

LAND USE  
BOARD OF APPEALS

BEFORE THE LAND USE BOARD OF APPEAL **Apr 12 3 48 PM '82**

OF THE STATE OF OREGON

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2  
3 ROBERT VINCENT, ROSWITHA )  
HOPKINS, LAWRENCE KAMPFER, )  
4 COLAN McKINNON, RUTH VINCENT, )  
PAULA McKINNON, et al, )

5 Petitioners, )

LUBA No. 81-126

6 vs. )

FINAL OPINION  
AND ORDER

7 BENTON COUNTY, )  
8 GEORGE NEUMAN and )  
BETTY NEUMAN, )

9 Respondents. )  
10

11 Appeal from Benton County.

12 Roderick L. Johnson, Corvallis, filed the Petition for  
13 Review and argued the cause on behalf of Petitioners. With him  
on the brief were Thomas & Johnson.

14 Richard T. Ligon, Corvallis, filed the brief and argued the  
cause on behalf of Respondent Benton County.

15 REYNOLDS, Chief Referee; BAGG, Referee; participated in  
16 this decision; COX, Referee, Dissenting.

17 REMANDED

4/12/82

18  
19 You are entitled to judicial review of this Order.  
20 Judicial review is governed by the provisions of Oregon Laws  
1979, ch 772, sec 6(a).  
21  
22  
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26

1 REYNOLDS, Chief Referee.

2 INTRODUCTION

3 Petitioners appeal Benton County's approval of a  
4 conditional use permit to enable Respondents George and Betty  
5 Neuman to operate a rock quarry crushing and mining operation.  
6 This is the second time the county's approval of a conditional  
7 use permit for the Neumans' quarrying operation has been before  
8 this Board. In Vincent v Benton County, 2 Or LUBA 422 (1981),  
9 we remanded the county's approval of a conditional use permit  
10 for the Neumans' quarrying operation. In doing so, we  
11 concluded the county's findings were not adequate to support  
12 the county's determination that the quarrying operation would  
13 be compatible with uses on surrounding lands. Following  
14 remand, Benton County conducted a new hearing and adopted  
15 additional findings of fact. Petitioners have again appealed,  
16 asserting that the findings of fact do not support the  
17 conclusion that the proposed use will be compatible with  
18 surrounding uses and also asserting that there is insufficient  
19 evidence in the record to support the findings of fact made by  
20 the county.

21 In order to approve the conditional use permit in this  
22 case, Benton County was required to comply with Section 20.01  
23 and Section 20.05 of the Benton County Zoning Ordinance. See  
24 ORS 215.416(3). Section 20.01 provides as follows:

25 "Although each zoning district is primarily  
26 intended for a predominant type of use, e.g.,  
dwellings in residential districts, there are a number

1 of uses which may or may not be appropriate in a  
2 particular district, depending upon all the  
3 circumstances of the individual case. For example,  
4 the location, nature of the proposed use, character of  
5 surrounding development, traffic capacities of  
6 adjacent streets, and potential environmental effects,  
7 all may dictate that the circumstances of development  
8 shall be individually reviewed. It is the intent of  
9 this article to provide review of such uses so that  
10 the county is assured that they are compatible with  
11 their locations and surrounding land uses and will  
12 further the purposes of county ordinances."

13 Section 20.05 provides, in pertinent part, as follows:

14 "2. No conditional use application shall be  
15 approved unless the approving agency finds the request  
16 is consistent with the objectives and purposes of this  
17 ordinance and the Comprehensive Plan and is designed  
18 to be compatible with surrounding land uses..."  
19 (Emphasis in original).

20 The first time this case was before the Board, Benton  
21 County argued that "compatibility" under the county's ordinance  
22 had to be construed reasonably. We summarized the county's  
23 argument as follows:

24 "The county does not dispute that the use  
25 authorized by the conditional use permit would have an  
26 impact on surrounding land uses. The county argues,  
27 however, that a reasonable interpretation of the  
28 compatibility requirement in the conditional use  
29 ordinance requires a balancing of the need for a  
30 proposed use against the negative impacts resulting  
31 from that use. In other words, compatibility under  
32 the county's ordinance must be construed reasonably  
33 and, in effect, does not mean that a proposed use must  
34 have no adverse impact on surrounding land uses in  
35 order to be approved. That negative adverse impact,  
36 however, must be reasonable in light of all the  
37 circumstances. The county argues that the conditions  
38 imposed by the county on the rock quarry operation  
39 relating to buffering, hours of operation, months of  
40 operation and permissible noise levels make the use  
41 reasonably compatible with the surrounding land uses.  
42 The county also points out that this area is not  
43 exactly an urban neighborhood inasmuch as the area is  
44 zoned forest-conservation and exclusive farm use.

1 People living in such areas cannot, according to the  
2 county, expect the kinds of non-interference with the  
3 use and enjoyment of their property from surrounding  
land uses as could one expect living in an urban  
neighborhood." 2 Or LUBA 422 at 426.

