

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

EDITH WEISS and CHARLES WEISS,
Petitioners,

vs.

LINN COUNTY,
Respondent,

and

NORTHROCK, INC.,
Intervenor-Respondent.

LUBA No. 2021-033

FINAL OPINION
AND ORDER

Appeal from Linn County.

Andree N. Phelps filed the petition for review and reply brief and argued on behalf of petitioners. Also on the brief was Education, Environmental, & Estate Law Group, LLC.

No appearance by Linn County.

Wallace W. Lien filed the response brief and argued on behalf of intervenor-respondent.

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

REMANDED

06/10/2021

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

NATURE OF THE DECISION

Petitioners appeal a county board of commissioners approval of (1) a comprehensive plan text amendment adding two sites totaling 40 acres to the comprehensive plan inventory of significant aggregate resource sites, (2) a zoning map amendment applying the Aggregate Resource Overlay (ARO) to the two sites, and (3) a development permit authorizing aggregate mining and processing on the two sites.

MOTION TO INTERVENE

Northrock, Inc. (intervenor), the applicant below, moves to intervene on the side of the county. The motion is unopposed and is granted.

BACKGROUND

Statewide Planning Goal 5 (Natural Resources, Scenic and Historic Areas, and Open Spaces) is “[t]o protect natural resources and conserve scenic and historic areas and open spaces.” OAR chapter 660, division 23

“establishes procedures and criteria for inventorying and evaluating Goal 5 resources and for developing land use programs to conserve and protect significant Goal 5 resources * * * [and] explains how local governments apply Goal 5 when conducting periodic review and when amending acknowledged comprehensive plans and land use regulations.” OAR 660-023-0000.

OAR 660-023-0180(3) provides that “[a]n aggregate resource site shall be considered significant if adequate information regarding the quantity, quality, and location of the resource demonstrates that the site meets” one of several

1 criteria. OAR 660-023-0180(5) sets out the process that local governments must
2 follow in deciding whether mining is permitted at a significant mineral or
3 aggregate site.¹

¹ That process is as follows:

“(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.

“(b) The local government shall determine existing or approved land uses within the impact area that will be adversely affected by proposed mining operations and shall specify the predicted conflicts. For purposes of this section, “approved land uses” are dwellings allowed by a residential zone on existing platted lots and other uses for which conditional or final approvals have been granted by the local government. For determination of conflicts from proposed mining of a significant aggregate site, the local government shall limit its consideration to the following:

“(A) Conflicts due to noise, dust, or other discharges with regard to those existing and approved uses and associated activities (e.g., houses and schools) that are sensitive to such discharges;

“(B) Potential conflicts to local roads used for access and egress to the mining site within one mile of the entrance

to the mining site unless a greater distance is necessary in order to include the intersection with the nearest arterial identified in the local transportation plan. Conflicts shall be determined based on clear and objective standards regarding sight distances, road capacity, cross section elements, horizontal and vertical alignment, and similar items in the transportation plan and implementing ordinances. Such standards for trucks associated with the mining operation shall be equivalent to standards for other trucks of equivalent size, weight, and capacity that haul other materials;

“(C) Safety conflicts with existing public airports due to bird attractants, i.e., open water impoundments as specified under OAR chapter 660, division 013;

“(D) Conflicts with other Goal 5 resource sites within the impact area that are shown on an acknowledged list of significant resources and for which the requirements of Goal 5 have been completed at the time the PAPA is initiated;

“(E) Conflicts with agricultural practices; and

“(F) Other conflicts for which consideration is necessary in order to carry out ordinances that supersede Oregon Department of Geology and Mineral Industries (DOGAMI) regulations pursuant to ORS 517.780.

“(c) The local government shall determine reasonable and practicable measures that would minimize the conflicts identified under subsection (b) of this section. To determine whether proposed measures would minimize conflicts to agricultural practices, the requirements of ORS 215.296 shall be followed rather than the requirements of this section. If reasonable and practicable measures are identified to minimize all identified conflicts, mining shall be allowed at

the site and subsection (d) of this section is not applicable. If identified conflicts cannot be minimized, subsection (d) of this section applies.

“(d) The local government shall determine any significant conflicts identified under the requirements of subsection (c) of this section that cannot be minimized. Based on these conflicts only, local government shall determine the [economic, social, environmental, and energy (ESEE)] consequences of either allowing, limiting, or not allowing mining at the site. Local governments shall reach this decision by weighing these ESEE consequences, with consideration of the following:

“(A) The degree of adverse effect on existing land uses within the impact area;

“(B) Reasonable and practicable measures that could be taken to reduce the identified adverse effects; and

“(C) The probable duration of the mining operation and the proposed post-mining use of the site.

“(e) Where mining is allowed, the plan and implementing ordinances shall be amended to allow such mining. Any required measures to minimize conflicts, including special conditions and procedures regulating mining, shall be clear and objective. Additional land use review (e.g., site plan review), if required by the local government, shall not exceed the minimum review necessary to assure compliance with these requirements and shall not provide opportunities to deny mining for reasons unrelated to these requirements, or to attach additional approval requirements, except with regard to mining or processing activities:

“(A) For which the PAPA application does not provide information sufficient to determine clear and objective measures to resolve identified conflicts;

1 The county has adopted code language implementing these requirements,
2 defining its “Goal 5 process” in part as “the planning process for mineral and
3 aggregate resources identified in OAR 660-023-0180.” Linn County Code (LCC)
4 939.030(J). The county’s Goal 5 process consists of

5 “(1) STEP 1 — determine adequacy of information provided in
6 the application with regard to the location, quality, and
7 quantity of the aggregate resource (LCC 939.110);

 “(B) Not requested in the PAPA application; or

 “(C) For which a significant change to the type, location, or
 duration of the activity shown on the PAPA application
 is proposed by the operator.

