

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

JOHN BEATH and CORINNE KOOPOWITZ,  
*Petitioners,*

vs.

DOUGLAS COUNTY,  
*Respondent,*

and

CUYLER ZEIGLER, BARRY ZEIGLER,  
ARTIE SCHWEIZER, KYLE BARNES,  
and DREW BARNES,  
*Intervenors-Respondents.*

LUBA No. 2022-060

FINAL OPINION  
AND ORDER

Appeal from Douglas County.

Zack P. Mittge filed the petition for review and reply brief and argued on behalf of petitioners. Also on the briefs was Hutchinson Cox.

No appearance by Douglas County.

Stephen Mountainspring filed the intervenors-respondents' brief and argued on behalf of intervenors-respondents. Also on the brief was Dole Coalwell.

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

RUDD, Board Member, did not participate in the decision.

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REMANDED

03/22/2023

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

**NATURE OF THE DECISION**

Petitioners appeal a county decision approving comprehensive plan text amendments to add an approximately 49-acre site to the county's mineral resources inventory and allow mining at the site, and zone changes to add a Mineral Resources (MR) Overlay to the mining site and a Design Review (DR) Overlay to limit conflicting uses within a 1,500-foot impact area around the mining site.

**FACTS**

Intervenors-respondents (intervenors) applied for (1) comprehensive plan text amendments to add 49.11 acres (Mining Site) of a 553.11-acre property to the Douglas County Mineral Resources Inventory (MRI), which would permit mining of the site; and (2) zone changes to (a) apply the DR Overlay to limit conflicting uses within a 1,500-foot buffer area around the Mining Site, and (b) apply the MR Overlay to the Mining Site itself.

The subject property is approximately 553 acres, is designated Agriculture (AGG), Farm Forest Transitional (FFT), and Industrial (IN), and is zoned Exclusive Farm Use-Grazing (FG), Farm Forest (FF), Timberland Resource (TR), and Rural industrial (ME). The subject property is subject to the Peripheral Big Game Habitat Overlay, the Riparian Vegetation Overlay, and the Significant Wetland Overlay. The Mining Site is 49.11 acres and includes a 25-acre area that is included on the county's Statewide Planning Goal 5 (Natural Resources, Scenic

1 and Historic Areas, and Open Spaces) inventory of significant wetlands (Goal 5  
2 Wetlands). The Mining Site is located in the southern portion of the property on  
3 a portion zoned FG and FF. Properties zoned Agriculture and Woodlot (AW),  
4 Rural Residential – 5 acre (R5), and Rural Residential – 2 acre (RR) are located  
5 to the southeast of the proposed mining site and are developed with dwellings.  
6 Properties to the west of the Mining Site are zoned FG and are in farm use.

7 The planning commission held hearings on the applications and, at the  
8 conclusion, voted to approve the applications. The planning commission's  
9 decision incorporated the December 9, 2021, December 16, 2021, and January  
10 13, 2022 staff reports. Record 127.

11 Petitioners appealed the decision to the board of county commissioners,  
12 which held an on the record hearing on the appeal. At the conclusion, the board  
13 of commissioners voted to affirm the planning commission's decision and  
14 approve the applications. The board of commissioners' decision incorporated and  
15 adopted the planning commission's findings. Record 31. This appeal followed.

## 16 **INTRODUCTION**

17 The required planning process for adopting and amending regulations or  
18 comprehensive plans to protect Goal 5 resources, such as mineral and aggregate  
19 resource sites, is set out at OAR chapter 660, division 23. We briefly summarize  
20 relevant parts of that planning process below before turning to petitioners'  
21 assignments of error.

1       Goal 5 planning for significant mineral and aggregate resource sites begins  
2       with the “Inventory Process.” OAR 660-023-0030. The required Goal 5  
3       inventory process includes multiple steps and is set out in great detail at OAR  
4       660-023-0030. That inventory process concludes with a comprehensive plan list  
5       or inventory of “significant resource sites.” OAR 660-023-0030(5).

