BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

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| STEPHEN SANDERS and JAIME SANDERS,<br><br>Petitioners,<br><br>and<br><br>GEORGE MORARU and MICHAEL ADAMS,<br><br>Intervenors-Petitioner,<br><br>vs.<br><br>YAMHILL COUNTY,<br><br>Respondent,<br><br>and<br><br>C.C. MEISEL CO., INC.,<br><br>Intervenor-Respondent. | LUBA No. 96-173<br><br>FINAL OPINION AND ORDER |

Appeal from Yamhill County.

Edward J. Sullivan, Portland, filed a petition for review and argued on behalf of petitioners. With him on the brief was Preston, Gates & Ellis.

George Moraru, Amity, filed a petition for review on his own behalf.

Mike Adams, Amity, represented himself.

John C. Pinkstaff, Assistant County Counsel, McMinnville, filed a response brief and argued on behalf of respondent.

Paul Hribernick, Portland, filed a response brief and argued on behalf of intervenor-respondent

LIVINGSTON, Administrative Law Judge; GUSTAFSON, Chief Administrative Law Judge, participated in the decision.

REMANDED 02/05/98

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

Opinion by Livingston.

**NATURE OF THE DECISION**

Petitioners appeal a decision of the county board of commissioners (county board) that amends the county plan map and zoning map to redesignate and rezone 80 acres to allow the extraction and crushing of rock.

**MOTIONS TO INTERVENE**

Michael Adams and George Moraru (Moraru) move to intervene on the side of the petitioners.[1] C.C. Meisel (Meisel) moves to intervene on the side of the respondent. There is no opposition to the motions, and they are allowed.

**MOTION TO FILE REPLY BRIEF**

Petitioners request permission to file a reply brief, which addresses five matters: (1) the appropriateness of applying a particular version of the standards for the Limited Use ("LU") overlay district in the challenged decision; (2) the rezoning of the subject property to Mineral Resource-2 (MR-2) rather than Mineral Resource-1 (MR-1), as requested in Meisel's initial application; (3) an alleged ex parte contact in the form of a site visit made by the county board; (4) support in the record for petitioners' contention that certain farm uses involving Goal 3 are impacted by the proposed mine

[1]Intervenor-petitioner Adams did not participate further in this appeal. Intervenor-petitioner Moraru filed a petition for review in which he makes one assignment of error. Meisel and the county (together, respondents) do not respond to Moraru's petition for review. To the extent that we can discern Moraru's arguments, we consider them together with petitioners' second assignment of error.

expansion; and (5) Meisel's reliance on Columbia Steel Castings v. City of Portland, 314 Or 424, 840 P2d 71 (1992), to support an argument concerning the type of review required for a consideration of conflicting uses under Goal 5 and the Goal 5 Rule.

In its response brief, Meisel contends that petitioners failed to make (and therefore waived) arguments with respect to conflicts with certain uses, including geothermal uses; accessory dwellings; manufacture of concrete or aggregate products; exploration for oil, gas or geothermal resources; horse breeding, boarding and kennels; parks; resorts; and golf courses. Meisel acknowledges that it is appropriate for us to consider petitioners' discussion, on page 8 of the reply brief, of Meisel's claim of waiver. Meisel objects to our consideration of the remainder of the reply brief on the grounds that it does not address new matters raised in the respondents' briefs, as required by OAR 661-10-039.

We consider petitioners' discussion of Meisel's claim of waiver and also the part of the reply brief which addresses the application of a new or different version of the LU overlay district standards. We do not consider the balance of the reply brief, which does not address new matters.

**MOTION TO STRIKE MATERIAL PROVIDED AT ORAL ARGUMENT**

At oral argument, petitioners offered a three-page handout, which was also reproduced on large poster boards, containing a summary of their arguments pertaining to

substantial evidence. Petitioners explained that there was no information included in the handout that was not also found in their petition for review. We agreed to review the handout and decide whether to consider it.

Meisel objects to our consideration of the handout on three grounds: (1) it did not have an opportunity to review the handout prior to oral argument and could not review it, because of its length, during oral argument; (2) the handout serves as an extension of petitioners' already lengthy brief; and (3) the handout circumvents the time limits placed on oral arguments by giving petitioners what amounts to a "continuing oral argument." We treat Meisel's objection as a motion to strike the handout. Petitioners respond that the handout is merely a convenience to the Board.

We agree with Meisel that consideration of the handout would provide an unfair advantage to petitioners. Although we do permit parties to submit or create simple demonstrative exhibits at oral argument, the handout is a reformulation of the arguments in petitioners' brief. Its length and complexity are such that Meisel could not have been expected to respond at oral argument. We do not consider the handout.[2]

**FACTS**

The subject property includes 80 acres. It is identified as tax lot 5423-1202, is designated Agricultural/Forestry

[2]Although we do not consider the handout, we do not return it as Meisel requests. It is part of LUBA's record.

Large Holding (AFLH), and is zoned Agricultural/Forestry-20 (AF-20). The property is located approximately three miles east of the city of Amity, to the north of Amity Road (State Highway 153) and Burch Hill Road, a gravel county road. Stephens Quarry, a 40-acre quarry operated by Meisel and zoned MR-2, adjoins the property to the east and has access to Lafayette-Hopwell Highway and Walnut Hill Road, a county road. Stephens Quarry has electric power and a weigh station, and supports a crushing plant and an asphalt batch plant. The Anderson "A" Quarry, which is zoned MR-2, is located approximately 1,200 feet to the east of the subject property. The Anderson "B" Quarry, which is zoned AF-20, is located across Burch Hill Road, to the south. To the north is a rural residential exception area, the Walnut Hill subdivision, which is zoned Agriculture/Forestry Small Holding (AF-10) and which contains lots of approximately five acres, many of which are developed with houses. Otherwise, the immediately surrounding area is in mixed farm and forest use.

The subject property is sloped from south to east, with elevations from 400 to more than 600 feet above mean sea level. There is a wetland running from northeast to southwest. The property contains pasture land, including scrub brush and some trees. At the south end is an untended grape patch.

In 1982 a county task force on Goal 5 recommended that the subject property be included, together with the Stephens

Quarry, in the county's Goal 5 inventory, and that the plan designation be amended to Quarry. The planning commission rejected the recommendation as to the subject property.

Meisel wishes to expand its mining activities from the Stephens Quarry onto the property. On July 26, 1993, Meisel applied to add the site to the county's mineral and aggregate inventory, change the plan map designation to Quarry and rezone the property to MR-1.[3,4] Record 1885-1904. Processing of the application was delayed until the signatures of the property owners were obtained.[5]

In March 1995, the county gave notice of the application to interested parties, and the planning commission held a public hearing on April 6, 1995. Record 1884. The planning commission initially recommended denial of the application, pending the completion of a necessary water study, which was completed with the consent of the county board. The planning commission then recommended approval, and the county board conducted hearings on January 31 and February 7, 1996. The county board voted on April 3, 1996 to approve the

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[3]The challenged decision rezones the subject property as MR-2. Unlike the MR-1 zone, the MR-2 zone does not permit portable concrete batching or portable hot-mix batching plants. The zones are otherwise identical.

[4]Although the parties do not provide a record citation to the signed application, we understand the processing of the application to indicate that the required signatures were obtained. No one contends otherwise, and an opponent of the mine expansion testified that the property owners had signed the application in February, 1995. Record 1805.

[5]Because the owners initially resisted signing, Meisel filed a lawsuit, based on a lease agreement, in circuit court. The suit was settled privately, Record 1826-27, and the processing of the application commenced. Record 1804-05.

application, and entered a final order on August 31, 1996.[6]

This appeal followed.

**FIRST ASSIGNMENT OF ERROR**

Petitioners contend that the findings and conclusions in the challenged decision with respect to Goals 2, 3, 4, 6, 7, 11, 12 and 14 are both inadequate and not supported by substantial evidence in the whole record. Petitioners contend further that the county improperly imposed a limited use overlay zone in the decision without notice or opportunity for hearing, and thereby prejudiced petitioners' substantial rights.

**A. Goal 2 (Land Use Planning)**

Goal 2 provides, in material part:

> "City, county, state and federal agency and special district plans and actions related to land use shall be consistent with the comprehensive plans of cities and counties and regional plans adopted under ORS Chapter 268.
>
> "* * * Each plan and related implementation measure shall be coordinated with plans of affected governmental units."

We have interpreted this "coordination" requirement not to demand that a governmental unit contemplating a plan revision accede to every concern that may be expressed by an "affected governmental unit," but to require that it at least make findings responding to legitimate concerns. ONRC v. City

[6]Effective September 1, 1996, the Department of Land Conservation and Development (DLCD) adopted new rules implementing Goal 5. These rules, OAR chapter 660, division 23, replace OAR chapter 660, division 16, except regarding cultural resources. The parties agree the old rules apply to the challenged decision.

of Seaside, 29 Or LUBA 39, 56 (1995); Waugh v. Coos County, 26 Or LUBA 300, 314 (1993). The local government must clearly explain the nature of the proposed action, and the comments of the affected governmental units must be solicited. If such comments are provided, the local government must consider them and accommodate the interests of the affected governmental units as much as possible. Davenport v. City of Tigard, 23 Or LUBA 565, 576, aff'd 116 Or App 248 (1992); Rajneesh v. Wasco County, 13 Or LUBA 202, 210 (1985).

Petitioners contend the Goal 2 coordination requirement was not satisfied with respect to four entities: (1) the Oregon Department of Transportation (ODOT); (2) the city of Amity; (3) the Yamhill County Soil and Water Conservation District (SWCD); and (4) the Oregon Department of Environmental Quality (DEQ). The concerns expressed by ODOT are raised by petitioners in connection with Goal 12, and are discussed below.

The city of Amity explained that although it did not have any funding available for the development of Breeding Spring, located to the west of the site, development of this water source is part of its water master plan. Record 782. The city raised concerns that the proposed mine expansion might cause the groundwater table to be lowered and might cause groundwater contamination that would affect the city's water system. Record 763.

Meisel contends the findings at Record 141-46 adequately

respond to the city's concerns regarding Breeding Spring. The findings describe the participation of witnesses expert in water resources and reach the conclusion that

> "the proposed application will not adversely affect water resources in the area because most extraction will occur above the identified location of water resources, and because mining will be conducted with an advanced air-drill program to locate, isolate and protect water resources." Record 142.

Meisel identifies evidence at Record 706-17 and 1387-1495 as supporting this conclusion.

Record 706-17 is a collection of maps, charts and geologic cross-sections. The maps include the area surrounding and including Breeding Spring. Record 207, 209, 216. A "Draft Groundwater Assessment Report" (Newton Report), prepared by a professional engineer and dated September 18, 1995, is at Record 1387-1495. The report mentions Breeding Spring specifically at Record 1404 and 1408, where it is described as "an example of natural discharge from the Upper Groundwater System [which] occurs at elevation 400 feet MSL and is interpreted to be at the contact between the basalt and marine sedimentary rocks." The report concludes that "expanding the quarry can be readily accomplished in a manner that protects both groundwater quantity and quality, while concurrently allowing the rock resource to be beneficially used." Record 1417. Although there is no reference to the city of Amity's letter in the findings, we agree with Meisel that the findings cited by Meisel, together with the evidence in the Newton Report upon which they are based, satisfy the

Goal 2 coordination requirement with respect to the city's concerns regarding water quality at Breeding Springs.