4 We specifically reserved the question of whether Benton  
5 County was properly construing its ordinance in adopting a  
6 balancing approach to the question of compatibility. We said,  
7 however,

8 "[E]ven granting the county the leeway to  
9 construe compatible so as to allow the county to  
10 invoke a balancing test of need versus adverse impact,  
11 we believe the county erred in concluding that the  
applicants' proposed mining and crushing operation  
would be compatible with the surrounding land uses."  
Id at 427

12 In our opinion in the previous case we identified several areas  
13 where we felt the county's findings were inadequate.

14 Concerning the issue of need, we said the findings were  
15 inadequate because (1) they did not show the present supply of  
16 diorite rock was inadequate to meet the demand for rock for  
17 revetment purposes for the immediate or foreseeable future; (2)  
18 there was no showing the cost savings between using diorite  
19 rock for gravel purposes as compared to other types of rock  
20 constituted a public need to use diorite for gravel purposes;  
21 (3) there was no demonstration of a need to allow the Neumans  
22 to crush their rock on site; and (4) the county did not  
23 establish a present need to use the Neuman site for rock  
24 quarrying purposes.

25 Concerning the issue of adverse impact, we believed the  
26 county's findings were inadequate in that while the county

1 found the proposed use would have an environmental impact on  
2 adjacent property owners, the county did not find that the  
3 imposition of conditions would actually lessen the impact. The  
4 buffering conditions imposed by the county would only maintain  
5 the status quo and would not actually lessen the noise impact.  
6 The conditions imposed by the county restricting the hours and  
7 months of operation also did nothing to reduce the noise level  
8 during the time quarrying activities were actually being  
9 undertaken. We concluded that the conditions would only ensure  
10 that the noise situation would not be further aggravated and  
11 would have no appreciable effect in reducing the adverse noise  
12 impact affecting surrounding property owners' use and enjoyment  
13 of their property.

14 We also said the county's findings were inadequate on the  
15 issue of whether the quarrying operation would adversely affect  
16 the water supply of surrounding property owners.. The county's  
17 finding indicated that the opponents of the quarrying operation  
18 had submitted no conclusive evidence that the water supply  
19 would be harmed. We said this finding was inadequate to  
20 demonstrate there would be no adverse effect on the water  
21 supply of surrounding property owners. The burden on the  
22 question of adverse effect on water supply was that of the  
23 proponent of the use and not the opponents. The county was  
24 required to find there would be no adverse effect on water  
25 quality and the county made no such finding.

26 Following remand of the previous case, Benton County

1 conducted a new hearing, received additional evidence and made  
2 additional findings of fact in those areas where we had  
3 identified the findings to be inadequate. Petitioners have  
4 challenged these additional findings, again on the basis they  
5 do not justify the county's conclusion that the proposed use  
6 will be compatible with surrounding land uses and on the basis  
7 they are not supported by substantial evidence in the record.

8 OPINION

9 The briefs of the parties in the present case are directed  
10 primarily at the question of whether there was substantial  
11 evidence in the record to support the county's additional  
12 findings. The county has substantially improved its findings  
13 of fact, reasons and conclusions in the areas identified as  
14 deficient in the previous opinion.

15 1. Need.

16 Concerning the issue of whether the upper Neuman quarry  
17 (the proposed use) was needed to ensure an adequate riprap  
18 supply, the county found that the other Neuman quarry (the  
19 lower Newman quarry) would be depleted in two and one half  
20 years and that the upper Neuman quarry was needed in order to  
21 provide rock of a quality which would meet the Corps of  
22 Engineers' revetment project requirements. Petitioners attack  
23 the evidence to support the county's finding that only rock  
24 from the upper Neuman quarry would meet the Corps of Engineers'  
25 requirements. Petitioners say the two individuals who  
26 testified from the Corps of Engineers, Mr. Hodgin and Mr.

1 Corke, both qualified their statements to the point where their  
2 testimony was not substantial. The county's findings recited  
3 the evidence of these individuals as follows:

4 "In opposition to Mr. Neuman's testimony  
5 regarding the supply of riprap material in the area,  
6 the opponents of the proposed conditional use permit  
7 presented testimony from Mr. Herbert Schlicker, a  
8 prominent geologist licensed in the State of Oregon,  
9 and a private consultant who formerly worked for the  
10 State of Oregon. Mr. Schlicker stated that several  
11 quarries were located within a ten mile radius of the  
12 Neuman pit which provide riprap consisting of either  
13 Columbia River Basalt or Gabbro. He stated that in  
14 his opinion these rock types were adequate for  
15 revetment purposes. However, Mr. Hodgkin and Mr.  
16 Corke, both of whom are working on the heretofore  
17 mentioned Willamette River Revetment Project, stated  
18 that in the immediate area only Diorite rock from the  
19 Neuman quarry would satisfy the Corps of Engineers'  
20 standards and that the next closest site for such rock  
21 is located over 20 miles away. Mr. Schlicker  
22 confirmed that although several sites are located  
23 within a ten mile radius of the Neuman pit, the actual  
24 road miles to such sites would be greater."

