BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

ERIC HOFFMAN and RONNA HOFFMAN,
Petitioners,

vs.

DESCHUTES COUNTY,
Respondent,

and

MARK LATHAM EXCAVATION, INC.,
Intervenor-Respondent.

LUBA No. 2009-061

MARK LATHAM EXCAVATION, INC.,
Petitioner,

vs.

DESCHUTES COUNTY,
Respondent,

and

ERIC HOFFMAN and RONNA HOFFMAN,
Intervenors-Respondents.

LUBA No. 2009-062

FINAL OPINION
AND ORDER

Appeal from Deschutes County.

Paul D. Dewey, Bend, filed a petition for review and intervenors-respondents' brief and argued on behalf of petitioners and intervenors-respondents Hoffman.

Bruce W. White, Bend, filed a petition for review and intervenor-respondent's brief and argued on behalf of petitioner and intervenor-respondent Mark Latham Excavation, Inc.

Laurie E. Craghead, Deschutes County Legal Counsel, Bend, filed the response brief

and argued on behalf of respondent.

HOLSTUN, Board Chair; BASSHAM, Board Member; RYAN, Board Member, participated in the decision.

REMANDED 05/17/2010

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

Opinion by Holstun.

NATURE OF THE DECISION

Petitioners appeal a county decision that grants conditional use and site plan approval for a mining operation on an 80-acre parcel.

THE PARTIES

Petitioners Eric and Ronna Hoffman (Hoffman) are neighbors and opponents of the proposed mining operation. In LUBA No. 2009-061, petitioners Hoffman challenge the county's decision to grant conditional use and site plan approval for additional mining on the subject property. Mark Latham Excavation, Inc. (Latham) is the owner of the property and was the applicant below. Latham has intervened on the side of respondent county in LUBA No. 2009-061. In LUBA No. 2009-062, Latham challenges conditions imposed by the county in approving its application. The Hoffmans have intervened on the side of respondent county in LUBA No 2009-062. LUBA Nos. 2009-061 and 2009-062 have been consolidated for review.

FACTS

The subject 80-acre property is located north of the City of Bend, approximately 2 miles south of the community of Tumalo and a short distance west of the Deschutes River. The property is located in the county's Surface Mine (SM) Zone. There is a prominent hill along the south side of the property. From a plateau on the southeastern corner of the property, the hill slopes steeply down to the north. Pumice mining on the property has occurred in the past on the lower elevations located in northeast and central parts of the property. Recently a portion of the northwest edge of the hill has been mined, creating a 50-foot headwall that is approximately 900 feet long. Pictures of that headwall appear at Record 3606 and 3612. It appears from the record that the mining Latham seeks approval for would ultimately result in a more pronounced headwall.

The Deschutes River is located approximately 500 feet east of the subject property's eastern property line. The river is a designated state scenic waterway, and that scenic waterway designation includes a ¼ mile corridor on each side of the river. A portion of the subject property is included within the scenic waterway. Record 1798. Tumalo State Park is located approximately one-half mile to the northeast of the subject property. Tumalo State Park includes a campground on the east side of the river and a day use area on the west side of the river. Record 2158. The campground and associated trails are at a higher elevation and parts of the mining operation, including the headwall, are visible from this part of Tumalo State Park. The park hosts approximately 200,000 visitors per year. Petitioners Hoffman own the adjoining property to the north. The Hoffmans' exclusive farm use (EFU) zoned property is approximately 60 acres in size and is improved with two residences. Tumalo Rim Subdivision is located approximately one half mile to the north and west. There are also ranching operations and other rural residences in the vicinity of the subject property.

There has been mining for pumice in the flat northeastern portion of the property since the 1970s. A prior owner of the subject property, Cascade Pumice, was granted a permit in 1995 and mined pumice on the subject property under that permit until 2006, when the property was sold to Latham.

INTRODUCTION

Among the resources protected by Statewide Planning Goal 5 (Natural Resources, Scenic and Historic Areas, and Open Spaces) are "Mineral and Aggregate Resources." OAR chapter 660 division 16 was the Land Conservation and Development Commission's (LCDC's) first Goal 5 implementing administrative rule. That administrative rule has largely been replaced by OAR chapter 660, division 23. OAR 660-023-0250(1). But the county's comprehensive plan and land use regulations for mineral and aggregate resources that were applied in the decision that is before us in this appeal were acknowledged by LCDC under OAR chapter 660, division 16. We briefly describe the planning process required by OAR

chapter 660, division 16 below. We also describe the planning process the county went through for the subject property in 1990 before turning to the parties' assignments of error.

A. OAR Chapter 660 Division 16

1. Collection of Data and Preparation of an Inventory

Under OAR 660-016-0000(1), the Goal 5 planning process begins with a local government collecting, analyzing and refining existing data regarding Goal 5 resources to determine "which resource sites are of significance and include[] those sites on the final plan inventory." OAR 660-016-0000(2) requires that the boundaries of significant Goal 5 resource sites be described and an impact area be identified. OAR 660-016-0000(3) requires that the local government determine the "quality" and "quantity" of a Goal 5 resource. Regarding the "quantity" of a Goal 5 resource, OAR 660-016-0000(3) provides that "[t]he level of detail that is provided will depend on how much information is available or 'obtainable.'" OAR 660-016-0000(5) gives local governments three inventory options: (1) "Do Not Include on Inventory," (2) "Delay Goal 5 Process," or (3) "Include on Plan Inventory." If there is sufficient information on the location, quality and quantity of a Goal 5 resource to determine that it is "significant," OAR 660-016-0000(5)(c) *requires* the local government to select the third option, include the site on the inventory, and "proceed through the remainder of the Goal 5 process."

