BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

MOBILE CRUSHING COMPANY, Petitioner, vs. LANE COUNTY and FALL CREEK LIVEABILITY GROUP, Respondents.	LUBA No. 84-092 FINAL OPINION AND ORDER

Appeal from Lane County.

Bruce Anderson, Eugene, filed the Petition for Review and argued the cause on behalf of Petitioner. With him on the brief was D. Michael Wells, Hutchinson, Anderson, Cox & Teising.

William A. Van Vactor, Eugene, filed a response brief and argued the cause on behalf of Respondent County.

Susan Connolly, Eugene, filed a response brief and argued the cause on behalf of Respondent Fall Creek Liveability Group.

KRESSEL, Referee; BAGG, Chief Referee; DUBAY, Referee, participated in the decision.

AFFIRMED 02/25/85

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

Opinion by Kressel

NATURE OF DECISION

This appeal is part of a long-standing controversy over whether mining should be allowed on a 171 acre tract in rural Lane County. The history is capsulized in our opinion in Mobile Crushing Company v. Lane County, ___ Or LUBA ___, LUBA No. 83-092, (May 25, 1984). In that opinion, we held the county adopted insufficient findings in support of its conclusion that Goal 5 prevented rezoning of the tract by the addition of an overlay district, the Quarry-Mining Combining District (hereinafter QM). Approval of the amendment would have permitted the site to be extensively mined.

After our remand, petitioner unsuccessfully sought a reopening of the county's record to permit the introduction of additional evidence. Supplemental findings were then adopted by Order No. 84-9-26-9. In addition to adopting these findings, the order reaffirmed the previous decision to deny the rezoning request. Petitioner appeals adoption of Order No. 84-9-26-9.

Mootness

As a threshold matter, the county urges us to dismiss this appeal as moot. Its argument is based on two events that occurred prior to adoption of the challenged order: (1) In February 1984, the property in question was rezoned in conjunction with legislative revisions of the map and text of the Lane County Zoning Ordinance and (2) in September, 1984 the

new zoning provisions were acknowledged by LCDC as in conformance with the statewide planning goals. For the reasons set forth below, we do not believe either of these events renders this appeal moot.

Mootness issues have arisen in several land use appeals. Although the contexts have been varied, a single inquiry has guided the judicial response: Would a decision on the merits of the case resolve merely an abstract question or, on the other hand, would it have practical effect? A mootness claim should be sustained only in the former circumstance. Warren v. Lane County, 297 Or 290, 686 P2d 316 (1984); Citadel Corp. v. Tillamook County, 66 Or App 965, 675 P2d 1114 (1984); Carmel Estates v. LCDC, 51 Or App 435, 625 P2d 1367 (1981) rev den 291 Or 309 (1981); Multnomah County v. LCDC, 43 Or App 655, 603 P2d 1238 (1978); Card v. Flegel, 26 Or App 783, 554 P2d 596 (1976).

A. Rezoning

For purposes of the mootness question here, the principal change brought about by the zoning revisions enacted in February, 1984 was the redesignation of the 171 acre tract from FF-20 (Farm Forest Use) to F-2 (Impacted Forest Lands). As explained below, we do not believe this change renders our review of Order No. 84-9-26-9 an abstract exercise or one having no practical effect.

As previously noted, Order No. 84-9-26-9 reaffirmed the county's denial of petitioner's request to add a QM overlay designation to the zoning of the site. It is undisputed that

the reclassification to F-2 did not alter the fact that petitioner's large-scale mining proposal could not be authorized without the addition of a QM overlay designation.[1] The parties also agree that the standards for approval of a QM designation were not significantly changed by the legislative zoning revisions enacted in February, 1984. Under these circumstances, it is clear the subsequent rezoning had little or no impact on (1) petitioner's interest in securing approval of the QM designation[2] and (2) the standards governing such an approval. Accordingly, we cannot conclude the rezoning to F-2 per se means review of Order No. 84-9-26-9 would be of purely abstract significance or academic interest.