The SWCD mentioned soil erosion and surface water contamination as possible problems arising from mining on the subject property. Record 1864. Petitioners contend the findings do not address these concerns. We disagree. The findings state repeatedly that the topsoil removed during mining will be stored in berms and used for future reclamation. Record 13, 16, 21 64, 67-69, 71, 130-31, 135-37, 135-47. The decision imposes conditions mandating periodic reclamation in accord with the requirements of the Oregon Department of Geology and Mineral Industries (DOGAMI), the preservation of existing vegetation within an "extraction setback area," and the storage of overburden and topsoil and berms, planted with a vegetative screen. Record 161-62.

In response to petitioners' contention that the county did not seek comment from DEQ on air, land or water quality, Meisel points out that the county gave notice to DEQ, Record 1549, but no response was received. We agree with Meisel that since the notice explained the proposed action and invited written comment, the Goal 2 coordination requirement was satisfied. The county is not required to "drag an answer" out of potentially affected governmental units. Davenport, 23 Or LUBA at 576.

This subassignment of error is denied.

**B. Goal 3 (Agricultural Lands)**

**1. Application of YCZO Chapter 904**

Yamhill County Zoning Ordinance (YCZO) chapter 904 contains the criteria for the LU district. On December 29, 1993, an amended version of YCZO chapter 904 became effective.[7] Petitioners contend that because Meisel filed its

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[7]YCZO 904.02 was amended as shown:

> "The LU Overlay District shall [only] apply to that specific area for which a reasons exception has been taken **or other area as deemed appropriate to protect Goal 5 resources**. The Limited Use Overlay District is intended to carry out the administrative rule requirement for ['reasons'] exceptions pursuant to OAR 660-14-018[(3)(a)] and ORS 197.732[(1)(c)] **and for Goal 5 resource protection pursuant to OAR 660-16-010**." (Bracketed language deleted; bold language added.)

YCZO 904.04 was amended as shown:

> "**A.** The Limited Use Overlay District is to be applied through a zone amendment application using the Type C process **at the time the underlying zone is being changed in the case of an exception**.
>
> "**B. It shall not be necessary to disclose in the public hearing notice of a zone change that a Limited Use Overlay may be applied.**
>
> **"C. The ordinance adopting overlay zone shall, by reference or by name, identify those permitted uses in the zone that will remain permitted uses or become conditional uses. The description of the permitted or conditional use may be qualified as necessary to achieve the intent of the LU overlay zone.**
>
> "[In order for an LU District to be approved, findings satisfying each of the following factors must be made and shall be included in the adopting ordinance:
>
> "A. That permitted uses and activities will be limited to those uses and activities justified and approved in the exception, as required by OAR 660-04-108(3)(a).
>
> "B. That a review has been made of all districts in the ordinance, and it has been determined that none of those districts limit the uses and activities, as required by OAR 660-04-018(3)(a).
>
> "C. That the location proposed in the underlying district is equally or better-suited than any other possible

application on July 26, 1993, former YCZO chapter 904 applies with respect to the application.[8] The county maintains that the original application was not complete when filed because it lacked the owners' consent, finally obtained in February 1995, whereupon the application was deemed complete. On that basis, the county argues the amended version applies.

In support of its contention that the application filed on July 26, 1993 was not complete, the county points to an August 26, 1993 letter from the county counsel to a representative of Meisel, which calls the signatures of the property owners on the application a "necessary prerequisite to a county land use decision changing the plan and zone map designation on the property." Record 1922.[9] Petitioners

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district.]" (Bracketed language deleted; bold language added.)

[8]In the petition for review, petitioners do not acknowledge the amendment of YCZO chapter 904. Their argument that former YCZO chapter 904 applies is found in their reply brief at pages 1-3.

[9]The August 26, 1993 county counsel's letter states:

> "This letter is to confirm a telephone conversation we had on August 25, 1993 regarding C.C. Meisel's land use application for a plan amendment/zone change to allow an expansion of quarrying activities on property leased from Cheryl Zedwick and Charmaine Sanders ('the owners'). I had previously advised the planning director that the signatures of the owners on the application were a necessary prerequisite to a county land use decision changing the plan and zone map designation on the property.
>
> "You have filed the above referenced lawsuit on behalf of Meisel against the owners and the county. Part of the relief sought is a declaration by the court that the effect of Meisel's lease is to make the owners' signatures on the land use application unnecessary.
>
> "In response to your question as to the reason why the county required the owners' signatures on the application, I told you in our telephone conversation that the purpose of the

reply that the county failed to make a needed finding in its final order on the issue of when the application was deemed complete under ORS 215.428.[10]

The challenged decision is an application for a plan map amendment and zone change. ORS 215.428(2) states that if an application for a permit, limited land use decision or zone change is "incomplete," the governing body or its designate (in this case, the planning director) shall notify the applicant that certain information is missing and allow the applicant to submit that information within 30 days. The application is to be deemed complete when the additional

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signatures was to verify that the owners consented to the plan amendment/zone change on their property. * * *" Record 1922.

[10]ORS 215.428 provides, in relevant part:

"* * * * *

"(2) If an application for a permit, limited land use decision or zone change is incomplete, the governing body or its designate shall notify the applicant of exactly what information is missing within 30 days of receipt of the application and allow the applicant to submit the missing information. The application shall be deemed complete for the purpose of subsection (1) of this section upon receipt by the governing body or its designate of the missing information. If the applicant refuses to submit the missing information, the application shall be deemed complete for the purpose of subsection (1) of this section on the 31st day after the governing body first received the application.

"(3) If the 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.

"* * * * *"

information is submitted. If the applicant refuses to submit the missing information, the application is to be deemed complete on the 31st day after the governing body first received the application.

The timing of the county counsel's August 26, 1993 letter, which refers to a telephone conversation on August 25, 1993, exactly 30 days after the application was filed, suggests that he and the county planning director were motivated by the 30-day deadline established in ORS 215.428(2) to obtain "missing information," i.e., evidence of the property owners' consent to the application, in order to begin processing the application. Had the consent of the property owners been obtained within 180 days of July 26, 1993, when the application was first submitted, ORS 215.428(3) would have required that approval or denial be based upon the standards and criteria applicable on July 26, 1993. However, the record makes clear that the property owners' consent was not obtained until settlement of a circuit court lawsuit in February, 1995. Record 1826-27. Because this was more than 180 days after the date of application, the statute does not require the application of standards and criteria in effect on July 26, 1993.

The August 26, 1993 letter of the county counsel supports the county's position that Meisel's application was not deemed complete until the consent of the property owners was obtained in 1995. Petitioners do not argue that the July 26, 1993

application was complete before then. Even if the findings are defective in failing to state explicitly when the application was deemed complete, it is obvious from the record.[11] Under ORS 197.840(11)(b), we affirm the county's use of the present version of YCZO chapter 904 in evaluating Meisel's application. We therefore do not consider those of petitioners' arguments which rely on provisions of former YCZO chapter 904 that have been superseded or augmented such that the arguments are moot. These include petitioners' arguments that under former YCZO 904.02, the LU district may only be applied in reasons exceptions cases, and that a Type C process was required.

**2. Notice Requirement As Applied to YCZO Chapter 904**

Petitioners contend the county failed to list YCZO chapter 904 in the notice of the April 6, 1995 hearing, as required by ORS 197.763(3) and implementing county regulations at YCZO 1301.01 C.3, 1402 and 1403.02.[12] The county responds that YCZO 904.04 B. expressly states that it is not necessary to disclose, in the public hearing notice of a zone change, that an LU district overlay may be applied. Petitioners reply

[11]The findings do state that the application was "submitted by C.C. Meisel in 1993 and activated in the Spring of 1995." Record 3. That is consistent with the evidence that the property owners' consents were obtained in March, 1995 and with the conclusion that the application became complete at that time.

[12]ORS 197.763(3)(b) requires the notice of hearing to "[l]ist the applicable criteria from the ordinance and plan that apply to the application at issue."

that YCZO 904.04 B. cannot be employed to subvert a statutory requirement.

It is undisputed that the LU district overlay was not mentioned in the public hearing notice and that petitioners were not aware that the use of the LU district was a possibility until their attorney read draft findings. Record 1926-27. However, we understand the LU district overlay, at least in this case where it was applied to the subject property only, to be a means of imposing restrictions, at the time of rezoning to MR-2, that act as conditions. It did not establish standards against which the application was measured. Since the task of imposing restrictions while approving a zone change to MR-2 falls to the county, it does not seem likely that Meisel would, of its own volition, ask for an LU district overlay on its own property at the time of application, or that the county itself would be aware that the LU district was required. Under the circumstances, notice of the LU district overlay was not required.

Petitioners contend that if the county "had clearly stated that it believed the current version of the LU overlay applied, Petitioners could have suggested restrictions." Reply Brief 2. However, the restrictions the county adopted clearly are intended to address the concerns expressed by petitioners and others in the course of the local proceedings. Petitioners have not shown that the means by which the county adopted the restrictions, as opposed to any inadequacy in the

restrictions themselves, prejudiced petitioners' substantial rights. We agree with the county that even if the failure to mention YCZO chapter 904 in the initial notice of hearing could be construed as error, it was harmless procedural error. ORS 197.835(9)(a)(B).

In their reply brief, petitioners argue that YCZO 904.03 B. allows uses permitted outright in the MR-2 zone, such as tile manufacturing, to be sited as conditional uses without requiring an exception to Goals 3, 4 or 14. However, as petitioners acknowledge, the effect of the LU district overlay in this case is to prohibit, not conditionally permit, use of the site for dwellings, batch plants or manufacturing uses, including tile or concrete products. See Record 162.

Petitioners contend the challenged decision does not amend the county's official zoning map to reflect the imposition of the LU district overlay. We agree that while the decision expressly amends the county's official zoning map to reflect a zoning designation of "MR-2 Mineral Resource," Record 2, 167, it does not expressly amend the map to reflect the LU district overlay. However, the findings, which are incorporated into the decision by reference, place an LU overlay on the subject property. Record 161.

Petitioners make some brief, additional contentions that the county misconstrued YCZO chapter 904 as it applies to "the limitation of the zone to reasons exceptions cases, required findings, notice to DLCD under ORS 197.610-.625, acting

without jurisdiction and not providing for later site plan review." Petition for Review 5. Some of these contentions appear to be based on former YCZO chapter 904. Those that have another basis are either without merit or insufficiently developed to permit review.

### C. Evaluation and Balancing of Conflicting Uses

Petitioners assert that the county violated both Goal 3 and OAR 660-16-005, which implements Goal 5, in finding that certain farm uses were "impractical" and that "allowing the mining use practically excluded the agricultural use." Petition for Review 6.[13] Like Meisel, we cannot follow petitioners' argument and do not discuss it further.