2. Identify Conflicting Uses and Determine the Economic, Social, Environmental, and Energy Consequences of Those Conflicting Uses

After a Goal 5 inventory of significant sites has been completed, OAR 660-016-0005(1) requires the local government to identify any conflicts with inventoried significant Goal 5 resource sites. A conflicting use is one that "could negatively impact a Goal 5 resource site." If no conflicting uses are identified, the local government must adopt policies that will "ensure preservation of the resource site." OAR 660-016-0005(2). If conflicting uses are identified, the "Economic, Social, Environmental, and Energy" (ESEE)

"consequences of the conflicting uses must be determined." The analysis of ESEE consequences that follows conflict identification is a two-way analysis, in that the impacts of the conflicting use on the Goal 5 resource site and the impacts of the Goal 5 resource site on the conflicting use must be considered. *Hegele v. Crook Count*y, 190 Or App 376, 385-86, 78 P3d 1254 (2003). Under OAR 660-016-0005(3), "[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*." (Emphasis added.)

3. Develop Program to Achieve the Goal

The "decisions" referenced in OAR 660-016-0005(3) are made in the "program" the local government selects to achieve Goal 5 for inventoried Goal 5 resource sites. "Based on the determination of the [ESEE] consequences, a jurisdiction must 'develop a program to achieve the Goal.'" Under OAR 660-016-00010, local governments are given three programmatic options for inventoried Goal 5 resource sites. *1000 Friends of Oregon v. LCDC (Tillamook County)*, 303 Or 430, 435, 737 P2d 607 (1987). Those three programmatic options are described below.

a. Protect the Resource Site

If a local government determines that a Goal 5 resource site is sufficiently important relative to the identified conflicting uses, it may prohibit conflicting uses on the inventoried site and within the impact area.

b. Allow Conflicting Uses Fully

The second programmatic option under OAR 660-016-0010 is essentially the opposite of the first option. This option may be selected where the local government determines conflicting uses are sufficiently important that they should be fully allowed, notwithstanding any damage to or limitations that may be placed on the Goal 5 resource site.

c. Limit Conflicting Uses

Under the final programmatic option, a local government may decide that both the Goal 5 resource and the conflicting uses are of sufficient importance to warrant only partial protection of the Goal 5 resource. Commonly both the Goal 5 resource and the conflicting use are limited to some extent, to extend partial protection to the other, based on the relative importance of the Goal 5 resource site and the conflicting uses.[1]

B. The County's Goal 5 Program for Mineral and Aggregate Resources

In 1990, Deschutes County adopted four ordinances to comply with its Goal 5 planning obligation for mineral and aggregate resources. One of those ordinances (Ordinance 90-028) adopted new comprehensive plan surface mining goals and policies. Record 1483-96. A second ordinance (Ordinance 90-025) adopted an inventory of significant mineral and aggregate sites and lists the subject property as site 303. Record 1444-81. A third ordinance (Ordinance 90-029) adopted "ESEE Findings and Decisions" for individual inventoried mineral and aggregate sites, including site 303. Record 1507-1630. The fourth ordinance (Ordinance 90-014) adopts amendments to the county's SM zone and adopts a new Surface Mining Impact Area (SMIA) Combining zone. 1412-41.

The county's "ESEE Findings and Decision" for site 303 address each of the three steps required by OAR chapter 660 division 16: (1) inventory, (Record 1797) (2) conflicts

---

[1] The complete text of the third programmatic option at OAR 660-016-0010(3) is set out below:

> "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."

resolution/ESEE consequences (Record 1797-1807), and (3) program to meet the goal (Record 1807-09).[2] The SM zone and SMIA zone appear to make up the heart of the county's Program to Meet the Goal for significant aggregate resource sites. However, as explained below, the county also imposed additional limitations in the Program to Meet the Goal for individual inventoried mineral and aggregate sites.

C. The County's ESEE Findings and Decision For the Subject Property

The ESEE Findings and Decision for site 303 first point out that the site is included on the county's mineral and aggregate inventory. With regard to the quality and quantity of mineral and aggregate resource present on the site (the first step under OAR chapter 660, division 16), the ESEE Findings and Decision provide the following explanation:

> "1. Inventory. The County's Goal 5 mineral and aggregate inventory establishes that the site has two types of mineral resources:
>
> "750,000 cubic yards of good quality pumice; and 10,000 cubic yards of sand and gravel.
>
> "The sand and gravel resource has largely been mined out by previous mining operations. Therefore, this analysis will focus on the pumice resource." Record 1797.

