

**FILED: April 04, 2012**

IN THE COURT OF APPEALS OF THE STATE OF OREGON

PROTECT GRAND ISLAND FARMS,  
Petitioner,

v.

YAMHILL COUNTY  
and BAKER ROCK RESOURCES,  
Respondents.

Land Use Board of Appeals  
2011035

A149819

Argued and submitted on December 15, 2011.

Courtney Johnson argued the cause for petitioner. With her on the brief were Ralph Bloemers and Crag Law Center.

Timothy S. Sadlo argued the cause and filed the brief for respondent Baker Rock Resources.

No appearance for respondent Yamhill County.

Before Ortega, Presiding Judge, and Sercombe, Judge, and Hadlock, Judge.

SERCOMBE, J.

Affirmed.

1                   SERCOMBE, J.

2                   Petitioner Protect Grand Island Farms seeks judicial review of a final order  
3 of the Land Use Board of Appeals (LUBA). That order affirmed a Yamhill County  
4 ordinance amending its comprehensive plan to add a 224.5-acre site to its inventory of  
5 significant mineral and aggregate resources under Statewide Planning Goal 5 (Natural  
6 Resources, Scenic and Historic Areas, and Open Spaces).<sup>1</sup> Petitioner argues that the  
7 aggregate resource site was not "significant" because the "average thickness of the  
8 aggregate layer within the mining area" did not exceed 25 feet as required by OAR 660-  
9 023-0180(3)(d)(B)(ii). Petitioner contends that the county and LUBA improperly applied  
10 that rule by treating two distinct aggregate layers--an upper deposit and a lower deposit  
11 that were separated by an intervening layer of clay--as a single layer for purposes of  
12 determining the thickness of the aggregate. In petitioner's view, the county was  
13 precluded from considering more than one deposit in calculating the "thickness of the  
14 aggregate layer." We review to determine whether LUBA's order was "unlawful in  
15 substance" under ORS 197.850(9)(a) and, for the reasons set forth below, affirm.

16                   We begin with a brief overview of the legal and factual context. Statewide  
17 Planning Goal 5 requires local governments to inventory and protect, among other natural  
18 resources, mineral and aggregate resources. Pursuant to that policy, the Land  
19 Conservation and Development Commission (LCDC) has adopted standards to ensure

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<sup>1</sup> "Aggregate resources" are "naturally occurring concentrations of stone, rock, sand gravel, \* \* \* and other naturally occurring solid materials commonly used in road building or other construction." OAR 660-023-0180(1)(a).

1 that local governments comply with their Goal 5 planning obligations when conducting  
2 periodic review or amending acknowledged comprehensive plans and land use  
3 regulations. OAR 660-023-0180 sets forth the standards for aggregate resources. That  
4 rule requires that local governments determine whether an aggregate resource site is  
5 "significant" before adding the site to its inventory. As relevant here, a proposed  
6 aggregate resource site is "significant" if the aggregate material meets certain Oregon  
7 Department of Transportation (ODOT) quality specifications and the estimated amount of  
8 the material is more than 2,000,000 tons for sites in the Willamette Valley. OAR 660-  
9 023-0180(3)(a). However, even if those criteria are met, an aggregate site in Yamhill  
10 County is not "significant" if more than 35 percent of the proposed mining area consists  
11 of Class I or Class II soils, "unless the average thickness of the aggregate layer within the  
12 mining area exceeds" 25 feet. OAR 660-023-0180(3)(d)(B)(ii). The "thickness of the  
13 aggregate layer" is defined as "the depth of the water-lain deposit of sand, stones, and  
14 pebbles of sand-sized fraction or larger, minus the depth of the topsoil and nonaggregate  
15 overburden." OAR 660-023-0180(1)(l).