In support of the mootness claim, the county argues its February, 1984 rezoning constituted a new decision denying petitioner's request for QM rezoning, thereby superseding the original rezoning denial (Order No. 83-8-24-9). The argument is stated in the county's supplemental memorandum as follows:

> "In the legislative process, petitioner's application for the Quarry Mining zoning designation was denied, with the county finding that the requested activity could occur via the CUP process. Per Warren, supra, these facts establish the appeal is now moot, as a new record and findings were made. While the record and findings are admittedly minimal, they are nevertheless sufficient to meet the Warren, supra, test."
> Respondent's Supplemental Memorandum at 4.

This argument derives at least theoretical support from Carmel Estates, Inc. v. LCDC, supra and Warren v. Lane County, supra, 297 Or at 295 ("For the purposes of judicial review, a

new ordinance enacted on a new record and different findings will generally supersede the prior one and render any decision on the sufficiency of the prior record moot.") However, we find no basis in the record for application of the quoted rule in the manner urged by the county.

First, we have not been furnished with evidence that the county considered and rejected a request to apply a QM overlay designation to the property when F-2 zoning was imposed in February, 1984. See ORS 197.830(11) (limiting this Board's review to the record established at the local government level). The county's brief provides some proof petitioner requested a QM designation during the legislative hearing process, but the evidence contained in the brief is not part of the record in this appeal. Moreover, no proof has been provided indicating the county's disposition of this request, or even that it was actually considered by the governing body during the rezoning process. Accordingly, we have not been presented with sufficient evidence in support of the mootness claim. cf Maresh v. Yamhill County, 68 Or App 471, 476, 683 P2d 124 (1984).

Equally significant to our refusal to accept the theory advanced by the county is the fact that after the allegedly superseding action was taken in February, 1984, the county itself proceeded as though petitioner's previous request for QM zoning remained in issue. The county did not claim the February, 1984 action superseded, or rendered moot, Order No.

83-8-24-9 during the pendency of our review of that order, although our review was conducted many months after February, 1984. Similarly, the county reaffirmed Order No. 83-8-24-9 in the decision challenged in this appeal, although that decision was made approximately 11 months after adoption of the legislative rezoning measure allegedly superseding it.

Based on the foregoing, we do not accept the county's assertion this appeal is moot as a consequence of legislative revisions adopted in February, 1984. Warren v. Lane County, supra; Carmel Estates v. LCDC, supra. We next consider the related claim that LCDC's acknowledgement of the legislative revisions in September, 1984 provides a basis for declaring the appeal moot.

B. Acknowledgement

As noted earlier, we remanded the county's initial denial of petitioner's application for the QM designation (Order No. 83-8-24-9) in May, 1984. See Mobile Crushing Company v. Lane County, ___ Or LUBA ___, LUBA No. 83-092, (May 25, 1984). The county readopted the denial, with the addition of supplemental findings, in October, 1984. During the period between these two events, LCDC acknowledged the county's plan and zoning ordinance, including the legislative revisions adopted in February, 1984.

The county correctly states that after LCDC's acknowledgement decision, the controlling land use measures were the county's acknowledged plan and implementing

ordinances. ORS 197.175(2)(d). Relying on the cited statute and Byrd v. Stringer, 295 Or 311, 313, 666 P2d 1332 (1983), the county claims this appeal is moot because the petition raises only goal-related issues. Although the county's description of the usual effect of acknowledgement cannot be disputed, we nonetheless conclude that in this case, petitioner's Goal 5 challenges to the rezoning denial remain viable even after acknowledgement. This is because the acknowledged measures themselves incorporate a Goal 5 standard of approval in connection with the QM district. Section 6.216(2) of the acknowledged zoning code states:

> "The Quarry and Mine Operations Combining Zone is intended to be applied only to those operations which have been evaluated through the Goal No. 5 Administrative Rule Conflict Resolution Process. Other Quarry and Mining operations of short term or intermittent duration should be provided pursuant to this special use provision of the various zones." Lane County Code, Section 6.216(2). (Emphasis added).

