(1), as opposed to a complete failure to provide the required notice, requires remand only if that failure (1) prejudiced the petitioner's substantial rights, or (2) was likely to prejudice the substantial rights of other persons who may be relying on DLCD's notice to participate in the PAPA process. We explained:

> "The Court of Appeals' concern in *Oregon City Leasing, Inc.* [*v. Columbia County*, 121 Or App 173, 854 P2d 495 (1993)] was with a potential failure of the larger statutory scheme at ORS 197.610 to 197.625, which is intended to expand notice and participatory options for DLCD and a broader audience that may not receive local notice and instead rely on notice from DLCD of proposed post-acknowledgment plan and land use regulation amendments. The ORS 197.610(1) requirement for secondary notice by DLCD and the broader participation that such secondary notice may stimulate in any given post-acknowledgment proceeding is to ensure that

> proposed post-acknowledgment amendment proposals receive appropriate scrutiny to ensure that the acknowledged comprehensive plan and land use regulations are not amended in ways that violate the statewide planning goals. The legislature apparently made this broader notice and potential for participation by DLCD and others the *quid pro quo* for ORS 197.625. ORS 197.625 deems post-acknowledgment amendments to be consistent with the statewide planning goals as a matter of law, if the amendment is not appealed or is affirmed on appeal. Viewed in that context, possible prejudice to DLCD and to the persons who are entitled to notice from DLCD under ORS 197.610(1), who may not be parties in an appeal to LUBA, is also relevant in determining whether a city's errors in its ORS 197.610(1) notice to DLCD warrant remand. In our view, whether such errors warrant remand depends upon whether the errors are of the kind or degree that calls into question whether the ORS 197.610 to 197.625 process nevertheless performed its function. If so, whether the particular petitioners before LUBA can demonstrate prejudice to their substantial rights is not dispositive.
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> "In this case, petitioner is located in Salem and asserts that it relies on notices from DLCD to make local appearances on behalf of its members. No doubt there are other organizations that similarly rely on notice of proposed post-acknowledgment amendments from DLCD. We simply cannot be sure that petitioner and other potential petitioners who received erroneous notice of the date of the local hearing have not been prejudiced by the city's erroneous notice of the date of the initial hearing. * * * In short, we cannot be sure that the city's error in specifying that the initial evidentiary hearing would be held on November 7, 2002 [when the initial evidentiary hearing was actually held on November 6, 2002] was a harmless error that did not result in a failure of the statutory scheme set out at ORS 197.610 to 197.625. Accordingly, remand is required so that the city may correct the error in its notice to DLCD under ORS 197.610(1)." *Id.* at 470-72 (footnote omitted).

OCAPA stands for the proposition that if errors in a local government's notice to DLCD under ORS 197.610(1) are of the kind or of a degree that call into question

whether the ORS 197.610 to 197.625 process performed its function, the decision must be remanded so that the notice required by ORS 197.610(1) is provided.

A. Notice to DLCD Was Required

Petitioners argue that the original proposal to amend the CP Significant Aggregate Sites Inventory to add 107 acres to the inventory and plan and zone those 107 acres for mining purposes was "altered to such an extent that the materials submitted no longer reasonably describe the proposed change," and that accordingly notice of the alterations to DLCD was required, pursuant to ORS 197.610(6). The county adopted findings responding to petitioners' argument below that concluded that no new notice pursuant to ORS 197.610(6) was required because (1) the changes were required by our decision in *Save TV Butte I*, and (2) the new proposal reduced the amount of acreage included on the CP Significant Aggregate Sites Inventory. Record 34-35. In its response brief, intervenor responds that the county correctly concluded that ORS 197.610(6) did not require notice to DLCD because the amount of acreage included in the new proposal was reduced as a result of LUBA's decision in *Save TV Butte I*.

We disagree with the county and intervenor that because the acreage included in the proposal to mine was reduced, the new proposal does not fall under the ambit of ORS 197.610(6). The statute gives non-exclusive examples of "[c]ircumstances requiring resubmission of a proposed change," which may include "a significant change in the location at which the principal uses would be allowed, limited or prohibited." We have no trouble concluding that an alteration

of a proposal to add property to the CP Significant Aggregate Sites Inventory that eliminates more than 50 percent of the area at which the mining and processing uses would be allowed is a proposal that changes the location of the mining and processing uses, alters the original proposal "to such an extent that the materials submitted no longer reasonably describe the proposed change," and is significant. The county and intervenor's assumption that a *reduction* in the amount of land included in an original proposal does not alter the proposal to such an extent that the originally submitted materials do not reasonably describe the proposed change is not supported by any language in the ORS 197.610(6), or the legislative history surrounding the enactment. The legislative history regarding HB 2129 makes clear that DLCD was concerned with receiving notice of major changes to a PAPA proposal in order to perform its secondary notice function and in order to assess the proposal. In addition, the fact that the change resulted from an aspect of our decision in *Save TV Butte I* also does not affect our conclusion. Accordingly, ORS 197.610(6) required the county to notify DLCD of the alterations to the proposal.

