BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

RALPH ECKIS, KAREN ECKIS, FRANK McCOY, ANNIE McCOY, and THE RIDGE DRIVE OPPONENTS, Petitioners, vs. LINN COUNTY, Respondent, and G & G ROCK QUARRY, INC., and MERLYN E. BENTLEY, Intervenors-Respondent.	LUBA No. 89-005 FINAL OPINION AND ORDER

Appeal from Linn County.

Charles H. Combs, Oregon City, filed the petition for review and argued on behalf of petitioners.

John T. Gibbon, Albany, filed a response brief and argued on behalf of respondent.

Steven Schwindt, Canby, filed a response brief and argued on behalf of intervenors-respondent. With him on the brief was Reif and Reif.

SHERTON, Chief Referee; HOLSTUN, Referee; KELLINGTON, Referee, participated in the decision.

REMANDED 03/14/90

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

Opinion by Sherton.

NATURE OF THE DECISION

Petitioners appeal Linn County Ordinance and Order #88-712, which (1) adopts an amendment to the Linn County Comprehensive Plan (plan) adding a 25 acre site to the plan's inventory of aggregate resource sites; and (2) approves a conditional use permit for aggregate extraction and processing for that site.

MOTION TO INTERVENE

G & G Rock Quarry, Inc., and Merlyn E. Bentley move to intervene on the side of respondent in this proceeding. There is no opposition to the motion, and it is allowed.

FACTS

A Linn County (county) decision to add the subject 25 acre site to the plan's aggregate resource site inventory and to approve a conditional use permit for aggregate extraction and processing on a ten acre portion of the 25 acre site was appealed to this Board in McCoy v. Linn County, 16 Or LUBA 295 (1987), aff'd 90 Or App 271 (1988) (McCoy).[1] In McCoy, we stated:

> "In the summer of 1986, [intervenor]-respondent Merlyn E. Bentley [intervenor] began an aggregate extraction and processing operation on a portion of a 70.77 acre parcel in rural Linn County. The

[1]The county record in the McCoy appeal was incorporated into the record in this appeal. We cite the McCoy record document as "Record M" and the additional record document filed by the county in this appeal as "Record E."

> parcel is designated Farm/Forest by the [plan] and is zoned Farm/Forest (F/F).
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> "The land uses surrounding the parcel include grazing, wood lots and residences. There are eight dwellings within 2,400 feet of [intervenor's] aggregate resource site. The properties surrounding the subject parcel are designated and zoned F/F or Exclusive Farm Use (EFU).
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> "Aggregate extraction and processing is a conditional use in the F/F zone. On September 24, 1986, the Linn County Planning and Building Department (Planning Department) notified [intervenor] that his aggregate mining activities required a county conditional use permit. [Intervenor] subsequently filed an application for a conditional use permit for aggregate extraction and processing on an unspecified portion of the 70.77 acre parcel. Sometime thereafter, the Planning Department informed [intervenor] that his proposed mining activities also required a plan text amendment to add the proposed extraction site to the plan's inventory of aggregate resource sites." McCoy, 16 Or LUBA at 298.

In McCoy, we remanded the county's decision for three reasons. The findings did not demonstrate compliance with the conditional use approval standard of Linn County Zoning Ordinance (LCZO) 21.435.5.a.[2] Id. at 299-302. We also concluded the plan amendment did not comply with Statewide

[2]LCZO 21.660.1 requires conditional use permits for aggregate extraction and processing to comply with the criteria of LCZO 21.480, and it is LCZO 21.480 to which we refer in McCoy. However, we explain in McCoy, 16 Or LUBA at 315, n 1, that the parties agree (1) we may treat Ordinance #87-096, which deleted LCZO 21.480 from the county code prior to the decision appealed in McCoy, as having recodified LCZO 21.480 as the identically worded LCZO 21.435.5; and (2) the standards of LCZO 21.435.5 apply to a conditional use permit for aggregate extraction and processing in the F/F zone. In this opinion, we refer to LCZO 21.435.5.

Planning Goal/5 (Open Spaces, Scenic and Historic Areas, and Natural Resources) because the findings on the quality of the aggregate resource at the site were inadequate, and because the findings on the quantity of the resource were not supported by substantial evidence. Id. at 310-313. Finally, we found the findings in support of the plan amendment inadequate to comply with Goal 6 (Air, Water and Land Resources Quality). Id. at 313-314.

On August 3, 1988, after the decision challenged in McCoy had been remanded to the county, the county adopted Ordinance #88-446, which amends LCZO 21.435.5.a and includes provisions regarding the application of the amended standard.[3] On October 6, 1988, intervenors submitted an application for a plan amendment to add the subject 25 acres to the plan aggregate resource site inventory and for a conditional use permit to conduct an aggregate extraction and processing operation on a portion of the site. Record E 538-545. On November 7, 1988, the planning department accepted intervenors' application as complete. Record E 511.

On November 29 and December 1, 1988, the county board of commissioners conducted a public hearing on intervenors' application. The hearing was a de novo evidentiary hearing

[3]The nature and effect of the amendments adopted by Ordinance #88-446 are discussed in detail under the fourth through sixth assignments of error, infra.

with regard to all approval criteria, including the amended LCZO 21.435.5.a. Participants were given until December 8, 1988 to submit additional written testimony. On December 28, 1988, the county adopted Ordinance #88-712 approving the plan amendment and conditional use permit. This appeal followed.

FIRST ASSIGNMENT OF ERROR

> "The Board's decision to grant the Comprehensive Plan amendment did not comply with Statewide Planning Goal 5. ORS 197.835(4)."

A. Quantity of Resource

Goal 5 states "the location, quality and quantity of [mineral and aggregate] resources shall be inventoried." (Emphasis added.) OAR 660-15-000(5). Sections (2) and (3) of OAR 660-16-000 provide in relevant part:

> "(2) A 'valid' inventory of a Goal 5 resource under subsection (5)(c) of this rule must include a determination of the * * * quantity of each of the resource sites. * * *
>
> "(3) * * * A determination of quantity requires consideration of the relative abundance of the resource (of any given quality). The level of detail that is provided will depend on what is available or 'obtainable.'"

The county adopted the following findings concerning the quantity of aggregate resource at the site:[4]

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[4]The appealed ordinance simply states that the plan "inventory of aggregate resources is amended to include the 25 acre land area" shown on certain maps. Record E 15. The parties assume the county findings addressing Goal 5 requirements (Record E 18-24), adopted by the county in support of the plan amendment, constitute the required plan inventory

"9. The quantity of rock at this site is determined by multiplying the length times the width times the depth. Evidence shows that there [were] five separate test holes drilled at the site to determine the quantity of aggregate in the 25 acres to be mined. All test holes showed that the topsoil extended to 12 inches below the surface, followed by a 21 foot layer of Columbia River Basalt, followed by a substantial clay layer.

"10. The existing quarry on the site shows that the Columbia River Basalt is 21 feet deep and that the bottom of the quarry is 22 feet from the surrounding surface.

"11. The quantity is determined by using the following equation: 43,560 sq. ft./acre times 25 acres = 1,089,000 sq. ft. times 21 ft. depth divided by 27 [cubic ft./cubic yard] = 847,000 cubic yards." Record E 19.

Petitioners argue the county's findings are inadequate because the second and third sentences of finding 9 are merely recitations of evidence, not findings of fact. Hershberger v. Clackamas County, 15 Or LUBA 401, 403 (1987).

Petitioners also argue that the county's determination of quantity is not supported by substantial evidence in the record. Petitioners contend there is no evidence in the record documenting that the test holes were actually drilled, where they were located or what they contained. Petitioners assert the only mention of the test holes in the record is in unsupported assertions by intervenors' attorney.

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information, and we proceed on that assumption for the purposes of this opinion.

Petitioners argue the record contains two logs for wells within 500 feet of the existing quarry which show basalt layers only from 6 to 18 ft. and 10 to 18 ft., and another for a well within 1000 feet of the quarry which shows clay down to 47 ft. Record E 333, 334, 340. Petitioners also point out the dimensions of the 25 acre area to be added to the plan inventory are 632 ft. by 1750 ft. Petitioners argue that given (1) the large size of the site, and (2) the well logs in the record showing there is a great deal of variation in subsurface strata within a short distance of the existing quarry site; evidence which merely establishes the nature of the strata at the existing quarry, and at three corners of the site, is not substantial evidence of the quantity of resource in the entire site.