The ESEE Findings and Decision then identify conflicting uses and discuss the ESEE consequences of the conflicting uses. That discussion looks at both the impacts on mining and the impacts on the conflicting use. The county identified a number of uses that conflict with mining on the subject property. Those conflicting uses include deer habitat, the Deschutes State Scenic Waterway, Tumalo State Park, the Tumalo Rim Drive subdivision to

[2] Goal 5 terminology can be confusing and the county uses somewhat different terminology which presents the potential for more confusion. The county's ESEE Findings and Decision for individual sites collapses step 1 (Inventory) and step 2 (Conflict Identification/ESEE Consequences under the heading "ESEE Findings and Conclusion." The county's ESEE Findings and Decision documents use almost the same terminology that the Goal 5 rule uses to describe the third step—Program to Meet the Goal. We have used the rule terminology in this opinion when discussing the portion of the ESEE Findings and Decision for site 303 that corresponds to the first two steps under the rule. We use the term "ESEE Findings and Decision," as the county does, when referring to the entire three step Goal 5 planning document for site 303.

the north, adjacent and nearby residences and nearby agricultural operations. In addressing the two-way conflicts analysis required by OAR chapter 660, division 16, the ESEE Findings and Decision for site 303 explain that those conflicts are in part attributable to visual impacts, noise, dust, truck traffic and "impact to aesthetic values, due to physical scarring of the landscape and the introduction of an industrial-type use into a rural setting." Record 1800. The county recognized that mining on the property will have negative social and environmental impact on these uses and that severely restricting or prohibiting mining to avoid these impacts would have a negative economic impact by limiting or precluding removal and productive use of the mineral and aggregate resource on the site. In assessing the ESEE consequence of allowing mining to go forward with limited protection for mining and for conflicting uses, the county noted that the impact of mining is a short-term and transitional use and after reclamation the subject property can be put to other uses. At the end of that discussion the county elected to adopt a program under OAR 660-016-0010(3) for the subject property to limit both the extraction of the resource and the conflicting uses.[3] That Program to Meet the Goal is then set out in some detail at Record 1808-09.

In its "Program to Meet the Goal," the county determined that it would apply the SM zone to the site. That zone imposes a number of limitations on mining to reduce off-site impacts, including setbacks, screening, noise, and operational limitations. The adopted program to meet the goal limits existing and new conflicting uses by applying the SMIA combining zone to the area within ½ mile of the SM zoned subject property. The SMIA restricts construction of new uses that might conflict with mining on the subject property. Although the SM and SMIA zones appear to be the heart of the county's Goal 5 programs to meet the goal for significant mineral and aggregate sites, those programs for individual

[3] The county adopted the following finding: "Accordingly the Board finds that pursuant to OAR 660-16-010 it will limit the use of the mineral resource and the existing conflicting uses surrounding the site in favor of each other." Record 1807.

mineral and aggregate sites are not identical and include additional limitations that appear to be based on the particular conditions present at individual sites.[4]

With the above overview of the applicable Goal 5 regulatory framework and the county's adopted program to meet Goal 5 for the subject property we turn to the parties' assignments of error.

FIRST ASSIGNMENT OF ERROR (HOFFMAN)

The mining operation authorized by the challenged decision proposes to remove approximately 700,000 cubic yards of pumice and 3.4 million cubic yards of tuff.[5] The

---

[4] For example for site 305/306, a site closer to Tumalo State Park, the program to achieve the goal limits mining to one year and requires a development agreement that "stipulates a specific time period for operating." The program for the subject property does not include those limitations, but does include the following limitations:

> "The Board finds that in order to protect both the aggregate resource and the conflicting resources and uses, the site * * * will be zoned for surface mining, subject to the following ESEE conditions:
>
> "(a) Setbacks shall be required for potential conflicting residential and other development;
>
> "(b) Noise and visual impacts shall be mitigated by buffering and screening, with particular attention paid to screening from Tumalo State Park, or the eastern, northeastern and southeastern boundaries;
>
> "(c) Hours of operation shall be consistent with DEQ standards and applicable county ordinances;
>
> "(d) Wildlife restrictions set forth in ODFW's letter of August 10, 1989, shall apply;
>
> "(e) Excavation shall be limited to five acres with ongoing incremental reclamation (subject to DOGAMI review and approval);
>
> "(f) Mining operations, including placement of processing operations and equipment and excavation and transport of material shall meet all applicable DEQ noise and dust standards.
>
> "The Board finds that processing on site will be allowed." Record 1807.

[5] The record includes the following explanation of the differences between pumice and tuff:

> "Based on reports from Hill (1985, 1990) the Tumalo Tuff and Bend Pumice represent two separate volcanic deposits. The Tumalo Tuff is an ash flow deposit with an estimated age of 290 thousand years and the Bend Pumice is an air fall deposit with estimated age of 420

county's mineral and aggregate resource site inventory identifies a number of different mineral and aggregate resources.[6] "Tuff" is not listed, as such, anywhere on the county's mineral and aggregate inventory.

Because the county's ESEE Findings and Decision for the subject property assume the site contains only approximately 750,000 cubic yards of pumice, petitioners contend the challenged decision exceeds the scope of the ESEE Findings and Decision for the property. If the county now wants to authorize removal of as much as 4.2 million cubic yards of tuff, pumice and soil (3.4 million cubic yards of tuff; 700,000 cubic yards of pumice; 100,000 cubic yards of soil) petitioners argue that Latham must first seek a post-acknowledgment plan amendment to revise the ESEE Findings and Decision to authorize removal of almost six times as much mineral material than the current ESEE Findings and Decision assumed was present. The county rejected that argument and petitioners Hoffman assign error to that rejection.

The ESEE Findings and Decision for site 303 were adopted as part of the county's comprehensive plan. The conditional use and site plan approval that is at issue in this appeal is a land use decision that must comply with the acknowledged comprehensive plan. ORS

---

thousand years. Based on standard geologic definitions, pumice is a geologic material that is texturally different than tuff.

