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

OLD HAZELDELL QUARRY, LLC,
Petitioner,

vs.

LANE COUNTY,
Respondent,

and

SAVE TV BUTTE, LINDA MCMAHON, TIM CAUGHLIN, KEEGAN COUGHLIN, JENNY CAUGHLIN, KEVIN MATTHEWS, MICHAEL GARVIN, PATRICIA BEARD, CASCADIA WILDLANDS and LANDWATCH LANE COUNTY,
Intervenors-Respondents.

LUBA No. 2021-102

FINAL OPINION
AND ORDER

Appeal from Lane County.

Seth J. King filed the petition for review and reply brief and argued on behalf of petitioner. Also on the brief were Steven L. Pfeiffer and Perkins Coie LLP.

H. Andrew Clark filed a response brief and argued on behalf of respondent. Also on the brief was Sara L. Chinske.

Sean T. Malone filed the intervenors-respondents' brief and argued on behalf of intervenors-respondents.

RYAN, Board Member; ZAMUDIO, Board Chair; RUDD, Board

Member, participated in the decision.

REMANDED 07/18/2022

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

Petitioner appeals a board of county commissioners decision that denies its applications to (1) amend the county's comprehensive plan inventory of significant aggregate resources to add 46 acres to the inventory; (2) adopt 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) approve a site plan for a quarry to mine and process aggregate on a portion of the 183-acre property.

MOTION TO TAKE EVIDENCE

In the first assignment of error, petitioner alleges two commissioners failed to disclose *ex parte* communications with each other during the proceedings below, in contravention of ORS 215.422(3). Petitioner requests that we take into evidence under OAR 661-010-0045(1) text messages between the two commissioners to support its allegations of error.[1] Petitioner contends that taking

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[1] OAR 661-010-0045 provides, in relevant part:

> "(1) Grounds for Motion to Take Evidence Not in the Record: [LUBA] may, upon written motion, take evidence not in the record in the case of disputed factual allegations in the parties' briefs concerning unconstitutionality of the decision, standing, ex parte contacts, actions for the purpose of

the text messages into evidence is warranted because they reflect "disputed factual allegations in the parties' briefs" concerning "*ex parte* contacts."

Petitioner also contends that the two commissioners were biased in opposition to petitioner's applications. Petitioner seeks to have us consider the text messages for the additional purpose of supporting its allegations of bias.

The county and intervenors (respondents) oppose the motion, arguing initially that there are no "disputed factual allegations" for purposes of OAR 661-010-0045(1) because respondents do not dispute that the communications between the two commissioners occurred and were not disclosed. Respondents dispute only the legal consequences of the communications, specifically whether the communications constitute "*ex parte* communications" within the meaning of ORS 215.422(3), or whether the emails provide evidence of bias.

For the reasons explained below, we agree with respondents that OAR 661-010-0045 does not provide a basis for us to consider the text messages for

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> avoiding the requirements of ORS 215.427 or 227.178, or other procedural irregularities not shown in the record and which, if proved, would warrant reversal or remand of the decision. * * *
>
> "(2) Motions to Take Evidence:
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> > "(a) A motion to take evidence shall contain a statement explaining with particularity what facts the moving party seeks to establish, how those facts pertain to the grounds to take evidence specified in section (1) of this rule, and how those facts will affect the outcome of the review proceeding."

purposes of the first subassignment of error concerning *ex parte* communications because there is no disputed factual allegation that the communications occurred. Rather, the dispute between the parties is whether communications between two decision makers constitute *ex parte* communications within the meaning of ORS 215.422(3).

However, we agree with petitioner that we can consider the text messages for the purpose of considering petitioner's arguments regarding bias, because whether the two commissioners were biased is a mixed question of fact and law. Therefore, petitioner's motion to take evidence is granted, in part.

INTRODUCTION

The challenged decision is the county's decision on remand from *Save TV Butte v. Lane County*, 77 Or LUBA 22 (2018) (*Save TV Butte I*) and *Save TV Butte v. Lane County*, ___ Or LUBA ___ (LUBA No 2019-002, Oct 16, 2019) (*Save TV Butte II*).[2] We set out the facts and the procedural history of this appeal and then describe the applicable law.

