

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

OREGON DEPARTMENT OF FISH AND WILDLIFE,  
*Petitioner,*

vs.

JACKSON COUNTY,  
*Respondent,*

and

FREEL & ASSOCIATES, LLC,  
*Intervenor-Respondent.*

LUBA No. 2025-037

FINAL OPINION  
AND ORDER

Appeal from Jackson County.

Erin L. Donald filed the petition for review and reply brief and argued on behalf of petitioner. Also on the brief was Dan Rayfield, Attorney General.

No appearance by Jackson County.

Garrett K. West filed the intervenor-respondent's brief and argued on behalf of intervenor-respondent. Also on the brief was O'Connor West, LLC.

WILSON, Board Member; ZAMUDIO, Board Chair; BASSHAM, Board Member, participated in the decision.

REMANDED

11/06/2025

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

**NATURE OF THE DECISION**

Petitioner appeals a county decision again approving, on remand from LUBA, a post acknowledgment plan amendment (PAPA) that changes the comprehensive plan designation from Agriculture to Aggregate Resource and changes the zoning map designation from Exclusive Farm Use (EFU) to Aggregate Removal (AR) for 435 acres and adds 324 acres to the county's inventory of significant aggregate resources.

**MOTION TO STRIKE**

Intervenor-respondent (intervenor) moves to strike petitioner's fourth assignment of error, which challenges the county's economic, social, environmental, and energy (ESEE) analysis.

OAR 661-010-0030(4) sets out the requirements for the contents of a petition for review. OAR 661-010-0030(4)(d) requires that each assignment of error in the petition for review, among other things, "demonstrate that the issue raised in the assignment of error was preserved during the proceedings below[,]" or state "why preservation is not required." Although the petition for review contains preservation of error sections for the first three assignments of error, it does not contain anything regarding preservation of error for the fourth assignment of error. Petitioner explains in its reply brief that it inadvertently omitted the preservation statement, and petitioner supplies citations to the record where it argues the issue was preserved. According to petitioner, the failure to

1 provide the preservation of error citation in the petition for review is merely a  
2 technical error which did not affect intervenor's substantial rights.<sup>1</sup>

3 Intervenor argues that the failure to comply with OAR 661-010-0030(4)(d)  
4 is not a mere technical error. Intervenor cites *H2D2 Properties, LLC v. Deschutes*  
5 *County*, 80 Or LUBA 528, 532-33 (2019), for the proposition that by failing to  
6 identify where the issue was preserved, petitioner impermissibly shifts the burden  
7 onto intervenor to scour the record to guess whether and where the issue was  
8 raised, and therefore it is not a technical violation.

9 The present case is more similar to *Nehmzow v. Deschutes County*, 81 Or  
10 LUBA 571 (2020), *aff'd*, 308 Or App 533, 479 P3d 340 (2021). In *Nehmzow*, we  
11 held that we will not deny an assignment of error based on an inadequate  
12 preservation statement where: (1) the respondent does not contend that issues  
13 were not raised during the proceedings below, but only to the adequacy of the

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<sup>1</sup> OAR 661-010-0005 provides:

“These rules are intended to promote the speediest practicable review of land use decisions and limited land use decisions, in accordance with ORS 197.805-197.855, while affording all interested persons reasonable notice and opportunity to intervene, reasonable time to prepare and submit their cases, and a full and fair hearing. The rules shall be interpreted to carry out these objectives and to promote justice. Technical violations not affecting the substantial rights of parties shall not interfere with the review of a land use decision or limited land use decision. Failure to comply with the time limit for filing a notice of intent to appeal under OAR 661-010-0015(1) or a petition for review under OAR 661-010-0030(1) is not a technical violation.”



1 preservation statement; (2) a reply brief provides more focused citations to places  
2 where an issue was raised below; and (3) it is evident from the challenged  
3 decision itself that the issues raised on appeal at LUBA were central to the local  
4 proceedings and the local government's decision responds to those issues. *Id.* at  
5 578-79.

6 In the present case, intervenor does not argue that the issue was not raised  
7 below, and the issue was clearly addressed in the county's decision. Petitioner  
8 raised the issue in its only submission below, as its nine-page submission has a  
9 heading labeled "Deficiencies in ESEE Analysis." Record 119-20. The county  
10 clearly addressed the issue in its decision with findings. Record 38-43. Under  
11 these circumstances, the failure to provide a preservation citation was a technical  
12 error.

13 Intervenor's motion to strike the fourth assignment of error is denied.

#### 14 **BACKGROUND**

15 The subject property is approximately 1,343 acres located in northern  
16 Jackson County, to the east of Highway 62 and north of Butte Falls Highway  
17 between the cities of Eagle Point and Shady Cove. The property has an existing  
18 quarry. The property is not within an urban growth boundary and was split-zoned  
19 AR and EFU in the early 2000s with 155 acres as AR. The site holds more than  
20 500,000 tons of high-quality aggregate, which is a Statewide Planning Goal 5  
21 (Natural Resources, Scenic and Historic Areas, and Open Spaces) resource. The  
22 property also contains Sensitive Winter Range habitat for deer and elk, which is



1 also a Goal 5 resource, and the property therefore has an Area of Special Concern  
2 (ASC) 90-1 Deer and Elk Habitat overlay.

3 In 2023, the county approved intervenor's application to designate and  
4 rezone an additional 324 acres as AR. Petitioner appealed the decision to LUBA,  
5 and we remanded the decision. *Oregon Department of Fish and Wildlife v.*  
6 *Jackson County*, LUBA No 2024-002 (July 24, 2024) (*Freel I*). On remand, the  
7 county again approved the application with conditions to mitigate impacts on  
8 deer and elk habitat. As conditionally approved, the portion of the property zoned  
9 AR would be divided into a series of individual quarry sites with a maximum of  
10 40 acres each. Only one quarry site would be able to operate at a time, although  
11 that quarry site would be able to operate while a previous site is being reclaimed.  
12 This appeal followed.

### 13 **GOAL 5 BACKGROUND**

14 As we did in *Freel I*, we summarize the applicable law regarding Goal 5  
15 before addressing the assignments of error. The purpose of Goal 5 is "[t]o protect  
16 natural resources and conserve scenic and historic areas and open spaces." Goal  
17 5 requires counties to identify, inventory, and make decisions concerning  
18 multiple resources, including wildlife habitat and aggregate resources. The  
19 general requirements for complying with Goal 5 include an inventory process,  
20 and a method for analyzing the ESEE consequences that would result from a  
21 decision to allow, limit, or prohibit uses that conflict with an identified Goal 5  
22 resource. OAR 660-023-0030; OAR 660-023-0040. For each identified resource

1 site, counties must adopt comprehensive plan provisions and land use regulations  
2 to implement the ESEE decisions. OAR 660-023-0050. These provisions are  
3 generally referred to as programs to achieve Goal 5 or Goal 5 programs. There  
4 are also specific rules for each Goal 5 resources category, including 660-023-  
5 0180 for mineral and aggregate resources and OAR 660-023-0110 for wildlife  
6 habitat.

7 Under OAR 660-023-0180(3), the county must first determine whether a  
8 proposed aggregate resource site is “significant.” It is undisputed that the  
9 aggregate resources on the property are significant. Next, under OAR 660-023-  
10 0180(5), the county must determine whether mining will be allowed by  
11 determining the impact area and identifying and specifying significant conflicts  
12 within the impact area. OAR 660-023-0180(5)(a), (b). Conflicts include  
13 “[c]onflicts with other Goal 5 resource sites within the impact area that are shown  
14 on an acknowledged list of significant resources and for which the requirements  
15 of Goal 5 have been completed at the time the PAPA is initiated[.]” OAR 660-  
16 023-0180(5)(b)(D). Next, the county must determine whether significant  
17 conflicts can be “minimized,” which means “to reduce \* \* \* to a level that is no  
18 longer significant.” OAR 660-012-0180(5)(c); OAR 660-023-0180(1)(g). If the  
19 identified significant conflicts can be minimized through reasonable and  
20 practicable measures, then aggregate mining must be allowed. OAR 660-023-  
21 0180(5)(c). If all conflicts cannot be minimized, then the county must evaluate  
22 the ESEE consequences of allowing mining, limiting mining, or not allowing

1 mining. OAR 660-023-0180(5)(d). The county must then determine whether to  
2 allow mining, limit mining, or not allow mining. *Id.* When, as here, there are  
3 conflicting significant Goal 5 resources, if the impacts cannot be minimized the  
4 county “shall determine the level of protection for each significant site using the  
5 ESEE process \* \* \*.” OAR 660-023-0040(2)(b).