25 Petitioners contend Mr. Corke's testimony

26 "was precisely to the contrary, and Mr. Hodgkin  
(an interested contractor, not a rock resources  
inventorier like Mr. Schlicker.) each time qualified  
his answer 'that I know of.' Neither said that the  
Corps of Engineers specifies 'diorite';" Petition for  
Review at 9.

The county responds in its brief by noting that Mr. Corke  
testified that the Corps of Engineers' revetment project  
consumed approximately 42,000 tons of material and that Mr.  
Corke testified the next available quarry with rock sufficient  
to meet the Corps' needs was located 20 miles further away from  
the revetment project than the upper Neuman quarry. Hauling  
costs from the next available quarry would have contributed an

1 additional \$294,000 to the cost of the Corps' revetment  
2 project. Mr. Hodgkin testified concerning whether other quarry  
3 pits in the area could produce rock sufficient to meet the  
4 Corps' requirements as follows:

5 "None, there's none that I know of that will pass  
6 the Corps of Engineers' specifications for that  
7 quality or quantity."

8 We believe the testimony of Hodgkin and Corke was  
9 substantial evidence to support the county's finding that the  
10 upper Neuman quarry was the only quarry reasonably available  
11 which had rock adequate to meet the Corps of Engineers'  
12 requirements. The fact that Mr. Hodgkin qualified his answer by  
13 "that I know of" does not require the inference that he was not  
14 aware of the other 11 active quarry pits in the area identified  
15 by Mr. Schlicker. It is at least as inferable that Mr. Hodgkin,  
16 acting for the Corps of Engineers, checked out all the active  
17 quarry pits in the area before picking the upper Neuman quarry  
18 to supply rock for its revetment project, as it is inferable  
19 that he only looked at one or two quarry pits. Petitioners  
20 were present at the hearing before the county and represented  
21 by counsel. The responsibility was petitioners to inquire of  
22 Mr. Hodgkin at the county's hearing how many pits he actually  
23 knew of and to establish that Mr. Hodgkin, in fact, only knew of  
24 a few of the 11 quarry pits. Had petitioners done so, we might  
25 then be able to say Mr. Hodgkin's testimony did not support the  
26 county's finding that of the 11 active quarry pits in the area  
only the Neuman quarry had rock of a quality adequate to meet

1 the Corps of Engineers' specifications.

2 The foregoing is but an illustration of many of the  
3 questions petitioners have raised in this case. Petitioners'  
4 arguments concerning the county's findings about the need to  
5 use the rock from the Neuman pit for revetment purposes as well  
6 as for gravel purposes consist primarily of a criticism of the  
7 county for believing some evidence in the record rather than  
8 other evidence. Without addressing each of the county's  
9 findings, we simply state that we believe the county's findings  
10 discuss the evidence on both sides of the need question and  
11 explain why the county found as it did. We believe the  
12 findings of the county and the evidence in support thereof are  
13 adequate to support the county's determination that there is a  
14 need for the Neuman quarry to supply rock for revetment and  
15 gravel purposes.

16 2. Adverse Impacts.

17 The county readdressed the adverse impacts on surrounding  
18 uses which would be caused by the proposed use, both with  
19 respect to noise and water quality. The county found that the  
20 testimony concerning water quality impairment was conflicting.  
21 Experts testified on both sides of the issue. The county chose  
22 to believe the expert who testified that the quantity of water  
23 available to surrounding property owners would not be adversely  
24 affected by the proposed use, and that at most minor turbidity  
25 problems lasting for only a minute or two would occur at  
26 infrequent intervals.<sup>1</sup> The county noted that while the

1 opponents' expert had testified that it could not be determined  
2 what the impact on the water supply would be without conducting  
3 a dye test, the expert could cite no specific evidence that  
4 turbidity problems had occurred following blasting at the  
5 quarry site. The county found there would be no adverse impact  
6 on water quality and we believe this finding is supported by  
7 substantial evidence in the record.

8 The county adopted additional findings concerning noise  
9 impact and readopted findings from the previous decision. The  
10 county found that noise levels "are below the minimum standard  
11 regulating harmful noise." The county said that evidence had  
12 been introduced by the applicants' attorney "which indicated  
13 the noise level from crushing actually is below that which  
14 exists in certain residential neighborhoods in the City of  
15 Corvallis." The county again mentioned the conditions imposed  
16 concerning hours and days of operation, stockpiling of gravel  
17 and maintenance of a vegetative buffer. The county said these  
18 conditions "substantially reduced the overall noise  
19 impact...[s]ubsequent to the initial public hearing." The  
20 county board members personally reviewed the site prior to  
21 initial approval at a time when the crusher was operating. The  
22 findings recite that the commissioners could hear "only  
23 extremely low background sound" even at the closest residence  
24 to the quarry. The county again mentioned the applicants' use  
25 of "sequential blasting," a new technique "which further  
26 reduces the sound impact caused by blasting." The county