A. Background

The subject 183-acre property is located in Lane County, east of the city of Oakridge and north of Highway 58. The subject property contains a previously

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[2] In *Save TV Butte II*, we remanded the county's decision for the county to provide the notice required under ORS 197.610(6), which the county did on remand. After providing the required notice, the county conducted remand proceedings to respond to our decision in *Save TV Butte I*.

existing quarry at the southern portion of the property. In 2015, petitioner applied to (1) amend the Lane County Comprehensive Plan Inventory of Significant Mineral and Aggregate Sites (CP Significant Aggregate Sites Inventory) to add 46 acres to the CP Significant Aggregate Sites Inventory; (2) amend the existing Lane County Comprehensive Plan Map (Plan Map) designation for 107 acres from F (Forest) to NR:M (Natural Resource: Mineral); (3) amend the existing Lane County Zoning Map designation for the 107 acres from F-1 (Non-Impacted Forest) and F-2 (Impacted Forest) to QM/RCP (Quarry and Mine Operations Zone/Rural Comprehensive Plan); and (4) for site review approval for mining and processing.

Petitioner proposes to mine and conduct mining operations on 107 acres of the subject property. Petitioner also proposes to excavate on 46 acres of the property, north and northeast from the existing quarry, and to conduct processing activities on the remaining 61 acres. In 2017, the board of county commissioners approved the applications, and that decision was appealed to LUBA. In *Save TV Butte I*, we remanded the county's decision for reasons we explain in more detail below. In 2018, petitioner requested that remand proceedings commence and, again, the board of commissioners again approved the applications. That decision was appealed to LUBA in *Save TV Butte II*. We remanded the county's decision. *See* n 2.

In September 2020, petitioner requested that the county begin proceedings on remand from *Save TV Butte I* and *Save TV Butte II*. The board of county

commissioners conducted two public hearings on the applications, and at the conclusion of the second public hearing, on May 4, 2021, left the record open for additional evidence and argument for three distinct periods, ending on June 8, 2021 (Open Record Period). We discuss the Open Record Period below in our resolution of the second assignment of error. At its next meeting, on August 3, 2021, the board of commissioners tentatively voted three to two to deny the applications. On October 26, 2021, the board of commissioners adopted a written decision denying the applications. This appeal followed.

B. The Goal 5 Rules

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

1. Inventory

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

For mineral and aggregate resources, the required inventory process is set out in even more detail at OAR 660-023-0180. OAR 660-023-0180(3) and (4) set out quantity and quality requirements for the aggregate resource that must be met to qualify as a "significant" aggregate resource site. Those requirements vary depending on location in the state and the quality of the overlying soil. In *Save TV Butte I*, we remanded the county's decision that added all 107 acres that petitioner proposed for mining operations to the CP Significant Aggregate Sites Inventory. We concluded that only 46 of the 107 acres qualified for inclusion on the CP Significant Aggregate Sites Inventory under the quality and quantity standards set out at OAR 660-023-0180(3)(a). *Save TV Butte I*, 77 Or LUBA at 29. Consistent with our decision in *Save TV Butte I*, petitioner subsequently amended its application to add 46 acres to the CP Significant Aggregate Sites Inventory. There is no dispute that 46 acres qualify for inclusion on the CP Significant Aggregate Sites Inventory.

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

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

"(a) Identify conflicting uses;

"(b) Determine the impact area;

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

"(d) Develop a program to achieve Goal 5 [which is to protect Goal 5 resources]." OAR 660-023-0040(1)(a)-(d).

OAR 660-023-0180(5) elaborates on how local governments are to conduct the ESEE process of determining whether mining at an inventoried significant mineral and aggregate site will be allowed and how any conflicts will be minimized. OAR 660-023-0180(5) requires identification of (1) an impact area; and (2) uses or significant resources in that impact area that may conflict with mining. We set out the relevant text from OAR 660-023-0180(5) below:

"For significant mineral and aggregate sites, local governments shall decide whether mining is permitted. For a PAPA application involving an aggregate site determined to be significant under section (3) of this rule, the process for this decision is set out in subsections (a) through (g) of this section. * * *

"(a) The local government shall determine an impact area for the purpose of identifying conflicts with proposed mining and processing activities. The impact area shall be large enough to include uses listed in subsection (b) of this section and shall be limited to 1,500 feet from the boundaries of the mining area, except where factual information indicates significant potential conflicts beyond this distance. * * *

"(b) The local government shall determine existing or approved land uses within the impact area that will be adversely affected by proposed mining operations and shall specify the predicted conflicts. For purposes of this section, 'approved land uses' are dwellings allowed by a residential zone on

existing platted lots and other uses for which conditional or final approvals have been granted by the local government. For determination of conflicts from proposed mining of a significant aggregate site, the local government shall limit its consideration to the following:

"* * * * *

"(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[.]"