Thus, at least with respect to the QM district, it is clear Lane County chose to maintain a type of goal analysis requirement in the post-acknowledgement period by codifying the requirement in the acknowledged zoning ordinance. Accordingly, petitioner's contention that Order No. 84-9-26-9 misconstrues Goal 5 is not mooted by the acknowledgement.[3]

In conclusion, we reject the county's claims this appeal should be dismissed as moot. We turn next to the merits of the petition.

FIRST ASSIGNMENT OF ERROR

While respondent suggests LCDC's September, 1984 acknowledgement order requires dismissal of this appeal on mootness grounds, see discussion, supra, petitioner claims the acknowledgement warrants a considerably different disposition of the appeal, viz., reversal of Order No. 84-9-26-9 and allowance of the requested zone change. We disagree.

Petitioner's reasoning takes a circuitous path. In essence, the claim is that acknowledgement (1) removed Goal 5 as an criterion of rezoning approval and (2) reinstated the county hearings officer's decision that the proposal complied with the comprehensive plan and should be conditionally approved.[4] Petition at 3-4.

We do not find petitioner's explanation of the effect of acknowledgement. If we assume the acknowledged plan and implementing ordinance became the governing land use controls after September 13, 1984, we must also recognize that the acknowledged measures incorporated a Goal 5 review requirement. As noted in our discussion of the mootness issue, supra, petitioner's application required evaluation "through the Goal No. 5 Administrative Rule Conflict Resolution Process" pursuant to Lane County Code, Section 6.216(2). Since this type of goal analysis requirement survived acknowledgement, the hearings officer's pre-acknowledgement findings of plan compliance cannot be relied on to avoid application of the goal.

If, on the other hand, we assume the rezoning application

was subject to the pre-acknowledgement measures in force when the hearings officer's decision was made, petitioner's argument must be rejected for a different reason. The argument disregards the indisputable fact that after the findings of plan compliance were entered by the hearings officer, the county commissioners reviewed the decision and expressly determined the rezoning proposal violated Goal 5. We would be standing Byrd v. Stringer, supra, and a considerable body of Oregon land use law on its head if we interpreted these circumstances to constitute satisfaction of Goal 5.[5]

In summary, we reject petitioner's claim that acknowledgement of the county's plan in September, 1984 reinstated the county hearings officer's 1981 approval of the request and barred the county from subsequently analyzing it under Goal 5. The first assignment of error is accordingly denied.

SECOND ASSIGNMENT OF ERROR

In Mobile Crushing Co. v. Lane County, ___ Or LUBA ___, LUBA No. 83-092, (May 25, 1984), we held the county's final order did not adequately explain why statewide Goal 5 warranted denial of petitioner's rezoning request. In reaching this conclusion we noted that, while the stated purpose of the goal is resource protection, the county's decision relied on the goal to prevent resource use in order to protect a conflicting use (residences) on nearby land.[6]

In the prior appeal, the county sought to explain this

apparent incongruity by reference to two interpretative rules adopted by LCDC, OAR 660-16-005 and 660-16-010. The former requires identification of conflicting uses[7] and separate analysis of the "resource site" and the conflicting use in terms of their economic, social, environmental and energy consequences (hereinafter the ESEE analysis). The ESEE analysis must include consideration of the impact of the conflicting use on the resource site and vice versa. OAR 660-16-005. The latter rule describes the alternatives available to a jurisdiction in cases of conflict between resource sites and conflicting uses. A subparagraph of this rule permits a planning jurisdiction to "...determine that the conflicting use should be allowed fully, notwithstanding the possible impacts on the resource site." OAR 660-16-010(2).[8] According to the rule, this approach may be used when the conflicting use for a particular site is of "sufficient importance, relative to the resource site." Id.