 “(f) Where mining is allowed, the local government shall
 determine the post-mining use and provide for this use in the
 comprehensive plan and land use regulations. For significant
 aggregate sites on Class I, II and Unique farmland, local
 governments shall adopt plan and land use regulations to limit
 post-mining use to farm uses under ORS 215.203, uses listed
 under ORS 215.213(1) or 215.283(1), and fish and wildlife
 habitat uses, including wetland mitigation banking. Local
 governments shall coordinate with [the Oregon Department
 of Geology and Mineral Industries (DOGAMI)] regarding the
 regulation and reclamation of mineral and aggregate sites,
 except where exempt under ORS 517.780.

 “(g) Local governments shall allow a currently approved
 aggregate processing operation at an existing site to process
 material from a new or expansion site without requiring a
 reauthorization of the existing processing operation unless
 limits on such processing were established at the time it was
 approved by the local government.” OAR 660-023-0180(5).

- 1 “(2) STEP 2 — determine site significance and classification
2 (LCC 939.120);
- 3 “(3) STEP 3 — identify impact area and all conflicts with existing
4 uses (LCC 939.130);
- 5 “(4) STEP 4 — determine whether conflicts can be minimized
6 (LCC 939.140);
- 7 “(5) STEP 5 — analyze [the economic, social, environmental, and
8 energy (ESEE)] consequences if significant conflicts cannot
9 be minimized (LCC 939.150);
- 10 “(6) STEP 6 — approve the mining of the aggregate resource
11 (LCC 939.160);
- 12 “(7) STEP 7 — determine the post-mining use (LCC 939.170);
- 13 “(8) STEP 8 — identify conflicts from new conflicting uses (LCC
14 939.180);
- 15 “(9) STEP 9 — analyze ESEE consequences and decide whether
16 to allow new conflicting uses (LCC 939.190); and
- 17 “(10) STEP 10 — adopt final decision and implementing
18 amendments to the *Comprehensive Plan* and Land
19 Development Code (LCC 939.200).” LCC 939.060(A)
20 (emphasis in original).

21 The 98.8-acre subject property is “located on the north side of Lyons Mill
22 City Drive, approximately 1.16 miles southeast of its intersection with Cedar Mill
23 Road, and approximately 2.08 miles southwest of the city limits of Lyons.”
24 Record 13. In 1982, the county adopted Ordinance 82-137, identifying the subject
25 property, referred to as the Wilson site, as a significant aggregate resource site
26 suitable for protection under Goal 5 and rezoning the property from Farm/Forest
27 to Aggregate Extraction and Processing. Record 212-27. Ordinance 82-137

1 approved “excavation within four areas of the site identified as areas A-D,
2 totaling 19.47 acres.” Record 121.

3 Intervenor operates the existing 19.47-acre quarry, and it applied to the
4 county to expand the quarry to include two new mining areas, one 27 acres and
5 the other 13 acres, all within the confines of the 98.8-acre subject property.
6 Intervenor seeks to add the additional acreage because the 19.47 acres approved
7 for extraction in Ordinance 82-137 have been depleted.² Intervenor explained in
8 its narrative that, although the new areas will provide additional material,
9 “[p]rocessing, stockpiling, sale, and transport of these materials will take place
10 as at present and at the same general location within the property.” Record 123.

11 The county’s “Inventory of Significant Sites Protected by Goal 5 and
12 Approved for Mining Pursuant to an ESEE Analysis (Formerly ‘3A’ and ‘3C’
13 Sites)” identifies the entire 98.8-acre subject property.³ LCC chapter 905, Apps

² Intervenor’s narrative also explains that, after a DOGAMI requirement for an NPDES permit led to the discovery that the previous owners had extracted material from outside the approved 19.47-acre mining area, a 2013 county decision allowed continued operation in those areas with no increase in the total acreage approved for mining. Record 122.

³ LCC 939.030(D) defines “ESEE analysis” as

“the consideration and balancing of the positive and negative economic social, environmental and energy consequences of a decision to allow, limit, or prohibit a conflicting use, following the process in OAR 660-023-0040. Based on the results of the ESEE analysis, the decision maker determines a level of protection for the resource and adopts *Comprehensive Plan* provisions and regulations

1 7, 7A. However, as discussed further below, the county found in the challenged
2 decision that only the existing 19.47-acre quarry is listed on the county's
3 inventory of significant aggregate resource sites.

4 The board of commissioners considered intervenor's applications at public
5 hearings on November 10, November 17, and November 24, 2020. At its
6 November 10, 2020 meeting, the board of commissioners voted to approve the
7 comprehensive plan text and zoning map amendments. On February 2, 2021, the
8 board of commissioners voted to approve the development permit. This appeal
9 followed.

10 **SECOND ASSIGNMENT OF ERROR**

11 Petitioners' second assignment of error has two components. First,
12 petitioners argue that the county committed procedural error because one of the
13 county commissioners was not present during their attorney's oral argument.
14 LUBA will reverse or remand the land use decision under review if it finds that
15 the local government "[f]ailed to follow the procedures applicable to the matter
16 before it in a manner that prejudiced the substantial rights of the petitioner." ORS
17 197.835(9)(a)(B). A procedural error is not a basis for reversal or remand unless
18 the petitioner shows prejudice to their substantial rights. *Eng v. Wallowa County*,
19 79 Or LUBA 421, 427-28 (2019). "Where a petitioner fails to identify any
20 applicable legal standard that he or she contends is violated by an alleged defect

to achieve the designated level of protection." (Emphasis in original.)

1 in the local government’s decision, LUBA cannot grant relief.” *Spiering v.*
2 *Yamhill County*, 25 Or LUBA 695, 700 (1993). Petitioners have not identified
3 any violation of an applicable legal standard—that is, they have not identified
4 any procedural error—or any prejudice to their substantial rights. Thus, this
5 element of the second assignment of error is denied.

