

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. 2024-002

FINAL OPINION
AND ORDER

Appeal from Jackson County.

Erin L. Donald filed the petition for review, reply brief, and cross-response brief and argued on behalf of petitioner. Also on the brief was Ellen F. Rosenblum, Attorney General.

Peter Philbrick filed the respondent's brief and argued on behalf of respondent.

Garrett K. West filed the intervenor-respondent's brief, cross-petition for review, and cross-reply briefs and argued on behalf of intervenor-respondent. Also on the brief was O'Connor Law, LLC.

Steven E. Shipsey filed a state agency brief on behalf of the Department of Land Conservation and Development. Also on the brief was Sara L. Urch.

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

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REMANDED

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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 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 STATE AGENCY BRIEF

In this appeal, petitioner asserts that the county erred in applying state administrative rules adopted by the Land Conservation and Development Commission (LCDC) at OAR chapter 660, division 23, that prescribe the processes by which the county must make decisions concerning resources that are identified in Statewide Planning Goal 5 (Natural Resources, Scenic and Historic Areas, and Open Spaces). The Department of Land Conservation and Development (DLCD) is a state agency that administers LCDC policies and rules, including OAR chapter 660, division 23. ORS 197.040; ORS 197.090(1).

DLCD, which is not a party to this appeal, filed a state agency brief under ORS 197.830(8), which provides:

“If a state agency whose order, rule, ruling, policy or other action is at issue is not a party to the proceeding, it may file a brief with the board as if it were a party. The brief shall be due on the same date the respondent’s brief is due and shall be accompanied by a filing fee of \$100.”

1 *See also* OAR 661-010-0038 (providing the process for filing a state agency
2 brief); OAR 661-010-0010(11) (providing that a state agency that files a brief
3 under ORS 197.830(8) is not a party to the appeal). DLCD’s brief sets out the
4 agency’s opinion about how certain rules in OAR chapter 660, division 23,
5 should operate and supports and expands on petitioner’s arguments that the
6 county erred in applying those rules.

7 Intervenor-respondent (intervenor) objects and moves to strike DLCD’s
8 brief arguing that it improperly contains new assignments of error and introduces
9 and relies on evidence that is not in the record—namely, excerpts from the
10 administrative rule history related to the 1996 adoption of OAR chapter 660,
11 division 23. DLCD points out that we have never concluded that a state agency
12 brief must be confined to the issues presented in the parties’ briefs. *See Citizens*
13 *for Florence v. City of Florence*, 34 Or LUBA 793, 794-95 (1998) (not deciding
14 the scope of a state agency brief). We need not decide that issue in this appeal
15 because DLCD responds, and we agree, that DLCD’s brief does not raise any
16 independent assignment of error and, instead, DLCD’s brief explains the
17 agency’s view on the interplay between the standard Goal 5 review process (OAR
18 660-023-0030 through OAR 660-023-0050), and the aggregate-specific rules
19 (OAR 660-023-0180), which are at issue in petitioner’s second assignment of
20 error. DLCD argues, and we agree, that LUBA may consider administrative rule
21 history that is not in the local record when construing the rules. The motion to
22 strike DLCD’s state agency brief is denied.

1 **MOTION TO TAKE OFFICIAL NOTICE**

2 We may take official notice of relevant law as defined in ORS 40.090.
3 OAR 661-010-0046(1). A motion for official notice must explain “with
4 particularity what the material sought to be noticed is intended to establish, how
5 it is relevant to an issue on appeal, and the authority for notice under ORS
6 40.090.” OAR 661-010-0046(2)(a). DLCD moves that we take official notice of
7 the administrative rule history as an official act of a state agency for the purpose
8 of construing the applicable rules at issue in this appeal. ORS 40.090(2).

9 Intervenor objects to the motion to take official notice because, among
10 other things, DLCD is not a party to the appeal and the administrative rule history
11 documents have not been authenticated, citing ORS 40.505 from the Oregon
12 Evidence Code. The Oregon Evidence Code applies to court proceedings, does
13 not apply to LUBA proceedings, and provides no basis for us to reject a motion
14 to take official notice. *See* ORS 40.015(2) (“The Oregon Evidence Code applies
15 generally to civil actions, suits and proceedings, criminal actions and proceedings
16 and to contempt proceedings except those in which the court may act
17 summarily.”); *Oster v. City of Silverton*, 79 Or LUBA 1058, 1065 (2019) (land
18 use proceedings are not governed by the Oregon Evidence Code). Our rules do
19 not limit motions to take official notice to parties to appeals and a state agency
20 that has filed a state agency brief may file such a motion. OAR 661-010-0046.
21 The motion to take official notice is allowed.

