

BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

JUL 19 8 35 AM '85

3 OWEN PANNER, JOAN HALE, SUSAN )  
 LANG, EUGENE WEGNER, SALLEY )  
 4 WEGNER, FRED BUCHANAN, JOHN )  
 SKILLERN, J. GLEN COUGILL, )  
 5 DOUGLAS MUCK, FRANK GILCHRIST, )  
 STEPHEN ROGERS, WILLIAM D. )  
 6 THOMASON and ANN R. THOMASON, )  
 )  
 7 Petitioners, )  
 )  
 8 vs. )  
 )  
 9 DESCHUTES COUNTY, )  
 )  
 10 Respondent, )  
 )  
 11 and )  
 )  
 12 ROSE & ASSOCIATES, )  
 )  
 13 Respondent- )  
 Participant. )  
 14

LUBA No. 85-004

FINAL OPINION  
AND ORDER

15 Appeal from Deschutes County.

16 Steven L. Pfeiffer, Portland, and Corrine C. Sherton,  
17 Salem, filed the petition for review and Corrine C. Sherton  
argued the cause on behalf of petitioners. With them on the  
brief were Sullivan, Josselson, Roberts, Johnson & Kloos.

18 Robert S. Lovlien, Bend, filed a response brief and argued  
19 the cause on behalf of Respondent-Participant Rose & Associates.

20 No appearance by Deschutes County.

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

23 REMANDED 07/19/85

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

1 Opinion by Kressel.

2 NATURE OF THE DECISION

3 Petitioners appeal the county's approval of a zone change  
4 from Surface Mining Reserve (SMR) to Surface Mining (SM). The  
5 rezoning affects a 20 acre portion of Rose Pit, a 497 acre  
6 tract owned by Respondent Rose & Associates.

7 FACTS

8 Rose Pit is designated SMR on the Deschutes County  
9 Comprehensive Plan and Zoning Map. Properties to the north and  
10 west of the 20 acres in question are zoned Exclusive Farm Use  
11 (EFU). A solid waste landfill (Knott Pit) is northeast of the  
12 site, about a half mile away. Crushed rock used by the county  
13 road department is stockpiled there.

14 The typical parcel size in the area is about 20 acres.  
15 There are seven dwellings within one half mile of the proposed  
16 mining site and four dwellings within one quarter mile.

17 Respondent Rose & Associates filed the rezoning  
18 application<sup>1</sup> in April, 1983. Although 20 acres<sup>2</sup> are  
19 affected, only a 200' x 200' portion of the site is to be mined  
20 initially. A portion of the crushed rock produced at the mine  
21 is to be sold to Deschutes County and stored at Knott Pit.

22 The county hearings officer approved the application  
23 subject to various conditions. The conditions (1) require  
24 approval of a site plan prior to commencement of mining  
25 satisfaction of state and county air quality and noise  
26 pollution standards, (2) limit mining to no more than 30 days

1 per year, and (3) impose limitations on the days and hours of  
2 mining operations.

3 On appeal by opponents of the application, the governing  
4 body affirmed the decision of the hearings officer. A final  
5 order incorporating the findings of fact, conclusions of law  
6 and conditions of approval set forth by the hearings officer  
7 was entered in December, 1984.

8 Surface Mining Regulations

9 The comprehensive plan was adopted in November, 1979. The  
10 plan establishes two classifications for inventoried aggregate  
11 and mineral resource sites: Surface Mining (SM) and Surface  
12 Mining Reserve (SMR). The former was applied to active mining  
13 sites at the time of plan adoption. Inactive or undeveloped  
14 sites were classified SMR. However, the plan states: "It shall  
15 be assumed land designated SMR will ultimately be mined."  
16 Deschutes County Comprehensive Plan at 129. Criteria for the  
17 conversion of land from SMR to SM (quoted later in this  
18 opinion) are set forth in Policy 5 of the plan's Mineral and  
19 Aggregate Resource Element.

20 In recognition of the potential for conflicts between  
21 resource extraction and neighboring land uses, the county's  
22 plan establishes criteria for assigning a "conflict level" to  
23 each resource site. In general, the plan encourages resource  
24 extraction at sites assigned higher conflict levels, so that  
25 reclamation for non-resource use can begin as soon as  
26 possible. At the same time, stringent conditions can be

1 imposed on mining activities at high conflict-level sites.<sup>3</sup>

2 Zoning regulations have been adopted to carry out the  
3 foregoing plan policies. In the SM district, mining is  
4 permitted outright. However, detailed site and reclamation  
5 plans must be approved before operations begin. The purpose of  
6 the SMR district, on the other hand, is "to protect surface  
7 mining resources that will be needed by the community in the  
8 near future while permitting compatible development in the  
9 interim." Section 4.110(1), Deschutes County Zoning  
10 Ordinance. Generally, the permissible uses in the SMR district  
11 parallel those set forth in state law governing exclusive farm  
12 use zones.