6 In *Freel I*, we sustained petitioner’s second assignment of error, in part,  
7 because we agreed with petitioner that the county had not adequately specified  
8 the predicted conflicts between the competing Goal 5 resources as required by  
9 OAR 660-023-0180(5)(b). We explained that the county could not move forward  
10 to determine whether the predicted conflicts were minimized under OAR 660-  
11 023-0180(5)(c) until the predicted conflicts were specified under OAR 660-023-  
12 0180(5)(b):

13 “The underlying problem with the minimization findings is that the  
14 county failed to ‘specify the predicted conflicts’ with deer and elk  
15 habitat. OAR 660-023-0180(5)(b), In opposing the PAPA,  
16 [petitioner] opined that mining activity will result in the direct loss  
17 of wildlife habitat and displacement. The decision does not identify  
18 habitat loss as a conflict, find that habitat loss is not a conflict, or  
19 explain why it is not a conflict. The findings refer to noise and dust  
20 impacts, and mitigation for those impacts, but the findings do not  
21 specify the conflicts that noise and dust impacts will cause with  
22 respect to wildlife habitat.

23 “The county must first specify conflicts and then determine whether  
24 those conflicts can be minimized. The findings state that the  
25 conditions \* \* \* will minimize noise and dust impacts to residential  
26 and agricultural uses within the impact area and those same  
27 measures will minimize conflicts with deer and elk habitat. It is  
28 impossible to determine whether the conditions of approval will



1 minimize wildlife habitat conflicts to a level where they are no  
2 longer significant without first specifying the conflicts. *The findings*  
3 *do not explain how, where, when, and to what extent aggregate*  
4 *removal activities impact deer and elk habitat and they do not*  
5 *explain how the mitigation measures, which are primarily directed*  
6 *at mitigating impacts to residential and farm uses, will minimize*  
7 *wildlife habitat conflicts.* The findings are inadequate to satisfy  
8 OAR 660-023-0180(5)(b) and (c).” *Freel I*, LUBA No 2024-002  
9 (emphasis added, internal citation omitted) (slip op at 16-17).

10 On remand, the county specified the predicted conflicts, imposed  
11 conditions of approval, found that the conditions of approval minimized the  
12 conflicts to the point where the impacts were no longer significant, and approved  
13 the application. Alternatively, the county conducted an ESEE analysis in the  
14 event that a reviewing body found that the conflicts were not minimized and,  
15 after weighing the ESEE, decided to limit mining with the conditions of approval.

#### 16 **FIRST ASSIGNMENT OF ERROR**

17 Petitioner argues that the county misconstrued OAR 660-023-0180(5)(c),  
18 OAR 660-023-0180(1)(g), and Jackson County Land Development Ordinance  
19 (JCLDO) 3.1.4(B)(1)(c), and that the conditions of approval the county imposed  
20 to minimize the impacts of habitat loss are inadequate and are not supported by  
21 substantial evidence.<sup>2</sup>

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<sup>2</sup> JCLDO 3.1.4(B)(1)(c) parallels OAR 660-023-0180(5)(c) and provides:

“The proposed use is not a conflicting use certified in an adopted Goal 5 ESEE applicable to the parcel, or if an identified conflicting use, one that can be mitigated to substantially reduce or eliminate impacts[.]”

1           **A.     Preservation**

2           Intervenor argues that petitioner did not raise these issues below. To be  
3     preserved for LUBA review, an issue must “be raised and accompanied by  
4     statements or evidence sufficient to afford the governing body, planning  
5     commission, hearings body or hearings officer, and the parties an adequate  
6     opportunity to respond to each issue.” ORS 197.797(1). Specific arguments need  
7     not have been raised below to preserve an issue for LUBA review, so long as the  
8     issue was raised with sufficient specificity. *See Boldt v. Clackamas County*, 21  
9     Or LUBA 40, 46, *aff’d*, 107 Or App 619, 813 P2d 1078 (1991) (the “raise it or  
10    waive it” principle does not limit the parties on appeal to the exact same  
11    arguments made below, but it does require that the issue be raised below with  
12    sufficient specificity so as to prevent “unfair surprise” on appeal). When  
13    attempting to differentiate between “issues” and “arguments,” there is no “easy  
14    or universally applicable formula.” *Reagan v. City of Oregon City*, 39 Or LUBA  
15    672, 690 (2001). While a petitioner is not required to establish that a precise  
16    argument made on appeal was made below, that does not mean that “any  
17    argument can be advanced at LUBA so long as it has some bearing on an  
18    applicable approval criterion and general references to compliance with the  
19    criterion itself were made below.” *Id.* (emphasis in original). A particular issue  
20    must be identified in a manner detailed enough to give the governing body and  
21    the parties fair notice and an adequate opportunity to respond. *Boldt v. Clackamas*  
22    *County*, 107 Or App 619, 623 (1991); *see also Vanspeybroeck v. Tillamook*

1    *County*, 221 Or App 677, 691 n 5, 191 P3d 712 (2008) (“[I]ssues [must] be  
2    preserved at the local government level for board review \* \* \* in sufficient detail  
3    to allow a thorough examination by the decision-maker, so as to potentially  
4    obviate the need for further review or at least make that review more efficient  
5    and timely.”).

6        Petitioner combines two separate issues under the first assignment of error.  
7    Initially, petitioner argues that the county misconstrued OAR 660-023-  
8    0180(1)(g), OAR 660-023-0180(5)(c), and JCLDO 3.1.4(B)(1)(c). OAR 660-  
9    0180(1)(g) provides the definition of “minimize a conflict.”<sup>3</sup> As discussed earlier,  
10    OAR 660-023-0180(5)(c) requires the county to determine whether “reasonable  
11    and practicable measures” can “minimize the conflicts.” If the reasonable and  
12    practicable measures can minimize the conflicts, then mining shall be allowed. If  
13    the identified conflicts cannot be minimized, then the county must proceed to the  
14    ESEE analysis. JCLDO 3.1.4(B)(1)(c) parallels OAR 660-023-0180(5)(c).  
15    Secondly, petitioner argues that Condition 9.e, which establishes a \$40,000  
16    habitat enhancement fund, is not clear and objective and impermissibly delegates  
17    authority to intervenor to determine the essential details of the habitat

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<sup>3</sup> OAR 660-023-0180(1)(g) defines “Minimize a conflict” as:

“[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.”



1 enhancement fund. *See* OAR 660-023-0180(5)(e) (“Any required measures to  
2 minimize conflicts, including special conditions and procedures regulating  
3 mining, shall be clear and objective.”); Record 52.

4 Petitioner raised below the issue of the misconstruction of OAR 660-023-  
5 0180(1)(g) and OAR 660-023-0180(5)(c):

6 “First, the proposed findings misconstrue OAR 660-023-  
7 0180(5)(b)-(d) and the applicable definition of ‘minimize a conflict’  
8 in OAR 660-0180(1)(g). This is because the findings fail to satisfy  
9 the required elements of each step in OAR 660-023-0180(5)(b)-(d)  
10 before proceeding to the next step. For example, the findings do not  
11 sufficiently specify the conflicts before moving on to address  
12 minimization measures, and the proposed minimization measures  
13 are inadequate to reduce the conflicts to an insignificant level even  
14 though reasonable and practicable minimization measures exist. At  
15 least in part this deficiency appears to be based on a misconstruction  
16 of the definition of ‘minimize a conflict’ that finds the minimization  
17 standard satisfied if the conflict is lessened by any amount, rather  
18 than applying the applicable standard which is that the minimization  
19 measures must reduce the conflict to a level that is no longer  
20 significant.” Record 114.