1 **BACKGROUND**

2 The subject property is approximately 1,373 acres located in northern
3 Jackson County, to the east of Highway 62 and north of Butte Falls Highway
4 between the cities of Eagle Point and Shady Cove. The property is not within an
5 urban growth boundary and is split-zoned EFU and AR. “The purpose of the
6 (EFU) District is to preserve agricultural land.” Jackson County Land
7 Development Ordinance (JCLDO) 4.2.1. The subject property contains Class IV
8 non-prime farm soils and is not considered to be significant farmland. “The
9 purpose of the [AR] District is to allow for the protection and utilization of
10 aggregate and other mineral resources, and to ensure the reclamation of mined
11 land.” JCLDO 4.4.1. Intervenor sought a change in the zoning map designation
12 from EFU to AR for 435 acres and to add 324 acres to the county’s inventory of
13 significant aggregate resources.

14 We first summarize the applicable law before setting out additional
15 background facts. Goal 5 is “[t]o protect natural resources and conserve scenic
16 and historic areas and open spaces.” Goal 5 requires counties to identify,
17 inventory, and make decisions concerning multiple resources, including, as
18 pertinent here, wildlife habitat and aggregate resources. The general requirements
19 for complying with Goal 5 include an inventory process and a prescribed method
20 for analyzing the economic, social, environmental, and energy (ESEE)
21 consequences that could result from a decision to allow, limit, or prohibit uses
22 that conflict with an identified Goal 5 resource. *See* OAR 660-023-0030

1 (inventory process); OAR 660-023-0040 (ESEE decision process). For each
2 identified resource site, counties are required to adopt comprehensive plan
3 provisions and land use regulations to implement the ESEE decisions. OAR 660-
4 023-0050. These provisions are generally referred to as programs to achieve Goal
5 5 or Goal 5 programs. In addition to those general rules, there are specific rules
6 for each Goal 5 resource category. OAR 660-023-0110 is specific to wildlife
7 habitat. OAR 660-023-0180 is specific to mineral and aggregate resources.

8 In 1991, the county adopted by ordinance the Goal 5 Resources
9 Background Document (1990) (Goal 5 Background Document) as a part of the
10 Jackson County Comprehensive Plan (JCCP). Record 321-23. The Goal 5
11 Background Document describes multiple units classified as winter range for
12 deer and elk. The Goal 5 Background Document includes two maps produced by
13 the Oregon Department of Fish and Wildlife (ODFW) depicting the location of
14 the deer and elk winter range habitat. Record 141-42. The subject property is
15 within the Area of Special Concern (ASC) 90-1 Deer and Elk Habitat overlay,
16 Big Butte Creek Unit, which is classified as “especially sensitive” habitat.
17 JCLDO 7.1.1(C)(1)(a)(v).¹

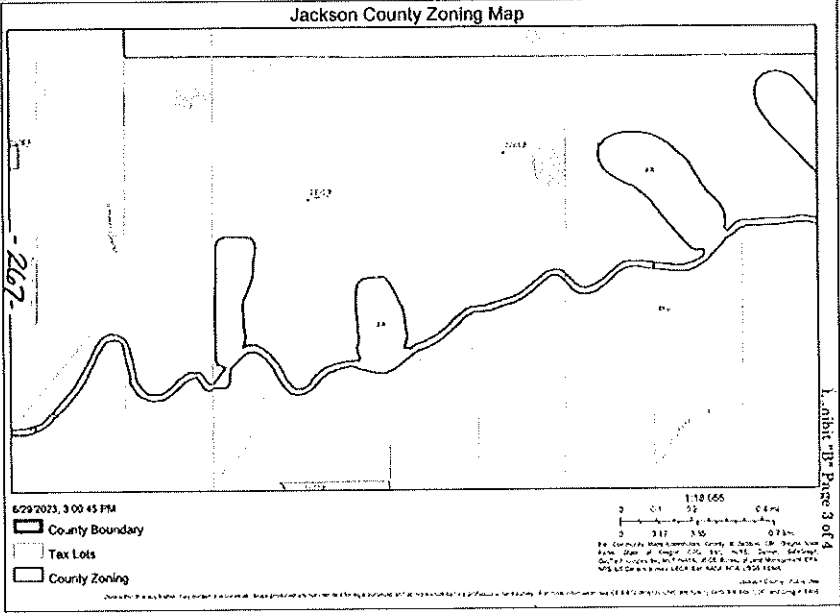
¹ In its first cross-assignment of error, intervenor argues that the county erred in concluding that the subject property is within the Big Butte Creek Unit of the ASC 90-1 deer and elk habitat overlay. We address and deny that cross-assignment of error below.