13 Acknowledgement Status

14 The county's efforts to obtain the state's acknowledgement  
15 of its plan and implementing measures have yet to be  
16 successful. Litigation instituted by Respondent Rose &  
17 Associates challenged the surface mining measures before this  
18 Board and LCDC. See Coats v. Deschutes County, 3 Or LUBA 69  
19 (1981). In Coats v. LCDC, 67 Or App 504, 679 P2d 898 (1984),  
20 the Court of Appeals overturned LCDC's acknowledgement of the  
21 county's plan and zoning ordinance on grounds neither set forth  
22 a conflict resolution program meeting the requirements of  
23 Statewide Goal 5 (Open Spaces, Scenic and Historic Areas, And  
24 Natural Resources). In particular, the court noted the  
25 measures permitted approval of conflicting uses (e.g.  
26 residences) near aggregate resource sites without consideration

1 of the potential consequences to the resource. The Court of  
2 Appeals stated:

3 "We agree with appellant that the amended ordinance  
4 fails to cure the deficiencies in the plan identified  
5 by LUBA and adopted by LCDC. First, there is no  
6 requirement that the economic, social, environmental  
7 and energy consequences (called in land use jargon  
8 'ESEE') of potential conflicting uses be considered  
9 before they are allowed. Second, the plan and  
10 ordinance do not provide a process for determining  
11 whether the use should be allowed and, if so, under  
12 what, if any, conditions." 67 Or App at 510 (emphasis  
13 in original).

14 In response to the remand in Coats, LCDC issued a  
15 continuance order in March, 1985. The order includes the  
16 following findings:

17 "3. On February 1, 1985, the Commission reconsidered  
18 the compliance of the plan and implementing  
19 measures with the Statewide Planning Goals.  
20 Based on its review, the Commission finds that  
21 Deschutes County's comprehensive plan and land  
22 use regulations comply with Statewide Planning  
23 Goals for the reasons set forth in the  
24 Commission's previous Acknowledgment and  
25 Continuance Orders (Exhibits A and B) readopted  
26 by the Commission on February 1, 1985 and  
27 incorporated herein except as determined in the  
28 Court of Appeals' decision in Coats v. LCDC, 67  
29 Or App 504, March 28, 1984.

30 "4. Deschutes County's comprehensive plan and land  
31 use regulations do not yet comply with Statewide  
32 Planning Goal 5 as applied to existing and  
33 potential surface mining sites for the reasons  
34 set forth in the Court of Appeals' decision  
35 reviewed by the Commission on February 1, 1985,  
36 and incorporated herein (Exhibit C)."

### 37 FIRST ASSIGNMENT OF ERROR

38 Petitioners first claim the decision must be remanded  
39 because the governing body failed to consider certain evidence  
40 prior to adopting the final order. The evidence in question

1 consists of numerous documents pertaining to the site's zoning  
2 history, the legislative history of the county's comprehensive  
3 plan and certain contracts for the purchase of aggregate. We  
4 have previously held these documents constitute part of the  
5 record in this case. Order on Objection to Record, March 6,  
6 1985. Petitioners claim the evidence was disregarded by the  
7 governing body and that accordingly, the decision cannot be  
8 "supported by substantial evidence in the whole record." See  
9 ORS 197.835(8)(a)(C).

10 We reject this claim for a number of reasons. First,  
11 petitioners misconstrue ORS 197.835(8)(a)(C). Although a land  
12 use decision may be reversed or remanded because it is not  
13 supported by substantial evidence in the whole record, the  
14 statute does not make the whole record required reading by  
15 local decisionmakers. Instead, it requires this Board to  
16 decide whether the evidence relied on by the local  
17 decisionmakers is substantial, i.e., evidence "a reasonable  
18 mind could accept as adequate to support a conclusion."  
19 Homebuilders Association of Metropolitan Portland v.  
20 Metropolitan Service District, 54 Or App 60, 62, 633 P2d 1320  
21 (1981). Moreover, we will undertake this inquiry when, and  
22 only when, a petitioner directs a substantial evidence  
23 challenge at a particular aspect of a decision. If a  
24 petitioner contends (as we assume is the case here) that  
25 certain evidence in the record undermines a decision's factual  
26 foundation under ORS 197.835(8)(a)(C), specific citations to

1 that evidence must be presented. The petition here is devoid  
2 of the particularity required. Accordingly, we reject the  
3 challenge.

4 We conclude petitioners have misinterepreted ORS  
5 197.835(8)(a)(C).<sup>4</sup> However, even if their interpretation of  
6 the statute is correct, we must still reject the challenge. As  
7 noted, the basis for the claim is that certain evidence in the  
8 record was wholly disregarded by the governing body of  
9 Deschutes County. However, the proof of the claim takes the  
10 form of indirect evidence we find unconvincing.<sup>5</sup>  
11 Accordingly, the factual foundation for the claim has not been  
12 established.

13 The first assignment of error is denied.

14 SECOND ASSIGNMENT OF ERROR

15 Petitioners claim the rezoning decision violates Statewide  
16 Goal 3 (Agricultural Lands). The goal requires the  
17 preservation of agricultural land by the adoption of exclusive  
18 farm use zoning pursuant to ORS Chapter 215. The goal is  
19 violated, according to petitioners, because the county's SM  
20 district allows uses not included in the statutory list of  
21 permissible uses of agricultural land. In particular, they  
22 claim the following non-farm uses are permitted outright in the  
23 SM district but are not permissible under ORS 215.213: (1)  
24 plants for concrete batching, mineral refining, hot mix asphalt  
25 and concrete products, (2) sale of the products produced from  
26 the site, and (3) buildings, structures, apparatus, equipment

1 and appurtenances necessary for the above. See Section  
2 4.100(2)(F), (G) and (H), Deschutes County Zoning Ordinance.  
3 The county may not permit these uses on the 20 acres in  
4 question, petitioners argue, until a valid exception to Goal 3  
5 is taken.

