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

MICHAEL HASTINGS, MANDI HASTINGS,
DINAH LORD, MIKE LORD,
TINA CASSITY, ROBERT CASSITY,
PATTY DICKINSON, and DON DICKINSON,
Petitioners,

vs.

MALHEUR COUNTY,
Respondent,

and

DARREN LEE,
Intervenor-Respondent.

LUBA No. 2024-030

FINAL OPINION
AND ORDER

Appeal from Malheur County.

Ty K. Wyman filed the petition for review and reply brief and argued on behalf of petitioners. Also on the brief was Dunn Carney LLP.

No appearance by Malheur County.

Brian R. Sheets filed the intervenor-respondent's brief and argued on behalf of intervenor-respondent. Also on the brief was BRS Legal, LLC.

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

REMANDED 08/20/2024

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

Opinion by Zamudio.

NATURE OF THE DECISION

Petitioners appeal a post-acknowledgment plan amendment (PAPA) that adds 80 acres to the county's inventory of significant aggregate resources.

MOTION TO INTERVENE

Darren Lee (intervenor), the applicant below, moves to intervene on the side of respondent. The motion is unopposed and allowed.

STANDING

Intervenor disputes that petitioners Mike Lord, Robert Cassity, and Brooke Cassity have established standing to participate as parties in this appeal. ORS 197.830(2) provides:

> "Except as provided in ORS 197.620, a person may petition the board for review of a land use decision or limited land use decision if the person:
>
> "(a) Filed a notice of intent to appeal the decision as provided in subsection (1) of this section; and
>
> "(b) Appeared before the local government, special district or state agency orally or in writing."

Petitioners must state the facts that establish their standing in the petition for review. OAR 661-010-0030(4)(a). In the petition for review, petitioners rely on ORS 197.830(2) and state that petitioner Tina Cassity appeared orally below and stated that she was also speaking on behalf of Robert Cassity and Brooke Cassity. Petition for Review 1 (citing Record 306). Petitioners state that petitioner Dinah Lord appeared orally below and stated that she was also speaking on behalf

of Mike Lord. Petition for Review 1 (citing Record 307). Intervenor argues that those statements do not satisfy the appearance standard for ORS 197.830(2)(b).

Petitioners reply that Robert Cassity appeared orally below, as evidenced at Record 236 (Planning Commission Meeting Minutes Feb 22, 2024), and Mike Lord appeared orally below, as evidenced at Record 37 (County Court Meeting Minutes April 3, 2024) and Record 83 (County Court Meeting Minutes March 20, 2024). Petitioners do not assert that Brooke Cassity appeared below, or argue that Tina Cassity's oral appearance and testimony is sufficient to establish standing for Brook Cassity. Accordingly, we agree with intervenor that Brooke Cassidy has not established standing to participate in this appeal and is thus removed as a party from this appeal.

BACKGROUND

A. Factual and Procedural Background

The subject property is approximately 308 acres and split zoned. Approximately 261 acres are zoned Exclusive Range Use (C-A2) and approximately 47 acres are zoned Exclusive Farm Use (C-A1). The property is developed with a farm dwelling. Surrounding uses include an aggregate mine to the west and farm and rural residential uses to the south, east, and north.

Intervenor sought county approval to add a portion of the subject property to the county's inventory of significant aggregate resources (PAPA) and a conditional use permit (CUP) to conduct aggregate mining and processing

activities.[1] The proposed aggregate resource site is entirely within the C-A2 zone. After conducting a public hearing and considering both applications in a consolidated proceeding, the planning commission adopted findings and denied the CUP and recommended that the county court deny the PAPA.[2] Intervenor did not appeal the CUP denial. Accordingly, the planning commission's CUP denial is final and is not before us for review in this appeal. The county court held a *de novo* hearing on the PAPA and approved the PAPA. This appeal followed.