1 The county identifies significant aggregate resources through the process
2 specified for complying with Goal 5 in the LCDC administrative rules at OAR
3 Chapter 660, division 23. JCCP 7-6, 7-7, 7-8. OAR 660-023-0180 requires a
4 number of sequential determinations. First, the county must determine whether a
5 proposed aggregate resource site is “significant.” OAR 660-023-0180(3). The
6 county found, and it is undisputed, that the aggregate resources on the subject
7 property are significant. Next, the county must determine whether mining a
8 significant aggregate resource will be allowed by determining the impact area
9 and identifying and specifying significant conflicts within the impact area. OAR
10 660-023-0180(5). Conflicts include “[c]onflicts with other Goal 5 resource sites
11 within the impact area that are shown on an acknowledged list of significant
12 resources and for which the requirements of Goal 5 have been completed at the
13 time the PAPA is initiated.” OAR 660-023-0180(5)(b)(D).

14 Next, the county must determine whether significant conflicts can be
15 “minimized,” which means reduced to a level that is no longer significant. OAR
16 660-023-0180(5)(c); OAR 660-023-0180(1)(g). If identified significant conflicts
17 can be minimized through reasonable and practicable measures, then aggregate
18 mining must be allowed. OAR 660-023-0180(5)(c). If any conflicts cannot be
19 minimized, then the county must evaluate the ESEE consequences of allowing
20 mining of the resource, limiting mining of the resource, or not allowing mining
21 of the resource. OAR 660-023-0180(5)(d). The local government must then
22 determine whether to allow mining, limit mining, or not allow mining. *Id.*