Petitioners also contend that the findings do not consider the potential impacts of dust from the quarry site on grape production in the surrounding area, notwithstanding concerns expressed by neighbors. Record 1657, 1765. Meisel responds that the discussion of ORS 215.296, as it applies to the proposed plan map amendment and zone change, addresses the neighbors' concerns. We discuss the application of ORS 215.296 below, under the fourth assignment of error.

Finally, petitioners object that the conditions on the proposed quarry use do not limit its duration. However,

[13]The petition for review is in three volumes. The first volume contains petitioners' argument, and is cited as "Petition for Review ___." The second and third volumes contain a copy of the decision and transcripts of tapes of the hearings below. We cite to the third volume as "Petition for Review, Volume 3 at ___."

petitioners do not identify a standard which requires a condition limiting the duration of the quarry use. This Board can grant relief only if petitioners demonstrate that an applicable legal standard is violated by the challenged decision. Schellenberg v. Polk County, 22 Or LUBA 673, 679 (1992); Lane School District 71 v. Lane County, 15 Or LUBA 150, 153 (1986).

We sustain petitioner's contention that the county's official zoning map should be amended to show the imposition of the LU district overlay. In all other respects, except as discussed under the fourth assignment of error, this subassignment of error is denied.

**C. Goal 4 (Forest Lands)**

To the extent that petitioners challenge the county's application of OAR 660-06-025(5), which addresses forest uses and which incorporates the limitations stated in ORS 215.296(1), their challenge is addressed below, under the fourth assignment of error. Several of petitioners' arguments are identical to their arguments with respect to Goal 3; these are addressed above. To the extent that we can identify any additional arguments, we find them without merit.

Except as discussed under the fourth assignment of error, this subassignment of error is denied.

**D. Goal 6 (Air, Water and Land Resources Quality)**

Goal 6 provides, in material part:

> "All waste and process discharges from future development, when combined with such discharges from

> existing developments shall not threaten to violate, or violate applicable state or federal environmental quality statutes, rules and standards. With respect to the air, water and land resources of the applicable air sheds and river basins described or included in state environmental quality statutes, rules, standards and implementation plans, such discharges shall not (1) exceed the carrying capacity of such resources, considering long range needs; (2) degrade such resources; or (3) threaten the availability of such resources.
>
> "Waste and Process Discharges -- refers to solid waste, thermal, noise, atmospheric or water pollutants, contaminants or products therefrom. Included here also are indirect sources of air pollution which result in emissions of air contaminants for which the state has established standards."

Petitioners contend that the proposed expansion of the Stephens Quarry onto the subject property will violate applicable air quality, water quality and quantity, and noise standards. Petitioners are correct that Goal 6 requires findings, supported by substantial evidence in the whole record, that in the event of the proposed expansion, compliance with applicable environmental standards is feasible. Eckis v. Linn County, 19 Or LUBA 15, 35 (1990).

**1. Air Quality**

Petitioners contend that the county's conclusion that Goal 6 is satisfied with respect to air quality is not supported by substantial evidence in the whole record. Petitioners make two arguments: first, that Meisel has a history of violations of air quality standards in its operations on other properties; and second, that it will be difficult, if not impossible, for Meisel to obtain the water

necessary to suppress dust emissions from its portable rock crusher.

In support of the first argument, petitioners rely on the report and testimony of their environmental consultant.[14] The report focuses on dust created by a portable rock crusher which has been used at several quarries operated by Meisel. The report advises that DEQ sent four notices of violations to Meisel between 1979 and 1988 for "emitting visible fugitive emissions in excess of permit limits." Record 481. DEQ has not sent any notices of violations since 1988, but the report advises that an August 3, 1993 inspection report by DOGAMI states there was a dust problem with the crushing operation. Id. In addition, the environmental consultant's report states that a review of annual production records submitted by Meisel to DEQ indicates an excess of plant site emission limits (PSELs) on 14 occasions from 1978 through 1995. Record 482-83. According to the consultant, a determination of compliance (or noncompliance) with the annual PSEL is based on whether or not permitted production limits are exceeded. Petition for Review, Volume 3 at 119.

Meisel responds that the county's conclusion that Meisel is in compliance with its permits is supported by the absence of any DEQ enforcement action against Meisel since 1988 and a statement in a 1991 DEQ permit application review report that

[14]The report is at Record 477-525. The consultant's testimony is transcribed in the Petition for Review, Volume 3 at 118-21.

there were no permit violations during the previous permit period.

A reasonable person could draw different conclusions from the evidence concerning Meisel's past permit compliance. We defer to the county's decision to rely on certain evidence and not on other evidence. Mazeski v. Wasco County, 28 Or LUBA 178, 184 (1994), aff'd 133 Or App, 258, 890 P2d 455 (1995). We question whether it is appropriate in a land use proceeding to evaluate the feasibility of compliance with Goal 6 on the basis of an applicant's uncertain reliability, as demonstrated by an alleged past failure to comply with environmental regulations in its operations on other properties. Petitioners' first argument also relies on the unacceptable inference that even if the county imposes conditions requiring Meisel to obtain the appropriate surface mining permits, the county cannot rely on DEQ to enforce DEQ's regulations.

Petitioners' second argument does raise a legitimate question concerning the feasibility of compliance with Goal 6. Meisel's portable rock crusher uses water sprays to suppress dust. This water is needed to protect air quality. Because Meisel has no water rights, the water must be transported to the site by truck. Petitioners express concern that "many trucks" will be required to haul water, particularly since the 1996 air quality discharge permit for operations on the Stephens Quarry raises production capacity from 350,000 to 600,000 tons per year. Petition for Review 8-9. Petitioners

contend that the challenged decision does not address this concern.

As an initial point, petitioners cannot challenge in this proceeding the issuance of the 1996 air quality discharge permit for operations on the Stephens Quarry. The challenged decision addresses petitioners' concerns regarding water supply by finding that "adequate water for the proposed use can be available from an on-site well (under statutory exemption) or that adequate water can be trucked in and stored on the site." Record 52. The decision does not identify evidence in support of this finding. Meisel points to statements in a February 7, 1996 letter from Meisel's general manager, Record 224-25, and the testimony of a representative of the Oregon Water Resources Department (OWRD), Petition for Review, Volume 3 at 68, to the effect that Meisel may use up to 5,000 gallons of well water per day for industrial purposes, that Meisel has a storage tank on site, and that Meisel has a water truck which it will fill up off site and bring to the expansion area. Even if correct, these statements are not sufficient to support the county's conclusion. To determine that adequate water will be available to protect air quality, the county must compare the amount of water it finds will be available to the amount of water it finds will be needed. Until that comparison is made, the county has no basis on which to conclude that compliance with Goal 6, as it applies to air quality, is feasible.

**2. Water Quality and Quantity**

Petitioners contend that the county's conclusion that Goal 6 is satisfied with respect to water quality and quantity is not supported by substantial evidence in the whole record. Petitioners maintain that surface mining will (1) interfere with groundwater flow; (2) reduce summer discharges into the Yamhill River, which is a DEQ-designated water quality limited stream, due to low summer flows; and (3) cause contamination of aquifers.

During the local proceedings, Meisel submitted the Newton Report and provided Mr. Newton's expert testimony.[15] Petitioners submitted evidence and expert testimony from Samuel R. Allison (Allison). Additional evidence and testimony were provided by representatives from OWRD and DOGAMI. The decision concludes at Record 142-45 that it will be possible to satisfy Goal 6 if advanced air track drilling is used to locate and protect water resources.[16] Record 142. Condition B.2 is imposed to require the air track drilling, using methodologies to be developed with the concurrence of DOGAMI and OWRD. Using drilling data, setbacks to protect "substantial perched zones" will be established with the

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[15]Petitioners emphasize that the Newton Report (at Record 1386-1495) is labeled a draft, and suggest that it should therefore be treated as preliminary and unreliable. However, the minutes of the county board's January 31, 1996 meeting indicate that Mr. Newton stood by the "draft" throughout the local proceedings. Record 648-49. See also Petition for Review, Volume 3 at 42.

[16]According to OWRD, advanced air track drilling can help to locate the lateral limits of water bearing zones. Record 852.

concurrence of DOGAMI and OWRD. Record 161.

In reviewing the decision, we cannot substitute our judgment for that of the county board, but must weigh all the evidence in the record to which we are directed, and determine whether, based on that evidence, the county board's conclusion is supported by substantial evidence. Younger v. City of Portland, 305 Or 346, 358-60, 752 P2d 262 (1988); 1000 Friends of Oregon v. Marion County, 116 Or App 584, 588, 842 P2d 441 (1992). The evidence cited by the parties includes taped testimony as transcribed by petitioners, reports and letters.

Notwithstanding continuing concerns expressed by Allison and the representatives from DOGAMI and OWRD, there appears to be a consensus among the expert witnesses that if appropriate conditions are imposed, it is feasible to mine the subject property while protecting water resources in compliance with Goal 6. See Record 1390 (Newton Report concludes Stephens Quarry can be expanded onto the subject property without interfering with the yield and quality of private wells in the area); Petition for Review, Volume 3 at 109 (Allison testimony that if OWRD and DOGAMI jointly developed conditions, they "probably" would protect water resources); Petition for Review, Volume 3 at 64-65 (OWRD representative's testimony that, though expensive, methodology can be designed to provide data necessary to protect water resources); Petition for Review, Volume 3 at 61 (DOGAMI representative's testimony that DOGAMI and OWRD will protect adjacent wells by restricting

mine depths and the direction of mining, and through reclamation requirements).

Petitioners specifically object to the failure of the decision (1) to restrict mining around "Monitor Well 4" (MW4), located near the southwestern boundary of the Stephens Quarry and the eastern boundary of the subject property; and (2) to impose conditions to protect water quality or quantity from damage due to mining. The condition that protects "substantial perched zones" addresses petitioners' first concern. Petitioners' second concern is addressed by condition B.5, which requires compliance with the environmental standards set forth in YCZO 404.07.[17] Record 162. Finally, condition B.7 requires that Meisel provide surety and insurance sufficient to cover damages to, and replacement of, any domestic water supplies in the area which are caused by its operations. Id.

As we explained in Rhyne v. Multnomah County, 23 Or LUBA 442, 446-47 (1992), assuming a local government finds compliance, or feasibility of compliance, with all approval criteria during a first stage, where statutory notice and public hearing requirements are observed, it is appropriate to impose conditions of approval to assure those criteria are met

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[17]YCZO 404.07 C.2. provides:

> "Any mining operation shall not exceed Department of Environmental Quality noise emission, air contamination and water quality standards. Additionally, appropriate federal environmental quality permits shall be obtained for each site."

and defer responsibility for assuring compliance with those conditions to planning and engineering staff as part of a second stage. Substantial evidence in the whole record supports the county's conclusion that compliance with Goal 6 is feasible. Conditions in the decision assure compliance at the time of development. No more is required.

**3. Noise**

Petitioners assert that the challenged decision lacks affirmative findings, required by Goal 6, that state noise standards will be met. We agree with Meisel that there are adequate findings with respect to noise. Record 14, 17, 101-02, 111, 116-18.