According to the county, petitioners erroneously contend that without proof of exactly what rock underlies the subject site, the county cannot make a finding on resource quantity which satisfies Goal 5. The county argues that the nature of mineral resources makes it impossible to inventory their exact quantity until they are excavated. The county, therefore, maintains that the evidence necessary to support its decision to place the subject site on its plan inventory should be "tests for rock upon which a reasonably prudent person would make a decision to develop the resource[,] as was done in this case * * *." Respondent's Brief 10.

Intervenors argue that the purpose of determining quantity of the resource under Goal 5 is to decide whether the amount of resource present warrants adding the site to the plan inventory of protected resource sites. Intervenors argue there is substantial evidence in the record that there is a sufficient quantity of rock material at the subject site to warrant protection as a Goal 5 resource. Intervenors claim there is testimony in the record by their attorney concerning quantity (Record E 65), and testimony by a Department of Geology and Mineral Industries (DOGAMI) geologist concerning the presence of Columbia River basalt, and sites for extracting Columbia River basalt, in this section of the county.[5]

Although no particular form is required, findings of fact must state what the decision makers believe to be true. Sunnyside Neighborhood v. Clackamas Co. Comm., 280 Or 3, 21, 569 P2d 1063 (1977). As we pointed out in Hershberger v. Clackamas County, supra, a statement that a particular witness testified X, or a particular document states Y, is a description of the evidence, not a statement of what the decision makers believe. The portions of finding 9 challenged by petitioners state that "[e]vidence shows" five test holes were drilled, and "all test holes showed" basalt from one foot to 22 feet in depth at the site. These

[5]However, intervenors do not cite the location of the geologist's testimony in the record.

portions of finding 9 do not merely describe the evidence in the record, they state what the county believes that evidence shows; and, therefore, are findings of fact. Accordingly, we reject petitioners' challenge to the county's findings on resource quantity.

Substantial evidence is evidence a reasonable person would rely on to reach a conclusion. Morse Bros., Inc. v. Clackamas County, ___ Or LUBA ___ (LUBA Nos. 89-069 and 89-090, October 20, 1989), slip op 19. In determining whether there is substantial evidence in the record to support the county's decision, we consider all relevant evidence in the record cited by the parties, including both that which supports the county's decision and that which detracts from it. Younger v. City of Portland, 305 Or 346, 360, 752 P2d 262 (1988).

In this case, the county's determination of the quantity of the aggregate resource is derived from a calculation which depends on a conclusion that the 25 acre site contains a layer of Columbia River basalt from 1 ft. to 22 ft. below the surface. The only evidence cited in the record which supports this conclusion is the following portion of an attachment to intervenors' application:

> "* * * Test drilling at five different locations on the site show that there is approximately twelve inches of topsoil, followed by twenty-one feet of the Columbia River basalt, then a substantial clay layer. The pit is currently twenty-two feet deep from the ground level surrounding the site, and the depth of the

aggregate is then twenty-one feet.

> "Five test holes have been drilled on the site: one at the site of the current extraction operation, one in the middle of the thirty [sic] acres, and then one at the southwest, northwest, and northeast corners. All show the twelve inches of topsoil below which is the twenty-one feet of the Columbia River basalt." Record E 406.

In McCoy, 16 Or LUBA at 312-313, one of the bases for remand of the previous county decision to add the subject site to the plan aggregate resource site inventory was the lack of substantial evidence in the record to support a county finding that "drilling tests" showed there was a layer of basalt extending from one ft. to 27 ft. below the surface of the subject site. Furthermore, in the county proceeding leading to the decision challenged here, petitioners argued there is "insufficient proof of the * * * quantity of the resource." Record E 102.

We are cited to no testimony, drill logs or other documents in the record substantiating how the test drilling cited above was performed or what the results were. Additionally, the drill logs in the record, cited by petitioners, demonstrate that there is great variability in the presence and thickness of a subsurface Columbia River basalt layer at sites within 1000 ft. of the existing quarry. Under these circumstances, we do not believe it is reasonable to conclude that the entire 25 acre site is underlain by a 21-foot layer of the Columbia River basalt at a depth of 12 inches, based on the depth of the strata at

the existing quarry, and the above quoted unsubstantiated statement regarding the drilling of five additional test holes.

This subassignment of error is sustained, in part.

B. Quality of Resource

Goal 5 also requires that the quality of mineral and aggregate resource sites be inventoried. The county adopted the following findings concerning the quality of the subject aggregate resource site:

> "3. The resource is described as Columbia River Basalt, a hard aggregate rock * * *.
>
> "* * * * *
>
> "5. When mined, Columbia River Basalt has proven as a good quality rock for many uses, such as jetty rock, base rock, riprap for water control, shoulder rock, concrete rock, asphalt mix and sewer drain rock.
>
> "6. The Los Angeles Abrasion Test shows quality of the rock is within the specifications for Base Aggregate and Concrete Aggregate for the State of Oregon. Other test results, also found to be credible, include the Unit Weight and Absorption Test, Abrasion Test and Expansive Breakdown Test. All of these tests were performed on January 31, 1988, by an independent laboratory * * *."
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> "7. There are currently only three sites in Linn County presently mined for Columbia River Basalt: the Brock quarry, the Silbernagel quarry and this site. A geologic map of the Lebanon Quadrangle shows the Columbia River Basalt in a pink color. This site is marked on the map. Other sites are not available to be mined because they are under or near existing subdivisions or prime farmland or of

such a small size as not to be identified by Linn County as an aggregate resource.

"8. The Brock quarry is a privately owned rock quarry leased exclusively to Linn County for its own use and is not open [to] the public. The Silbernagel quarry is an area of less than one acre in size and a quarry that extracts less [than] 5,000 cubic yards in any 12 month period. All other aggregate extraction sites near this particular site are river rock sites, not the hard rock of Columbia River Basalt found at applicant's site. There are no other commercial operations mining Columbia River Basalt available to the general public in [the county] except for the small amount that can be sold from the Silbernagel quarry and the amount that applicant will be able to sell in the event the Conditional Use Application is approved." Record E 18-19.

Petitioners challenge the adequacy of the above findings, and the evidentiary support for the county's determination of the quality of the subject aggregate resource site, with regard to (1) the quality of the resource at the subject site, and (2) the value of the subject resource site as compared to other aggregate resource sites within the county.

1. Quality of On-site Resource

Petitioners argue the above quoted finding that the resource at the subject site "is described as Columbia River Basalt" is a recitation of evidence rather than a finding of fact. Petitioners further contend the findings are defective because they refer to the qualities of Columbia River Basalt in general, rather than specifically to the

qualities of the rock at the subject site.

Petitioners also argue that, even if the findings are sufficient to determine that the subject site contains Columbia River Basalt, the record does not contain substantial evidence to establish the quality of rock throughout the 25 acre site, particularly in view of the variability in rock strata shown by the well logs in the record. Petitioners maintain the record does not demonstrate that all Columbia River Basalt is of high quality. Petitioners contend the two sets of test results in the record, referred to in the findings, do not establish the quality of the resource on the subject site. According to petitioners, there is no evidence in the record that the two rock samples producing the test results at Record E 417 came from the subject site, and there is no evidence that the results of the tests on a sample from the existing quarry at Record E 418 demonstrate that the rock is of high quality, or that the sample tested is representative of rock throughout the 25 acre site.

Intervenors argue the results of test drilling on the subject site demonstrate that the entire 25 acre site contains Columbia River Basalt. Intervenors assert this is consistent with the geologic history of the area, as shown on maps in the record. Intervenors also argue that a representative of the Department of Geology and Mineral Industries (DOGAMI) testified that the rock on the subject

site is Columbia River Basalt, the hardest basalt in the state. Intervenors contend that the test results and DOGAMI testimony show that the rock on the subject site is of sufficient quality to be placed on a Goal 5 inventory of mineral resources. The county adds there is testimony in the record from users of rock from the existing quarry regarding the high quality of the rock. Record E 10, 12.