6 The county's order concedes Goal 3 is applicable to the  
7 property in question. However, the Goal 3 discussion is  
8 limited to whether the proposed use will be compatible with  
9 nearby uses, including farming operations. There is no  
10 discussion of the relationship between other uses allowed in  
11 the SM district and the provisions of ORS 215.213.

12 Respondent Rose & Associates offers two answers to  
13 petitioners' challenge. First, it claims LCDC has acknowledged  
14 the county's plan and ordinance with respect to Goal 3;  
15 therefore the goal challenge can not now be presented. Second,  
16 Rose & Associates insist no Goal 3 exception is required  
17 because the approved use is allowable under ORS 215.213(2)(d).

18 We sustain petitioners' challenge under Goal 3. Although  
19 acknowledgement would foreclose a goal challenge to the zone  
20 change at issue here, ORS 197.175(2)(d); Byrd v. Stringer, 295  
21 Or 311, 661 P2d 1332 (1983), LCDC has yet to acknowledge the  
22 county's plan and implementation measures. As noted earlier,  
23 the acknowledgement issued by the commission was remanded by  
24 the Court of Appeals in Coats v. LCDC, supra. The continuance  
25 order entered in response to the remand indicates Goal 3  
26 compliance has been achieved, but the order does not constitute



1 final, i.e., judicially reviewable, acknowledgement.<sup>6</sup>

2 Accordingly, the county's rezoning is vulnerable to  
3 petitioners' Goal 3 challenge. See Woodcock v. LCDC, 51 Or  
4 Appp 577, 584, 626 P2d 901 (1981), rev den 291 Or 151.

5 The Goal 3 challenge is not sufficiently answered by  
6 Respondent Rose & Associates' argument the proposed operation  
7 is a permissible non-farm use under ORS 215.213(2)(d). The  
8 statute authorizes exploration, mining and processing of  
9 aggregate and other subsurface resources in an EFU district.  
10 As we held in Gearhard v. Klamath County, 7 Or LUBA 27, 33  
11 (1983), however, the term "processing" in the statute is not  
12 broad enough to encompass a concrete batching plant, mineral  
13 refining plant, hot mix asphalt plant, or concrete products  
14 plant, the sale of those products, or the buildings and  
15 equipment necessary for the above. All of these uses are  
16 expressly allowed in the county's SM district. See Section  
17 4.100(2)(F)(G) and (H), Deschutes County Zoning Ordinance.  
18 Since the rezoning to SM would allow uses in addition to  
19 statutorily permitted uses,<sup>7</sup> an exception to Goal 3 must be  
20 taken. See Gearhard v. Klamath County, supra.

21 The second assignment of error is sustained.

## 22 THIRD ASSIGNMENT OF ERROR

23 Petitioners next claim the rezoning fails to comply with  
24 Statewide Goal 5 in various respects. The goal is "to conserve  
25 open space and protect natural and scenic resources."  
26 Inventories of the location, quality, and quantity of such

1 resources must be prepared. Inventoried resources must be  
2 preserved unless conflicting uses have been identified. In  
3 such cases, "...the economic, social, environmental and energy  
4 consequences of the conflicting uses shall be determined and  
5 programs developed to achieve the goal."

6 Petitioners present a multi-faceted challenge under Goal 5  
7 and OAR 660-16-000 et seq, an interpretive rule adopted by  
8 LCDC. However, Respondent Rose & Associates offers a single  
9 response. Its brief states:

10 "Since the Land Conservation and Development  
11 Commission has found that the Surface Mining Element  
12 of the Deschutes County Comprehensive Plan is in  
13 compliance with Goal 5 except for the reasons set  
14 forth in Coats v. LCDC, supra, the participants do not  
15 agree that each zone change must go through the four  
16 step analysis of Goal 5 before approval." Brief of  
17 Respondent Rose & Associates at 4.

18 Respondent incorrectly characterizes the effect of the  
19 continuance order adoption by LCDC in March, 1985. As already  
20 stated, we do not construe the order as a form of  
21 acknowledgement. Since the county's measures have yet to be  
22 acknowledged, the Goal 5 challenges presented here are  
23 cognizable. We reject the argument (implicit in the  
24 above-quoted portion of respondent's brief) that the county's  
25 land use measures should be considered acknowledged with  
26 respect to parts of Goal 5.

Based on the foregoing, we turn to the Goal 5 challenges  
set forth in the petition. The challenges can be summarized as  
follows: (1) although the county concedes the site has value

1 as a wildlife habitat, the decision does not specify the nature  
2 and extent of this protected resource or evaluate the  
3 consequences of allowing the site to be mined; (2) the rezoning  
4 opens a 20 acre parcel to surface mining but the actual extent  
5 of the parcel's aggregate resources is unknown and (3) the  
6 final order does not fully address the consequences of allowing  
7 the mining proposal vis a vis conflicting uses (nearby farm  
8 operations and residences). We take up these challenges below.

