

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

3
4 DELTA PROPERTY COMPANY LLC,
5 *Petitioner,*

6
7 vs.

8
9 LANE COUNTY,
10 *Respondent,*

11
12 and

13
14 JOEL NARVA and TERESA NARVA,
15 *Intervenors-Respondents.*

16
17 LUBA No. 2013-061

18
19 FINAL OPINION
20 AND ORDER

21
22 Appeal from Lane County.

23
24 Bill Kloos, Eugene, filed the petition for review and argued on behalf of
25 petitioner. With him on the brief was the Law Office of Bill Kloos, PC.

26
27 Stephen L. Vorhes, Assistant County Counsel, Eugene, filed a response
28 brief and argued on behalf of respondent.

29
30 Zack P. Mittge, Eugene, filed a response brief and argued on behalf of
31 intervenors-respondents. With him on the brief was Hutchinson, Cox, Coons
32 Orr & Sherlock, PC.

33
34 HOLSTUN, Board Chair; BASSHAM, Board Member; RYAN, Board
35 Member, participated in the decision.

36
37 AFFIRMED

 05/05/2014

38
39 You are entitled to judicial review of this Order. Judicial review is

1 governed by the provisions of ORS 197.850.

NATURE OF THE DECISION

Petitioner Delta Property Company, LLC (Delta) appeals a county decision that denies its request for a special use permit to mine gravel and aggregate resources on EFU-zoned land adjacent to Delta’s existing mine.

MOTION TO INTERVENE

Joel Narva and Teresa Narva (intervenors) move to intervene on the side of respondent. There is no opposition to the motion, and it is allowed.

REPLY BRIEF

Delta moves for permission to file a reply brief. Intervenors object that the third argument in the proposed reply brief does not respond to “new matters” in the response briefs, as required by OAR 661-010-0039. Although it is a reasonably close question, we do not agree. The reply brief is allowed in full.

MOTION TO TAKE OFFICIAL NOTICE

Delta filed a motion requesting that LUBA take official notice of an October 3, 1984 Land Conservation and Development Commission (LCDC) Acknowledgment Order, which acknowledges Lane County’s Rural Comprehensive Plan (RCP), as well as a September 12, 1984 Department of Land Conservation and Development (DLCD) staff report that accompanied the acknowledgement order.

LUBA has frequently taken official notice of LCDC Orders. *D.S. Parklane Development, Inc. v. Metro*, 35 Or LUBA 516, 530 (1999), *affirmed as modified* 165 Or App 1, 994 P2d 1205 (2000) (periodic review order); *DLCD v. City of Warrenton*, 37 Or LUBA 933, 936 (2000) (continuance order); *DLCD v. Klamath County*, 24 Or LUBA 643, 646 (1993) (enforcement order);

1 *Schatz v. City of Jacksonville*, 22 Or LUBA 799, 801 (1991)(acknowledgment
2 and enforcement orders); *McCrystal v. Polk County*, 1 Or LUBA 196, 197
3 (1980) (enforcement order). The Court of Appeals has also taken judicial
4 notice of an acknowledgment order in an appeal of a LUBA decision.
5 *Fujimoto v. City of Happy Valley*, 55 Or App 905, 910 n5, 640 P2d 656 (1982).
6 Intervenor objects that while LUBA may take official notice of LCDC orders,
7 LUBA does not take official notice of “adjudicative facts” that may appear in
8 those orders. *Friends of Deschutes County v. Deschutes County*, 49 Or LUBA
9 100, 103 (2005). Intervenor contends that Delta seeks to have LUBA take
10 official notice of adjudicative facts in the acknowledgment order staff report.

11 One of the key issues in this appeal is the identity and scope of
12 inventories of mineral and aggregate natural resources in the Metro Plan and
13 Lane County RCP. Under applicable statutes, Delta’s proposed mining
14 expansion site must be on one or both of those inventories to qualify for the
15 requested special use permit. We believe that inquiry can be accurately
16 described as an attempt to identify the applicable law rather than an inquiry
17 into adjudicative facts. We grant the motion to take official notice.

18 **INTRODUCTION**

19 This is a complicated case. We ultimately sustain the first and third
20 assignments of error and deny the second assignment of error, with the result
21 that Delta’s challenge to two of the county’s bases for denial are sustained, but
22 one is rejected. The challenged decision is a decision that denies permit
23 approval, and therefore only requires one valid basis for the denial to be
24 sustained on appeal. *McCoy v. Marion County*, 16 Or LUBA 284, 286 (1987);
25 *Weyerhauser v. Lane County*, 7 Or LUBA 42, 46 (1982). Because we the deny
26 the second assignment of error, the county’s decision must be affirmed, even

1 though we sustain the first and second assignments of error. However, the
2 second assignment of error presents a fairly novel issue of law, and the parties
3 have granted a number of extensions to the statutory deadline for LUBA to
4 issue its opinion in this appeal as we have worked our way through the
5 complicated issues presented in the first assignment of error. We therefore
6 decide all issues presented in the first through third assignments of error so that
7 the parties will have a complete resolution of those assignments of error by
8 LUBA in the event our resolution of the second assignment of error is reversed
9 on appeal.

10 We now begin with a discussion of some of the factors that make this a
11 complicated case.

12 **A. The Metro Plan**

13 The Metro Plan is a regional comprehensive plan that was adopted by
14 Lane County and the cities of Eugene and Springfield in 1980. For purposes of
15 planning and zoning within the area subject to the Metro Plan, there are what
16 Delta refers to as three jurisdictional rings: (1) the area inside city limits, (2)
17 the area outside city limits but inside the urban growth boundary (UGB), and
18 (3) the area outside the UGB but inside the Metro Plan area. The third area is
19 referred to as the “donut.”

20 There are different requirements for participation by the three Metro Plan
21 governments for different kinds of decisions. The Metro Plan pages that
22 explain those participation requirements are not easy reading. Metro Plan IV-1
23 through IV-4. We are concerned in this appeal with the Metro Plan donut area
24 west of Interstate 5 outside the City of Eugene and outside the UGB. Within
25 that donut area of the Metro Plan, Delta contends “site specific [Metro Plan]
26 text and diagram amendments must be concurred in by Lane County and

1 Eugene.” Petition for Review 7. But in that donut area, Lane County is
2 responsible for adopting the land use regulations (including the zoning) that
3 implement or carry out the Metro Plan. Delta further contends that Metro Plan
4 amendments in the Metro Plan area outside city limits, “are not effective,”
5 unless they are “concurring in by both jurisdictions.” *Id.*

6 To summarize the key points regarding the Metro Plan in this matter, in
7 the donut area the Metro Plan is the comprehensive plan, and as relevant here
8 both the City of Eugene and Lane County must agree to amend the Metro Plan
9 in the donut area. But the applicable zoning ordinance that governs
10 development in the donut area is Lane County’s Land Use and Development
11 Ordinance, and Lane County is free to amend its zoning ordinance in the donut
12 area without any requirement that the City of Eugene agree.

13 **B. Statewide Planning Goal 5 and the Goal 5 Administrative Rule**

14 **1. Statewide Planning Goal 5**

15 Statewide Planning Goal 5 (Natural Resources, Scenic and Historic
16 Areas, and Open Spaces) was adopted in 1974 and requires that local
17 governments adopt comprehensive plans and land use regulations to inventory
18 and protect, among other things, “mineral and aggregate resources.” The text
19 of the version of Goal 5 that was in effect when the Metro Plan and Lane
20 County Rural Comprehensive Plan and land use regulations were
21 acknowledged in the early 1980s appears at Record 1608 and is set out in
22 relevant part in the footnote below.¹ As relevant here, the version of Goal 5

¹ When the Metro Plan was acknowledged, Goal 5 provided in part:

“GOAL: To conserve open space and protect natural resources.

“Programs shall be provided that will: (1) insure open space, (2) protect scenic and historic areas and natural resources for future generations, and (3) promote healthy and visually attractive environments in harmony with the natural landscape character. The location, quality and quantity of the following resources shall be inventoried:

“* * * * *

“b. Mineral and aggregate resources;

“* * * * *

“Where no conflicting uses for such resources have been identified, such resources shall be managed so as to preserve their original character. Where conflicting uses have been identified the economic, social, environmental and energy consequences of the conflicting uses shall be determined and programs developed to achieve the goal.

“* * * * *

“GUIDELINES

“A. Planning:

“* * * * *

“6. In conjunction with the Inventory of mineral and aggregate resources, sites for removal and processing of such resources should be identified and protected.

“* * * * *

“B. Implementation”

“* * * * *

“9. Areas identified as having non-renewable mineral and aggregate resources should be planned for interim,

1 that was in effect in the early 1980s required local governments to do a number
2 of things to comply with Goal 5. First, it required that local governments
3 prepare inventories of, among other things, “mineral and aggregate resources.”
4 Second, where uses are identified that conflict with inventoried mineral and
5 aggregate resources, the “economic, social, environmental and energy” (ESEE)
6 “consequences of the conflicting uses shall be determined and programs
7 developed to achieve the goal.” Finally, Goal 5 Guideline A(6) anticipated that
8 the inventory of mineral and aggregate resources would lead to protection of
9 sites for mineral and aggregate removal and Goal 5 Guideline B(9) anticipated
10 that mineral and aggregate sites would be planned for a primary use
11 (presumably mineral and aggregate extraction and processing), as well as
12 “interim” uses until the mineral and aggregate resource is needed and
13 “transitional” and “second use” after mineral and aggregate extraction and
14 processing was complete.

15 **2. The Goal 5 Administrative Rules**

16 Although the text of Goal 5 itself has remained relatively unchanged
17 over the years, LCDC has adopted Goal 5 administrative rules that have
18 elaborated considerably on the required Goal 5 planning process. The first
19 Goal 5 rule, which took effect on May 8, 1981, explicitly addressed the Goal 5
20 inventory process. We set out the relevant text of the rule below in discussing
21 a Court of Appeals’ decision that is particularly relevant in this matter. For
22 now it will suffice to say the primary importance of the rule was to require that
23 the Goal 5 inventory of mineral and aggregate sites identify “significant” or
24 “important” sites, before proceeding with analysis of conflicts and development

transitional and ‘second use’ utilization as well as for the
primary use.” Record 1608 (bold face in original).

1 of programs to protect those sites. At the time the rule was first adopted, the
2 text of Goal 5 itself included no express requirement to determine if sites were
3 “significant” or “important,” before including them on the inventory.

4 In 1996, DLCD adopted a second Goal 5 administrative rule. OAR
5 chapter 660, division 23. To distinguish this newer version of the Goal 5 rule
6 from the initial version, we will refer to the newer version as the “new” Goal 5
7 rule. The new Goal 5 administrative rule extensively elaborated on the Goal 5
8 planning process, and has largely displaced the initial Goal 5 rule. As we
9 explain next, Delta sought amendments to the Metro Plan and Lane County
10 Land Development Code under the new Goal 5 administrative rule in 2008.

11 **C. Delta’s Proposed Expansion**

12 **1. Delta’s Prior Proposal**

13 Delta’s existing mine is designated Sand and Gravel (S-G) on the Metro
14 Plan Diagram (which is the comprehensive plan map), and is zoned Sand and
15 Gravel S-G by the county. One of the purposes of the S-G zone is to “[i]dentify
16 and zone * * * major deposits of sand and gravel, rock and related material
17 resources.” Lane Code (LC) 10.205-5(2). Sand and gravel extraction is
18 permitted in the S-G zone. LC 10.205-10(1). In the language of Goal 5,
19 Delta’s existing mine is zoned for “primary use[s]” that include sand and gravel
20 mining. *See* n 1 (Implementation Guideline B(9)).