"The stated differences between the Tumalo Tuff and Bend Pumice are based on literature and desktop review. Collection of rock samples and petrologic testing would need to be performed to provide a more thorough analysis of the differences between the Tumalo Tuff and the Bend Pumice. We understand from the Siemen's response that material from the tuff deposit is used commercially in the Bend, Oregon area as compacted embankment fill and retaining wall backfill on residential and commercial projects and as pipe bedding, trench backfill and other fills depending on project specifications. We understand the pumice can be used for higher value applications such as building blocks, horticultural uses, landscaping, abrasives, absorbants, filters, stone washing of denim and traction enhancers for tires." Record 2414.

[6] The mineral and aggregate resources identified in the inventory include: aggregate, sand and gravel, cinders, rock, dirt, diatomite, pumice, and lump pumice. Record 1473-81.

197.175(2)(d).[7] On this much, we do not understand the parties to disagree. However, from that point of apparent agreement, petitioners Hoffman and Latham rapidly part company. The most significant point of disagreement concerns the legal effect of the Inventory and Conflict Resolution/ESEE Consequences portions of the ESEE Findings and Decision, which correspond to steps 1 and 2 under OAR chapter 660, division 16. Latham generally takes the position that those portions of the ESEE Findings and Decision may have been adopted as part of the county's comprehensive plan, but they merely form the basis for the "Program to Meet the Goal," and they are not actually part of the county's Program to Meet the Goal for site 303.

We understand Latham to take the position that the *only* role the ESEE estimate of 750,000 cubic yards of pumice and 10,000 cubic yards of sand and gravel plays is to allow the county to determine whether the quantity and quality of mineral and aggregate on the subject property is sufficient to make it "significant" and worthy of inclusion on the county's Goal 5 inventory of mineral and aggregate sites.[8] We understand Latham to take the position that under OAR chapter 660, division 16, once the subject property is placed on the county's inventory of significant mineral and aggregate sites and a program is adopted to allow the subject property to be mined, the county may thereafter issue permits to authorize removal of whatever mineral and aggregate resources are encountered on the site once mining commences, even if significantly more mineral resources and significantly different mineral resources are encountered than were believed to be present when the ESEE Findings and Decision for the subject property were adopted in 1990.

---

[7] Under ORS 197.175(2)(d), counties with acknowledged comprehensive plans and land use regulations must "make land use decisions * * * in compliance with the acknowledged plan and land use regulations."

[8] As we explained earlier, it is a decision that a site is "significant or important," within the meaning of OAR 660-016-0000(5)(c), that obligates the county to include the site on the inventory and complete the Goal 5 planning process for that site.

We reject that extremely broad view of the legal effect of the county's ESEE Findings and Decision. The estimated quantity and quality of mineral resources determined to be present on a site play a larger role in the Goal 5 planning process than merely determining whether the resources cross a threshold of significance. Those estimates are also central to the Conflict Resolution/ESEE Consequences and Program to Achieve the Goal phases under OAR chapter 660, division 16. Where, as here, the county determines that there are conflicting uses, and it must decide whether and to what extent to limit both the conflicting uses and the Goal 5 resource, the county conducts the Conflict Resolution/ESEE Consequences phase in which it compares the relative values of the Goal 5 resource on the site (in this case the quality and quantity of mineral resources estimated to be present on the site, including economic value) and the conflicting uses (in this case Tumalo State Park, the Deschutes River Scenic Area, wildlife resources and residences in the area, and their economic value). The county's ultimate decision concerning whether and how much to limit/protect/prohibit the Goal 5 use and conflicting uses is based on that comparison. The Conflict Resolution/ESEE Consequences phase evaluated only the estimated 750,000 cubic yards of pumice and 10,000 cubic yards of aggregate. That analysis and the resulting Program to Meet the Goal might well have been very different, if it were known in 1990 that the site included a significant deposit of a different type of mineral resource with economic value, extraction of which could generate different or more intensive kinds of conflicts with nearby uses than the minerals considered. Under Latham's view, if the site were later discovered to include a non-inventoried resource such as gold that could be extracted only by a cyanide leaching process that could threaten to pollute the Deschutes River, that non-inventoried resource would nonetheless be treated as a protected Goal 5 resource, and the county might be required to issue permits to mine it under its existing program to achieve the goal, notwithstanding that the county's ESEE analysis did not identify or inventory that

resource as a significant Goal 5 resource, did not consider conflicts created by extracting that resource, and did not adopt a program to achieve the goal that balances such conflicts.

On the other hand, we also reject petitioners' contention that the quantity and quality of the pumice and aggregate described in the county's ESEE Findings and Decision for site 303 under OAR chapter 660, division 16 *necessarily* operates to strictly limit the amount and type of mineral and aggregate that may be mined to those described in the ESEE Findings and Decision. With respect to quantity, absent some indication that the county believed the estimated quantity to represent a maximum and took that maximum estimated quantity into account in its ESEE analysis and ultimate decisions regarding the Program to Achieve the Goal (for example by imposing a time or quantity limit on mining in the Program to Achieve the Goal), we do not think that a new or amended ESEE analysis is required simply because the applicant discovers that a larger amount of inventoried mineral is present at the site than was originally estimated. Therefore, if subsequent investigation reveals that the site includes two million cubic yards of pumice rather than the estimated 750,000 cubic yards of pumice, in our view no new or amended ESEE analysis would be required to obtain a permit to mine the amount over 750,000 cubic yards.