Once conflicting uses in the impact area have been identified, OAR 660-023-0180(5)(c) directs local governments to "determine reasonable and practicable measures that would minimize the conflicts identified under" OAR 660-023-0180(5)(b).[3] If identified conflicts cannot be minimized, OAR 660-023-

[3] OAR 660-023-0180(5)(c) provides:

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

0180(5)(d) applies.[4] We discuss those two provisions in more detail in our resolution of the third assignment of error.

In *Save TV Butte I*, we concluded that the county's adopted inventory of big game habitat (Big Game Range) is "an acknowledged list of significant resources * * * for which the requirements of Goal 5 have been completed at the time the PAPA [in this case was] initiated," within the meaning of OAR 660-023-0180(5)(b)(D). 77 Or LUBA at 40. The eastern half of the 1,500-foot impact area is designated Major Big Game Range and the western half of the impact area is designated Impacted Big Game Range.[5] We concluded that the county had

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[4] OAR 660-023-0180(5)(d) provides:

> "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 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:
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> "(A) The degree of adverse effect on existing land uses within the impact area;
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> "(B) Reasonable and practicable measures that could be taken to reduce the identified adverse effects; and
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> "(C) The probable duration of the mining operation and the proposed post-mining use of the site."

[5] No party has challenged the size of the impact area in either *Save TV Butte I*, *Save TV Butte II*, or in this appeal. The impact area is approximately 486 acres or .76 square miles. Record 2400.

erred in failing to evaluate conflicts from the proposed mining operations with inventoried Big Game Range located within the 1,500-foot impact area.

On remand, the board of commissioners evaluated conflicts from the proposed mining operation on Major Big Game Range and Impacted Big Game Range and concluded that conflicts with Big Game Range from displacement of deer and elk from the impact area due to noise from the mining operation could not be minimized to an insignificant level. The board of commissioners evaluated the ESEE effects of allowing, limiting, or prohibiting the mine and concluded that the mine would be prohibited. The board of commissioners voted three to two to deny the application. This appeal followed.

FIRST ASSIGNMENT OF ERROR

Petitioner's first assignment of error alleges that the county committed procedural errors that prejudiced its substantial right to a full and fair hearing.

A. First Subassignment of Error – Ex Parte Communications

ORS 215.422(3) provides:

> "No decision or action of a planning commission or county governing body shall be invalid due to ex parte contact or bias resulting from ex parte contact with a member of the decision-making body, if the member of the decision-making body receiving the contact:
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> "(a) Places on the record the substance of any written or oral ex parte communications concerning the decision or action; and
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> "(b) Has a public announcement of the content of the communication and of the parties' right to rebut the substance of the communication made at the first hearing following the

> communication where action will be considered or taken on the subject to which the communication related."

Petitioner's first subassignment of error under the first assignment of error alleges that two commissioners failed to disclose text messages they exchanged with each other during the April 20, 2021 hearing, in contravention of ORS 215.422(3). Petitioner argues that communications between decision makers that occur "outside the local proceedings" are *ex parte* communications that the statute requires to be disclosed. Reply Brief to Respondent's Brief 2.

Our resolution of this subassignment of error requires us to ascertain the meaning of "ex parte communication" in ORS 215.422(3). The phrase "ex parte communication" is not defined in ORS 215.422 or any other statute. We first look to the plain, ordinary meaning of the phrase. *State v Gaines*, 346 Or 160, 171-72, 206 P3d 1042 (2009). An "ex parte communication" is defined in *Black's Law Dictionary* as "a communication between counsel and the court when opposing counsel is not present." *Black's Law Dictionary* 316 (9th ed 2009). That definition suggests that in order to be an *ex parte* communication, the communication must involve a party (or their counsel) and does not include communications between members of the "court," the decision maker. We have held in the context of land use proceedings that an *ex parte* communication is "a communication between a party and a decision-maker, made outside the hearing process, concerning a decision or action before the decision-maker." *Oregon Shores Conservation Coalition v. Coos County*, ___ Or LUBA ___, ___ (LUBA Nos 2019-137/2020-006, Dec 22, 2020) (slip op at 10). We conclude that

according to the plain, ordinary meaning of the phrase, communications between decision makers are not *ex parte* communications because they do not involve communication between a party and a decision maker.

The first subassignment of error is denied.