21 The proposed expansion area is approximately 70 acres in size and
22 located next to Delta’s existing mine. The proposed expansion area is
23 designated Agriculture on the Metro Plan Diagram and is zoned exclusive farm
24 use (EFU) by Lane County. Delta previously filed applications with Lane
25 County and the City of Eugene to mine an area that corresponded roughly with
26 the currently proposed 70-acre expansion area. Delta asked for that expansion

1 area to be (1) added to the Metro Plan inventory of significant aggregate
2 resource sites (Metro Plan ISARS), (2) designated Sand and Gravel on the
3 Metro Plan Diagram and (3) zoned S-G by the county.² At that time, Delta, the
4 City of Eugene and Lane County all apparently believed that the proposed
5 expansion area is not included on the Metro Plan ISARS. That application was
6 submitted under the new Goal 5 Rule. OAR 660-023-0180(3)(a) through (c)
7 set out three criteria for determining if a site qualifies as a significant aggregate
8 resource site. OAR 660-023-0180(3)(a) and (b) set out quality and numerical
9 quantity standards for a site to qualify as “significant.” Under OAR 660-023-
10 0180(3)(c), a site may also qualify as significant, if it “was on an inventory of
11 significant sites in an acknowledged plan on September 1, 1996.” But even if a
12 site is shown to be significant under OAR 660-023-0180(3)(a), (b) or (c), under
13 OAR 660-023-0180(3)(d), sites that would otherwise qualify as significant are
14 disqualified in some circumstances where the proposed mining area has high
15 quality agricultural soils.

16 In a 2008 decision, the Lane County Board of Commissioners found
17 Delta carried its burden under OAR 660-023-0180(3) regarding its prior
18 proposal for expansion and approved the application. However, the City of
19 Eugene subsequently denied the application. After attempts to reach consensus

² This case would be much easier if there actually was a Metro Plan ISARS, labeled as such; but there is not. One of the major tasks in this appeal is culling the Metro Plan ISARS from the somewhat disjointed planning and acknowledgment process that led to acknowledgment of the Metro Plan and Lane County RCP and Land Use and Development Code. The Metro Plan ISARS is different from the Metro Plan Diagram. Acronyms can be confusing, but we refer to the Metro Plan ISARS so many times in this opinion that the acronym is unavoidable.

1 between the city and county failed, under the procedures required by the Metro
2 Plan, the Lane County Planning Director issued a decision denying the
3 application. In support of the denial decision, the county planning director
4 adopted the city's findings. That decision was appealed to LUBA, and
5 affirmed. *Delta Property Company v. Lane County*, 58 Or LUBA 409 (2009).
6 In affirming the decision, LUBA concluded that Delta failed to assign error to
7 one of the findings that was adopted by the city and ultimately adopted by the
8 county planning director as a basis for concluding Delta failed to carry its
9 burden to demonstrate that the proposed expansion area qualified as
10 "significant" under OAR 660-023-0180(3)(a). 58 Or LUBA at 417. LUBA
11 also concluded that Delta failed to assign error to another finding that found the
12 proposed expansion area fell within the OAR 660-023-0180(d)(B)(i) exclusion
13 for sites composed of high quality agricultural soils where the average
14 thickness of the aggregate layer does not exceed 60 feet. 58 Or LUBA at 418.
15 LUBA's decision was not appealed.

16 Intervenor suggests that Delta's current application is an improper
17 collateral attack on the 2008 decision, which found the proposed expansion
18 area is not on the Metro Plan ISARS. The county hearings official found that
19 the application that led to the decision in this appeal is not a collateral attack on
20 the prior decision that was affirmed by LUBA. Record 58. No party has
21 assigned error to that finding. We therefore do not consider intervenor's
22 collateral attack argument further.

23 **2. Delta's Current Proposal**

24 In the proceedings that led to the decision in this appeal, Delta contended
25 that the expansion area is already included on the Metro Plan ISARS. But
26 rather than seek a Metro Plan amendment to have the proposed expansion area

1 designated Sand and Gravel on the Metro Plan Diagram and zoned S-G, Delta
2 sought approval from Lane County under ORS 215.213(2), which as we
3 explain below authorizes mining in EFU zones, in certain circumstances.

4 **D. ORS 215.213(2)(d)(B), 215.296 and 215.298 and the County’s**
5 **Decision**

6 ORS 215.213 is the section of the EFU zoning statutes that applies to
7 marginal lands counties, such as Lane County. ORS 215.213(2)(d)(B)
8 authorizes mining “of aggregate and other mineral * * * resources subject to
9 ORS 215.298.” Among other things, ORS 215.298 requires that “[a] permit for
10 mining of aggregate shall be issued only for a site included on an inventory in
11 an acknowledged comprehensive plan.” ORS 215.298(2). The LC analog of
12 ORS 215.298(2) requires that the site must be on an inventory in the “Lane
13 County” acknowledged RCP. LC 16.212(4)(y)(ii).³ Uses authorized by ORS
14 215.213(2) are also subject to ORS 215.296. ORS 215.296 imposes the
15 following requirement:

16 “(1) A use allowed under ORS 215.213(2) * * * may be
17 approved only where the local governing body or its
18 designee finds that the use will not:

19 “(a) Force a significant change in accepted farm or forest
20 practices on surrounding lands devoted to farm or
21 forest use; or

22 “(b) Significantly increase the cost of accepted farm or
23 forest practices on surrounding lands devoted to farm
24 or forest use.”

25 The county hearings official found that the proposed expansion area is
26 not included on the Metro Plan ISARS. The county hearings official also

³ We set out the text of LC 16.212(4)(y)(ii) later in this opinion.

1 found that the application could not be approved because the proposed
2 expansion area is not on the *county's* inventory of significant aggregate
3 resource sites, rejecting Delta's contention that only the Metro Plan ISARS
4 applies in the Metro Plan donut area under ORS 215.298(2), and that LC
5 16.212(4)(y)(ii) cannot be applied to require that Delta's proposed expansion
6 site be on the Lane County RCP inventory, which, as explained above, does not
7 apply in the Metro Plan donut area. Finally, the hearings official found that the
8 application could not be approved because Delta failed to carry its burden
9 under ORS 215.296(1) to establish that mining on the proposed expansion area
10 will neither force a significant change in accepted farm practices nor
11 significantly increase the cost of accepted farm practices. The Board of County
12 Commissioners affirmed the hearings official's decision, and adopted the
13 hearings officials' interpretations of law as its own.

14 **E. *Beaver State Sand and Gravel*, 187 Or App 241, 65 P3d 1123**
15 **(2003)**

16 As noted above, ORS 215.298(2) requires that “[a] permit for mining of
17 aggregate shall be issued only for a site included on an inventory in an
18 acknowledged comprehensive plan.” The statute is ambiguous, because it does
19 not specify whose inventory or what kind of an inventory the site must be on.
20 The Court of Appeals resolved one of those questions in *Beaver State Sand and*
21 *Gravel v. Douglas County*, 187 Or App 241, 65 P3d 1123 (2003). In seeking a
22 permit for mining on EFU-zoned property under ORS 215.298, the property
23 owner in *Beaver State* did not seek to have its property included on Douglas
24 County's Goal 5 inventory of significant mineral and aggregate resource sites.
25 Rather, the property owner sought to have its property included on a separate
26 inventory of “nonsignificant” aggregate sites that Douglas County maintained,

1 an inventory that was not prepared to comply with Goal 5. The property owner
2 took the position that once its site was included on the county’s inventory of
3 nonsignificant sites, it would satisfy the ORS 215.298 requirement to be “a site
4 included on an inventory in an acknowledged comprehensive plan.” The court
5 first described the kind of inventory options that are permissible under the Goal
6 5 rule:

7 “[OAR 660-016-0000(1981)] directed the local government to
8 collect data from as many sources as possible on the location,
9 quality, and quantity of resource sites within the jurisdiction.
10 OAR 660-016-0000(1), (2). Based on that information, a local
11 government had three options: (a) do not include the resource on
12 the inventory because it is a nonsignificant resource; (b) delay the
13 Goal 5 process until more information is available; or (c) include
14 the resource on the plan inventory as a significant resource. OAR
15 660-016-0000(5)(a)-(c). Under the Goal 5 rule as first
16 promulgated, those options were known respectively as ‘1A,’
17 ‘1B,’ and ‘1C’ options.” 187 Or App at 243-44.⁴

18 The court then quoted the Goal 5 rule text at length:

19 “* * * In this case, LCDC promulgated OAR 660-016-0000 eight
20 years before the legislature enacted ORS 215.298. That rule
21 implements Goal 5 and specifies which Goal 5 sites should and
22 should not be included on a local government's inventory. It
23 directs local governments to gather data to determine ‘the location,
24 quality, and quantity of each resource site.’ OAR 660-016-
25 0000(2). It then provides:

26 “Based on data collected, analyzed and refined by the local
27 government, as outlined [in OAR 660-016-0000(1)-(4)], a
28 jurisdiction has three basic options:

⁴ These distinctions are critical in this appeal, in particular, the 1B option (under which the Goal 5 planning process is delayed to collect more information) and the 1C option (under which the site is determined to be significant and included on the Goal 5 resource inventory).

1 “(a) **Do Not Include on Inventory:** Based on information
2 that is available on location, quality and quantity, the local
3 government might determine that a particular resource site is not
4 important enough to warrant inclusion on the plan inventory, or is
5 not required to be included in the inventory based on specific Goal
6 standards. No further action need be taken with regard to these
7 sites. The local government is not required to justify in its
8 comprehensive plan a decision not to include a particular site in
9 the plan inventory unless challenged by [DLCD], objectors, or
10 [LCDC] based upon contradictory information;

11 “(b) **Delay Goal 5 Process:** When some information is
12 available, indicating the possible existence of a resource site, but
13 that information is not adequate to identify with particularity the
14 location, quality and quantity of the resource site, the local
15 government should only include the site on the comprehensive
16 plan inventory as a special category. The local government must
17 express its intent relative to the resource site through a plan policy
18 to address that resource site and proceed through the Goal 5
19 process in the future. The plan should include a time frame for
20 this review. Special implementing measures are not appropriate or
21 required for Goal 5 compliance purposes until adequate
22 information is available to enable further review and adoption of
23 such measures. The statement in the plan commits the local
24 government to address the resource site through the Goal 5
25 process in the post-acknowledgment period. Such future actions
26 could require a plan amendment;

27 “(c) **Include on Plan Inventory:** When information is
28 available on location, quality and quantity, and the local
29 government has determined a site to be significant or important as
30 a result of the data collection and analysis process, the local
31 government must include the site on its plan inventory and
32 indicate the location, quality and quantity of the resource site
33 * * *. Items included on this inventory must proceed through the
34 remainder of the Goal 5 process.”

35 “OAR 660-016-0000(5) (boldface added).” 187 Or App 248-49.