6 Petitioners next argue that the county committed procedural error because
7 the board of commissioners reopened the record after approving the
8 comprehensive plan text and zoning map amendments on November 10, 2020,
9 but did not conduct a revote on those two applications when it approved the
10 development permit on February 2, 2021. Again, petitioners do not identify any
11 legal standard that was allegedly violated by the county’s process or, if there was
12 a violation, how it prejudiced their substantial rights.

13 The second assignment of error is denied.

14 **FOURTH ASSIGNMENT OF ERROR AND FIRST ASSIGNMENT OF**
15 **ERROR, FIRST SUBASSIGNMENT**

16 LCC 939.050(C) and (D) and LCC 939.110(B) identify specific
17 information that an applicant *shall* include in or with an application. For example,
18 LCC 939.050(C)(2) requires that the application include “[i]nformation
19 regarding the location, quality, and quantity of the aggregate source” and LCC
20 939.110(B)(2) requires that the application include

21 “[a] description of the quality of the resource, including a statement
22 of compliance with federal, state or local standards issued by a
23 certified lab according to the following applicable methods:

- 1 “(a) Resistance to Abrasion (* * * OSHD Tet Method 211);
- 2 “(b) Sodium Sulfate Soundness (OHSD Test Method 206);
- 3 “(c) Oregon Air Degradation (OSHD Test Method 208); or
- 4 “(d) Other test appropriate for the type of resource[.]”

5 LCC 939.050(D) requires that an applicant submit a site development plan
6 containing certain information and materials with its application. Petitioners’
7 fourth assignment of error and the first subassignment of error under their first
8 assignment of error allege that the county erred in approving the applications
9 because intervenor did not submit a number of items that the code requires be
10 included in an application. Those items include a conceptual site reclamation
11 plan, a traffic impact assessment within one-mile of the entrance to the mining
12 area, and diagrams, calculations, or other documentation of the location, quantity,
13 and quality of the aggregate at the site. Petitioners also argue that intervenor’s
14 site development plan does not include a number of required components,
15 including a DOGAMI-approved surface water management plan and a
16 DOGAMI-approved site reclamation plan.

17 LUBA will “reverse or remand a decision involving the application of a
18 plan or land use regulation provision if the decision is not in compliance with
19 applicable provisions of the comprehensive plan or land use regulations.” ORS
20 197.835(8). However, intervenor argues that this issue was not preserved below
21 and is therefore waived.

22 ORS 197.763(1) provides:

1 “An issue which may be the basis for an appeal to [LUBA] shall be
2 raised not later than the close of the record at or following the final
3 evidentiary hearing on the proposal before the local government.
4 Such issues shall be raised and accompanied by statements or
5 evidence sufficient to afford the governing body, planning
6 commission, hearings body or hearings officer, and the parties an
7 adequate opportunity to respond to each issue.”

8 Issues before LUBA are “limited to those raised by any participant before the
9 local hearings body as provided by ORS 197.763.” ORS 197.835(3).

10 In their reply, petitioners cite as evidence of preservation a statement in the
11 staff report:

12 “[Intervenor] was provided a letter on July 2, 2020[,] * * * stating
13 that the application did not include a traffic impact assessment, as
14 required by OAR 660-023-180(8)(c) and LCC 939.050(C)(7);
15 evidence of an approval [*sic*] truck haul route approved by the
16 County Roadmaster, as required by LCC 939.050(D)(17); or a
17 conceptual site reclamation plan and surface water management
18 plan, as required by LCC 939.050(D)(7-8).” Record 85.

19 Where planning staff initially takes a position that a code provision is not met
20 and later changes its position, we have held that staff’s initial position may be
21 sufficient to preserve the issue and avoid waiver. *Olstedt v. Clatsop County*, 62
22 Or LUBA 131, 140 (2010).

23 To the extent that petitioners argue that the items referenced in the July 2,
24 2020 letter and the staff report were not included with the application, the issue
25 is preserved. However, the issue is not preserved as to other items that petitioners
26 assert, for the first time at LUBA, are missing from the application. Petitioners
27 do not identify any place in the record where an issue was raised regarding the

1 description of the location, quantity, and quality of the aggregate at the site, the
2 absence of which petitioners now challenge for the first time at LUBA. However,
3 to the limited extent that the issue is preserved, the assignments of error are
4 denied on the merits.

5 Application submission requirements are not approval criteria. The fact
6 that application content requirements may not have been satisfied provides no
7 basis for remand absent a showing that the failure to provide the relevant material
8 or information resulted in non-compliance with at least one mandatory approval
9 criterion. *Le Roux v. Malheur County*, 32 Or LUBA 124, 129 (1996). Petitioners
10 argue only that intervenor failed to comply with code requirements for
11 application contents. Petitioners have not provided a basis for remand.

12 The fourth assignment of error and the first assignment of error, first
13 subassignment, are denied.

14 **THIRD ASSIGNMENT OF ERROR**

15 In approving the applications, the county considered impacts on lands
16 within Marion County. LCC 931.704(B)(3) provides, “The decision maker shall
17 not apply either a mining area or an impact area to land within another county
18 without that county’s consent, or to land within a city or its urban growth
19 boundary without that city’s consent.” Petitioners’ third assignment of error is
20 that the county improperly construed LCC 931.704(B)(3) because it did not seek
21 Marion County’s approval before considering impacts within that county’s
22 boundaries.

1 LUBA will reverse or remand the land use decision under review if it finds
2 that the local government “[i]mproperly construed the applicable law.” ORS
3 197.837(9)(a)(D). Intervenor responds that the county did not interpret its code
4 but merely responded to petitioners’ argument. The findings state, “The Board
5 interprets LCC 931.704(B)(3) to mean that the Board cannot apply an aggregate
6 resource zoning overlay or aggregate resource impact area zoning overlay to
7 properties within another county without review and approval by that county
8 through a zoning map amendment application. The Board action does not do
9 this.” Record 17. We agree with petitioners that the county interpreted its code,
10 but we deny the assignment of error and affirm the county’s interpretation of its
11 code.