9 Wildlife Habitat

10 Wildlife areas are resources within the protection of Goal  
11 5. The record indicates that eagles, hawks, deer, coyotes,  
12 bobcats and other wildlife have been sighted on or near the 20  
13 acres in question. However, the final order addresses the  
14 subject in these general terms:

15 "During the course of the hearing and decisionmaking  
16 process, many issues have been raised with respect to  
17 the proposed site. Many citizens who live in nearby  
18 residential developments have vocalized the need to  
19 preserve this space as a wildlife habitat. There is  
20 undoubtedly a number of species of animal which  
21 inhabit the general area. This particular site itself  
22 is primarily level with only a very few trees.  
23 Mostly, this site consists of sagebrush and a larger  
24 outcropping of rocks to the west. Mr. R. L. Coats  
25 presented evidence in favor of the application  
26 concerning wildlife which inhabit areas closely  
adjacent to other active surface mines. On the issue  
of wildlife, there is a considerable disagreement as  
to the effects of a surface mine of this size.

23 "Mr. R. L. Coats is a long time mine operator in  
24 Deschutes County. He is interested in this site as  
25 the person who will operate the mine. I [the Hearings  
26 Officer] cannot discount his experience as one who  
observes mining sites in all three phases; before,  
during and after. Therefore, I find that the  
operation of a [sic] open pit mine will not adversely

1 affect the wildlife patterns in the area as testified  
2 to by Mr. Coats." Record at 16-17.

3 We agree with petitioners that the county's treatment of  
4 the wildlife issue does not pass muster under Goal 5. The  
5 recognition that a number of species inhabit the area is  
6 sufficient to trigger the goal's conflict resolution  
7 mechanism.<sup>8</sup> Thus, the county was obligated to evaluate the  
8 economic, social, environmental and energy (ESEE) consequences  
9 of allowing mining on the site.<sup>9</sup> This evaluation could not  
10 be undertaken, much less completed, without a full discussion  
11 of the site's value as a wildlife area. The conclusional  
12 statement that "...operation of a [sic] open pit mine will not  
13 adversely affect the wildlife patterns in the area as testified  
14 to by Mr. Coats," Record at 17, is of little assistance. The  
15 statement neither identifies the nature and extent of the  
16 wildlife patterns nor explains (i.e., through the ESEE  
17 analysis) why those patterns will not be adversely affected.  
18 As a consequence, a remand of the decision is in order.<sup>10</sup>

#### 19 Extent of the Aggregate Resource

20 As noted earlier, the rezoning application concerns a 20  
21 acre tract, but the actual mining proposal affects a far  
22 smaller area. The findings state the site contains "a  
23 marketable quantity and quality of aggregate," Record at 17,  
24 but do not describe the extent of the resource in detail. This  
25 lack of specificity sets the stage for petitioners' next  
26 challenge under Goal 5.

1 As we understand the argument, the county may not rezone  
2 the entire 20 acres to the SM classification unless the record  
3 contains inventory data as to the specific location, quality  
4 and quantity of the resource and the findings discuss the  
5 reliability of the data. The petition states:

6 "These unanswered questions as to the specific  
7 location, quality and quantity of the aggregate  
8 resource on the 20 acres made available for immediate  
9 extraction must be assessed before the county can  
10 undertake the remainder of its Goal 5 tasks; that is,  
11 an adequate analysis of the existing and potential  
12 conflicts, the ESEE consequences of such conflicts and  
13 what measures are available, if any, to resolve these  
14 conflicts and 'achieve the goal.' If such evidence is  
15 available and relied upon by the county to complete  
16 its Goal 5 obligations, it must recite that which it  
17 chose to believe and rely [sic]. Its failure to do so  
18 in this instance leaves this board with no choice but  
19 to return the matter back to the county for such  
20 additional work." Petition at 19-20.

14 We have previously held that the tract's value as a  
15 wildlife area requires the county to conduct an ESEE analysis  
16 of the conflicts between aggregate extraction and the wildlife  
17 resource. In our view, any such analysis would require  
18 discussion of the nature and extent of both resources and the  
19 tract's relative value for each. To the extent this is the  
20 focus of petitioners' criticism of the final order, the  
21 criticism has merit.

22 On the other hand, we do not accept the idea, also  
23 suggested in the petition, that Goal 5's inventory requirement  
24 alone calls for detailed findings as to the location, quality  
25 and quantity of the resource. As a general rule, a decision  
26 that a given resource warrants protection under Goal 5 must be

1 supported by substantial evidence in the form of inventory  
2 data, but the evidence need not be reiterated in the findings.

3 Other Conflicting Uses

4 As noted earlier, Goal 5 provides that where conflicting  
5 uses for land protected by the goal have been identified, the  
6 ESEE consequences of the conflicting uses must be determined  
7 and programs to achieve the goal must be developed. Although  
8 the focus of the goal's conflict resolution mechanism is on  
9 resource conservation, LCDC has adopted an interpretive rule  
10 requiring the ESEE analysis to address the impacts on the  
11 conflicting use as well as on the resource. OAR 660-16-005  
12 provides, in pertinent part:

13 \* \* \*

14 "A conflicting use is one which, if allowed, could  
15 negatively impact a Goal 5 resource site. Where  
16 conflicting uses have been identified, Goal 5 resource  
17 sites may impact those uses. These impacts must be  
18 considered in analyzing the economic, social,  
19 environmental and energy (ESEE) consequences."

20 During the county's rezoning proceedings, petitioners  
21 identified two conflicting non-resource uses<sup>11</sup> affected by  
22 the mining proposal: nearby residences and farm operations.  
23 With respect to those uses, their claim here is that the  
24 county's order fails to conduct the type of ESEE analysis  
25 required by LCDC's interpretive rule. We agree.