OAR 660-16-000 ("Inventory Goal 5 Resources") provides in relevant part:

> "* * * * *
>
> "(2) A 'valid' inventory of a Goal 5 resource under subsection (5)(c) of this rule must include a determination of the * * * quality * * * of each of the resource sites. * * *
>
> "(3) The level of detail that is provided [with regard to quality] will depend on how much information is available or 'obtainable.'
>
> "(4) The inventory completed at the local level * * * will be adequate for Goal compliance unless it can be shown to be based on inaccurate data, or does not adequately address * * * quality * * *.
>
> "* * * * *"

Fairly read, the county's findings state (1) the subject 25 acres contain Columbia River Basalt; (2) Columbia River Basalt is a good quality rock for many uses; and (3) Los Angeles abrasion test results show the rock on the subject site meets the state's specifications for base

aggregate and concrete aggregate.[6] The findings adequately address the quality of the rock resource found on the 25 acre site. We, therefore, turn to petitioners' challenge that these findings are not supported by substantial evidence in the record.

The only evidence cited in the record that the entire 25 acre site contains Columbia River Basalt are the two geologic quadrangle maps at Record E 369 and 487.[7] However, as petitioners point out, the well logs in the record show that sites within the area designated as Columbia River Basalt on the geologic maps contain varied rock strata, including one where "rock" is not found above a depth of 53 feet. Record E 331-334. As far as we can determine from the transcript in the record, the DOGAMI representative did not specifically testify that the subject 25 acre site

[6]The findings also state that the results of the "Unit Weight and Absorption Test, Abrasion Test and Expansive Breakdown Test" are also "found to be credible." Record E 19. However, the findings do not state what those results are or what significance the results have in terms of quality of the resource. We note the only evidence in the record we are cited concerning these tests consists of results for one sample of rock from the existing quarry. Record E 418. The test results are given as numerical values, with no evaluation or explanation as to what significance the numerical values have with regard to rock quality.

[7]Although the 25 acre site is not outlined on these geologic maps, a comparison of the geologic maps with other site maps in the record indicates that the entire 25 acre site is within the area marked Tcr (Columbia River Basalt) on the geologic maps.

contains Columbia River Basalt.[8] Furthermore, the record indicates that the Los Angeles abrasion test results are from two rock samples taken from "Headache Acres Pit." Record E 417. We are cited no evidence establishing the location of Headache Acres Pit. Finally, there is a statement in the record by an aggregate user that he "likes the quality of rock from G & G Pit * * *." Record E 10.

Without testimony from the DOGAMI representative specifically addressing rock quality at the subject site, or test results from rock samples from the subject site, the only relevant evidence in the record is that the site is shown as Columbia River Basalt on the geologic quadrangle maps (although there are disparate well logs in the record for sites within the area designated as Columbia River Basalt on the geologic quadrangle maps), and one user's testimony that he likes the quality of rock from the existing quarry. We do not believe it is reasonable to

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[8]The DOGAMI representative testified that he was asked to talk about the rock quality "out there." Record E 76. The transcript of his testimony provides as follows:

> "A now (russel [sic] of paper drowned out words) ... is located approximately right in here. And that's the Columbia River basalt which is the pinkish. Frankly Butte, Hungry Hill and Rodgers Mountain are river basalt and the hardest basalt you can find in the state and it's not that common to find it. Most of the core is in Linn County with the exception of the brought core pit is in a different kind of basalt." Record E 76-77.

The most we can determined from the above testimony is that there is Columbia River Basalt in Linn County.

conclude that the subject 25 acre site contains a mineral resource of a quality warranting placement of the site on the plan Goal 5 aggregate resource site inventory on the basis of this evidence.

This subassignment of error is sustained.

2. Relative Value of Resource Site

Petitioners argue the above quoted findings are inadequate because they consider only sites where the resource is Columbia River Basalt. According to petitioners, the findings improperly fail to address the quality of the resource at the subject site relative to other high quality mineral sites in the county which petitioners identified during the county proceedings. Petitioners point to additional sites for which the plan aggregate resource inventory states there is a large reserve of "basalt" (JB Rock Products), "good quality * * * gravel" (North Santiam Sand & Gravel; Morse Bros., Inc.), or "high quality rock material" (Morse Bros., Inc. & Paetsch).[9]

Petitioners also argue that to the extent the findings imply that all non-Columbia River Basalt sites in the county contain lower quality, softer "river rock," that implication is not supported by substantial evidence in the record.

[9]As requested by petitioners, we take official notice of Linn County Ordinance #80-335, adopted August 27, 1980, which adopted the "Open Spaces, Scenic and Historic Areas, and Natural Resources Background Report for the 1980 Linn County Comprehensive Plan" (Background Report) as part of the plan. See McCoy, 16 Or LUBA at 317, n 10.

Petitioners point to evidence in the record that the North Santiam Sand & Gravel and JB Rock Products sites produce higher quality rock, as measured by the Los Angeles abrasion test, than that claimed to be found at the subject site. Compare Record M 247, 264-265 with Record E 417.

The county argues that it properly compared the subject site to the only two other sites in the county able to produce rock of equal quality, i.e., Columbia River Basalt. Intervenors contend that the county is not required to compare the resource at the subject site with that at the additional aggregate sites raised by petitioners because petitioners did not establish that these additional sites are in operation and produce Columbia River Basalt. Intervenors also argue the testimony of the DOGAMI representative establishes that Columbia River Basalt is the highest quality rock. Record E 78.

OAR 660-16-000(3) provides in relevant part:

> "The determination of quality requires some consideration of the resource site's relative value, as compared to other examples of the same resource in at least the jurisdiction itself. * * * The level of detail that is provided will depend on what is available or 'obtainable.'" (Emphasis in original.)

This rule provision requires the county to compare the value of the resource at the subject site with that of the "same resource" at other sites within the county.

The county's findings limit the resource sites considered to those containing Columbia River Basalt,

excluding other types of rock and aggregate resources.[10] The only justification given for this limitation is the implication in the findings that Columbia River Basalt is "good quality" and "hard" rock. However, in the proceedings below, petitioners identified other aggregate resource sites in the county which the plan inventory recognizes as having reserves of "basalt," "good quality gravel" or "high quality rock."[11] Petition for Review App. 3. Petitioners also submitted evidence that at least two of these sites produce rock which is "harder," as measured by the Los Angeles abrasion test, than rock allegedly produced from the subject site. Record M 247, 264-265; Record E 417.

Where a relevant issue is raised in the local proceeding, the county must address the issue in its findings. City of Wood Village v. Portland Metro Area LGBC, 48 Or App 79, 97, 616 P2d 528 (1980); Norvell v. Portland Metro Area LGBC, 43 Or App 849, 853, 604 P2d 896 (1979); Highway 213 Coalition v. Clackamas County, ___ Or LUBA ___ (LUBA No. 88-060, December 15, 1988), slip op 5; Grover's Beaver Electric Plumbing v. Klamath Falls, 12 Or LUBA 61, 66

[10]However, we note that the two sites identified in the findings as being mined for Columbia River Basalt (Brock/Haugerud and Silbernagel) are described in the plan inventory as having Yakima basalt.

[11]We disagree with intervenors' contention that whether extraction of the resource is currently occurring at these sites is relevant to determining whether the quality of the resource at the subject site warrants including the site on the plan aggregate resource site inventory.

(1984). In this case, the county findings provide no explanation of why the rock resource at the sites identified by petitioners is not comparable to that at the subject site, and do not compare the relative value of these resource sites to that of the subject site.[12] The findings, therefore, do not comply with OAR 660-16-000(3) and are inadequate to justify inclusion of the subject site on the plan inventory.

This subassignment of error is sustained.