B. Legal Background

We set out the applicable legal framework before proceeding to the assignments of error. Statewide Planning Goal 5 (Natural Resources, Scenic and Historic Areas, and Open Spaces) is "[t]o protect natural resources and conserve scenic and historic areas and open spaces." Goal 5 requires counties to identify, inventory, and make decisions concerning multiple resources, including aggregate resources. "'Aggregate resources' are naturally occurring

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[1] In 2021, the county denied an application for mining on the same property. In 2023, intervenor was subject to a county code enforcement violation and a Department of Geology and Mineral Industries (DOGAMI) suspension order for mining activity on the subject property. Record 14, 185, 217; *see also* OAR 632-030-0020 (setting out procedures for applying for a DOGAMI operating permit); OAR 660-023-0180(5)(f) ("Local governments shall coordinate with DOGAMI regarding the regulation and reclamation of mineral and aggregate sites, except where exempt under ORS 517.780.").

[2] The planning commission was not authorized to make an initial decision on the PAPA and was limited to making a recommendation to the county court. Record 183.

concentrations of stone, rock, sand gravel, decomposed granite, limestone, pumice, cinders, and other naturally occurring solid materials commonly used in road building or other construction." OAR 660-023-0180(1)(a). The county identifies significant aggregate resources through the process specified for complying with Goal 5 in the administrative rules adopted by the Land Conservation and Development Commission (LCDC).

OAR 660-023-0180 is specific to mineral and aggregate resources and requires a number of sequential determinations. First, the county must determine whether a proposed aggregate resource site is "significant." OAR 660-023-0180(3). As pertinent here, significance of the aggregate resource is determined by the quantity and quality of the aggregate on site. OAR 660-023-0180(3)(a). Next, the county must determine whether mining a significant aggregate resource will be allowed by determining the impact area and identifying and specifying significant conflicts within the impact area. OAR 660-023-0180(5). Next, the county must determine whether significant conflicts can be "minimized," which means reduced "to a level that is no longer significant." OAR 660-023-0180(5)(c); OAR 660-023-0180(1)(g). If specified significant conflicts can be minimized through "reasonable and practicable measures," then aggregate mining must be allowed. OAR 660-023-0180(5)(c). If any conflicts cannot be minimized, then the county must evaluate the economic, social, environmental, and energy (ESEE) consequences of allowing, limiting, or not allowing mining of the significant aggregate resource. OAR 660-023-0180(5)(d). The local

government must then decide whether to allow, limit, or not allow mining at the site. *Id.*

FIRST ASSIGNMENT OF ERROR

Petitioners argue that respondent misconstrued applicable law and adopted inadequate findings not supported by substantial evidence in determining that the proposed aggregate resource site is "significant" under OAR 660-023-0180(3)(a), which provides:

> "An aggregate resource site shall be considered significant if adequate information regarding the quantity, quality, and location of the resource demonstrates that the site meets any one of the criteria in subsections (a) through (c) of this section, except as provided in subsection (d) of this section:
>
> "(a) A representative set of samples of aggregate material in the deposit on the site meets applicable Oregon Department of Transportation (ODOT) specifications for base rock for air degradation, abrasion, and soundness, and the estimated amount of material is * * * more than 500,000 tons outside the Willamette Valley[.]"

Before the planning commission, intervenor explained that they had excavated a borrow pit and 14 test pits. Record 189. The planning commission observed:

> "During the February 22, 2024 hearing, [intervenor] stated that he drilled the borrow pit and 14 test pits himself and that they 'had to be left open for a substantial amount of time' due to the suspension order that had been issued by [the Department of Geology and Mineral Industries (DOGAMI)]. [Intervenor] further stated that following a lapse of several months, Mr. Cunningham of [Petra Drilling and Blasting (Petra)] visited the property and examined the pits. In the Application there is a description of the excavations and

depth of overburden and aggregate at each test pit." *Id.*

The application materials explain that "test holes * * * were excavated to more accurately determine the quantity of aggregate and confirm the presence of aggregate throughout the site. This was achieved with an excavator * * *." Record 321. Intervenor submitted a log of the 14 test pits (test pit log), setting out the location, elevation, and composition of each test pit. Record 340-43. For example:

"Test Hole # 5

"Location 44 Degrees 10'44.82"N 116 Degrees 59'53.42"W

"Elevation 2402

"Clay/Silt/Carbonate from surface to 18 feet

"Poorly graded gravel from 19 feet to 35 feet

"Silt at 36 feet" Record 341.