B. Second Subassignment of Error- Bias

In its second subassignment of error, petitioner argues that the text messages demonstrate that the two commissioners were not impartial and prejudged its applications, in violation of petitioner's substantial right to an impartial decision maker. *Fasano v. Washington Co. Comm.*, 264 Or 574, 588, 507 P2d 23 (1973) (a party in a quasi-judicial land use proceeding has a substantial right to an impartial decision-maker). In order to prevail on a bias challenge, the petitioner must demonstrate that the challenged decisionmaker was actually biased, as opposed to apparently biased. To demonstrate actual bias, a party must identify "explicit statements, pledges, or commitments that the local official has prejudged the specific matter before the tribunal." *Columbia Riverkeeper v. Clatsop County*, 267 Or App 578, 609-10, 341 P3d 790 (2014). Petitioner must cite to clear and unmistakable evidence. *Halvorson Mason Corp. v. City of Depoe Bay*, 39 Or LUBA 702, 710 (2001). Further, an elected local official is not expected to have no appearance of having views on matters of community interest when a decision is to be made in a quasi-judicial proceeding. *Columbia Riverkeeper*, 267 Or App at 602. On the contrary, an elected local official

> "'is expected to be intensely involved in the affairs of the community. [They are] elected because of [their] political predisposition, not despite it, and [they are] expected to act with awareness of the needs of all elements of the county, including all government agencies charged with doing the business of the people.'" *Id.* at 599 (quoting *Eastgate Theatre v. Bd. of County Comm'rs*, 37 Or App 745, 752-53, 588 P2d 640 (1978)).

Petitioner points to portions of the text message exchanges between the two commissioners that compare petitioner's experts to "flat earthers and anti-vaxxers," and that, according to petitioner, mock petitioner's counsel's arguments by characterizing the arguments as "insulting" and "REdiculous[.]" Motion to Take Evidence Ex 1 at 1-2. Petitioner argues that the messages show that the commissioners prejudged the applications and reflect personal attacks, animus towards petitioner and its experts, and a strong emotional commitment to deny the applications.

Respondents respond that the text messages show that the commissioners possessed strong opinions about the matter that amounted to, at most, a general predisposition toward a particular outcome. Respondents also respond that the text messages fail to provide "clear and unmistakable evidence" of bias.

We agree with respondents that the text messages at most evidence strong opinions about, and even dislike of, petitioner's experts, including petitioner's counsel. While the text messages display a lack of courtesy towards participants in a land use proceeding, the text messages do not provide the clear and unmistakable evidence of bias that is required to disqualify a decision maker.

The second subassignment of error is denied.

The first assignment of error is denied.

SECOND ASSIGNMENT OF ERROR

ORS 197.835(9)(a)(B) authorizes LUBA to reverse or remand a decision where a local government fails "to follow the procedures applicable to the matter before it in a manner that prejudiced the substantial rights" of the parties. In its second assignment of error, petitioner argues that the board of commissioners committed a procedural error that prejudiced its substantial right to rebut evidence when it denied petitioner's June 1, 2021 and June 8, 2021 requests to reopen the record at a later date, after the Open Record Period had concluded and the record closed on June 8, 2021, to submit a Habitat Management and Mitigation Plan (Mitigation Plan). In particular, petitioner argues that Lane Code (LC) 14.070(19) required the county to reopen the record after petitioner requested that it be reopened, to allow petitioner to rebut the letter. We first describe the proceedings before the board of commissioners and the evidence that was submitted during the Open Record Period before turning to petitioner's assignment of error.

As noted, at the conclusion of the May 4, 2021 public hearing, the board of commissioners left the record open, as follows:

- May 4 to May 18, 2021 Record Open for New Evidence and Argument (First Open Record Period)

- May 19 to June 1, 2021 Record Open for Rebuttal Evidence and Argument (Rebuttal Open Record Period)

- June 2, 2021 to June 8, 2021 Record Open for Applicant's Final Written Argument (Final Argument Period) *See* Record 926-27.

No party objected to the Open Record Period established by the board of commissioners at the conclusion of the May 4, 2021 hearing.

Prior to the May 4, 2021 hearing, ODFW submitted a letter to the county detailing potential impacts to deer and elk from the project (April ODFW Letter). Record 628-30. During the First Open Record Period, on May 18, 2021, an Oregon Department of Fish and Wildlife (ODFW) biologist submitted a letter (May ODFW Letter) with detailed comments on impacts to Big Game Range and a recommendation for further discussion between ODFW, petitioner, and the county of impacts to Big Game Range from displacement of deer and elk, mitigation for loss of habitat, and any impacts during reclamation of the property at the conclusion of mining activities. Record 625-27. We refer to those letters as the ODFW Letters.