12 LCC 931.702, the “Definitions” section of the LCC provisions governing
13 the ARO, incorporates by reference the definitions in LCC 939.030, which is part
14 of the county’s Mining Permits and Uses Code. LCC 939.030(P) defines “mining
15 area” to mean

16 “the geographic area containing an identified significant aggregate
17 site within which some or all aspects of mining is permitted. The
18 mining area may consist of one or more properties or portions of
19 properties, and may include two or more contiguous properties
20 under different ownership. The mining area does not include
21 undisturbed buffer areas or areas on a property where mining is not
22 authorized.”

23 LCC 939.030(L) defines “impact area” to mean “a geographic area within which
24 conflicting uses could adversely affect a significant Goal 5 aggregate resource.”

1 The LCC therefore defines both mining areas and impact areas as geographic
2 areas.

3 LCC 939.130(A)(1) and (2) direct the county to “[i]dentify an impact area
4 for the purpose of identifying conflicts with proposed mining and processing
5 activities” and to prepare a map showing the impact area. For proposed
6 expansions of existing mining areas, the impact area is measured from the
7 perimeter of the proposed expansion area and does not include the existing site.
8 LCC 939.130(A)(1)(b). The impact area is limited to 1,500 feet, “except where
9 factual information is adequate to indicate significant potential conflicts beyond
10 this distance.” LCC 939.130(A)(1)(a). The county found that

11 “the 1500-foot impact area specified in OAR 660-023-0180(5) and
12 LCC 939.130(A)(1) fulfills the purpose of identifying conflicts with
13 proposed mining and processing activities. The Board determines
14 that factual information contained in the record does not indicate
15 significant potential conflicts with the proposed mining and
16 processing operation beyond the 1500-foot impact area specified by
17 rule and ordinance.” Record 15.

18 Thus, the county concluded that a 1,500-foot impact area was adequate for
19 purposes of considering the applications. Because a portion of that 1,500-foot
20 impact area extended into Marion County, the county considered impacts on
21 those lands, as required by LCC chapter 939.

22 LCC 939.200(B) provides, in part:

23 “If the decision maker makes a determination approving mining
24 under subsections (A)(1)(c) to (A)(1)(e), the decision maker shall
25 amend the Land Development Code Zoning Map:

1 “(1) To show the mining area. * * *

2 “(2) To show the impact area. * * *

3 “(3) *To apply an ARO* to the impact area for sites receiving
4 protection pursuant to Goal 5.” (Emphasis added.)

5 In LCC 939.200(B)(3), the terms “ARO” and “impact area” are distinguished.
6 The direction in LCC 939.200(B)(1) and (2) is to amend the map to show
7 geographic areas. The direction in LCC 939.200(B)(3) is to apply an overlay zone
8 to the impact area.

9 The county found, in effect, that the distinction between the terms “ARO”
10 and “impact area” in LCC chapter 939 does not exist in LCC 931.704:

11 “OAR 660-023-0180(5)(a) and LCC 939.130([A])(1) require the
12 County to identify a 1500-foot impact area from the proposed
13 mining area and identify conflicting uses within the impact area.
14 [The Oregon Administrative Rules] and [the LCC] do not limit the
15 County from identifying conflicting uses within another jurisdiction
16 located within the 1500-foot impact area. *However, Linn County is*
17 *prohibited from applying a zoning overlay to properties within*
18 *another county, unless the other county also approves an*
19 *application for a zoning amendment to apply an overlay.* The record
20 clearly indicates that the ARO and ARO-1 zoning overlay is being
21 applied to properties located within Linn County. There is no
22 requirement for Marion County to consent to the proposed
23 applications because no zoning overlay is being applied to
24 properties outside of Linn County.” Record 17 (emphasis added).

25 As set forth above, LCC 931.704(B)(3) provides that the county shall not *apply*
26 an impact area—which, as defined in LCC chapter 939, is a geographic area—to
27 land within another county without that county’s consent.

28 “In the construction of a statute, the office of the judge is simply to
29 ascertain and declare what is, in terms or in substance, contained

1 therein, not to insert what has been omitted, or to omit what has been
2 inserted; and where there are several provisions or particulars such
3 construction is, if possible, to be adopted as will give effect to all.”
4 ORS 174.010.

5 Petitioners argue that the board of commissioners’ interpretation inserts an
6 overlay zone qualifier into the term “impact area,” where there is no such
7 qualification in the code. However, LCC 931.704(B) is itself titled “Application
8 of the ARO.” LCC 931.704(B)(1) explains that the ARO is *applied* by the county
9 through a Type IIIA legislative process if the application is initiated by the county
10 and a Type IIIB post-acknowledgment plan amendment (PAPA) process if the
11 application is not initiated by the county. LCC 931.704(B)(2) provides that the
12 county shall amend the zoning map to implement the ARO and *include in the*
13 *ARO all property determined to be in the impact area.* Although LCC
14 931.704(B)(3) provides that the county will not apply an *impact area* to land
15 outside its jurisdiction without the relevant county or city’s consent, that
16 provision concerns the application of the *ARO*, and the county interpreted LCC
17 931.704(B)(3)’s reference to applying an “impact area” outside the county’s
18 jurisdiction to mean applying the ARO. In effect, the county determined that LCC
19 931.704(B), unlike LCC chapter 939, uses the terms “ARO” and “impact area”
20 interchangeably.