16 In this case, Baker Rock Resources (Baker Rock) applied for an  
17 amendment to Yamhill County's comprehensive plan to add a 224.5-acre site to the  
18 county's inventory of significant mineral and aggregate resources. The site was zoned for  
19 Exclusive Farm Use, and all of its soils were categorized as Class II soils. Baker Rock  
20 proposed to mine roughly 175 acres of the site for aggregate to be used in the production  
21 of asphalt and concrete.

1                   As part of its application, Baker Rock submitted a geology report based on  
2 borehole samples taken throughout the property. That report detailed the location and  
3 composition of aggregate within the mining site. Among other things, it explained that  
4 "[t]he sand and gravel resource exists in two distinct horizons beneath the subsoil."

5 Baker Rock's application summarized the relevant data this way:

6                   "Geological analysis of the data collected indicates that there are two  
7 distinct layers of sand and gravel on the site, separated by a layer of clay.  
8 The upper layer averages 23 feet in thickness, and the lower layer averages  
9 21 feet in thickness. Both layers are easily mineable using available  
10 technologies. The upper layer will be mined 'wet,' and the operating cell  
11 will be temporarily dewatered to mine the lower layer of aggregate.

12                   "The average thickness of both aggregate layers available for mining on the  
13 site is 44 feet \* \* \*."

14 The report estimated that the site contained 23.6 million tons of high-quality alluvial sand  
15 and gravel. It also confirmed that the aggregate within the site met the ODOT  
16 specifications for soundness and durability.

17                   In addition to the report, Baker Rock presented written testimony from its  
18 geology expert, who opined that all of the sand and gravel within the proposed mining  
19 site was part of the Willamette Aquifer and was deposited by the "modern Willamette  
20 River" during the Holocene Epoch (after the last ice age concluded). According to the  
21 expert, intervening layers of silt and clay "are common and expected, in alluvial seams  
22 and pockets, in Willamette River aggregate deposits." The expert indicated that below  
23 the Willamette Aquifer was a stratum known as the "Willamette Confining Unit," which  
24 separated the Holocene deposits from the older, softer, and less sorted "Pleistocene

1 Epoch sands and gravels \* \* \* deposited by glacial age streams," which Baker Rock did  
2 not propose to mine.

3           Based on that information, the expert concluded that the aggregate resource  
4 "above the [clay] seam split, and below the seam split, is the same rock" deposited during  
5 "the same geological period, by the same river, and functionally by the same hydrological  
6 processes." Thus, the expert opined that all of the sand and gravel within the mining area  
7 was a single "geologic unit." In the expert's view, the "presence of a silt/clay strat[um] in  
8 the deposit" was of no geologic moment: it did not serve as a boundary but merely  
9 represented a period of "quiescent deposition."

10           The county, relying on the expert's assessment, ultimately approved an  
11 ordinance adding the site to its inventory of significant aggregate resources. In doing so,  
12 it concluded that the "average thickness of the aggregate layer" within the proposed  
13 mining site exceeded 25 feet, considering the aggregate both above and below the clay  
14 layer. It based that determination on two alternate theories. First, it concluded that the  
15 clay layer was "nonaggregate overburden" that could be subtracted from the thickness of  
16 the aggregate:

17           "All of the overburden at the site, even the clay overburden within the  
18 deposit, is located above identified sand and gravel deposits within the  
19 mining area. \* \* \* The Goal 5 rule does not require or compel the County  
20 to refuse to acknowledge the presence of a significant aggregate resource at  
21 the site \* \* \* solely because the deposit contains clay interbeds.

22           "\* \* \* [T]he 'thickness of the aggregate layer' includes the entire depth of  
23 mineable aggregate within the mining area, minus the overburden,  
24 regardless of whether the overburden is found in one, or more than one

1 location, where it must be removed in order to obtain quality sand and  
2 gravel located below it."