1 referred once more to the condition requiring the applicants to  
2 "consult annually with county engineer and Department of  
3 Environmental Quality to discuss methods of reducing noise  
4 level." The county found this condition would assure "an on  
5 going effort to reduce noise impact." The county noted that  
6 "Mr. Neuman previously incorporated a rubber flap to the rock  
7 crusher at the suggestion of DEQ...[which]...has reduced the  
8 noise generated in crushing the rock." Finally, the county  
9 said that "testimony revealed that blasting would occur no more  
10 than two or three times per year, with some smaller shots  
11 occurring more frequently." The county found that the blasting  
12 "can be coordinated with surrounding residential owners in that  
13 they can expect any related noise and vibration."

14 In the "other findings/conclusions" section of the county's  
15 "additional findings," the county said the following:

16 "Consistent with the holding of the Circuit  
17 Court, and with Sections 20.01 and 20.05 of the Zoning  
18 Ordinance, the County established conditions limiting  
19 the gravel operation in various ways in order that it  
20 be reasonably compatible with surrounding land uses.  
21 These conditions in large part address the areas noted  
22 above by the Circuit Court. The Board concludes that  
23 the quarry's impact does not unreasonably interfere  
24 with the use of the properties of the surrounding land  
25 owners."

26 In our view the findings of the county set forth above do  
reflect that the noise associated with the rock quarrying and  
crushing operation has been reduced since the initial hearing  
by the county. There is no evidence in the record to suggest  
that the county could impose additional conditions on the

1 applicants so as to further reduce the noise level for the rock  
2 quarrying and crushing operation. Thus, to the extent the  
3 county was required under its "need versus adverse impact"  
4 balancing approach to minimize the adverse impacts from the  
5 proposed use as much as is reasonably possible, we believe the  
6 county's findings reveal that this task has been done.  
7 However, this accomplishment does not necessarily mean that the  
8 county was justified under its conditional use ordinance in  
9 allowing the proposed use, as will be discussed next.

10 3. County Interpretation of Conditional Use Ordinance.

11 The question which we must now address and which we did not  
12 address in the previous opinion, is whether the county's  
13 balancing approach of need versus adverse impact was proper  
14 given the standard in the county's zoning ordinance for  
15 granting a conditional use. Section 20.01 of the zoning  
16 ordinance sets forth the intent of the conditional use  
17 ordinance. It states that each zoning district has two kinds  
18 of uses: those which are permitted outright and those which  
19 "may or may not be appropriate in a particular district  
20 depending upon all the circumstances of the individual case."  
21 (Emphasis added). The latter uses are allowed conditionally.  
22 Such uses are to be reviewed by the county on an individual  
23 basis "so that the county is assured that they are compatible  
24 with their locations and surrounding land uses and will further  
25 the purposes of county ordinances." (Emphasis added). Section  
26 20.05 of the county zoning ordinance provides, in pertinent

1 part, as follows:

2 "No conditional use application shall be approved  
3 unless the approving agency finds the request is  
4 consistent with the objectives and purposes of this  
5 ordinance and the Comprehensive Plan and is designed  
6 to be compatible with surrounding land uses..."  
7 (Emphasis added).

8 The key to the granting of a conditional use under the  
9 county's ordinance is a determination that the proposed use  
10 will be "compatible with surrounding land uses." The county  
11 has, as has previously been explained, interpreted the word  
12 "compatible" to include a balancing of the need for the  
13 proposed use against the impact of the proposed use on  
14 surrounding land uses. It is our function to determine  
15 whether, in so interpreting the word "compatible," the county  
16 has properly construed its own ordinance. In the recent case  
17 of Theland, Inc. v Multnomah County, \_\_\_ Or LUBA \_\_\_ (LUBA No.  
18 81-081, 1981), we followed the approach outlined by the Supreme  
19 Court in Springfield Education Association v The School  
20 District, 290 Or 217, \_\_\_ P2d \_\_\_ (1980), in determining our  
21 role in the review of a local government's interpretation of  
22 its ordinance. We indicated in that opinion that with both  
23 inexact terms and delegative terms, our function is to  
24 determine whether the interpretation or application of the term  
25 at issue is consistent with the legislative intent or  
26 purpose.<sup>2</sup> While we are not all together certain in this  
case, we believe the term "compatible" more closely fits the  
Supreme Court's definition of an inexact term rather than a