21 We review the board of commissioners’ interpretation of its own
22 regulations under ORS 197 .829(1) and are required to affirm that interpretation
23 so long as it is not inconsistent with the express language of the regulation or the
24 regulation’s underlying purposes or policies—that is, if it is plausible. *Siporen v.*

1 *City of Medford*, 349 Or 247, 259, 243 P3d 776 (2010). The board of
2 commissioners' interpretation is consistent with the titles of various code
3 provisions governing the ARO. LCC 931.745 is titled "ARO-I; impact area uses
4 allowed outright." LCC 931.740 is titled "ARO; mining area uses permitted
5 through Type IIIB conditional use review." LCC 931.735 is titled "ARO; mining
6 area uses permitted through Type IIA conditional use review." The purpose of
7 the LCC provisions governing the ARO is:

8 "(A) to protect significant sand, gravel, rock, stone and related
9 aggregate resources to ensure the continued availability of
10 aggregate resources at reasonable costs for the overall development of
11 Linn County;

12 "(B) to coordinate the development and utilization of significant
13 aggregate resources with other land uses to minimize
14 conflicts;

15 "(C) to establish standards of development and operation for
16 significant aggregate resource extraction and processing sites;

17 "(D) to prohibit the use of land in the [ARO] for uses incompatible
18 with the extraction and processing of significant aggregate
19 resources;

20 "(E) to provide for the agricultural and forest use of land in the
21 ARO prior to the development of extraction and processing
22 activities; and

23 "(F) to provide for the reclamation, rehabilitation and beneficial
24 final use of aggregate resource sites in a manner compatible
25 with the surrounding land use pattern." LCC 931.701.

1 The board of commissioners' interpretation is consistent with this purpose
2 because it recognizes that the county does not have authority to apply the ARO
3 to land outside its jurisdiction.

4 The third assignment of error is denied.

5 **FIFTH ASSIGNMENT OF ERROR**

6 LCC 921.872 provides that comprehensive plan text amendments must be
7 consistent with the statewide planning goals. Statewide Planning Goal 6 (Air,
8 Water and Land Resources Quality) is "[t]o maintain and improve the quality of
9 the air, water and land resources of the state." Goal 6 further provides, in part:

10 "All waste and process discharges from future development, when
11 combined with such discharges from existing developments shall
12 not threaten to violate, or violate applicable state or federal
13 environmental quality statutes, rules and standards. With respect to
14 the air, water and land resources of the applicable air sheds and river
15 basins described or included in state environmental quality statutes,
16 rules, standards and implementation plans, such discharges shall not
17 (1) exceed the carrying capacity of such resources, considering long
18 range needs; (2) degrade such resources; or (3) threaten the
19 availability of such resources.

20 "***Waste and Process Discharges*** -- refers to solid waste, thermal,
21 noise, atmospheric or water pollutants, contaminants, or products
22 therefrom." (Boldface and italics in original.)

23 As we explained in *Friends of the Applegate v. Josephine County*,

24 "[t]he function served by Goal 6 is not to anticipate and precisely
25 duplicate state and federal environmental permitting requirements.
26 The function of Goal 6 is much more modest. Goal 6 requires that
27 the local government establish that there is a *reasonable expectation*
28 that the use that is seeking land use approval will also be able to

1 comply with the state and federal environmental quality standards
2 that it must satisfy to be built.” 44 Or LUBA 786, 802 (2003)
3 (emphasis in original).

4 In the fifth assignment of error, petitioners argue that the county’s findings are
5 inadequate to demonstrate compliance with Goal 6.

6 LUBA will “reverse or remand an amendment to a comprehensive plan if
7 the amendment is not in compliance with the goals.” ORS 197.835(6). Intervenor
8 argues that petitioners did not raise an issue concerning LCC 921.872 below and
9 that the issue is therefore waived. Although petitioners did not cite LCC 921.872,
10 petitioners did argue that Goal 6 was not met. Petitioners testified that mining
11 poses serious harm to surface and ground water quality and argued:

12 “The Application from [intervenor] to add a 40 acre aggregate
13 resource site situated directly at the banks of the North Santiam
14 River in order to mine the area, process and store resulting residue
15 from the mining operations at the site raises very serious issues
16 about satisfying the criteria in the [LCC] and the Oregon Land Use
17 Goals.” Record 73.

18 We conclude that the issue was preserved.

19 The county found:

20 “Aggregate processing requires Department of Environmental
21 Quality (DEQ) permits. The DEQ was provided notice of the
22 proposal. [Intervenor] is required (as a condition of approval) to
23 obtain all permits required by the DEQ and to obtain and maintain
24 all permits necessary for the operation and reclamation of the site.
25 Therefore the proposed Plan amendment complies with * * * Goal
26 6.” Record 23.

27 As we explained in *Marcott Holdings, Inc. v. City of Tigard*,

28 “Goal 6 requires findings that a proposal will be *able* to comply with

1 applicable environmental standards. It is not satisfied by findings
2 stating only that the proposed use will be *required* through
3 conditions to comply with applicable environmental standards. The
4 city must make additional findings addressing the feasibility of
5 compliance with Goal 6, meaning that ‘solutions to certain problems
6 * * * posed by [the] project are possible, likely and reasonably
7 certain to succeed’ in addressing compliance.” 30 Or LUBA 101,
8 113-14 (1995) (emphasis in original) (quoting *Meyer v. City of*
9 *Portland*, 67 Or App 274, 280 n 5, 678 P2d 741, *rev den*, 298 Or 82
10 (1984) (brackets in *Marcott Holdings*)) (citing *Eckis v. Linn County*,
11 19 Or LUBA 15, 35 (1990)).

12 As we further explained in *Friends of Yamhill County v. Yamhill County*, where
13 the record includes sufficient information regarding proposed or contemplated
14 uses to determine whether a PAPA is consistent with applicable goals, the local
15 government must address and resolve whether the uses are consistent with those
16 goals at the time the PAPA is adopted. 47 Or LUBA 160, 171 (2004). The county
17 did not make the required findings.

18 Intervenor argues that we should deny this assignment under ORS
19 197.835(11)(b), which provides:

20 “Whenever the findings are defective because of failure to recite
21 adequate facts or legal conclusions or failure to adequately identify
22 the standards or their relation to the facts, but the parties identify
23 relevant evidence in the record which clearly supports the decision
24 or a part of the decision, [LUBA] shall affirm the decision or the
25 part of the decision supported by the record and remand the
26 remainder to the local government, with direction indicating
27 appropriate remedial action.”