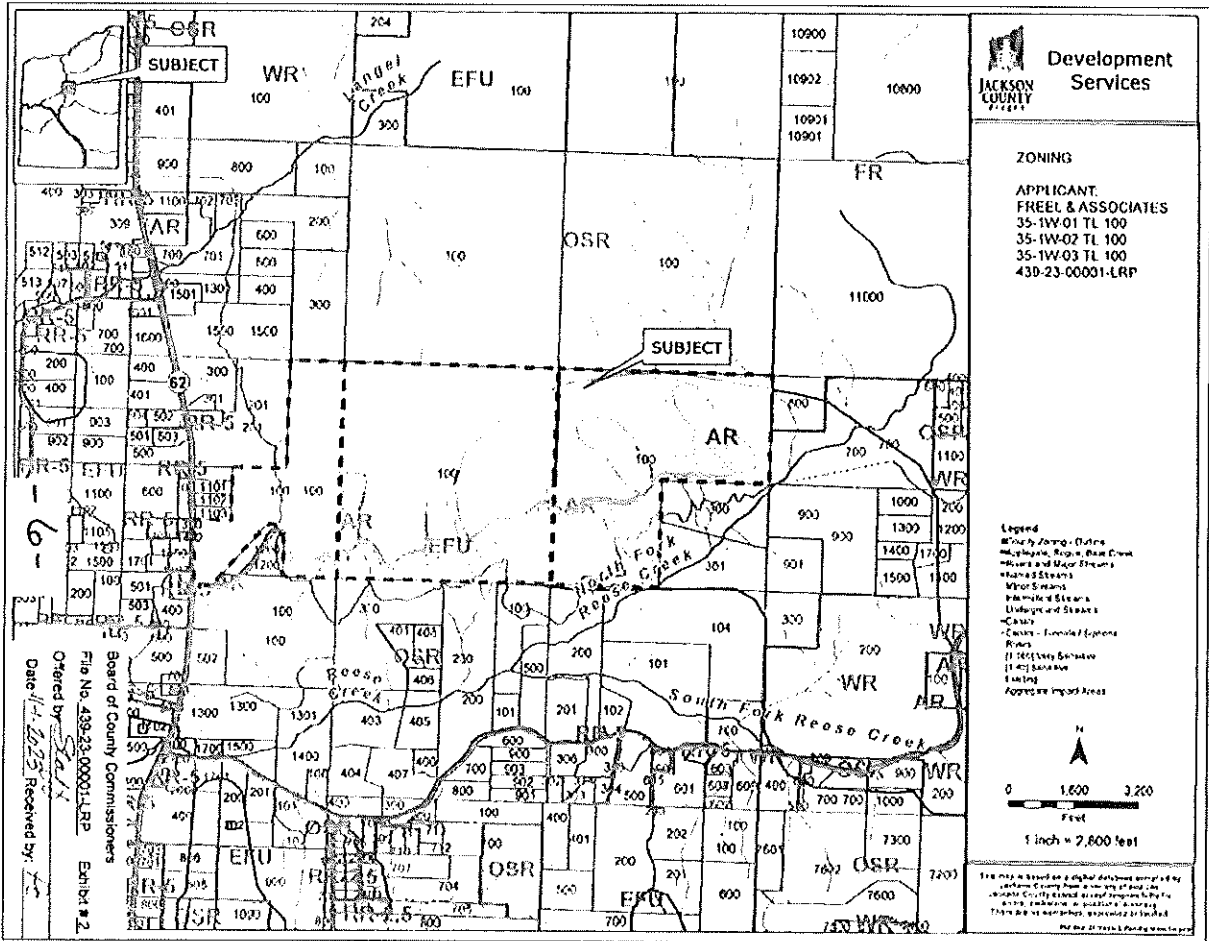
1 "A local government may determine that one or more significant Goal 5
2 resource sites are conflicting uses with another significant resource site. The local
3 government shall determine the level of protection for each significant site using
4 the ESEE process and/or the requirements in OAR 660-023-0090 through 660-
5 023-0230 (see OAR 660-023-0020(1))." OAR 660-023-0040(2)(b). "A local
6 government may conduct a single [ESEE] analysis for a site containing more than
7 one significant Goal 5 resource." OAR 660-023-0040(4).

8 In 2006, the county approved a PAPA to change the JCCP map designation
9 from Agriculture to Aggregate Resource and change the zone from EFU to AR
10 on portions of property. Record 581. That decision relied on an ESEE analysis
11 prepared by the applicant in 1995. Record 581-82. Thus, after the 2006 decision,
12 the subject property was split-zoned EFU and AR with approximately 155 acres
13 zoned AR within irregular boundaries, as shown on the images below. A
14 permitted quarry has been operating on the site.



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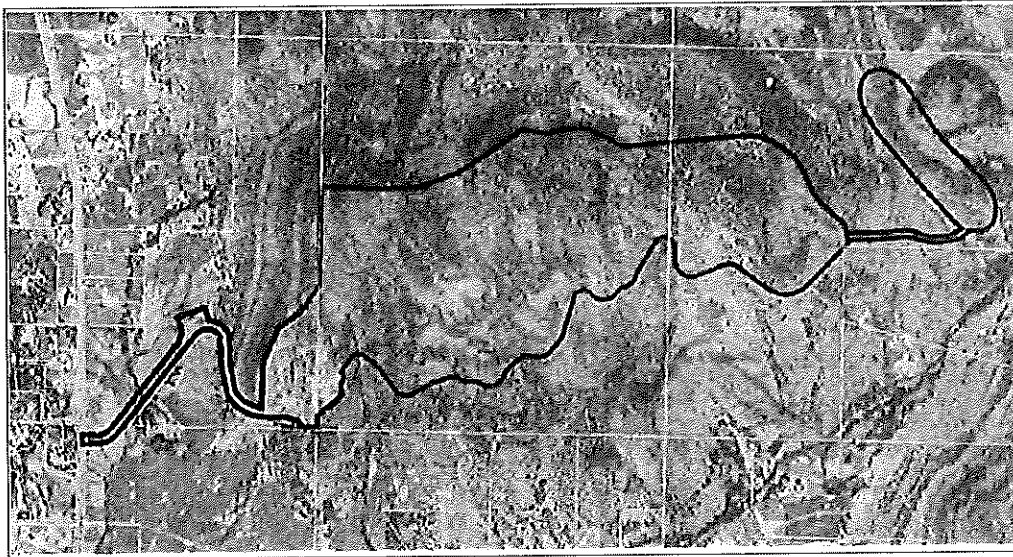
Record 673.