With respect to the quality or type of resource, however, we largely agree with petitioners that if a *different*, non-inventoried mineral resource is later discovered at the subject site that is not identified in the ESEE analysis as a significant mineral resource and is therefore not a resource protected by Goal 5, the county can extend Goal 5 protection to that non-inventoried mineral resource, by allowing it to be mined under its acknowledged Program to Meet the Goal, only pursuant to a new or amended ESEE analysis. In this circumstance, the non-inventoried resource is in much the same position as a resource about which there was insufficient information to complete the Goal 5 process, under OAR 660-

016-0000(5)(b).[9] Where there is insufficient information, the local government does not adopt measures to protect the resource, but places the resource site in a special category, and commits to complete the Goal 5 process at a later time when sufficient information is available, usually by means of a post-acknowledgment plan amendment. If a *partially* identified and *partially* inventoried resource site under OAR 660-016-0000(5)(b) is not entitled to protection under Goal 5 until fully evaluated under the Goal 5 process, it is difficult to understand how a *completely* unidentified, unevaluated and non-inventoried resource at a site is entitled to protection under Goal 5, absent a new or amended Goal 5 analysis.

That view also has some support in the Court of Appeals' reasoning in *Urquhart v. Lane Council of Governments*, 80 Or App 178, 179-81, 721 P2d 870 (1986), which admittedly involved a different Goal 5 context. In *Urquhart*, opponents of a comprehensive plan amendment to allow a mixed industrial and commercial development argued that the development site included a Goal 5 resource (open space) that had not previously been identified in the local government's inventory of significant Goal 5 resource sites. The opponents argued that the plan amendment triggered the obligation for the local government to reconsider whether the site should now be included on the inventory, based on more recent

---

[9] As we have already explained, OAR 660-016-0000(5) sets out three basic options when conducting phase one of the Goal 5 analysis: do not include the resource on the plan inventory, delay the Goal 5 process due to insufficient information, or include the resource on the plan inventory. OAR 660-016-0000(5)(b) describes the "delay Goal 5 process" option:

> "Delay Goal 5 Process: When some information is available, indicating the possible existence of a resource site, but that information is not adequate to identify with particularity the location, quality and quantity of the resource site, the local government should only include the site on the comprehensive plan inventory as a special category. The local government must express its intent relative to the resource site through a plan policy to address that resource site and proceed through the Goal 5 process in the future. The plan should include a time-frame for this review. *Special implementing measures are not appropriate or required for Goal 5 compliance purposes until adequate information is available to enable further review and adoption of such measures*. The statement in the plan commits the local government to address the resource site through the Goal 5 process in the post-acknowledgment period. Such future actions could require a plan amendment[.]" (Emphasis added.)

evidence that a Goal 5 resource was present on the property. The Court of Appeals answered that question in the negative, concluding that once the local government's Goal 5 inventory is acknowledged, periodic review is the only means for correcting Goal 5 compliance issues, and that in adopting plan amendments to authorize development the local government is not obligated to reconsider the adequacy of its Goal 5 inventory and whether there are non-inventoried resources on the site that arguably should have been or should be inventoried. In our view, the inverse of that conclusion is equally true, *i.e.*, that Goal 5 protection generally does not extend beyond those resources that are identified, evaluated and inventoried in the local government's Goal 5 inventory. In the decision on appeal, the county essentially determined that its Program to Meet the Goal for site 303 extends Goal 5 protection vis-à-vis potential conflicting uses to the mining of significant quantities of a non-identified, non-evaluated and non-inventoried mineral resource. Absent a better explanation for that determination, we believe the county's Program to Meet the Goal for site 303 does not extend Goal 5 protection to such a non-inventoried resource unless and until the county adopts an amended ESEE Findings and Decision document for site 303 to extend Goal 5 protection to the tuff resource.

We do not mean to suggest that in all cases where a different, non-inventoried mineral is found at an inventoried mineral resource site that a proposal to mine that non-inventoried mineral will require an amended ESEE analysis. Mineral deposits are rarely uniform, and where *incidental* mining of a non-inventoried mineral resource is proposed, we see no impediment in Goal 5, OAR chapter 660, division 016 or elsewhere to a local government issuing a mining permit pursuant to its program to achieve the goal for that site that includes incidental mining of a non-inventoried resource that would otherwise not be entitled to Goal 5 protection.

But the scope of protection for incidental mining of a non-inventoried mineral resource in the absence of a Goal 5 analysis of that resource must be sufficiently narrow, or

the Goal 5 planning process loses all integrity. In our view, if mining of the inventoried resource requires removal of the non-inventoried resource, and the non-inventoried resource resembles the inventoried resource in economic use and value, the means of extraction and processing, and the type and intensity of impacts on pre-existing conflicting uses, then it is more likely that a local government can adopt a sustainable conclusion that mining of that non-inventoried resource is incidental to mining of the inventoried resource, and therefore issue a permit for such mining in the absence of a new or amended Goal 5 analysis evaluating the non-inventoried resource. Stated in different terms, mining of an uninventoried resource can be accurately viewed as incidental to mining of an inventoried resource if the local government adopts a conclusion supported by the record that, had it known of the quality and quantity of the non-inventoried resource when it adopted the original ESEE analysis and program to achieve the goal, the differences between inventoried and non-inventoried resources are sufficiently minimal in terms of extraction methods, conflicts, etc., that the local government would have chosen to balance the conflicts in the same way, and would have adopted the same program to achieve the goal.