In the prior appeal we accepted the county's contention that Goal 5 does not protect utilization of resources absolutely but instead contemplates a conflict resolution process which may result in severe restrictions or even prohibition of such activities in favor of conflicting uses. Mobile Crushing Co. v. Lane County, supra. See OAR 660-16-010; See also, Olsen v. Columbia County, 8 Or LUBA 152, 167 (1983). However, we held that the county's ESEE analysis was not sufficient. We stated:

"The ESEE analysis by the county is inadequate to meet this standard. Although impacts on the protected resource site from the conflicting use - i.e., residential use in the neighborhood - are required to be considered, the findings are almost exclusively confined to impacts of mining on the adjacent residential use. The only mention of impacts on the resource site are findings related to economic matters, but the findings address only the possibility of economic loss to the owner during a period in which mining hardly occurred. There are no findings, such as one might expect in such an analysis, of any increased costs incident to mining near residential areas, and the effects of such increases, if any, on the costs of the roads and other aggregate uses in the county. The energy consequences, both on the resource site and the residential use, are also missing from the analysis. We find no discussion of whether use of this resource site would be more or less energy efficient than the alternatives." Mobile Crushing Co. v. Lane County, ___ Or LUBA ___, LUBA No. 83-092, Slip Opinion at 10.

In response to our remand, the county adopted supplemental findings in support of its rezoning denial under Goal 5. The findings can be summarized as follows:

1. The majority of the consequences to the resource use of allowing the conflicting use (the residences) are economic in nature. They include (a) increased operating costs as a result of strict limitations on the resource use which the county would probably impose as conditions of mining approval, (b) potential liability of the mining operator for accidents between gravel trucks and the vehicles driven by area residents, and (c) increased transportation costs due to traffic congestion in the area.

2. No social consequences would be engendered by allowance of the conflicting use.

3. The rural residential traffic in the area would cause air pollution at the resource site (an environmental consequence).

4. The resource operator's energy (transportation) costs would increase as a result of conflicts

between truck traffic and rural residential traffic. There are 93 homes within one half mile of the quarry and 183 homes within one mile. The roads are narrow and single lane.

5. There are at least five operating quarries within eight miles of the quarry site; within the same area there are at least ten additional aggregate sites;

6. The present and projected demand for aggregate in the portion of the county including petitioner's site is relatively low in comparison with other sections of the county; the supply is relatively high and is adequate to meet the demand;

7. The county's draft plan on mineral and aggregate resources listed 30 aggregate sites in the conflict analysis sections and determined that the site in question was the only quarry of the 30 with identified conflicts.

8. Transportation is the largest expense item in the aggregate mining industry; the numerous quarries in the area in question "...insure that local residents and businesses can easily and economically fulfill their needs for rock and gravel."

9. Although petitioner claimed the type of aggregate at the site is unavailable elsewhere in the area, other evidence contradicted this assertion. Record at 54-64.

In the second assignment of error, petitioner claims the supplemental findings do not adequately address the issues raised in our remand order. Four specific challenges are presented. We consider each of them below.

The first challenge is predicated on OAR 660-16-010, LCDC's interpretive rule concerning the process by which conflicts between uses may be resolved. As noted earlier, one provision of the rule allows a planning jurisdiction to resolve a

conflict between a resource site and a conflicting use in favor of "allowing the conflicting use fully, notwithstanding the possible impacts on the resource site." OAR 660-16-010(2). This approach is authorized, according to the rule, "...when the conflicting use for a particular site is of sufficient importance, relative to the resource site." Id.[9]

Petitioner claims the supplemental findings fail to reasonably explain why the rural residences near the quarry "are so important as to preclude the mineral resource on this site for the indefinite future." Petition for Review at 7. We agree the county's findings are not phrased expressly in the terms used by OAR 660-16-010(2).[10] However, this does not necessarily mean petitioner's challenge must be sustained. Taken as a whole, the findings do explain the county's judgment that, on balance, the conflicting residential uses deserve full protection in this instance.