21 The issue of whether the county misconstrued the requirements for  
22 minimizing conflicts or misconstrued the meaning of “minimize a conflict” was  
23 raised with sufficient specificity to give intervenor and the county fair notice and  
24 an opportunity to respond. Petitioner also raised the issue of compliance with  
25 JCLDO 3.1.4(B)(1)(c). “The conditions proposed \* \* \* do not substantially  
26 reduce or eliminate impacts, as required per J[C]LDO 3.1.4(B)(1)(c).” Record  
27 114. Although the issue is raised briefly, the ordinance parallels the

1 administrative rule and the issues are essentially the same. Petitioner preserved  
2 these issues.

3 Petitioner also preserved the issue of whether Condition 9.e was clear and  
4 objective and whether there was an improper delegation of authority. Intervenor  
5 acknowledges that the issue of whether the condition is clear and objective was  
6 raised. Petitioner also raised the issue of whether the condition impermissibly  
7 delegates authority for dispersing the funds. Petitioner devoted a significant  
8 portion of its submission to challenging Condition 9.e. Record 117-19. Although  
9 petitioner never uses the word “delegation” in its submission, petitioner  
10 challenges the use of the funds by intervenor:

11 “Without a condition that provides reasonable and practicable  
12 measures on the who, what, where, when, and how a payment would  
13 be implemented, there is not evidentiary support that the conflicts  
14 will be minimized to a level that is no longer significant.” Record  
15 119.

16 Petitioner raised the issue of impermissibly allowing intervenor to  
17 determine the method of dispersing the habitat enhancement funds with sufficient  
18 specificity to give the county fair notice and an opportunity to respond. Petitioner  
19 preserved this issue.

20 **B. Whether the County Misconstrued the Law**

21 Petitioner argues that the county misconstrued the definition of “minimize  
22 a conflict” in OAR 660-023-0180(1)(g) and the OAR 660-023-0180(5)(e)  
23 requirements to minimize conflicts by reducing conflicts to a level that is no

1 longer significant.<sup>4</sup> According to petitioner, the county must minimize identified  
2 conflicts to a level that are no longer significant, “not just potentially decrease  
3 the conflicts \* \* \* to some extent.” Petition for Review 21.

4 The decision identifies nine specific conflicts. The decision adopts 17  
5 conditions of approval designed to minimize the identified conflicts. The decision  
6 explains in detail which conditions of approval go towards minimizing each  
7 specific conflict. The decision then concludes that the conditions of approval  
8 collectively serve to minimize the identified conflicts.

9 “The County finds that *the identified conflicts between the proposed*  
10 *mining and the deer and elk habitat have been effectively minimized*  
11 *to a level that is no longer significant through the implementation of*  
12 *comprehensive conditions of approval.* Each condition of approval  
13 has been carefully designed to target specific conflicts, such as  
14 direct habitat loss, vegetation loss, noise pollution, water quality  
15 impacts, and increased human presence. \* \* \*

16 “Individually, each condition addresses its respective conflict with  
17 targeted restrictions and requirements, ensuring that specific issues,  
18 like noise impacts, habitat fragmentation, and road hazards, are  
19 minimized effectively. Collectively, these conditions work in  
20 concert to create a comprehensive framework that manages the  
21 cumulative impacts of mining activities. By setting clear operational  
22 limits, coordinating reclamation efforts, and enforcing protective  
23 measures during critical seasons, the conditions maintain habitat  
24 continuity and functionality throughout the minim process. The  
25 record further demonstrates that the existing conditions of approval  
26 have proven effective in managing the impacts of the current mine,

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<sup>4</sup> Petitioner also argues the county misconstrued JCLDO 3.1.4(B)(1)(c) for the same reasons.



1 providing a strong foundation for the proposed expansion.

2 “Therefore, the County concludes that *the proposed conditions*  
3 *mitigate the identified conflicts to a level where they are no longer*  
4 *significant.*” Record 38 (emphases added).

5 The county clearly understood the definition of “minimize a conflict” to  
6 require that an identified conflict be reduced to a level that is no longer  
7 significant. As far as we can tell, petitioner’s argument relies on the finding for  
8 compliance with JCLDO 3.1.4(B)(1)(c) which states:

9 “The proposed use is a conflicting use certified in an adopted Goal  
10 5 ESEE. There are significant conflicts between the Deer and Elk  
11 Habitat Overlay (ASC 90-1) which is Goal 5 protected, and the  
12 aggregate. The conditions [of approval] mitigate to substantially  
13 reduce or eliminate the conflicts.” Record 43.

14 While the finding is brief, it clearly relies upon the findings and reasoning  
15 for the administrative rule that it parallels, OAR 660-023-0180(5)(c). As  
16 intervenor points out, there was no need for the county to repeat all the findings  
17 it made under OAR 660-023-0180(5) that reach the same conclusion necessary  
18 to satisfy JCLDO 3.1.4(B)(1)(c). Petitioner points to the language in the finding  
19 that the conditions of approval may only “substantially reduce” the conflicts  
20 rather than reduce them to a level that is no longer significant. That language,  
21 however, merely mirrors the language of JCLDO 3.1.4(B)(1)(c). As the earlier  
22 emphasized language illustrates, the county clearly understood the proper  
23 construction of OAR 660-023-0180(1)(g) and OAR 660-023-0180(5)(c).

24 Finally, under its misconstruction of the law argument, petitioner argues  
25 the county misconstrued OAR 660-023-0180(5)(c) by not imposing reasonable

1 and practicable measures that would minimize the conflicts. According to  
2 petitioner, the county could not reach the ESEE step when there were measures  
3 that could be imposed that would minimize the conflicts. That issue arises only  
4 if the county relies on an ESEE analysis when it determines that conflicts cannot  
5 be minimized. This assignment of error, however, involves whether the county  
6 misconstrued the law in determining that conflicts were indeed minimized. As  
7 the county found that the conditions of approval do minimize conflicts, there  
8 would be no reason to impose more or different conditions of approval to achieve  
9 that same result. While petitioner may argue that the conditions of approval the  
10 county adopted do not actually minimize the identified conflicts, the county  
11 clearly construed the law correctly by identifying the specific conflicts and  
12 determining that specific reasonable and practicable measures would minimize  
13 the conflicts to level that was no longer significant. The county did not  
14 misconstrue the law.

15 **C. Habitat Enhancement Fund**

16 Petitioner makes multiple arguments about the habitat enhancement fund  
17 imposed as a condition of approval.

1                   **1. Whether the Condition of Approval is Clear and**  
2                   **Objective**

3                   OAR 660-023-0180(5)(e) requires that measures to minimize conflicts  
4 must be clear and objective.<sup>5</sup> The habitat enhancement fund is required by  
5 Condition of Approval 9.e, which states:

6                   “Habitat Enhancement Fund Allocation. Upon approval of a site  
7 plan review for each new quarry, the Operator shall allocate an  
8 inflation adjusted equivalent of \$40,000 (in 2023 dollars) to habitat  
9 enhancement projects. The fund shall be used exclusively for habitat  
10 restoration and mitigation projects designed to offset temporary  
11 habitat loss and improve long-term wildlife habitat conditions.

12                  “i. Allowable Uses of the Fund. The fund shall be used for  
13 wildlife habitat restoration projects including:

14                   “Native plant restoration and vegetation restoration in  
15 designated priority areas.

16                   “Controlled burns or other ecological management practices  
17 to enhance forage availability and habitat resilience.

18                   “Connectivity enhancement projects aimed at preserving  
19 seasonal wildlife movement pathways.

20                  “ii. Project Selection and Monitoring. Jackson County may  
21 require a periodic report on fund allocation and habitat  
22 improvements. The report shall document the effectiveness of  
23 funded projects in mitigating habitat loss and improving

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<sup>5</sup> OAR 660-023-0180(5)(e) provides, in part:

“Where mining is allowed, the plan and implementing ordinances shall be amended to allow such mining. Any required measures to minimize conflicts, including special conditions and procedures regulating mining, shall be clear and objective.”



1 wildlife habitat functions.” Record 52.

2 Petitioner argues that the condition of approval is not clear and objective.  
3 According to petitioner, the problem with the habitat enhancement fund is that it  
4 is too vague because it “lacks essential details and requirements necessary to  
5 ensure that [the fund] is utilized in a manner that will effectuate the intent of  
6 mitigating, and ideally minimizing to an insignificant level, the impacts that the  
7 proposed mining will have on deer and elk winter range in Jackson County.”  
8 Petition for Review 25-26. Petitioner criticizes the habitat enhancement fund on  
9 various grounds: (1) that it should specify the locations where the funds may be  
10 spent; (2) that it should specify when the funds may be spent; and (3) that it does  
11 not justify why \$40,000 is a sufficient amount. None of those arguments,  
12 however, specifically explains why the condition of approval is not clear and  
13 objective.