In the present case, the county did not frame the key question precisely the same way we have framed that question in this appeal, in approving mining of 3.4 million cubic yards of tuff, in addition to the inventoried 750,000 cubic yards of pumice. But the county did adopt extensive findings considering whether the proposed mining is consistent with the existing ESEE Findings and Decision for the site. Pertinent parts of those findings are set out below:

> "The Board finds that the result of mining the Tumalo tuff in addition to the Bend pumice in this case does not result in significant added impacts that exceed or are in any way different in kind than the general impacts of mining documented and contemplated in the ESEE [Findings and Decision]. As an overlying band of mineral material, the tuff must necessarily be excavated and stored on site in any event to expose and mine the underlying Bend pumice. The Board finds from information in the record from the Oregon Department of Geology and Mineral Industries (DOGAMI) and from applicant's geotechnical expert that Tumalo tuff qualifies as a mineral under the County's

DCC 18.04.030 definition of a 'mineral' and that the Bend pumice and the Tumalo tuff are derived from the same volcanic event and are similar in composition, except for grain size, with the tuff being made up of 30% pumice inclusions by weight. Because of the nature of the tuff material, it is excavated in exactly the same manner as the Bend pumice, using the same kind of machinery as is involved in the excavation of the Tumalo tuff. About the only difference is that, when used as a fill material, the Tumalo tuff doesn't require processing, while the Bend pumice must be screened and crushed. While the excavation of the Tumalo tuff in addition to the Bend Pumice would result in additional truck traffic, the Board finds that the ESEE's Program to Meet the Goal and the implementing zoning ordinance do not regulate the amount of truck traffic required to service the mine.

"The Board finds that an understatement of the inventoried resource at the site would not have affected the resolution of conflicts in the ESEE [Findings and Decision] in this case, since, under the conflicts resolution step in OAR 660-016-0010, the resolution of conflicts requires weighing the relative *importance* of the resource site vis a vis the relative importance of the conflicting use and does not involve a weighing of the impacts. If anything, inventorying just the pumice resource would have tended to give the site less importance in the ESEE evaluation process as weighed against the importance of the conflicting resources and uses; but, even then, the resource was sufficiently important to warrant protection. Similarly, the Board finds, from a comparison with two nearby surface mining sites, Sites 304 and 305/306, that the specific inclusion of an amount of Tumalo tuff on the inventory would not have resulted in any different Program to Meet the Goal for the Site 303 ESEE. The two nearby sites are sand and gravel sites, with Site 304 inventoried 225,000 cubic yards of material and Site 305/306 inventoried with 150,000 cubic yards of material. Site 304 is located within a half-mile of the Tumalo Rim subdivision and within a half-mile of Tumalo State Park and across the road from the Deschutes River. Site 305/306 borders the Tumalo Rim subdivision on its west side. The Programs to Meet the Goal of these two sites are essentially similar to the Program to Meet the Goal for Site 303 in that the decision in each was a decision to Limit the Conflicting Uses Under OAR 660-016-0010(3) and each decision relies on the regulations in the SM and SMIA zones of the zoning ordinance to implement the ESEE decision, with some additional site-specific restrictions not present in the Program to Meet the Goal for site 303. The additional restrictions found in those two sites are related to the closer proximity of those sites to the Tumalo rim subdivision and Tumalo State Park.

"All this and the discussion above under the amount of material covered by the ESEE leads the Board to conclude that applicant's proposal to mine the tuff in addition to the pumice is well within the scope of the ESEE [Findings and Decision] adopted by the Board and that no amendment to the ESEE

> [Findings and Decision] is required in order for the applicant to mine the tuff material." Record 16-17 (italics in original; underlining added).

The above-quoted findings go part of the way toward establishing that the proposed mining of 3.4 million cubic yards of tuff can accurately be viewed as incidental to mining of the inventoried pumice on the site, in other words, that the ESEE Findings and Decision that were adopted in 1990 would not have been changed had the current view of the amount and type of mineral and aggregate available for extraction been known in 1990. The findings conclude that the impacts of mining tuff are the same as mining pumice, and that the tuff is an overburden that must be mined (removed) in any event to remove the pumice.

In the findings that are underlined above, the county explicitly addresses the pertinent question and concludes that the addition of tuff mining would not have changed the Goal 5 Program to Meet the Goal that was adopted for the subject property in 1990. However, the reasoning that the county provides for that conclusion does not address the primary concern that petitioners have advanced and the county's reasoning potentially supports a different conclusion. The findings explain that two other nearby aggregate sites have Programs to Meet the Goal that are similar to the Program to Meet the Goal that was adopted for the subject property. However, the final sentence of those findings acknowledges that those programs include additional restrictions on mining and explain "[t]he additional restrictions found in those two sites are related to the closer proximity of those sites to the Tumalo Rim subdivision and Tumalo State Park." We understand petitioners to argue that mining and removing the tuff, as opposed to retaining the tuff on-site and using it in the reclamation process, could dramatically increase the size of the excavation and the headwall that will be left exposed after mining is complete. Although there is no expression of concern about the depth of the excavation or a headwall in the 1990 ESEE analysis for the subject property, concerns about both visual and dust impacts from the mining operation on Deschutes River Scenic Area, nearby Tumalo State Park and other nearby uses are a recurring theme in the ESEE analysis. From the parties' arguments there does not seem to be any serious dispute