28 Intervenor argues that, because the additional mining areas are within the subject
29 property, all 98.8 acres of which have already been found significant by the

1 county, “issues such as those provided for in Goal 6 * * * are included in the
2 conflict analysis to determine if mining can take place with[in] the boundaries of
3 the already significant site” and we should conclude that Goal 6 is met. Response
4 Brief 43. Intervenor relies on Ordinance 82-137 and the county’s “Inventory of
5 Significant Sites Protected by Goal 5 and Approved for Mining Pursuant to an
6 ESEE Analysis (Formerly ‘3A’ and ‘3C’ Sites).”

7 The county found that “[t]he existing 19.47-acre aggregate mining site was
8 listed in the Linn County Plan Inventory of significant aggregate sites on
9 September 1, 1996. *The proposed 40-acre expansion area is not currently listed*
10 *in the inventory of significant aggregate sites.*” Record 14 (citation omitted;
11 emphasis added). The “clearly supports” standard at ORS 197.835(11)(b) does
12 not allow LUBA to weigh evidence, substitute findings or interpretations, or draw
13 inferences that conflict with findings in the record. *Marcott Holdings*, 30 Or
14 LUBA at 122-23. Intervenor does not assign error to the county’s finding that the
15 40 acres sought to be added to the inventory are not currently listed on the
16 inventory. Accordingly, intervenor’s response does not provide any basis for us
17 to overlook the county’s deficient Goal 6 findings.

18 The fifth assignment of error is sustained.

1 **FIRST ASSIGNMENT OF ERROR**

2 **A. Second Subassignment of Error**

3 LCC 939.120 sets out the process for the county to determine whether an
4 aggregate resource site is significant, Step 2 in the county's Goal 5 process. LCC
5 939.120(B) provides:

6 "An aggregate resource site shall be significant if adequate
7 information regarding the location, quality and quantity of the
8 resource demonstrates that the site meets the following criteria:

9 "(1) A representative set of samples of aggregate material in the
10 deposit on the site meets Oregon Department of
11 Transportation (ODOT) specifications for base rock for air
12 degradation, abrasion and sodium sulfate soundness; and

13 "(2) The estimated amount of material is more than 1.5 million
14 cubic yards or 2 million tons; or

15 "(3) The aggregate site was listed on an inventory of significant
16 aggregate sites in the Comprehensive Plan on September 1,
17 1996."

18 The county found:

19 "Evidence in the records demonstrates that material from the
20 existing and proposed expansion site exceed 2 million tons/1.54
21 million cubic yards. This amount is greater than the significance
22 threshold of 2,000,000 tons or 1.5 million cubic yards in LCC
23 939.120(B)(2) to include the property in the inventory as a
24 significant aggregate resource site. These results satisfy the
25 requirements of LCC 939.120(B)(2) for a significant aggregate
26 site." Record 14.

27 Petitioners argue that "there is not adequate information in the record that the site
28 meets the soundness or the amount of material requirements." Petition for Review

1 21. We understand petitioners to argue that the above-quoted finding is not
2 supported by substantial evidence, that is, evidence a reasonable person would
3 rely upon to make a decision. *Younger v. City of Portland*, 305 Or 346, 360, 752
4 P2d 262 (1988).

5 LUBA will reverse or remand the land use decision under review if it finds
6 that the local government “[m]ade a decision not supported by substantial
7 evidence in the whole record.” ORS 197.835(9)(a)(C). Intervenor maintains that
8 this assignment of error was not preserved. We have reviewed the record pages
9 cited by petitioners in the reply brief and agree with intervenor that the issue of
10 the quantity and quality of the aggregate at the site was not preserved.

11 As we explained in our resolution of the fourth assignment of error and the
12 first subassignment of error under the first assignment of error, the LCC identifies
13 information on the quantity and quality of the aggregate at the site that the
14 applicant must include in its application. Consistent with those provisions, the
15 county’s application form requires applicants to provide the “[e]stimated amount
16 of aggregate material at the resource site, in tons or cubic yards” and to “[a]ttach
17 diagrams, calculations, and other documentation supporting this conclusion.”
18 Record 106. Intervenor responded “2 mil tons/1.54 mil cu yds,” but it appears to
19 have provided no diagrams, calculations, or other documentation supporting that
20 conclusion. *Id.* Where the application form requires applicants to “[a]ttach a copy
21 of the laboratory test analysis” of representative samples of aggregate material
22 from the site, intervenor responded that “[t]he site is on the Significant inventory.

1 The Significance test does not apply.” *Id.* The July 2, 2020 letter to intervenor,
2 listing the items that were missing from the applications, does not include any
3 mention of the quantity or quality of the aggregate. Record 187-88. Neither the
4 application form nor the July 2, 2020 letter was sufficient to preserve this issue.

5 Petitioners also rely on a letter from petitioners’ attorney to the county,
6 dated November 19, 2020, which provides, in part, “Under, LCC 939.120(C)(2),
7 this site is not a significant aggregate resource site. By the applicant’s own
8 admission, (1) more than 35% (in fact over 80%) of the site is Class I or Class II
9 soils and (2) the average thickness of aggregate layer does not exceed 17 feet.”
10 Record 52. Although the letter asserts that the site is not a significant aggregate
11 resource site, it provides no notice to the decision maker that the *quality and*
12 *quantity* of the aggregate at the site was at issue. Allowing petitioners to raise this
13 issue now would result in unfair surprise to the decision maker. Accordingly,
14 petitioners failed to preserve the issue. *Boldt v. Clackamas County*, 21 Or LUBA
15 40, 46 (1990), *aff’d*, 107 Or App 619, 813 P2d 1078 (1991).