1 delegative term. This is because we believe the county has  
2 fully expressed its intentions in the purposes section of the  
3 county's ordinance. The county has left no policy judgments to  
4 be made for the future as is the case with delegative terms.  
5 Assuming "compatible" is an inexact term, the only task of the  
6 county was to determine whether, given the facts in this  
7 particular case, the proposed use was "compatible" with  
8 surrounding land uses. The application, however, of an inexact  
9 term such as "compatible" to a given set of facts requires that  
10 the county apply the term in a manner intended by the  
11 ordinance. The first task, therefore, of a county faced with  
12 an inexact term is "...to determine what the legislative  
13 purpose is, and then, what the particular term means in the  
14 context of the statute in which it is used.\*\*\*" The land, Inc.  
15 v Multnomah County, supra, Slip Op at 9. To determine this  
16 intent, the Supreme Court in Springfield said the following:

17 "\*\*\*To determine the intended meaning of inexact  
18 statutory terms, in cases where their applicability  
19 may be questionable, courts tend to look to extrinsic  
20 indicators such as the context of the statutory term,  
21 legislative history, a cornucopia of rules of  
22 construction, and their own intuitive sense of the  
23 meaning which legislators probably intended to  
24 communicate by use of the particular word or phrase.  
25 In any event, however, the inquiry remains the same:  
26 what did the legislature intend by using the term."  
290 Or 217 at 224.

23 It is apparent to us from reading the purposes section of  
24 that portion of the county's ordinance pertaining to  
25 conditional uses, that the county did not intend to give to the  
26 term "compatible" a meaning which would permit, in essence, a

1 balancing test of need versus adverse impact. Rather, the  
2 purposes section indicates the county was concerned with  
3 whether a proposed conditional use would fit in harmoniously  
4 with surrounding land uses. In other words, there is no  
5 indication that the county intended to use the word  
6 "compatible" in other than its ordinary and accepted meaning,  
7 which is:

8 "Capable of existing together without discord or  
9 disharmony." See Webster's Third New International  
Dictionary, 1976.

10 The county's analysis of whether the proposed rock quarry  
11 should be allowed begins with what we conclude is an improper  
12 interpretation of the word "compatible" as used in the county's  
13 ordinance. In the absence of a proper interpretation of the  
14 word compatible in the first instance, it is inappropriate if  
15 not impossible for us to conduct a meaningful review of the  
16 county's decision to determine whether the facts found by the  
17 county justified the conclusion reached by the county that the  
18 proposed use was compatible with surrounding land uses. A  
19 preliminary issue which would have to be resolved by the county  
20 in order for us to be able to review the findings, and which  
21 has not yet been resolved, is whether the determination that a  
22 use is "compatible" as used in the ordinance is to be based on  
23 a subjective or objective assessment of the impact of the  
24 proposed use on surrounding land uses. If the county intends  
25 for the term to be used in its subjective sense, that is,  
26 whether the proposed use is compatible with surrounding

1 land uses as viewed by those persons who live in the  
2 surrounding area, the county would probably be forced to  
3 conclude that the use is not compatible given the testimony in  
4 the record of those persons who live in the surrounding area.  
5 These people testified at considerable length both in person  
6 before the Board of County Commissioners and the planning  
7 commission as well as in written form. Perhaps as descriptive  
8 as any of the testimony is the following excerpt from a letter  
9 of Ruth E. Vincent to the Benton County Planning Commission,  
10 dated May 12, 1980, as follows:

11 "We can hardly believe the difference. Relaxful  
12 quietness. Merely the noises of the normal world. We  
13 again notice the hum of the hummingbird, the tap of  
14 the woodpecker. This most appreciated atmosphere has  
15 been ours several days now because of no activity at  
16 the rock quarry.

17 "Ordinarily, my husband, daughters and I are not  
18 gripers or even easily annoyed. But the noise of a  
19 quarry next door interferes with our thinking and our  
20 health. It is truly a stressful situation.

21 "As a former farmer's daughter and worker, I am  
22 -- even now -- use to the noise of tractors and farm  
23 equipment and do not find them objectionable.  
24 Certainly, I also understand the need and appreciate  
25 the liberty to purchase land and earn a living. But I  
26 cannot accept severe encroachments upon a  
neighborhood. (Certainly noise driving neighbors  
batty is a severe encroachment). With every personal  
liberty, there comes a responsibility.

27 "We moved to our Oregon location in 1971 from  
28 Washington, D.C., when my husband was forced to take  
29 medical retirement because of a constant base headache  
30 and severe headache flairups. Not only did we choose  
31 a quiet environment but even made our house  
32 acoustically quiet by shag carpeting on the walls,  
33 etc. Yet with the quarry operating, it would be  
34 quieter in town. These acoustical precautions give  
35 little relief from the day-after-day nerve-racking

1 grind of the rock crushing, the loud bangs of truck  
loading, nor the continual staccato of the drilling.

2 "Not only do I worry about the effect this noise  
3 pollution has on my husband's health, but on the rest  
4 of us as well. Even when our daughters come home from  
noisy college life, they complain about the continual  
5 noise, often escaping to the OSU library to do their  
studying.