14 There is a well-established framework for analyzing whether land use  
15 provisions are clear and objective. Petitioner does not attempt to demonstrate how  
16 the condition of approval is not clear and objective under this framework.  
17 Petitioner’s argument is not sufficiently developed for our review. *Deschutes*  
18 *Development v. Deschutes Cty.*, 5 Or LUBA 218, 220 (1982) (LUBA declines to  
19 review insufficiently developed arguments).

20 Even if petitioner had sufficiently developed its argument, we agree with  
21 intervenor that the condition of approval is clear and objective. The “clear and  
22 objective” standard includes two fundamental parts. First, a standard must be

1 clear. The term “clear” means easily understood and without obscurity or  
2 ambiguity. *Roberts v. City of Cannon Beach*, 316 Or App 305, 312, 504 P3d 1249  
3 (2021), *rev den*, 370 Or 56 (2022); *see also 1000 Friends of Oregon v. City of*  
4 *Portland*, LUBA No 2023-088 (Apr 8, 2024) (explaining that “[w]e see no reason  
5 to interpret the phrase ‘clear and objective’ differently” in the non-housing  
6 context) (order at 4 n 2). Second, a standard must be objective. The term  
7 “objective” means “existing independent of mind.” *Roberts*, 316 Or App at  
8 311. Standards are not objective “if they impose ‘subjective, value-laden analyses  
9 that are designed to balance or mitigate impacts of the development on (1) the  
10 property to be developed or (2) the adjoining properties or community.’” *Id.*

11 The habitat enhancement fund condition of approval applies upon approval  
12 of a “site plan review for each new quarry,” requires an amount of \$40,000, and  
13 requires that the funds be “used exclusively for habitat restoration and mitigation  
14 projects” to mitigate habitat loss. Record 52. The condition of approval describes  
15 the “[a]llowable uses of the fund[s,]” and provides that the county may require a  
16 periodic report and details what such a report must require. The condition of  
17 approval is easily understood and does not contain obscurity or ambiguity, and is  
18 therefore “clear.” The mere fact that the condition of approval does not contain  
19 more specifics that petitioner desires does not render the condition of approval  
20 unclear, and petitioner makes no attempt to explain how the lack of petitioner’s  
21 desired specifics means the condition is unclear. The condition is clear.

1 The condition of approval is straightforward, as it provides a specific  
2 amount of money that must be spent in specific ways, and allows for the county  
3 to require a report with specific requirements. While the condition of approval is  
4 designed to mitigate the impacts of the proposed mining, it does not impose  
5 subjective or value-laden analyses or require any sort of balancing act. The mere  
6 fact that the condition of approval is not as specific as petitioner would like does  
7 not mean that it is subjective. Petitioner points to no part of the condition of  
8 approval that requires subjective analyses. The condition of approval is objective.  
9 The condition of approval complies with OAR 660-023-0180(5)(e).

10 **2. Whether the Findings Are Supported by Substantial**  
11 **Evidence**

12 As discussed earlier, the county identified nine significant conflicts  
13 between the competing Goal 5 resources and imposed 17 conditions of approval  
14 to minimize those conflicts. In addressing each significant conflict, the county  
15 explained which of the various conditions of approval applied towards  
16 minimizing that particular significant conflict. As pertinent to this assignment of  
17 error, the county relies upon the habitat enhancement fund of Condition of  
18 Approval 9.e to minimize Conflict 1, Direct Loss of Deer and Elk Habitat, and  
19 Conflict 4, Temporal Loss of Habitat. Record 7-9.

20 Petitioner “strongly agrees” that the concept of a habitat enhancement fund  
21 is an essential minimization measure and that creating such a fund is reasonable  
22 and practicable. Petition for Review 25. As discussed earlier, however, petitioner



1 argues the condition of approval is too vague because it does not specify the  
2 location or timing of when the funds may be spent or justify that \$40,000 is  
3 enough to ensure minimization of the conflicts. If the habitat enhancement fund  
4 were all the county was relying on to minimize the conflicts we might agree with  
5 petitioner. The county, however, relied on numerous conditions of approval to  
6 minimize the conflicts. In addition to the habitat enhancement fund, the county  
7 relied upon five other conditions of approval to minimize Conflict 1 and four  
8 other conditions of approval to minimize Conflict 4.

9 Substantial evidence is evidence that a reasonable person would rely on in  
10 making a decision. *Dodd v. Hood River County*, 317 Or 172, 179, 855 P2d 608  
11 (1993). In reviewing the evidence, LUBA may not substitute its judgement for  
12 that of the local decision maker. Rather, LUBA must consider all the evidence to  
13 which it is directed, and determine whether based on that evidence, a reasonable  
14 local decision maker could reach the decision that it did. *Younger v. City of*  
15 *Portland*, 305 Or 346, 358-60, 725 P2d 262 (1988). The county adopted findings  
16 that both conflicts with direct loss of deer and elk habitat and temporal loss of  
17 habitat could be minimized with conditions of approval. Petitioner does not  
18 identify the evidence in support of the county's decision or explain why a  
19 reasonable person would not reach the same conclusion based on that evidence.  
20 Petitioner only challenges the vagueness and monetary amount of the habitat  
21 enhancement fund.

1 Under Conflict 1, in addition to the habitat enhancement fund, the county  
2 also imposed conditions of approval limiting active disturbances, capping  
3 footprints, requiring reclamation planning, preserving topsoil, and requiring  
4 revegetation. Record 12-16. Under Conflict 4, in addition to the habitat  
5 enhancement fund, the county also imposed conditions of approval requiring  
6 phasing of quarry sites, seasonal closures, staged reclamation, and soil  
7 conservation and revegetation. Record 21-24. Petitioner does not explain why,  
8 given all the findings and conditions of approval in support of the conflict  
9 minimization, even if the habitat enhancement fund is more vague than petitioner  
10 would like, a reasonable person could not rely on the evidence to reach the  
11 conclusion that the conflicts are minimized.<sup>6</sup> We agree with intervenor that a  
12 reasonable person could conclude that the impacts are minimized.

13 The county's finding that direct conflicts with deer and elk habitat and  
14 temporal loss of habitat are minimized, in part, by the habitat enhancement fund  
15 are supported by substantial evidence.

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<sup>6</sup> While we do not agree with intervenor that the individual conditions of approval are all separate bases for approval such that invalidating any separate condition of approval would not be basis for remand, we do agree that the multiple conditions of approval in support of findings of minimization must be considered together.

1           **D.     Whether the County Misconstrued OAR 660-023-0180(5)(c) by**  
2           **Delegating Authority of Use of the Habitat Enhancement Fund**  
3           **to Intervenor**

4           Petitioner argues that the county misconstrued OAR 660-023-0180(5)(c)  
5           by delegating to intervenor the authority to determine the essential details for the  
6           use of the habitat enhancement fund. As discussed earlier, OAR 660-023-  
7           0180(5)(c) requires the county to determine whether there are reasonable and  
8           practicable measures that can minimize the identified significant impacts, and if  
9           the significant impacts can be minimized then the county must approve the  
10          mining. The county clearly explained what the identified significant impacts are  
11          and adopted conditions of approval to minimize those significant impacts. The  
12          county clearly explained why it believes the conditions of approval minimize the  
13          identified conflicts to a level that is no longer significant. The county did not  
14          misconstrue OAR 660-023-0180(5)(c).

15          Petitioner appears to be arguing that there is not substantial evidence to  
16          support the county's finding that significant impacts to habitat loss can be  
17          minimized with the conditions of approval. As discussed earlier, there are  
18          additional findings and conditions of approval, and the fact that the county did  
19          not adopt conditions of approval that petitioner wanted does not mean the  
20          decision is not supported by substantial evidence.

21          Petitioner relies on *Rock Solid Sand and Gravel, LLC v. Umatilla County*,  
22          LUBA No 2023-033 (Oct 25, 2023) (*Rock Solid*), for the proposition that the  
23          habitat enhancement fund impermissibly delegates authority to a later stage.