16 The second subassignment of error is denied.

17 **B. Third Subassignment of Error**

18 LCC 939.130 provides:

19 “(A) *STEP 3A — Identify an impact area and known conflicts*
20 *within it.* The Director shall:

21 “(1) Identify an impact area for the purpose of identifying
22 conflicts with proposed mining and processing
23 activities.

1 “(a) The impact area shall be large enough to include
2 uses listed in subsection (B) of this section and
3 shall be limited to 1,500 feet from the boundaries
4 of the proposed mining area, except where
5 factual information is adequate to indicate
6 significant potential conflicts beyond this
7 distance.” (Emphasis in original.)

8 As discussed, the county concluded that a 1,500-foot impact area was adequate
9 for purposes of considering the applications. Petitioners’ third subassignment of
10 error is that “[t]here is no evidence in the findings that [concerns from the City
11 of Salem regarding the potential for water quality impacts beyond 1,500 feet] are
12 addressed or why only a 1,500-foot impact area was adopted in consideration of
13 [those concerns].” Petition for Review 23.

14 Generally, findings must “(1) identify the relevant approval standards, (2)
15 set out the facts which are believed and relied upon, and (3) explain how those
16 facts lead to the decision on compliance with the approval standards.” *Heiller v.*
17 *Josephine County*, 23 Or LUBA 551, 556 (1992). Findings must also address and
18 respond to specific issues relevant to compliance with applicable approval
19 standards that were raised in the proceedings below. *Norvell v. Portland Area*
20 *LGBC*, 43 Or App 849, 853, 604 P2d 896 (1979).

21 Petitioners note that the City of Salem submitted testimony raising
22 concerns related to potential impacts on the city’s water supply, explaining that
23 the North Santiam River is the city’s primary drinking water source and that the
24 proposed expansion area is in the North Santiam Watershed, in close proximity
25 to the river. The city testified:

1 “Based on [DEQ] Source Water Assessment, the rock quarry site is
2 approximately four miles upstream of Lyons-Mehama and is within
3 the eight-hour time-of-travel (based on annual mean flow) to the
4 Lyons-Mehama drinking water intake on the North Santiam River.
5 The City of Salem’s intake is less than eight miles downstream of
6 the Lyons-Mehama intake. Based on the Source Water Assessment,
7 updated in 2018, the area that the quarry has proposed to expand is
8 a high-risk area of erosion within the North Santiam Watershed.
9 This quarry site is listed in the water system’s Source Water
10 Assessment as a high-potential contamination risk to drinking water.
11 The risk level is based on the potential for spills, leaks, and/or
12 improper handling of chemicals and wastes from mining operations
13 or heavy equipment to impact the drinking water supply. In addition,
14 there is concern for the increased risk of turbidity and total
15 suspended solids depending on the site activities and land conditions
16 as the City of Salem’s drinking water process is highly sensitive to
17 turbidity greater than 10 NTU.

18 “Furthermore, the City of Salem is concerned with the potential
19 impairment of water quality on the site, including harm to surface
20 water and groundwater systems. Impairments include increased
21 wastewater discharge from processing and treatment, storage of
22 rock product, washing of equipment and vehicles, and road
23 treatment for dust control.” Record 180.

24 The county’s findings note that the city’s comments were received after the board
25 of commissioners had already voted on the comprehensive plan text amendment;
26 however, the findings go on to address the issues raised by the city. The findings
27 observe that no factual information was submitted with the comments supporting
28 a conclusion that there would be significant potential impacts *at a distance*
29 *greater than the 1,500-foot impact area*. The findings go on to conclude that

30 “the potential impacts generally identified in the [city’s] comment
31 are already addressed. Potential impacts to Goal 5 resources are
32 addressed in analysis below and information in the record indicates

1 that several properties located in Marion County, past the northern
2 bank of the North Santiam River[,] are included in the 1500-foot
3 impact area. DOGAMI administers water quality permits for [DEQ].
4 Permit conditions included with the Order require the quarry
5 operator to obtain and maintain a current permit from [DEQ]. This
6 includes any applicable water quality permits, as required by DEQ
7 and associated with the DOGAMI operating permit.” Record 15.

8 Petitioners do not explain why these findings that the 1,500-foot impact area is
9 sufficient are inadequate, and their argument does not provide a basis for reversal
10 or remand. *Knapp v. City of Corvallis*, 55 Or LUBA 376 (2007).

11 The third subassignment of error is denied.

12 **C. Fourth Subassignment**

13 LCC 939.140(A) and (B) concern Step 4 of the county’s Goal 5 process
14 and provide:

15 “(A) *STEP 4 — Determine whether conflicts can be minimized.*
16 The decision maker shall determine whether the conflicts
17 identified pursuant to LCC 939.130 can be minimized by
18 reasonable and practicable measures. Such measures shall be
19 clear and objective.

20 “(1) *If conflicts cannot be minimized — go to STEP 5.* If the
21 decision maker finds that all the conflicts identified by
22 the decision maker cannot be minimized by reasonable
23 and practicable measures, the decision maker shall
24 proceed as set forth in LCC 939.150.

25 “(2) *If conflict can be minimized — go to STEP 6.* If the
26 decision maker finds that all the conflicts identified by
27 the decision maker can be minimized, the decision
28 maker shall identify the reasonable and practicable
29 measures that would minimize the conflicts. The
30 decision maker shall next proceed as set forth in LCC
31 939.160.

1 “(B) In making the determination whether proposed measures
2 would minimize conflicts with agricultural practices, the
3 decision maker shall consider only the requirements of ORS
4 215.296.” (Emphasis in original.)

5 Step 5 of the county’s Goal 5 process is an ESEE analysis. LCC 939.150. Step 6
6 requires the county to approve mining at the site, without the need to conduct an
7 ESEE analysis. LCC 939.160.