B. The Notice was Inadequate to Satisfy ORS 197.610(6)

Petitioners next argue that the 2018 DLCD Notice was inadequate to fulfill the county's obligations under ORS 197.610(6) to notify DLCD "of the alterations to the proposed change and provide a summary of the alterations along with any alterations to the proposed text or map * * * at least 10 days before the final evidentiary hearing." First, petitioners argue the 2018 DLCD Notice was

not sent to DLCD at least 10 days before the final evidentiary hearing on the proposal occurred on September 25, 2018, but rather, was sent to DLCD on October 12, 2018, 17 days *after* the final evidentiary hearing on the proposal had already occurred. OAR 660-018-0010 defines "Final Evidentiary Hearing" to mean:

> "[T]he last hearing where all interested persons are allowed to present evidence and rebut testimony on a proposal to adopt a change to a comprehensive plan or land use regulation. A hearing held solely on the record of a previous hearing held by the governing body or its designated hearing body is not a 'final evidentiary hearing.'"

Petitioners argue that the 2018 DLCD Notice was misleading and failed to accurately identify the date of the final evidentiary hearing. Rather, it identified two dates, neither of which was identified as the "final evidentiary hearing." We agree with petitioners that the 2018 DLCD Notice failed to accurately identify the date of the final evidentiary hearing. On the first line, the 2018 DLCD Notice describes the "Date of first evidentiary hearing: September 25, 2018 for Remand Hearing."[5] Record 422. On the second line, the Notice describes the "Date of final hearing: November 27, 2018 with the Lane County Board of

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[5] OAR 660-018-0005 defines "first evidentiary hearing" to mean "the first hearing conducted by the local government where interested persons are allowed to present and rebut evidence and testimony on a proposal to adopt a change to a comprehensive plan or land use regulation. 'First evidentiary hearing' does not include a work session or briefing where public testimony is not allowed."

Commissioners." *Id.* Neither of those described dates identify the "date of the final evidentiary hearing."

Further, petitioners argue, the 2018 DLCD Notice was not accompanied by accurate text of the proposed alteration to the original proposal because the text, included as the proposed Ordinance 1363 at Record 450-60, described significantly more property than the 46 acres that was ultimately added to the CP Significant Aggregate Sites Inventory. Record 450. Again, we agree. The 2018 DLCD Notice included the text of Ordinance 1363, which included the same 183 acres that was included in the proposal that we remanded *in Save TV Butte I. Id.* That described significantly more acreage than the 46 acres that was ultimately added to the inventory. Petitioners argue that, taken together, the inadequacies in the 2018 DLCD Notice were of the kind that were "likely to prejudice the substantial rights of other persons who may be relying on DLCD's notice to participate." Petition for Review 11.

Intervenor concedes that the 2018 DLCD Notice was "late," but argues that the late submission was cured because the county provided the 2018 DLCD Notice during the open record period. Intervenor also asserts that petitioners have failed to establish either that they were prejudiced or the likelihood of prejudice to the substantial rights of other persons, because no party was denied the opportunity to "appear" before the board of county commissioners at its November 27, 2018 hearing. Response Brief 10-11. Intervenor argues that no party could have been prejudiced by the county's errors in providing the notice

in a timely manner and identifying the correct date of the "final evidentiary hearing."

The substantial rights of a petitioner include "the rights to an adequate opportunity to prepare and submit [its] case and a full and fair hearing." *Muller v. Polk County*, 16 Or LUBA 771, 775 (1988). As we explain above, our decision in *OCAPA* provides useful guidance for determining whether errors in the 2018 DLCD Notice warrant remand. As we concluded in *OCAPA*, whether such errors warrant remand

> "depends upon whether the errors are of the kind or degree that calls into question whether the ORS 197.610 to 197.625 process nevertheless performed its function. If so, whether the particular petitioners before LUBA can demonstrate prejudice to their substantial rights is not dispositive." *Id.* at 471.

We conclude that the errors in the 2018 DLCD Notice are of the kind and the degree that call into question whether the ORS 197.610 to 197.625 process performed its function. In *OCAPA*, we noted that the petitioner in that appeal and other organizations rely on notice of PAPAs from DLCD, and that we simply could not be sure that the petitioner and other parties who received the erroneous hearing date were not prejudiced by the city's erroneous notice. We concluded that the city's error in incorrectly identifying the initial evidentiary hearing date as one day later than it was actually held was not a harmless error that did not result in a failure of the statutory scheme set out at ORS 197.610 to 197.625.