1 Petitioner misreads *Rock Solid*. In *Rock Solid*, the county misconstrued OAR  
2 660-023-0180(5)(c) by deferring to the applicant to determine whether there  
3 would be dust impacts, whether those impacts would be significant, and if so how  
4 to minimize the conflicts.

5 “Petitioners also argue that the county misconstrued OAR 660-023-  
6 0180(5)(c) by delegating to intervenor the authority to decide  
7 whether there is a dust impact, whether it is significant, and what, if  
8 any, minimization strategy will be employed, and when, and to what  
9 degree. We agree.” *Rock Solid*, LUBA No 2023-033 (slip op at 18).

10 In the present case, the county determined that there were impacts to  
11 habitat loss, determined that the impacts were significant, imposed conditions of  
12 approval to mitigate those impacts, and found that the conditions of approval  
13 reduced the conflicts to a level that was no longer significant. In other words, the  
14 county in this case did everything the county failed to do in *Rock Solid*. *Rock*  
15 *Solid* is of no assistance to petitioner.

16 Petitioner also cites *ODFW v. Lake County*, 81 Or LUBA 300 (2020), in  
17 support of its argument. Petitioner misreads *ODFW* as well. In *ODFW*, the  
18 applicant sought approval of a solar power generation facility that had the  
19 potential for adverse effects on protected species or habitat. Because of those  
20 potential adverse effects, under OAR 660-033-0130(38)(j)(G) a site-specific  
21 assessment by a professional biologist was required for a proposal to site a

1 photovoltaic solar power generation facility on agricultural land.<sup>7</sup> Under the rule,  
2 if the professional biologist's assessment determines that the "potential" "adverse  
3 effects" "to habitat or to big game winter range or migration corridors" cannot be  
4 avoided, the applicant and the appropriate wildlife management agency are to  
5 cooperate to develop an agreement to mitigate the adverse effects. OAR 660-033-  
6 0130(38)(j)(G). If the applicant and the wildlife management agency cannot

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<sup>7</sup> OAR 660-033-0130(38)(j)(G) provides:

"If a proposed photovoltaic solar power generation facility is located on lands where, after site specific consultation with an [ODFW] biologist, it is determined that the potential exists for adverse effects to state or federal special status species (threatened, endangered, candidate, or sensitive) or habitat or to big game winter range or migration corridors, golden eagle or prairie falcon nest sites or pigeon springs, the applicant shall conduct a site-specific assessment of the subject property in consultation with all appropriate state, federal, and tribal wildlife management agencies. A professional biologist shall conduct the site-specific assessment by using methodologies accepted by the appropriate wildlife management agency and shall determine whether adverse effects to special status species or wildlife habitats are anticipated. Based on the results of the biologist's report, the site shall be designed to avoid adverse effects to state or federal special status species or to wildlife habitats as described above. If the applicant's site-specific assessment shows that adverse effects cannot be avoided, the applicant and the appropriate wildlife management agency will cooperatively develop an agreement for project-specific mitigation to offset the potential adverse effects of the facility. Where the applicant and the resource management agency cannot agree on what mitigation will be carried out, the county is responsible for determining appropriate mitigation, if any, required for the facility."

1 agree on a mitigation plan then “the county is responsible for determining  
2 appropriate mitigation, if any, required for the facility.” *Id.*

3 In *ODFW*, the applicant and the Oregon Department of Fish and Wildlife  
4 (ODFW) could not agree on a mitigation plan, but instead of making its own  
5 determination on proper mitigation as required by OAR 660-033-0130(38)(j)(G),  
6 the county made a conclusory finding that the rule was satisfied and then deferred  
7 compliance with the mitigation requirement to subsequent discussions between  
8 the applicant and ODFW and a return to the county if they could not reach an  
9 agreement. The county therefore impermissibly deferred compliance with the  
10 rule to a later process.

11 “In our view, OAR 660-033-0130(38)(j)(G), like virtually all land  
12 use regulations, contemplates that a determination of compliance  
13 with the rule be made as part of the county land use approval of the  
14 proposed solar facility, based on substantial evidence in the record.  
15 However, that is not what occurred in the present case. There is no  
16 dispute in the present case that compliance with OAR 660-033-  
17 0130(38)(j)(G) requires mitigation to offset unavoidable impacts to  
18 habitat. While the county adopted a finding of compliance with  
19 OAR 660-033-0130(38)(j)(G), as discussed below that finding is  
20 wholly conclusory, and not supported by a proposed mitigation plan  
21 or evidence. The county’s finding of compliance rests entirely on a  
22 condition of approval requiring the applicant to continue working  
23 privately with ODFW to agree on a mitigation plan, outside a public  
24 participatory process, and return to the county for approval of the  
25 mitigation plan only if the applicant is unable to reach agreement  
26 with the wildlife agency.

27 “For whatever reason, intervenors and ODFW were unable to reach  
28 agreement on a mitigation plan prior to the close of the evidentiary  
29 record. The solution to that impasse is stated in the rule: the county



1 is ultimately responsible for making the determination regarding  
2 what mitigation is required, if any.” 81 Or LUBA at 319-320.

3 Unlike the county in *ODFW*, which was required to but did not make its  
4 own determination regarding mitigation when the applicant and the ODFW could  
5 not agree on a mitigation plan, the county here did exactly what was required of  
6 it by the applicable rule, OAR 660-023-0180(5)(c) – namely, identify conflicts  
7 and impose conditions of approval that the county found minimize the conflicts.  
8 *ODFW* is of no assistance to petitioner.

9 The first assignment of error is denied.

## 10 **SECOND ASSIGNMENT OF ERROR**

11 Petitioner argues that that the county’s findings addressing impacts of  
12 noise pollution and dust and air quality impacts misconstrue OAR 660-023-  
13 0180(5)(c), OAR 660-023-0180(1)(g), and JCLDO 3.1.4(B)(1)(c), are  
14 inadequate, and not supported by substantial evidence because the county failed  
15 to specify the conflicts and the conditions of approval do not minimize them.

### 16 **A. Preservation**

17 There are essentially three aspects to the second assignment of error.  
18 Petitioner argues: (1) the county’s attempt to specify the conflicts with wildlife  
19 habitat due to noise and dust were not specific enough to comply with OAR 660-  
20 023-0180(5)(b); (2) the conditions of approval the county imposed to minimize  
21 the significant conflicts from noise and dust under OAR 660-023-0180(5)(c) do  
22 not minimize those conflicts; and (3) the conditions of approval do not minimize

1 the conflicts because they defer compliance to later studies and future mitigation.

2 Intervenor argues that none of these issues were raised below.

3 Intervenor argues that petitioner failed to preserve the issue of adequate

4 specification of conflicts. Petitioner's submission to the county states:

5 "ODFW finds that *there is inadequate explanation and evidentiary*  
6 *support that have conflicts have been adequately specified.* For  
7 example, but not limited to the following:

8 " \* \* \* \* \*

9 "Noise Pollution: The findings lack empirical data on noise impacts  
10 and how they displace deer and elk from critical areas. Research  
11 \* \* \* documented that drilling noise over 70 [decibels] resulted in  
12 fine scale habitat loss as the deer avoided the immediate vicinity.  
13 Similarly, [research] found that mule deer detection probability was  
14 decreased in proximity to anthropogenic noise sources that could  
15 affect habitat use.

16 "Dust and Air Quality Impacts: The proposed findings do not  
17 address how dust accumulation on vegetation affects forage quality.  
18 The findings equate human land use impacts with wildlife impact  
19 mitigation, even though responses from wildlife are different. It has  
20 been documented that dust load increases with an increase in the  
21 number of vehicles utilizing a particular roadway most likely  
22 stunting growth and causing a decrease in chlorophyll and therefore  
23 photosynthetic capabilities. It has also been suggested that increased  
24 accumulation of dust could exacerbate secondary issues such as  
25 susceptibility to drought, insect damage, and other pathogens."  
26 Record 115-16 (first emphasis added, subsequent emphases in  
27 original, internal citations omitted).

28 Intervenor's preservation arguments are premised on the proposition that

29 petitioner was required to challenge anything in the proposed findings and

30 proposed conditions of approval submitted by intervenor, and absent any

1 challenge to the proposed findings and conditions petitioner is precluded from  
2 challenging the ultimate findings adopted by county. We do not agree.