This subassignment of error is sustained, in part.

**E. Goal 7 (Areas Subject to Natural Disasters and Hazards)**

Goal 7 provides that developments "shall not be planned nor located in known areas of natural disasters and hazards without appropriate safeguards." (Emphasis added.) Petitioners do not contend that the subject property is known to be an area of natural disasters or hazards.[18] The challenged decision finds that it is not, and notes that it will not become one because the reclamation permit from DOGAMI will require "stabilization of overburden and control of the heights of extraction faces within the quarry." Record 146.

[18]Petitioners cite to Record 777, a photograph of two tractors; oversized item 38, a soils map; and oversized item 61, a photograph of what we understand to be the Stephens Quarry. None of these exhibits supports a conclusion that the area is subject to natural disasters or hazards.

The findings are adequate to explain why Goal 7 is either satisfied or inapplicable. Bridges v. City of Salem, 19 Or LUBA 373, 379, aff'd 104 Or App 220 (1990).

This subassignment of error is denied.

**F. Goal 11 (Public Facilities and Services)**

Petitioners contend that the proposed development threatens the water supply of the city of Amity and surrounding rural properties in a way that violates Goal 11, which is "[t]o plan and develop a timely, orderly and efficient arrangement of public facilities and services to serve as a framework for urban and rural development." We agree with Meisel that Goal 11, which emphasizes planning to provide an appropriate level of public facilities and services to urban areas, on the one hand, and rural areas, on the other hand, does not address the impacts of surface mining on water supplies.

This subassignment of error is denied.

**G. Goal 12 (Transportation)**

The challenged decision contemplates that road access to the subject property will be through the Stephens Quarry to Walnut Hill Road. Record 17, 52, 91, 249, 151. Petitioners state that the decision does not satisfy OAR 660-12-060(1), which requires, among other things, that amendments to acknowledged comprehensive plans and land use regulations "shall assure that allowed uses are consistent with the identified function, capacity and level of service of the

facility."

Petitioners express concern about using the existing Stephens Quarry access to Walnut Hill Road. However, they do not provide citations to evidence in the record that indicates this use would allow a level of activity that would significantly affect a transportation facility.[19] See OAR 660-12-060(2).

Petitioners also advise that while the challenged decision contemplates that access to the subject property will be from Walnut Hill Road through the Stephens Quarry, approval of the proposed plan amendment and zone change is not conditioned on such access. Petitioners are correct. Meisel does not dispute that if access from Burch Hill Road to the subject property were developed, it would significantly affect a transportation facility. However, Meisel relies on its promise that if access onto Burch Hill Road were ever requested, it would work with the appropriate state agency to construct a safe approach.

As we noted in 1000 Friends of Oregon v. City of North Plains, 27 Or LUBA 372, 398-99, aff'd 130 Or App 406 (1994), under the Transportation Planning Rule (TPR), OAR chapter 660, division 12, plan amendments which significantly affect a transportation facility must be consistent with TPR

[19]Although petitioners identify dangers arising from the present use of Walnut Hill Road by truck traffic, those dangers already exist. Petitioners cite to nothing in the record which indicates that if the Stephens Quarry is expanded to include the subject property, the dangers will increase, thereby significantly affecting a transportation facility.

provisions. Although Meisel is correct that the challenged decision reflects the county's clear expectation that access to the subject property will be from the north, petitioners are correct that this expectation is not stated as a requirement, and there is evidence that Meisel may eventually wish to obtain access to the subject property from the south.[20] The findings must address Goal 12 and the TPR as they apply to access to the subject property from the south, or the county must impose a condition that requires that access be via the intended route through Stephens Quarry and requires review under Goal 12 and the TPR if and when access to the subject property from the south is requested.

This subassignment of error is sustained.

**H. Goal 14 (Urbanization)**

Petitioners' Goal 14 argument depends upon their contention that the county cannot rely on the imposition of an LU district overlay to preclude an urban manufacturing use. As discussed above, there is no legal impediment to the county's imposition of an LU district overlay on the subject

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[20]In an April 14, 1995 letter, Meisel told the county:

> "Some neighbors have expressed concern about access onto Burch Hill Road. This southerly road is not in our plans for excavation at the north end of the parcel. It may be possible by the time the quarry is fully developed that we would request access to that site, but this would be many years into the future. It is our expectation that if we make this request in the future, that the Amity-Hopewell Highway will be improved by that time to handle more traffic. We will work with the appropriate public agencies to construct a safe approach in the event the Burch Hill Road [to the South of the subject property] would ever be used for access. Again, it is not initially planned to be an access point. * * *" Record 238.

property. Since the LU district overlay precludes manufacturing uses on the property and thus limits uses to rural uses, an exception to Goal 14 is not required.

This subassignment of error is denied.

The first assignment of error is sustained, in part.

**SECOND ASSIGNMENT OF ERROR**

Goal 5 (Open Spaces, Scenic and Historic Areas, and Natural Resources) establishes a comprehensive planning process that requires a local government to (1) inventory the location, quality and quantity of listed resources within its territory; (2) identify conflicting uses for the inventoried resources; (3) determine the ESEE consequences of the conflicting uses; and (4) develop programs to achieve the goal of resource protection. Blatt v. City of Portland, 21 Or LUBA 337, aff'd 109 Or App 259 (1991). Petitioners challenge the adequacy of the county's findings and their evidentiary support, with regard to each step of this planning process.

**A. Location, Quality and Quantity**

As applicable to this proceeding, OAR 660-16-000 requires that the county determine (1) the location of the rock to be mined and of impact areas to be affected if the rock is mined; (2) the quality of the rock relative to the rock to be found on other sites in at least the county itself; and (3) the quantity of rock on the site as it relates to the amount of

rock of similar quality to be found elsewhere in the county.[21] Like petitioners, we discuss these factors in reverse order.

**1. Quantity and Quality**

**a. Standard of Comparison**

Petitioners contend the county's findings as to quantity and quality are insufficient because they consider only land owned by Meisel and already zoned for surface mining. See Record 33 (no available site zoned for mineral extraction has been found with rock of similar quality or "the immediate ability to prepare and use the site") and Record 35 (other lands already designated for surface mining are either unavailable or not as well suited due to location, size or other factors). Meisel responds that the county is not

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[21]OAR 660-16-000 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 location, quality, and quantity of each of the resource sites. Some Goal 5 resources (e.g., natural areas, historic sites, mineral and aggregate sites, scenic waterways) are more site-specific than others (e.g., groundwater, energy sources). For site-specific resources, determination 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. For non-site-specific resources, determination must be as specific as possible.

"(3) 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. 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 how much information is available or 'obtainable'.

"* * * * *" (Emphasis in original.)

required to consider sites where rock is not available because either the zoning does not already permit surface mining or a property owner does not wish to rezone his property to make it available.

OAR 660-16-000(3) recognizes practical limitations on information gathering. Palmer v. Lane County, 29 Or LUBA 436 (1995). The rule does not expressly limit the appropriate inquiry to sites where a particular resource is now available or even to sites that are presently on the county's inventory of Goal 5 resources. However, the inventory represents an assessment at the time of periodic review of what properties either qualify or could qualify for resource protection. See OAR 660-16-000(5)(b) and (c). That assessment need not be reexamined until the next periodic review, unless it is directly or indirectly affected by Meisel's application. See Urquhart v. Lane Council of Governments, 80 Or App 176, 721 P2d 780 (1986) (periodic review is the only method for correcting goal non-compliance that results from changes in circumstances after acknowledgment, when the noncompliance is not the product of an amendment to an acknowledged plan or land use regulation). It follows that the county's choice of certain properties for inclusion in the inventory establishes a standard of comparison in determining the relative quantity or quality of the aggregate resource on the subject property. In addressing OAR 660-16-000(3), the relevant question, which is not addressed by the challenged decision and which must be

answered to the extent information is available or obtainable, is whether the aggregate resource on the subject property is comparable or superior in quality or quantity (or both) to the aggregate resource on properties already included on the county's Goal 5 inventory, regardless of their immediate availability for surface mining.[22]

**b. Evidence of Quality and Quantity of Resource on Subject Property**

The challenged decision states that the existing Stephens Quarry includes high-quality rock, which extends laterally throughout the proposed site. The decision relies on evidence from a certified engineering geologist, a rock driller, Meisel's manager and competitors of Meisel. Record 104. It concludes that the relative value of the subject property is high compared to other mineral and aggregate resources in the county. Id.

Petitioners contend that these findings are not supported by substantial evidence. Petitioners specifically challenge the evidentiary basis for the county's finding that, "based on borings throughout the 80-acre expansion area, there are approximately 8 million cubic yards of rock available for extraction on the site." Record 105. Petitioners argue that the evidence does not show rock that can be mined on the

[22]In McCoy v. Linn County, 16 Or LUBA 295, 310 (1987), aff'd 90 Or App 271 (1988), we explained that neither Goal 5 nor the Goal 5 rule provide that need for the aggregate resource is a criterion for adding an aggregate site to a plan inventory. Whether the resource is available only matters if there is a need for it, and since need may not be considered, availability is also irrelevant.

southern portion of the subject property. Petitioners maintain that most, if not all, of the evidence of high quality rock relates to the existing Stephens Quarry. See Record 250, 252, 258, 271-73, 347 (testimony of competitors); Record 1611-12, 1615-22 (tests of aggregate delivered from the Stephens Quarry to state projects).[23] Relying on a document prepared by petitioner Stephen Sanders (Sanders Report), petitioners assert that even the rock at the Stephens Quarry is only of average to good quality. The document compares the quality of rock found at the Stephens Quarry to other county quarries, based on ODOT tests, and finds it to be better in some respects and worse in others. Record 393-96.

In response, Meisel relies in part on a February 6, 1996 letter from a geologist at DNA, which states that "[b]ased upon borings placed within the existing and proposed quarry areas, it is estimated that approximately 8 million cubic yards of rock could be mined at the site"; that "subsurface investigations have verified the lateral extent of the basalt which underlies the proposed extension area"; and that based on rock quality tests conducted, "the basalt was found to exceed testing requirements for use as aggregate for construction purposes." Record 369. The "site" referred to apparently includes the existing Stephens Quarry and the

[23]Record 1613-14, which is identical to Record 261-62, clearly relates to the expansion area, but as explained below, it is not clear where the test holes were drilled or what the diagram means.

proposed expansion area.[24] Meisel also relies on (1) both a chart referring to 14 holes and a diagram that we cannot decipher, Record 261-62; (2) a February 6, 1996 letter from a rock driller with 20 years' experience, to the effect that there is a substantial rock quantity throughout the property, based on "[m]y drilling * * * over large portions of the site" and that the rock is excellent throughout, Record 327;[25] (3) a statement by Meisel's manager, referring to 25 test borings and four permanent monitoring wells, that there is high-quality aggregate throughout the site, "conservatively" estimated at 8 to 12 million yards, Record 658; and (4) a map showing MW4 and about 20 test borings, none of which appear to be in the southern half of the subject property. Record 715. See also Record 714.

