

1 BEFORE THE LAND USE BOARD OF APPEALS
2 OF THE STATE OF OREGON

3
4 RON DUNDAS,
5 *Petitioner,*

6
7 vs.

8
9 LINCOLN COUNTY,
10 *Respondent,*

11
12 and

13
14 ROLAND ROUSSEAU, HARRY McADAMS
15 and DONNETTE McADAMS,
16 *Intervenors-Respondent.*

17
18 LUBA No. 2002-126

19
20 FINAL OPINION
21 AND ORDER

22
23 Appeal from Lincoln County.

24
25 Douglas R. Holbrook, Newport, filed the petition for review and argued on behalf of
26 petitioner. With him on the brief was Litchfield & Carstens LLP.

27
28 Wayne Belmont, County Counsel, Lincoln City, and Robert Connell, Newport, filed a
29 joint response brief on behalf of respondent Lincoln County and intervenors-respondent
30 Harry McAdams and Donnette McAdams. With them on the brief was Minor, Bandonis &
31 Connell, PC. Robert Connell argued on behalf of Harry McAdams and Donnette McAdams.

32
33 Roland Rousseau, Portland, filed a response brief on his own behalf.

34
35 HOLSTUN, Board Chair; BASSHAM, Board Member; BRIGGS, Board Member,
36 participated in the decision.

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38 AFFIRMED

12/26/2002

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

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NATURE OF THE DECISION

Petitioner appeals a county decision that denies his application for conditional use approval for an aggregate operation.

MOTIONS TO INTERVENE

Roland Rousseau, Harry McAdams, and Donnette McAdams, opponents below (intervenor), move to intervene on the side of respondent.¹ There is no opposition to the motions and they are allowed.

REPLY BRIEF

Petitioner moves to file a reply brief. There is no opposition to the motion, and it is allowed.

FACTS

Petitioner applied for a conditional use permit to establish a surface aggregate mining operation. Petitioner seeks to reopen a rock quarry that has been mined periodically since the 1950s, but ceased operation in the 1980s. The Oregon Department of Geology and Mineral Industries (DOGAMI) permit for the mine lapsed in 1991. Statewide Planning Goal 5 (Open Spaces, Scenic and Historic Areas, and Natural Resources) requires that the county protect mineral and aggregate resources. In 1982, the county amended the Lincoln County Comprehensive Plan (LCCP) to include a program to protect mineral and aggregate resources (hereafter 1982 Goal 5 Mineral and Aggregate Program). The subject property, referred to as the Logsden Site, was listed in the inventory of aggregate sites in the 1982 Goal 5 Mineral and Aggregate Program. The property includes approximately 99 acres and is located next to the Siletz River. The property is zoned A-C (Agricultural Conservation)

¹ Rousseau and the McAdamses intervened separately. Rousseau filed a response brief, and the McAdamses filed a joint response brief with the county. Unless necessary to distinguish between the parties, we will refer to respondent and all intervenors-respondent as “respondents.”

1 and T-C (Timber Conservation), but the proposed aggregate operation would be located on
2 the A-C zoned portion of the property. With the exception of a small commercial area, the
3 surrounding properties are zoned A-C and T-C and are developed with a mix of rural
4 residential homes and small-scale agriculture and timber production uses. The planning
5 commission denied the application. Petitioner appealed the planning commission decision to
6 the county board of commissioners, and the board of commissioners upheld the denial of the
7 application. This appeal followed.

8 **FIRST ASSIGNMENT OF ERROR**

9 The A-C zone is an exclusive farm use (EFU) zone. ORS 215.283(2)(b)(B) provides
10 that mining operations may be permitted on EFU-zoned lands, subject to county approval
11 and subject to the limitations and approval standards at ORS 215.296 and 215.298. The
12 Lincoln County Code (LCC) provides that mining is a conditional use in the A-C zone. The
13 LCC provision at issue in this case is LCC 1.1630(1), which establishes general standards for
14 review of conditional use applications:

15 “In addition to the standards of the zone in which the conditional use is
16 located and the other standards of this chapter, conditional uses shall meet the
17 following standards:

18 “(1) General Standards: In addition to the other applicable standards of this
19 section, all conditional uses, except for dwellings authorized in the T-
20 C and A-C zones, shall comply with the following requirements:

21 “(a) The site under consideration is suitable for the proposed use
22 considering:

23 “(i) The size, design and operating characteristics of the
24 use.