C. Economic, Social, Environmental and Energy (ESEE) Consequences

Petitioners argue that Goal 5 and OAR 660-16-005 require the county to analyze the ESEE consequences of the proposed aggregate use on conflicting uses in the surrounding area. Petitioners argue the county erred in concluding the proposed use would cause no adverse economic or social consequences to conflicting uses in the surrounding area and in failing to address relevant issues raised by petitioners. Petitioners contend they presented considerable evidence that the proposed aggregate use would cause adverse economic impacts such as damage to

[12]Pursuant to ORS 197.835(9)(b) (under which LUBA may affirm a decision even though the findings are inadequate if the parties identify evidence in the record which clearly supports the challenged decision), we note that the DOGAMI testimony at Record E 78, cited by intervenors, indicates only that Columbia River Basalt is a high quality rock, and less expensive to use for some purposes, but does not clearly support a determination that the rock resource at the sites identified by petitioners is not comparable to that at the subject site.

agriculture, reduction in property values and damage to wells, and adverse social impacts such as reduction in livability and loss of aesthetics. Petitioners also contend the county erred by failing to address the environmental consequence issue of water quality impacts on fish and wildlife habitat downstream from the proposed use raised by the Oregon Department of Fish and Wildlife (ODFW). Record M 178.

Intervenors argue that the ESEE consequences which Goal 5 requires the county to consider are the impacts of surrounding uses on the proposed aggregate use, not impacts of the proposed aggregate use on surrounding uses. In any event, according to intervenors, impacts on surrounding uses are adequately addressed by findings of compliance with other Statewide Planning Goals.

With regard to the issue of impacts on fish and wildlife habitat, the county argues that this Board determined in McCoy that the county's "approach analyzing the project's impact on identified sensitive fish and wildlife habitat was the correct approach to handling this part of the analysis." (Emphasis in original.) Respondent's Brief 11-12. The county also argues the "law of the case" doctrine precludes the Board's consideration of this issue in this appeal. Hearne v. Baker County, 16 Or LUBA 193, 195 (1987); Mill Creek Glen Protection Assoc. v. Umatilla County, 15 Or LUBA 563, aff'd 88 Or App 522

(1987); Portland Audubon v. Clackamas County, 14 Or LUBA 433, aff'd 80 Or App 593 (1986). Finally, the county argues that in any case there is evidence in the record that the ODFW concerns can be resolved by implementation of basic water management processes at the quarry site. Record E 45.

OAR 660-16-005 ("Identify Conflicting Uses") provides in relevant part:

> "It is the responsibility of local government to identify conflicts with inventoried Goal 5 resource sites. * * * A conflicting use is one which, if allowed, could negatively impact a Goal 5 resource site. 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.
>
> "* * * * *"

Under OAR 660-16-005, the county is required to address the impacts of the proposed Goal 5 resource site use on the identified conflicting uses, as well as the impacts of the conflicting uses on the resource site use. Panner v. Deschutes County, 14 Or LUBA 1, 11, aff'd 76 Or App 59 (1985).

In this case, the county identified agriculture and residential uses as conflicting with the proposed aggregate extraction use. Record E 22. However, the county concluded, without explanation, that the proposed aggregate use would have no economic, social or energy consequences on the identified conflicting uses. Id. We agree with petitioners the issues of damage to wells, reduction in

property values, reduction in livability and harm to aesthetics are relevant economic and social impacts of the proposed use on surrounding agricultural and residential uses, and were raised in the proceedings before the county. The county erred in failing to address these issues as part of its ESEE consequence analysis.[13]

The county's decision does not identify fish and wildlife habitat as a conflicting use of surrounding property, and petitioners do not assign as error the failure to identify fish and wildlife habitat as a conflicting use. Accordingly, OAR 660-16-005 does not require the county to address water quality impacts of the proposed use on downstream fish and wildlife habitat.[14]

This subassignment of error is sustained in part.

D. Identification of Impact Area

Petitioners argue the county failed to comply with OAR 660-16-000(2) because it failed to determine the impact area which will be affected by the proposed aggregate use.

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[13]Although intervenors assert these issues are adequately addressed elsewhere in the county's findings, intervenors do not indicate where in the county's findings these issues are addressed or provide argument in support of their assertion.

[14]In McCoy, we determined that an LCZO conditional use approval standard concerning impacts on "identified sensitive fish or wildlife habitat" applies only to areas identified on maps in the Background Report as "Sensitive Fish Habitat" or "Sensitive Wildlife Habitat." McCoy, 16 Or LUBA at 304. We note that this determination has nothing to do with whether OAR 660-16-005 requires the county to address impacts of the proposed aggregate resource site on downstream fish and wildlife habitat as part of a Goal 5 ESEE consequence analysis.

Portland Audubon v. Clackamas County, 14 Or LUBA at 441.

OAR 660-16-000(2) provides in relevant part:

> "A 'valid' inventory of a Goal 5 resource under subsection (5)(c) of this rule must include a determination of the location * * * of each of the resource sites. Some Goal 5 resources (e.g., * * * mineral and aggregate sites * * *) are more site-specific than others * * *. For site-specific resources, determinations of location must include a description or map of the boundaries of the resource site and of the impact area to be affected, if different. * * *" (Emphasis in original.)

In Portland Audubon v. Clackamas County, 14 Or LUBA at 442, we stated:

> "'Impact area' is not defined in either the statewide goals or LCDC's interpretive rules. However, [from other rule provisions] it is apparent an impact area is the area where uses may occur that could adversely affect the resource site or be adversely affected by use of the resource site. The rule requires this impact area be identified if it is not coterminous with the resource site." (Emphasis in original.)

The county findings state that "[s]urrounding uses that conflict with the resource include residential uses, agricultural uses and mining of the resource." Record E 22. The findings also recognize that the "resource site has an impact on surrounding residences." Id. The findings further provide that "[m]ining will cause environmental concerns * * * addressed to the surrounding neighborhood." Record E 23. Thus, the findings recognize that uses outside the resource site could impact the resource site, and that use of the resource site could impact surrounding uses.

However, the findings do not satisfy the requirement of OAR 660-16-000(2) that the area subject to such impacts be identified as part of the inventory of the location of this site-specific Goal 5 resource.[15]

This subassignment of error is sustained.

E. Decision to Limit Conflicting Uses

Petitioners argue that the decision does not comply with OAR 660-16-010(3) ("Limit Conflicting Uses").[16] According to petitioners, the decision improperly fails to explain how both the resource site and conflicting uses are important relative to each other, and to provide reasons to support the county's choice of the limiting conflicting uses option. Panner v. Deschutes County, supra.

OAR 660-16-010 ("Develop Program to Achieve the Goal") allows the county, based on its inventory data and ESEE consequence analysis, to "resolve" conflicts concerning a specific resource site, in one of three ways identified in

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[15]As we determined under the previous subassignment of error, the county failed to address in its findings particular impacts which petitioners raised as an issue in the proceedings below. If, on remand, the county determines that any of these identified impacts will affect surrounding properties, the county will have to consider these impacts in identifying the "impact area" pursuant to OAR 660-16-000(2).

[16]OAR 660-16-010(3) provides in relevant part:

> "Limit Conflicting Uses: Based on the analysis of ESEE consequences, a jurisdiction may determine that both the resource site and the conflicting use are important relative to each other, and that the ESEE consequences should be balanced so as to allow the conflicting use but in a limited way so as to protect the resource site to some desired extent. * * *"

sections (1), (2) and (3) of the rule, respectively, as "Protect the Resource Site," "Allow Conflicting Uses Fully" and "Limit Conflicting Uses." These sections set out a description of each option, and each section concludes with the following statement:

> "* * * Reasons which support this decision must be presented in the comprehensive plan, and plan and zone designations must be consistent with this decision."

In this case, the challenged decision states the county "recognizes that both the resource and conflicting uses are important [and] classifies this site as a resource that needs limits placed upon conflicting uses as per OAR 660-16-010(3)." Record E 24. The decision also states that aggregate extraction at the resource site "is permitted as a conflicting use" subject to obtaining a conditional use permit, and residences built on adjacent property are required to have a 30 foot setback and a vegetative screen between the residence and the extraction site. Id. However, the decision does not include findings satisfying the requirement of OAR 660-16-010(3) that reasons supporting the choice of the "limit conflicting uses" option be set out in the plan.[17]

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[17]In any case, under OAR 660-16-010, the county's choice of a program to achieve the goal must be "based on the determination of the economic, social, environmental and energy consequences" of the conflicting uses identified pursuant to OAR 660-16-005. The identification of conflicting uses and ESEE consequence analysis in turn depend on the resource inventory required by OAR 660-16-000. We determined under sections A-D of this

This subassignment of error is sustained.

The first assignment of error is sustained, in part.