As a review body, LUBA is authorized to reverse or remand the challenged decision if it is "not supported by substantial evidence in the whole record." ORS 197.835(9)(a)(C). Substantial evidence exists to support a finding of fact when the record, viewed as a whole, would permit a reasonable person to make that finding. Dodd v. Hood River County, 317 Or 172, 179, 855 P2d 608 (1993). In reviewing the evidence,

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[24]Meisel's manager testified on February 7, 1996 that although Meisel has always assumed there is rock in the southern part of the existing Stephens Quarry, it has never "put a drill bit down in there." Petition for Review, Volume 3 at 186. It is unclear whether the 8 million cubic yards estimate includes the rock Meisel assumes is in the Stephens Quarry.

[25]The site identified is the Stephens Quarry. It is unclear whether the letter also refers to the subject property.

we may not substitute our judgment for that of the local decision maker. Rather, we must consider and weigh all the evidence in the record to which we are directed. Younger 305 Or at 358-60; 1000 Friends of Oregon v. Marion County, 116 Or App at 588. Where the evidence is conflicting, if a reasonable person could reach the decision the county made, in view of all the evidence in the record, we will defer to the county's choice between conflicting evidence. Mazeski v. Wasco County, 28 Or LUBA 178, 184 (1994), aff'd 133 Or App 258, 890 P2d 455 (1995).

The strongest evidence in support of Meisel's quantity and quality estimates is found in the Newton Report, which estimates the amount of rock at approximately 8 million cubic yards. However, of the test borings and monitoring wells relied upon, only one, MW2, is located in the southern half of the subject property. The hydrogeologic log for MW2 detracts from, rather than supports, a hypothesis that the high-quality rock around MW4 extends as far as the southern boundary.[26]

In Palmer, 29 Or LUBA at 443, we explained that test holes or borings used to evaluate the quality and quantity of

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[26]MW2 is located near Burch Hill Road, at the extreme southeast corner of the subject property. The other monitoring wells are located north of the southern boundary (or a westward extension of the southern boundary) of the existing Stephens Quarry. Record 1424. The hydrogeologic log for MW2 shows mostly silt, sandstone or silty sandstone to a depth of 168 feet, where there is a three-foot layer of basalt, under which is more silty sandstone. Record 1444-45.

As Moraru points out, the sloping terrain and the differences between the hydrogeologic logs for MW2 and MW4 raise serious doubts about the reliability of an extrapolation from the MW4 results to the rest of the subject property.

aggregate resources must be representative. See also Eckis v. Linn County, 22 Or LUBA 27, 34-36, aff'd 110 Or App 309 (1991). Neither the expert witnesses nor the findings explain why the results of test borings located in the northern half should be considered representative of the southern half. Without some demonstration or explanation, a reasonable person could not conclude that the county's findings as to the quantity and quality of the resource throughout the subject property are supported by substantial evidence.

Finally, as discussed above, the challenged approval is conditioned on the protection of groundwater. The county must make a finding, supported by substantial evidence, as to approximately how much rock on the site must be preserved to protect groundwater resources and how much can be mined. As it stands, the finding at Record 105 as to the quantity of rock that can be mined, notwithstanding the requirement that groundwater resources be protected, is not supported by substantial evidence.

**c. Comparison to Other Sites**

The failure to establish the quality and quantity of rock throughout the subject property precludes a finding as to relative quality and quantity. However, we address this issue to provide guidance to the parties on remand. With respect to the relative quality and quantity of the resource on the subject property, the challenged decision states:

> "Our examination of the quality factor requires a consideration of the relative value of this resource

> site compared with other examples of the same resource at least within Yamhill County. Testimony provided to us at our public hearings consistently indicated that the rock at this quarry site is the best in the county. We find this testimony to be persuasive. While there are other sites in the county that may have good quality rock, we find this particular resource is of very high quality and the relative value of the site is high in comparison to other mineral and aggregate resources in the county. We find that we are not required to do a detailed statistical ranking of quality test scores of the proposed 80-acre site as compared to other rock resources in the county. We are required to provide general consideration of the resource's relative value by looking at the quality of the rock from the proposed 80-acre site and determining that it is of high quality compared to other resources in the county." Record 104-05.

Petitioners contend that because no "objective comparison" was made to other sites in the county in the findings, the decision fails to establish the relative quality and quantity on the subject property. Petition for Review 16-17. Meisel does not dispute that the findings fail to set out the facts relied upon in making a relative quality and quantity determination. However, Meisel points out that the reclamationist for DOGAMI testified that there is only one other site in the county with rock quality of the same high level, and apparently invites us to use our authority under ORS 197.835(11)(b) to affirm this portion of the challenged decision.

We decline Meisel's invitation. The "clearly supports" standard in ORS 197.835(11)(b) is considerably more demanding than the substantial evidence standard. Waugh v. Coos County, 26 Or LUBA 300, 306-08 (1993). The testimony of the

reclamationist for DOGAMI clearly pertains to the rock quality at the existing Stephens Quarry, not the subject property.[27] Petition for Review, Volume 3 at 175. Based on information that is available or obtainable, the findings must identify substantial evidence that establishes that the resource is "of significance," as the phrase is used in OAR 660-16-000(1).

**2. Location[28]**

For site-specific resources, such as aggregate, the determination 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." OAR 660-16-000(2). The identification of the impact area depends upon an assessment of the impacts of Goal 5 resource sites and conflicting uses on one another, as required by OAR 660-16-005(2). Columbia Steel Castings Co. v. City of Portland, 314 Or 424, 431, 840 P2d 71 (1992); Nathan v. City of Turner, 26 Or LUBA 382, 393 (1994). To the extent that these impacts are determined to exist, the boundaries of the impact area must be drawn to include all of them. However, what protective measures are appropriate to protect a particular resource, including what

[27]The Sanders Report, which arguably contradicts the testimony of the reclamationist, also discusses only the quality of rock at the Stephens Quarry.

[28]As we have in the past, see, e.g., Palmer, 29 Or LUBA at 46-47; Gonzalez, 24 Or LUBA at 266-67; Eckis, 19 Or LUBA at 30-34, in order to provide guidance on remand, we consider petitioners' challenge to the county's identification of an impact area, its ESEE analysis and its "program to achieve the goal," notwithstanding our conclusion that the significance of the resource, based on its location and relative quality and quantity, has not been established.

area is involved, depends upon the type and scope of the impacts on the resource or created by the resource.

The challenged decision defines an impact area based on the following impacts: noise, water and vibration. Record 100-03. In addition, as petitioners advise, the decision mentions (1) visual impacts in the context of YCZO 404.07, which concerns screening, and YCZO 1202.02 D., which concerns the character of the surrounding area;[29] (2) surface water pollution or erosion;[30] (3) dust;[31] and (4) impacts on

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[29]YCZO 404.07 provides:

> "Adequate screening with indigenous planting shall be preserved or established to block the view at the site from any public road, residential zoning district and from any existing dwelling located within one thousand (1,000) feet of the site prior to establishment of the MR district. Existing trees and other natural vegetation shall be preserved and maintained at the perimeter of the site to provide screening."

The findings interpret this standard to require a vegetative barrier be maintained or established between the site and public roads, residential zones and residences within 1,000 feet of the site, and not to require "that the vegetative barrier completely hide the site from the view of these other locations or screen out all evidence of the use of the MR property for rock extraction." Record 11. The findings then conclude that through the imposition of conditions, this standard will be met.

YCZO 1202.02 D. provides:

> "The proposed use will not alter the character of the surrounding area in a manner which substantially limits, impairs or prevents the use of surrounding properties for the permitted uses listed in the underlying zoning district."

The findings conclude that the surrounding area is the impact area (i.e., 1000 feet) and that its character will not be altered in any significant way, due to screening and other mitigation measures. The findings also note that the character of the surrounding area is to some extent defined by existing mining uses. Record 42.

[30]The decision finds that the enforcement of existing permits and the establishment of berms and vegetative screening will help to control surface water impacts, and there will be "minimal, if any, adverse impact from surface pollution or erosion on persons or activities on adjoining property." Record 15.

wildlife.[32] Petitioners contend that the mention of these listed impacts should not have been ignored in the establishment of the impact area.[33]

Meisel responds that by addressing the most significant impacts, which we understand to mean the most far-ranging impacts, the county has adequately addressed the "less significant" impacts listed above.[34] Meisel Brief 18. We agree with Meisel that the findings make clear these impacts will not extend beyond 1,000 feet from the subject property and, therefore, they provide no basis for expanding the impact area beyond the boundary adopted by the challenged decision.

Petitioners also complain that the decision discusses only certain impacts (e.g., utility facility impacts, road and

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[31]The decision finds that because the private access road to the Stephens Quarry is paved, Meisel intends to water interior truck paths on the site, and there have been no DEQ citations of the Stephens Quarry in the past eight years, the proposed operation will "minimize its adverse effects on adjacent properties." Record 15. The decision also rejects the testimony of petitioners' expert regarding the possibility of air pollution problems.

[32]Pursuant to Yamhill County Comprehensive Plan (YCCP) section II.D., (Fish and Wildlife), goal 1, the decision considers impacts on fish and wildlife habitat and concludes that there are no significant wildlife species on the subject property. Record 75.

[33]Petitioners object here and elsewhere that the discussion of uses assumes that Brentmar v. Jackson County, 321 Or 481, 900 P2d 1030 (1995) and Lane County v. LCDC, 138 Or App 635, 910 P2d 414 (1996), rev'd 325 Or 569, ___ P2d ___ (1997) were never decided, because uses permitted under ORS 215.283(2), which are excluded or restricted by OAR 660, division 33, are not addressed by the decision. Petition for Review 19. The Oregon Supreme Court's opinion in Lane County v. LCDC, which reverses the Court of Appeals' opinion, disposes of this objection.

[34]Separate findings as to individual impacts would be justified only if each had distinctly different effects on each identified conflicting use. In such cases, it might be appropriate to define different impact areas. We do not believe such precision is required when, as in this case, the impact area is compact and all of the identified impacts affect essentially the same uses.

highway impacts, horse breeding impacts) in connection with certain uses, implying that additional impacts should have been discussed. However, petitioners do not identify these additional impacts. Petitioners' argument is difficult to follow. If it is that the decision should have discussed, in connection with every use, all of the impacts mentioned in connection with any use, we disagree. There would be no purpose in mentioning impacts that were determined not to exist.

Finally, petitioners complain that the challenged decision does not explain why it rejected the impact areas suggested by the county planning department, Meisel's own hydrogeologist or the city of Amity's engineering consultant.[35] However, the findings identify substantial evidence to support the impact area that was adopted. Record 100-03. A local government is not required to explain why it chose to balance conflicting evidence in a particular way or to identify evidence it chose not to rely upon. Douglas v. Multnomah County, 18 Or LUBA 607, 619 (1990); Kellogg Lake Friends v. City of Milwaukie, 16 Or LUBA 755, 765 (1988); Ash Creek Neighborhood Ass'n v. City of Portland, 12 Or LUBA 230, 236-38 (1984).