that those impacts could be dramatically increased if mining and removing the tuff produces a much deeper final excavation and larger headwall that will become a permanent fixture of the subject property after reclamation. That potential for increase in the headwall, like the closer proximity of sites 304 and 305/306 to the Tumalo Rim Subdivision and Tumalo State Park, might justify an amended ESEE Findings and Decision for site 303 that imposes additional restrictions on mining the subject property to provide additional protection for the conflicting uses. The 1990 ESEE Findings and Decision for site 303 do not address the potential impact of mining and removing 3.7 million cubic yards of tuff, creating the possibility of leaving a larger more visible headwall that may continue to produce dust after the site has been reclaimed.[10] We leave open the possibility that the county might be able to explain why that possibility would not have changed the Goal 5 program that the county adopted for the subject property in 1990. However, that explanation is not present in the challenged decision, and therefore remand is necessary so that the county can either provide that explanation or, in the alternative, require that the ESEE Findings and Decision for the subject property be amended to take into consideration the impacts that additional mining of tuff may have and to impose any additional limits on mining the county finds are appropriate to address the likely impacts that allowing the mining 3.7 million cubic yards of tuff may have on the conflicting uses.

The first assignment of error is sustained.

SECOND ASSIGNMENT OF ERROR (HOFFMAN)

Deschutes County Code (DCC) Chapter 18.52, the SM zone, imposes setbacks, restrictions and standards that apply when "noise-sensitive uses" or "dust-sensitive uses" are present. For example, DCC 18.52.110(B) requires screening to obscure the view of mining from noise-sensitive and dust-sensitive uses. DCC 18.52.090(A) requires that "all surface

[10] As our discussion of Latham's third assignment of error makes clear, the county apparently has concerns about dust impacts that may result from mining the headwall.

mining activities and uses, including structures, shall be located and conducted at least 250 feet from a noise-sensitive or dust-sensitive use or structure" DCC 18.52.090(B) provides that "[s]torage and processing of mineral and aggregate material, and storage of operational equipment which creates noise and dust, shall not be allowed closer than one-quarter mile from any noise or dust sensitive use or structure" that existed in 1990.[11]

DCC 18.04.030 provides that the definitions set out in that section apply throughout DCC Chapter 18.[12] In their second assignment of error, petitioners present two arguments. Petitioners first argue that the county erred by applying the DCC 18.04.030 definitions set out at n 12 instead of the definitions of dust-sensitive use and noise sensitive use set out in the ESEE Findings and Decision Document, which petitioners argue are broader than the DCC 18.04.030 definitions. Petitioners also argue that even if the DCC 18.04.030 definitions apply here, the county interpreted and applied those definitions too narrowly. We understand petitioners to argue that if the county had applied the ESEE Findings and Decision Document definitions or adopted petitioners' broader interpretation of the DCC

---

[11] Petitioners cite a number of other DCC Chapter 18.52 provisions that impose regulations based on proximity to dust-sensitive and noise-sensitive uses: DCCC 18.52.110(A) (access roads must be "adequately maintained at all points within 250 feet of a dwelling or other dust-sensitive use"); DCC 18.52.110(I)(1)(a) (limiting hours of operation of "[s]urface mining sites located within one-half mile of any noise-sensitive or dust-sensitive use or structure"); DCC 18.52.110(J) (imposing standards on drilling or blasting "within one-half mile of any noise-sensitive use or dust-sensitive use or structure"); 18.52.140(A) (imposing standards if a "[c]rusher is to be located less than one-half mile from a noise-sensitive use or structure"); 18.52.140(C) (requiring that the area of a mine site where products will be sold must be "at least one-half mile from noise or dust-sensitive use or structure"); and 18.52.140(D) (imposing standards if a "processing operation is located less than one-half mile from a noise-sensitive use or structure").

[12] DCC 18.04.030 includes the following definitions:

> "'Dust-sensitive use' means real property normally used as a residence, school, church, hospital or similar use. Property used in industrial or agricultural activities is not 'dust-sensitive' unless it meets the above criteria in more than an incidental manner. Accessory uses such as garages and workshops do not constitute dust-sensitive uses."
>
> "'Noise-sensitive use' means real property normally used for sleeping or normally used as schools, churches, hospitals or public libraries. Property used in industrial or agricultural activities is not 'noise-sensitive' unless it meets the above criteria in more than an incidental manner. Accessory uses such as garages or workshops do not constitute noise-sensitive uses."

18.04.030 definitions of those terms, in applying the DCC Chapter 18.52 SM zone standards the county would have had to require additional screening, setbacks and operational limitations for the proposed mining.

A. The ESEE Findings and Decision Definitions of Dust-Sensitive Use and Noise-Sensitive Use

Petitioners contend that the ESEE Findings and Decision document provides the following "definitions" of dust-sensitive use and noise-sensitive use:

> "The Board finds that all commercial, residential, park or community-type uses are dust-sensitive uses due to the potential health impacts of dust on occupants and patrons." Record 1800.