1 The court next considered whether a site not included on an inventory of
2 significant mineral and aggregate resources mandated by the Goal 5 rule, but
3 included on a locally created list of “nonsignificant” sites, could qualify for a
4 permit under ORS 215.298(2):

5 “When the legislature enacted ORS 215.298, OAR 660-016-
6 0000(5) specified which sites should and should not be included
7 on a ‘plan inventory,’ *i.e.*, on the inventory that will be included in
8 a local government’s comprehensive plan. More particularly,
9 subsection (5)(a) told local governments, ‘Do [n]ot [i]nclude’
10 nonsignificant sites in a comprehensive plan inventory. *Cf.*
11 *Williams v. LCDC*, 154 Or App 195, 202, 961 P.2d 269 (1998)
12 (explaining that, under OAR 660-016-0000, a local government
13 ‘determines which sites are significant and includes those sites in
14 its inventory’). It follows that, when the legislature provided in
15 ORS 215.298 that permits for mining aggregate ‘shall be issued
16 *only* for a site included on an inventory in an acknowledged
17 comprehensive plan,’ it understood that nonsignificant aggregate
18 sites would not be ‘included on an inventory’ in a local
19 government’s comprehensive plan and thus would not be eligible
20 for a mining permit. (Emphasis added.) We accordingly agree
21 with LUBA that ORS 215.298(2), read in the context of OAR 660-
22 016-0000(5), precludes issuing a mining permit for a
23 nonsignificant aggregate site.” 187 Or App 249.

24 Having concluded that the inventory referenced in ORS 215.298(2) must be an
25 inventory of significant aggregate sites, and having rejected the argument that a
26 site on a locally created list of nonsignificant aggregate sites could qualify for a
27 mining permit under ORS 215.298(2), the court also concluded that a site that
28 is identified in a comprehensive plan as a 1B site (delay the Goal 5 process and
29 collect more information) would similarly not be eligible for a permit under
30 ORS 215.298(2):

31 “[Option 1B] provides that, when there is insufficient information
32 ‘to identify with particularity the location, quality and quantity of
33 the resource site, the local government should only include the site

1 on the comprehensive plan inventory as a special category.’ OAR
2 660-016-0000(5)(b). That subsection also provides that, in the
3 post-acknowledgment period, the local government will address
4 the ‘1B’ site and proceed through the Goal 5 process. Put another
5 way, the rule contemplates that, within a specified time, the local
6 government will acquire sufficient information to determine
7 whether the ‘1B’ site should be downgraded to a ‘1A’ or
8 nonsignificant site or upgraded to a ‘1C’ or significant site and
9 listed as a protected resource on the inventory. There is nothing
10 inconsistent in LUBA’s recognition that ‘the ‘final plan inventory’
11 was intended for significant sites’ and the fact that the rule
12 provides that both ‘1B’ and ‘1C’ sites should be included on an
13 inventory. If local governments follow the process set out in OAR
14 660-016-0000(5)(b), only significant sites will be included on the
15 *final* plan inventory. See OAR 660-016-0000(1); *Williams*, 154
16 Or App at 202 (explaining that the local ‘government determines
17 which sites are significant and includes those sites in its
18 inventory’).” 187 Or App 251.

19 The Court of Appeals’ view of how the first Goal 5 rule works tracks the
20 structured step-by-step process that the Goal 5 rule calls for. In practice, it is
21 often less clear whether an inventory qualifies as a 1C inventory of significant
22 mineral and aggregate resource sites or, stated differently, whether all the sites
23 shown on a survey of mineral and aggregate resources have been determined to
24 be significant under option 1C.

25 This case is further complicated by two additional factors. First, the
26 Goal 5 rule took effect on May 8, 1981, after the planning that led to the Metro
27 Plan and Lane County RCP adoption and acknowledgment was largely
28 complete. Second, planning in the donut area is complicated because the
29 comprehensive planning (including the Goal 5 1C inventory) for the donut area
30 is adopted as part of the Metro Plan while the land use regulations (which make
31 up a significant part of the program to protect inventoried Goal 5 resources) are
32 adopted as part of the Lane County Land Use and Development Code. In this

1 case the complications caused by the split responsibility for comprehensive
2 planning and zoning is further magnified, because much of the Metro Plan
3 acknowledgement review by LCDC (the part for the Metro Plan area inside the
4 UGB) occurred first. The Metro Plan Goal 5 planning for the Metro Plan area
5 up to, but not including, the donut (the area inside the UGB) was
6 acknowledged in August 1982. The acknowledgment proceedings to review
7 the Lane County RCP and Land Use and Development Code (and the Metro
8 Plan donut area) came later. The Goal 5 planning for the donut area of the
9 Metro Plan and the Goal 5 planning for the remainder of the county outside the
10 Metro Plan area was acknowledged three years later, in August 1985.

11 **F. Standard of Review**

12 Finally, for purposes of this introduction, the parties disagree regarding
13 LUBA's standard of review. Because the Lane County Board of
14 Commissioners expressly adopted the hearings official's Metro Plan and Lane
15 County Land Use and Development Code interpretations, respondents contend
16 those interpretations are entitled to the deferential standard of review required
17 by ORS 197.829(1) and *Siporen v. City of Medford*, 349 Or 247, 243 P3d 776
18 (2010).⁵ See *Green v. Douglas County*, 245 Or App 438, n 5, 263 P3d 355

⁵ ORS 197.829(1) provides:

“The Land Use Board of Appeals shall affirm a local government's interpretation of its comprehensive plan and land use regulations, unless the board determines that the local government's interpretation:

“(a) Is inconsistent with the express language of the comprehensive plan or land use regulation;

1 (2011) (deference is due where governing body’s decision declines review of a
2 decision but incorporates that decision as the governing body’s own decision).
3 If respondents are correct, those interpretations must be affirmed so long as
4 they are “plausible.” *Siporen*, 349 Or at 261.

5 Delta contends that to the extent the county’s decision relies on
6 interpretations of the Metro Plan, the county is not entitled to the deferential
7 standard of review required by *Siporen*. See *Jaqua v. City of Springfield*, 193
8 Or App 573, 580 n3, 91 P3d 817 (2004) (questioning whether the City of
9 Springfield, as only one of the three governmental bodies enacting the Metro
10 Plan, is entitled to deference under ORS 197.829 and *Clark v. Jackson County*,
11 313 Or 508, 836 P2d 710 (1992) when interpreting the Metro Plan).

12 The cases that led to the highly deferential standard of review that is
13 described in *Siporen* began with *Clark*. The Oregon Supreme Court explained
14 the principles that underlie *Clark*, in *Gage v. City of Portland*, 319 Or 308,
15 316-17, 877 P2d 1187 (1994):

16 “Based on the foregoing authorities, it is apparent that there are
17 two fundamental principles behind the rule of deference
18 announced by this court in *Clark*. First, deference is due a local
19 governing body’s interpretation of its own ordinance, because that
20 governing body is composed of the politically accountable
21 representatives elected by the community affected by the

“(b) Is inconsistent with the purpose for the comprehensive plan
or land use regulation;

“(c) Is inconsistent with the underlying policy that provides the
basis for the comprehensive plan or land use regulation; or

“(d) Is contrary to a state statute, land use goal or rule that the
comprehensive plan provision or land use regulation
implements.”

1 ordinance. Second, and perhaps more important, deference is due
2 a local governing body's interpretation of its own ordinance,
3 because that governing body is the legislative body responsible for
4 enacting the ordinance and may be assumed to have a better
5 understanding than LUBA or the courts of the intended meaning
6 of the ordinance.”

7 Neither of those principles apply here to Lane County's interpretations of the
8 Metro Plan. First, the Lane County commissioners were not elected by, and are
9 not politically accountable to, the voters of the cities of Eugene and
10 Springfield, and those voters could easily be affected by Lane County's
11 interpretations of the Metro Plan. Second, the Lane County Commission is
12 only one of three legislative bodies responsible for enacting the Metro Plan.
13 Giving one of those three enacting legislative bodies deference would be
14 similar to giving one Lane County Commissioner's interpretations of the Lane
15 Code deference under *Siporen*, when the other two county commissioners
16 might have very different views about the correct interpretation of the Lane
17 Code. The Lane County Commission's interpretations of the Metro Plan are
18 not entitled to deference under ORS 197.829(1) and *Siporen*. We review the
19 county's interpretations of the Metro Plan to determine whether they are
20 correct. *McCoy v. Marion County*, 90 Or App 271, 275-76, 752 P2d 323
21 (1988).

22 With the above lengthy introduction we now turn to Delta's first
23 assignment of error.

24 **FIRST ASSIGNMENT OF ERROR**

25 In its first assignment of error, Delta alleges the county erred in
26 concluding that its proposed expansion area is not included on the Metro Plan
27 ISARS. The county concluded that only areas that are planned and zoned S-G
28 are included on the Metro Plan ISARS. As we have already explained,

1 although Delta’s existing mine is planned and zoned S-G, the proposed
2 expansion area is not.

3 In its petition for review, Delta argues:

4 “Goal 5 law has changed over time; it is a finely decorated
5 Christmas tree now; it was just a tiny Douglas fir seedling in 1980.
6 The Metro Plan was prepared, reviewed and acknowledged in the
7 seedling era. The labels we apply to Goal 5 issues today,
8 including the Division 23 rule, are from the current epoch. Hence,
9 when examining the pedigree of the early Goal 5 program, it is
10 important to keep one’s eye focused on the content, not the
11 labels.” Petition for Review 14.

12 We agree with Delta. In particular, we agree that it is appropriate to look at the
13 content and context of the key planning documents, when attempting to
14 determine what Goal 5 rule labels to assign those documents, since they were
15 prepared before the Goal 5 rule was adopted and took effect.

16 **A. The Metro Plan**

17 The Metro Plan was submitted for acknowledgment in 1980. That
18 submittal included an April 12, 1978 Natural Assets and Constraints Working
19 Paper, which was adopted to identify the Metro area’s planning assets and
20 constraints. Section II of the Natural Assets and Constraints Working Paper
21 included a number of additional working papers, including an April 12, 1978
22 Sand and Gravel Resources working paper (S&GWP). Because both of those
23 documents were prepared before the Goal 5 rule was adopted and took effect,
24 neither of them is written in the 1A, 1B, and 1C Goal 5 rule inventory
25 language. We turn first to the S&GWP.

26 **1. 1978 Sand and Gravel Resources Working Paper**

27 The S&GWP briefly discusses issues regarding sand and gravel
28 resources, noting “steadily increasing consumer demand for aggregate

1 products,” the “finite supply of high quality sand and gravel resources,” and the
2 aggregate industry’s “need to protect resources from encroachment or
3 permanent conversion to other uses, thus precluding future resource
4 extraction.” Record 5773. The S&GWP also notes “[n]uisances (or potential
5 nuisances) caused by sand and gravel operations – noise, dust and water
6 pollution; safety hazards; truck traffic; spoiled landforms,” and the need to
7 “strike a balance between the need for extraction and the need for
8 environmental quality.” Record 5774. This text makes it clear that the authors
9 of the S&GWP were clearly aware that there are potential conflicts with
10 identified sand and gravel resources and potential impacts from extraction of
11 those resources.

12 We have no difficulty agreeing with Delta that the text of the S&GWP
13 supports a conclusion that the S&GWP identifies earlier studies that examined
14 the location, quality and quantity of sand and gravel deposits, at least in a
15 rudimentary way, and that the S&GWP identifies areas of potentially
16 significant deposits of sand and gravel.⁶

⁶ For example, the S&GWP includes the following text:

“2. Tons of Aggregate Per Acre

“The amount of usable aggregate will vary from area to area and by depth.