[35]We assume without deciding that the planning department, Meisel's hydrogeologist, and the city of Amity engineering consultant did, in fact, suggest that a larger impact area was required. However, that is far from clear, based on petitioners' own record citations. See Petition for Review, Volume 3 at 17-24, 95-115 (January 31, 1996 hearing, Tapes 1, 2, 9, 10); Record 763; 1428; 1707.

**B. Conflicts Analysis**

**1. Identification of Conflicting Uses**

The impact area for this analysis includes land zoned AF-20, MR-1, MR-2 and Exclusive Farm Use-40 (EF-40). The findings state correctly that Goal 5 requires consideration of the uses allowed in each of these zones to determine if conflicts will arise between and among the allowable uses and the mineral and aggregate use. Audubon Society of Portland v. LCDC, 92 Or App 496, 502, 760 P2d 271 (1988). Petitioners assign as error the failure of the findings to identify all allowable uses within the defined impact area, which petitioners contend is required by OAR 660-16-005. Petitioners list more than 10 uses which are not mentioned in the findings and identify the statutes or YCZO provisions under which these uses are allowable.[36] Petition for Review 21.

Meisel responds that although the uses listed by petitioners are not addressed by the decision individually, they are addressed as part of the broad categories of uses that are considered. In Audubon Society, the Court of Appeals

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[36]These uses include (1) farm stands; (2) livestock feeding operations; (3) small businesses; (4) veterinary hospitals; (5) residential homes or facilities; (6) commercial activities in conjunction with farm use; (7) fire stations for rural areas; (8) private hunting and fishing operations; (9) manufacturing and storage of brick and tile; (10) filming; (11) log truck parking; and (12) thermal energy plants.

Moraru contends that the county erred in failing to treat groundwater as a Goal 5 resource. However, the county's failure to place groundwater on its Goal 5 inventory is not before us in this appeal. Urquhart, 80 Or App at 180-81.

required the local government to consider all potential uses and their conflicts with a proposed Goal 5 use, where the number of potential uses was finite and defined. 92 Or App at 502. See also Columbia Steel Castings Co., 314 Or at 432 (Goal 5 ESEE analysis must contain enough information on impacts that resource sites and conflicting uses will have on each other to permit the responsible jurisdiction to have reasons to explain why decisions are made for specific sites). However, we agree with Meisel that if it is evident both that the uses listed by petitioners were effectively considered as part of a larger category of uses, because they are similar to uses identified within the category, and that findings were made addressing the conflicts that could arise between each category and the proposed mining and aggregate use, the failure to specify individual uses by name or to relate them to specific code sections is not error.[37]

The findings identify ten types of uses and the YCZO sections which permit them in the impact area.[38] For example, under the rubric "Dwelling, Schools, Churches and Related Structures," the findings address

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[37]Whether certain uses are allowed under the applicable statutes or the YCZO provisions affecting the four zones within the impact area is a matter of interpretation. If every allowable use had to be specifically identified, the parties could appeal an interpretation that a particular use was or was not allowed, making the process even more difficult, if not impossible, to complete.

[38]The types of uses include (1) mineral and aggregate and related uses; (2) farm uses; (3) dwellings, schools, churches and related structures; (4) utilities facilities; (5) roads and highways; (6) horse breeding, boarding and kennels; (7) firearms facilities; (8) habitat-related uses; (9) parks, resorts and golf courses; (10) forest-related uses. Record 106-14.

> "a variety of dwellings, and other similar types of noise sensitive structures, including schools, labor camps, home occupation, subdivisions, mobile home storage, infrastructure for subdivisions, secondary dwellings, day care, cemeteries, and other types of structures and uses that are predominantly designed for human habitation or human use and may be noise sensitive in nature." Record 108.

For each type of use, the findings discuss the conflicts which could develop with the proposed mining and aggregate use. To continue the example, it is clear that although "residential homes or facilities," which are among the uses petitioners contend are not addressed, are not specifically mentioned, they are sufficiently like the uses which are mentioned to permit the inference that the conflicts would be the same. Petitioners do not identify types of conflicts associated with the uses they list that are not addressed in connection with one or more of the ten categories. We conclude the county has adequately identified conflicting uses.

**2. Conflicts with Identified Uses**

Petitioners next challenge the analysis of the conflicts which may arise between the proposed use and the listed conflicting uses. According to petitioners, because the ESEE analysis is limited to certain conflicts with certain uses, it does not satisfy OAR 660-16-005.[39] Meisel responds that the

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[39]OAR 660-16-005 states:

> "It is the responsibility of local government to identify conflicts with inventoried Goal 5 resource sites. This is done primarily by examining the uses allowed in broad zoning districts established by the jurisdiction (e.g., forest and agricultural zones). A conflicting use is one which, if allowed, could negatively impact a Goal 5 resource site. Where

ESEE analysis threshold is low under OAR 660-16-005(2), which provides that "[a] determination of the ESEE consequences of identified conflicting uses is adequate if it enables the jurisdiction to explain why decisions are made for specific sites."

It is difficult to specify how precise either a conflicting use analysis or the resulting analysis of ESEE consequences must be in a particular situation. The process itself is fluid and subject to refinement as new information is obtained. Columbia Steel Castings Co., 314 Or at 431. However, we agree with Meisel that in demanding a separate discussion of each possible use in each zone as it conflicts with each possible use on the subject property, petitioners ask for more than OAR 660-16-005 requires. A more general discussion is sufficient. As the Oregon Supreme Court

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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:

"(1) Preserve the Resource Site: If there are no conflicting uses for an identified resource site, the jurisdiction must adopt policies and ordinance provisions, as appropriate, which insure preservation of the resource site.

"(2) Determine the Economic, Social, Environmental, and Energy Consequences: If conflicting uses are identified, the economic, social, environmental and energy consequences of the conflicting uses must be determined. Both the impacts on the resource site and on the conflicting use must be considered in analyzing the ESEE consequences. The applicability and requirements of other Statewide Planning Goals must also be considered, where appropriate, at this stage of the process. A determination of the ESEE consequences of identified conflicting uses is adequate if it enables a jurisdiction to provide reasons to explain why decisions are made for specific sites."

explained in Columbia Steel Castings Co.:

> "[T]he Goal 5 implementing rules require that an ESEE analysis contain enough information on impacts that resource sites and conflicting uses will have on each other to permit the responsible jurisdiction to have 'reasons to explain why decisions are made for specific [resource] sites.' The reasons need be given only if a particular decision is challenged, but the reasons must exist at the time the land use decision is made." 314 Or at 431.

The challenged decision concludes that of the ten types of uses listed, only three would potentially conflict with the proposed surface mining use: (1) dwellings, schools, churches and related structures (farm dwelling group); (2) habitat-related uses (habitat group); and (3) parks, resorts and golf courses (parks group). We first address petitioners' objection to the elimination of the other seven types of uses listed.

Mining and Related Uses. The findings state that because the zones within the impact area (MR, AF-10, AF-20 and EF-40) permit both mineral and aggregate uses and geothermal uses, which have similar impacts and conflicts, mineral and aggregate uses can be established on the subject property without creating a conflict. The findings are correct that mining is not a conflicting use for mining. Eckis, 22 Or LUBA at 40. In the absence of any cited evidence to the contrary, we accept as reasonable the county's conclusion that mineral and aggregate uses and geothermal uses have similar impacts and conflicts.

Farm Uses. The findings state that ORS 215.296(1)

provides an appropriate approach to determining whether a proposed use conflicts with farm activities. Petitioners object that a Goal 5 ESEE analysis must include many different conflicts not addressed by ORS 215.296(1). However, the only conflicts petitioners mention are water shortages and excessive dust. We discuss these potential conflicts in connection with ORS 215.296(1), under the fourth assignment of error.

Utility Facilities. Petitioners again raise the issue of possible water shortages. Because the county finds there will be no adverse effect on water resources, as discussed above, it does not consider the provision of water, as a utility, to be a conflicting use. We agree with Meisel that the county was not required to consider the additional potential conflicts identified by petitioner, which are highly speculative.

Roads and Highways. Petitioners' argument is difficult to follow. We agree with Meisel that the findings are adequate. Record 148-53, 225, 238.[40]

Horse Breeding, Boarding and Kennels. We agree with Meisel that the findings are adequate. Record 14, 101, 111, 116-18.

Firearms Facilities. Petitioners' argument does not

[40]Meisel does not respond to petitioners' contention that because an airport is allowed under YCZO 404.04(K) and 501.03(E) in this sloped area, "it is still a permitted use with which the findings must grapple." Petition for Review 26. We also do not discuss this contention.

merit discussion.

Forest-Related Uses. We agree with Meisel that the findings are adequate. Where petitioners identify no conflicts that would or could arise between a particular use allowed within the impact area and the proposed use, there is no basis on which to find deficient the county's conclusion that there are no conflicts.[41]

Next, we address the three uses that the county found could potentially conflict with the proposed surface mining use.

Farm Dwelling Group. Petitioners argue that the analysis of conflicting uses is inadequate because while the challenged decision recognizes that residential and mining uses conflict, only noise is specifically identified as a use that conflicts with the farm dwelling group. We agree with Meisel that because the decision discusses elsewhere the impacts of noise, possible interference with water supplies and vibration in connection with residential uses to define the impact area, Record 100-03, it was not necessary to repeat that discussion. We also agree with Meisel that the other concerns raised by petitioners are addressed by findings that such other impacts either are not conflicting in the impact area or will be adequately regulated to avoid impacts.

[41]Petitioners do not contend here that the findings do not demonstrate compliance with ORS 215.296(1). We address that contention under the fourth assignment of error.

Habitat Group. Petitioners object that only noise was considered as a potential conflict with habitat in the impact area. According to petitioners, prevention of passage to other habitat areas, direct loss of habitat, loss of stream flow and water, and contamination should also have been considered. The issue of prevention of passage was not raised below, and was therefore waived. ORS 197.835(3). Temporary loss of habitat is considered in the findings addressing conflicts. Record 107. The water issues are adequately addressed elsewhere in the findings. Record 144-45.

Parks Group. Petitioners raise issues on appeal that were not raised below, and were therefore waived. ORS 197.835(3).

In summary, we conclude the decision adequately describes potential conflicts with identified uses in the impact area.

**3. Analysis of ESEE Consequences**

**a. Introduction**

Petitioners make a lengthy attack on the county's ESEE analysis, based primarily on petitioners' view that the analysis is too general to satisfy the requirements of OAR 660-16-005(2). Petitioners repeatedly complain that the county made assumptions or drew conclusions that are not supported by substantial evidence.[42] Meisel responds that the

[42]For example, petitioners argue, with respect to the "economic" analysis of the impacts of dust on the subject property:

> "The findings on dust * * * admit an economic consequence, but do not deal with the nature and extent of the consequence,

evidence and findings that petitioners complain are not included in the ESEE analysis are found elsewhere in the decision.

We agree with Meisel that the ESEE analysis may rely on findings made elsewhere in the decision. We also agree that in demanding that, as part of its ESEE analysis, the county describe and, in effect, quantify every conceivable conflict between the resource use and every conflicting use, petitioners ask for more than OAR 660-16-005(2) requires.