25 “(ii) The adequacy of transportation access to the site.

26 “(iii) The natural and physical features of the site such as
27 general topography, natural hazards, natural resource
28 values, and other features.

1 “(b) The proposed use is compatible with existing and projected
2 uses on surrounding lands, considering the factors in
3 paragraph (a) of this subsection.”

4 The county applied the LCC 1.1630(1) suitability/compatibility standard, determined
5 that petitioner failed to carry his burden to demonstrate that the proposed mining use would
6 be compatible with existing residential uses on surrounding lands, and denied the application.
7 Petitioner does not dispute that conditional use approval is required to resume mining on the
8 Logsden Site. However, petitioner argues that applying the LCC 1.1630(1) conditional use
9 suitability/compatibility standard to deny the application is inconsistent with the 1982 Goal 5
10 Mineral and Aggregate Program for the Logsden Site.

11 As previously noted, the 1982 Goal 5 Mineral and Aggregate Program was adopted to
12 comply with Goal 5 and the Goal 5 administrative rule that was in effect at the time. The
13 county’s comprehensive plan has been acknowledged by the Land Conservation and
14 Development Commission (LCDC). Resolution of the first issue requires that we identify
15 the county’s Goal 5 program for the Logsden Site. Below, we first describe the planning
16 process that was required under LCDC’s first Goal 5 rule and the county’s comprehensive
17 plan in 1982.² We then describe the county’s 1982 Goal 5 Mineral and Aggregate Program
18 before turning to the parties’ arguments under this assignment of error.

19 **A. The Goal 5 Planning Process**

20 We described the planning process that is required under LCDC’s first Goal 5
21 administrative rule in *Nathan v. City of Turner*, 26 Or LUBA 382, 388-89 (1994).

22 “The Goal 5 planning process, as explained in LCDC’s Goal 5 administrative
23 rule, involves essentially three steps. Those steps and the options available to
24 a local government under each step can be stated in outline form as follows:

² LCDC adopted a much more elaborate Goal 5 administrative rule in 1996. OAR chapter 660, division 23. The first Goal 5 rule remains codified at OAR chapter 660, division 16. It is possible that petitioner could seek a post-acknowledgment plan amendment to mine the Logsden Site under the current Goal 5 rule. However, petitioner did not do so. As previously noted, petitioner seeks conditional use approval under the county’s *current* comprehensive plan and zoning ordinance.

- 1 “Step 1. Adopt inventory of Goal 5 resource sites. OAR 660-16-000.
- 2 “a. Collect information on potential Goal 5 sites. OAR 660-16-
3 000(1)-(3).
- 4 “b. Make inventory decision.
- 5 “1. Do not include on inventory. OAR 660-16-000(5)(a).
- 6 “2. Delay Goal 5 process. OAR 660-16-000(5)(b).
- 7 “3. Include site on plan inventory. OAR 660-16-000(5)(c).
- 8 “Step 2. Identify conflicts with Goal 5 resource sites. OAR 660-16-
9 005.
- 10 “a. If no conflicts exist, preserve the site. OAR 660-16-005(1).
- 11 “b. Determine the economic, social, environmental and energy
12 (ESEE) consequences of any identified conflicts. OAR 660-
13 16-005(2).^[3]
- 14 “Step 3. Develop a program to achieve the goal. OAR 660-16-010.
- 15 “a. Preserve the site fully. OAR 660-16-010(1).

³ The text of OAR 660-16-005 is set out below:

“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 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.”

- 1 “b. Allow the conflicting use fully. OAR 660-16-010(2).
- 2 “c. Protect the site to some desired degree by limiting the
- 3 conflicting uses. OAR 660-16-010(3).”⁴ (Original footnote
- 4 omitted.)