SECOND ASSIGNMENT OF ERROR

> "The Board's decision to grant the Comprehensive Plan amendment did not comply with Statewide Planning Goal 6. ORS 197.835(4)."

Petitioners argue the record shows that aggregate extraction at the subject site will require DOGAMI "operating and reclamation permits," Department of Environmental Quality (DEQ) "waste-water discharge and NPDES permits," and will have to meet DEQ noise standards. Petition for Review 24. Petitioners contend the county's findings fail to comply with Goal 6 because they do not state that the proposed use will comply with the applicable DOGAMI and DEQ standards. Vizina v. Douglas County, ___ Or LUBA ___ (LUBA No. 88-014, August 26, 1988).

Goal 6 provides in relevant part:

> "All waste and process discharges from future development * * * shall not threaten to violate, or violate applicable state or federal environmental quality statutes, rules and standards. * * *"

Goal 6 requires findings that a proposed use will be able to comply with applicable environmental standards, and is not satisfied by findings stating only that the proposed use

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assignment of error that the county did not properly complete these earlier steps of the Goal 5 planning process. Therefore, the county has not established the necessary basis for developing a program to achieve the goal pursuant to OAR 660-16-010. League of Women Voters v. Klamath County, ___ Or LUBA ___ (LUBA Nos. 88-010 and 88-012, August 24, 1988), slip op 26-27.

will be required to comply with applicable environmental standards. McCoy, 16 Or LUBA at 313-314; Spalding v. Josephine County, 14 Or LUBA 143, 149 (1985); see Allen v. Umatilla County, 14 Or LUBA 749, 755 (1986).[18] On the other hand, we have frequently recognized that a local government may demonstrate compliance with an applicable standard by (1) determining that the proposal can comply with the standard, if certain conditions are imposed; and (2) imposing those conditions to ensure compliance. Foland v. Jackson County, ___ Or LUBA ___ (LUBA Nos. 89-105 and 89-111, February 7, 1990), slip op 66; Kenton Neighborhood Assoc. v. City of Portland, ___ Or LUBA ___ (LUBA No. 88-119, June 7, 1989), slip op 24; McCoy, 16 Or LUBA at 301.

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[18]In McCoy, we found the findings in support of the county's earlier decision to add the subject site to its aggregate resource site inventory inadequate to satisfy Goal 6 because they did not "state that future aggregate extraction and processing operations on the resource site added to the plan inventory will be able to meet state and federal environmental quality standards." McCoy, 16 Or LUBA at 314.

Vizina v. Douglas County, supra, and Allen v. Umatilla County, supra, both concern code provisions requiring the local government to find that applicable state agency regulatory requirements are met by the use proposed. Spalding v. Josephine County, supra, and McCoy both determined that similar findings (i.e., that state and federal agency regulatory standards will not be violated) are required by Goal 6. We do not reconsider our decisions in McCoy and Spalding v. Josephine County here. However, we note that we do not believe Goal 6 imposes a requirement that state or federal permits be secured before a local permit can be approved, or that all of the information that will be needed to secure state or federal permits be developed in the local process. Rather, Goal 6 requires that local government findings explain why it is reasonable to expect that applicable state and federal standards can be met by the proposed use, based on the information reasonably available.

We consider petitioners' arguments concerning the adequacy of the findings to demonstrate compliance with Goal 6 with these principles in mind.

A. DOGAMI Standards

Petitioners argue the county's findings are inadequate to satisfy Goal 6 because they state only that a DOGAMI-approved reclamation plan was submitted with the application and approved by the county. Record E 22.

The county's finding states:

> "A reclamation plan approved by the Oregon Department of Geology and Mineral Industry [sic] has been submitted with the application, and the Board [of Commissioners] approves the plan." Record E 22.

We understand this finding to state that DOGAMI has determined that the proposed use meets DOGAMI standards, and the county concurs in that determination. The finding is adequate to satisfy Goal 6.

This subassignment of error is denied.

B. Air Quality Standards

Petitioners assert the county found only that "the portable rock crusher at this site has obtained a [DEQ] permit allowing it to discharge contaminants into the air." Record E 31. Petitioners contend this finding is inadequate to comply with Goal 6 because it does not state that the proposed use will meet air quality standards. Petitioners cite Vizina v. Douglas County, supra, slip op at 9-10 (code requirement that proposed aggregate extraction and

processing use meet DEQ dust standards is not satisfied by a finding that rock crusher to be used has DEQ air contaminant discharge permit).

We agree with petitioners that the county findings simply state that the rock crusher to be used at the subject site has a DEQ air contaminant discharge permit.[19] Such findings are not adequate to establish that the proposed use of the site for aggregate extraction and processing will comply with applicable air quality standards. See Vizina v. Douglas County, supra.

This subassignment of error is sustained.

C. Water Quality Standards

Petitioners' entire argument with regard to this issue is as follows:

> "Finding III.A.1(f)(3) [sic (2)] at [Record E 31] does not find that the use will meet surface water discharge standards, as required by Goal 6. See Vizina, supra." Petition for Review 24.

The county argues that even if its findings are not adequate to establish that the proposed use will comply with surface water discharge standards, a December 22, 1988 letter from DEQ (Record E 45), and testimony by the planning director at the board of commissioners' December 29, 1988 hearing (Record E 6), clearly support a finding that the

[19]We note that in addition to the finding quoted above, findings I.B.22, II.B.9 and II.B.19 similarly state that the rock crusher has a DEQ permit. Record E 23, 27, 28.

proposed use will comply with surface water discharge standards. ORS 197.835(9)(b).

Finding III.A.1(f)(2) provides that "if a surface water discharge permit is required, then applicant must obtain the surface water discharge permit before the issuance of the Conditional Use Permit." Record E 31. However, Condition (A) of the challenged decision approving a conditional use permit provides:

> "* * * The applicant has shown that surface water discharges will comply with [DEQ] standards by a letter issued by [DEQ] dated December 22, 1988. It is a condition of conditional use approval that [DEQ] standards be maintained." (Emphasis added.) Record E 38.

Although it was adopted as part of the conditions of approval (Exhibit C), rather than the findings of fact in support of the decision (Exhibit A), we understand the above emphasized portion of Condition (A) to state that the proposed use will comply with surface water discharge standards. Furthermore, even if this statement contained in the conditions of approval were not an adequate finding of compliance with DEQ surface water discharge standards, we would agree with with the county that the DEQ letter in the record is evidence which "clearly supports" a determination that the proposed use can be carried out without a discharge of process wastewater and, therefore, in compliance with DEQ

surface water discharge standards.[20] ORS 197.835(9)(b).

This subassignment of error is denied.

D. Noise Standards

1. Rock Crushing and General Operations

Petitioners argue that the following findings state the rock crushing and general aggregate operations proposed do not comply with DEQ noise standards:

> "Applicant has submitted tests showing results of the noise of the crusher and general operations. The noise generated by operations and the crusher are found to be within [DEQ] standards, when modified as required." (Emphasis added.) Record E 23.
>
> "Noise tests at the site have been performed while crushing and general operation was conducted. These show that the operation was in compliance with [DEQ] standards in most areas. Applicant must comply with the recommendation of the testing laboratory concerning noise reduction to fall within the limits set by [DEQ]."[21] (Emphasis added.) Record E 31.

However, the challenged decision contains additional findings which state that noise impacts will be reduced when the crusher is placed on the floor of the quarry and earthen berms and vegetative plantings are installed. Record E 24, 27, 28. Furthermore, Condition (M) of the conditional use

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[20]Petitioners do not explain how the proposed use could fail to comply with surface water discharge standards if the proposed use does not produce process wastewater requiring a surface water discharge permit. We will not make petitioners' argument for them.

[21]A similar statement is found in finding II.B.5(3) as well. Record E 26.

permit approval provides:

> "Noise suppression. The applicant shall locate the crusher and any other processing equipment within the pit and below the parcel's surface grade. The crusher shall be located within the pit before September 1, 1989.
>
> "Topsoil berms, or berms consisting of topsoil and rocks not being stored for sale shall be incorporated into site development as noise barriers. The berms shall be of adequate dimension and be strategically placed to mitigate noise generated at the site.
>
> "Operation of the site is authorized only in a manner that complies with the L10 and L50 noise emission standards for new noise sources at previously unused sites. The applicant shall retain the services of an acoustical engineer to show that the site complies with these standards. A copy of the analysis demonstrating that the site complies with these standards shall be provided to [DEQ] and to the Linn County Planning and Building Department * * *.
>
> "* * * * *" Record E 39-40.

