

**Oregon LUBA Headnotes**  
**Oregon's Statewide Planning Goals & Guidelines**  
**GOAL 5: NATURAL RESOURCES, SCENIC AND HISTORIC AREAS, AND OPEN SPACES**  
(<http://www.oregon.gov/LCD/docs/goals/goal5.pdf>)

**OAR 660-015-0000(5)** (Please Note: Amendments Effective 08/30/96)

**To protect natural resources and conserve scenic and historic areas and open spaces.**

**OAR 660-023-0180(5)(b)(A)?**

October 13, 2014

**9.2 Goal 5 – Open Spaces and Natural Resources/ Goal 5 Rule – Resource Inventory**

9.2 Goal 5 – Open Spaces and Natural Resources/ Goal 5 Rule – Resource Inventory. Adoption of an ordinance that authorizes demolition of a structure that the city's **Goal 5 historic inventory** [emphasis added] classifies as “noncontributing” and that is not protected under the city's **historic resource protection program** [emphasis added] does not alter the **Goal 5 inventory** [emphasis added] or “amend” the city's “resource list” within the meaning of OAR 660-023-0250(3)(a). *NWDA v. City of Portland*, 47 Or LUBA 533 (2004).

9.2 Goal 5 – Open Spaces and Natural Resources/ Goal 5 Rule – Resource Inventory. Code provisions **protecting historic structures** [emphasis added] that are described in the county's inventory as **significant** [emphasis added], important or contributing to the **significance** [emphasis added] of the overall resource are not properly interpreted to protect an accessory structure on the subject property that is not mentioned in the county's inventory. *Paulson v. Washington County*, 40 Or LUBA 345 (2001).

**9.2 Goal 5 – Open Spaces and Natural Resources/ Goal 5 Rule – Resource Inventory.** A local ordinance that institutes a process to remove property from a **Goal 5 historic resources inventory** [emphasis added] but fails to include a method to determine whether the **historic designation** [emphasis added] was “imposed” on the property, within the meaning of ORS 197.772(3), is inconsistent with that statute. *Demlow v. City of Hillsboro*, 39 Or LUBA 307 (2001).

9.2 Goal 5 – Open Spaces and Natural Resources/ Goal 5 Rule – Resource Inventory. A local government may not apply only local code provisions to an application to remove property from a **historic resources inventory** [emphasis added], where the local code provisions are inconsistent with statutory provisions permitting removal of certain properties from a **historic resources inventory** [emphasis added]. *Demlow v. City of Hillsboro*, 39 Or LUBA 307 (2001).

9.2 Goal 5 – Open Spaces and Natural Resources/ Goal 5 Rule – Resource Inventory. Where the only inventory of **historic structures** [emphasis added] maintained by a city has not been adopted as part of the city's acknowledged comprehensive plan, a post-acknowledgment decision not to designate an inventoried building as a **historical landmark** [emphasis added] is not a de facto post-acknowledgment plan amendment, even though the decision may ultimately allow the building to be demolished. *Historical Development Advocates v. City of Portland*, 27 Or LUBA 617 (1994).

### **9.3 Goal 5 – Open Spaces and Natural Resources/ Goal 5 Rule – Conflicting Use Identification**

9.3 Goal 5 – Open Spaces and Natural Resources/ Goal 5 Rule – Conflicting Use Identification. Where the zoning ordinance definition of “**noise-sensitive uses**” [emphasis added] is ambiguous and could be interpreted to include the entire parcel where the use is located or more narrowly to include only the use’s structure, and there is some contextual support for limiting the use to the structure, LUBA will defer to the local government’s decision to adopt the more narrow interpretation. *Hoffman v. Deschutes County*, 61 Or LUBA 173 (2010).

9.3 Goal 5 – Open Spaces and Natural Resources/ Goal 5 Rule – Conflicting Use Identification. In determining the **size of an impact area** [emphasis added] under OAR 660-023-0180(5)(a) and whether “factual information indicates significant potential conflicts beyond” the 1,500-foot impact area set out in the rule, a county must evaluate evidence submitted regarding land that is located beyond the 1,500-foot impact area and potentially some distance from the mining site. *Walker v. Deschutes County*, 59 Or LUBA 488 (2009).

9.3 Goal 5 – Open Spaces and Natural Resources/ Goal 5 Rule – Conflicting Use Identification. OAR 660-023-0180(5)(b)(A) requires a county to consider conflicts due to noise, dust, etc. with “existing” uses that are sensitive to such discharges. There is no basis under the rule for a county to conclude that Native American **cultural** [emphasis added] and religious visits to pictograms and **native burial sites** [emphasis added] are not “existing” uses because those visits do not occur on a regular basis. *Walker v. Deschutes County*, 59 Or LUBA 488 (2009).

9.3 Goal 5 – Open Spaces and Natural Resources/ Goal 5 Rule – Conflicting Use Identification. A condition requiring that the applicant for mining restrict rock blasting for up to three days after being notified of Native American **cultural** [emphasis added] or religious visits to a nearby site is sufficient to ensure that noise from blasting will not conflict with such visits. *Walker v. Deschutes County*, 59 Or LUBA 488 (2009).