“For example, the 1976 Aggregate Resource Study along the Middle fork of the Willamette River estimated that in one area, 99% of the materials to a depth of 100 feet were sand and gravel, while in another area, the best aggregate resources were found in the top 20 feet and between 40 and 80 feet. Very little aggregate material was found below 80 feet * * *.

1 But the Goal 5 rule’s use of the word “significant” has a particular
2 meaning and consequence. As used in the Goal 5 rule, once there is sufficient
3 information regarding location, quality and quantity of mineral and aggregate
4 resources to determine a site is significant, a local government is bound to
5 “proceed through the remainder of the Goal 5 process.” OAR 660-016-
6 0000(5). That process entails identifying conflicting uses and determining the
7 ESEE consequence of those conflicting uses. OAR 660-016-0005. Then the
8 local government must develop a program to: (1) protect the mineral and
9 aggregate resource by prohibiting the conflicting uses, (2) allow the conflicting
10 uses fully or (3) achieve a level of protection somewhere between those two
11 extremes. OAR 660-016-0010. We do not believe it is appropriate to assume
12 that just because the S&GWP may identify significant sand and gravel
13 resources in a generic sense that necessarily means the S&GWP inventories
14 should be viewed as 1C inventories.

“The CLPC Study stated that core samples in the resource areas
‘owned by sand and gravel companies (approximately 4,000 acres)
indicate that the lands contain good quality aggregate material,
averaging 98 percent sand and gravel in the top 20 foot stratum.’

“In a recent statement of the resource supply for a portion of the
Wildish Company on the north side of the McKenzie Rivers, the
company estimated that approximately 99% of the material
extracted to 30 feet was usable aggregate.

“For the purpose of calculating supply in this report, it was
estimated that 85% of the material extracted to depths of 30, 40
and 60 feet is usable aggregate. This figure was assumed to
account for the variation on quality of materials, particularly at the
greater depths.” Record 5782.

1 S&GWP Figure E 1 identifies three relatively large areas, located
2 partially within and partially outside the donut area, which the Lane County
3 Public Works Department earlier identified as “[s]and and gravel resource
4 areas.” Record 5794. The S&GWP also includes Figure E 2, which identifies
5 three smaller areas, generally within those three larger areas, which have been
6 planned and zoned S-G for sand and gravel extraction. Record 5795.⁷ Table 1
7 of the S&GWP explains that those three areas on Figure E 1 include a total of
8 10,350 acres. Of those 10,350 acres, 3,800 acres have been designated S-G
9 resources in Metro Plan and the RCP and 2,160 acres have been zoned S-G.
10 Within the donut area, a total of 7,450 acres of sand and gravel resource area is
11 shown on Figure E 1, with 3,800 acres planned or zoned for S-G and 3,650
12 acres zoned EFU and other zones.

13 After quoting the same Goal 5 language that we quoted earlier in this
14 opinion at n 1, the S&GWP provides the following discussion of those three
15 areas:

16 “The total extent of aggregate resources (quantity and quality) in
17 the Eugene-Springfield metropolitan area is probably unknown.
18 The best source of available data is the 1967 study by the Lane
19 County Public Works Department which identifies three resource
20 areas in the metropolitan area. (See Map 1 and Table 1.)

21 “In identifying these resources, *the [1967] study did not attempt to*
22 *make choices between the appropriateness of an area for*
23 *aggregate resource management as opposed to use of such areas*
24 *for agriculture, open space, recreation, etc.* Consequently, the
25 resource areas are quite large and not all are designated as
26 resource areas in related land use plans.

⁷ The S&GWP frequently refers to Figures E 1 and E 2 as Maps 1 and 2.

1 “As each land use plan was adopted, smaller aggregate resource
2 areas were designated and zoned (see Map 2). This was done as a
3 result of trying to balance the need to identify and protect
4 aggregate resources with other needs such as protecting important
5 agriculture areas, protecting scenic open space, wildlife habitat,
6 recreational opportunities, etc.” Record 5775.

7 Later the S&GWP concludes:

8 “1. Sufficient acres (3800 acres) of sand and gravel resources
9 have been designated in various land use plans * * * and
10 zoned (2100 acres) to meet the projected demand through
11 the rest of this century.

12 “2. Adopted land use plans surrounding the metropolitan area
13 provide an adequate treatment of sand and gravel resources,
14 and the Metropolitan Plan Update can draw on these plans
15 to provide direction on this subject.

16 “3. Major issues relative to sand and gravel resources include;

17 “A. Designating and protecting sand and gravel resources
18 from development which would preclude future
19 resource extraction (housing, commercial, industrial
20 or other intensive development resulting in permanent
21 loss of resources).

22 “B. Zoning an adequate amount of resource areas for
23 extraction while maintaining the balance of the
24 resource lands in less intensive use (e.g. agriculture,
25 greenway, open space).” Record 5780 (Emphasis
26 added.)

27 **a. Respondents’ Interpretation of the S&GWP**

28 There are at least a couple of ways the S&GWP could be viewed in terms
29 of Goal 5 rule inventory nomenclature. Lane County and intervenors-
30 respondents (respondents) take the position that it is most accurate to describe
31 the S&GWP as having determined that when the areas shown on Figure E 2
32 (Map 2) were planned and zoned S-G, conflicting uses were examined at that

1 time and a decision to protect those areas for mining was made. The S&GWP
2 takes the position that those areas, which are already planned and zoned to
3 protect them for sand and gravel extraction, should provide an adequate
4 amount of sand and gravel to meet needs through the end of the planning period.
5 According to respondents, for those Figure E 2 areas, in Goal 5 rule
6 nomenclature, the S&GWP inventory is properly viewed as a 1C inventory, and
7 the S-G planning and zoning is the program to protect the inventoried sand and
8 gravel resources.

9 With regard to the remaining areas (*i.e.*, the areas shown on Figure E 1
10 that are not also shown on Figure E 2), the S&GWP is far less clear. There is
11 no suggestion in the S&GWP that conflicting uses, other than urban
12 development, had been considered so that the relative values of those
13 conflicting uses and sand and aggregate values could be balanced to determine
14 whether also to protect those areas for sand and gravel extraction. To the
15 contrary, there is language in the S&GWP that seems to say that such an
16 analysis has not been done: “the [1967] study did not attempt to make choices
17 between the appropriateness of an area for aggregate resource management as
18 opposed to use of such areas for agriculture, open space, recreation, etc.”
19 There is other language in the S&GWP to the same effect.⁸

⁸ The S&GWP cites language from the Willamette – Long Tom Subarea Plan that states:

“The sand and gravel resource areas indicated on the Plan Diagram are intended to identify areas of resource availability. More detailed study of specific sites to determine extraction priorities will be necessary. Therefore, the designation of sand and gravel resource areas should not be construed as a plan

1 To summarize, respondents essentially contend the S&GWP inventory
2 should be viewed as including both 1B special category sites (for the portion of
3 the large areas shown on Figure E 1 that is not also shown on Figure E 2) and a
4 1C inventory (for the S-G designated areas shown only on Figure E 2).
5 Conflicts with mining for areas shown only on Figure E 2 had already been
6 considered and decisions had already been made to protect those sites for
7 mining by planning and zoning them for sand and gravel extraction. Record
8 5775. Respondents contend the S&GWP is best viewed as taking the position
9 that more information would be needed before the areas shown on Figure E 1
10 that are not also shown on Figure E 2 could be added to the 1C inventory so
11 that the additional analysis required to consider all conflicting uses could be
12 completed to determine whether the conflicting uses should be prohibited,
13 limited or allowed fully.

14 **b. Delta’s Interpretation of the S&GWP**

15 If the initial Goal 5 rule is read literally, 1B decisions to “Delay the Goal
16 5 Process” are to be exercised only where “information is not adequate to
17 identify with particularity the location, quality and quantity of the resource
18 site.” Delta contends there is nothing in the record that could lead one to
19 believe that more or better “location, quality and quantity” information was
20 available for the smaller areas shown on Figure E 2 than for the larger areas
21 shown on Figure E 1.

22 At the risk of oversimplifying, we understand Delta to contend that
23 Figure E 1 in the S&GWP is best viewed as constituting a 1C inventory.
24 According to Delta, the Metro Plan protects the all identified sand and gravel

recommendation to randomly proceed with extraction of the sand
and gravel resources. * * *” Record 5788-89.

1 resources (both those shown on Figure E 2 and the larger areas shown on
2 Figure E 1) by excluding those areas from the UGB, and thereby protecting
3 them from potentially conflicting urban development. We understand Delta to
4 contend the areas shown on Figure E 2 are *further* protected by the existing S-
5 G planning and zoning, which ensures that they will be available to satisfy
6 immediate needs through the planning period. However Delta argues the
7 record simply does not support any suggestion that the areas shown on Figure
8 E 1 were shrunk to include only those areas shown on Figure E 2 on the 1C
9 inventory.

10 “Where is the program document that explains why the acreage
11 plan designated Sand and Gravel is important or significant, but
12 the balance of the acreage inventoried and mapped in the 1978
13 Working Papers (plan designated Agriculture) is not important or
14 significant? It does not exist, because that policy decision to
15 shrink the inventory was never made.

16 “Where is the document that explains the policy choice to shrink
17 the inventory to only the existing mining operations and enough
18 additional adjacent acreage to get through the 20-year planning
19 period – just the areas plan designated Sand and Gravel? It does
20 not exist.” Petition for Review 30.

21 We understand Delta to contend that the “Agriculture” Metro Plan designation
22 that is applied to much of the larger area shown on Figure E 1 that is not also
23 shown on Figure E 2 can be viewed as a program to protect or to provide
24 interim protection for significant sand and gravel resources. *Higginson v.*
25 *Yamhill Cty.*, 2 Or LUBA 314, 317 (1981). We understand Delta to contend
26 there is no reason to believe the Metro Plan did not propose to protect some of
27 the inventoried mineral and aggregate resources with that Agricultural
28 designation here.

1 Both Delta and respondents state a possible recharacterization of the
2 S&GWP into initial Goal 5 rule inventory language, although respondents'
3 recharacterization seems a little stronger to us. We turn next to the Natural
4 Assets and Constraints Working Paper.

5 **2. The Natural Assets and Constraints Working Paper**

6 The Natural Assets and Constraints Working Paper does not add a great
7 deal to the S&GWP. It says that Goal 5 resources have been inventoried (“A
8 survey or inventory of existing constraints and resources was conducted as part
9 of the update process.”). Record 5311. And it says those identified assets are
10 significant (Significant metropolitan assets were identified.”). Record 5312.
11 But it also later includes the following finding:

12 “b. Sand and Gravel Resources – A detailed study of the quality
13 and quantity of sand and gravel resources would aid future
14 land use decisions.” Record 5322.