We understand the above quoted findings to state that rock crushing and general operations in association with the proposed use, other than drilling and blasting, will comply with DEQ noise standards if certain conditions are imposed. The necessary conditions are imposed by Condition (M), and include placement of the crusher in the pit and use of earthen berms and plantings.[22] Condition (M) also imposes a requirement for an additional noise survey to ensure that

[22]In addition, Condition (F) imposes limitations on the hours and days on which crushing and general quarry operations may occur.

the use complies with DEQ standards after the measures required by the condition are carried out. We conclude the county (1) found DEQ noise standards would be met by the proposed rock crushing and general aggregate operations, if certain conditions were imposed; and (2) imposed those conditions.

This subassignment of error is denied.

2. Drilling and Blasting

Petitioners contend the following finding fails to establish that drilling associated with the proposed use will comply with DEQ noise standards:

> "Applicant failed to provide noise test data regarding drilling at the site. Applicant will be required to do so before issuance of the Conditional Use Permit, as stated below." Record E 23.

Petitioners also argue the county failed to adopt any finding that noise from blasting will meet DEQ standards.

The county argues that the conditions it imposed are sufficient to mitigate noise impacts of the proposed use, and are based on specific recommendations found in a letter from DEQ. Record 500-501. According to the county, the DEQ letter is evidence which clearly supports the decision. ORS 197.835(9)(b).

In addition to the finding quoted above, the county found as follows with regard to drilling:

> "Applicant did not show evidence of tests for the drilling noise. Before the issuance of the Conditional Use Permit, applicant must perform

> noise tests at the site while holes are being drilled in the normal manner used for placement of charge prior to a blast. Applicant must then demonstrate that the noise from the drilling comes within the limits set by [DEQ]. If applicant cannot demonstrate that the noise from drilling falls within the limits of [DEQ}, then the County shall not issue the Conditional Use Permit."[23] Record E 31-32.

There are no findings with regard to the noise impacts of blasting. Findings and conditions of approval state that the hours and days on which drilling and blasting can occur will be limited. Record E 27, 28, 39. Condition (A) requires the applicant to demonstrate that the proposed drilling activities meet DEQ L10 and L50 noise standards "before the conditional use permit can be activated." Record E 38. Finally, Condition (M) ("Noise Suppression") provides that "[t]he applicant shall undertake every feasible effort to minimize the noise generated by drilling." Record E 40.

The county's decision does <u>not</u> find that the proposed drilling and blasting activities will comply with DEQ noise standards, but rather simply states that the applicant will be required to demonstrate compliance with DEQ noise standards sometime before the approved conditional use permit is actually issued.[24] Accordingly, the findings do

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[23]A similar finding regarding drilling noise is found on Record E 26-27.

[24]We are cited nothing in the decision, plan or LCZO which sets out how or when such a determination prior to actual issuance of the conditional

not satisfy Goal 6.[25]

This subassignment of error is sustained.

The second assignment of error is sustained, in part.

THIRD ASSIGNMENT OF ERROR

> "The Board's decision to grant the comprehensive plan amendment and conditional use permit failed to comply with the Aggregate Resources Policy of the Linn County Comprehensive Plan. * * *"

Petitioners contend that plan Aggregate Resources Policy 4 (Policy 4) establishes approval standards for the appealed comprehensive plan amendment. Petitioners argue that the county's decision fails to comply with Policy 4.b, c, e and g.

The county contends that Policy 4 does not contain approval standards for an amendment to add a site to the plan aggregate resource inventory. The county argues Policy 4 simply contains policy directives which were used

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use permit will be made, or guarantees that procedures equivalent to those employed in making the challenged decision will be followed. See McCoy, 16 Or LUBA at 313-314.

[25]The DEQ letter cited by the county states "all new noise sources located on previously unused sites are required to comply with L10 and L50 noise emissions standards not to exceed ten decibels * * * above the sound levels indigenous to the area at residential and other noise sensitive properties * * *." Record E 500. The letter recommends certain noise control methods and other restrictions "to assure a greater level of compatibility with surrounding land uses * * *." Record E 501. The letter concludes that DEQ "believe[s] the quarry can be adequately retrofitted with permanent noise controls which should prevent undue aggravation for surrounding land uses." Id. However, the letter does not specifically discuss the noise impacts of drilling or blasting or conclude that these activities will comply with DEQ noise standards if the recommendations in the letter are followed. Therefore, the letter is not evidence which "clearly supports" a determination that the proposed drilling and blasting will meet DEQ noise standards and, therefore, comply with Goal 6.

to develop the LCZO provisions governing the Aggregate Resources Extraction and Processing district and conditional use permit standards for the extraction and processing of aggregate resources in other districts.

Policy 4 provides in relevant part:

> "Site development plans for areal expansion of existing sites, or for new extraction sites shall be submitted for review by Linn County. The proposal shall include the following:
>
> "a. provision of buffering and visual screening throughout the extraction period * * *;
>
> "b. development, where necessary, of all-weather access roads. * * *;
>
> "c. analysis of the overlying soils capabilities for long term agricultural or forest resource use;
>
> "d. mechanisms to minimize the impact on air, surface and ground water quality, fish and wildlife habitat and general environmental quality;
>
> "e. acceptable proposed final use;
>
> "f. reclamation plan approved by ODOGAMI that results in the final use; and
>
> "g. provision for public safety.
>
> "Linn County shall evaluate such proposals and attach, where necessary, conditions of operation."

The plan also contains "[i]mplementation measures [which] generally describe how plan policies will be carried out." Plan, p. 1. Next to each implementation measure in the plan is a "Policy Reference" column, in which the number(s) of the policies intended to be carried out by a

particular implementation measure are listed. Policy 4 is listed as being carried out by Aggregate Resources Implementation Measure 4 (Implementation 4). Implementation 4 provides:

> "The Linn County Zoning Ordinance shall include standards of operation for an aggregate resource extraction site."

Policy 4 does not purport to establish standards for adding a new site to the plan aggregate resources inventory. Rather, Policy 4 lists elements to be included in a development plan for aggregate extraction at a new resource site or an expansion of an existing site. Furthermore, Implementation 4 makes it clear that Policy 4 is implemented through the provisions of the LCZO governing approval of conditional use permits and site plans for aggregate extraction operations. We, therefore, agree with the county that Policy 4 does not provide approval standards for the appealed decision.

The third assignment of error is denied.

FIFTH ASSIGNMENT OF ERROR

> "Failure to follow applicable procedures in a manner that prejudiced Petitioners' substantial rights."

A. ORS 215.428(3)

ORS 215.428(3) provides:

> "If the [permit] application was complete when first submitted or the applicant submits the requested additional information within 180 days of the date the application was first submitted

> and the county has a comprehensive plan and land use regulations acknowledged under ORS 197.251, approval or denial of the application shall be based upon the standards and criteria that were applicable at the time the application was first submitted."

Petitioners argue that in Kirpal Light Satsang v. Douglas County, 96 Or App 207, 772 P2d 944, adhered to 97 Or App 614 (1989), where the applicant submitted a new application at the request of the county after an applicable approval criterion was amended, the Court of Appeals held that ORS 215.428(3) required the county to apply the original approval criterion. Petitioners also argue that in Territorial Neighbors v. Lane County, ___ Or LUBA ___ (LUBA No. 87-083, April 27, 1988), this Board held that ORS 215.428(3) does not allow the application of "new criteria adopted during a hiatus in the hearing schedule." Petition for Review 34. Petitioners maintain that under the facts of this case the county violated ORS 215.428(3) by applying, as a conditional use permit approval criterion, the amended version of LCZO 21.435.5.a adopted by Ordinance #88-446, rather than the version of LCZO 21.435.5.a applied in McCoy.