6       For mineral and aggregate resources, the required inventory process is set  
7       out in even more detail at OAR 660-023-0180. OAR 660-023-0180(3) and (4)  
8       set out quantity and quality requirements for the aggregate resource that must be  
9       met to qualify as a “significant” aggregate resource site. Those requirements vary  
10      depending on location in the state and the quality of the overlying soil.

11      After a resource qualifies for inclusion on the inventory, the local  
12      government must identify predicted conflicts from mining the resource with  
13      existing and approved land uses within an impact area, and other predicted  
14      conflicts set out in OAR 660-023-0180(5)(b)(A) – (F). For identified conflicts  
15      that are significant, the local government must seek to minimize the conflicts to  
16      an insignificant level. OAR 660-023-1080(5)(c). If that cannot be done, then the  
17      local government must evaluate the economic, environmental, social, and energy  
18      (ESEE) consequences of allowing mining of the resource, limiting mining of the  
19      resource, or not allowing mining of the resource. OAR 660-023-0180(5)(d); *see*  
20      OAR 660-023-0040 (describing the ESEE process). The local government must  
21      then determine whether to allow mining, limited mining, or not allow mining. *Id.*

22      With that general overview, we turn to petitioners’ assignments of error.

1   **FIRST ASSIGNMENT OF ERROR**

2           ORS 197.835(9)(a)(B) provides that the Board shall reverse or remand the  
3   land use decision under review if the Board finds that the local government  
4   “[f]ailed to follow the procedures applicable to the matter before it in a manner  
5   that prejudiced the substantial rights of the petitioner[.]” Petitioners’ first  
6   assignment of error is that the planning commission committed a procedural error  
7   in accepting new evidence as part of the applicants’ final rebuttal.

8           At the conclusion of the December 16, 2021 planning commission hearing,  
9   the planning commission left the record open for seven days for submission of  
10   new evidence, and then allowed intervenors, the applicants, until January 3, 2022  
11   to submit final argument. On that date, intervenors submitted a 37-page document  
12   (Final Submittal). Record 142-179. On January 19, 2022, petitioners moved to  
13   strike the Final Submittal from the planning commission’s record, alleging that  
14   the document contained new evidence, including a new site plan. On January 20,  
15   2022, the planning commission deliberated, considered the Final Submittal, and  
16   voted to approve the application. Petitioners raised the planning commission’s  
17   acceptance of new evidence as one of the grounds for their appeal to the board of  
18   commissioners. Record 93.

19           Intervenors dispute that the Final Submittal included new evidence and  
20   argue that the Final Submittal included only evidence that was previously  
21   included in the record. Intervenors also respond that petitioners have failed to

1 allege or establish that their substantial rights were prejudiced by the Final  
2 Submittal.

3 We agree with intervenors that petitioners have failed to allege or establish  
4 that their substantial rights were prejudiced by the planning commission's  
5 acceptance of the Final Submittal. Even assuming for purposes of this opinion  
6 only that the Final Submittal included new evidence, petitioners must establish  
7 that the planning commission's acceptance of that evidence prejudiced their  
8 substantial rights. Petitioners do not attempt to do so. Accordingly, their  
9 argument provides no basis for reversal or remand.

10 The first assignment of error is denied.

## 11 **SECOND ASSIGNMENT OF ERROR**

12 OAR 660-023-0180(3) provides that "[a]n aggregate resource site shall be  
13 considered significant if adequate information regarding the quantity, quality,  
14 and location of the resource demonstrates that the site meets" any one of several  
15 criteria set out, as relevant here, in OAR 660-023-0180(3)(a) – (c):

16 "(a) A representative set of samples of aggregate material in the  
17 deposit on the site meets applicable Oregon Department of  
18 Transportation (ODOT) specifications for base rock for air  
19 degradation, abrasion, and soundness, and the estimated  
20 amount of material is more than 2,000,000 tons in the  
21 Willamette Valley, or more than 500,000 tons outside the  
22 Willamette Valley;

23 "(b) The material meets local government standards establishing a  
24 lower threshold for significance than subsection (a) of this  
25 section; or

1       “(c) The aggregate site was on an inventory of significant  
2       aggregate sites in an acknowledged plan on September 1,  
3       1996.”