15 The Natural Assets and Constraints Working Paper includes a matrix that
16 includes two columns—one indicating “Development Prohibited” and the other
17 indicating “Development Limited.” The matrix lists a number of “Constraints”
18 and “Assets” and indicates whether development should be prohibited or
19 limited. For example, for two constraints—the floodway, and the floodway
20 fringe—development is to be prohibited in the former and limited in the latter.
21 The matrix indicates that for “Sand and Gravel Resource Areas,” which are
22 listed among assets, development is to be prohibited. The Natural Assets and
23 Constraints Working Paper includes a number of figures. Figure 1 shows
24 “Development Prohibitions” and includes “Sand and Gravel Resource Areas.”
25 The area shown corresponds with the large three areas shown on Figure E 1 of
26 the S&GWP. This lends at least some support to Delta’s contention that the

1 larger three areas are the inventory of significant sand and gravel sites to be
2 protected. However, it is not clear what significance to assign to Figure 1. As
3 respondents suggest, Figure 1 could simply be indicating that the sand and
4 gravel resource sites are located outside the UGB where urban development is
5 prohibited, without necessarily deciding whether there are other potential
6 conflicts that need to be considered.

7 The Natural Assets and Constraints Working Paper lends some support
8 to both Delta's and respondents' views of how to characterize the Natural
9 Assets and Constraints Working Paper and S&GWP inventory. To summarize,
10 respondents seem to assign a great deal of significance to the fact that there
11 may have been consideration of other conflicting uses at the time the sites that
12 are currently planned and zoned S-G were so designated. Delta disputes that
13 any significance can be given to the prior S-G zoning and relies on language
14 that seems to take the position that the sites shown on S&GWP Figure E 1 and
15 Natural Assets and Constraints Working Paper Figure 1 (both of which include
16 the proposed expansion area) constitute inventories of significant sand and
17 gravel sites. Delta takes the position that the existing zoning on the mineral
18 and aggregate sites that are not planned and zoned S-G, including the EFU
19 zoning applied to the proposed expansion site, can also be viewed as programs
20 to protect the sand and gravel resources to some extent and that there is no
21 evidence in the record to suggest that EFU zoning was not applied as an
22 "interim" protection measure under Goal 5 until the inventoried sand and
23 gravel on those sites is needed in the future.⁹

⁹As we noted earlier, under Goal 5 one of the options for protecting identified mineral and aggregate resource areas is to plan them for interim uses. See n 1 (Implementation Guideline B(9)).

1 **B. Standard of Review**

2 We earlier rejected respondents’ argument that county interpretations of
3 the Metro Plan are entitled to deference under ORS 197.829(1) and *Siporen*.
4 Delta contends that an interpretation of the Metro Plan that was adopted by all
5 three Metro Plan governments in 2005 is entitled to deference under ORS
6 197.829(1) and *Siporen*. In adopting a Water Resources Conservation Plan in
7 2005, Lane County and the cities of Eugene and Springfield all adopted
8 ordinances that Delta contends identify the S&GWP as the inventory of
9 significant mineral and aggregate sites. The language from one of Lane
10 County’s ordinances is set out below:

11 “In addition to the portions of the list and map referred to in
12 Section 2, the inventory of significant Goal 5 resources for the
13 Eugene Urban Growth Area shall include, and be limited to, *the*
14 *resource sites shown for that area on the following documents: the*
15 *April 12, 1978 [S&GWP], the April 12, 1978 Scenic Sites*
16 *Working Paper, the April 12, 1978 Willamette Greenway Working*
17 *Paper, the April 12, 1978 Archaeological Sites Working Paper, the*
18 *December 1, 1976 list of historic land marks, and the West Eugene*
19 *Wetlands Plan.” Record 1236 (emphasis added).*

20 Delta contends that this after-the-fact interpretation should be given particular
21 weight, because it was adopted by all three of the Metro Plan jurisdictions in
22 the context of expanding the Metro Plan Goal 5 program.

23 We do not agree that the above language provides much assistance in
24 this case. The main problem is that while it does identify the S&GWP as
25 making up the inventory of significant Goal 5 resource sites inside the UGB,
26 the S&GWP includes both Figure E 1, which Delta contends is the significant
27 sand and gravel inventory, and Figure E 2, which the county found to be the
28 significant sand and gravel inventory. As we have already explained, neither

1 figure is clearly labeled as a 1C inventory, and the above language does not
2 assist in determining which is properly viewed as the 1C inventory.

3 **C. LCDC Acknowledgment and Metro Plan Technical Report**
4 **Map 3**

5 If it has not already become clear, trying to recast pre-Goal 5 rule
6 planning documents into the Goal 5 rule planning constructs is a bit of a
7 challenge. We next attempt to determine from LCDC's actions what it thought
8 it was acknowledging. The introduction to the August 14, 1981 staff report
9 concerning the Metro Plan proposal for complying with Goal 5 is set out in part
10 below:

11 "The methodology used in the Metro Plan process to consider
12 Goal 5 resources is described in the 'Natural Assets and
13 Constraints' working paper, Section 1. The first step in this
14 process involved a determination of the location, quality and
15 quantity of natural assets and constraints in the study area.
16 Conflicting uses were identified. * * *

17 "The second step in the process was to preliminarily adjust the
18 location of the UGB to exclude resources areas that should not be
19 developed, and to allocate land uses based in part on updated plan
20 policies governing resource preservation. The 'Draft Metro Area
21 General Plan' (1979) included revised Goal 5 policies, and a plan
22 diagram and UGB reflective of those policies. At this point in the
23 process, trade-offs between competing resource values (e.g.
24 aggregate extraction vs. preservation of wildlife habitat), and
25 between urban development needs and resource values, were
26 considered. Several sites on the inventories were excluded or
27 reduced in size based on additional study, while most were
28 protected by either the 'Open Space and Parks' or 'Sand and
29 Gravel' plan designations." Record 5330.

30 There is nothing in the above text that clearly suggests to us that LCDC
31 understood the Metro Plan to be proposing a 1B special category status to delay

1 the Goal 5 process for the identified sand and gravel areas that are not already
2 planned and zoned S-G.¹⁰

3 Later in the report the following text appears:

4 “Aggregate and mineral resources are also considered under this
5 heading. Although these resource areas are for the most part
6 excluded from the UGB, major Goal 5 conflicts have been
7 identified between aggregate extraction and fish and wildlife
8 habitat protection. Most of the objections received focus on the
9 alleged inadequacy of conflict resolution mechanisms in the areas
10 designated for sand and gravel extraction on the Plan Diagram
11 * * *.” Record 5331.

12 Again, there is nothing in that text that clearly suggests LCDC understood the
13 Metro Plan to be proposing a 1B special category designation for some
14 identified sand and gravel areas and a 1C inventory designation for other
15 identified sand and gravel areas.

16 Later the report seems to refer to the S&GWP Figure 1 larger area as the
17 area of significant mineral and aggregate resources:

18 “5. A Metro Plan working paper entitled ‘Sand and Gravel
19 Resources’ extensively reviews the supply of and demand
20 for aggregate resources in the metropolitan area. Three
21 significant aggregate resources areas are analyzed and
22 mapped. * * *

23 “Identified Sand and Gravel Resource Areas

24 Total Acres

25 “1. Confluence of the Willamette/Mackenzie River 5,170 Acres

¹⁰ The report only specifically mentions Open Space and Parks and Sand and Gravel plan designations which somewhat undercuts Delta’s contention that the Agriculture designation was applied to protect identified sand and gravel areas.

1 “2. Middle Fork Willamette River/Mt. Pisgah 2,830 Acres

2 “3. McKenzie River, Thurston Area 2,350 Acres

3 “Demand for aggregate resources to the year 2000 ranges from
4 521 to 1023 acres, depending on the depth of extraction * * *. In
5 April of 1978, 3800 acres had been designated on the
6 Metropolitan 1990 Plan and neighboring county sub-area plans for
7 aggregate extraction * * *. Goal 5 conflicts were identified
8 between aggregate extraction and open space and environmental
9 quality values. Rehabilitation of excavation sites is recommended
10 * * *.” Record 5333.

11 The report’s discussion of Metro Plan policies lends some support to
12 respondents’ position that the primary protection for mineral aggregate
13 resources in the Metro Plan was exclusion from the UGB, and that better
14 inventory information regarding mineral and aggregate resources is needed.

15 ““8. Sand and gravel resource areas shall be protected from
16 premature urban development in order to maintain existing
17 and future sources of this important, nonrenewable resource
18 in close proximity to the metropolitan market. * * *

19 “* * * * *

20 ““10. Lane County shall conduct studies to determine:

21 “a. The location, quality, and quantity of sand and gravel
22 resources within the resource areas designated in the
23 technical supplement.

24 “b. Conduct reanalysis of the relationship between the
25 demand for the resource and the land planned, zoned,
26 and actually usable for extraction.

27 “These studies should be conducted in cooperation with local sand
28 and gravel industries.” Record 5337-38.

29 Finally, and perhaps most importantly, the report appears to ask the
30 county to submit an inventory of significant Goal 5 resource sites.

1 “The Metro Area Plan itself does not include any adopted
2 inventory map(s) which define(s) the location of Goal 5 natural
3 resource areas. The status of the various natural resource maps in
4 the working papers, and their relationship to one another, is
5 unclear in the plan documents. Since not all mapped natural
6 resource sites are protected or intended to be protected by plan
7 designations, and recognizing that small-scale sites will be
8 reviewed through local rather than metropolitan procedures, it is
9 essential that the Metro Area Plan clearly identify the size,
10 location and characteristics of sites that actually have development
11 prohibitions or limitations. There must be a defined linkage
12 between inventoried sites, plan policies and local implementation
13 measures. Inclusion of a modified version of Figures 1 and 2
14 (Development Prohibitions and Limitations) and D-3 (Significant
15 Vegetation and Wildlife Areas) in the Metro Area Plan would be
16 sufficient to meet the intent of this Goal 5 requirement.” Record
17 5345.

18 The report later included a number of Compliance Requirements, including the
19 following:

20 “1. Include a consolidated natural resource map or maps which
21 clearly define the location of sites where conflicting uses are
22 prohibited or limited. Figures 1, 2 and D3 of the Working
23 Papers are particularly relevant to this task. Potential
24 conflicts to be considered include low density residential
25 development, aggregate extraction, timber harvesting, farm
26 practices, industrial development and rural development.

27 “* * * * *

28 “3. Include mandatory policy language requiring local
29 governments to adopt resource protection/conflict resolution
30 measures consistent with the plan’s adopted text and
31 findings.* * *” Record 5357.

32 To us, this language clearly shows that LCDC was concerned that the
33 Metro Plan should more clearly map the areas where programs to protect
34 natural resources like mineral and aggregate were in place. This language

1 called for an inventory of 1C sites. The first compliance requirement also
2 directed that a variety of conflicts must be considered, including “aggregate
3 extraction, timber harvesting, farm practices, * * * and rural development.”
4 Those are precisely the kinds of conflicts that might occur on mineral and
5 aggregate resource sites that are not already planned and zoned sand and
6 gravel. The third compliance requirement does not call for a better inventory, it
7 calls for a policy that requires local governments, like Lane County, to adopt
8 implementing regulations that are consistent with Metro Plan policies. We
9 agree with Delta that this language seems to be requesting (1) a better
10 delineation of the 1C inventory and (2) program improvements to protect sites
11 on the 1C inventory, not an inventory that includes both 1B and 1C sites.

12 The Metro Plan jurisdictions submitted Metro Plan Technical Report
13 Map 3 to comply with the above. Record 461. Metro Plan Technical Report
14 Map 3 shows the larger S&GWP Figure E 1 areas, not the smaller S&GWP
15 Figure E 2 areas. Record 149, 151. A subsequent July 29, 1982 DLCD staff
16 report indicated that that map satisfied the above-quoted compliance
17 requirements:

18 “The Metro Plan has been amended to include a consolidated
19 natural resource map (Map 3, General Plan Technical Report). In
20 addition, very detailed site specific maps of each natural resource
21 site are provided in the amended Natural Resource working paper.
22 Resources mapped include wetland vegetation, *sand and gravel*,
23 significant vegetation and wildlife areas, and slopes.” Record
24 5505 (emphasis added).