In reviewing an ESEE analysis, we are guided by the above-quoted statement in Columbia Steel Castings Co. that an ESEE analysis is adequate if it contains enough information to permit the responsible jurisdiction to have "reasons to explain why decisions are made for specific resource sites." We understand the rule to require findings in the ESEE analysis, supported by substantial evidence, to show that the local government was aware of the general nature and scope of the identified conflicts and their interplay.

**b. Economic Consequences**

With respect to each category of the ESEE analysis, the challenged decision discusses first, the impacts on the

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preferring to discuss mitigation measures, the adequacy of which belongs to the program to achieve Goal 5. Before that adequacy can be measured, however, the potential economic consequences of the mining use on each conflicting use must be determined, to provide a sufficient basis for limiting those conflicting uses and developing the Goal 5 program. However, there are no specific findings on the economic consequences of dust from the proposed quarry, nor substantial evidence in the whole record on this issue." (Footnotes omitted.) Petition for Review 29.

resource of allowing conflicting uses; and second, the impacts on conflicting uses of allowing resource development. The decision finds that the unrestricted allowance of identified conflicting uses (the farm group, the habitat group or the park group) would result in a reduction of the area on which mining could occur and a consequent loss of resource available for mining. The only cognizable objection petitioners make is that the county ignores the fact that conflicting uses are already located in close proximity to the site. Petitioners do not identify which conflicting uses they mean, but we understand them to refer to several dwellings located within the impact area. We note that the decision does recognize the impacts of the proposed mining use on existing uses. Record 114-17.

Petitioners challenge separately each aspect of the county's analysis of the economic impacts of the proposed mining use (dust, noise, vibration, traffic, water quantity and quality, and site alteration and visual impacts) on conflicting uses. In most of these separate challenges, petitioners contend that the county should have made separate findings as to the economic consequences of each impact (i.e., the economic impact of dust, the economic impact of noise, etc.). We disagree with petitioners. All of the impacts have the same result: conflict with the uses permitted in the impact area. It is that conflict which generates ESEE consequences.

Petitioners also contend the county erred in considering the impacts of conflicting uses as mitigated or limited by identified circumstances, such as the requirement that DEQ air quality standards be met. We do not believe Goal 5 requires a discussion of unmitigated conflicts when it is determined that the conflicts will be mitigated.

Petitioners make many additional challenges to the county's determinations of the scope and nature of each impact, as that impact has an economic consequence.[43] With respect to dust, water (discussed above), vibration, traffic, and site alteration and visual impacts, the findings and supporting evidence are adequate to support the conclusion that the proposed mining operation will not have significant economic impacts on identified conflicting uses within the impact area.

The same is not true of the findings with respect to noise. As far as we can tell, the only evidence concerning noise on the subject property was the testimony of petitioners' expert, Albert G. Duble (Duble), a professional engineer who consults in acoustics.[44] Duble testified that,

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[43]Although these challenges appear to relate to the determination of the impact area, the challenged decision itself contains a lengthy discussion of impacts as part of the ESEE analysis.

[44]Meisel does not respond to petitioners' argument concerning the impact of noise. This Board does not search the record for evidence supporting a challenged decision, but rather relies on the parties to cite to places in the record where the evidence can be found. See Friends of Bryant Woods Park v. City of Lake Oswego, 126 Or App 205, 868 P2d 24 (1994); Eckis v. Linn County, 110 Or App 309, 313, 321 P2d 1127 (1991). There is a reference in the challenged decision to a noise study performed on a different property. Record 115-16.

based on existing ambient levels on the subject property, the noise created by the drilling associated with mining, at an existing house 500 feet from the subject property, will be four times as loud as DEQ standards, stated in OAR 340-35-035(1)(b)(B), would permit.[45] Petition for Review, Volume 3 at 130. We understand the challenged decision to conclude that because existing zoning permits drilling at the extreme western edge of the Stephens Quarry, and that drilling will occur immediately prior to crossing over onto the subject property, the ambient noise level for purposes of OAR 340-35-035(1)(b)(B) should be calculated as if the drilling is already taking place.

Petitioners argue that even if Meisel could meet the applicable DEQ noise standards, they "do not cover the full range of noise impacts." Petition for Review 32. We agree. The economic impact depends on actual noise levels. That noise levels may be legally increased on the subject property under DEQ regulations does not alter the undisputed fact that

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[45]OAR 340-35-015(5) defines ambient noise:

> "'Ambient Noise' means the all-encompassing noise associated with a given environment, being usually a composite of sounds from many sources near and far."

OAR 340-35-035(1)(b)(B) states noise control regulations for new sources located on a previously unused site, and provides, in relevant part:

> "(i) No person owning or controlling a new industrial or commercial noise source located on a previously unused industrial or commercial site shall cause or permit the operation of that noise source if the noise levels generated or indirectly caused by that noise source increase the ambient statistical noise levels, L sub10 or L sub50, by more than 10 dBA in any one hour * * *.

if drilling is permitted throughout the subject property, the noise level at some or all of the houses within the impact area will increase, perhaps substantially. The challenged decision must consider the economic impact of increased noise on these houses.

**c. Social, Environmental and Energy Consequences**

Petitioners make many of the same objections to the county's analysis of social, environmental and energy consequences as to its analysis of economic consequences, addressed above. Depending on its additional findings concerning noise, and the evidence upon which it relies to support them, the county may have to reconsider its analysis of noise impacts on the ESEE consequences of surface mining. Petitioners' additional objections do not merit discussion.

**4. Program to Achieve the Goal**

OAR 660-16-010 provides that, based on its determination of the ESEE consequences, a jurisdiction must "develop a program to achieve the Goal." Petitioners' argument in support of their contention that this was not done is unclear. To the extent that petitioners argue the limitations placed on uses within the conflict area are not sufficiently clear, we disagree.

The second assignment of error is sustained, in part.

**THIRD ASSIGNMENT OF ERROR**

**A. Improper Notice**

The notices of all proceedings indicated that the

application was for an MR-1, rather than an MR-2 zoning designation on the subject property. Record 793, 1498, 1540 1884. An April 6, 1995 planning staff report, of which petitioners were aware prior to the hearings before the county commissioners, Record 763, states that because of the limitation in ORS 215.301 on batching plants within two miles of a planted vineyard, the zoning designation should be MR-2. Record 1676. Nevertheless, petitioners contend that "[h]aving to direct testimony and evidence to one set of criteria and being told after the hearing that there was another set of criteria that 'really' applied" prejudiced their substantial rights to participate below. Petition for Review 43.

Meisel responds that petitioners cannot prevail unless they demonstrate prejudice to their substantial rights resulting from the alleged procedural error. ORS 197.835(9)(c). Meisel points out that the only difference between an MR-1 and MR-2 designation is the inclusion of portable concrete batching or portable hot-mix batching plants as a permitted use in the MR-1 zone. Since a batching plant is not proposed, the applicable standards under which the application would be reviewed are exactly the same, and so there can be no prejudice to petitioners. We agree with Meisel.

This subassignment of error is denied.

**B. YCZO 404.07**

YCZO 404.07 addresses operating standards. Petitioners

raise issues related to setbacks, screening, environmental standards,[46] roadways,[47] and Meisel's reclamation plan. Only petitioners' arguments concerning the reclamation plan required under YCZO 404.07 F. merit discussion here.[48]

The challenged decision concludes that reclamation is feasible at the site. Record 21. It then concludes, in essence, that because Meisel must obtain approval of a reclamation plan from DOGAMI prior to the start of operations on the site, the requirements of YCZO 404.07 F. are satisfied.

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[46]With respect to air quality, petitioners incorporate by reference their arguments under Goal 6, which are addressed above.

[47]To the extent the decision relies on its findings in conjunction with Goals 11 and 12, Record 13, it is vulnerable to the same challenges made to those findings, discussed above.

[48]YCZO 404.07 F. (Land Reclamation) provides, in relevant part:

> "1. Any parcel or site used as a mineral resource site for which a reclamation plan is required by the Department of Geology and Mineral Industries (DOGAMI) shall be reclaimed in accordance with the site operation and reclamation plan on file with and approved by the County.
>
> "2. The approved reclamation plan shall be implemented in accordance with a schedule contained therein showing the planned order and sequence of said reclamation.
>
> "3. The approved reclamation plan shall require all excavations to be backfilled, contoured or terraced or put to a use shown on the reclamation plan which is compatible with the final depth and slopes within the excavation site.
>
> "4. The approved reclamation plan shall require topsoil to be saved and stored in such a manner as to prevent erosion, and that said topsoil shall be replaced to at least the depth of the original overburden, or to a depth adequate to achieve the approved reclamation use.
>
> "5. The approved reclamation plan may, in the County's discretion, provide for reclamation of portions of the site prior to total exhaustion of the resource found on the site."

Petitioners object that the county has not actually approved a reclamation plan, as required by YCZO 404.07 F.

It is evident from the language in YCZO 404.07 F. that DOGAMI's requirements, set forth in OAR 632-30-025, suffice to satisfy the stated criteria. The absence of specific findings addressing each criterion does not prevent LUBA from affirming this part of the decision, as required by ORS 197.840(11)(b).

This subassignment of error is denied.

**C. YCZO 404.08**

YCZO 404.08 states detailed requirements for the submission of a site plan. The challenged decision finds that these requirements are procedural and may be satisfied by various maps and plans already submitted, in combination with narrative descriptions of the proposed activity, hearing testimony and a site visit. We disagree. Notwithstanding the deferential standard of review established by Clark v. Jackson County, 313 Or 508, 514-15, 836 P2d 710 (1992), the county cannot amend its ordinance under the guise of interpretation. Goose Hollow Foothills League v. City of Portland, 117 Or App 211, 843 P2d 992 (1992). Unless there is a demonstration in the findings that the compilation of the listed submissions satisfies the site plan requirement, we cannot affirm this part of the decision.

This subassignment of error is sustained.

**D. YCZO 404.09 and YCZO 1208**

YCZO 404.09 A. requires "[t]hat a sufficient quality and

quantity of mineral resource exists at the proposed site to fulfill a market need." YCZO 1208 requires a

> "demonstrable need for the particular uses allowed by the requested zone, considering the importance of such uses to the citizenry or the economy of the area, the existing market demand which such uses will satisfy, and the availability and location of other lands so zoned and their suitability for the uses allowed by the zone."

Petitioners' contentions concerning the quality and quantity of the mineral resource and possible land use conflicts are addressed above in our discussion of Goal 5. Petitioners argue further that the findings address only Meisel's need and not a market or public need, and that they fail to quantify the resources that are available to satisfy the identified need. In our view, YCZO 1208 does not require the precision desired by petitioners. The findings and the evidence upon which they rely satisfy YCZO 404.09 A. and YCZO 1208. Record 22-24, 30-36, 148-52, 157, 225-28, 238-40, 245-57, 693-97.

This subassignment of error is denied.

**E. YCZO 1207**

Notwithstanding a statement in YCZO 404.09 that "[a]pproval of a zone change to the MR District shall be based upon * * * the amendment review criteria listed in Section 1207," the decision finds that YCZO 404.09 should also refer to YCZO 1208.[49] Since YCZO 1208 includes the amendment review

[49]YCZO 1207 states the criteria for a legislative amendment; YCZO 1208 states the criteria for a quasi-judicial amendment.

criteria listed in YCZO 1207, the county's failure to make additional findings responsive to YCZO 1207 is harmless error, if it is error at all.