As explained further below, intervenor also submitted reports from Petra, Strata, Inc. (Strata), and Atlas Technical Consultants, LLC (Atlas).

A. Quantity

Petra prepared an undated quantity analysis comprised of a letter (Cunningham's letter), a map depicting the locations of the test pits, and a series of computer-generated images. Record 335-39. As explained in the planning commission findings quoted above, Cunningham visited the property and examined the excavated test pits. Record 189, 335. Cunningham's letter explained that "the test pits revealed 18 feet average depth of overburden on the

top of the aggregate as depicted in exhibit B, with an average depth of 10 feet from top of aggregate to bottom of aggregate as depicted in exhibit C, with a total depth from original ground to bottom of borrow of 28 feet as depicted in exhibit D." Record 335. Cunningham concluded that "[t]he net borrow equat[ed] to 2.75 million tons" and "[t]hrough the borrow process it can be expected for a variance of ~25% of the actual quantity." *Id.* Cunningham's letter does not include any information about their credentials. *Id.*

The planning commission concluded that the quantity information from Petra was inadequate, because (1) Petra did not establish its professional and business credentials; (2) Petra made no independent findings on the homogeneity of the aggregate source; (3) Petra did not verify nor confirm intervenor's descriptions of the test pits, including the depth of overburden, type of aggregate found, and depth of aggregate resource in each test pit; (4) Petra made no findings nor verified that the test pits were adequate in size and number to determine quantity; and (5) the Petra reports are undated. Record 189.

B. Quality

Strata prepared a quality analysis of nine bags of sample gravel from five of the test pits. Record 323. "The gravel from the test pits was stockpiled adjacent to the test pits." *Id.* "Bulk samples for testing were gathered from each gravel stockpile adjacent to the test pit location. The bulk samples obtained from the site were combined into one composite sample, and all laboratory testing was performed on the combined sample." *Id.* Strata's report concluded:

> "Our services consist of professional opinions based on generally accepted geotechnical engineering sampling and laboratory testing practices. This acknowledgement is in lieu of all express or implied warranties. Our scope of services was limited to sampling of stockpiles and aggregate testing and did not include subsurface exploration or aggregate volume calculations. As such, conditions can change between exploration locations which may impact the viability of this site as a potential borrow source. If this potential for variability is unacceptable to you, please contact us to discuss the scope and associated fee for additional exploration and testing." Record 324.

The Department of Land Conservation and Development (DLCD), which implements the LCDC Goal 5 rules, explained in an email to the county planning department that that analyzing a hybrid sample for quality testing is an acceptable practice, if the samples are similar. That is, quality tests can be run on a composite sample taken from several different test sites if the aggregate deposit is homogeneous. Record 188, 99. The planning commission found that it was not clear from the Strata report whether the samples from the five test pits were in fact homogeneous before they were combined for quality testing. Record 188.

Intervenor also submitted a quality analysis report, prepared by Atlas, that describes quality of material excavated from three test pits, from a location that was not identified in the report. Record 330. Intervenor testified that the samples that Atlas tested were from a site outside the proposed Goal 5 significant aggregate resource site. The planning commission concluded that the quality information from Atlas is insufficient to establish quality of the aggregate resource because it was not from the area proposed for inventory. Record 188.

C. County Court's Findings Regarding Quantity and Quality

With respect to quantity, the county court found:

"[Intervenor] drilled the borrow pit und 14 test pits himself. Following the lapse of several months, Mr. Nick Cunningham of Petra visited the property and examined the pits. [Intervenor] typed a description of the excavations and depth of overburden and aggregate at each test pit and submitted it with the Application. The Petra report states, in part: 'the test pits revealed 18 feet average depth of overburden on the top of the aggregate * * * with an average depth of 10 feet from top of aggregate to bottom of aggregate * * *.' The depths of aggregate were depicted in computer generated models provided by Petra, and included in the Application. Mr. Cunningham explained his methodology and calculations – letter in Exhibit 39. Mr. Cunningham also testified by phone before the County Court on March 20, 2024. See Malheur County Court Minutes of March 20, 2024 – verbatim testimony of Nick Cunningham, incorporated herein by reference.