6 "I personally find the noise not just irritating,  
7 but physically and mentally exhausting. I become  
strained from the hour-after-hour pound, become less  
8 patient, and continually look forward to Sunday when  
it will be quiet."

9 The county may also, however, decide that whether a  
10 proposed use is "compatible" with surrounding uses requires an  
11 objective test, that is, one based upon whether a reasonable  
12 person would conclude a proposed use is compatible with  
13 surrounding land uses. If the county were to choose to employ  
14 an objective test, the county would have to consider the  
15 testimony of the surrounding property owners as well as the  
16 noise decibal (dBA) levels as recorded by the Department of  
17 Environmental Quality. There appears to be an excellent  
18 resource in the record of this proceeding which would assist  
19 the county in determining whether the complaints of the  
20 neighbors should persuade the county that a reasonable person  
21 would conclude the proposed use from a noise standpoint was  
22 incompatible. That resource was submitted by the applicants at  
23 the hearing following remand and is a study for the City of  
24 Corvallis entitled "Accoustical Assessment for The Circle  
25 Boulevard-Walnut Boulevard Environmental Impact Statement."  
26 This study was prepared by Ecumene Associates of California and

1 contains helpful information on the effect on people's comfort  
2 of exposure to various sound levels. Table 1 of the study  
3 ranks decibal levels (dBA) from 10 to 150. DBA 10 to 30 is  
4 said to be very quiet; 30 to 50 is quiet; 50 to 75 is  
5 moderately loud; 75 to 100 is very loud and 100 to 125 is  
6 uncomfortably loud. The report also states the following, at  
7 page 3:

8 "Three qualities characterize the effects of  
9 noise on the listeners: (a) The frequencies of the  
10 noise; (b) The intensities of the noise; and (c) The  
11 time-varying (or changeable) character of the noise."

12 At page 5 of the report is the following:

13 "The effects of noise on people can be grouped in  
14 three general categories: (a) Subjective effects of  
15 annoyance, nuisance, and dissatisfaction; (b)  
16 Interference with activity such as speech, sleep and  
17 learning; and (c) Physiological effects such as  
18 startle or hearing loss. The sound levels associated  
19 with environmental noise, in almost every case,  
20 produce effects only in the first two categories.  
21 Yet, at any given level, individual responses will  
22 vary considerably. Annoyance, nuisance,  
23 dissatisfaction and startle effects can happen at  
24 virtually any level. The response of an individual  
25 depends on additional factors such as time duration,  
26 frequency content, background noise level, and the  
27 hearer's activity at the time. Background noise  
28 levels exceeding 55 dBA interfere with speech at a  
29 speaker to listener distance of about 12 feet.  
30 Continuous exposure to levels exceeding 70 dBA causes  
31 hearing loss over a 40 year period.\*\*\*" (Emphasis  
32 added).

33 The study has a section entitled "Noise Acceptability  
34 Criteria" in which are set forth tables from both the  
35 Department of Housing and Urban Development and the U.S.  
36 Environmental Protection Agency. The HUD criteria lists as  
37 "acceptable" a noise level which does not exceed 45 dBA more

1 than 30 minutes per 24 hours; as "discretionary - normally  
2 acceptable" a dBA level which does not exceed 65 dBA more than  
3 8 hours per 24 hours; as "discretionary - normally  
4 unacceptable," a dBA level which exceeds 65 dBA 8 hours per 24  
5 hours; and as "unacceptable," a dBA level which exceeds 80 dBA  
6 60 minutes per 24 hours. The "acceptable range" is defined as:

7 "The noise exposure is such that both the indoor  
8 and outdoor environments are pleasant."

9 The "normally acceptable" range is defined as:

10 "The noise exposure is great enough to be of some  
11 concern but common building construction will make the  
12 indoor environment acceptable, even for sleeping  
13 quarters, and the outdoor environment will be  
14 reasonably pleasant for recreation and play."

15 On remand of this case, the county must explain whether, in  
16 using the term compatible, it is relying upon a subjective or  
17 objective meaning of that term. Once this determination is  
18 made, the county must then consider the evidence in this case,  
19 adopt findings of fact, and explain why the facts found led the  
20 county to the conclusion which it reached. Even if we were to  
21 assume, given the result in this case, that the county would  
22 use an objective standard on remand, we are unable to tell from  
23 the evidence in this case and the county's findings whether the  
24 noise level from the rock quarrying and crushing operation  
25 would be deemed by a reasonable person to be "compatible" with  
26 surrounding land uses. Based on the study in the record  
referenced above and the tables contained in that study it  
appears that the noise level from the crushing and quarrying

1 operation falls just within the moderately loud noise  
2 range.<sup>3</sup> The study, if we were to rely upon it as  
3 authoritative, indicates that other factors besides just noise  
4 level itself must be considered in determining whether a noise  
5 level will have an adverse impact on listeners. The evidence  
6 in the record must be weighed by the county, not by this Board,  
7 in arriving at a conclusion of whether the rock quarrying and  
8 crushing operation would be compatible with surrounding land  
9 uses.