26 Although the county's order recognizes that mining will  
27 have some adverse impacts on nearby residences and farms, and  
28 that conditions of approval are therefore warranted, the order

1 does not discuss the land use conflicts in sufficient scope.  
2 OAR 660-16-005 requires consideration of the economic, social,  
3 environmental and energy consequences of allowing surface  
4 mining of the site. Some of these areas of inquiry are  
5 reflected in the county's order (notably the environmental  
6 consequences) while others are not mentioned at all.<sup>12</sup> As a  
7 result, a remand is necessary.

8 FOURTH ASSIGNMENT OF ERROR

9 This assignment of error arises under Statewide Goal 6.  
10 The goal is "to maintain and improve the quality of the air,  
11 water and land resources of the state." Discharges associated  
12 with new development may not, when combined with discharges  
13 from existing developments, "threaten to violate or violate  
14 applicable state or federal environmental quality statutes,  
15 rules and standards." Petitioners assert the record includes  
16 evidence, relevant under the goal, that the proposed mining  
17 operation would exceed state and local standards governing air  
18 quality and noise pollution. They contend this evidence  
19 obligated the county to obtain proof the standards could be met  
20 before the rezoning was approved.

21 The county's rezoning order acknowledges the factual  
22 dispute over whether the proposed use can satisfy the  
23 applicable environmental standards. The dispute is resolved by  
24 conditioning the zone change on satisfaction of "all Department  
25 of Environmental Quality and county air and noise standards."  
26 Record at 27. Although this portion of the final order is

1 unclear as to whether compliance must be shown before or after  
2 mining operations actually commence, another condition  
3 specifies that site plan approval must be obtained prior to  
4 commencement of mining activities. Under the Deschutes County  
5 Zoning Ordinance, site plan approval is predicated on findings,  
6 among others, that air and water quality and noise levels meet  
7 the requirements of federal, state and local law. See Section  
8 4.100(7)(C), Deschutes County Zoning Ordinance.

9       Petitioners contend the county's land use decision evades  
10 Goal 6 rather than concluding the Goal is satisfied. However,  
11 we find no error in the county's approach. As we understand  
12 the decision, approval of the application is to be granted in  
13 two stages. The first involves a conditional rezoning from SMR  
14 to SM. The second involves detailed review of the site and  
15 reclamation plans proposed by the mine operator, including  
16 review for conformance with pertinent rezoning conditions.  
17 Notably, the procedures governing notice and participation by  
18 interested persons are equivalent in both stages.<sup>13</sup> Thus,  
19 the county has not attempted to evade Goal 6, but has assigned  
20 the task of assuring compliance with it to a separate part of  
21 the decisionmaking process. We find no error. Turner v. Lane  
22 County, 8 Or LUBA 234 (1983).

23       The fourth assignment of error is denied.

24 FIFTH ASSIGNMENT OF ERROR

25       In this assignment of error petitioners direct our  
26 attention to the criteria governing conversion of land from the



1 SMR to the SM designation. The criteria are set forth in  
2 Policy No. 5 of the comprehensive plan's Surface Mining  
3 Element. Policy No. 5 reads as follows:

4 "5. Changes from a Surface Mining Reserve (SMR) Zone  
5 to a Surface Mining (SM) Zone shall occur upon  
findings by the County that:

6 "(a) The site is needed to meet the next  
7 five-year resource requirements of the  
8 County (not the individual operator whose  
9 resource or financial requirements may be  
10 met for many years by this one site). In  
11 determining the resource requirements,  
consideration shall be given to population  
12 growth, area needs, fluctuations in the  
13 construction industry, the amount of  
14 materials with active site permits and the  
15 sometimes transient nature of mining  
16 activities.

17 "(b) This site is in the closet [sic] proximity  
18 to the utilization area, or is otherwise the  
19 most economical available at the time. Some  
20 withholding of materials by resource owners  
21 could require additional area be  
22 designated. Also, more than one resource  
23 site of a kind should be available in order  
24 that a monopoly not occur.

25 "(c) As a condition of the zone change approval  
the operator and/or owner shall submit a  
26 site plan (includes a reclamation plan)  
which is adequate to mitigate the potential  
27 conflicts. Operating, reclamation or site  
28 plan conditions or standards shall consist  
29 of reasonable conditions or standards used  
30 in the State to mitigate the adverse  
31 environmental and aesthetic effects of  
32 surface mining although specific  
33 requirements shall vary with the conflict  
34 level found to exist at the time. Conflict  
35 level IV surface mines shall meet stringent  
36 conditions and standards, and these  
37 conditions shall exceed those normally used  
38 at sites of lesser conflict levels.  
(Amended by Ordinance 80-203).

39 "(d) Pumice, cinders or other non-aggregate

1 materials not in scarce supply, which are  
2 needed for export in addition to local  
3 demand, shall have a lower burden of proof  
4 as regards criteria (a) and (b) above.  
5 However, sites with a conflict level of IV  
6 shall not be used for mining and those of  
7 conflict level III shall only be used when  
8 no other site is feasible and extraordinary  
9 precautions are taken.

6 "(e) Aggregate resources in conflict level IV  
7 areas shall be utilized as soon as a need  
8 for the material exists [See 5(a) and (b)]  
9 so as to eliminate the conflicts as soon as  
10 possible, prevent additional conflicts from  
11 developing, avoid uncertainty, remove  
12 possible effects on property values, and  
13 reclaim the mine area and designate this  
14 area for uses which do not conflict with  
15 neighboring residences. This provision  
16 shall only apply to sites with a conflict  
17 level IV at the time of plan adoption by the  
18 County. Special restrictions such as  
19 off-site processing, limits on the length of  
20 concurrent reclamation and time limits on  
21 the length of the time mining will be  
22 permitted will be required."