The county argues that Ordinance #88-446, which amended LCZO 21.535.5.a, was duly adopted on August 3, 1988. According to the county, intervenors submitted a new permit application on October 6, 1988, and the county properly applied to that new permit application the version of

LCZO 21.435.5.a which was in effect on the date the new application was filed. The county contends ORS 215.428(3) does not prohibit an applicant from choosing to submit a new application, subject to the criteria in effect when that new application is filed, and does not give petitioners a statutory entitlement to retention of the criteria in effect when the original application was filed.

In Territorial Neighbors v. Lane County, supra, slip op at 7-8, we held that under ORS 215.428(3) a county must apply to a permit application the approval standards and criteria which were in effect when the application was filed. In Kirpal Light Satsang v. Douglas County, 96 Or App at 212, the Court of Appeals held that a county cannot require an applicant to replace its application for a permitted use with one for a conditional use after the county amends its ordinance to make the proposed use conditional rather than permitted.

Neither of the above cases interpreted ORS 215.428(3) with regard to the standards applicable to a permit application, voluntarily filed by the applicant after the county amends the applicable standards, which is identical or very similar to an earlier permit application filed before the standards were amended. However, in Sunburst II Homeowners Assoc. v. City of West Linn, ___ Or LUBA ___ (LUBA No. 89-130, January 26, 1990), slip op 10, we interpreted the identical statutory provision applicable to

cities, ORS 227.178(3), not to preclude an applicant from submitting a new application, similar or identical to a previous application found inconsistent with applicable standards, for the purpose of obtaining review under amended approval standards in effect when the new application is filed.

The circumstances in this case are parallel to those in Sunburst II Homeowners Assoc. v. City of West Linn, supra. We agree with the county that intervenors filed a new conditional use permit application on October 6, 1988.[26] Record E 538. The county complied with ORS 215.428(3) by applying to its decision on that new application the version of LCZO 21.435.5.a in effect on the date the new application was filed.

This subassignment of error is denied.

B. LCZO 7.050.6 and 21.640.1

Petitioners contend that under LCZO 7.050.6 and 21.640.1, the county planning commission "would normally be the first body to hear an application of the type that the Board [of Commissioners] considered in this case." Petition for Review 33. Petitioners argue that by improperly bypassing planning commission review of the amended application, the county deprived petitioners of an additional opportunity to prepare and present evidence in

[26]We note that petitioners do not appear to dispute that a new application was filed on October 6, 1988.

opposition to the proposal guaranteed by LCZO 7.050.6 and 21.640.1.[27]

We agree with petitioners that under LCZO 7.050.6, 21.640.1, and 28.050, aggregate extraction conditional use permit applications are generally reviewed initially by the planning commission, with the opportunity to appeal the planning commission's decision to the board of commissioners. However, when the county adopted Ordinance #88-446, amending the LCZO to change the conditional use permit approval criterion found in LCZO 20.020.2.a, 21.430.5.a, 21.435.5.a and 21.440.2.a, the county also adopted the following procedural provisions:

> "* * * Applications already reviewed using the [pre-Ordinance #88-446] decision criterion will be reviewed using the amended criterion, provided that;
>
> "(a) the applicant submits an amended application to the planning and building department that addresses the amended criterion;
>
> "(b) the applicant agrees that the amended application shall be subject to a de novo hearing on all approval criteria;
>
> "(c) the de novo hearing referred to above occurs before the appropriate reviewing body as specified in the [LCZO], and in a manner that conforms to the appeals procedure specified in that ordinance, and

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[27]Petitioners also argue that the county's alleged procedural error deprived them of the opportunity to obtain a decision denying the application by appearing before an unbiased decision making body. We address petitioners' charge that the board of commissioners was biased against them under the fourth assignment of error.

> "(d) participants in earlier hearings are provided with a mailed notice at least 14 days before the public hearing that the amended decision criterion will be used rather than the decision criterion effective before adoption of this ordinance." Record E 155.

The above-quoted provisions of Ordinance #88-446 have the effect of modifying the general procedural provisions cited by petitioners. We understand the above provisions to state that where (1) a permit application was already reviewed by a county decision maker under the pre-Ordinance #88-446 criterion; (2) the applicant files an amended application addressing the amended criterion; and (3) the applicant agrees that the amended application shall be subject to a de novo hearing; that de novo hearing takes place before the county body which would otherwise have been the next to review the original, unamended application (provided that mailed notice of that de novo hearing is sent to all participants in earlier hearings on the original application). In other words, the county amended the LCZO to provide that, in these circumstances, the processing of the amended application is not required to begin at square one with review by the planning commission.

Petitioners do not argue under this subassignment that the county failed to follow the process set out in Ordinance #88-446 and described above, or that this process was inapplicable to the facts of this case.

This subassignment of error is denied.

The fifth assignment of error is denied.

FOURTH ASSIGNMENT OF ERROR

> "The Board actions leading up to and including it's [sic] decision in ordinance #88-712 violated the constitutional rights of the Petitioners. * * *"

A. Equal Privileges and Immunities

Petitioners argue the county intentionally created in Ordinance #88-446 an arbitrary classification which allowed review of intervenors' amended application (1) by the board of commissioners, without prior hearing by the planning commission; and (2) under more lenient criteria than were applicable prior to adoption of the ordinance. According to petitioners, there is "no conceivable legitimate reason for the [board of commissioners'] arbitrary action impacting a designedly small class." Petition for Review 32. Petitioners contend the process followed by the county in making the appealed decision, which denied petitioners their rights under ORS 215.428(3) to have intervenors' application considered under the original approval criteria, and under the LCZO to have an initial hearing on intervenors' application before the planning commission, denied petitioners equal privileges under Article I, Section 20 of the Oregon Constitution.[28] State v. Clark, 291 Or 231, 239,

[28]Article I, Section 20 of the Oregon Constitution provides:

630 P2d 810 (1981); Beamer v. City of Roseburg, 15 Or LUBA 491, 493 (1987).

The county argues that the procedures it followed do not violate Article I, Section 20 of the Oregon Constitution if there is a rational basis for the classification made by Ordinance #88-446. The county contends that making a procedure applicable to all conditional use permit applications for which the applicable approval criteria have changed "represents a rational approach to the difficult issue [of] how to make a change in the law effective" without undue delay. Respondent's Brief 20.

We determined under the fifth assignment of error that petitioners do not have any rights under ORS 215.428(3) or the LCZO which were violated by the county following the procedures for review of the subject conditional use permit application which it adopted in Ordinance #88-446. Furthermore, we agree with the county that the procedure it used in this case would only violate the Equal Privileges and Immunities Clause of the Oregon Constitution if there is no rational basis to justify the establishment of the selective procedure adopted by the ordinance. Medford Assembly of God v. City of Medford, 72 Or App 333, 339, 695 P2d 1379, rev den 299 Or 203 (1985); Wagner v. Marion

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""No law shall be passed granting to any citizen or class of citizens privileges, or immunities, which, upon the same terms, shall not equally belong to all citizens."

County, 15 Or LUBA 260, 272, aff'd 85 Or App 220 (1987). We also agree with the county that when it amends permit approval criteria, it is reasonable for it to adopt special procedures for application of the new criteria to amended permit applications already reviewed by a county decision maker, procedures which avoid undue delay in processing the amended application but offer notice and a de novo hearing on the new criteria.

This subassignment of error is denied.

B. Due Process

Petitioners argue the county violated their due process right under the 14th Amendment to the U.S. Constitution to an unbiased decision maker in a quasi-judicial proceeding. Withrow v. Larkin, 421 US 35, 46-47, 95 SCt 1456, 43 LEd2d 712 (1975); 1000 Friends of Oregon v. Wasco County Court, 304 Or 76, 742 P2d 39 (1987). Petitioners argue the board of commissioners' bias in this matter is demonstrated by (1) failure to enforce the LCZO against intervenors; (2) an unreasonable interpretation of LCZO 21.435.5.a in McCoy, supra; (3) discussion by the board of commissioners at its July 20, 1988 hearing on Ordinance #88-446;[29] and (4) the

[29]Petitioners quote a transcript of the July 20, 1988 hearing at length in their brief and argue that the discussion between the board of commissioners, county counsel and county planner implies that certain county commissioners wanted to prevent petitioners from having a de novo hearing before the planning commission and to ensure a quick approval of the permit application. Petitioners also contend that one commissioner demonstrated bias by stating an opinion that the county's decision under

use of procedures violating ORS 215.428(3), the LCZO and Article I, Section 20 of the Oregon Constitution.

