

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

3
4 OLD HAZELDELL QUARRY, LLC,
5 *Petitioner,*

6
7 vs.

8
9 LANE COUNTY,
10 *Respondent,*

11
12 and

13
14 SAVE TV BUTTE, LINDA MCMAHON, TIM CAUGHLIN,
15 KEEGAN CAUGHLIN, JENNY CAUGHLIN,
16 KEVIN MATTHEWS, MICHAEL GARVIN,
17 PATRICIA BEARD, CASCADIA WILDLANDS,
18 and LANDWATCH LANE COUNTY.
19 *Intervenors-Respondents.*

20
21 LUBA No. 2021-102

22
23 FINAL OPINION
24 AND ORDER

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26 Appeal on remand from the Court of Appeals.

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28 Seth J. King represented petitioner.

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30 H. Andrew Clark represented respondent.

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32 Sean T. Malone represented intervenors-respondents.

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

36
37 AFFIRMED

02/21/2023

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

Petitioner appeals a board of county commissioners decision denying 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.

BACKGROUND

This matter is on remand from the Court of Appeals. Petitioner’s application for a comprehensive plan map and zoning map amendment and associated site plan approval to mine aggregate has a lengthy appellate history, and we will not summarize it again here. *See Save TV Butte v. Lane County*, 77 Or LUBA 22 (2018); *Save TV Butte v. Lane County*, 80 Or LUBA 422 (2019), *aff’d*, 301 Or App 853, 455 P3d 1051 (2020).

In our decision in *Old Hazeldell Quarry, LLC v. Lane County*, ___ Or LUBA ___ (LUBA No 2021-102, July 18, 2022), we denied the first and second assignments of error. We sustained the first subassignment of error under the

1 third assignment of error. We did not reach the second subassignment of error
2 under the third assignment of error.

3 In *Old Hazeldell Quarry, LLC v. Lane County*, 323 Or App 120 (2022),
4 the court reversed and remanded our decision regarding the first subassignment
5 of error under the third assignment of error. We now proceed to resolve the
6 second subassignment of error.

7 **THIRD ASSIGNMENT OF ERROR**

8 **A. First Subassignment of Error**

9 In resolving petitioner’s first subassignment of error under the third
10 assignment of error, we concluded that

11 “the county’s decision that relies on [letters in the record from an
12 Oregon Department of Fish and Wildlife (ODFW) biologist (the
13 ODFW Letters)] is not supported by substantial evidence in the
14 whole record, where the ODFW Letters (i) agree that displacement
15 conflicts from noise are minimized through Conditions 21 through
16 24; and (ii) are ambiguous regarding the extent of ODFW’s
17 consideration of (a) conflicts in areas not limited to the impact area,
18 including conflicts caused by mining activities in the 107 acre
19 mining area; (b) conflicts with Big Game Range outside the impact
20 area but within ‘ODFW’s jurisdiction,’; and (c) conflicts that are
21 unrelated to the impact area at all. On remand, the county’s analysis
22 of conflicts with Big Game Range in the impact area must be limited
23 to conflicts from displacement of deer and elk from the impact area
24 due to noise from the mining operations, which is the only identified
25 cause of displacement that is supported by the record.” ___ Or
26 LUBA at ___ (slip op at 29-30).

27 In its decision, the court concluded that we considered the ODFW Letters
28 “out of their necessary context” and, thus, incorrectly applied the substantial

1 evidence standard of review at ORS 197.835(9)(a)(C). 323 Or App at 132. For
2 the reasons explained in the court’s opinion, we conclude that the ODFW Letters
3 are evidence that a reasonable person would rely on to conclude that conflicts
4 with deer and elk could not be minimized to an insignificant level and that an
5 economic, social, environmental, and energy (ESEE) analysis was therefore
6 required.

7 The first subassignment of error is denied.

8 **B. Second Subassignment of Error**

9 In our decision, we explained:

10 “If conflicts cannot be minimized, the local government is required
11 to determine the ESEE consequences of allowing, not allowing, or
12 limiting mining at the site, and to determine, based on the ESEE
13 analysis, whether to allow mining at the site. OAR 660-023-
14 0180(5)(d). Based on its determination that conflicts with Big Game
15 Range in the impact area could not be minimized to an insignificant
16 level through the proposed conditions of approval, the board of
17 commissioners evaluated the ESEE impacts, and concluded that the
18 ESEE analysis supported denial of the applications. Record 119-
19 130. In its second subassignment of error, petitioner argues that the
20 board of commissioners’ decision that the ESEE analysis favored
21 denial of the applications is not supported by substantial evidence in
22 the record and that its findings are inadequate.”

23 We did not reach the second subassignment of error, explaining that

24 “[o]ur resolution of the first subassignment of error will require the
25 county to identify evidence in the record that supports its conclusion
26 that conflicts from noise from the mining operation will cause
27 displacement of deer and elk from Big Game Range, and that noise
28 conflicts cannot be minimized to an insignificant level such that
29 displacement will be minimized. OAR 660-023-0180(1)(g). If

1 conflicts can be minimized to an insignificant level, then no ESEE
2 analysis will occur. Accordingly, it is premature for us to address
3 petitioner's second assignment of error that challenges the board of
4 commissioners' ESEE analysis and conclusions."

5 We now resolve the second subassignment of error.

6 Petitioner first argues that the county's findings regarding "social"
7 consequences are inadequate and not supported by substantial evidence in the
8 record because they fail to assign sufficient value to job creation from the mine.
9 Intervenors-respondents respond, and we agree, that the findings adequately
10 consider the issue and explain why the likelihood of job creation did not require
11 a different ESEE conclusion. Petitioner also argues that the county's findings
12 regarding the environmental consequences of allowing the mine rely on what
13 petitioner characterizes as "deficient, unreliable" testimony in the ODFW Letters.
14 For the reasons explained above, we reject that argument. Petition for Review 42.

15 Finally, petitioner argues that the county's findings are inadequate to
16 explain why it weighed the ESEE factors the way that it did. After extensively
17 discussing the evidence and arguments, the board of commissioners concluded
18 that two of the ESEE factors, the energy and economic consequences, weighed
19 in favor of allowing the mine and that the two other factors, the environmental
20 and social consequences, weighed against allowing it. Record 119-30. The board
21 of commissioners concluded that the presence of the "unique Big Game resource"
22 tipped the balance towards not allowing the mine. Record 129-30. These findings
23 are more than adequate to explain the county's highly subjective decision to not
24 allow the mine.

- 1 The second subassignment of error is denied.
- 2 The third assignment of error is denied.
- 3 The county's decision is affirmed.