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2 Record 319.

3 In 2023, intervenor applied for a second PAPA to expand the AR-zoned
 4 area of the subject property. The resulting AR zone boundaries would be as
 5 depicted below within the irregular black line.



Record 65.

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Petitioner opposed the PAPA due to the anticipated loss of designated especially sensitive winter range for deer and elk. After a public hearing, the planning commission recommended that the county deny the PAPA because the application did not adequately address conflicts between aggregate mining and wildlife habitat. The board of commissioners held a hearing and decided to approve the PAPA. As explained further below, the board of commissioners determined that aggregate mining conflicts with wildlife habitat. However, the board of commissioners found that, with the conditions of approval, those conflicts would be minimized to a level that is no longer significant. The board of commissioners further adopted the 1995 ESEE analysis from the prior 2006 PAPA approval and decided that aggregate mining should be allowed. This appeal followed.

1 **FIRST ASSIGNMENT OF ERROR**

2 JCLDO 7.1.1(C)(1) provides, in part, that the county’s ASC 90-1 Deer and
3 Elk Habitat Overlay

4 “includes all lands on which development can affect survival of
5 Black-tailed deer or Roosevelt elk herds as described in the Natural
6 and Historic Resources Element (Chapter 16) of the [JCCP]. Such
7 lands are identified as winter range habitat on base maps prepared
8 by [ODFW] and adopted by the Board of Commissioners as ASC
9 90-1. Winter range is classified by ODFW as ‘Especially Sensitive,’
10 ‘Sensitive’, and ‘Other’, with commensurate levels of protection
11 provided to protect the carrying capacity of the range as set forth in
12 the [JCCP].”

13 Petitioner argues that the county failed to apply approval criteria in JCLDO
14 7.1.1(C), which includes general development standards that apply to
15 discretionary land use permits for development within the ASC 90-1 overlay.²
16 Intervenor responds, initially, that during the local proceedings petitioner never
17 raised the issue that the approval criteria in JCLDO 7.1.1(C) apply to the PAPA
18 and, thus, petitioner has waived that issue. ORS 197.797(1); ORS 197.835(3). On
19 the merits, intervenor responds that the approval criteria in JCLDO 7.1.1(C) do
20 not apply to the PAPA because the challenged decision is not a land use permit
21 and does not approve any development in the overlay. We agree with intervenor

² JCLDO 7.1.1(C)(1) describes land subject to the overlay. JCLDO 7.1.1(C)(2) sets out minimum parcel size. JCLDO 7.1.1(C)(3) sets out gating requirements. JCLDO 7.1.1(C)(4) sets out dwelling standards. JCLDO 7.1.1(C)(5) sets out general development standards. JCLDO 7.1.1(C)(6) sets out standards for ODFW Alternative Siting Plans.

1 that the issue is waived. We express no opinion about whether the approval
2 criteria in JCLDO 7.1.1(C) would apply to the challenged PAPA if the issue had
3 not been waived.