3 In order to raise the issue of whether findings of compliance with an  
4 applicable approval criterion are adequate, a petitioner must demonstrate that  
5 issues regarding compliance with that criterion were raised below. *Lucier v. City*  
6 *of Medford*, 26 Or LUBA 213, 216 (1993). A petitioner is *not* required to  
7 challenge the applicant's proposed findings of compliance with the criteria in  
8 order to preserve an inadequate findings challenge in a LUBA appeal. That is so  
9 because the findings regarding compliance with that criteria are not adopted until  
10 the local government's final decision, after the record has been closed in the local  
11 proceeding. In other words, a petitioner cannot object to the adequacy of findings  
12 before there are any final findings.<sup>8</sup> *Riverview Abbey Mausoleum Company v.*  
13 *City of Portland*, 79 Or LUBA 38, 42-43, *aff'd*, 297 Or App 192, 440 P3d 684  
14 (2019).

15 While petitioner was certainly free to raise objections to the proposed  
16 findings and conditions of approval submitted by intervenor (which petitioner  
17 did), the proposed findings and conditions are just that – proposed. Intervenor's  
18 proposed findings and conditions are merely a submission by a party like other

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<sup>8</sup> Differently, an issue may be waived where an applicant or local government planning staff have proposed findings of compliance with applicable criteria and no party has raised any issue challenging compliance with those criteria. *See Central Oregon Landwatch v. Jefferson County*, LUBA No 2025-023 (Oct 31, 2025) (slip op at 29-30).



1 submissions. There was no guarantee that the county would adopt any or all of  
2 the proposed findings and conditions. Intervenor's position would create a new  
3 procedural preservation hurdle not based on any authority. In order to preserve  
4 the issue for our review, petitioner need only have raised the issue of adequately  
5 specifying the conflicts.

6 Intervenor argues that, although petitioner stated that the conflicts were not  
7 adequately specified, the argument in support of that position acknowledges that  
8 the issues were specified and merely faults the conflict descriptions as being too  
9 general. According to intervenor, "[s]aying 'your descriptions are too general' is  
10 not the same as saying 'you never specified the conflicts.'" Intervenor-  
11 Respondent's Brief 36. Petitioner is not arguing that the county never specified  
12 the conflicts at all, but instead is arguing that the conflicts were not adequately  
13 specified. Petitioner's submission clearly raised that issue. The issue of whether  
14 the conflicts were adequately described was preserved.

15 Intervenor argues that petitioner did not preserve the issue that the  
16 conditions of approval fail to minimize the impacts from noise and dust. As  
17 explained earlier, petitioner was not required to make an inadequate findings  
18 challenge to the *proposed* findings below. Petitioner was merely required to raise  
19 the issue of minimizing the impacts from noise and dust. The above-quoted  
20 submission from petitioner clearly raises the issues of noise and dust conflicts  
21 and argues that they must be minimized. The issue of noise and dust conflicts not  
22 being minimized was preserved.

1 Finally, intervenor argues that petitioner failed to preserve the issue that  
2 deferring noise and dust studies to a future date impermissibly delegated  
3 compliance with OAR 660-023-0180(5)(c). Intervenor appears to be correct that  
4 petitioner did not specifically raise the issue that certain proposed conditions of  
5 approval allegedly impermissibly deferred compliance to a later stage and  
6 impermissibly delegated authority to intervenor to determine compliance. As  
7 discussed earlier, however, while those conditions were in the proposed findings  
8 submitted by intervenor, petitioner could not have known that the county would  
9 adopt those conditions of approval until the final county decision was issued.  
10 Petitioner clearly raised the issue of dust and noise conflicts. Petitioner therefore  
11 preserved the issue of whether the decision minimizes those impacts, including  
12 challenges to the conditions of approval.

13 **B. Whether the County Adequately Specified the Conflicts**

14 OAR 660-023-0180(5)(b) requires the county to “specify the predicted  
15 conflicts.” Petitioner argues that the county did not adequately specify the  
16 predicted conflicts from both noise and dust on wildlife habitat. According to  
17 petitioner, because the county did not adequately specify the predicted conflicts  
18 it is premature to move forward to determining whether the conditions of  
19 approval will minimize those conflicts.

20 The county’s findings on noise state:

21 “Conflict Description: Noise pollution from ongoing mining  
22 operations is a significant and persistent conflict, affecting the  
23 behavior and habitat use of deer and elk in the area.

1 “Impact: The operation of heavy machinery and mining equipment  
2 would produce temporary or continuous noise, which could disturb  
3 deer and elk. Prolonged exposure to noise may cause wildlife to  
4 avoid certain areas, even where suitable habitats remain. Given the  
5 expected decades-long duration of each quarry site, the noise impact  
6 would be persistent.” Record 9-10 (boldface omitted).

7 The county’s findings on dust state:

8 “Conflict Description: Dust and air quality impacts pose an  
9 immediate conflict from the mined area. The reduced quality of  
10 forage from dust accumulation could impact the dietary needs and  
11 health of deer and elk populations.

12 “Impact: Dust generated by mining operations could settle on  
13 vegetation, reducing the quality of available forage for deer and elk.  
14 Dust covered plants are less palatable and could decrease the  
15 availability of nutritious food sources. The sustained operations over  
16 several decades could pose long-term concerns for forage quality.”  
17 Record 10 (boldface omitted).

18 While the county has nominally specified the conflicts, we have held that  
19 OAR 660-023-0180(5)(b) requires a more stringent analysis. In *Rock Solid*, we  
20 stated:

21 “Petitioners argue, and we agree, that the site plans and the decision  
22 fail to describe the aggregate mining and processing activities and  
23 what levels of noise, dust, or other discharges that those activities  
24 will generate. OAR 660-023-0180(5)(b) requires the county to  
25 ‘specify the predicted conflicts.’ That analysis will necessarily  
26 require intervenor to analyze noise, dust, and other discharges  
27 generated by separate activities at different locations on the mining  
28 site and explain whether and how those activities will affect  
29 conflicting uses within the impact area. For example, dust generated  
30 from concrete batching will likely have distinct impacts from dust  
31 generated from a haul road. Noise from mining likely will have  
32 different impacts than noise from asphalt batching. The county does  
33 not satisfy the conflicts analysis required by OAR 660-023-



1 0180(5)(b) by assuming that all mining activities will produce some  
2 level of noise, dust, or other discharges and finding that those  
3 impacts can be minimized.” LUBA No 2023-033 (slip op at 14-15).

4 Petitioner argues that, as in *Rock Solid*, instead of determining what the  
5 discrete noise and dust impacts from the mining would be, the county  
6 impermissibly deferred determination of those impacts to a later stage. The  
7 county adopted conditions of approval requiring a noise study and a dust study  
8 to be conducted before mining operations begin. According to petitioner, the  
9 county may not defer determining *what* the specific conflicts are until a later  
10 stage.

11 Intervenor argues that adequately specifying the conflicts does not require  
12 noise and dust studies to determine whether noise and dust can be minimized to  
13 ensure conformance with quantitative environmental standards. *See* n 3 (setting  
14 out the definition of “minimize a conflict” for purposes of OAR 660-023-0180).  
15 According to intervenor, *Freel I* merely required the county to determine the how,  
16 where, when, and to what extent the noise and dust will affect habitat. The  
17 county’s findings attempt to address those aspects of the mining. For noise, the  
18 findings state:

19 “How: Heavy machinery and mining equipment produce continuous  
20 noise.

21 “Where: Within and around active mining sites.

22 “When: Throughout each quarry site’s long-term operation.

23 “Extent: Persistent noise exposure causes displacement and stress in  
24 deer and elk populations, disrupting habitat use and behavior.”

1 Record 10.

2 For dust, the findings state:

3 “How: Dust generated from mining activities settles on vegetation.

4 “Where: Vegetation in the immediate area of active quarries.

5 “When: Throughout the long-term operation of quarry sites.

6 “Extent: Impairs vegetation quality and forage quality.” *Id.*

7 While the county has attempted to describe the predicted conflicts better  
8 than the county in *Rock Solid*, it has nonetheless failed to specify the impacts to  
9 the degree required by OAR 660-023-0180(5)(b). As *Rock Solid* demonstrates,  
10 there are different impacts from different aspects of a mining operation. The  
11 county’s findings, as in *Rock Solid*, do not describe the different aggregate  
12 activities that will generate noise and dust or how or if those different activities  
13 will have different impacts.