This subassignment of error is denied.

**F. YCZO 403.04 and YCZO 404.06**

Petitioners' contentions with respect to YCZO 403.04 and YCZO 404.06 do not merit discussion.

This subassignment of error is denied.

The third assignment of error is sustained, in part.

**FOURTH ASSIGNMENT OF ERROR**

**A. ORS 215.253 and ORS 527.722**

Petitioners contend that conditions B and C of the county's program to meet Goal 5 violate ORS 215.253 and ORS 527.722 by restricting and regulating farm and forest practices both on the site and within the impact area.[50] Condition B, which addresses activities on the site, does not expressly restrict or regulate farm or forest practices. ORS 215.283(2)(b)(B) permits the "mining, crushing or

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[50]ORS 215.253(1) provides, in relevant part:

> "No * * * county * * * may exercise any of its powers to enact local laws or ordinances or impose restrictions or regulations affecting any farm use land situated within an exclusive farm use zone established under ORS 215.203 * * * in a manner that would unreasonably restrict or regulate farm structures or that would unreasonably restrict or regulate accepted farming practices because of noise, dust, odor or other materials carried in the air or other conditions arising therefrom if such conditions do not extend into an adopted urban growth boundary in such manner as to interfere with the lands within the urban growth boundary. 'Accepted farming practice' as used in this subsection shall have the meaning set out in ORS 215.203."

stockpiling of aggregate and other mineral and other subsurface resources," subject to the approval of the governing body. We reject petitioners' argument that ORS 215.253 acts to prohibit mining on the site notwithstanding ORS 215.283(2)(b)(B). Mission Bottom Assoc. v. Marion County, 29 Or LUBA 281, 293, aff'd 136 Or App 275 (1995). ORS 527.722(2)(e) expressly allows physical alterations of the land for purposes of mining on the site.

Condition C addresses properties within the impact area.[51]

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[51]Petitioners do not identify which subparts of Condition C they believe restrict or regulate farm or forest practices. As far as we can tell, there are only three provisions which might have some effect on farm or forest practices:

> "2. The ability of [Meisel] to conduct its 'resource use' in the 80-acre zone shall not be diminished by activities on surrounding properties. Accordingly, consistent with Ordinance No. 541, the county shall take no enforcement action against the resource use approved herein based on complaints by any conflicting use, as identified in these findings, that is located in the impact area after the date of this approval.
>
> "* * * * *
>
> "4. It is, and shall be, the policy of the county with regard to the 80-acre Goal 5 resource site that we approve herein, that noise, dust, vibration and other effects of the mineral and aggregate use shall not be considered a nuisance for any conflicting use as defined in these findings, that is constructed within the impact area after the date of this approval. * * *
>
> "* * * * *
>
> "7. "Prior to the issuance of building, occupancy or similar permit for any of the uses described in these findings as a conflicting use, the property owner(s) shall execute an 'Affidavit of Mining/Resource Use' in the form attached hereto as Exhibit C, and such Affidavit shall be recorded in the real property records of the county." Record 163-65.

The "Affidavit of Mining/Resource Use" provides, in relevant part, that "Yamhill County does not consider it the mining operator's responsibility to modify accepted practices to accommodate the owner or occupants of the

Any impacts of condition C on farm or forest practices arise from the Goal 5 requirement to protect the resource from conflicting uses. Condition C does not violate ORS 215.253 or ORS 527.722.

This subassignment of error is denied.

**B. ORS 215.296**

In order to demonstrate compliance with ORS 215.296(1),[52] the findings must (1) describe the farm and forest practices on surrounding lands devoted to farm or forest use; (2) explain why the proposed use will not force a significant change in those practices; and (3) explain why the proposed use will not significantly increase the cost of those practices. Schellenberg v. Polk County, 21 Or LUBA 425, 440 (1991). The decision concludes that "surrounding lands," as the term is used in ORS 215.296, may, in this case, be limited to the impact area. Record 156. The decision then examines uses in a much wider area, which it finds similar to the impact area, to determine what farm and forest practices might occur within the impact area.

The decision states that the "appropriate" forest

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above described property, with the exception of such operator's violation of state law." Record 168.

[52]ORS 215.296(1) provides that a use allowed under ORS 215.283(2) may be approved only where it is found that the use will not:

> "(a) Force a significant change in accepted farm or forest practices on surrounding lands devoted to farm or forest use; or
>
> "(b) Significantly increase the cost of accepted farm or forest practices on surrounding lands devoted to farm or forest use."

practices in the area are the planting and growing of trees for commercial harvest.[53] Record 156. It describes forest uses on surrounding lands. Record 133-34, 156. Based on evidence in the record and the commissioners' view of the property and adjacent properties, where healthy forests coexist with existing mineral and aggregate extraction, the decision concludes there is nothing in the nature of mineral and aggregate extraction which adversely affects forest operations on surrounding properties. Record 133-34.

As petitioners note, ORS 527.620(9) defines "forest practice" as:

> "[A]ny operation conducted on or pertaining to forestland including but not limited to:
>
> "(a) Reforestation of forestland;
>
> "(b) Road construction and maintenance;
>
> "(c) Harvesting of forest tree species;
>
> "(d) Application of chemicals; and
>
> "(e) Disposal of slash."

The findings, which conclude in essence that the operation in the Stephens Quarry appears to have had no significant impact on the growing of trees in the surrounding area, do not address the forest practices listed in ORS 527.620(9) that are employed on individual properties within the surrounding area.

The decision describes "farm practices" in the

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[53]Although the decision uses the word "appropriate," we understand it to mean "accepted," the term employed by ORS 215.296(1).

surrounding area as "livestock in the immediate vicinity, but orchards and field crops * * * in the general area." Record 5. It concludes, based on the coexistence of these farm uses with an existing mineral and aggregate operation in the area, that "quarrying activities are essentially neutral to farm practices." Record 157.

In Platt v. Washington County, 16 Or LUBA 151, 154 (1987), we explained that the burden is on the applicant to show the proposed land use action will force no significant change in farm uses. We rejected as inadequate findings which consisted of "a description of the [subject] property, some comment as to topography and size of and uses on nearby lands and the availability of public services." We stated that there must be an analysis of how the proposed use impacts properties in the surrounding area.

In Schellenberg, 21 Or LUBA at 440-42, we made a distinction between farm uses, which the challenged decision describes very briefly, and farm practices, which it does not discuss at all. We rejected findings comparable to the findings in the challenged decision because they did not indicate where certain farms were located or what the "accepted farming practices" were on these farms. In Berg v. Linn County, 22 Or LUBA 507, 510-11 (1992), we rejected findings stating only that "surrounding uses include cattle pasture, a horse stable and grass seed production." We explained:

> "The findings fail to identify the farm practices employed on the surrounding properties devoted to these farm uses. * * * [W]ithout an adequate identification of the accepted farm practices on surrounding lands, the findings cannot explain why the proposed use will not cause a significant change in or increase the cost of such practices." (Original emphasis deleted; emphasis added.)

The county must identify farm and forest uses on properties in the surrounding area and examine the farm and forest practices necessary to continue those uses. It must include findings that the proposed mining use will not "force a significant change" in or "significantly increase the cost of" these farm and forest practices. Without such findings, there is not an adequate basis on which to conclude that ORS 215.296(1) is satisfied. Furthermore, in this case, where a Goal 5 analysis is also required, the absence of findings adequate to meet the requirements of ORS 215.296(1) undermines any conclusion that there will be no conflicts with existing farm or forest uses in the area.[54]

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[54]Petitioners object that testimony established that if mining were allowed on the subject property, dust might create conflicts with wineries, a possible farm use, and water shortages might occur that could interfere with farm uses.

The challenged decision concludes that dust can be reduced through "significant factors." Record 119. One of the significant factors is the use of a water truck. As discussed above, the findings do not establish that there will be adequate water available for the use of the water truck.

We discuss the possible loss of irrigation water in connection with Goal 6. Contrary to petitioners' claim, the evidence relied upon with respect to the protection of water resources addresses both the quantity and quality of the water. Record 1390. The challenged approval is conditioned upon the protection of substantial water resources. Record 161.

We agree with Meisel that the decision adequately addresses the potential loss of water quantity on farm practices by concluding that "there will be no adverse [effect] on the groundwater from the proposed

This subassignment of error is sustained.

**C. ORS 215.422(3)**

The minutes of the county board's January 31, 1996 hearing show that a county planner described the site visits he had conducted with the commissioners. Record 645-46. The commissioners essentially adopted the planners' description as their own. Petitioners incorrectly advise that ORS 215.422(3) applies to site visits, and claim that the site visits constituted ex parte contacts which were not fully disclosed.[55] As respondents note, we explained in McNamara v. Union County, 28 Or LUBA 396, 398 n1 (1994), that a site view which involves communication with only a staff member is not an ex parte contact to which ORS 215.422(3) applies.

Petitioners' real complaint is that they were not provided an opportunity to rebut evidence obtained during a site visit because that evidence was not disclosed until it

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operations," based on detailed testimony from expert witnesses. Record 142-46, 158.

[55]ORS 215.422(3) provides:

> "No decision or action of a planning commission or county governing body shall be invalid due to ex parte contact or bias resulting from ex parte contact with a member of the decision-making body, if the member of the decision-making body receiving the contact:
>
> "(a) Places on the record the substance of any written or oral ex parte communications concerning the decision or action; and
>
> "(b) Has a public announcement of the content of the communication and of the parties' right to rebut the substance of the communication made at the first hearing following the communication where action will be considered or taken on the subject to which the communication related."

was used to support various findings. In Angel v. City of Portland, 21 Or LUBA 1, 8 (1991), we stated:

> "Petitioner has a right to rebut evidence placed before the local decision maker in a quasi-judicial land use proceeding. Fasano v. Washington Co. Comm., supra; Lower Lake Subcommittee v. Klamath County, 3 Or LUBA 55, 59 (1981). This right extends to requiring disclosure of and opportunity to rebut the substance of ex parte communications to and personal site observations by the local decision maker. ORS 227.180(3); Jessel v. Lincoln County, 14 Or LUBA 376, 381(1986); Friends of Benton Cty v. Benton Cty, 3 Or LUBA 165, 173 (1981)."

The opportunity to rebut evidence cannot be exercised unless the substance of the site observations is fully disclosed. It follows that the county cannot rely on undisclosed evidence obtained during a site visit to support its findings. However, the evidence that petitioners contend was not disclosed was not the sole basis for the findings to which petitioners object. The site visit apparently provided a context that enabled the commissioners to integrate other evidence. This aspect of the site visit could not have been rebutted. The commissioners also relied upon maps, composite photographs and other evidence. Record 11, 24, 27, 63, 100, 135. Petitioners do not contend they could not rebut that evidence.

This subassignment of error is denied.

The fourth assignment of error is sustained, in part.

The county's decision is remanded.