The key points made by the findings are as follows: (1) numerous residences exist in proximity to the site, (2) a mining operation on the site would have significant negative impacts on the residential uses (e.g., increased noise, truck traffic and safety problems), (3) other sources of rock exist in the vicinity and are adequate to meet the demand, and (4) while the effect of approval of the rezoning would be highly adverse to the conflicting use, the effect of denial would be to preserve the resource site for future mineral extraction. These points are concisely summarized in the following finding

adopted by the county in answer to objections raised by petitioner during the remand proceeding:

> "We agree there is an aggregate resource at the site. However, with the five nearby quarrys available, non-use at this time would not outweigh a high degree of conflict with the existing residences. Furthermore, denial at this time nearly preserves the resource for the future. This objection is denied." Record at 64.

Given these findings, we cannot sustain petitioner's charge that "...there is no rational relationship between those findings and the conclusion that the conflicting uses are to be fully allowed and preclude extraction of the mineral resources." Petition at 7. See Higginson v. Yamhill County, 2 Or LUBA 314, 317 (1981). Neither Goal 5 nor LCDC's interpretive rules prohibit the county from classifying existing rural residences in the acknowledged F-2 zone as "conflicting uses."[11] Further, the rules permit the county to "allow the conflicting use fully, notwithstanding the possible impacts on the resource site." OAR 661-16-010(2). Although the findings may severely limit the prospects for aggregate extraction at this resource site, we cannot say they are arbitrary[12] or outside the purview of the goal and the interpretive rules.[13]

This portion of the first assignment of error is therefore denied.

Petitioner's remaining challenges are to the adequacy of the county's ESEE analysis. First, petitioner claims the

findings are focused incorrectly on the private rather than the public consequences of precluding use of the resource site. The petition states:

> "The question is not how a particular owner of a resource site will be affected but what is the effect on the public from the county's decision to preclude use of this resource. The majority of the findings concern economic impacts; all of those are hypothetical impacts on Mobile Crushing Company." Brief of Petitioner at 8 (citations omitted).

However, after making this statement, petitioner acknowledges that certain of the findings do contain the proper public interest focus. Petitioner then sets forth reasons why some of those findings are contradictory or irrelevant.

Although a few of petitioner's specific criticisms of the findings seem valid, we find the attack as a whole unpersuasive. As noted previously, the county's ESEE analysis expressly acknowledges the existence of a resource on the site, but concludes that the consequences of prohibiting use (extraction) of this resource at this time are not significant. This is because similar resources are available in the area and the supply of the resource meets current and projected demands.[14] Importantly, the county's findings also note that other aggregate resource sites in the area do not present the use conflicts presented by petitioner's proposal. These findings are sufficient to warrant rejection of petitioner's challenge. We believe the ESEE analysis correctly focuses on the consequences of the decision to the public

interest in resource protection. Higginson v. Yamhill County, supra, (where record showed adequate quarry sites in area, Goal 5 did not require county to designate petitioner's property for quarry purposes). Consequently, whether some other findings adopted by the county are flawed in certain respects is not significant. Heilman v. City of Roseburg, 30 Or App 71, 77, 591 P2d 390 (1979); Marracci v. City of Scapoose, 26 Or App 131, 135, 552 P2d 552 (1976).

Petitioner next challenges certain findings which describe the negative energy consequences of allowing the mining use. Petitioner claims the findings are inadequate because they fail to compare these consequences with those that would result from use of the site for purposes other than mining. However, we again do not believe such findings are necessary to support the challenged decision. Denial of the proposal under Goal 5 does not depend on whether or not use of the site for aggregate extraction will have energy consequences different from some other use. Rather, the county's decision is grounded on the determinations that (1) mining in this area will have significant adverse impacts on a conflicting use and (2) adequate supplies of the resource are available at nearby sites which do not present such conflicts. No purpose would be served by requiring the county to adopt additional findings in response to this challenge.