Petitioner did not submit rebuttal evidence and argument during the Rebuttal Open Record Period. Rather, on June 1, 2021, petitioner submitted a letter into the record stating that petitioner would seek to reopen the evidentiary record at an unspecified later date to submit a Mitigation Plan. On June 8, 2021, during the Final Argument Period, petitioner submitted its final argument that

included a restatement of its intent to request that the record be reopened at an unspecified later date.[6]

At its August 3, 2021 meeting for deliberations, the board of commissioners deliberated on whether to reopen the record and voted to keep the record closed. As noted, at that meeting the board tentatively voted to deny the applications.

In its second assignment of error, petitioner argues that the county's procedure and its decision to leave the record closed to new evidence after June 3, 2021 violated LC 14.070(19), and prejudiced petitioner's substantial right to rebut the ODFW Letter. LC 14.070(19) provides, as relevant here:[7]

> "Re-opening the Record. When the hearing authority re-opens the record to admit new evidence, arguments, or testimony, the hearing authority must allow people who previously participated in the hearing to request the hearing record be re-opened, as necessary, to present evidence concerning the newly presented facts. Upon announcement by the hearing authority of their intention to take notice of such facts in its deliberations, any person may raise new issues which relate to the new evidence, arguments, testimony, or standards and criteria which apply to the matter at issue." (Boldface

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[6] On October 25, 2021, petitioner submitted a motion to reopen the record so that petitioner could submit a draft habitat mitigation and management plan, which was represented as being prepared in coordination with ODFW and required additional collaboration and specifics to finalize. Record 158.

[7] LC 14.100(1)(b)(iii) provides that "[a] LUBA remand hearing will be conducted in accordance with LC 14.070 except that where the procedures of this subsection are duplicative of or conflict with those procedures, the procedures of this subsection will apply."

omitted.)

Petitioner argues that LC 14.070(19) by its express terms required the county to reopen the record upon petitioner's request. Petitioner also argues, in the alternative, that the 14 days allowed by the Rebuttal Open Record Period was inadequate time to allow petitioner to rebut the ODFW Letters.

The county responds that LC 14.070(19) is not properly construed to require the county to reopen the record here. Here, the county maintains, the county did not *reopen* the record to allow additional evidence; rather, the record was left open at the conclusion of the May 4, 2021 hearing, as set out above. The county maintains that the Rebuttal Open Record Period of 14 days was sufficient to allow petitioner the opportunity to rebut the ODFW Letters, and points out that petitioner did not object to the Open Record Period established at the conclusion of the May 4, 2021 hearing. Finally, the county also points out that ODFW's concerns were initially presented in a letter submitted into the record dated April 29, 2021, prior to the May 4, 2021 hearing and prior to date of the May ODFW Letter. Record 625-630.

We review the county's decision to leave the record closed to determine whether the county improperly construed LC 14.070(19). ORS 197.835(9)(a)(D). The board of commissioners did not adopt a reviewable interpretation of LC 14.070(17) and (19).[8] "If a local government fails to interpret a provision of

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[8] LC 14.070(17) states in relevant part:

its * * * land use regulations, or if such interpretation is inadequate for review the board may make its own determination of whether the local government decision is correct." ORS 197.829(2). We conclude that LC 14.070(19) does not require the county to reopen the record in the circumstances presented here, where the county did not "reopen" the record, but rather left the record open at the conclusion of the evidentiary hearing for additional evidence and argument. Under petitioner's view, any party can request to reopen a record at any time until the final decision, and the county is required to reopen it. That view is not a persuasive interpretation of LC 14.070(19). At some point, the record must close, and the local government must make a decision based on the closed record. *See Rice v. City of Monmouth*, 53 Or LUBA 55, 60 (2006), *aff'd*, 211 Or App 250, 154 P3d 786 (2007) (under ORS 197.763, "there is no unlimited right to rebut rebuttal evidence.").

The second assignment of error is denied.

> "Continuances and Leaving the Record Open. If the hearing is an initial evidentiary hearing, prior to the conclusion of the hearing any participant may request an opportunity to present additional evidence or testimony regarding the application. The hearing authority must grant such request by continuing the public hearing in accordance with subsection (17)(a) below or leaving the record open for additional written evidence, arguments, or testimony in accordance with subsection (17)(b) below."

THIRD ASSIGNMENT OF ERROR

As explained above, OAR 660-023-0180(5)(b)(D) requires the county to identify conflicts with Big Game Range in the impact area. If conflicts with other Goal 5 resources in the impact area are identified, OAR 660-023-0180(5)(c) directs local governments to "determine reasonable and practicable measures that would minimize the conflicts identified under" OAR 660-023-0180(5)(b)(D). *See* n 3. OAR 660-023-0180(1)(g) defines "minimize a conflict" to mean:

> "[T]o reduce an identified conflict to a level that is no longer significant. For those types of conflicts addressed by local, state, or federal standards (such as the Department of Environmental Quality standards for noise and dust levels), to 'minimize a conflict' means to ensure conformance to the applicable standard."