14 For instance, in *Rock Solid*, we explained that noise from mining will have  
15 different impacts than noise from asphalt batching, and the county did not comply  
16 with OAR 660-023-0180(5)(b) because it did not specify those different impacts.  
17 *Rock Solid*, LUBA No 2023-033 (slip op at 14). Similarly, in the present case the  
18 conditions of approval require that the future noise study assess and document  
19 “noise levels generated by all mining-related activities, including but not limited  
20 to blasting, crushing, loading hauling and processing operations.” Record 48. As  
21 in *Rock Solid*, those different activities will have different impacts. The county

1 may not defer specifying those conflicts until a noise study is conducted at a later  
2 date.

3 In *Rock Solid*, we explained that dust generated from concrete batching  
4 will likely have distinct impacts from dust generated from a haul road, and the  
5 county failed to comply with OAR 660-023-0180(5)(b) because it did not specify  
6 those different impacts. *Rock Solid*, LUBA No 2023-033 (slip op at 14). In the  
7 present case, the conditions of approval require a dust study to “evaluate potential  
8 dust emissions from all major mining activities, including but not limited to  
9 blasting, crushing, loading, hauling, and on-site road use.” Record 50. As in *Rock*  
10 *Solid*, those different activities will have different impacts. The county may not  
11 defer determining what those impacts are until a dust study is conducted at a later  
12 date.

13 While we do not agree with petitioner that specifying the significant  
14 predicted conflicts requires a noise and dust study as comprehensive as the site-  
15 specific studies required by the conditions of approval, the county must still  
16 address the different activities that will cause conflicts and specify the different  
17 conflicts that those activities will cause. Such specification should provide  
18 information about how, where, when, and to what extent aggregate removal  
19 activities will impact identified wildlife habitat.<sup>9</sup> The county has not done that in

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<sup>9</sup> Because we understand that the subject property include sites on which mining activities are currently being conducted, one empirical approach to specifying noise and dust impacts would be to conduct noise and dust studies of



1 the present case and therefore has not complied with OAR 660-023-0180(5)(b)  
2 for noise and dust conflicts with wildlife habitat.

3 **C. Whether the Conditions of Approval Minimize the Conflicts**

4 Petitioner argues that, even if the county adequately specified the conflicts,  
5 the conditions of approval imposed to minimize those conflicts do not minimize  
6 them to a level that is no longer significant, and therefore the county has not  
7 complied with OAR 660-023-0180(5)(c). As we agree with petitioner that the  
8 county has not adequately specified the noise and dust conflicts, it would be  
9 premature to consider whether the conditions of approval are sufficient to comply  
10 with OAR 660-023-0180(5)(c). Therefore, we do not reach the remaining  
11 subassignments of error.<sup>10</sup>

12 The second assignment of error is sustained, in part.

13 **THIRD ASSIGNMENT OF ERROR**

14 Petitioner argues that that the county's findings addressing connectivity  
15 and disruption of migration routes misconstrue OAR 660-023-0180(5)(c), OAR  
16 660-023-0180(1)(g), and JCLDO 3.1.4(B)(1)(c), are inadequate, and are not

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current operations that are similar in scale or intensity as those proposed. If no such similar sites or operations are available, then intervenor could commission a non-empirical study from appropriate experts, estimating the noise and dust impacts that typically could be expected of mining operations as proposed.

<sup>10</sup> As it is premature for us to address whether the conflicts have been minimized under OAR 660-023-0180(5)(c), it also is premature for us to address whether the county has complied with JCLDO 3.1.4(B)(1).

1 supported by substantial evidence because the county failed to specify the  
2 conflicts, and the conditions of approval do not minimize them.

3 **A. Preservation**

4 There are essentially four aspects to the third assignment of error.  
5 Petitioner argues: (1) the county's findings were not specific enough regarding  
6 migration conflicts to comply with OAR 660-023-0180(5)(b); (2) the county  
7 should have considered the impacts of reclamation in determining the conflicts  
8 under OAR 660-023-0180(5)(b) rather than as a way to minimize conflicts under  
9 OAR 660-023-0180(5)(c); (3) the condition of approval requiring seasonal  
10 closures is not sufficient to minimize the conflicts; and (4) the findings regarding  
11 JCLDO 3.1.4(B)(1)(c) are conclusory. Intervenor argues none of these issues  
12 were raised below.

13 Intervenor argues that petitioner failed to preserve the issue of adequate  
14 specification of conflicts regarding connectivity and disruption of migration  
15 routes. Petitioner's submission, under the heading of "Failure to Specify the  
16 Conflicts," states:

17 *"Connectivity and Disruption of Migration Routes:* The findings do  
18 not evaluate how the loss of corridors will impact seasonal  
19 migrations. Deer could see an increase in energy expenditures when  
20 navigating areas of high disturbance, like mine complexes, which  
21 would result in a decreased level of fitness leading to a lower  
22 survival and productivity rate." Record 115 (emphasis in original,  
23 internal citation omitted).

1 Intervenor argues that the quoted language is not specific enough to raise  
2 the issue. According to intervenor, the language does not articulate a competing  
3 interpretation of the rule, demand activity-specific modeling, or identify which  
4 corridors or timeframes require quantification. While petitioner's statement is not  
5 as specific as intervenor claims it should be, the statement clearly raises the issue  
6 of whether the county has properly identified the conflicts with habitat  
7 connectivity and disruption of migration routes. The issue is preserved.

8 Intervenor argues that although petitioner raised the issue of ongoing  
9 reclamation while a new quarry site is opened causing disturbances because  
10 reclamation itself generates noise and dust impacts on wildlife, that argument was  
11 only made in the context of a failure to minimize conflicts under OAR 660-023-  
12 0180(5)(c) – not as a predicted conflict that must be specified under OAR 660-  
13 023-0180(5)(b). As the earlier quoted language demonstrates, in the section of  
14 petitioner's submission addressing the failure to adequately specify the conflicts,  
15 petitioner does not mention reclamation. Instead, petitioner specifically argues  
16 that a new quarry should not be opened until reclamation of the prior site is  
17 finished under the caption of "Inadequate Mitigation Measures." Record 116-17.  
18 The issue raised that opening new quarry sites while reclamation is still ongoing  
19 fails to minimize conflicts as required by OAR 660-023-0180(5)(c) does not give  
20 fair notice to the county and intervenor of the issue of whether reclamation  
21 activities generate conflicts under OAR 660-023-0180(5)(b). *Boldt*, 107 Or App  
22 at 623. We agree with intervenor that this issue is waived.



1 Intervenor argues that petitioner failed to preserve the issue of whether the  
2 proposed seasonal closures misconstrue “minimize” under OAR 660-023-  
3 0180(1)(g) and are not supported by substantial evidence. As discussed under the  
4 first assignment of error, petitioner preserved the issue of whether the county  
5 misconstrued “minimize” under OAR 660-023-0180(1)(g). Regarding seasonal  
6 closures affecting migration routes, petitioner stated in its submittal below:

7 “The findings state that seasonal closures will ‘ensure that key  
8 corridors remain accessible and undisturbed during critical  
9 migration periods.[’] However, the mining activity will impact  
10 winter range, which results in permanent conversion of habitat.  
11 ODFW supports seasonal and timing restrictions to minimize  
12 impacts to wildlife during operations, but seasonal and timing  
13 restrictions do not provide assurances that migration corridors are  
14 accessible during those times or that temporal loss of habitat is  
15 mitigated.” Record 117.

16 Petitioner then suggests a different condition of approval that would close  
17 all mining activities, including loading and hauling, between October 15 and  
18 April 30. *Id.* Petitioner clearly raised the issue that the proposed seasonal closures  
19 conditions of approval were not sufficient to minimize the conflicts. The issue  
20 was preserved.

21 Finally, intervenor argues that petitioner failed to preserve the issue of  
22 compliance with JCLDO 3.1.4(B)(1)(c). As discussed in the first assignment of  
23 error, JCLDO 3.1.4(B)(1)(c) is derivative of OAR 660-023-0180(5)(c). The  
24 arguments directed as OAR 660-023-0180(5)(c) also apply to JCLDO  
25 3.1.4(B)(1)(c). Thus, petitioner’s argument that the conditions of approval “do

1 not substantially reduce or eliminate impacts,” as required by JCLDO  
2 3.1.4(B)(1)(c) is sufficient. The issue is preserved.