10 Accordingly, we must remand this case to the county for the  
11 county to adopt a proper interpretation of the term  
12 "compatible" and to then apply the facts in this case, given  
13 the interpretation, to see whether the facts justify a  
14 conclusion that the use is compatible.<sup>4</sup>

15 For the foregoing reasons, this matter is remanded to  
16 Benton County for further proceedings not inconsistent with  
17 this opinion.

1 COX, Dissenting.

2 I disagree with the majority in its interpretation of the  
3 role the word "compatible" plays in this decision for two  
4 reasons. The majority has in effect elevated the rights  
5 non-conforming and alternate conditional uses have in dictating  
6 whether a requested conditional use shall be allowed. Also,  
7 the majority fails to defer to the county's interpretation of  
8 its own ordinance.

9 There are nine dwellings within a 1/2 mile radius of the  
10 site. Two of the dwellings are in the Forest Conservation (FC)  
11 zone and the remaining seven are in an Exclusive Farm Use (EFU)  
12 zone. All these dwellings appear to have been constructed when  
13 the land upon which they exist was zoned Rural Residential.  
14 Apparently none of the petitioners who reside in these  
15 dwellings are using the property they own for resource  
16 purposes. The county in its findings continually refers to  
17 petitioners' use of their property in terms such as  
18 "dwellings," and "residences" and not as "farms" or "forest  
19 operations." As such the petitioners dwellings located in the  
20 FC zone are non-conforming uses and the petitioners' dwellings  
21 located in the EFU zone are also non-conforming uses. The  
22 dwellings become such when the property upon which they were  
23 situated was rezoned in January, 1979. Under the FC and EFU  
24 zones non-forest and non-farm dwellings are allowed only as  
25 conditional uses. See Benton County Zoning Code, Articles III  
26 and IV. Apparently none of the dwellings have applied for

1 conditional use status under the new code provisions.

2 With the foregoing history in mind, I believe the majority  
3 interpretation of Benton County's conditional use provisions in  
4 effect allows the tail to wag the dog. The majority, by  
5 interpreting the conditional use provision requiring a finding  
6 of "compatibility with surrounding land uses" to mean  
7 compatibility with existing non-conforming uses or even  
8 existing conditional uses, fails to read the county's  
9 conditional use provisions in the context of the zoning code as  
10 a whole.

11 The Benton County code uses the word "compatible" in  
12 several code provisions. It is always used, however, in the  
13 context that a less desirable use, i.e., non-conforming or  
14 conditional, must be shown to be compatible with a more desired  
15 use, i.e. permitted, and not as the majority in effect holds,  
16 with uses of equal or less desirability. For example, in the  
17 Benton County FC zone (Article III) all conditional uses must  
18 be shown to be compatible with the permitted uses but no  
19 mention is made of a requirement that compatibility with other  
20 conditional uses be shown. Section 4, Conditional Uses,  
21 Subsections (2), (3) and (4) of Article III state in pertinent  
22 part:

23 "2. One single family residence in conjunction with  
24 forest or farm use on parcels meeting the lot  
25 size standards of this Article upon findings by  
26 the Planning Official that forest or farm use  
exists and the following criteria have been  
satisfied.

- 1            "a. Is compatible with existing forest uses;  
2            "b. Does not seriously interfere with accepted  
3            forest practices on adjacent lands;  
4            \*\* \* \* \*

5            "3. Non-forest residential dwelling or mobile home on  
6            parcels of less than the lot size minimum  
7            designated by the Comprehensive Plan; public or  
8            private schools and churches, on a finding by  
9            Planning Official or Planning Commission that  
10           each such dwelling or structure:

- 11           "a. Is compatible with existing forest uses;  
12           "b. Does not seriously interfere with accepted  
13           forest practices on adjacent lands;  
14           \*\* \* \* \*

15           "4. Park or recreational facilities or bike paths  
16           provided that they are compatible with forest  
17           use." (Emphasis added).

18           More importantly, Subsection 7, which controls the specific  
19           request before the county, allows aggregate mining upon a  
20           showing of compatibility with "forest uses." No mention is  
21           made of compatibility with existing conditional uses.

22           Specifically, Article III(4)(2) allows:

23           "Aggregate and other mineral resources or other  
24           sub-surface resources, provided that such operations  
25           can be shown not to have an adverse impact on the  
26           forest uses and a complete reclamation plan has been  
27           provided showing how the affected area will be  
28           returned to forest use if feasible after depletion of  
29           the mineral resource."

30           The same sort of analysis holds true for EFU property, the  
31           only other "surrounding" zone involved here. Specifically,  
32           Benton County Zoning Code, Article IV.05 states:

33           "Criteria for Conditional Uses The criteria in this  
34           section shall be satisfied, or found not applicable,  
35           before approval of any use in Section .04. A use  
36           identified in .04(1) - .04(6) may also be approved if

1 it meets criteria .05(1)(a),(b),(c),(e) and (f) and  
2 the criteria in subsection (2).