If conflicts in the impact area cannot be minimized, the local government is required to determine the ESEE consequences of allowing, not allowing, or limiting mining at the site, and to determine, based on the ESEE analysis, whether to allow mining at the site. OAR 660-023-0180(5)(d). *See* n 4.

A. First Subassignment of Error

In the first subassignment of error, petitioner argues that the board of commissioners' decision is not supported by substantial evidence in the record. ORS 197.835(9)(a)(C). Substantial evidence is evidence that a reasonable person would rely on in making a decision. *Dodd v. Hood River County*, 317 Or 172, 179, 855 P2d 608 (1993) (citing *Younger v. City of Portland*, 305 Or 346, 351-52, 752 P2d 262 (1988)). We first describe petitioner's expert's evidence,

followed by the ODFW Letters' conclusions, and the board of commissioners' decision.

Petitioner's expert biologist evaluated conflicts with Big Game Range in the impact area. First, they recognized that no *habitat* within the impact area would be removed or modified. Record 2414 ("the impact area consists of three primary habitat types, open meadow/early seral, high canopy conifer forest with a diverse understory, and densely regenerated Douglas fir stands. * * * No habitat will be removed and/or modified within the impact area[.]"). That fact is not disputed.

Petitioner's expert also concluded that some deer and elk would be displaced and that the main cause of deer and elk displacement from Big Game Range would be noise from the mining operations. Petitioner's expert proposed noise mitigation measures in proposed Conditions 21 through 24 that petitioner's expert opined would decrease noise and minimize deer and elk displacement to an insignificant level. Conditions 21 through 24 proposed (1) implementation of the noise mitigation provisions described in a noise study report that would comply with DEQ noise standards; (2) utilization of berms, buffers or polyurethane screens to mitigate noise from crushing and screening equipment; (3) use of mufflers and radiator fan controls to reduce haul truck noise; (4) maintenance of a 20-foot high natural barrier on the east side of the quarry, and (5) at certain times use of an additional barrier or curtain system. Record 2406, 3534.

ODFW disagreed with petitioner's expert with respect to conflicts with deer in the impact area. The ODFW Letters opined that deer are less likely than elk to relocate outside of their home ranges and, we understand the ODFW Letters to say, consequently deer will not generally leave their home range based on noise from mining activities. The evidence in the record is that the 486-acre impact area serves as approximately 19 percent of a home range of approximately 2,500 acres for elk, and approximately 75 percent of a home range of approximately 640 acres for deer. Record 2402, 2405. The May ODFW Letter addressed the proposed noise mitigation measures, and agreed that the mitigation measures addressed displacement from noise impacts. Record 626-27 ("[t]he proposed Conditions of Approval (21-24) do not seem to address the issue of displacement *other than those impacts related to noise*.") (emphasis added). However, the May ODFW Letter also explained that "the elk population in this area spend the majority of their time on private lands in the greater Oakridge area." Record 627. The ODFW Letters evaluated "[t]he potential increase for wildlife damage associated with the mine and associated mining activity" as "both a wildlife resource and department staffing resource concern to address the damage complaints." Record 627.

Relying on the ODFW Letters, the board of commissioners determined that the proposed mining operation will conflict with Big Game Range in the impact area due to displacement conflicts. Specifically, the board of commissioners concluded that the proposed mining will conflict with Big Game Range in the

impact area by displacing elk from the impact area, and by causing loss of deer and elk habitat. The board of commissioners concluded that petitioner had failed to demonstrate that "reasonable and practicable measures," specifically proposed conditions of approval 21 through 24, would minimize displacement conflicts with Big Game Range within the impact area.[9]

Petitioner argues that the ODFW Letters are not evidence that a reasonable person would rely on for three reasons. First, petitioner points to the May ODFW Letter's statement that the proposed conditions of approval address displacement from noise, and argues that the board of commissioners' reliance on that letter is therefore unreasonable, since there is no other evidence in the record that conflicts *other than conflicts from noise* will cause displacement to occur. Second, petitioner points to portions of the ODFW Letters that indicate that ODFW evaluated displacement conflicts from mining activities *in the 107-acre*

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[9] The board of commissioners found, in relevant part:

> "The Board finds that the ODFW submissions demonstrate that mining activities would result in conflicts to Big Game and that the applicant's proposed conditions of approval are inadequate to sufficiently minimize significant conflicts to Big Game. Specifically, the Board finds that the measures proposed by the applicant, including Conditions of Approval 21-24, are insufficient to reduce the conflicts with Big Game habitat (specifically, the likely displacement of resident elk herds and loss of habitat to deer and elk) such that the conflicts are no longer significant, as required by OAR 660-023-0180. The Board further finds that the conflicts with Big Game will lead to impacts to private property located in their home range within the 1,500 impact area." Record 123.

mining area, which are not a permissible consideration under OAR 660-023-0180(5)(c) because conflicts are geographically limited to the impact area. Record 626. Because ODFW appears to have evaluated displacement conflicts from within the mining area, we understand petitioner to argue that the evidence is flawed and a reasonable person would not rely on it. *Setniker v. Polk County*, 63 Or LUBA 38, 71, *aff'd in part, rev'd in part, and rem'd*, 244 Or App 618, 260 P3d 800, *rev den* 351 Or 216, 262 P3d 402 (2011) (OAR 660-023-0180(5)(c) is concerned with identifying conflicts between mining and existing or approved uses within the impact area, not the issue of losing agricultural land to mining within the mining area itself).

Third, petitioner argues that the ODFW Letters evaluated displacement conflicts *outside* the impact area, which is not permissible under OAR 660-023-0180(5)(c), because the rule is geographically limited to conflicts within the 1,500-foot impact area. Petitioner argues that at best it is unclear how much weight ODFW placed on conflicts occurring outside of the impact area in concluding that conflicts could not be minimized. Petitioner argues that ambiguity means a reasonable person would not rely on the evidence.

Finally, petitioner also argues that the findings are inadequate to explain the conclusion that petitioner failed to establish that conflicts with Big Game Range would be minimized to an insignificant level, and that the county's decision must "inform [petitioner] of the steps necessary to gain approval of the application." Petition for Review 39 (quoting *OnTrack, Inc. v. City of Medford*,

37 Or LUBA 472, 477 (2000)) (remanding a decision denying a zone change from single-family residential to multi-family residential, where the city's findings did not include an interpretation of an applicable approval criterion that was adequate for our review, and where the city concluded that an intersection not adjacent to, and located some distance from, the subject property "serve[d] the property" within the meaning of the criterion).

As a preliminary matter, we reject petitioner's challenge to the adequacy of the findings on the basis that the county is required to adopt findings in support of its denial that inform petitioner of the steps necessary to gain approval. We have held in the context of permit decisions and limited land use decisions that the local government has an obligation to "inform the applicant either what steps are necessary to obtain approval or that it is unlikely that the application will be approved." *Bridge Street Partners v. City of Lafayette*, 56 Or LUBA 387, 394 (2008) (citing *Commonwealth Properties v. Washington County*, 35 Or App 387, 400, 582 P2d 1384 (1978)); *Montgomery v. City of Dunes City*, 60 Or LUBA 274, 282-83, *rev and rem on other grounds*, 236 Or App 194, 236 P3d 750 (2010). However, we have never held that where an applicant seeks to amend the comprehensive plan and zoning ordinance to allow mining, the local government is required to adopt findings in support of a denial that notify an applicant of the steps that would lead to approval. That is because the decision whether to approve or deny a comprehensive plan and zoning ordinance amendment to allow mining is a subjective decision that often requires engaging in an ESEE analysis that

balances various local interests to determine whether to allow mining. We decline to extend the holding in *Commonwealth Properties* and cases that rely on it to decisions to deny a comprehensive plan amendment for mining. The general requirement that findings must "(1) identify the relevant approval standards, (2) set out the facts which are believed and relied upon, and (3) explain how those facts lead to the decision on compliance with the approval standards" is all that is required in a decision denying an application for a comprehensive plan and zoning ordinance amendment to allow mining. *Heiller v. Josephine County*, 23 Or LUBA 551, 556 (1992).

Respondents respond to petitioner's substantial evidence challenge by arguing that the ODFW Letters are evidence the county could reasonably rely on to conclude that conflicts with Big Game Range in the impact area cannot be minimized. Intervenors respond that even if the ODFW Letters evaluated displacement conflicts from mining in the mining area and displacement conflicts outside of the impact area, it is undisputed that the letters evaluated conflicts with Big Game Range in the impact area, and any consideration of conflicts outside of the impact area is therefore harmless. Intervenors-Respondents' Brief 25.