Petitioner's final challenge directs our attention to the county's admittedly speculative findings on the economic costs

to the quarry operator if conditional approval of QM zoning should be granted. The cited findings discuss conditions which might be imposed to protect adjacent residences and conclude that such conditions would impose severe costs on the operator. See Record at 55-57. However, we again fail to see why the adequacy or inadequacy of these findings is critical to the decision in issue. Regardless of whether the costs to the operator of mining the site under county approval would be high or low, the county could still disapprove the proposal on grounds it imposed unacceptable costs on the nearby residences (the conflicting use). OAR 660-16-010(2). As we understand it, this is precisely the rationale underlying the challenged order. Accordingly, we proceed no further concerning this claim.

The second assignment of error is denied.

THIRD ASSIGNMENT OF ERROR

In this assignment of error petitioner claims the county followed improper procedure prior to adopting Order No. 84-9-26-9. Specifically, petitioner claims the county erred in refusing to first reopen the record for additional evidence pertinent to the ESEE analysis. The petition states:

> "Mobile Crushing Company requested a reopening of the hearing for evidence on the consequences of fully allowing the conflicting residential uses on the Goal 5 Protected Resource Use. This evidence would necessarily have included any evidence on any remaining substantial beneficial use of the property including any limited quarry operations under a conditional use permit. Lane County denied the request to reopen the hearing. (Citations omitted).

* * *

> "The inadequate findings show that the hearing should have been reopened for evidence on the impact of the residences on the resource site and the explanation of why those residences are of sufficient importance to justify denying use of the resource. This Board should direct Lane County to reopen the hearing on what will be a third attempt to create adequate findings. Lane County should not be able to avoid this requirement by stating that no evidence is better than hypothetical evidence." Petition at 13-14 (citation omitted).

Petitioner offers no legal argument in support of this claim and we find it unpersuasive. Petitioner and its legal counsel were undoubtedly aware of the applicability of Goal 5 to the rezoning request when the county conducted the hearings resulting in the original rezoning denial, Order No. 83-8-24-9. Indeed, the record indicates the Lane County Commission held a de novo evidentiary hearing specifically on the Goal 5 issue prior to adopting that order. Petitioner clearly had an opportunity to make a record on the goal issue.

Our remand of Order No. 83-8-24-9 found deficiencies in the Goal 5 findings adopted by the county in support of its rezoning denial. However, nothing in the remand order required the county to take additional evidence relating to the goal.[15] Under the circumstances, the county's decision to permit only legal argument concerning the sufficiency of the proposed supplemental findings was not error.

The third assignment of error is denied.

Based on the foregoing, the county's decision is affirmed.

FOOTNOTES

1

The F-2 zone designates quarrying in conjunction with farm or forest use as a permitted use. Small-scale quarrying for offsite use requires issuance of a conditional use permit. Petitioner's proposal, however, requires rezoning to add a QM designation because of the magnitude of the intended use.

2

In Card v. Flegel, supra, the reclassification of the land during the pendency of an appeal rendered the appeal moot because the use sought by petitioner was allowed under the new classification. Here, in contrast to Flegel, the intervening zone change to F-2 has not obviated petitioner's need to obtain further zoning approval (i.e., the QM overlay designation) before commencing the intended use.

3

After oral argument, the parties provided supplemental materials on the question whether the zoning revisions adopted in February, 1984 and later acknowledged by LCDC were intended to apply to petitioner's rezoning application. We raised this question because the application was initially denied by the county in 1983 under ordinances predating the February, 1984 revisions.

The supplemental materials do not provide a clear answer to the question. In either event, however, the mootness claim must be rejected since (1) if the prior, unacknowledged plan and ordinances govern, Goal 5 must be considered an approval criterion of petitioner's (QM) rezoning proposal, ORS 197.175(2)(c) and (2) if the acknowledged measures govern, Section 6.216(2) of the acknowledged QM district requires evaluation of the proposal "through the Goal 5 Administrative Rule Conflict Resolution Process."