The county argues that a party claiming the existence of bias must demonstrate that the decision makers were incapable of making a decision on the basis of the evidence and argument before them. Oatfield Ridge Residents Rights v. Clackamas County, 14 Or LUBA 766 (1986). The county argues that petitioners' allegations of bias are unsubstantiated by the record. The county maintains that the transcript cited by petitioners as demonstrating bias actually shows "a Board of Commissioners seeking to provide for prompt resolution of a major controversy, in a manner which prevented administrative problems and was consistent with constitutional and legal principles." Respondent's Brief 22.

We agree with the county that petitioners have the burden of establishing that the board of commissioners prejudged the matter before it, i.e., was incapable of making a decision on the basis of the evidence and argument before it.[30] Oatfield Ridge Residents Rights v. Clackamas County, 14 Or LUBA at 768.

With regard to item (1) above, petitioners do not

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the amended criterion would still be in favor of the application. Petition for Review 27-30.

[30]Personal interest in a decision on the part of the decision makers can also constitute "bias." See 1000 Friends of Oregon v. Wasco County Court, 304 Or at 83. However, petitioners do not argue that the board of commissioners was biased in this manner.

explain in what way the county failed to enforce the LCZO and cite no evidence demonstrating the alleged failure to enforce the LCZO. With regard to item (2), we do not believe that applying an unreasonable interpretation of an ordinance provision to an application is evidence that the local decision maker is permanently biased towards that and similar applications. With regard to item (3), the transcript indicates at most a general desire to resolve the controversy expeditiously and that one commissioner expressed an opinion that application of the amended standard to the original application would produce the same result. This does not establish that commissioner was incapable of applying the amended standard impartially to an amended application after a de novo hearing. Finally, with regard to item (4), we determined under the fifth assignment of error and subassignment A of this assignment of error that the procedures followed by the county did not violate ORS 215.428(3), the LCZO and Article I, Section 20 of the Oregon Constitution.

This subassignment of error is denied.

The fourth assignment of error is denied.

SIXTH ASSIGNMENT OF ERROR

> "The Board improperly construed the new decision criteria, and failed to make findings that the criteria were met."

Ordinance #88-446 amended LCZO 21.435.5.a to provide as follows:

> "The location, size, design and operating characteristics of the proposed development will be made reasonably compatible with and have minimal impact on the livability and appropriate development of abutting properties and the surrounding neighborhood, with consideration given to scale, bulk, coverage and density; to the availability of public facilities and utilities; to traffic generation and the capacity of the surrounding road network; and to other related impacts of the development."[31]

Petitioners argue that the county erred by failing (1) to define "livability," (2) to address issues concerning impacts on livability and appropriate development raised by petitioners below, and (3) to explain in its findings how and why the proposed use will be "reasonably compatible with and have minimal impact on livability and appropriate development of abutting properties and the surrounding neighborhood."

A. Definition of Livability

To show that a proposed development will have "minimal impact on the livability * * * of abutting properties and the surrounding neighborhood," the county must first identify the qualities or characteristics constituting the "livability" of abutting properties and the surrounding neighborhood. See McCoy, 16 Or LUBA at 301. In its

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[31]Prior to the amendment, LCZO 21.435.5.a stated:

> "The location, size, design and operating characteristics of the proposed development will be compatible with and will not adversely affect the livability or appropriate development of abutting properties and the surrounding neighborhood."

findings addressing compliance of the proposed conditional use with LCZO 21.435.5.a, the county stated:

> "The Board accepts the following definition of livability for use in this case: 'The expectation a person has for health, safety and general well-being in light of surrounding natural resources, neighbors, and applicable zoning laws.'" Record E 26.

Under this subassignment of error, petitioners argue only that the above quoted finding does not constitute county adoption of a definition of "livability." According to petitioners, "although the [county] 'accepted' a definition of livability for use in this case, it did not state that the definition that it accepted was the correct definition." Petition for Review 35. Petitioners contend the county's failure to define "livability" requires that we remand the county's decision.

We interpret the above quoted finding to be a statement of what the county believes is the correct interpretation of "livability," as that term is used in LCZO 21.435.5.a.

This subassignment of error is denied.

B. Issues Raised Below

Petitioners argue that the county failed to address issues concerning impacts of the proposed use on livability or appropriate development of neighboring or abutting properties which they raised in the county proceedings. Norvell v. Portland Metro Area LGBC, supra. According to petitioners, the county was obligated to consider under

LCZO 21.435.5.a adverse impacts on agriculture (Record E 126), reduction in property values (Record E 103, 126-128, 497, 537, 548, 647) and impacts of the ultimate reclaimed use of the subject property as a lake on groundwater (Record M 66, 68; Record E 454, 642, 705).

The county responds that it "evaluated each off-site impact that the proposed use had been identified as causing and made findings as to the existence and effect of each" and "imposed conditions intended to insure none of the impacts had an 'unreasonable' effect on the livability of the effected [sic] area." Respondent's Brief 25. The county also argues that there is evidence in the record that the ultimate use of the subject site as a fish and wildlife pond will be supported by surface run-off, not groundwater. However, the county does not identify the findings, conditions or evidence to which it refers.

We agree with petitioners that the issues of impacts on property values and impacts of the ultimate reclaimed use of the subject property on groundwater were raised below, are relevant to compliance with LCZO 21.435.5.a, and are not addressed in the county's decision. However, we do not find that the issue of impacts of the proposed use on agriculture was sufficiently raised below to require the county to address this issue in its findings.[32]

[32]In support of their claim that they raised this issue below, petitioners cite only a letter from a neighboring property owner which

This subassignment of error is sustained, in part.

C. Statement of Reasons

Petitioners argue the county found that the proposed conditional use would have significant impacts on visual aesthetics, noise, groundwater, dust and traffic. Record E 26-29. Petitioners further argue that the county does not explain how these concerns have been addressed to make the use "reasonably compatible with and have minimal impact on the livability" of neighboring properties. According to petitioners, under ORS 215.416(9),[33] the county's failure to explain the justification for its decision based on the applicable standard and its findings of fact requires remand or reversal of the county's decision.

The county's decision to approve the subject conditional use permit must be supported by findings which not only identify the applicable criteria and state the facts relied upon, but also explain why those facts demonstrate that the criteria are met. ORS 215.416(9); Sunnyside Neighborhood v. Clackamas Co. Comm., 280 Or at

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states "[a]t present we have sheep grazing on our land and they are at times mired in mud [due to runoff from the existing quarry]." Record E 126.

[33]ORS 214.416(9) provides:

> "Approval or denial of a permit shall be based upon and accompanied by a brief statement that explains the criteria and standards considered relevant to the decision, states the facts relied upon in rendering the decision and explains the justification for the decision based on the criteria, standards and facts set forth." (Emphasis added.)

20-21; Green v. Hayward, 275 Or 693, 706-708, 552 P2d 815 (1976); Vizina v. Douglas County, ___ Or LUBA ___ (LUBA No. 89-007, June 16, 1989), slip op 6; Standard Insurance Co. v. Washington County, ___ Or LUBA ___ (LUBA No. 87-020, September 1, 1987), slip op 21.

In this case, the county findings addressing LCZO 21.435.5.a basically describe the site, the proposed use, and some of the expected impacts of the use, and indicate that visual and noise impacts will be reduced by earthen berms and vegetative plantings.[34] Record E 25-28. The county conclusion states (1) the conditional use permit is granted, subject to conditions; (2) the aggregate extraction and processing operations shall be reviewed by the county after the operation has affected five acres and ten acres; and (3) the final beneficial use of the site will be a fish and wildlife pond also used for agricultural purposes. Record E 29.

We agree with petitioners that the county's findings do not include a statement of reasons explaining why the facts found concerning impacts on neighboring properties lead to the conclusion that the proposed use "will be made reasonably compatible with and have minimal impact on the livability and appropriate development of abutting

[34]We determined under the previous subassignment of error that the county's findings fail to address all impacts relevant to compliance with LCZO 21.435.5.a.

properties and the surrounding neighborhood."

This subassignment of error is sustained.

The sixth assignment of error is sustained, in part.

The county's decision is remanded.