25 On July 29, 1982, LCDC acknowledged the portion of the Metro Plan
26 inside the UGB and deferred action on the portion of the Metro Plan to be
27 completed in conjunction with acknowledgment review of the Lane County

1 RCP. The donut portion of the Metro Plan was subsequently acknowledged on
2 August 29, 1985.

3 We believe the above supports a conclusion that LCDC understood that
4 it was acknowledging Metro Plan Technical Report Map 3 as a 1C inventory of
5 significant mineral and aggregate resources, not as a map that identified both
6 1B “special category” sites for further study *and* a 1C inventory. It is certainly
7 possible to look back over 30 years later and question whether the Metro Plan
8 actually followed the letter and spirit of the Goal 5 rule process with regard to
9 assessing conflicting uses and developing programs to protect the inventoried
10 mineral and aggregate sites that are not zoned S-G. But based on the DLCD
11 staff reports including the compliance requirements, it seems reasonably clear
12 that LCDC did not understand the Metro Plan to propose a 1B special category
13 designation for the sites shown on S&GWP Figure E1 that are not also shown
14 on Figure E 2, or that the Metro Plan was proposing to delay the Goal 5 process
15 for those sites.

16 **D. Acknowledgment of the Lane County RCP**

17 Respondents contend that additional Goal 5 planning for mineral and
18 aggregate resources was done by the county following LCDC’s partial
19 acknowledgment of the Metro Plan for the area inside the UGB. Respondents
20 contend that LCDC’s acknowledgment in 1984 of the Lane County RCP, and
21 in particular the county’s 1982 RCP Mineral and Aggregate Resources
22 Working Paper, shows that Map 3 in the Metro Plan Technical Report, which
23 shows the same mineral and aggregate areas as S&GWP Figure 1, was not
24 intended to include all of those mineral and aggregate areas as part of the
25 Metro Plan’s 1C Goal 5 inventory of significant aggregate resource sites.
26 Respondents contend that LCDC’s acknowledgment of the Lane County RCP

1 and implementing ordinances shows the 1C inventory of significant mineral
2 and aggregate resource sites was limited to the S-G planned and zoned sites.
3 The county argues:

4 “Delta’s summary of what was reviewed and acknowledged
5 makes no mention of the July 19, 1984 DLCD acknowledgment
6 review memo, in which DLCD identifies the 1982 RCP Mineral
7 and Aggregate Resources Working Paper, Appendix D, as the 1C
8 inventory of significant mineral and aggregate sites and Appendix
9 E, as the 1B ‘special category’ of mineral and aggregate sites
10 inside the Metro Plan area. DLCD July 19, 1984 report at 7-8, 12,
11 16-18, 75; Record 5555-5556, 5560, 5564-5566, 5623 * * *. That
12 inventory utilizing the Goal 5 Rule steps and process does not
13 identify the expansion area as either a 1C or 1B site. Record 2143,
14 2954, 3170-3196.” Respondent’s Brief 30.¹¹

15 The county is correct that pages 7-8 of the DLCD July 19, 1984
16 acknowledgement review (Record 5555-5556) describe the “February 1982
17 RCP Mineral and Aggregate Resources Working Paper” (RCP working paper)
18 and state that Appendix D of the RCP working paper is the county’s proposed

¹¹ Intervenor makes a similar argument:

“[C]ontrary to Petitioner’s argument, the Metro Plan did not designate all 10,350 acres of the ‘resource areas’ as sand and gravel resource sites by including them in the [Metro Plan] Technical Supplement [Report Map 3]. Rather, the purpose of identifying these areas in the technical supplement was to identify potential resource areas for future study by Lane County. Lane County conducted this study in its Mineral and Aggregate Resources Working Paper, which established Appendix ‘D’ as the Goal 5 inventory of significant aggregate resources.” Intervenor-Respondent’s Brief 26.

1 1C inventory of mineral and aggregate sites.¹² The July 19, 1984
2 acknowledgement review also refers to Appendix E as the 1B inventory inside
3 the Metro Plan area.¹³ We understand the county to take the position that
4 because the proposed expansion area appears on neither Appendix D nor
5 Appendix E it is not included on the final 1C inventory of mineral and
6 aggregate sites for the donut area.

7 Page 12 of the DLCD July 19, 1984 report (Record 5560), which is cited
8 by the county in the quoted language above, but not discussed in the county’s
9 brief, points out that the county S-G zone that applies both inside and the
10 outside the donut area to many existing and proposed mineral extraction sites
11 provides that “[F]or any property designated in the Eugene-Springfield
12 Metropolitan Plan as significant in terms of OAR 660-16-000/025 and
13 designated as ‘1B’, a Goal 5 ESEE consequences analysis per the Goal No. 5
14 administrative rule must first be completed.”

15 We are not sure what to make of the just-quoted language. Metro Plan
16 Technical Report Map 3 does not designate any 1B sites. Under the Goal 5
17 rule for any property that the Metro Plan found to have significant Goal 5
18 resources, the next step would have been to identify and examine conflicting
19 uses and adopt a program to protect the resource—a 1B designation for

¹² The reference to Appendix D in the 1982 RCP working paper is presumably a reference to the map that appears at Record 3186. The same map appears at Record 2954. That is a very small scale map. Although we cannot be sure, all of the 1C sites appear to be located in the county, outside the Metro Plan area. However, three of the sites on the map are located very close to the Metro Plan area.

¹³ Appendix E appears at Record 3188 and lists 51 sites. Presumably that was the county’s proposed list of 1B sites for the Metro Plan donut area.

1 significant resource sites is not an option under the Goal 5 rule. If instead the
2 quoted language means the sites in the donut shown on the county's Appendix
3 E as 1B sites must proceed with additional ESEE conflicts identification and
4 analysis, notwithstanding that the sites were already included on the Metro
5 Plan Technical Report Map 3 as significant sites, that would seem to require, at
6 a minimum, that Metro Plan Technical Report Map 3 be amended by all three
7 of the enacting jurisdictions to designate any such sites as a 1B special
8 category. That did not happen. But whatever the language means, if that
9 proposal had been acknowledged, the county would be in a strong position to
10 argue that notwithstanding DLCD's acknowledgment of the Metro Plan
11 Technical Report Map 3, the acknowledged 1C inventory for the donut area is
12 as shown on Appendix D and the 1B sites in the donut are as shown on
13 Appendix E and the proposed mining expansion area appears on neither
14 appendix.

15 Turning first to the Appendix D list of county 1C inventory of mineral
16 and aggregate sites, the county points to nothing that establishes that Appendix
17 D was adopted or acknowledged in place of Metro Plan Technical Report Map
18 3 as the inventory of significant aggregate resources for the donut area. And it
19 seems unsurprising that there is nothing that suggests that was intended, since
20 Appendix D appears to show no sites in the donut area at all, even the sites
21 planned and zoned S-G that all parties agree are on the Metro Plan ISARS.

22 The county's reliance on Appendix E is even more difficult to
23 understand. The Lane County ordinance that appears at Record 2135-2278

1 deleted Appendix E. Record 2137.¹⁴ The DLCDC staff report that accompanied
2 the order that completed acknowledgment of the RCP explained that Appendix
3 E had been eliminated because it was inconsistent with the Metro Plan,
4 although the precise nature of that inconsistency is not entirely clear to us.
5 Petitioner’s Motion to Take Official Notice of LCDC Acknowledgment Order;
6 DLCDC Staff Report dated September 12, 1984, page 23 (final paragraph).¹⁵
7 The elimination of Appendix E before acknowledgment severely undercuts the
8 respondents’ position that anything in the adopted and acknowledged RCP was
9 adopted or acknowledged to narrow the Metro Plan Technical Report Map 3 as
10 the inventory of significant aggregate resources in the donut area.

11 **F. Conclusion**

12 The Natural Assets and Constraints Working Paper and S&GWP are
13 ambiguous regarding the nature of the inventories contained therein and can be
14 read in ways that support both Delta’s and respondents’ position. But (1)
15 LCDC’s compliance requirement, (2) the submission of the Metro Plan
16 Technical Report Map 3 as a response to that directive, and (3) the subsequent
17 LCDC acknowledgement order staff report describing Metro Plan Technical

¹⁴ Actually the ordinance replaced the version of Appendix E that appears at Record 2955 with a new Appendix E, which is a map. But since the map does not show 1B sites for the Metro Plan area the effect of the replacing original Appendix E with the new map Appendix E was to repeal the original Appendix E inventory of 1B sites for the donut area.

¹⁵ The DLCDC staff report explains: “* * * The original Appendix E—a listing of sites in the Metro Area—has been deleted since it was inconsistent with the list contained in the Metro Plan.” If the reference to a “list contained in the Metro Plan” is a reference to something different from Metro Plan Technical Report Map 3 or one of the documents it was prepared from no party has identified or provided us with that list.

1 Report Map 3 make it reasonably clear that LCDC understood that all of the
2 mineral resource areas depicted on that map were proposed for inclusion in the
3 Metro Plan’s 1C inventory for mineral and aggregate resources in the donut
4 area. The subsequent acknowledgment of the Lane County RCP, which
5 included a failed attempt either to (1) reflect what the county mistakenly
6 thought Metro Plan Technical Report Map 3 already reflected or (2)
7 unilaterally convert some 1C sites to a 1B special category designation
8 reinforces that understanding. We conclude the Metro Plan Technical Report
9 Map 3 is the Metro Plan ISARS, or the inventory of 1C sites. The county erred
10 in concluding that S&GWP Figure 2 (which shows only the resource sites
11 designated S-G) rather than Metro Plan Technical Report Map 3, constitutes
12 the Metro Plan ISARS.

13 The first assignment of error is sustained.

14 **SECOND ASSIGNMENT OF ERROR**

15 To restate several key facts, the proposed mining expansion area is
16 subject to the Lane County Land Use and Development Code, which is set out
17 at LC Chapter 16. The Lane County Land Use and Development Code is a
18 “land use regulation,” as that term is defined by ORS 197.015(11). The Lane
19 County Land Use and Development Code has been acknowledged, and the
20 proposed expansion area is zoned EFU.

21 LC 16.212 sets out the county’s EFU zone. As noted earlier LC
22 16.212(4)(y)(ii) requires that an applicant for a mining permit under LC
23 16.212(4)(y) must show that the proposed mining site is “included on an
24 inventory *in the acknowledged Lane County Rural Comprehensive Plan.*”
25 (Emphasis added.) There is legislative history in the record that this county
26 EFU-zone requirement was adopted to reflect ORS 197.298(2), which requires

1 that an applicant for a mining permit under ORS 197.298 must show that the
2 proposed mining site is “included on an inventory *in an acknowledged*
3 *comprehensive plan.*” (Emphasis added.) While we have concluded that the
4 proposed expansion site is on the Metro Plan ISARS, it is undisputed that the
5 proposed expansion area is not “included on an inventory in the acknowledged
6 Lane County Rural Comprehensive Plan,” as LC 16.212(4)(y)(ii) requires. The
7 county is required by ORS 197.175(2)(d) to ensure that its land use decisions
8 comply with LC 16.212(4)(y)(ii).