15 Petitioners take issue with the county's findings in  
16 connection with these criteria. We take up each challenge  
17 below.

18 1. Need (Policy 5(a))

19 The county's findings under Policy 5(a) state:

20 "Policy No. 5 requires a finding that the site is  
21 needed to meet the next five year resource  
22 requirements of the county and that the site is in the  
23 closest proximity to the utilization area or is  
24 otherwise the most economical available at the time.  
25 The applicant's testimony was that Deschutes Ready-Mix  
26 has a contract with Deschutes County to deliver 25,000  
tons of crushed rock during the current fiscal year.  
It is true that part of that contract has already been  
filled. However, a significant portion of that  
contract has yet to be filled. Furthermore, the  
applicant's testimony bore out the fact that the

1 county is continually contracting for aggregate  
2 material. This aggregate material is stored at the  
3 Knott Pit Sanitary Landfill for use by the Deschutes  
4 County Road Department. There is no questions [sic]  
5 but that this site is in the closest proximity to the  
6 utilization area based upon the needs of the county.  
7 It is also clear that the county is in continual need  
8 of the resource which would be mined at this site."  
9 Record at 22.

10 Petitioners contend the finding is not responsive to the  
11 terms of Policy 5(a). We agree.

12 The policy requires analysis of the existing supply and  
13 anticipated need for aggregate. Consideration is to be given  
14 to "population growth, area needs, fluctuations in the  
15 construction industry, the amount of materials with active site  
16 permits and the sometimes transient nature of mining  
17 activities." However, the finding discusses none of these  
18 considerations, relying instead on the more general idea that  
19 "the county is continually contracting for aggregate  
20 materials." Record at 22. The policy is written in more  
21 specific (and more demanding) terms. A remand for the adoption  
22 of responsive findings is in order.<sup>14</sup>

23 2. Proximity to Utilization Area (Policy 5(b))

24 The county's finding under Policy 5(b) is in the  
25 above-quoted portion of the final order. The finding is that  
26 the proposed mining operation, which will produce rock used for  
road construction by the county, is a short distance from the  
county's aggregate stockpiling site (the Knott Pit Landfill).  
Petitioners attack the finding in two respects. First they  
claim it does not define general terms used in Policy 5(b),

1 such as "closest proximity" and "utilization area." Second,  
2 they argue the finding does not address alternate mining sites,  
3 which the record indicates should have been considered in  
4 connection with Policy 5(b). We reject both challenges.

5 Petitioners' first challenge asks more of the county's  
6 findings than the law requires. The criterion in 5(b) is not  
7 stated in such vague terms that it must be further refined  
8 before it can be applied in the decisionmaking process. See  
9 Andersen v. Peden, 284 Or 313, 587 P2d 59 (1978); Lee v. City  
10 of Portland, 57 Or App 798, 802-03, 646 P2d 662 (1982).

11 Moreover, the finding reasonably explains the basis on which  
12 the criterion is satisfied. Although the aggregate produced at  
13 the mine will no doubt eventually be used at distances from the  
14 stockpiling site, the term "utilization area" is broad enough  
15 to encompass that site. Were it otherwise, the county would be  
16 required to purchase aggregate on a project-by-project basis,  
17 only from the nearest source in each instance. We do not  
18 believe we should assume such a limitation was intended by  
19 those who adopted Policy 5(b).

20 The second challenge is similar in nature and equally  
21 without force. The criterion in policy 5(b) allows conversion  
22 from SMR to SM zoning if the site is in the closest proximity  
23 to the utilization area. Correspondingly, the county's finding  
24 is that the site is the closest to the utilization area. The  
25 existence of other sites might be relevant to a claim the  
26 finding is unsupported by substantial evidence, but that is not

1 the claim petitioners make. Instead, they seem to insist that  
2 unless the findings first define "utilization area," the county  
3 cannot conclude the site in question satisfies criterion 5(b)  
4 to any greater extent than do other mining sites. We disagree  
5 for the reasons stated above.

6 3. Site Plan Review (Policy 5(c))

7 Next, Petitioners point out that the final order misquotes  
8 the first sentence of Policy 5(c) of the plan's Surface Mining  
9 Element. The sentence reads:

10 "As a condition of the zone change approval the  
11 operator and/or owner shall submit a site plan  
12 (includes a reclamation plan) which is adequate to  
13 mitigate the potential conflicts."

14 The final order misquotes the policy by omitting the reference  
15 to the conditional aspect of the rezoning.

16 Petitioners launch two fruitless attacks on the disparity  
17 between the actual text of Policy 5(c) and the language  
18 appearing in the final order. First, they contend "the  
19 decision must be overturned since an applicable criterion was  
20 never applied to the proposal under review..." Petition at  
21 36. However, as noted earlier, the final order unmistakably  
22 adheres to the text of Policy 5(c) by conditioning the rezoning  
23 on submission of a site plan. Under the circumstances, the  
24 incorrect quotation of the policy in the final order amounts to  
25 no more than a clerical mistake.