3 In support of that interpretation, the county relied on a letter from the Department of  
4 Land Conservation and Development, which took the position that the "average thickness  
5 of the aggregate layer" was established by "averaging the vertical depth of the aggregate  
6 planned to be excavated within the mining area. In other words, the rule does not  
7 consider the existence of one or more areas of non-aggregate as relevant to determining  
8 the average thickness of the aggregate layer \* \* \*." The county also reasoned that its  
9 interpretation was consistent with the purpose of the rule, which, according to the county,  
10 was to strike a balance between the protection of farmland and the need for local supplies  
11 of aggregate for construction--"mining the least amount of farmland to obtain the greatest  
12 yield of sand and gravel."

13 Alternatively, the county concluded that the term "layer" in "thickness of  
14 the aggregate layer" referred to deposits made during the same geologic epoch. Thus,  
15 because all of the aggregate within the proposed mining site was deposited during the  
16 Holocene Epoch, the county reasoned that it constituted a single "layer" for purposes of  
17 the rule.

18 Petitioner appealed the county's decision to LUBA, arguing, among other  
19 things, that the county misconstrued the meaning of the phrase "thickness of the  
20 aggregate layer" in OAR 660-023-0180(3)(d)(B). LUBA affirmed the county's decision:

21 "Nothing in the language of the rule definitively addresses the question  
22 presented in this appeal, and it is probable that the rule drafters simply did  
23 not anticipate the circumstances present in this appeal when drafting the

1 rule. However, we agree with the county that it is not inconsistent with the  
2 text or purpose of the rule to consider the intervening clay layer to  
3 constitute 'overburden' for purposes of mining the lower aggregate deposit  
4 as proposed. Certainly once the upper deposit is mined as proposed, the  
5 clay layer lying over the lower deposit could only be described as  
6 overburden.

7 "In addition, it is undisputed that aggregate that is present both  
8 above and below the clay layer is of nearly identical quality. It is also  
9 undisputed that [Baker Rock] plans to mine all of the aggregate present at  
10 the mining site, and that it is apparently no more difficult or expensive to  
11 mine the aggregate that is below the clay than it is to mine the aggregate  
12 that is above the clay. Finally, it is undisputed that mining the aggregate  
13 below the clay will result in no greater area of high value soils being  
14 removed from farm use than would already be removed to mine the  
15 aggregate located above the clay. Under those circumstances, we think the  
16 county's understanding of the rule is correct, and its consideration of the  
17 thickness of the entire aggregate deposit to be mined while subtracting the  
18 intervening clay layer is consistent with the rule."

19 LUBA did not reach the county's alternative construction of the rule.

20 Petitioner now seeks review of LUBA's order, assigning error to its  
21 interpretation of the requirement in OAR 660-023-0180(3)(d)(B) that "the average  
22 thickness of the aggregate layer within the mining area" exceed 25 feet. Petitioner argues  
23 that the plain language of the rule, which refers to "*the aggregate layer*" and "*the water-*  
24 *lain deposit*," limits the consideration of "thickness" to a single layer or deposit of  
25 aggregate. (Emphasis added.) According to petitioner, LUBA's interpretation of the rule  
26 improperly permitted the county to "sum[ ] the average thicknesses of two separate and  
27 distinct aggregate layers on the site." Petitioner further argues that the clay layer cannot  
28 be excluded as "overburden" and that, even if it can, it still serves to sever the aggregate  
29 resource into two distinct deposits. Finally, petitioner argues that LUBA's construction  
30 would render the rule meaningless because "virtually any site in the Willamette Valley

1 floodplain would pass the aggregate thickness test" if an applicant were permitted to "add  
2 up" intermittent layers of aggregate to an infinite depth.

3 Baker Rock responds that LUBA correctly interpreted "the average  
4 thickness of the aggregate layer" standard in OAR 660-023-0180(3)(d)(B). Baker Rock  
5 advances no textual analysis in support of that argument but, instead, apparently relies on  
6 the county's and LUBA's interpretations. Baker Rock additionally relies on the fact that  
7 "all of the aggregate identified by the applicant, from top to bottom, is the same high-  
8 quality, well-graded alluvial sand and gravel, all deposited during the Holocene \* \* \*  
9 Epoch." It then asserts that "[i]t was reasonable for the county to consider th[o]se facts as  
10 one way to establish that all of the resource identified \* \* \* on the site [is] part of the  
11 same 'water-lain deposit of [aggregate]' and [is] properly considered when calculating the  
12 'average thickness of the aggregate layer.'" (Emphasis omitted.)