"The County Court finds the Petra information (report in Application, letter in Exhibit 39 of Planning Commission file and Mr. Cunningham's testimony) is sufficient and substantial evidence. The County Court finds the aggregate quantity threshold of over 500,000 tons outside the Willamette Valley is met. The Site is estimated at 2.75 million tons of aggregate." Record 15-16.

Cunningham testified about his qualifications as follows:

"I've been in the drilling/blasting 20 years. This is a type of activity that I do, I'll say, 15/20 times a month, which is probably more frequently than let's say an engineering firm that did something similar, because they would do dozens of different activities as well as doing this. Sometimes these quantity takeoffs will be just a quantified blast, sometimes it'll be a takeoff to identify amounts of material within a cut, sometimes it'll be to identify amounts of material in overburden, like we're doing there, and sometimes it'll be used to figure out mine life and various different things like that based on production levels and utilization and stuff like that. I've

> been doing that about 20 years. I think about, I'll say about 10 years, steady with the Topcon, GPS system, which is what I used, and their software. Prior to that it was a lot more manual stuff, a lot of drawings and stuff like that for what we were doing." Record 82 (County Court Minutes, March 20, 2024).

With respect to quality, the county court agreed with the planning commission and found that the Atlas quality testing did not support the application because it was from outside the proposed PAPA site. With respect to the Strata quality testing, the county court departed from the planning commission and found that the Strata testing of a composite sample of nine bags of aggregate from five test holes was sufficient to demonstrate quality. The findings acknowledge DLCD's guidance that a hybrid sample is acceptable if the aggregate deposit is homogeneous. Unlike the planning commission, the county court found that the record demonstrates that the aggregate deposit is homogeneous. The county court found:

> "Barry Miller, PE, PG, Engineering Service Manager of Strata Inc., writes in part, 'In our experience in Idaho evaluations for alluvial aggregate resources, when gravel encountered in explorations is of the same depositional environment and appears to be the same soil type (visual classification), there is no need to perform quality testing on each sample' (Miller email dated February 15, 2024 in Exhibit 39 of Planning Commission file). The County Court finds that from this statement and based on Miller's professional experience, it is reasonable to conclude that the aggregate samples were, in fact, similar; and there was no need to perform quality testing on each sample/pit. The information from Strata and Mr. Miller is adequate and substantial evidence. Quality of aggregate is met." Record 17.

D. Findings Challenge Regarding Quantity and Quality

Petitioners argue that the county court's findings regarding quantity and quality are inadequate because they do not address the following issues:

> "• lack of professional credentials;
>
> "• lack of independent findings on the homogeneity of the aggregate source;
>
> "• lack of verification/confirmation [of intervenor's test pit log] information/data on depth of overburden, type of aggregate found and depth of aggregate resource in each test pit;
>
> "• lack of verification that the test pits were adequate in size and number to determine quantity." Petition for Review 8.

Generally, findings must (1) address the applicable standards, (2) set out the facts relied upon, and (3) explain how those facts lead to the conclusion that the standards are met. *Heiller v. Josephine County*, 23 Or LUBA 551, 556 (1992). Findings must address and respond to specific issues relevant to compliance with applicable approval standards that were raised in the proceedings below. *Norvell v. Portland Area LGBC*, 43 Or App 849, 853, 604 P2d 896 (1979). "What is needed for adequate judicial review is a clear statement of what, specifically, the decision-making body believes, after hearing and considering all the evidence, to be the relevant and important facts upon which its decision is based." *Sunnyside Neighborhood v. Clackamas Co. Comm.*, 280 Or 3, 21, 569 P2d 1063 (1977). "[T]o be sufficient for review, findings need only 'establish the factual and legal basis for the particular conclusions drawn in a challenged decision.'" *Niederer v.*

City of Albany, 79 Or LUBA 305, 314 (2019) (quoting *Thormahlen v. City of Ashland*, 20 Or LUBA 218, 229-30 (1990)).