4

The steps taken by petitioner's argument seem to be as follows:

1. The county commission's sole basis for denying the rezoning request was that Goal 5 required protection of conflicting uses (rural residences) near the quarry site;

2. While our remand in Mobile Crushing Co. v. Lane County, supra, was pending before the county

commission, LCDC acknowledged the county's plan and implementing measures as in compliance with the statewide goals;

3. Pursuant to ORS 197.175(2)(d) the effect of the intervening acknowledgement was that the acknowledged plan and implementing measures became the controlling land use authorities in Lane County;

4. Given ORS 197.175(2)(d), the challenged order could not rely on Goal 5 as a basis for denying the requested rezoning because the order was adopted after acknowledgement;

5. In response to petitioner's rezoning request, the county hearings officer made findings of comprehensive plan compliance in November, 1981 and those findings were not appealed to the governing body by opponents of the application;

6. The county has not shown that the plan acknowledged by LCDC in September 1984 differs in any significant respect from the plan in force when the hearings officer's findings of plan compliance were adopted; and

7. Therefore, under ORS 197.175(2)(d), the county's reliance on Goal 5 in Order No. 84-9-26-9 was impermissible; that order should be reversed and the county should be directed to approve the zone change in accord with the action of the hearings officer. Petition at 3-4.

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[5] Apart from the above, petitioner's argument invites us to make an unwarranted assumption, i.e., that the plan acknowledged by LCDC did not differ in any material respects from the plan in force when the hearings officer entered the findings of plan compliance. With respect to this point, we believe it is petitioner's obligation to demonstrate identity, or at least substantial equivalence, between the plan considered by the hearings officer and the plan subsequently acknowledged by LCDC. See ORS 197.350(1). Petitioner, however, would place the burden on the county to demonstrate significant dissimilarity between the two plans and to adopt a finding to that effect. Petitioner cites no authority for this proposition and we decline to endorse it.

[6] In pertinent part, Goal 5 (OAR 660-15-000) provides:

"Goal: To conserve open spaces and protect natural and scenic resources.

"Programs shall be provided that will: (1) insure open space, (2) protect scenic and historic area 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.

"* * * * *"

[7] According to OAR 660-16-005 a conflicting use is "one which, if allowed, could negatively impact a Goal 5 resource site." Notably, the rule does not solely protect "resource sites" from the harmful consequences of "conflicting uses." Another provision states "where conflicting uses have been identified, Goal 5 resource sites may impact those uses. These impacts must be considered in analyzing the economic, social, environmental and energy (ESEE) consequences." Thus, a balancing process is envisioned. See also OAR 660-16-010.

[8] Alternatively, the rule allows a conflict to be resolved by protecting the resource site and prohibiting all conflicting uses, OAR 660-16-010(1), or by limiting conflicting uses in certain ways in order to "protect the resource site to some desired extent." OAR 660-16-010(3).

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[9] OAR 660-16-010(2) states:

> "(2) Allow Conflicting Uses Fully: Based on the analysis of ESEE consequences and other Statewide Goals, a jurisdiction may determine that the conflicting use should be allowed fully, notwithstanding the possible impacts on the resource site. This approach may be used when the conflicting use for a particular site is of sufficient importance, relative to the resource site. Reasons which support this decision must be presented in the comprehensive plan, and the plan and zone designations must be consistent with this decision."

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[10] In its brief, the county claims OAR 660-16-010 impermissibly goes beyond the scope of Goal 5 and therefore cannot serve as authority in the interpretation of the goal. However, the county's sole explanation for this sweeping claim is that the goal includes the following language:

> "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."

We fail to see why this language prevented LCDC from adopting the interpretative rule in question. See Coates v. LCDC, 67 Or App 504, 679 P2d 898 (1984) (concluding that the requirements of OAR 660-16-010 are consistent with this Board's interpretation of Goal 5).