26 Petitioners' second attack is of no greater substance. The  
argument seems to be that, regardless of the actual text of

1 Policy 5(c), the county was bound to apply the policy as  
2 misquoted in the final order. Thus, according to petitioners,  
3 the county could not condition the rezoning on submission of a  
4 site plan, as Policy 5(c) mandates, but was obligated to demand  
5 submission of the site plan in the course of the challenged  
6 proceedings. However, it is elementary that the county could  
7 not amend Policy 5(c) by misquoting it. Petitioners give far  
8 too much significance to a misprint.

9 In summary, we uphold the challenge under Policy 5(a) of  
10 the comprehensive plan's Surface Mining Element. The decision  
11 fails to explain why the 20 acres in question is needed to meet  
12 the county's aggregate resource requirements in the next five  
13 years. Although the policy expressly requires consideration of  
14 a number of factors in the determination of resource  
15 requirements, and although another plan provision specifically  
16 indicates proposals to convert the Rose Pit to an SM  
17 designation should be carefully scrutinized, the order does not  
18 reflect the necessary inquiries. A remand is therefore in  
19 order.<sup>15</sup>

20 The remaining challenges under Policy 5 are rejected.

21 SIXTH ASSIGNMENT OF ERROR

22 Petitioners' final contention arises under Section 10.025  
23 of the Deschutes County Zoning Ordinance. This section reads  
24 as follows:

25 "SECTION 10.025. REZONING STANDARDS. The applicant  
26 for a quasi-judicial rezoning must establish that the  
public interest is best served by a (sic) rezoning the

1 property. Factors to be demonstrated by the applicant  
2 are:

3 "(1) That the change conforms with the Comprehensive  
4 Plan, and the change is consistent with the  
5 Plan's introductory statement and goals.

6 "(2) That the change in classification for the subject  
7 property is consistent with the purpose and  
8 intent of the proposed zone classification.

9 "(3) That changing the zoning will presently serve the  
10 public health, safety and welfare considering the  
11 following factors:

12 "a. The availability and efficiency of providing  
13 necessary [sic] public services and  
14 facilities.

15 "b. The impacts on surrounding land use will be  
16 consistent with the specific goals and  
17 policies contained within the Comprehensive  
18 Plan.

19 "(4) That there has been a change in circumstances  
20 since the property was last zoned, or a mistake  
21 was made in the zoning of the property in  
22 question."

23 Petitioners correctly point out that the summary of the  
24 applicable rezoning standards in the final order does not  
25 correspond with Section 10.025 as quoted above. The order  
26 characterizes the inquiry under the zoning ordinance<sup>16</sup> more  
27 narrowly, as follows:

28 "(1) Conformance with the comprehensive plan.

29 "(2) Conformance with the statewide planning goals.

30 "(3) Usefulness to the public of the proposed use in  
31 the proposed site." Record at 27.

32 Petitioners maintain that the county's failure to consider  
33 the application under the correct rezoning standards requires  
34 us to remand the decision. Respondent Rose & Associates

1 answer, however, that the final order addresses the substance  
2 of the applicable rezoning standards, albeit not in the  
3 language set forth in Section 10.025. The argument is that the  
4 plan standards governing conversion of land from the SMR to the  
5 SM classification (which are addressed in the final order)  
6 encompass the more general rezoning standards set forth in  
7 Section 10.025. For the most part, we agree.

8 Policy 5 of the plan's Surface Mining Element (the  
9 conversion policy), covers nearly all the general  
10 considerations listed in Section 10.025 of the zoning  
11 ordinance. To the extent there is overlap or conflict between  
12 the plan and zoning ordinance criteria, the former are  
13 controlling. Baker v. City of Milwaukie, 271 Or 500, 514, 533  
14 P2d 772 (1975).

15 However, we note the plan's conversion policy does not  
16 address the availability and efficiency of public services and  
17 facilities, an issue required to be addressed under Section  
18 10.025(3)(a) of the zoning ordinance. Although the final order  
19 touches on this issue in the context of Statewide Goal 11  
20 (Public Facilities and Services), the discussion there is  
21 conclusional at best. Accordingly, a remand for further  
22 findings under Section 10.025(3)(a) is warranted.

23 The sixth assignment of error is sustained in part.

24 The decision of Deschutes County is remanded.

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FOOTNOTES

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The parties agree the SM zoning designation could be applied to the property without a corresponding amendment of the comprehensive plan map.

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2  
The zoning ordinance does not prescribe a minimum lot size in the SM district. However, 20 acres is the minimum lot size in the EFU-20 district, which has been applied to a number of properties near Rose Pit.

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3  
Rose Pit was designated a level III ("significant") site by the 1979 plan. However, the county's final order describes the 20 acres in question as level II, ("moderate"), in recognition of the small number of dwellings nearby.

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Petitioners also claim the governing body's failure to consider the evidence in question deprived them of a "full and fair hearing", in violation of federal due process principles. However, they cite no authority for this broad assertion of unconstitutionality. We therefore will not consider it.

We note also that petitioners rely on ORS 197.835(8)(a)(B) and (D) in this assignment of error. However, their claims under these statutes incorrectly assume that the alleged failure to consider certain evidence violates ORS 197.835(8)(a)(C) (substantial evidence rule). The claims therefore are rejected.

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Petitioners offer two types of proof that the evidence was ignored by the governing body. The first is a consultant's affidavit. The affiant recounts a conversation he had with the planning director in which the director allegedly said that each member of the county governing body had a chance to review the evidence and refused to do so. The second is a statement by the county counsel during a telephone conference with this Board, indicating he believed the governing body did not consider the evidence.

We find neither of the above to be convincing proof of petitioners' claim.