4 ORS 197.835(3) requires that issues before LUBA on review “shall be
5 limited to those raised by any participant before the local hearings body as
6 provided by ORS 197.195 or 197.797, whichever is applicable.” ORS
7 197.797(1), in turn, requires that:

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

15 The “raise it or waive it” principle does not limit the parties on appeal to the exact
16 same arguments made below, but it does require that the issue be raised below
17 with sufficient specificity to prevent “unfair surprise” on appeal. *Boldt v.*
18 *Clackamas County*, 21 Or LUBA 40, 46, *aff’d*, 107 Or App 619, 813 P2d 1078
19 (1991); *Friends of Yamhill County v. Yamhill County*, ___ Or LUBA ___ (LUBA
20 No 2021-074, Apr 8, 2022), *aff’d*, 321 Or App 505 (2022) (nonprecedential
21 memorandum opinion), *rev den*, 370 Or 740 (2023) (slip op at 5-6). A particular
22 issue must be identified in a manner detailed enough to give the local government
23 and the parties fair notice and an adequate opportunity to respond. *Boldt*, 21 Or
24 LUBA at 46. When attempting to differentiate between “issues” and

1 “arguments,” there is no “easy or universally applicable formula.” *Reagan v. City*
2 *of Oregon City*, 39 Or LUBA 672, 690 (2001).

3 In its preservation statement in the petition for review, petitioner quotes
4 the following statement from petitioner’s written testimony below:

5 “The project site is located within Jackson County’s designated
6 Especially Sensitive Winter Range for deer and elk habitat (ASC 90-
7 1). * * * The project includes mining activity that results in the direct
8 loss of suitable wildlife habitat, which include direct and indirect
9 impacts to wildlife, such as noise disturbance and displacement of
10 wildlife during mining operations.” Petition for Review 9-10
11 (quoting Record 162).

12 In its reply brief, in response to intervenor’s waiver argument, petitioner contends
13 that the issue of the applicability of the approval criteria in JCLDO 7.1.1(C) was
14 adequately raised by its reference to “ASC 90-1” and its statement that mining
15 activities would impact wildlife habitat. Petitioner’s Reply Brief 1.

16 It was disputed below, and is disputed on appeal, whether the subject
17 property is within the ASC 90-1 overlay and thus, whether the county was
18 required to determine whether the proposed aggregate resource and removal
19 designations would create conflicts with designated wildlife habitat. The county
20 concluded that the subject property is within the ASC 90-1 overlay and, thus, the
21 county was required to consider whether aggregate removal would conflict with
22 the designated wildlife habitat *under the LCDC Goal 5 rules*. Petitioner never
23 argued that the county *was also* required to apply the approval criteria in JCLDO
24 7.1.1(C) to the PAPA. If petitioner had asserted that the county was required to

1 apply the approval criteria in JCLDO 7.1.1(C), then intervenor could have argued
2 to the county, as intervenor argues to us in this appeal, that the approval criteria
3 in JCLDO 7.1.1(C) do not apply to the PAPA, and the board of commissioners
4 would have had an opportunity to interpret those local standards and determine
5 in the first instance whether and how they apply. Reference to the ASC 90-1
6 overlay title alone was insufficient to give the county and the parties fair notice
7 and an adequate opportunity to respond to the issue of whether the county was
8 required to apply the approval criteria in JCLDO 7.1.1(C) to the PAPA. We
9 conclude that issue is waived.

10 The first assignment of error is denied.

11 **SECOND ASSIGNMENT OF ERROR**

12 The county found that “[t]here are significant conflicts between the Deer
13 and Elk Habitat Overlay (ASC 90-1) which is Goal 5 protected and the proposed
14 aggregate expansion.” Record 14.

15 “The conditions found in Exhibit B to this Ordinance will provide
16 reasonable and practicable measures that will minimize noise and
17 dust impacts to residential/agricultural uses within the impact area
18 should this application be approved. The inclusion of the conditions
19 applicable to the existing aggregate resource, and additional
20 conditions, will minimize conflicts with ASC 90-1.” *Id.*

21 The county determined that an ESEE analysis was not required because
22 significant conflicts, including the loss of deer and elk habitat, would be
23 minimized by the conditions of approval. *Id.* (“The conditions in Exhibit B to this
24 Ordinance are found to mitigate the ASC 90-1 and do not require further ESEE

1 analysis beyond the ESEE analysis submitted as part of the record.”).
2 Nevertheless, the county also adopted an ESEE analysis from documents in the
3 record. Record 8.

4 Petitioner argues that the county’s findings specifying conflicts between
5 aggregate mining and wildlife habitat and concluding that those conflicts are
6 minimized by conditions of approval are inadequate, not based on substantial
7 evidence in the record, and misconstrue OAR 660-023-0180(5). For the reasons
8 explained below, we agree that the findings are inadequate.