In reviewing a local decision for substantial evidence, LUBA may not substitute its judgment for that of the local decision maker. Rather, LUBA must consider all the evidence to which it is directed and determine whether, based on that evidence, a reasonable local decision maker could reach the decision that it did. *Younger*, 305 Or at 358-60. The county is generally entitled to choose

between conflicting evidence, including conflicting expert evidence, as long as the evidence relied upon, viewed in light of the whole record, is substantial. *Dodd*, 317 Or at 179.

We agree with petitioner that the ODFW Letters are not evidence a reasonable person would rely on to conclude that conflicts from displacement of deer and elk due to noise from the mining operation cannot be minimized to an insignificant level. First, given the May ODFW Letter's statement that conditions 21 through 24 address displacement due to noise, that is not evidence a reasonable person would rely on to conclude that conflicts from noise cannot be minimized to an insignificant level. There is no other evidence in the record identified in the decision or by respondents to support the board of commissioners' conclusion that proposed conditions 21 through 24 are not sufficient to minimize conflicts from noise to an insignificant level.

We also agree with petitioner that the ODFW Letters are ambiguous regarding the extent to which ODFW's evaluation of conflicts is limited only to conflicts with Big Game Range in the impact area, as required by OAR 660-023-0180(5)(c). The April ODFW Letter states that "[t]he County's analysis may be limited to some distance surrounding the project area, understandably. However, ODFW's jurisdiction extends beyond that boundary." Record 629. The May ODFW Letter states that "The department is concerned that the conflict due to loss of habitat has not been adequately considered, and the analysis has been limited to only 1500 feet from the boundary of the mining area." Record 626. The

May ODFW Letter also discusses impacts to the city of Oakridge, located outside of the impact area, and to "private lands in the greater Oakridge area," and expresses concern that "[i]f elk are displaced from around the proposed project area, these animals will most likely move to these other private lands." Record 627. The location of the "other private lands" "in the greater Oakridge area" is not identified, and it is not clear whether those private lands are outside the impact area.

Finally, the May ODFW Letter discusses other impacts that are both speculative and indirectly related to the mining operation. Record 627 ("Depending on where elk are displaced, damage may occur. Damage can occur to agricultural lands, fences, and other features on property. The department will have to addresses any new damage issues resulting from displacement of big game, which can cause workload increases and result in additional lethal take of wildlife through the department's damage program."). Damage to agricultural lands, fences and other features on private property outside the impact area is not relevant, and additional workload increases and impacts to ODFW's damage program are similarly not relevant conflicts because they are not tied to the impact area.

Accordingly, we agree with petitioner that the county's decision that relies on the ODFW Letters is not supported by substantial evidence in the whole record, where the ODFW Letters (i) agree that displacement conflicts from noise are minimized through Conditions 21 through 24; and (ii) are ambiguous

regarding the extent of ODFW's consideration of (a) conflicts in areas not limited to the impact area, including conflicts caused by mining activities in the 107 acre mining area; (b) conflicts with Big Game Range outside the impact area but within "ODFW's jurisdiction,"; and (c) conflicts that are unrelated to the impact area at all. On remand, the county's analysis of conflicts with Big Game Range in the impact area must be limited to conflicts from displacement of deer and elk from the impact area due to noise from the mining operations, which is the only identified cause of displacement that is supported by the record.

The first subassignment of error is sustained.

B. Second Subassignment of Error

If conflicts cannot be minimized, the local government is required to determine the ESEE consequences of allowing, not allowing, or limiting mining at the site, and to determine, based on the ESEE analysis, whether to allow mining at the site. OAR 660-023-0180(5)(d). Based on its determination that conflicts with Big Game Range in the impact area could not be minimized to an insignificant level through the proposed conditions of approval, the board of commissioners evaluated the ESEE impacts, and concluded that the ESEE analysis supported denial of the applications. Record 119-130. In its second subassignment of error, petitioner argues that the board of commissioners' decision that the ESEE analysis favored denial of the applications is not supported by substantial evidence in the record and that its findings are inadequate.

Our resolution of the first subassignment of error will require the county to identify evidence in the record that supports its conclusion that conflicts from noise from the mining operation will cause displacement of deer and elk from Big Game Range, and that noise conflicts cannot be minimized to an insignificant level such that displacement will be minimized. OAR 660-023-0180(1)(g). If conflicts can be minimized to an insignificant level, then no ESEE analysis will occur. Accordingly, it is premature for us to address petitioner's second assignment of error that challenges the board of commissioners' ESEE analysis and conclusions.

We do not reach the second subassignment of error.

The third assignment of error is sustained, in part.

The county's decision is remanded.