4   This standard requires an applicant to provide adequate information to  
5   demonstrate that “a representative set of samples” of aggregate material on the  
6   site meet the applicable ODOT quality standards for base rock, and that there is  
7   an estimated amount of material that is more than the 500,000-ton threshold  
8   established by the rule.<sup>1</sup>

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<sup>1</sup> OAR 660-023-0180(8) in turn provides guidance regarding when an application contains “adequate information” within the meaning of OAR 660-023-0180(3):

“An application for a PAPA concerning a significant aggregate site following sections (3) and (5) of this rule shall be adequate if it includes:

“(a) Information regarding quantity, quality, and location sufficient to determine whether the standards and conditions in section (3) of this rule are satisfied;

“(b) A conceptual site reclamation plan;

“\* \* \* \* \*

“(c) A traffic impact assessment within one mile of the entrance to the mining area pursuant to section (5)(b)(B) of this rule;

“(d) Proposals to minimize any conflicts with existing uses preliminarily identified by the applicant within a 1,500 foot impact area; and

“(e) A site plan indicating the location, hours of operation, and other pertinent information for all proposed mining and associated uses.”



1       The county determined that intervenors submitted adequate information to  
2 demonstrate that the proposed quarry site satisfies OAR 660-023-0180(3)(a) –  
3 (c).<sup>2</sup> Record 113-14. In their second assignment of error, petitioners argue that  
4 intervenors did not provide adequate information regarding the location of the  
5 aggregate resource, the quantity of the resource, or the quality of the resource.

6       **A.     Location**

7       Petitioners first argue that the county’s conclusion, that OAR 660-023-  
8 0180(3) was met regarding the location of the resource, is not supported by  
9 substantial evidence in the record. The planning commission’s findings, which  
10 the board of county commissioners adopted, relied on intervenors’ application  
11 materials, a December 9, 2021 staff report, a December 16, 2021 supplemental  
12 staff report, and a second supplemental staff report dated January 13, 2022.  
13 Petitioners argue that intervenors’ application materials do not identify the  
14 location of the resource within the Mining Site, but instead identify the location  
15 of the entire 49-acre Mining Site. Intervenors respond that Record 1711, 1647,  
16 1642, and 1535-36 show the location of the aggregate resource on the 49-acre  
17 portion of the subject property proposed for mining activity.

18       We agree with petitioners. The Goal 5 “inventory” of aggregate “resource  
19 sites” is to include the “‘resource site’ or ‘site,’” which “is a particular area where

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<sup>2</sup> We understand the county to have concluded that the aggregate resource site satisfies subsection (a).

resources are located.” OAR 660-023-0010; *Save TV Butte v. Lane County*, 77 Or LUBA 22, 28-29 (2018). We have reviewed the cited record pages, and nothing on those record pages identifies the location of the aggregate resource within the Mining Site. Rather, those record pages include depictions of the entire 49.11-acre Mining Site, which includes a wash plant, a settling pond, scales, and roads. *See, e.g.*, Record 1647. The staff reports that the planning commission and the board of commissioners incorporated as findings also do not identify the location of the aggregate resource but describes the entire Mining Site. Record 1542. We agree with petitioners that intervenors did not provide adequate information regarding the location of the aggregate resource and that the county’s decision regarding the location of the resource is not supported by substantial evidence in the whole record. ORS 197.835(9)(a)(C).

#### **B. Quality**

OAR 660-023-0180(3)(a) provides that one way an applicant can demonstrate the quality of the aggregate resource is by submitting adequate information that “[a] representative set of samples of aggregate material in the deposit on the site meets applicable Oregon Department of Transportation (ODOT) specifications for base rock for air degradation, abrasion, and soundness[.]” Intervenors submitted the results from a single sample of gravel taken in December 2020 to the Oregon Department of Transportation (ODOT) materials laboratory for testing for quality. Record 1637, 1718, 1842. It is undisputed that ODOT concluded that sample met ODOT quality specifications.