9 Petitioner focuses their findings challenge on the county’s findings that
10 conflicts will be minimized, as required by OAR 660-023-0180(5)(c). However,
11 as we explained in *Rock Solid Sand & Gravel, LLC v. Umatilla County*:

12 “[T]he county cannot proceed to ‘determine reasonable and
13 practicable measures that would minimize the conflicts identified’
14 without first specifying the predicted conflicts. OAR 660-023-
15 0180(5)(c). In other words, the county cannot move on to subsection
16 (5)(c) without first completing subsection (5)(b). The county must
17 first specify the predicted conflicts. The county then may determine
18 whether specified conflicts can be minimized.” ___ Or LUBA ___
19 (LUBA No. 2023-033, Oct 25, 2023) (slip op at 16).

20 The underlying problem with the minimization findings is that the county failed
21 to “specify the predicted conflicts” with deer and elk habitat. OAR 660-023-
22 0180(5)(b). In opposing the PAPA, ODFW opined that mining activity will result
23 in the direct loss of wildlife habitat and displacement. Record 162-63, 705. The
24 decision does not identify habitat loss as a conflict, find that habitat loss is not a
25 conflict, or explain why it is not a conflict. The findings refer to noise and dust

1 impacts, and mitigation for those impacts, but the findings do not specify the
2 conflicts that noise and dust impacts will cause with respect to wildlife habitat.

3 The county must first specify conflicts and then determine whether those
4 conflicts can be minimized. The findings state that the conditions in Exhibit B to
5 the Ordinance will minimize noise and dust impacts to residential and agricultural
6 uses within the impact area and those same measures will minimize conflicts with
7 deer and elk habitat. It is impossible to determine whether the conditions of
8 approval will minimize wildlife habitat conflicts to a level where they are no
9 longer significant without first specifying the conflicts. The findings do not
10 explain how, where, when, and to what extent aggregate removal activities
11 impact deer and elk habitat and they do not explain how the mitigation measures,
12 which are primarily directed at mitigating impacts to residential and farm uses,
13 will minimize wildlife habitat conflicts. The findings are inadequate to satisfy
14 OAR 660-023-0180(5)(b) and (c).

15 Petitioner and DLCDD further argue that the county's ESEE analysis is
16 inadequate, not based on substantial evidence in the record, and misconstrues
17 OAR 660-023-0180(5)(d). As we explain above, the county must first specify
18 conflicts and determine whether those conflicts can be minimized before
19 conducting an ESEE analysis based on any conflicts that cannot be minimized.
20 *See* OAR 660-023-0180(5)(d) (providing that only conflicts that cannot be
21 minimized must be evaluated through an ESEE analysis). The county cannot
22 analyze the ESEE consequences without first identifying the conflicts and the

1 degree to which such conflicts can be minimized. The county erred in steps (b)
2 and (c). Thus, it cannot yet move on to step (d). Similarly, we cannot and do not
3 analyze any county adopted ESEE analysis in the challenged decision. The
4 county likely will adopt new conflict and minimization findings on remand and
5 may adopt a new ESEE analysis. Accordingly, it would be premature for us to
6 resolve the challenges to the ESEE analyses in the record and adopted by the
7 county in support of the decision challenged in this appeal.

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

9 **FIRST CONTINGENT CROSS-ASSIGNMENT OF ERROR**

10 Intervenor argues that the county erred in concluding that the subject
11 property is within the deer and elk habitat ASC 90-1 overlay. The Goal 5
12 Background Document includes two maps produced by ODFW depicting the
13 location of the deer and elk winter range habitat overlay. Record 141-42.
14 Intervenor argues that the first map is too vague and approximate to locate the
15 subject property within the habitat overlay boundaries. Intervenor does not
16 dispute that the overlay boundary on the second map encompasses the subject
17 property. Instead, intervenor argues that the textual description of the overlay
18 does not include the subject property, the map conflicts with the narrative
19 description, and that the text should control over the map.