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ORS 197.251(12) states in pertinent part:

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"(a) 'Continuance' means a commission order that:

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"(C) Is a final order for purposes of judicial review of the comprehensive plan, land use regulations or both the comprehensive plan and land use regulations as to the part of the plan, regulations or both the plan and regulations that are in compliance with the goals." (Emphasis added.)

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We do not construe the continuance order of March, 1985 to come within this provision. The order does not state that any part of the Deschutes County plan or land use regulations complies with the goals. Instead, it states the plan and regulations as a whole comply with most, but not all of the goals. Compare former ORS 197.251(8) (a) (C) (1981 Replacement Part), amended by 1983 Oregon Laws, Chapter 827, Section 5 (authorizing LCDC to grant judicially reviewable continuance order "as to the goals with which...the plan and regulations are in compliance.") Nor do we construe the March, 1985 order as an acknowledgement of an "identifiable geographic area" pursuant to ORS 197.251(6) and (7) (authorizing limited acknowledgement).

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Thus, although LCDC's continuance order may make it unlikely the agency will have further Goal 3 objections to the county's plan upon resubmittal, it does not have the legal effect Rose and Associates ascribes to it, i.e., shielding this rezoning decision from a goal-violation charge.

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Apart from their connection to the manufacturing uses allowed under Section 4.100(2)(F), the accessory or incidental uses allowed under Section 4.100(2)(G) (sale of products produced on site zoned SM) and (H) (appurtenant structures and equipment) do not offend Goal 3.

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The county's finding on the wildlife issue is ambiguous. We read it to say the rezoned area is inhabited by wildlife. However, it can also be read to suggest the rezoned area is not a significant wildlife habitat, but that wildlife do inhabit lands nearby ("the general area").

1 If our reading is correct, an ESEE analysis is required to  
2 balance the site's relative value as a source of aggregate with  
3 its value as a wildlife area. If the county intends to say no  
4 balancing is required because the 20 acres has minimal wildlife  
5 value, a clear finding to this effect, supported by substantial  
6 evidence, should be entered on remand.

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9 An ESEE analysis is required under Goal 5 where  
6 "conflicting uses" are identified. OAR 660-16-005 defines  
7 "conflicting use" as "one which, if allowed, could negatively  
8 impact a Goal 5 resource site." Where a site has value for two  
9 protected resources (as here), we believe the conflict must be  
10 resolved by way of an ESEE analysis, i.e., both uses should be  
11 considered "conflicting uses."

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10 Our holding does not mean the county cannot ultimately  
11 approve a mining proposal on the site. Rather, we hold that  
12 such an approval may not be granted under Statewide Goal 5  
13 until the conflicts between protected uses are specifically  
14 defined and the competing values are expressly balanced.

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14 The tract's value as a wildlife area was also asserted. We  
15 discuss the wildlife issue elsewhere in this opinion.

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17 The findings also make the point that the comprehensive  
18 plan gave notice to potential neighbors of land zoned SMR  
19 (e.g., Rose Pit) that mining activities could be expected.  
20 This is not an adequate substitute for the ESEE analysis called  
21 for by Goal 5, although it has weight in the balancing inherent  
22 in that analysis.

21 As stated in a previous footnote, we do not hold that the  
22 existence of the conflicting uses bars the requested rezoning.  
23 The petition itself states the case correctly:

23 "While it may be possible to exploit the resource and  
24 'resolve' these conflicts as required by the Goal,  
25 neither the county nor this Board can reach such a  
26 conclusion until the county undertakes its ESEE  
obligation on remand." Petition at 25.

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2 The parties agree county Ordinance No. 82-011 governs site  
3 plan review procedure. The review may be conducted by the  
4 planning director or may be referred to the hearings officer.  
5 Mailed notice of hearing is to be provided to the applicant and  
6 owners of abutting property. However, where a zone change  
7 application is involved, notice must be mailed to all owners of  
8 property within 250 feet of the property in question.

9 In addition, Ordinance No. 82-011 permits any person to  
10 comment in writing on the application. All such persons are  
11 designated as parties to the proceeding and may appeal the  
12 decision to higher levels within the county.

13 There is some question as to whether notice of the site  
14 plan review stage of the proposal in question must be as  
15 extensive as the notice provided in stage one. Because we  
16 construe the final order to constitute stage one of a two stage  
17 zone change action, we conclude the question must be answered  
18 affirmatively. Thus, if on remand the county continues to  
19 treat the Goal 6 compliance issue as one reserved for decision  
20 until site plan review, notice of that review must adhere to  
21 zone change notice standards.

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15 The deficiency of the findings under Policy 5(a) is  
16 particularly noteworthy in light of the following statement in  
17 the comprehensive plan:

18 "2. No change from SMR to SM shall be permitted  
19 except as consistent with Surface Mining Policy  
20 number 5. This will be particularly difficult  
21 for the Rose Pit since it must demonstrate that  
22 the resource is in short supply and the site is  
23 needed to meet a community need, although the  
24 conflict level is Level III." Record at 133-134.

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27 As petitioners correctly allege, the plan policy  
28 deficiency also constitutes a violation of Statewide Goal  
29 2 (Land Use Planning) because the findings do not  
30 demonstrate the rezoning is consistent with the  
31 comprehensive plan.

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35 Evidently, the order cites rezoning standards that were  
36 superseded by new provisions during the pendency of Rose &  
37 Associates' application.