⁴ The text of OAR 660-16-010 is set out below:

“Based on the determination of the economic, social, environmental and energy consequences, a jurisdiction must ‘develop a program to achieve the Goal.’ Assuming there is adequate information on the location, quality, and quantity of the resource site as well as on the nature of the conflicting use and ESEE consequences, a jurisdiction is expected to ‘resolve’ conflicts with specific sites in any of the following three ways listed below. Compliance with Goal 5 shall also be based on the plan’s overall ability to protect and conserve each Goal 5 resource. The issue of adequacy of the overall program adopted or of decisions made under sections (1), (2) and (3) of this rule may be raised by the Department or objectors, but final determination is made by the Commission, pursuant to usual procedures:

- “(1) Protect the Resource Site: Based on the analysis of the ESEE consequences, a jurisdiction may determine that the resource site is of such importance, relative to the conflicting uses, and the ESEE consequences of allowing conflicting uses are so great that the resource site should be protected and all conflicting uses prohibited on the site and possibly within the impact area identified in OAR 660-016-0000(5)(c). Reasons which support this decision must be presented in the comprehensive plan, and plan and zone designations must be consistent with this decision.
- “(2) Allow Conflicting Uses Fully: Based on the analysis of ESEE consequences and other Statewide Goals, a jurisdiction may determine that the conflicting use should be allowed fully, notwithstanding the possible impacts on the resource site. This approach may be used when the conflicting use for a particular site is of sufficient importance, relative to the resource site. Reasons which support this decision must be presented in the comprehensive plan, and plan and zone designations must be consistent with this decision.
- “(3) Limit Conflicting Uses: Based on the analysis of ESEE consequences, a jurisdiction may determine that both the resource site and the conflicting use are important relative to each other, and that the ESEE consequences should be balanced so as to allow the conflicting use but in a limited way so as to protect the resource site to some desired extent. To implement this decision, the jurisdiction must designate with certainty what uses and activities are allowed fully, what uses and activities are not allowed at all and which uses are allowed conditionally, and what specific standards or limitations are placed on the permitted and conditional uses and activities for each resource site. Whatever mechanisms are used, they must be specific enough so that affected property owners are able to determine what uses and activities are allowed, not allowed, or allowed conditionally and under what clear and objective conditions or standards. Reasons which support this decision must be presented in the comprehensive plan, and plan and zone designations must be consistent with this decision.”

1 **B. The County’s Goal 5 Program for Mineral and Aggregate Resources**

2 **1. LCCP 1.0115(1) through (5)**

3 The status and legal effect of LCCP 1.0115(1) through (5), particularly LCCP
4 1.0115(3), is at the core of the parties’ very different positions concerning the nature and
5 content of the county’s 1982 Goal 5 Mineral and Aggregate Program for the Logsden Site.
6 LCCP 1.0115(1) through (5) essentially restate the above-described planning process that is
7 required by OAR chapter 660, division 16.⁵ For example, LCCP 1.0115(3) requires that:

8 “Where no conflicting uses have been identified, Lincoln County shall
9 manage inventoried natural resources so as to retain their original character.”

⁵ As relevant, LCCP 1.0115 provides:

“ (1) Lincoln County shall inventory the location, quality and quantity of the following
types of significant sites:

“* * * * *

“ (b) Mineral and aggregate resources[.]

“* * * * *

“ (2) Lincoln County shall identify conflicting uses for inventoried natural resources.

“ (3) Where no conflicting uses have been identified, Lincoln County shall manage
inventoried natural resources so as to retain their original character.

“ (4) Where conflicting uses are identified for inventoried natural resources, Lincoln
County shall determine the economic, social, environmental and energy
consequences of either allowing or not allowing the conflicting use or uses.

“ (5) Lincoln County shall develop programs to resolve identified conflicts with
inventoried natural resources. These programs shall be based upon an evaluation of
the economic, social, environmental and energy consequences of alternative courses
of action. Such programs shall:

“ (a) Preserve the inventoried resource;

“ (b) Allow the conflicting use or uses in full; or

“ (c) Specifically limit the conflicting use or uses through the application of clear
and objective standards.”

1 LCCP 1.0115(3) simply restates the planning obligation that is imposed by OAR 660-16-
2 005(1), in situations where there are no conflicts with an inventoried resource site:

3 “Preserve the Resource Site: If there are no conflicting uses for an identified
4 resource site, the jurisdiction must adopt policies and ordinance provisions, as
5 appropriate, which insure preservation of the resource site.”