1 Record 1637. The county found “that the quality information submitted by the  
2 applicant is sufficient to conclusively determine that the random samples of the  
3 proposed quarry material meet or exceed applicable ODOT specifications for  
4 base rock for air degradation, abrasion, and soundness.” Record 114.

5 Petitioners argue that the county misconstrued OAR 660-023-0180(3)(a)  
6 by concluding that a single sample constitutes “[a] representative set of samples  
7 of aggregate material in the deposit.” Relatedly, petitioners argue that the  
8 county’s conclusion that intervenors provided adequate information regarding  
9 the quality of the resource is not supported by adequate findings or substantial  
10 evidence. Petitioners argue that a single sample of gravel is inadequate.

11 Intervenors do not dispute that the ODOT lab report is based on a single  
12 sample from one location within the mining area. Instead, intervenors respond  
13 that “sets may be empty or include but one member” and observes that the single  
14 sample contained multiple pieces of gravel. Intervenors-Respondents’ Brief 6.  
15 Intervenors argue that the rule does not demand multiple samples. *Id.*

16 The parties’ dispute requires us to interpret OAR 660-023-0180(3)(a).  
17 When interpreting an administrative rule, we consider the text of the rule in its  
18 regulatory and statutory context. *Noble v. Dept. of Fish and Wildlife*, 355 Or 435,  
19 448, 326 P3d 589 (2014); *State v. Gaines*, 346 Or 160, 171-72, 206 P3d 1042  
20 (2009); *PGE v. Bureau of Labor and Industries*, 317 Or 606, 610-12, 859 P2d  
21 1143 (1993).

1 OAR 660-023-0180(3)(a) requires “[a] representative set of samples of  
2 aggregate material in the deposit.” “Set,” used as a noun, means “a number of  
3 things naturally connected by location.” *Webster’s Third New Int’l Dictionary*  
4 2078 (unabridged ed 2002). “Sample” used as a noun, means “a representative  
5 portion of a whole : a small segment or quantity taken as evidence of the quality  
6 or character of the entire group or lot.” *Webster’s* at 2008. The rule requires a set  
7 of samples, meaning multiple samples. We agree with petitioners that a single  
8 sample, even if it contains multiple pieces of aggregate material, does not  
9 constitute a “set of samples.” OAR 660-023-0180(3)(a).

10 “Representative” means “serving as a characteristic example[.]” *Webster’s*  
11 at 1926. The term “representative” in OAR 660-023-0180(3)(a) refers to  
12 “aggregate material in the deposit.” The purpose of that provision is to provide  
13 adequate information regarding the quality of the deposit. “Deposit” means  
14 “something laid, placed, or thrown down; *esp[ially]* : matter deposited by some  
15 natural process \* \* \* : a natural accumulation.” *Webster’s* at 605. The term  
16 “deposit” is also used in OAR 660-023-0180(1)(l), which provides: “‘Thickness  
17 of the aggregate layer’ means the depth of the water-lain *deposit* of sand, stones,  
18 and pebbles of sand-sized fraction or larger, minus the depth of the topsoil and  
19 nonaggregate overburden.” (Emphasis added); *see also* OAR 660-023-  
20 0180(1)(a) (“‘Aggregate resources’ are naturally occurring concentrations of  
21 stone, rock, sand gravel, decomposed granite, limestone, pumice, cinders, and  
22 other naturally occurring solid materials commonly used in road building or other

1 construction.”). We understand the term “deposit” in OAR 660-023-0180(3)(a)  
2 to mean a naturally occurring accumulation or concentration of aggregate  
3 material. A single sample is insufficient to provide adequate information  
4 regarding the quality of the deposit. We also agree with petitioners that without  
5 adequate information identifying the location of the deposit, the county has no  
6 basis to conclude that a single sample taken somewhere in the mining site area is  
7 “representative” of “the deposit.”

8 We agree with petitioners that the county’s decision that intervenors  
9 provided adequate information regarding that the quality of the resource  
10 misconstrues OAR 660-023-0180(3)(a) and is not supported by adequate findings  
11 or substantial evidence in the whole record.