13 The parties' contentions require us to interpret OAR 660-023-0180(3)(d)(B)  
14 to determine what portion of the aggregate resource within the mining site can be  
15 considered in calculating the average "thickness of the aggregate layer." In construing an  
16 administrative rule, we employ the same methodology as we do for construing statutes.  
17 [Tye v. McFetridge](#), 342 Or 61, 69, 149 P3d 1111 (2006). We examine the text of the rule  
18 in context to discern the intent of the body that promulgated the rule. *Id.*; *see also* [State](#)  
19 [v. Gaines](#), 346 Or 160, 171-72, 206 P3d 1042 (2009) (setting forth interpretive  
20 methodology).

21 As noted, OAR 660-023-0180(3)(d)(B) requires that, in this case, "the



1 average thickness of the aggregate layer within the mining area" exceed 25 feet.  
2 "Thickness of the aggregate layer" is defined as "the depth of the water-lain deposit of  
3 sand, stones, and pebbles of sand-sized fraction or larger, minus the depth of the topsoil  
4 and nonaggregate overburden." OAR 660-023-0180(1)(I). The components of that  
5 definition--such as "deposit" and "overburden"--are not further defined within the rule.

6           We give words of common usage their plain and ordinary meaning. *PGE v.*  
7 *Bureau of Labor and Industries*, 317 Or 606, 611, 859 P2d 1143 (1993). "Deposit"  
8 means "a natural accumulation" or "something laid, placed, or thrown down," especially  
9 "matter deposited by some natural process." *Webster's Third New Int'l Dictionary* 605  
10 (unabridged ed 2002). "Overburden" is defined, in relevant part, as "consolidated or  
11 unconsolidated material overlying a deposit of useful geological materials (as a coal seam  
12 or an ore body)." *Webster's* at 1606. The context implies a similar meaning. ORS  
13 517.750, which concerns the reclamation of mining lands, defines "overburden" as "the  
14 soil, rock and similar materials that lie above natural deposits of minerals." Although  
15 OAR 660-023-0180(1) does not cite that definition of "overburden," the rule cites several  
16 other definitions in ORS 517.750 and, therefore, provides a basis for presuming that the  
17 body enacting the rule was aware of it.

18           The foregoing definitions suggest that an "aggregate layer" is a natural  
19 accumulation of sand, stones, and pebbles set down by water, minus topsoil and  
20 nonaggregate material overlying useful deposits. All of the aggregate resource at issue in  
21 this case--both above and below the nonaggregate material--is naturally accumulated

1 sand, stone, and pebbles deposited by flowing water. The question remains, however,  
2 whether all of that aggregate may be considered part of the "aggregate layer" within the  
3 meaning of the rule, where nonaggregate material rests within or between the aggregate.  
4 Stated differently, we must determine whether the term "aggregate layer" is meant to  
5 encompass all of the aggregate within a resource site, regardless of whether the aggregate  
6 exists in discontinuous deposits, or whether the term is meant only to refer to a single,  
7 discrete, unbroken concentration of aggregate, distinguishable from other concentrations  
8 of aggregate within the same site that are physically separated by other materials.