Intervenor responds that the county's findings are adequate and that petitioners essentially and impermissibly ask LUBA to reweigh the evidence and make credibility findings. We agree with intervenor that the county's findings are adequate. The findings set out Cunningham's credentials and implicitly find them credible and sufficient to support the quantity findings in Petra's report. The findings adequately explain that the county relies on Miller's experience and explanation of similarity of soil types as implicit evidence that Strata deemed the nine samples that were combined for quality testing sufficiently similar to allow for combined testing under generally accepted sampling and testing practices. The findings adequately explain that Petra independently determined from field investigation, or accepted as accurate after field investigation, intervenor's test pit log description of the depth of the overburden and the type and depth of the aggregate resource. The findings also rely on Petra's computed-generated models for estimating the aggregate quantity based on the test pits. Implicit in those models and conclusions is Petra's determination, and the county court's reliance on that determination, that the test pits were adequate in size and number to determine quantity.

The findings are adequate. Whether substantial evidence supports the conclusions, and whether the conclusions misconstrue the applicable standard, are analyzed below.

The first assignment of error, first subassignment, is denied.

E. Misconstruction of OAR 660-023-0180(3)

Petitioners argue that the county misconstrued the phrase "[a] representative set of samples of aggregate material in the deposit" because, according to petitioners, "a representative set of samples" must be taken and tested by a professional geologist. OAR 660-023-0180(3)(a). In support of that argument, petitioners cite *Protect Grand Island Farms v. Yamhill County*, 64 Or LUBA 179, 184-86 (2011). Intervenor responds that *Protect Grand Island Farms* concerned dueling expert analyses of aggregate quality, the petitioner challenged the applicant's expert's methodology, and that case does not stand for the proposition that "a representative set of samples" must be taken and tested by a professional geologist. We agree. Here, as in *Protect Grand Island Farms*, we have not been cited anything in the Goal 5 rule or elsewhere to support an "argument that any particular standards govern the requirement to provide 'a representative set of samples' in order to determine whether the OAR 660-023-0180(3)(a) thresholds for significance as to the quantity of aggregate are met." *Protect Grand Island Farms*, 64 Or LUBA at 184. Unlike other administrative rules that require an applicant to apply particular standards or obtain specific professional assessments, OAR 660-023-0180(3)(a) more generally requires "adequate information" and "a representative set of samples." *Compare* OAR 660-023-0180(3)(a) *with* OAR 660-006-0010 (prescribing method for changing forest land designation); OAR 660-023-0100(3) (prescribing standards and

procedures for conducting local wetlands inventory); OAR 660-023-0110 (prescribing standards and procedures for conducting wildlife habitat inventory); OAR 660-033-0030(5)(b) (requiring assessment by "a professional soil classifier"). OAR 660-023-0180(3)(a) does not require a professional opinion provided by a specially credentialed expert as to quantity of the resource, nor does it require a professional geologist to collect or analyze the aggregate material samples in order for the samples to qualify as "a representative set of samples." The county did not misconstrue OAR 660-023-0180(3)(a).

The first assignment of error, second subassignment, is denied.

F. Substantial Evidence

Petitioners argue that the county's conclusion that the aggregate resource site is significant is not supported by substantial evidence. We will reverse or remand a challenged decision if it is "not supported by substantial evidence in the whole record." ORS 197.835(9)(a)(C). Substantial evidence is evidence a reasonable person would rely on in making a decision. *Dodd v. Hood River County*, 317 Or 172, 179, 855 P2d 608 (1993). A finding of fact is supported by substantial evidence if the record, viewed as a whole, would permit a reasonable person to make that finding. *Younger v. City of Portland*, 305 Or 346, 360, 752 P2d 262 (1988). In reviewing the evidence, we may not substitute our judgment for that of the local decision maker. Rather, we must consider all the evidence to which we are directed and determine whether, based on that evidence, a reasonable local decision maker could reach the decision that it did. *Id.* at 358-

60; *1000 Friends of Oregon v. Marion County*, 116 Or App 584, 588, 842 P2d 441 (1992).