9.3 Goal 5 – Open Spaces and Natural Resources/ Goal 5 Rule – Conflicting Use Identification. **OAR 660-023-0180(5)(b)(A)** requires a county to **consider conflicts due to noise, dust, etc. with “existing” uses that are sensitive to such discharges** [emphasis added] . There is no basis under the rule for a county to conclude that Native American **cultural** [emphasis added] and religious visits to pictograms and native burial sites are not “existing” uses because those visits do not occur on a regular basis. *Walker v. Deschutes County*, 59 Or LUBA 488 (2009).

### **9.3 Goal 5 – Open Spaces and Natural Resources/ Goal 5 Rule – Conflicting Use Identification.**

If a mineral and aggregate site is found to be significant under **OAR 660-023-0180(3)**, then local governments must determine whether mining will be allowed. That in turn requires a number of additional determinations regarding: (1) an impact area, (2) conflicts, and (3) whether conflicts can be minimized. OAR 660-023-0180(5)(a) through (c). If all identified conflicts can be minimized, mining must be allowed. OAR 660-023-0180(5)(c). If all identified conflicts cannot be minimized, the local government must then determine the economic, social, environmental, and energy consequences of allowing mining notwithstanding that the conflicts cannot be minimized. OAR 660-023-0180(5)(d). *Delta Property Company v. Lane County*, 58 Or LUBA 409 (2009).

**9.3 Goal 5 – Open Spaces and Natural Resources/ Goal 5 Rule – Conflicting Use Identification.**  
The language of OAR 660-016-0005(1) and the Court of Appeals’ interpretation of that rule in *Hegele v. Crook County*, 190 Or App 376, 379, 78 P3d 1254 (2003) support the conclusion that conflicting uses may be uses that, while not specifically listed in the zoning district as allowed *land uses*, are nevertheless uses that could conflict with a Goal 5 resource. *Hegele v. Crook County*, 56 Or LUBA 1 (2008).

#### **9.4 Goal 5 – Open Spaces and Natural Resources/ Goal 5 Rule – ESEE Consequence Determination**

9.4 Goal 5 – Open Spaces and Natural Resources/ Goal 5 Rule – ESEE Consequence Determination. OAR 660-023-0007 exempts the determination of a “**program to protect historic resources**” [emphasis added] from the requirement to conduct an ESEE (economic, social, environmental and energy) analysis. The scope of that exemption is ambiguous, and could plausibly exempt (1) a local government’s entire **historic resources** [emphasis added] “program,” as that rule broadly defines that term, or (2) only those parts of the program that “protect” **historic resources** [emphasis added], which a rule definition narrowly limits to local government review of applications for demolition or alteration of **historic resources** [emphasis added]. Given the intertwined nature of most **historic resources** [emphasis added] programs, the better reading of OAR 660-023-0007 is that it comprehensively exempts from the ESEE analysis adoption or modification of the “program,” not merely those parts of the program that require local government review of applications for demolition or alteration of **historic resources** [emphasis added]. *NWDA v. City of Portland*, 50 Or LUBA 310 (2005).

9.4 Goal 5 – Open Spaces and Natural Resources/ Goal 5 Rule – ESEE Consequence Determination. Because OAR 660-023-0200(7) provides that local governments are not required to apply the ESEE process in order to determine a program to protect **historic resources** [emphasis added], it follows that a local government is also not required to apply the ESEE process when the city allows a new use that could conflict with a particular **historic resource** [emphasis added]. *NWDA v. City of Portland*, 47 Or LUBA 533 (2004).

## 9.5 Goal 5 – Open Spaces and Natural Resources/ Goal 5 Rule – Resource Protection Programs

9.5 Goal 5 – Open Spaces and Natural Resources/ Goal 5 Rule – Resource Protection Programs. A decision that merely adds an aggregate site to a comprehensive plan inventory of significant aggregate resource sites may not trigger application of the **transportation planning rule (TPR)** [emphasis added] in any of the ways described in OAR 660-012-0060(1). But when the county decides to allow mining of the site and places an overlay zone on the site to allow mining, that zone change authorizes a new, more traffic-intensive use of the property and may trigger application of the TPR. *Setniker v. Polk County*, 63 Or LUBA 38 (2011).

9.5 Goal 5 – Open Spaces and Natural Resources/ Goal 5 Rule – Resource Protection Programs. Where the challenged decision approves (1) a comprehensive plan amendment adding a site to the county’s Goal 5 inventory of **significant sites** [emphasis added], and (2) a zone change to allow mining of the site, because the zone change application is consolidated with, and dependent upon, the plan amendment, the goal-post rule at ORS 215.427(3) does not operate to “freeze” the standards that apply to the zone change to those applicable on the date the application was filed. *Setniker v. Polk County*, 63 Or LUBA 38 (2011).