### 12 **C. Quantity**

13 OAR 660-023-0180(3)(a) requires that for an aggregate site outside the  
14 Willamette Valley to be significant, the applicant must submit adequate  
15 information that “the estimated amount of material is more \* \* \* than 500,000  
16 tons[.]” In order to demonstrate the estimated amount of material, intervenors  
17 submitted estimates of material based on estimates of “rock” for the “Glenbrook”  
18 project that were prepared in 2006 by a consultant for a different mining  
19 company, Knife River. Record 1718; 1742-45. Petitioners argue that the county’s  
20 decision that the estimated amount of material is more than 500,000 tons is not  
21 supported by substantial evidence in the record, because the Knife River

1 estimates were based on large areas outside of the Mining Site instead of only the  
2 49.11-acre Mining Site. Record 1742; First Supplemental Record 33.

3 Intervenor's do not respond to petitioners' argument that the Knife River  
4 estimates of the amount of material were based on areas outside of the 49.11-acre  
5 Mining Site. Accordingly, we agree with petitioners that the county's decision  
6 that intervenors provided adequate information to demonstrate that the estimated  
7 amount of material is more than 500,000 tons is not supported by substantial  
8 evidence in the record.

9 The second assignment of error is sustained.

### 10 **THIRD ASSIGNMENT OF ERROR**

11 OAR 660-023-0180(5) sets out the process that local governments must  
12 follow in deciding whether mining is permitted at a significant mineral or  
13 aggregate site. OAR 660-023-0180(5)(a) requires the local government to  
14 "determine an impact area for the purpose of identifying conflicts with proposed  
15 mining and processing activities." The default "impact area" is limited in size to  
16 1,500 feet from the boundaries of the mining area. *Id.* After establishing the  
17 impact area, OAR 660-023-0180(5)(b) requires the local government to identify  
18 existing or approved uses in that impact area that may conflict with mining, and  
19 to specify the predicted conflicts.

20 Petitioners' third assignment of error argues that the county's identification  
21 of uses within the impact area and its description of the predicted conflicts from  
22 mining with those uses improperly construes OAR 660-023-0180(5)(b), that it is

1 not supported by substantial evidence in the record, and that the findings are  
2 inadequate to explain its decision.

3 **A. Uses Within the Impact Area**

4 Petitioners first argue that the county failed to identify all existing uses  
5 within the impact area boundary, because the county failed to identify petitioners'  
6 existing residential use of their dwelling or agricultural uses on Wilcox farm,  
7 adjacent to the Mining Site to the west, both of which petitioners argue are  
8 located within the 1,500-foot impact area. Petition for Review 21-22 (citing  
9 Record 210, 218, and 1576 regarding petitioners' home and Record 1514 and  
10 1710 referencing Wilcox farm); Reply Brief 2 (citing Record 1820, 1838-39).  
11 We understand intervenors to dispute that petitioners' residence and Wilcox farm  
12 are located inside the 1,500-foot impact area. Response Brief 8 (citing Record  
13 1761). We have reviewed the record pages cited by petitioners and intervenors,  
14 and although we cannot be entirely certain from any of the cited materials, it  
15 appears to us more likely than not that petitioners' residence and at least some  
16 portion of the Wilcox farm are located within the 1,500-foot impact area. Record  
17 1838-39. Accordingly, because remand is required for other reasons, on remand  
18 the county should consider and determine whether petitioners' residence and any  
19 portion of the Wilcox farm are located within the impact area boundary, as  
20 required by OAR 660-023-0180(5)(b).

21 **B. Predicted Conflicts**

22 As relevant here, OAR 660-023-0180(5)(b) provides that

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

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

14 “\* \* \* \* \*

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

19 “(E) Conflicts with agricultural practices[.]”

20 In another part of the third assignment of error, petitioners argue that the county  
21 failed to adequately consider the predicted conflicts with identified uses in the  
22 impact area due to noise, dust, and discharge of contaminated water.