9 Delta argues that despite the express requirement in LC 16.212(4)(y)(ii)
10 that an applicant for mining under LC 16.212(4)(y) must establish that the
11 proposed mining site is “included on an inventory in the acknowledged Lane
12 County Rural Comprehensive Plan,” and despite the fact that the proposed
13 expansion area is not on the county’s inventory, the county nevertheless erred
14 by denying its application for failure to comply with the LC 16.212(4)(y)(ii).

15 Since it is undisputed that the Metro Plan ISARS applies in the donut
16 and the Lane County Rural Comprehensive Plan inventory of significant
17 aggregate resource sites does not apply in the donut, one possibility is that the
18 county simply made a mistake when it adopted the language that appears at LC
19 16.212(4)(y)(ii). That mistake was failing to provide that where the county
20 EFU zone applies in the donut, a proposed mining site must be included on an
21 inventory in the acknowledged Metro Plan ISARS (which applies in the donut
22 area) not on an inventory in the Lane County RCP (which does not apply in the
23 donut area). But typically the remedy for such a mistake would be to correct
24 the mistake by amending the Lane County Land Use and Development Code,
25 not to refuse to give effect to a clearly worded requirement in an acknowledged
26 land use regulation. Delta offers several reasons why it believes the county

1 erred by applying LC 16.212(4)(y)(ii) as written, as one basis for denying its
2 application.

3 **A. LC 16.212(4)(y)(ii) is Ambiguous**

4 While there is nothing ambiguous about LC 16.212(4)(y)(ii), if it is
5 viewed in isolation, we agree with Delta that it is ambiguous when viewed in
6 context. The Metro Plan dictates that the Metro Plan ISARS applies in the
7 donut and the Lane County RCP inventory of significant mineral and aggregate
8 sites applies in the county outside the donut. But the Metro Plan also dictates
9 that the Lane County Land Use and Development Code applies to development
10 in the donut. Given the lack of any legislative history suggesting the county
11 intended to require that proposed sites in the donut be included on the
12 inapplicable Lane County RCP inventory of significant mineral and aggregate
13 sites, rather than the applicable Metro Plan ISARS, we believe the county
14 would have been within its discretion to find that LC 16.212(4)(y)(ii) is
15 ambiguous and to interpret LC 16.212(4)(y)(ii) to apply only to those areas of
16 the county where the RCP is effective or controlling, *i.e.*, outside the donut.
17 That would leave the Metro Plan ISARS as the controlling or effective
18 comprehensive plan inventory in the donut area under ORS 215.298(2).

19 But the issue is not whether the county could have interpreted LC
20 16.212(4)(y)(ii) not to require that Delta's site be on the RCP inventory. The
21 issue presented in this appeal is whether the county erred by failing to do so.
22 More precisely, the issue presented in this appeal is whether the board of
23 county commissioners' interpretation of LC 16.212(4)(y)(ii) to require that
24 Delta's site be included on the Lane County RCP inventory of significant
25 mineral and aggregate sites is reversible under the deferential standard of
26 review required by ORS 197.829(1) and *Siporen*. Under *Siporen* the county's

1 interpretation of its own EFU zone requirements must be affirmed unless
2 LUBA can say the interpretation is implausible. The county offers two reasons
3 for its interpretation that we cannot say are implausible.

4 First, the county suggests that although the Metro ISARS is authoritative
5 in the donut as far as Goal 5 is concerned, LC 16.212(4)(y)(ii) can be
6 interpreted to require that the Lane County RCP inventory of significant
7 mineral and aggregate sites be amended to incorporate or reflect the inventory
8 adopted by the Metro ISARS for the donut area. While that skates pretty close
9 to the plausibility line, it does not cross it. And in view of the confusion
10 regarding the identity of the Metro Plan ISARS, we certainly cannot say there
11 would be no practical purpose in imposing such a parallel *shadow* inventory
12 requirement to make it easier to administer the county's EFU zone in the donut.

13 The county also suggests that the requirement in LC 16.212(4)(y)(ii)
14 might represent an exercise of the county's authority to regulate more
15 stringently in the EFU zone than the minimum standards that are set by the
16 statute. Under ORS 215.296(10), the county may impose additional conditions
17 on uses that are authorized by ORS 215.213(2). *Brentmar v. Jackson County*,
18 321 Or 481, 496, 900 P2d 1030 (1995) ("a county may enact and apply
19 legislative criteria of its own that supplement those found in ORS 213.213(2)
20 and 215.283(2)"). The challenged decision suggests a county decision to
21 regulate mining in the donut more stringently than the minimum requirements
22 of the statute could explain the way LC 16.212(4)(y)(ii) is worded.¹⁶ Again,

¹⁶ The decision explains:

"ORS 215.213(2) lists uses that 'may' be established by a marginal lands county on land zoned for exclusive farm use.

1 while there is apparently no legislative history to that effect, we cannot say that
2 interpretation is implausible.

3 Delta’s only response to the suggestion that LC 16.212(4)(y)(ii) may
4 have been adopted to regulate mining in the donut more stringently than is
5 required under the statute is as follows:

6 “The [county] suggests elsewhere that uses listed in ORS
7 215.213(2) may be regulated by the county more strictly than the
8 statute allows. * * * Respondents might argue that by adopting
9 this conflicting language the County really intended to say that it
10 does not want any mining special use permits issued in the Metro
11 Plan areas. However, this is not what the [county said]. Petition
12 for Review 38.

13 We are not sure we understand the last two sentences quoted above. Delta
14 apparently does not argue the county could not word LC 16.212(4)(y)(ii) as it
15 did, as an exercise of its authority to regulate ORS 215.213(2) uses more
16 stringently than the statute. Rather, we understand Delta to argue that the
17 challenged decision does not take the position that it did so in enacting LC
18 16.212(4)(y)(ii). While the county might have expressed its position more
19 clearly, we conclude the county did take that position. *See* n 17. The county’s
20 interpretation that the LC 16.212(4)(y)(ii) requirement that mine permit
21 applicants demonstrate that their sites are included on the RCP inventory could
22 represent an exercise of the county’s authority to regulate ORS 215.213(2) uses
23 more stringently than the statute is not implausible.

Although counties may not adopt EFU zones that are less restrictive than statutory zoning requirements, they may adopt EFU zones that are more restrictive (except for uses allowed outright by the statute). * * *” Record 63.

1 **B. ORS 197.175(2)(d), the Metro Plan, and County Rural**
2 **Comprehensive Plan**

3 Delta makes two additional arguments, which we consider together.

4 “* * * The introductory language to the RCP says it only applies to
5 the county lands beyond the boundary of the Metro Plan”

6 “The Lane County Rural Comprehensive Plan
7 applies to all unincorporated lands within the County
8 beyond the Urban Growth Boundaries of incorporated
9 cities in the County and beyond the Eugene-
10 Springfield Metropolitan Area Plan.’

11 “The same limitation is repeated at RCP page 3, para 1.

12 “The Metro Plan says the inverse – it only applies inside the
13 boundary between the RCP and Metro Plan:

14 “The Plan Boundary shown on the Metro Plan
15 Diagram in Chapter 11 is adjacent to the boundaries
16 of the Lane County Rural Comprehensive Plan that
17 surround the Eugene-Springfield metropolitan area.
18 There is no overlap between the boundaries of the
19 Metro Plan and the Lane County Rural
20 Comprehensive Plan. Lane Code Chapter 16 is
21 applied in the area between the UGB and the Plan
22 Boundary to implement the Metro Plan. Adjustments
23 to boundaries may occur in the future so that areas
24 previously a part of one plan are covered under
25 another plan. These adjustments may occur using the
26 Metro Plan review and amendment procedures
27 described in Chapter IV.’ * * *”

28 Delta goes on to point out that if the county wanted to adopt an inventory for
29 the donut area that would displace the Metro Plan ISARS, it would have to be
30 adopted by all three Metro Plan jurisdictions, and that did not happen here.¹⁷

¹⁷ Metro Plan IV-3, paragraph (5)(a) provides:

1 If in making the above argument Delta is arguing that the county could
2 not unilaterally adopt the RCP inventory as the Goal 5 1C inventory for the
3 donut area, and thereby displace the Metro Plan ISARS as the Goal 5 inventory
4 for significant mineral and aggregate sites in the donut, we agree. And we do
5 not understand respondents to contend that the county could do so unilaterally.
6 But the relevant issue is whether the county can adopt *an EFU zone* that
7 requires mining site applicants under ORS 215.298(2) and LC 16.212(4)(y)(ii)
8 in the donut to establish that their sites are also shown on the RCP inventory,
9 either as a reflection of the Metro Plan ISARS or as an exercise of county
10 authority under ORS 215.296(10) to regulate ORS 215.213(2) uses more
11 strictly than the statute. We do not see that the jurisdictional division of
12 authority under the Metro Plan and RCP precludes such a requirement in the
13 county’s EFU zone.

14 Delta also argues:

15 “[I]t is contrary to statutes, which always apply directly, for the
16 County to apply a plan inventory from its RCP to a decision in the
17 Metro Plan area, which is on the wrong side of the jurisdictional
18 bright line. The RCP inventory is not an acknowledged inventory
19 for the Metro Plan area. Inside the Metro Plan area, the County
20 may only apply acknowledged inventories from the Metro Plan.
21 That is the directive of ORS 197.175(2)(d).” * * *” Petition for
22 Review 39 (citations and footnote omitted).

“All three governing bodies must approve non-site-specific text amendments; site specific Metro Plan Diagram amendments that involve a UGB or Plan Boundary change that crosses the Willamette or McKenzie Rivers or that crosses over a ridge into a new basin; and, amendments that involve a goal exception not related to a UGB expansion.”

1 Again, the issue is not whether the Metro Plan ISARS is the operative Goal 5
2 inventory or whether Delta’s site must be included on the Metro Plan ISARS.
3 The Metro Plan ISARS is the operative Goal 5 inventory in the donut area and
4 although LC 16.212(4)(y)(ii) does not expressly require that Delta’s site must
5 be on the Metro Plan ISARS, ORS 215.298(2) does. Once again, the issue is
6 whether any applicable law is violated if Lane County adopts an EFU zone that
7 requires that sites eligible for special permits for mining in the county’s EFU
8 zone, both outside the donut and inside the donut, must be included on the RCP
9 inventory.

10 We do not see that requiring that a site be include on the RCP inventory,
11 as LC 16.212(4)(y)(ii) expressly requires, violates ORS 197.175(2)(d). That
12 statute provides in relevant part:

13 “Pursuant to ORS chapters 195, 196 and 197, each city and county
14 in this state shall:

15 “* * * * *

16 “(d) If its comprehensive plan and land use regulations have
17 been acknowledged by the commission, make land use
18 decisions and limited land use decisions in compliance with
19 the acknowledged plan and land use regulations[.]

20 If Delta is arguing that by giving effect to the LC 16.212(4)(y)(ii) requirement
21 that Delta’s site be included on the RCP the county is applying the wrong
22 acknowledged plan, we do not agree. Rather, the county is simply applying its
23 acknowledged land use regulations, which include LC 16.212(4)(y)(ii), as ORS
24 197.175(2)(d) requires. While ORS 215.298(2) and ORS 197.175(2)(d) may
25 require only that Delta’s site be on the Metro Plan ISARS, LC 16.212(4)(y)(ii),
26 an applicable county land use regulation, expressly requires that Delta’s site be

1 on the RCP inventory. Giving effect to that language does not violate ORS
2 197.175(2)(d).