9.5 Goal 5 – Open Spaces and Natural Resources/ Goal 5 Rule – Resource Protection Programs OAR 660-023-0007 exempts the determination of a **“program to protect historic resources”** [emphasis added] from the requirement to conduct an ESEE (economic, social, environmental and energy) analysis. The scope of that exemption is ambiguous, and could plausibly exempt (1) a local government’s entire **historic resources** [emphasis added] “program,” as that rule broadly defines that term, or (2) only those parts of the program that “protect” **historic resources** [emphasis added], which a rule definition narrowly limits to local government review of applications for demolition or alteration of **historic resources** [emphasis added]. Given the intertwined nature of most **historic resources** [emphasis added] programs, the better reading of OAR 660-023-0007 is that it comprehensively exempts from the ESEE analysis adoption or modification of the “program,” not merely those parts of the program that require local government review of applications for demolition or alteration of **historic resources** [emphasis added]. *NWDA v. City of Portland*, 50 Or LUBA 310 (2005).

9.5 Goal 5 – Open Spaces and Natural Resources/ Goal 5 Rule – Resource Protection Programs. Findings that a text amendment adding a new use to a park zone are inadequate to address protection of **historic sites under Goal 5** [emphasis added], where the findings address only one of several parks with **historic sites** [emphasis added], and fail to explain why allowing a new potentially conflicting use on or near **historic sites** [emphasis added] is consistent with Goal 5. *Cox v. Polk County*, 49 Or LUBA 78 (2005).

9.5 Goal 5 – Open Spaces and Natural Resources/ Goal 5 Rule – Resource Protection Programs. Adoption of an ordinance that authorizes demolition of a structure that the city’s **Goal 5 historic inventory** [emphasis added] classifies as “noncontributing” and that is not protected under the city’s **historic resource protection program** [emphasis added] does not alter the Goal 5 inventory or “amend” the city’s “resource list” within the meaning of OAR 660-023-0250(3)(a). *NWDA v. City of Portland*, 47 Or LUBA 533 (2004).

9.5 Goal 5 – Open Spaces and Natural Resources/ Goal 5 Rule – Resource Protection Programs. Because OAR 660-023-0200(7) provides that local governments are not required to apply the ESEE process in order to determine a program to protect **historic resources** [emphasis added], it follows that a local government is also not required to apply the ESEE process when the city allows a new use that could conflict with a particular **historic resource** [emphasis added]. *NWDA v. City of Portland*, 47 Or LUBA 533 (2004).

**9.5 Goal 5 – Open Spaces and Natural Resources/ Goal 5 Rule – Resource Protection Programs.** Code provisions protecting historic structures that are described in the county’s inventory as significant, important or contributing to the significance of the overall resource are not properly interpreted to protect an accessory structure on the subject property that is not mentioned in the county’s inventory. *Paulson v. Washington County*, 40 Or LUBA 345 (2001).

**9.5 Goal 5 – Open Spaces and Natural Resources/ Goal 5 Rule – Resource Protection Programs.** A code provision allowing a **historic resource** to be relocated if it is on land that is “needed to accommodate” a planned transportation project is not properly interpreted in context to require the county to determine if an alternative alignment would not require relocation, where a related code provision prohibits the county from considering alternative alignments. *Paulson v. Washington County*, 40 Or LUBA 345 (2001).

**9.5 Goal 5 – Open Spaces and Natural Resources/ Goal 5 Rule – Resource Protection Programs.** LUBA will defer to the local governing body's interpretation that under its code provisions governing permits for the demolition of **historic properties**, the planning director's determination regarding compliance with pre-application requirements is not reviewable by the historic review board or appealable to the governing body. *Save Amazon Coalition v. City of Eugene*, 29 Or LUBA 238 (1995)

**9.5 Goal 5 – Open Spaces and Natural Resources/ Goal 5 Rule – Resource Protection Programs.** Whereas ORS 358.653(1) imposes a duty on state agencies and local governments that have a proprietary interest in **historically significant properties** to consult with the state **Historic Preservation Office** prior to seeking demolition of such properties, it does not establish requirements for state agencies and local governments to follow in carrying out their authority to regulate property under the ownership and control of other entities. *Save Amazon Coalition v. City of Eugene*, 29 Or LUBA 238 (1995).

9.5 Goal 5 – Open Spaces and Natural Resources/ Goal 5 Rule – Resource Protection Programs. The provisions of **ORS 358.920 to 358.950 and 97.740 to 97.760** concerning excavation of **archaeological sites are not approval standards a local government must address in approving a planned development**, so long as the local government does not approve the planned development in a way that obviates the applicant's responsibility to comply with those statutes, without demonstrating (1) the statutes do not apply to the excavation or construction that may be carried out under the challenged decision, or (2) the statutory requirements have been met. *ONRC v. City of Seaside*, 29 Or LUBA 39 (1995). *ONRC v. City of Seaside*, 29 Or LUBA 39 (1995)

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