23 **1. Conflicts Due to Noise, Dust, and Other Discharges - OAR**  
24 **660-023-0180(5)(b)(A)**

25 Petitioners argue that the county’s analysis of conflicts from noise from  
26 mining operations, which rely on intervenors’ application materials, is deficient  
27 because the application materials fail to include a quantitative analysis of the  
28 noise impacts. Petitioners point out that no noise assessment is included in the  
29 record. Petition for Review 24, n 1. Petitioners also point out that intervenors’



1 analysis of noise was limited to conflicts from noise generated by the wash plant  
2 to be located in the northeast corner of the Mining Site and it did not consider  
3 noise from excavation and hauling activities on the Mining Site.

4 Petitioners next argue that the county's description of conflicts from dust  
5 is limited to dust from the wash plant and haul road and does not describe  
6 conflicts from other dust-generating activities such as excavation, loading and  
7 unloading of materials, and erosion from wind during inactive periods. Finally,  
8 petitioners also argue that the county failed to adequately consider "other  
9 discharges," such as particulate matter discharged into the air and contaminated  
10 water discharged into the surface and groundwater in the surrounding area of the  
11 Mining Site. OAR 660-023-0180(5)(b)(A).

12 Intervenors respond that the rule requires the county to identify predicted  
13 conflicts, but does not require the county to resolve any conflicts at this stage.  
14 While intervenors are correct as far as it goes, the rule requires the county to  
15 adequately identify predicted conflicts. An identification of predicted conflicts  
16 that considers conflicts due to noise and dust that are generated only from one of  
17 many mining activities on the property, and that fails to consider conflicts from  
18 other discharges such as particulate matter and water, is not sufficient to satisfy  
19 the rule's requirement to identify predicted conflicts for purposes of the rule.  
20 Accordingly, we agree with petitioners that the county's identification of  
21 predicted conflicts from mining under OAR 660-023-0180(5)(b)(A) is  
22 incomplete, where it does not identify predicted conflicts from all activities on

1 the Mining Site. It is also incomplete where the county failed to identify, at the  
2 outset, two existing uses that are apparently within the impact area.

3 **2. Other Goal 5 Resources - OAR 660-023-0180(5)(b)(D)**

4 As noted, the 49-acre Mining Site includes a 25-acre area that is included  
5 on the county's inventory of significant wetlands. Record 1553-56. The proposed  
6 mining activity will destroy the wetland because intervenors propose to mine  
7 aggregate directly out of the wetland. Record 1555. The county found that the  
8 predicted conflict with the wetland will be that the wetland will be lost. Record  
9 115-16, 1562. Petitioners argue that the county's identification of predicted  
10 conflicts from mining fails to address all of the conflicts that will arise from  
11 mining and the destruction of the wetland, including contamination of the surface  
12 water of the wetlands, temperature changes in shallow groundwater, and post-  
13 mining infiltration of surface water into groundwater. Petitioners also argue that  
14 mining the wetland will impact the plant life within the wetland and that the  
15 county failed to specify that impact as a predicted conflict.

16 Intervenors respond that the county found, in essence, that the predicted  
17 conflicts from the mining activity will be to destroy the wetland, and that no other  
18 predicted conflicts will occur. Intervenors-Respondents' Brief 11 (citing Record  
19 1562). We agree with petitioners that the county failed to adequately identify the  
20 predicted conflicts with that Goal 5 resource from the proposed mining  
21 operations. Petitioners identify conflicts that are related to but differ from merely

1 destroying the wetland, including surface and groundwater contamination, and  
2 the county's findings do not address those conflicts at all.

3 **3. Agricultural Practices - OAR 660-023-0180(5)(b)(E)**

4 Petitioners also argue that the county's findings are inadequate to identify  
5 conflicts from mining with agricultural practices that are occurring within the  
6 impact area. Petitioners point to incorporated findings at Record 1556-57:

7 "The types of farm operations being conducted on parcels within the  
8 impact area appear to be limited to livestock grazing and seasonal  
9 hay cropping, together with existing forestry and mining operations.  
10 The applicant asserts that most commercial aggregate mining  
11 operations conducted in central Douglas County are located on sites  
12 which are proximate to lands used for such agricultural activities  
13 with no evidence to suggest incompatibility or that special measures  
14 to minimize potential conflicts are warranted."