6 However, contrary to petitioner’s argument under the first assignment of error, LCCP
7 1.0115(3) does not apply directly to petitioner’s conditional use application as an approval
8 criterion, and it does not obviate the county’s obligation to apply the relevant conditional use
9 criteria to petitioner’s application for conditional use approval. Rather, LCCP 1.0115(3),
10 like the OAR chapter 660, division 16 procedural and substantive requirements that it
11 duplicates, sets out the substantive and procedural requirements that governed and guided
12 preparation of the 1982 Goal 5 Mineral and Aggregate Program. That program is described
13 in more detail below. The 1982 Goal 5 Mineral and Aggregate Program is the county’s Goal
14 5 program for the Logsden Site.

15 Any question concerning the adequacy of that 1982 Goal 5 Mineral and Aggregate
16 Program for the Logsden Site to meet the requirements of OAR chapter 660, division 16 or
17 LCCP 1.0115 could have been raised in LCDC’s proceedings to acknowledge the county’s
18 comprehensive plan. LCDC’s acknowledgement of the 1982 Goal 5 Mineral and Aggregate
19 Resources Program makes that question irrelevant in this proceeding. *Byrd v. Stringer*, 295
20 Or 311, 316-17, 666 P2d 1332 (1983); *Friends of Neabeack Hill v. City of Philomath*, 139 Or
21 App 39, 46, 911 P2d 350 (1996); *Urquhart v. Lane Council of Governments*, 80 Or App 176,
22 181, 721 P2d 870 (1986). Petitioner’s apparent view that LCCP 1.0115(3) is itself part of the
23 county’s Goal 5 program to protect the Logsden Site, and that it operates independently to
24 require that mining be allowed on the Logsden Site, is simply a misreading of the LCCP.

25 Any possible confusion that LCCP 1.0115(3) is itself the county’s Goal 5 program to
26 protect the Logsden Site is dispelled by LCCP 1.0115(6), which explains the role of
27 subsections (1) through (5) of LCCP 1.0115:

1 “The results and conclusions of application of the procedures and
2 requirements of the policies contained in subsections (1) through (5) of
3 [LCCP 1.0115] shall be set forth in the Goal 5 element of the Comprehensive
4 Plan Inventory. Change to the Goal 5 Inventory element shall be
5 accomplished through the plan amendment process.”

6 It is the “results and conclusions” that the county reached in applying LCCP 1.0115 and
7 expressed in the 1982 Goal 5 Mineral and Aggregate Program that constitute the county’s
8 Goal 5 program for the Logsden Site. Therefore, if mining must be allowed on the Logsden
9 Site, notwithstanding that such mining would violate the conditional use criterion at LCC
10 1.1630(1), that requirement must be found in the county’s 1982 Goal 5 Mineral and
11 Aggregate Program. That requirement is not imposed directly by LCCP 1.0115(3).

12 **2. The County’s 1982 Goal 5 Mineral and Aggregate Program**

13 The county’s 1982 Goal 5 Mineral and Aggregate Program begins with a general
14 discussion of the county’s mineral and aggregate resources and needs. It includes an
15 appendix that lists 58 “Rock Quarries and Gravel Pits.” That appendix identifies the
16 “Quantity” (“Unknown,” “Small,” “Medium,” or “Large) and “Quality” (“Unknown,”
17 “Poor,” “Marginal,” “Variable,” or “Good”) of the resource at each site. Each site is placed
18 in one of three “Categories.”

19 Forty-seven of the 58 inventoried sites are placed in “Category 1 – Forest Land
20 Quarries.” The sites in Category 1 are described as “small and remotely located on lands
21 planned and zoned for forest uses.” “[C]ommercial gravel extraction and processing” is a
22 use that is permitted outright in the Timber Conservation (T-C) Zone, which is the county’s
23 forest zone. The 1982 Goal 5 Mineral and Aggregate Program goes on to take the position
24 that “[o]ther uses of forest lands which are permitted or reviewed on a conditional basis will
25 not conflict with or pre-empt the use of these forest quarries.” It is reasonably clear that for
26 the 47 forest quarries, the county concluded that its T-C zone was adequate to “Preserve the
27 Resource Site[s],” in the words of OAR 660-16-005(1), and to “manage [the forest quarries]
28 so as to retain their original character,” as required by LCCP 1.0115(3). *See* ns 3 and 5.