9           Nothing in the definition itself seems to immediately resolve the  
10 significance of the nonaggregate material. That is, the definition does not fix the  
11 temporal or spatial boundaries of an "accumulation" or indicate explicitly whether an  
12 accumulation is interrupted by the existence of nonaggregate material. As noted,  
13 petitioner argues that the reference to "the \* \* \* deposit" in the definition of "aggregate  
14 layer" is intended to limit the application of OAR 660-023-0180 to a single, continuous  
15 deposit. Petitioner is correct that, in many cases, use of the definite article "the,"  
16 followed by a singular noun, conveys an intent to refer to one particular thing. *See, e.g.,*  
17 [Carrillo v. City of Stanfield](#), 241 Or App 151, 157, 255 P3d 491 (2011) (statutory  
18 reference to "the contract" construed to mean "one particular contract"); [State v. Branam](#),  
19 220 Or App 255, 260, 185 P3d 557, *rev den*, 345 Or 301 (2008) (statutory reference to  
20 "the sentence" construed to mean "only one particular sentence"). Nonetheless, that is  
21 not the only plausible construction. *See, e.g.,* [State v. Rowland](#), 245 Or App 240, 245,

1 262 P3d 1158 (2011), *rev den*, \_\_\_ Or \_\_\_ (Mar 22, 2012) ("Although the statute refers to  
2 'the confinement,' we do not agree with defendant that the legislature thereby intended to  
3 refer only to a single confinement."). Thus, we must look beyond the text to determine  
4 whether "the \* \* \* deposit" refers to only a single, continuous deposit or whether it refers  
5 to deposits collectively. The context of the rule does not indicate which construction was  
6 intended, and there is no relevant history surrounding the rule's adoption.

7           To the extent that text and context do not resolve ambiguity in the rule, we  
8 may resort to maxims of construction. One such maxim is that "we are to construe the  
9 language of a [rule] in a manner that is consistent with its purpose[.]" *Branam*, 220 Or  
10 App at 263. Here, the parties agree that the purpose of the rule is to balance the  
11 protection of farmland against the need for local sources of aggregate. By confining  
12 mining operations to places where the vertical depth of the resource is substantial, the  
13 rule forces mining operators to limit the horizontal reach of their mining sites. Thus,  
14 where a farmland mining site contains an aggregate resource that runs miles wide but  
15 only 10 feet deep, mining would be precluded although the overall yield of aggregate  
16 would be great. That is because it would result in the destruction of significant amounts  
17 of farmland. Instead, mining operators must find sites that yield similar overall quantities  
18 of aggregate but that result in less destruction of farmland; that is, they must find  
19 vertically deep resources of aggregate.

20           That purpose suggests that the rule was not intended to prohibit the mining  
21 of deep, but discontinuous, resources of aggregate. For instance, where the mining site is

1 composed of vertically discontinuous aggregate deposits of 26 feet (upper deposit) and 20  
2 feet (lower deposit), it is unlikely that LCDC would have intended to preclude mining of  
3 the lower deposit or to require that deposit to independently meet the thickness  
4 requirement, because no greater protection of farmland would result. Similarly, where a  
5 mining site is composed of several substantial but discontinuous deposits of aggregate,  
6 none of which independently meet the thickness requirement but which collectively far  
7 exceed it, it is unlikely that LCDC would have intended to prevent mining of the  
8 aggregate resource. At bottom, the rule permits the destruction of farmland for mining  
9 where the depth of the aggregate resource is sufficiently substantial; it makes no sense,  
10 then, to prevent the mining of a deep deposit of aggregate merely because it also contains  
11 areas of nonaggregate (assuming all of the aggregate is in fact commercially mineable).

12           In light of the purpose of the rule, we conclude that the "average thickness  
13 of the aggregate layer within the mining area" is intended to refer to the average depth of  
14 all the mineable aggregate within the resource site, regardless of whether that aggregate is  
15 physically discontinuous. Pursuant to the rule, the topsoil and overburden are then  
16 excluded from the calculation of the average thickness. Consistently with that  
17 interpretation, "overburden" includes all nonaggregate material that lies above any  
18 deposit of aggregate proposed to be mined, that is, any nonaggregate that must be  
19 removed to access an aggregate resource.

20           Applying that construction here, the depth of aggregate resource throughout  
21 the mining site averaged 44 feet. Thus, under OAR 660-023-0180(3)(d)(B)(ii), the

1 aggregate resource was "significant."

2 Affirmed.