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[11] We note OAR 660-16-010(2) authorizes allowance of a conflicting use despite the impacts on a resource site based on the ESEE analysis and other statewide goals. Petitioner seems to argue that the rural residences (i.e., the conflicting uses) protected by the county's decision are not consistent with the statewide goals, e.g., Goal 4, because the area is rural forest land. See Petition at 7. However, the acknowledged F-2 zoning district allows even new non-forest residences on "vacant legal lots." Section 16.211(5)(9), Lane County Code. We believe LCDC's acknowledgement of the F-2 zone entitles the rural residences near the quarry site to status as "conflicting uses." We need not consider whether or under what

circumstances that status would be denied to rural residences in an unacknowledged zone.

12

OAR 660-16-005 includes the following broad language:

> "A determination of the ESEE consequences of identified conflicting uses is adequate if it enables a jurisdiction to provide reasons to explain why decisions are made for specific sites."

The county's decision is well within this very general requirement.

13

Although not stated in the petition, an argument could be made that OAR 660-16-010(2), which seems to lend support to the county's Goal 5 interpretation, is not intended as a means of protecting established conflicting uses from resource proposals on nearby sites (as here). Instead, the text might be read to apply only where the proposal would "allow" a new conflicting use on or near a resource site. Compare OAR 660-16-010(1) (locality can "protect the resource site") with OAR 660-16-010(2) (locality can "allow conflicting uses fully"). See also the definition of "conflicting use" in OAR 660-16-005.

We have considered such an interpretation of the rule and rejected it. The text is concededly ambiguous. However, we doubt LCDC (which did not participate in this appeal) intended the Goal 5 conflict resolution process to cover only resource sites and future conflicting uses. Had that been the agency's intent, clear language to that effect could easily have been used. If our approach to this question is in error, the agency can enact a remedial rule, or, if this case is appealed, advise the appellate courts of the correct interpretation.

14

Petitioner takes particular issue with the county's finding that, because other quarries exist in the area, denial of Mobile Crushing Company's proposal will not result in increased costs for aggregate. Petition at 9-10. Petitioner points out that this finding is at odds with a finding in Order No. 83-8-24-9 stating:

> appellant's witnesses testified very generally that they preferred Fall Creek Quarry Rock, and that the quarry was closer to their homes than other quarries."

We fail to see legal significance in the fact that the quoted finding was previously made by the county. It does not contradict the county's more recent finding on the availability and adequacy of alternative resource sites. Instead, the prior finding merely recites evidence in the record, i.e., that certain witnesses testified about their preference for Fall Creek Quarry Rock. Petitioner does not explain why such testimony prevents the county from now concluding that adequate alternative sites exist in the area.

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15 In Morrison v. City of Portland, 70 Or App 437, ___ P2d ___ (1984) this Board remanded an order approving a variance on grounds the order set forth inconsistent and unclear interpretations of the variance approval criteria. On remand the locality adopted supplemental findings interpreting the criteria and applying the revised interpretation to the facts in the record. Petitioners requested the opportunity to present additional evidence pertinent to the revised interpretation but the request was denied. Although we subsequently upheld that denial, Morrision v. City of Portland, ___ Or LUBA ___, LUBA No. 84-022, (June 15, 1984), the Court of Appeals disagreed. The Court held that petitioner had a right, under Fasano v. Washington County, 264 Or 574, 507 P2d 23 (1973), to present evidence once the decisionmaker clearly articulated the governing standards. 70 Or App at 441-42.

The present case is distinguishable from Morrison v. City of Portland, supra. Here the governing criteria are not locally adopted ordinance or plan provisions, but are instead embodied in a statewide planning goal adopted by a state agency. Further, our remand in LUBA No. 83-092 did not require the county to clarify or reformulate the mandated criteria, but rather to more fully explain how the facts related to those criteria. We do not read Fasano or Morrison to require an opportunity to present evidence in such a circumstance.