1. Depth of Deposit

As explained above, the county court found that intervenor "drilled the borrow pit and 14 test pits himself" and the depths of the overburden and aggregate were established by intervenor's test pit log excavation descriptions and Petra's report. Record 15. Petitioners argue that those findings are not supported by substantial evidence because there is no evidence that the test pits were "drilled." Instead, the evidence shows that they were excavated. Petitioners argue that an excavator has a maximum digging depth of 25 feet and that the test pit log "shows 14 test pits substantially deeper than the maximum capabilities" of an excavator. Petition for Review 10.

Intervenor concedes that the finding that intervenor "drilled" the test pits is inaccurate and not supported by evidence and agrees that the evidence in the record is that intervenor excavated the test pits. However, intervenor responds that the error is a "harmless mischaracterization." Intervenor-Respondent's Brief 13. We agree. Petitioners do not point to any other findings that rely on the erroneous finding that intervenor "drilled" the test pits. The evidence that the county relied on explains that the samples were taken from excavated test pits. Record 77, 88, 92, 321, 335. Petitioners point to no evidence in the record indicating that drilling is the only method for obtaining "adequate information regarding the quantity, quality, and location of the resource" or "[a]

representative set of samples of aggregate material in the deposit." OAR 660-023-0180(3)(a). We agree with intervenor that the use of the term "drill" in the findings is an inaccurate word choice and is not an analytical error that requires remand.

Intervenor responds, and we agree, that petitioner did not raise during the local proceeding the issue of excavating equipment digging depth limitations and there is no evidence in the record that excavating equipment is limited to 25 feet digging depth. Intervenor responds that petitioner incorrectly points to an equipment list describing the equipment proposed to be used for mining activities in the denied CUP and that list does not describe equipment used for excavating the test pits. Record 374. Petitioners do not direct us to any countervailing evidence that undermines the county's reliance on intervenor's evidence of test pit depths of up to 46 feet. Record 343. Accordingly, this issue is waived and provides no basis for remand.

Petitioners further argue that the record does not contain any visual evidence of the depths of the test pits or layers of rock. Intervenor responds, and we agree, that this argument is directed at the weight of the evidence. We will not reweigh the evidence where we find that a reasonable person could rely on the evidence that the local decision maker relied upon. A reasonable person could rely on written evidence of depth and composition of the aggregate resource without corresponding photographs or other visual evidence.

Petitioners argue that there is no evidence that Petra's representatives were qualified to make a gravel quantity assessment or that they analyzed the material on the site. Intervenor responds, and we agree, that the record contains evidence of both Petra's qualifications and site visit details. As explained above, the county decided that Petra's representatives were qualified to assess the quantity of the deposit, based on Cunningham's testimony explaining his experience. Similarly, Cunningham testified to the county court about the site visit details as follows:

> "[W]e went up there and, you know, [intervenor] dug those test pits and we got coordinates on the test pits and identified where the strata changes from one type of geology to another type of geology. And then we just plotted those points and did what's called a 'quantity takeoff,' which I'm sure you're all very familiar with, to figure out how much overburden there was and how much material there was and then what the bottom looked like below the good material there." Record 82.

A reasonable person could rely on that testimony.

The county's findings regarding the depth of the deposit, and the quantity estimates that flowed from those findings, are supported by substantial evidence.

2. Homogeneity of Deposit

Petitioners argue that the county's findings that the aggregate deposit is similar across test sites so that the composite sample provided "adequate information" and "a representative set of samples" of the quality of the aggregate are not supported by substantial evidence. OAR 660-023-0180(3)(a). The county's findings rely on an email from Miller, of Strata. Petitioners point out that, when presented with that same evidence, the planning commission

determined that Miller's testimony does not demonstrate that the samples were homogeneous but, instead, "broadly state[d] that the environment and soil where the aggregate is located is the same." Record 188. Petitioners argue that a reasonable person would not rely on that evidence.