15 Petitioners argue that the findings are inadequate because they rely on other  
16 mining operations "conducted in central Douglas County" to conclude that there  
17 is "no evidence to suggest incompatibility or that special measures to minimize  
18 potential conflicts are warranted." *Id.* Petitioners argue that OAR 660-023-  
19 0180(5)(b)(E) requires the county to identify predicted conflicts from the specific  
20 mining activity proposed by intervenors with agricultural practices occurring  
21 within the impact area. Intervenors respond that the findings conclude that  
22 existing mining operations occurring on the north half of the subject 550-acre  
23 property already co-exist, without conflict, with the identified agricultural  
24 practices occurring within the impact area for the proposed mining operation.

1       We agree with petitioners that the findings at Record 1556-57, which are  
2       the only findings that the parties direct us to, are inadequate because they fail to  
3       properly evaluate what the rule requires, which is an identification of predicted  
4       conflicts from the proposed mining operation with agricultural practices  
5       occurring within the impact area.

6       The third assignment of error is sustained.

#### 7       **FOURTH ASSIGNMENT OF ERROR**

8       Once conflicting uses in the impact area have been identified, OAR 660-  
9       023-0180(5)(c) directs local governments to “determine reasonable and  
10      practicable measures that would minimize the conflicts identified under” OAR  
11      660-023-0180(5)(b).<sup>3</sup> OAR 660-023-0180(1)(g) provides the following  
12      definition of what it means to “[m]inimize a conflict,” within the meaning of ORS  
13      chapter 660, division 23, section 180:

14      “‘Minimize a conflict’ means to reduce an identified conflict to a

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<sup>3</sup> The text of OAR 660-023-0180(5)(c) is set out below:

“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.”

1 level that is no longer significant. For those types of conflicts  
2 addressed by local, state, or federal standards (such as the  
3 Department of Environmental Quality standards for noise and dust  
4 levels), to 'minimize a conflict' means to ensure conformance to the  
5 applicable standard."

6 The county found that all predicted conflicts it identified could be minimized  
7 with conditions, except that the conflict with the Goal 5 Wetland could not be  
8 minimized. Record 113-117. As we explain in more detail below under the fifth  
9 assignment of error, the county is required to conduct an ESEE analysis for all  
10 conflicts that cannot be minimized by reasonable and practicable measures. OAR  
11 660-023-0180(5)(d).

12 Petitioners' fourth assignment of error is related to and somewhat  
13 derivative of their third assignment of error. Petitioners argue that the county's  
14 errors in initially failing to identify all existing uses within the impact area, and  
15 then failing to identify (1) predicted conflicts from noise, dust and other  
16 discharges from all of the mining activities with existing and approved uses that  
17 are sensitive to those discharges, (2) predicted conflicts from the mining  
18 operation with the Goal 5 Wetland, and (3) predicted conflicts from the mining  
19 operation with agricultural practices, render the county's findings, that all  
20 predicted conflicts have been minimized, inadequate.

21 Intervenors, unsurprisingly, dispute petitioners' contentions. We agree  
22 with petitioners' general premise that the county's findings that all conflicts  
23 except the conflict with the Goal 5 Wetland have been minimized are inadequate  
24 where the county made early analytical errors in failing to identify all existing

1 and approved uses within the impact area, and then failing to identify all predicted  
2 conflicts with all aspects of the mining operation. Because on remand the county  
3 will need to first identify all existing uses within the impact area and then identify  
4 all predicted conflicts from all aspects of the mining operation before it attempts  
5 to determine whether those conflicts can be minimized, it would be premature for  
6 us to reach the fourth assignment of error.

7 We do not reach the fourth assignment of error.

#### 8 **FIFTH ASSIGNMENT OF ERROR**

9 For conflicts that cannot be minimized, OAR 660-023-0180(5)(d) requires  
10 the county to “determine the ESEE consequences of either allowing, limiting, or  
11 not allowing mining at the site.”<sup>4</sup> Petitioners’ fifth assignment of error is also  
12 related to and somewhat dependent on their third assignment of error. In their  
13 fifth assignment of error, petitioners argue that the county’s ESEE analysis is  
14 inadequate because it fails to evaluate the ESEE consequences of allowing,

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<sup>4</sup> OAR 660-023-0180(5)(d) further provides that:

“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.”