8 The county concluded that the conditions of approval it imposed “are
9 reasonable and practical measures that will minimize all of the conflicts that have
10 been identified in this proceeding. The Board finds that the proposal satisfies the
11 standard in LCC 939.140 and OAR 660-023-0180(5).” Record 21. The board of
12 commissioners also found that “there are no conflicts between the proposed mine
13 expansion and adjacent land uses that cannot be minimized to a level at which
14 they can no longer be considered significant. An ESEE conflict analysis, as
15 specified in LCC 939.150 and OAR 660-023-0180(5), is therefore not
16 applicable.” *Id.* Petitioners’ fourth subassignment of error is that the county’s
17 findings that an ESEE analysis is not required are inadequate because they are
18 inconsistent with Ordinance 82-137 and because they are not supported by
19 substantial evidence.

20 First, petitioners argue that the county’s findings that conflicts can be
21 minimized and that an ESEE analysis is therefore not required for the proposed
22 40-acre expansion are inconsistent with Ordinance 82-137, which the county’s
23 inventory of significant aggregate resource sites suggests approved the existing
24 19.47-acre quarry for mining “Pursuant to an ESEE Analysis.” LCC chapter 905,

1 Apps 7, 7A. As discussed, the county found that Ordinance 82-137 did not
2 designate the 40 acres at issue in these applications as significant. Record 14.
3 Again, that finding is not challenged. The county did not rely on Ordinance 82-
4 137 and petitioners' inconsistency argument provides no basis for remand.

5 Petitioners also argue that the county's findings that conflicts can be
6 minimized and that an ESEE analysis is therefore not required are inadequate and
7 not supported by substantial evidence:

8 "Considering this list of conflicts with noise, dust, other discharges
9 related to stormwater and groundwater, local roads, and other Goal
10 5 resources, and the minimal findings and conditions adopted by the
11 County, the County erred in determining that these identified
12 conflicts can be minimized by reasonable and practicable measures
13 that are clear and objective." Petition for Review 27 (citing LCC
14 939.140(A)).

15 Petitioners do not identify specific findings, demonstrate why those findings are
16 inadequate, or develop their argument that the conditions are not clear and
17 objective. We will not develop petitioners' arguments and we do not consider
18 them further. *Deschutes Development v. Deschutes Cty.*, 5 Or LUBA 218, 220
19 (1982).

20 Lastly, petitioners argue that the county's findings that conflicts can be
21 minimized are not supported by substantial evidence. General disagreement with
22 the county's decision, without more, is not a basis for reversal or remand.
23 Although petitioners would reach a different conclusion than the county,
24 petitioners generally do not explain why a reasonable person would not rely on

1 the evidence on which the county relied. *Younger*, 305 Or at 360. For example,
2 the county concluded that noise impacts can be minimized by maintaining buffers
3 and compliance with DEQ noise regulations. Petitioners' argument that the
4 county *could have* required a noise or acoustic study to verify that DEQ standards
5 are being met does not mean that the county *was required* to do so. With respect
6 to conflicts with other Goal 5 resources, the county conditioned its approval on
7 compliance with Department of State Lands requirements, application for an
8 operating permit amendment with DOGAMI, and maintenance of a vegetative
9 tree buffer and riparian habitat setback. Record 20. Petitioners do not explain why
10 those conditions are inadequate.

11 Petitioners argue that dust is a problem with the existing quarry and that
12 the county's imposition of existing conditions on the expanded operation is
13 insufficient to minimize that conflict. Again, petitioners' disagreement with the
14 conditions imposed by the county, including requiring intervenor to use water or
15 another dust palliative, does not render those conditions inadequate.

16 Petitioners point to a statement in intervenor's traffic assessment that sight
17 distance could be impeded if vegetation is not well maintained and argue that
18 nothing in the findings addresses that issue. However, the county relied on a letter
19 from its roadmaster maintaining that mining at the site would not have an adverse
20 impact on county roads and the determination of intervenor's traffic assessment
21 that the proposed expansion will not significantly affect the transportation
22 system. Record 19.

1 Petitioners also argue that the county should have required evidence or
2 statements in the record regarding how intervenor will manage surface water,
3 stormwater, and groundwater impacts. Petitioners acknowledge that intervenor
4 will be required to secure DEQ permits but argue that the decision must identify
5 how intervenor will manage those impacts. This is similar to the argument that
6 we sustained in petitioners' third subassignment of error that it is not enough to
7 rely on permits; some analysis of water impacts is required.

8 Petitioners testified that the

9 “original mining operation on 19.75 acres was located to the east of
10 [petitioners] and was not along the bank of the North Santiam River.
11 The current proposed extension of 40 acres now puts the mining
12 operations directly along the North Santiam River. At this point, it
13 poses serious harm to * * * surface and ground water quality[.]”
14 Record 73.

15 Petitioners also testified about the potential for arsenic contamination of
16 groundwater. Record 75. As discussed, the City of Salem expressed concerns
17 “with the potential impairment of water quality on the site, including harm to
18 surface water and groundwater systems. Impairments include increased
19 wastewater discharge from processing and treatment, storage of rock product,
20 washing of equipment and vehicles, and road treatment for dust control.” Record
21 180.

22 The county's decision includes the statement that potential conflicts with
23 other Goal 5 resources can be minimized in part “by the establishment of the
24 mining boundary a minimum of 400 feet away from the bank of the North

1 Santiam River.” Record 6. As we discuss in our resolution of the third
2 subassignment of error, DOGAMI administers water quality permits for DEQ.
3 One of the conditions that the county imposed requires the quarry operator to
4 obtain and maintain a current permit from DEQ, including any required water
5 quality permits. However, the county’s findings that conflicts can be minimized
6 do not identify substantial evidence, or in fact any evidence, addressing the
7 potential water impacts identified by petitioners and the city. *Norvell*, 43 Or App
8 at 853. The fourth subassignment of error is sustained, in part.

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

10 The county’s decision is remanded.