Intervenor responds that intervenor's test pit log shows that the aggregate deposit is similar across test sites with a surface layer of clay and silt, "poorly graded gravel" in the middle, and silt below. Record 340-43. There is no evidence in the record indicating that the aggregate deposit is not similar across the site. Miller, from Strata, explained:

> "Section 8.8.1 of Oregon's Geotechnical Design Manual (GDM) states that a minimum of 9 bags should be obtained for aggregate testing in source evaluations, which we obtained. In our experience in Idaho evaluations for alluvial aggregate sources, when gravel encountered in explorations is of the same depositional environment and appears to be the same soil type (visual classification), there is no need to perform quality testing on each sample.
>
> "Rather, the samples from multiple test pits and at varying depths of the investigation are combined/blended in order to perform quality testing as this would represent an overall sample of the site. The GDM also states that the sampling should follow AASHTO T2 (Sampling of Aggregates) which outlines the method of sampling from stockpiles and conveyor belts for QC testing. The standard requires multiple samples at different locations and then combining to get an overall representative sample. We used the same reasoning for blending samples as described in AASHTO T2 to our evaluation of the Dallas Head Quarry; we combined the samples obtained from across the site and combined them to perform the quality testing." Record 102.

The county court noted Miller's credentials as a licensed professional geoscientist and engineer and found that, based on Miller's statement and "professional experience," "it is reasonable to conclude that the aggregate samples were, in fact, similar; and there was no need to perform quality testing on each sample/pit." Record 17. The county court reasoned that Strata must have determined by visual classification that the aggregate deposit was in the same depositional environment and appeared to be of the same or a similar type, or Strata would not have combined the nine samples from five different test pits for quality testing. The planning commission was unwilling to reach that conclusion in the absence of a specific statement in the record that the samples were similar. A reasonable person could make that connection based on the evidence in the record, as the county court did, relying on Miller's statement and the fact that Strata combined the samples for quality testing in accordance with their understanding and application of accepted aggregate quality testing methodology.

The county's findings regarding the quality of the aggregate deposit are supported by substantial evidence.

The first assignment of error is denied.

SECOND ASSIGNMENT OF ERROR

As explained above, if a county determines that an aggregate resource is significant, then the county must determine the impact area and identify and specify significant conflicts within the impact area. OAR 660-023-0180(5). Next,

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

Petitioners argue that the county's decision misconstrues the law and makes inadequate findings by failing to identify the impact area, conflicting uses, and minimization measures, and failing to complete an ESEE analysis for the PAPA.

Intervenor responds, initially, that these issues are waived. Petitioners respond, and we agree, that petitioners were not required to predict that the county court would fail to make findings on applicable criteria in OAR 660-023-0180. The findings and misconstruction errors that petitioners assert arose upon the county's issuance of its final decision. Thus, preservation was not required for those challenges. *Rogue Advocates v. Josephine County*, 72 Or LUBA 275, 290 (2015); *League of Women Voters v. City of Corvallis*, 63 Or LUBA 432, 436 (2011); *Lucier v. City of Medford*, 26 Or LUBA 213, 216 (1993).

Intervenor also argues that the issues are "moot" because, in intervenor's view, the county was not required to identify the impact area, conflicting uses, minimization measures, or conduct an ESEE analysis for the PAPA, because the planning commission denied the CUP, effectively disallowing mining at the site. Alternatively, on the merits, intervenor argues that OAR 660-023-0180(5)(c) and (d) are satisfied, relying on the planning commission decision denying the CUP and concluding that mining should not be allowed. Intervenor-Respondent's Brief 16-18 (citing Record 191-202).

There are at least two problems with that response. First, and most importantly, OAR 660-023-0180(5) prescribes the process for adding an aggregate resource site to the county's inventory of significant aggregate resource sites. When adding land to the county's inventory of significant aggregate resources, OAR 660-023-0180(5) requires a conflicting use analysis and, if any specified impacts to a conflicting use cannot be minimized, then the rule requires a county ESEE determination. In other words, if the county determines that the aggregate resource is significant under OAR 660-023-0180(3), then the county must decide whether to allow mining of the site, following the decision process in OAR 660-023-0180(5).

Second, in approving the PAPA and rejecting the planning commission's recommendation, the county court did not adopt the planning commission's ESEE analysis from the CUP denial. The CUP denial was not appealed and was not before the county court. Neither is the CUP denial before us in this appeal.

Thus, we may not rely upon the planning commission's CUP denial findings to affirm the county court's PAPA approval. We agree with petitioners that the county misconstrued OAR 660-023-0180 and made inadequate findings.

The second assignment of error is sustained.

The county's decision is remanded.