1 Seven of the 58 inventoried mineral and aggregate sites, including the disputed
2 Logsdon Site, are included under “Category 2 – Sites Currently Utilized for Commercial
3 Production.” The 1982 Goal 5 Mineral and Aggregate Program description of Category 2 is
4 ambiguous, and the parties take different positions about the Goal 5 program that the county
5 adopted for the Logsdon Site. The general description of Category 2 is set out below:

6 “These sites are generally large deposits of good quality and are currently
7 being utilized for commercial aggregate production. These sites are generally
8 located in proximity to other developed lands and potential conflicts may
9 exist. *The location and nature and extent of conflicts for these sites are*
10 *detailed below.*” (Emphasis added.)

11 Although the emphasized language suggests that the discussion of individual sites that
12 follows will identify the “nature and extent of conflicts,” the individual discussions that
13 follow the quoted language in each instance ultimately conclude that there are *no conflicts*.

14 The discussion that addresses the Logsdon Site is set out below:

15 “Site #30 & 31 – Siletz River Gravel Pits

16 “* * * * *

17 “Discussion. These two sites are owned and operated by Toledo Sand and
18 Gravel for the commercial production of aggregate. Limited quantities remain
19 at both sites. The Siletz site is also the location of the crushing and processing
20 plant, and is designated industrial in the comprehensive plan. The Logsdon
21 site is a pit operation and is zoned agricultural. Both sites have been in active
22 use for more than 10 years without conflicts; no future conflicting uses are
23 anticipated.”⁶

⁶ The county adopted similar discussions for the other six Category 2 sites. For Site #23 the county observes that “[i]t is in a remote location * * * and zoned for forest use.” The county concludes that “[n]o conflicting uses are existing or anticipated at this time.” For Site #33 the county notes that the site is “now nearly depleted,” and similarly concludes that “no conflicts are anticipated” due to the forest zoning that is applied to the property. The county reaches a similar conclusion regarding the adequacy of forest zoning to avoid future conflicts with Sites #50 and #53. For Site #34, the county concludes that the site is an important site that has been quarried for over 50 years, with substantial quantities of rock remaining. The county notes that Site #34 is relatively close to residential areas, but that the pit is buffered by “the topography of the site and the orientation of the quarry pits.” The LCCP concludes that Site #34 “is zoned for industrial use, which will prevent any future conflicts in the area.”

1 It is relatively clear that for the seven Category 2 sites, the county found that there were no
2 conflicts with those sites and the T-C, A-C and industrial zones would be adequate to
3 preserve the sites from future conflicts, as required by OAR 660-16-005(1) and LCCP
4 1.0115(3).

5 Four of the 58 inventoried sites are placed in “Category 3 – Potential Sites Located in
6 Probable Conflict Areas.” Three of those sites are described as sites that were mined in the
7 past. These three sites are described as having “negligible” or “small amounts” of rock
8 remaining. The county concludes that because reopening these sites would conflict with
9 numerous residential uses that surround these sites, and the value of the remaining rock is
10 small, the conflicting residential use should be allowed fully at the expense of the mine sites.
11 We understand the county to have adopted a program under OAR 660-16-010(2) and LCCP
12 1.0115(5)(b) to allow conflicting uses fully for these sites.⁷ See ns 4 and 5. One other
13 Category 3 site is described as “abandoned,” and “nearly depleted” but with “some rock * *
14 * still available.” The county concludes that because the site is owned by the “State
15 Highway Division” and surrounded by land owned by the state, “no conflicting uses on or
16 near the site are anticipated.” We understand the county’s decision with regard to this site to
17 be a decision to preserve the site under OAR 660-16-005(1) and LCCP 1.0115(3).