3 "1. Conditional use criteria:

4 "a. The use is compatible with farm uses and is  
5 consistent with ORS 215.243; and

6 "b. It does not interfere seriously with  
7 accepted farming practices on adjacent  
8 lands; and

9 "\*\* \* \* \*"

10 With reference to aggregate mining, Article IV.04 allows:

11 "Operations conducted for the exploration, mining and  
12 processing of geothermal resources as defined by ORS  
13 522.010(4), aggregate and other mineral resources or  
14 other sub-surface resources, providing that such  
15 operations will be shown not to have an adverse impact  
16 on the agricultural economy of the County and;  
17 complete reclamation plans are provided showing how  
18 the affected area will be returned to agriculture use  
19 if feasible after depletion of the resources."

20 The majority opinion in effect puts the applicant and the  
21 county in the position of making an in-depth evaluation of the  
22 impact a proposed conditional use has on not only permitted  
23 uses but also all existing conditional uses and non-conforming  
24 uses individually. Such an interpretation ultimately allows  
25 the petitioners herein to collaterally attack the 1979 rezoning  
26 of their property from Rural Residential to FC and EFU. It was  
at that point the county permitted aggregate extraction around  
petitioners' residences as a conditional use and petitioners  
should have attempted to protect their solitude by  
remonstrating against aggregate extraction in the zones placed  
upon their property. Under such an analysis the findings made  
by the county pertaining to the impact on petitioners'  
residences were not required by the conditional use ordinance.

1 Therefore, the findings should be treated as surplusage and  
2 attempts to be considerate of constituents' fears. Sunnyside  
3 Neighborhood v. Clackamas County Comm., 280 Or 3, 569 P2d 1063  
4 (1977).

5 In the alternative, even if the county were indeed required  
6 to find compatibility with all surrounding uses, they have done  
7 so. The majority fails to apply the standard in a manner which  
8 will effectuate the county's zoning ordinance. In effect, the  
9 majority's use of the word "compatible" would require the  
10 county to find that an aggregate extraction operation has  
11 absolutely no impact on the surrounding land uses whether those  
12 uses are permitted, conditional, or non-conforming. Such an  
13 interpretation of the standard would make it impossible to  
14 permit a resource extraction operation within the county if one  
15 neighbor, no matter how abnormally sensitive, complained. The  
16 majority in effect recognizes that such an interpretation is  
17 unrealistic when it discusses the difference between subjective  
18 and objective definitions of the word compatible. The county  
19 has clearly already decided that it must ultimately decide what  
20 is compatible based on a balancing of the conflicting desires  
21 of its constituents and the demands of its economy. The county  
22 found and concluded that

23 "The general area is zoned for resource uses (FC and  
24 EFU). Residential users located within resource lands  
must co-mingle their land uses with resource uses."

25 The county has listened to the complaints of neighbors and  
26 investigated the validity of those complaints. The county

1 placed conditions on operating the extraction business to  
2 reduce the noise to a level that is appropriate. It then  
3 permitted the aggregate operation. By implication, the county  
4 in granting the permit, after applying its conditional use  
5 ordinance criteria has already determined the extraction  
6 operation is "compatible" within the meaning of its ordinance.  
7 Nothing is to be gained from remanding the matter back to the  
8 county.

9 I would affirm Benton County's decision.

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FOOTNOTES

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3 1  
4 Turbidity is explained in the record as discoloration of  
the water.

5 2  
6 A third category of terms is exact terms, which includes  
7 "terms which impart relatively precise meaning,  
8 e.g., 21 years of age, male, 30 days, Class II  
9 farm land, rotent, Marion County.\*\*\*"  
10 Springfield Education Association v The School  
District, supra, 290 Or 217 at 223. We believe  
the term "compatible" certainly does not fall  
within this category of terms.

11 3  
12 We draw this conclusion from DEQ's analysis of the  
13 rock quarrying and crushing operation performed on June  
19, 1980.

14 4  
15 It may be that, on remand, the county will wish to  
16 further define the term "compatible" by amending its  
zoning ordinance. It may also be that the county will  
17 wish to amend its zoning ordinance to give the county  
greater latitude in allowing conditional uses under  
18 certain circumstances than is allowed by any conceivable  
definition of the term "compatible." Mr. Mickelson,  
19 representing the applicants in this proceeding noted a  
particular problem with gravel quarries because it is a  
20 resource which must be taken where it is found. The  
county, we understand, allows quarry operations as  
21 conditional uses only. Requiring the county to find that  
a proposed quarry will be "compatible with surrounding  
22 land uses" could well preclude the county from allowing  
quarry operations anyplace in the county. The standard  
23 may be so difficult as applied to rock quarries as to  
violate statewide planning Goal 5, although this issue is  
not before us in this case.