20 The text of the Goal 5 Background Document contains the following
21 narrative description:

22 “The Big Butte Creek Unit is located south and east of the Crater

1 Lake Highway 62 and the Rogue River. This unit encompasses lands
2 drained by Big Butte Creek and its tributaries and smaller streams
3 of the lower slopes of Round Mountain that feed the south fork of
4 the Rogue River. The southern extent of this range is the divide
5 between Big and Little Butte Creeks.” Record 355 (citing Goal 5
6 Resources Background Document (1990) at 35(emphasis omitted)).

7 Intervenor argued to the county that, based on that narrative description,
8 the Big Butte Creek Unit includes only those lands that drain into Big Butte Creek
9 and its tributaries and the smaller streams of Round Mountain that drain into the
10 south fork of the Rogue River. Intervenor explained that the subject property
11 drains into Reese Creek, which flows southwestward and directly into the Rogue
12 River. Intervenor argued that the subject property is not within the Big Butte
13 Creek Unit because subject property lands do not drain into Big Butte Creek or
14 its tributaries, the smaller streams of Round Mountain, or the south fork of the
15 Rogue River. Record 355.

16 The decision does not contain findings analyzing intervenor’s textual and
17 drainage-based arguments. The decision simply states: “The subject site is within
18 the ASC 90-1 Deer and Elk Habitat established to protect the Goal 5 – Resource
19 Deer and Elk Winter Range.” Record 2. Intervenor argues the “findings are
20 conclusory, bereft of analysis, and do not grapple with the issues raised below”
21 and are not supported by substantial evidence in the record. Cross-Petition for
22 Review 14.

23 We must defer to the board of commissioner’s interpretation of its own
24 comprehensive plan if that interpretation is not “inconsistent with the express

1 language of the comprehensive plan” or inconsistent with the underlying
2 purposes and policies of the plan. ORS 197.829(1); *Siporen v. City of Medford*,
3 349 Or 247, 243 P3d 776 (2010) (applying ORS 197.829(1)). In order for that
4 deferential standard to apply, the local government’s interpretation must be
5 explicit or implicit in the challenged decision. *Green v. Douglas County*, 245 Or
6 App 430, 438-40, 263 P3d 355 (2011).

7 The county and petitioner respond that the board of commissioner’s
8 implicit interpretation of the Goal 5 Background Document text is consistent with
9 the express language. We agree. The second sentence of the narrative description
10 of the Big Butte Creek Unit states that the unit “encompasses” certain lands. The
11 definition of “encompass,” is to “encircle,” “envelop,” “include.” *Webster’s*
12 *Third New Int’l Dictionary* 747 (unabridged ed 2002). “Encompass” connotes
13 inclusivity and does not indicate exclusivity. The county could plausibly
14 conclude that, contrary to intervenor’s argument, the term “encompass,” and the
15 drainage descriptions that follow that term, do not delimit the Big Butte Creek
16 Unit. The county could plausibly conclude, as it did, that the narrative description
17 of the Big Butte Creek Unit does not exclude the subject property, which is
18 included in the Goal 5 Background Document map, and there is no conflict
19 between the text and the maps.

20 The first contingent cross-assignment of error is denied.

1 **SECOND CONTINGENT CROSS-ASSIGNMENT OF ERROR**

2 Intervenor argues that, even if the county correctly concluded that the
3 subject property is within the ASC 90-1 overlay, aggregate is not a conflicting
4 use with deer and elk habitat because it is not listed as a conflict in the JCCP.

5 The county and petitioner respond, and we agree, that OAR 660-023-
6 0180(5) requires the county to determine conflicting uses, including conflicts
7 with other acknowledged Goal 5 resources, and those conflicts are not limited to
8 conflicts listed in the JCCP.³ OAR 660-023-0180(5)(b)(D).

9 The second contingent cross-assignment of error is denied.

10 The county's decision is remanded.

³ The county adopted the Goal 5 Background Document in 1991 and LCDC adopted OAR chapter 660, division 23, in 1996.

Certificate of Mailing

I hereby certify that I served the foregoing Final Opinion and Order for LUBA No. 2024-002 on July 24, 2024, by mailing to said parties or their attorney a true copy thereof contained in a sealed envelope with postage prepaid addressed to said parties or their attorney as follows:

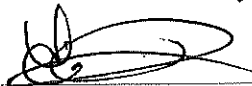
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Dated this 24th day of July, 2024.



Erin Pence
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