18 In summary, the county concluded that there were no conflicts with its Category 1
19 and Category 2 sites. The county relied on the zoning that is applied to those sites to
20 preserve the sites for resource use under OAR 660-16-005(1) and LCCP 1.0115(3). The
21 county explicitly relied on T-C zoning for its mineral and aggregate protection program for
22 Category 1 sites, and implicitly relied on industrial, T-C and A-C zoning for Category 2 sites.
23 For one of the Category 3 sites, the county found there were potential conflicts if mining on
24 the site resumed in the future. However, we understand the county to have concluded that

⁷ Although the LCCP does not identify the zoning for these sites, it presumably would allow continued residential development around these three sites and would preclude further mining of the sites.

1 state ownership of the site and its surrounding properties would avoid any conflicts with such
2 mining under OAR 660-16-005(1) and LCCP 1.0115(3). For the remaining Category 3 sites,
3 the county balanced the ESEE consequences of prohibiting surrounding residential uses and
4 prohibiting mining and determined that the value from mining of these nearly depleted sites
5 did not offset the harm that would be caused by prohibiting surrounding residential uses. For
6 these remaining Category 3 sites, the county decided that it would allow the conflicting
7 residential uses fully. OAR 660-16-010(2); LCCP 1.0115(5)(b).

8 **C. The Parties' Arguments**

9 We do not include an extended discussion of the parties' arguments, because both
10 petitioner and respondents misunderstand the nature of the 1982 Goal 5 Mineral and
11 Aggregate Program that was adopted for the Logsdan Site. Petitioner's argument has two
12 parts. First, petitioner correctly points out that the 1982 Goal 5 Mineral and Aggregate
13 Program findings concerning the Logsdan Site state, in part:

14 "Both sites have been in active use for more than 10 years without conflicts;
15 no future conflicting uses are anticipated."

16 Petitioner reads that finding, together with LCCP 1.0115(3), to impose an obligation to
17 preserve the Logsdan Site for mining. As we have already explained, LCCP 1.0115(3) does
18 not apply directly to the disputed conditional use permit application in the way that petitioner
19 argues it does. The program that the county adopted in its 1982 Goal 5 Mineral and
20 Aggregate Program for the Logsdan Site is A-C zoning, which allows mining but makes it a
21 conditional use. It could certainly have been argued in 1982 that A-C zoning, on its face,
22 would be an inadequate long-term program to preserve the Logsdan Site for mining. Under
23 that zoning, as far as we can tell, residential uses could have been and in fact were approved
24 over the years since 1982 without any explicit requirement that the county consider the

1 possible conflict that those dwellings might pose for mining on the Logsdan Site.⁸ However,
2 as we have already explained, any question concerning the adequacy of A-C zoning to
3 preserve the Logsdan Site for mining was answered, as a matter of law, by LCDC's
4 acknowledgement of the county's comprehensive plan.

5 We also note that the county's treatment of other nearly-depleted sites in the 1982
6 Goal 5 Mineral and Aggregate Program offers a possible explanation for the county's
7 assumption in 1982 that A-C zoning would be adequate to preserve the existing mining
8 operation on the Logsdan Site. The Logsdan Site was nearly depleted when mining stopped
9 in the 1980s. Although petitioner plans to remove the remaining aggregate over a five-year
10 period, he stated below that it could be removed in two months. Given the nearly depleted
11 nature of the site in the 1980s, the county may have simply assumed that the remaining
12 aggregate would be removed well before any new houses that would pose a conflict could be
13 approved. The county may not have anticipated that (1) petitioner would suspend mining at
14 the Logsdan Site in the 1980s, (2) many additional dwellings would be approved around the
15 mine over the years while the mine was closed, and (3) petitioner would then seek to reopen
16 the mine in 2002. Had the county anticipated these events, it might have applied zoning or
17 other restrictions to the Logsdan Site that would preserve petitioner's right to close and
18 reopen the mine indefinitely. But the county might also have decided to the contrary that the
19 Logsdan Site did not warrant unlimited protection in view of the limited remaining
20 aggregate, as it did with some Category 3 sites where mines were not operating in 1982. In
21 that event, the A-C zone would preserve petitioner's right to continue the mining operation
22 that existed in 1982, notwithstanding any conflicts with new residences, because no
23 conditional use approval would be required to continue that previously existing mine. But
24 because mining is a conditional use in the A-C zone, it would not necessarily preserve an

⁸ There is testimony in the record that there are 29 dwellings in the area and that 18 of those dwellings were constructed since 1987. Record 196.