1 limiting or not allowing the mining on (1) other conflicts with existing uses and  
2 agricultural practice that are described in the third assignment of error, and (2)  
3 other conflicts with the Goal 5 Wetland described in the third assignment of error,  
4 including surface and groundwater contamination.

5 Intervenor respond, initially, that petitioners failed to exhaust their  
6 remedies by failing to specify the issues raised in the fifth assignment of error in  
7 their local appeal statement.<sup>5</sup> In the petition for review, petitioners cite Record  
8 94 and Record 1517-18 for where the issues raised in the fifth assignment of error  
9 were raised below. Petition for Review 40-41. In the reply brief, petitioners  
10 respond to intervenors' waiver argument by citing Record 70-74, 76, and 94-95.  
11 We agree with petitioners that the issues raised in the fifth assignment of error  
12 were raised for purposes of exhaustion waiver at Record 94.<sup>6</sup>

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<sup>5</sup> ORS 197.825(2)(a) provides that LUBA's jurisdiction "[i]s limited to those cases in which the petitioner has exhausted all remedies available by right before petitioning the board for review[.]" In *Miles v. City of Florence*, 190 Or App 500, 79 P3d 382 (2003), *rev den*, 336 Or 615 (2004), the Court of Appeals concluded that, when the local appeal ordinance requires an appealing party to specify the issues for appeal, and the local ordinance expressly or impliedly limits the local appeal body to the issues so specified, the local appeal body's review is generally limited to the specified issues. 190 Or App at 509-10. We refer to this type of waiver as exhaustion waiver.

<sup>6</sup> Record 94 includes the following statements specifying the grounds for appeal:

"M. The Planning Commission's ESEE analysis does not address all significant unmitigated conflicts and ignores health impacts,

1        On the merits, intervenors do not respond to petitioners' argument that the  
2    ESEE analysis is inadequate because it fails to evaluate other conflicts with  
3    existing uses and agricultural practices in the impact area that are identified and  
4    described in the third assignment of error. Accordingly, we agree with petitioners  
5    that the county's ESEE analysis is incomplete where the county failed to identify  
6    other conflicts with existing uses and agricultural practices in the impact area and  
7    determine whether those conflicts can be minimized.

8        Intervenors also respond that the county's ESEE analysis is adequate to  
9    evaluate the ESEE consequences on the Goal 5 Wetland of fully allowing the  
10   mining, limiting the mining, or not allowing mining of the resource. Record  
11   1557-65 is the portion of the incorporated Staff Report that contains the county's  
12   ESEE analysis. The county's decision is to fully allow mining and not protect the  
13   Goal 5 Wetland. If the only "predicted conflict" under OAR 660-023-  
14   0180(5)(b)(D) was that the wetland will be lost, we might agree with intervenors  
15   that the county's ESEE analysis is adequate to evaluate the ESEE consequences  
16   of fully allowing the mining. However, as we explained in the third assignment  
17   of error, petitioners have identified other conflicts that could result from mining  
18   in the Goal 5 Wetland, including contamination of the surface water of the

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water quality and quantity impacts, impacts to drinking water, and  
impacts to agriculture.

"N. The Planning Commission fails to properly conduct the ESEE  
analysis with regard to the Goal 5 wetlands to be destroyed under  
the application."



1 wetlands, temperature changes in shallow groundwater, and post-mining  
2 infiltration of surface water into groundwater. Accordingly, where the county's  
3 decision does not address whether those conflicts are "predicted conflicts"  
4 pursuant to OAR 660-023-0180(5)(b)(D) and if so, whether those conflicts can  
5 be minimized pursuant to OAR 660-023-0180(5)(c), the county's ESEE analysis  
6 and determination to fully allow mining is both premature, and incomplete.

7 The fifth assignment of error is sustained.

8 The county's decision is remanded.