3 **B. Whether the County Adequately Specified the Conflicts to**  
4 **Migration Routes**

5 OAR 660-023-0180(5)(b) requires the county to “specify the predicted  
6 conflicts.” Petitioner argues that the county did not adequately specify the  
7 predicted conflicts regarding connectivity and disruption of migration routes.  
8 According to petitioner, because the county did not adequately specify the  
9 predicted conflicts it is premature to move forward to determining whether the  
10 conditions of approval will minimize those conflicts.

11 The county’s findings on connectivity and disruption of migration routes  
12 state:

13 “Conflict Description: Loss of connectivity between habitats could  
14 disrupt migratory patterns in areas with documented seasonal  
15 migration routes. This poses a long-term conflict for deer and elk  
16 populations.

17 “Impact: Migratory black-tailed deer and Roosevelt elk rely on  
18 connectivity between seasonal habitats. Disruptions caused by  
19 mining operations could impact established migration routes, which  
20 are essential for accessing critical resources between summer and  
21 winter ranges. Disruption of connectivity would reduce the  
22 effectiveness of these areas in supporting wildlife movements.”  
23 Record 9 (boldface omitted).

24 Petitioner argues that to comply with OAR 660-023-0180(5)(b) the county  
25 must go beyond these general statements and evaluate how, where, when, and to

1 what extent aggregate removal activities will impact deer and elk migration. The  
2 county's findings continue:

3 "How: Disruption of established migration routes by mining  
4 activities, affecting movement between seasonal habitats.

5 "Where: Areas between summer and winter concentration habitats,  
6 crucial for seasonal migrations.

7 "When: As mining operations expand and new sites open.

8 "Extent: Reduces effectiveness of migration routes, impacting  
9 wildlife movement and access to critical resources." Record 9.

10 Petitioner argues that the county was required to assess how deer and elk  
11 move through the property, the range of dates during which migration occurs, the  
12 predicted impacts from different types of mining activities on seasonal migration  
13 and habitat connectivity, and the cumulative effects of decades-long impacts  
14 from mining. OAR 660-023-0180(5)(b) requires that the conflicts be identified  
15 with enough detail to frame minimization rather than requiring technical  
16 modeling. The county identified the loss of connectivity as a conflict, explained  
17 how mining activities could disrupt seasonal movement, and explained the how,  
18 where, when, and extent of the conflict. Unlike the identification of conflicts for  
19 noise and dust, the county did not defer identification of the specific conflicts to  
20 a later stage. While petitioner would have preferred a more detailed description  
21 of the conflict, we agree with intervenor that the conflict description is not merely  
22 general statements but an adequate description of the conflict.



1           **C.     Whether the Conditions of Approval Minimize the Conflict**

2           Petitioner argues that even if the county adequately specified the predicted  
3     connectivity and migration conflict, the conditions of approval do not minimize  
4     that conflict to a level that is no longer significant, and therefore the county has  
5     not complied with OAR 660-023-0180(5)(c).

6           In addressing the conflicts to connectivity and disruption of migration  
7     routes, the county's findings state:

8           "The conflict of Connectivity and Disruption of Migration Routes  
9     arises from the potential fragmentation of key migration corridors  
10    due to mining activities. Deer and elk rely on connected habitats to  
11    move between their seasonal ranges, accessing critical resources  
12    during different times of the year. Disruption of these migration  
13    routes could lead to diminished habitat effectiveness and negatively  
14    impact population health. The conditions of approval are designed  
15    to protect these corridors by limiting the scale of mining activities,  
16    implementing seasonal closures, and requiring habitat restoration.

17          "Specifically, the conditions limit quarry activity to 40 acres and  
18    restrict operations to a single quarry at a time, thereby reducing the  
19    spatial extent of disturbances that could fragment critical habitats.  
20    Seasonal closures are also imposed to prevent mining activities  
21    during sensitive periods when deer and elk are most dependent on  
22    unobstructed migration routes. Additionally, the phased reclamation  
23    plans require restoration efforts that prioritize habitat connectivity  
24    and ensure that the reclaimed areas are suitable for wildlife  
25    movement, thereby maintaining functional corridors over time.

26          "The record highlights the importance of maintaining connected  
27    habitats for seasonal migration and access to resources, especially  
28    in regions with documented migratory patterns of deer and elk. The  
29    conditions of approval effectively address these concerns by  
30    controlling the scale of active mining, enforcing protective closures,  
31    and focusing on restoring connectivity through progressive

1 reclamation efforts. These combined measures minimize the conflict  
2 to a level that is no longer significant.” Record 18-19 (internal  
3 citations omitted).

4 The conditions of approval regarding connectivity and disruption of  
5 migration routes include: quarry size limitation, single active quarry limitation,  
6 reclamation plans, revegetation with native plants, seasonal closures, and gates  
7 on private roads. Petitioner challenges only the allowance of reclamation while  
8 another quarry is opened and the allowance of year-round loading and hauling.

9 Intervenor argues that reclamation decreases rather than increases conflicts  
10 to connectivity and disruption of migration routes. According to intervenor,  
11 progressive reclamation shortens the duration of habitat loss and rebuilds habitat  
12 over the project’s multi-decade use. The county’s findings under the condition of  
13 approval for reclamation state:

14 “Reclamation plans minimize the conflict by prioritizing the  
15 restoration of critical habitat features that support connectivity. By  
16 restoring disturbed areas to their natural or compatible state, these  
17 plans help reestablish habitats that are essential for successful  
18 wildlife movement.” Record 20.

19 We agree with intervenor that a reasonable person could reach the  
20 conclusion that the impacts to connectivity and disruption of migration routes can  
21 be reduced to a level that is not significant while allowing reclamation on finished  
22 quarry sites to begin while a new quarry site is opened.

23 Intervenor argues that the county reasonably distinguished between  
24 blasting and crushing, which generate acute disturbances, and limited loading and  
25 hauling which produces far less disruption. Intervenor also points out that the

1 conditions of approval regarding seasonal closures of mining and blasting while  
2 allowing year-round loading and hauling are consistent with past ODFW  
3 recommendations. As intervenor explains, in 2001 ODFW's district biologist  
4 recommended seasonal closures for blasting and crushing on the subject property  
5 while allowing year-round loading and hauling. Intervenor-Respondent's Brief  
6 63. The county carried those measures forward in 2006 and 2023, and now carries  
7 them forward in the present case. *Id.* (citing Record 482, 913, 1317). We agree  
8 with intervenor that a reasonable person could reach the conclusion that the  
9 impacts to connectivity and disruption of migration routes can be reduced to a  
10 level that is not significant while allowing year-round loading and hauling.

11 Finally, as explained under the first two assignments of error, compliance  
12 with JCLDO 3.1.4(B)(1)(c) is derivative of OAR 660-023-0180(5)(c). As the  
13 county has complied with OAR 660-023-0180(5)(c), it has also complied with  
14 JCLDO 3.1.4(B)(1)(c).

15 The third assignment of error is denied.

#### 16 **FOURTH ASSIGNMENT OF ERROR**

17 The county adopted alternative findings that, in the event a reviewing body  
18 found that the conflicts had not been minimized to a level that is not significant,  
19 conducted an ESEE analysis, balanced the impacts to the competing Goal 5  
20 resources, and allowed limited mining with conditions of approval. Petitioner  
21 argues it is premature to consider the ESEE analysis under OAR 660-023-  
22 0180(5)(d) when the county has not complied with OAR 660-023-0180(5)(b) and



1 (c). Petitioner also argues that the ESEE is not supported by adequate findings,  
2 misconstrues the law, and is not based on substantial evidence.

3 As we agree with petitioner that the county has not fully complied with  
4 OAR 660-023-0180(5)(b) and (c), we also agree with petitioner that the county  
5 may not rely on alternative ESEE findings to allow mining without first  
6 completing the OAR 660-023-0180(5)(b) and (c) process.

7 The fourth assignment of error is sustained, in part.

8 The county's decision is remanded.