1 unqualified right to close that existing mine and later reopen the mine. In that event,
2 petitioner would be subject to the LCC 1.1630(1) suitability/compatibility standard.

3 Although we do not agree with the reasoning that the county adopted in concluding
4 that LCC 1.1630(1) applies to petitioner's conditional use application, the county's faulty
5 reasoning in reaching that conclusion does not make their decision to apply LCC 1.1630(1)
6 any less correct.⁹ In conclusion, we reject petitioner's argument that it was error for the
7 county to apply the conditional use criterion at LCC 1.1630(1).

8 **D. Previously Approved Residences**

9 Finally, petitioner also argues that, as a matter of law, the county was required to
10 approve the conditional use application because when the county approved the numerous
11 residences that now constitute the uses that the county believes conflict with the proposed
12 mining, it necessarily found that the residences would not conflict with an aggregate resource
13 use. Petitioner argues that the county is legally presumed to have followed the law and
14 therefore is estopped from finding the proposed mine would be incompatible with the
15 surrounding residential uses.

16 There are a number of problems with petitioner's legal presumption and estoppel
17 arguments. We note a few of them. Petitioner merely asserts that numerous residences were
18 approved as conditional uses and therefore the county must have determined there were no
19 conflicts between the residences and the Goal 5 aggregate resource. Petitioner does not

⁹ An extended discussion of the county's reasoning would needlessly complicate this decision. It is based on the county's conclusion that conflicts, or at least possibilities of future conflicts, were identified in the 1982 Goal 5 Mineral and Aggregate Resources Program. From that conclusion, the county reasons in its decision that LCC 1.1630(1) is simply a vehicle by which the county may develop a program to address conflicts with the Logsdon Site. The county recognizes that once a site is included on an inventory and conflicts are identified, deferral of the development of a program under OAR 660-16-010 to address the identified conflicts with a Goal 5 resource site is not permissible under the Goal 5 administrative rule. *Collins v. LCDC*, 75 Or App 517, 524, 707 P2d 599 (1985). However, the county takes the position that LCDC's acknowledgment of its 1982 Goal 5 Mineral and Aggregate Program obviates any problem with deferred program development. Even if the county is correct about the effect of LCDC's acknowledgment, we simply do not agree with respondents that the 1982 Goal 5 Mineral and Aggregate Program for the Logsdon Site identified any conflicts. To the contrary, as we have already explained, the county found there were no conflicts and that none were expected.

1 direct us to any legal requirement that such findings of compatibility be made when
2 approving dwellings in the A-C zone, and we have not been able to locate such a legal
3 requirement.¹⁰ Even if some legal standard required such compatibility findings, the
4 applicants for the disputed residences may have approached the compatibility determination
5 with the assumption that the closed mine would remain closed. Even if that assumption
6 ultimately proved incorrect, and even if the compatibility question should not have been
7 approached with that assumption, we do not agree that the county would therefore be
8 estopped in the present case from considering whether the proposed resumption of mining on
9 the Logsden Site would be compatible with those residences. As the county correctly points
10 out in its decision, LCC 1.1630(1) expressly requires that the county apply the
11 suitability/compatibility standard to conditional use applications such as the one at issue
12 here, and nothing in the 1982 Goal 5 Mineral and Aggregate Program excuses or overrides
13 that requirement.

14 The first assignment of error is denied.

15 **SECOND ASSIGNMENT OF ERROR**

16 Petitioner argues that the county’s decision that the proposed mining use would be
17 incompatible with the surrounding uses based on noise, dust, and vibration impacts is not
18 supported by substantial evidence.

19 The county’s findings addressing those issues state:

¹⁰ LCC 1.1630(1), which is set out in full earlier in this opinion, does not appear to require such findings for dwellings:

“In addition to the other applicable standards of this section, all conditional uses, *except for dwellings authorized in the T-C and A-C zones*, shall comply with the following [suitability/compatibility] standards: * * *” (Emphasis added.)