Here, similarly, the 2018 DLCD Notice was provided 17 days *after* the final evidentiary hearing had already occurred.[6] We cannot be sure that other parties were not prejudiced by the submission of the 2018 DLCD Notice 27 days after it was required to be submitted to DLCD, after the final evidentiary hearing was held, and after the record was closed for new evidence. We also do not find intervenor's argument that the 2018 DLCD Notice was sent during the time when the record was left open particularly persuasive. That is so, in part, because the express language of ORS 197.610(6) is clear that the notice must be provided to DLCD "at least 10 days before the final evidentiary hearing." ORS 197.610(6) does not contemplate that the notice may be sent after the final evidentiary hearing has been held and the public hearing closed, but during a time when the record is open for limited evidentiary submissions.[7] Moreover, on October 12,

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[6] Unlike ORS 197.610(3), which requires the local government to specify the date of the first evidentiary hearing in its notice to DLCD, ORS 197.610(6) does not require the local government to specify the date of the final evidentiary hearing in its notice.

[7] We note that HB 2129 also amended ORS 197.620(2), as follows. ORS 197.620 is a provision of the PAPA statutes that obviates the appearance requirement in ORS 197.830(2) for an appeal to LUBA by DLCD and other persons in some circumstances.

As relevant here, ORS 197.620 now waives the appearance requirement where the local government (1) failed to submit all of the materials required by ORS 197.610(6), and the failure *"prejudiced the substantial rights of [DLCD] or the person [appealing the decision]*"; (2) submitted the materials described in ORS 197.610(6) after the deadline specified, except if the local government cured the untimely submission of notice to DLCD by either (a) postponing the date for

2018, the date that the county provided the 2018 DLCD Notice, the record was open only for responsive evidence that responded to the evidence submitted between September 25, 2018 and October 8, 2018. In other words, there is no certainty that a person desiring to present new evidence could have done so after October 12, 2018, and after receiving DLCD's secondary notice of the alterations to the PAPA sometime after that date.

Finally, while the second page of the 2018 DLCD Notice accurately described the alterations to the proposal, including the reduction in size of area to be designated a significant resource from 107 to 46 acres, the 2018 DLCD Notice also included materials that did not accurately describe the alterations to the original proposal. Record 423, 450-60. A party receiving notice from DLCD regarding the PAPA would have been hard pressed to determine what the proposed alterations to the original proposal encompassed, given the disparity between what the second page of the 2018 DLCD Notice described and the text of the Ordinance that was included with the 2018 DLCD Notice. A party receiving notice from DLCD regarding the PAPA would also have been hard pressed to attend a final evidentiary hearing that had already occurred, or even to submit new evidence during an open record period when the period for submitting new evidence had ended. Accordingly, we conclude that the totality

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the final evidentiary hearing, or (b) holding the evidentiary record open and providing notice of the postponement or open record period to DLCD. ORS 197.620(2) (emphasis added).

of the errors in submitting the notice and in the notice itself are of the kind and degree that make it doubtful that the ORS 197.610 to 197.625 process nevertheless performed its function. Remand is required so that the county may provide DLCD with notice of the proposed alterations that accurately describes the proposed alterations, and that is provided to DLCD at least 10 days before the final evidentiary hearing.

The first assignment of error is sustained.

REMAINING ASSIGNMENTS OF ERROR

Petitioners' second assignment of error alleges that the county's decision to designate and zone the 61 acres that are adjacent to the 46 acres included on the CP Significant Aggregate Sites Inventory as NR:M and QM/RCP improperly construes the Lane County Code (LC). Petitioners' third assignment of error challenges findings that the county adopted regarding compliance with OAR 660-023-0180(5)(b)(D) and argues that those findings are inconsistent with other findings adopted to demonstrate compliance with LC 16.257(4). In their fourth assignment of error, petitioners argue that the county improperly construed OAR 660-023-0180(5)(b)(D) in failing to evaluate all conflicts with big game, in failing to conduct an Economic, Social, Environmental, and Energy (ESEE)

analysis for the conflicts that are not minimized, and in failing to impose conditions to minimize the displacement that will occur from the mining activity.[8]

Because we sustain the first assignment of error and remand to the county to provide timely and accurate notice to DLCD of the proposed alterations to the original proposal, a new "final evidentiary hearing" will be required, at which any persons may appear and present evidence and testimony. Accordingly, we will not address the remaining assignments of error until the county adopts a new decision based on all of the evidence and testimony presented to the board of commissioners prior to the close of the final evidentiary hearing or the record of the proceeding.

We do not reach the second, third, or fourth assignments of error.

The county's decision is remanded.

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[8] These additional alleged conflicts include conflicts due to vehicle and human traffic, big game stress hormone response, decreased reproduction, increased mortality and other behavioral responses.