3 The second assignment of error is denied.

4 **THIRD ASSIGNMENT OF ERROR**

5 LC 16.212(10)(f) and (g) apply and require that an applicant for a special
6 permit to mine under LC 16.212(4)(y) must demonstrate the mining “[w]ill not
7 force a significant change in accepted farm * * * practices on surrounding
8 lands devoted to farm * * * use,” and “[w]ill not significantly increase the cost
9 of accepted farm * * * practices on lands devoted to farm use.”¹⁸ As relevant
10 here, LC 16.212(10)(f) and (g) are both concerned with “accepted farm
11 practices,” with one standard requiring that the proposal not cause a
12 “significant change” in those practices and the second requiring that the
13 proposal not “significantly increase the cost” of those practices.

14 **A. The County’s Decision**

15 In finding 5 at record 53-54 of the decision, the county describes some of
16 the testimony below. Finding 5 does not identify any testimony regard changes
17 or increased costs in accepted farm practices. Finding 5 includes the following
18 regarding a farmer located a few hundred feet west of the existing mine:

19 “* * * Mr. Mulkey testified that he has raised apples, peaches,
20 pears, cherries, grapes, strawberries, and raspberries, among other
21 produce, and had a successful peach orchard for about 20 years.
22 He stated that he never experienced adverse dust impacts on his

¹⁸ ORS 215.296(1)(a) and (b) impose identical requirements.

1 most sensitive crops, which were the peaches and raspberries.”
2 Record 54.¹⁹

3 Finding 5 notes another farmer who opposed Delta’s 2008 application based on
4 well impacts supported the current application.²⁰

5 Finding 6 appears on record pages 6-7 and discusses dust. The first
6 paragraph concludes as follows, based on a letter from an “OSU/Lane County
7 Extension Horticulture Agent:”

8 “[D]ust can increase the cost of accepted farming practices by
9 increasing labor costs to remove dust from crops that currently
10 isn’t necessary, increase the damage caused by mites, increase the
11 pesticide applications to control the increase in mites, additional
12 soil testing on organic farms, reduced pollination that reduces crop
13 yield, mechanical damage to crops due to additional washing and
14 reduced shelf life of crops due to additional washing. In addition,
15 dust can cause the increased use of groundwater to clean crops.
16 Mr. Penhallegon was able to quantify the additional costs to about
17 \$177 per acre.” Record 55.

18 Finding 6 notes that there are accepted farm practices being carried out to the
19 west and northwest of the proposal and that winds blow to the west and
20 northwest during dry months “26 percent of the time.” *Id.* Finding 6 goes on
21 to explain that “watering of the access road, haul road, and other vehicle traffic

¹⁹ Mr. Mulkey also testified he has been a full time farmer in the area for over 60 years and that Delta’s existing mine directly to the east has caused “no dust impacts.” Record 1554-55.

²⁰ This is a reference to Clyde Beat. Mr. Beat stated he has farmed property that adjoins the existing mine and proposed expansion area for 45 years. He stated he grows “fruit trees, shade trees, flowering trees, cabbage for seed, sugar beets for seed, corn, pumpkins, and other fresh produce.” Record 5166. He stated that “[f]arming activities on my tract have not been impacted by dust from Delta’s existing operation.” *Id.*

1 areas” will be the primary dust mitigation, but “is only about 50 percent
2 efficient.” Record 55. Finding 6 concludes with the following paragraph:

3 “A February 25, 3013 Air Quality Evaluation (Updated) of the
4 proposed expansion was done by Bridgewater Group, Inc. The
5 study pointed out that aggregate mining activities will generate
6 dust and could create conflict with nearby farming to the north and
7 west of the expansion site and noted that the potential for conflict
8 created could be a nuisance condition due to unusual or annoying
9 amounts of dust present in the ambient air. After identifying a
10 series of dust mitigation measures, the study essentially concluded
11 that if these measures were employed they would minimize dust-
12 related conflicts to LRAPA standards. The study did not analyze
13 impacts to accepted farming practices in the area.” Record 56.

14 Later in the opinion, the county repeats its earlier discussion that dust
15 can have significant adverse impacts that in turn force significant changes in
16 farm practices, and ultimately concludes that the applicant failed to carry its
17 burden to establish that dust impacts will not force a significant change in
18 accepted farm practices:

19 “What is missing from the analysis is sufficient information to
20 come to a conclusion on this issue. The applicant has warranted
21 that it applies dust-containment techniques that control dust
22 emissions but air quality experts estimate that the primary tool to
23 dust mitigation, watering, is effective only about 50 percent of the
24 time. Anecdotal information from residents to the west have [sic]
25 suffered from dust impacts from the applicant’s existing
26 excavation activities although Mr. Mulkey and Mr. Beat, located
27 to the north, have not experienced such impacts. However, the
28 record demonstrates that wind conditions can blow dust toward the
29 other identified accepted farming practices in the area, located
30 west and northwest of the expansion area, at least 26 percent of the
31 time during the dry months. Without the use of air dispersion
32 modeling, one cannot measure the significance of dust fallout or
33 the degree and downwind distance potential where significant
34 impacts could occur.” Record 69.

1 After concluding that Delta failed to carry its burden concerning the
2 “significant change” standard, the hearings official relied on that conclusion to
3 conclude that Delta also failed to carry its burden concerning the “significantly
4 increase the cost” standard as well:

5 “* * * Because it has been shown that the proposed expansion
6 would force a significant change in accepted farm practices on
7 surrounding lands devoted to farm use it can also be concluded
8 that it has also not shown that the expansion will not significantly
9 increase the cost of in [sic] accepted farm practices on surrounding
10 lands devoted to farm use.” Record 70.

11 **B. Delta’s Argument**

12 Before turning to Delta’s argument, we note that we are mindful that an
13 applicant making a substantial evidence challenge to a local government
14 decision to deny land use approval faces a significant burden. In describing
15 that burden under the ORS 34.040(3) writ of review substantial evidence
16 standard, which is worded almost identically to the ORS 197.835(9)(a)(C)
17 substantial evidence standard that applies to LUBA review, the Court of
18 Appeals has explained that to carry that burden an applicant must show it
19 sustained its “burden as a matter of law.” *Jurgenson v. Union County Court*,
20 42 Or App 505, 510, 600 P2d 1241 (1979). As we explained in *Weyerhauser v.*
21 *Lane County*, 7 Or LUBA 42, 46 (1982):

22 “It is not enough for the proponent to introduce evidence
23 supporting affirmative findings of fact and conclusions on all
24 applicable legal criteria. The evidence must be such that a
25 reasonable trier of fact could only say the [proponent’s] evidence
26 should be believed.”

27 Delta contends the hearings official ultimately lost sight of the fact that
28 the proposal here is not to introduce a mining operation into an area where
29 none currently exists, but rather a proposal to expand an existing mine. Delta

1 notes the county found mining in the proposed expansion area will actually
2 generate less dust than the existing mining operation. Delta also faults the
3 hearings official for insisting on air dispersion modeling:

4 “* * * The standard is significant changes in farming practices and
5 significant increases in farming costs. It is not about how much
6 dust will go how far and in what direction. Perfect mathematical
7 dust dispersion modeling (if that were possible) * * * would not
8 inform the decision about the standard. It would support no
9 conclusions about changed practices or increased costs of
10 farming.” Petition for Review 47.

11 Delta also points out that there was no testimony below that both
12 identified accepted farm practices and took the position that the proposed
13 mining would force significant changes in or significantly increase the cost of
14 those accepted farm practices. The only testimony below that specifically
15 identified and addressed accepted farm practices came from Mulkey and Beat,
16 who have farmed properties adjacent to the existing mine for 60 and 45 years
17 respectively. *See* ns 19 and 20. Both took the position that their farming
18 operations, which include some dust-sensitive crops, have suffered no adverse
19 dust impacts from the existing mining operation and that they expect no
20 adverse dust impacts from the proposed expansion.

21 With regard to the “significantly increase the cost” standard, Delta
22 contends it does not necessarily follow that a failure to carry its burden
23 regarding the “significant change” would also mean it also failed to carry its
24 burden regarding the “significantly increase the cost” standard.

25 **C. Conclusion**

26 **1. Significant Change Standard**

27 Against the backdrop of Mulkey’s and Beat’s letters regarding dust
28 impacts on accepted farm practices, which was the only evidence that

1 specifically addressed possible dust impacts on accepted farming practices in
2 the area, the hearings official appears to have concluded Delta failed to carry its
3 burden regarding the “significant change” standard by relying on essentially
4 four premises or pieces of evidence. First, he relied on a letter from an
5 extension agent that dust can have significant adverse effects on farming.
6 Second, he pointed out that there are farms west and north of the proposed
7 expansion area, and wind sometimes blows in those directions. Third, he relied
8 on evidence that dust mitigation through watering is only about 50 percent
9 efficient. And finally, he relied on the lack of “air dispersion modeling” in the
10 record.

11 The first three reasons do not seem substantial to us, when viewed
12 alongside the more focused testimony from Beat and Mulkey about their
13 longtime farming operations adjacent to the existing mine. And it is not
14 apparent to us why air dispersion modeling is necessary to determine whether
15 the dust that can be expected from the proposed expansion will significantly
16 change existing farm practices to the west and northwest. Such a model might
17 predict where the dust might go and how much dust there will be, but it would
18 tell you little or nothing about whether that dust will force significant changes
19 in accepted farm practices or increase their costs. However, the real problem
20 may be that no one identified what kinds of accepted farm practices are
21 occurring on the farms to the west and northwest, and there is no evidence
22 regarding whether the dust that can be expected from the proposed expansion
23 will force a significant change in those accepted farm practices. Given that
24 possible gap in the evidentiary record and given the somewhat subjective
25 nature of the “significant change” standard, we are not prepared to say Delta
26 carried its burden as a matter of law.

1 We do agree with Delta, however, that the first three reasons given by
2 the county, viewed in context with the Beat and Mulkey letter, do not constitute
3 substantial evidence that the proposed expansion will violate the “significant
4 change” standard. The basis for the county’s belief that air dispersion
5 modeling is needed to assess whether farms to the west and northwest will be
6 impacted in ways that would violate the “significant change” standard is
7 sufficiently unclear to us that if we were not required to sustain the county’s
8 decision, based on our resolution of the second assignment of error, we would
9 sustain the third assignment of error and remand for the county to better
10 explain its belief that air dispersion modeling is necessary to apply the
11 “significant change” standard.

12 **2. The “Significantly Increase the Cost” Standard**

13 With regard to the “significantly increase the cost” standard, we agree
14 with Delta that even if it did not carry its burden regarding the “significant
15 change” standard, it does not logically or necessarily follow that Delta failed to
16 carry its burden regarding the “significantly increase the cost” standard. They
17 are different standards. But for our resolution of the second assignment of
18 error, we would remand under the “significantly increase the cost” standard as
19 well.

20 The third assignment of error is sustained.

21 Because we deny the second assignment of error and the county’s
22 reliance on LC 16.212(4)(y)(ii) provides an independent basis for its decision
23 to deny the requested permit, it follows that the county’s decision must be
24 affirmed even though we sustain the first and third assignments of error.

25 The county’s decision is affirmed.