To the extent petitioner relies on LCCP 1.0115(3) to impose a requirement for compatibility findings, as we have already explained, LCCP 1.0115(3) applied to the county’s legislative decision to adopt the 1982 Goal 5 Mineral and Aggregate Program. That program does not require direct application of LCCP 1.0115(3) to individual permit decisions.

1 “Evidence in the record indicates that activities associated with the proposed
2 mining and quarry operation would result in the creation of noise, vibrations,
3 dust, and an increase in heavy truck traffic in the surrounding area. The
4 subject property is situated within a relatively level valley that is surrounded
5 by small hills and is adjacent to twelve separate parcels of land. Seven of
6 those adjacent parcels have residential dwellings located on them; one has a
7 commercial use. The closest residences are approximately 250 to 350 feet
8 from the proposed stockpile and quarry locations. Approximately 22
9 additional homes are located within the same square mile section of the
10 proposed surface mine. The nearest residences, located directly across the
11 Siletz River from the proposed quarrying and stockpiling area, are separated
12 from the proposed operation by only minimal vegetation, topographical, or
13 other physical buffers.

14 “Testimony from residents in the area indicates that noise from activities
15 associated with site preparation and operation of equipment on the subject
16 property is plainly audible from adjoining residences. Agricultural and forest
17 management activities and uses are among the existing and projected uses
18 within A-C and T-C zones in the surrounding area. However, evidence in the
19 record indicates that the levels and duration of noise, dust and vibration from
20 the proposed quarry would exceed those of accepted farm and forest practices
21 in the area.

22 “The record does not contain any evidence as to actual noise levels that would
23 be generated by the proposed operation. Although the applicant’s proposal
24 included the placement of earth berms around certain portions of the property
25 for purposes of mitigating noise and visual impacts to surrounding properties,
26 no specific evidence was submitted concerning the effectiveness of such
27 berms for reducing impacts from noise.

28 “The applicant has proposed measures for controlling dust on Bell Lane from
29 the resulting truck traffic, however no evidence concerning the effectiveness
30 of such methods has been submitted. Measures to minimize dust from the
31 initial excavation of material, rock crushing, and screening have not been
32 proposed.” Record 27.

33 The county’s findings are adequate to express the reasoning for its decision.
34 Petitioner does not challenge the adequacy of the findings, but instead argues that they are
35 not supported by substantial evidence. Substantial evidence is evidence a reasonable person
36 could rely on in reaching a decision. *Dodd v. Hood River County*, 317 Or 172, 179, 855 P2d
37 608 (1993).

1 The county’s decision is a denial. The applicant has the burden to establish that the
2 LCC 1.1630(1) suitability/compatibility standard is satisfied. To overcome the county’s
3 finding that petitioner failed to carry his burden with regard to LCC 1.1630(1), petitioner
4 must demonstrate that he carried that burden as a matter of law. *Jurgenson v. Union County*
5 *Court*, 42 Or App 505, 600 P2d 1241 (1979); *Towry v. City of Lincoln City*, 26 Or LUBA
6 554, 560-61 (1994); *Kropf v. Marion County*, 18 Or LUBA 577, 585-86 (1989). That is an
7 exceedingly difficult evidentiary burden, particularly in view of the highly subjective nature
8 of the suitability/compatibility standard that is imposed by LCC 1.1630(1). In the present
9 case, petitioner makes no attempt to demonstrate the proposed mine will be compatible with
10 the residences in the surrounding area, as a matter of law.¹¹ Frankly, in cases involving such
11 subjective approval criteria as the suitability/compatibility criterion, it would be extremely
12 difficult, if not impossible, to demonstrate that such an approval criterion is met as a matter
13 of law. In any event, petitioner in this case has not met that burden.

14 The second assignment of error is denied.

15 The county’s decision is affirmed.

¹¹ For example, petitioner does not appear to dispute the county’s finding that there was no evidence presented below about the “actual noise levels that would be generated by the proposed operation.” Record 27. As the findings note, there is testimony in the record that certain activities being carried out on the subject property in anticipation of reopening the mine are generating objectionable noise. While there is evidence in the record that petitioner proposes to take a number of steps to minimize off-site noise, we are unable to agree with petitioner that those measures are sufficient to establish, as a matter of law, that the noise generated by the proposed operation will be compatible with nearby residences.