> "The Board finds that under DEQ noise standards, all possible uses in the surrounding zones would be noise-sensitive uses, except utility uses, landfill uses, other mining or other geothermal uses, personal landing strip uses, forest products processing uses, and hydroelectric uses." Record 1800

> "Most uses in the surrounding zoning designations are classed as noise-sensitive uses for purposes of DEQ noise regulations. Farm uses may be noise-sensitive uses in certain situations, such as with livestock operations. Record 1805.

In rejecting petitioners' argument that the county must apply the above "definitions" of dust-sensitive use and noise-sensitive use when applying the DCC Chapter 18.52 screening, setback and operational standards, the county adopted the following findings:

> "As set forth in the Board's discussion in Section IV(B)(1)(d) of this decision, the only portion of the ESEE [Findings and Decision] that is to be applied during the site plan permitting process is the ESEE's Program to Meet the Goal as implemented through the site plan regulations. DCC 18.52.020 allows application of restrictions or allowances from the conditions listed in the ESEE's Program to Meet the Goal * * *. To be consistent with Goal 5 and the findings implementing the Program to Meet the Goal DCC 18.52.100 and DC 18.52.110(P) must be interpreted narrowly to constitute nothing more than a cross-reference to those conditions of the ESEE Program to Meet the Goal that either are not otherwise addressed in the implementing site plan criteria or that conflict with the site plan criteria." Record 4.

To state the county's position a little more bluntly, it concluded that the only portion of the ESEE Findings and Decision that is a potential source of regulatory requirement in this

matter in applying DCC Chapter 18.52 is the Program to Meet the Goal. Because the so-called ESEE Findings and Decision definitions of dust-sensitive use and noise-sensitive use do not appear in the Program to Meet the Goal for site 303, the county and Latham take the position that they do not apply in this case.

Although the county answered a far broader question (What parts of the ESEE Findings and Decision are regulatory?) than is posed by the second assignment of error (Which definition applies?), we agree with the county that the DCC 18.04.030 definitions of dust-sensitive use and noise-sensitive use apply in this matter. There is almost no textual support in DCC Chapter 18.52 or the ESEE Findings and Decision document for petitioners' position that the ESEE Findings and Decision "definitions" of dust-sensitive use and noise-sensitive use apply in place of the DCC 18.04.030 definitions of those terms. First of all, what petitioners describe as "definitions" in the ESEE Findings and Decision document are not definitions at all; they are findings. More importantly, they are findings in the Conflict Resolution/ESEE Consequences portion of the ESEE Findings and Decision document and presumably were adopted to allow the county to perform the Conflict Resolution/ESEE Consequences portion of the ESEE Findings and Decision Document. As we have already explained, under OAR chapter 660, division 16, that portion of the ESEE Findings and Decision document is a prelude to the decision making phase of the ESEE Findings and Decision document, which occurs in the "Program to Meet the Goal."

The Program to Meet the Goal for site 303 adopts the SM zone and imposes other requirements. *See* n 4. Neither the SM zone nor any language in the Program to Meet the Goal for site 303 gives any suggestion that the county intended that its findings concerning "dust-sensitive uses" and "noise-sensitive uses" would apply in place of the DCC 18.04.030 definitions of those terms, when applying the screening, setback, and operational limitations

set out in DCC Chapter 18.52. To the contrary, DCC 18.04.030 expressly provides that the definitions in that section are to be used when applying the zoning ordinance.[13]

Petitioners first argue that the findings concerning dust-sensitive uses and noise-sensitive uses in the Conflict Resolution/ESEE Consequences for site 303 must be applied and given regulatory effect, because the entire ESEE Findings and Decision document was adopted as part of the county's comprehensive plan. However, the county's decision to adopt the ESEE Findings and Decision as part of the county's comprehensive plan only "potentially" makes the "definitions" in the cited findings mandatory. Whether the language is mandatory, generally or in this case, depends on the language and context of the ESEE Findings and Decision. The fact that it is part of the county's comprehensive plan does not resolve whether it has regulatory effect. *McGowan v. City of Eugene*, 24 Or LUBA 540, 546 (1993); *Neuenschwander v. City of Ashland*, 20 Or LUBA 144, 154 (1990); *Bennett v. City of Dallas*, 17 Or LUBA 450, 456, *aff'd* 96 Or App 645, 773 P2d 1340 (1989).

Although petitioners criticize the county's interpretation as lacking in textual support, it is not entirely clear to us what text petitioners are relying on. Petitioners appear to rely in part on DCC 18.52.020, which provides in part:

> "[T]he setbacks, operation standards and conditions set forth in DCC 18.52.090, 18.52.110 and 18.52.140, respectively, apply to every surface mining site and activity to the extent that setbacks, standards and conditions are not expressly provided for in the site-specific ESEE analysis within the surface mining element of the Comprehensive Plan. *When there is a conflict between the site-specific ESEE analysis and the provisions of DCC 18, the site-specific ESEE analysis shall control*." (Emphasis added.)

Petitioners also rely in part on the fact that a number of sections in DCC Chapter 18.52 refer to the "ESEE analysis" rather than to the ESEE Program to Meet the Goal.[14]

---

[13] DCC 18.04.030 provides "As used in DCC Title 18, the following words and phrases shall mean as set forth in DCC 18.04.030."

[14] DCC 18.52.100(B) provides in part that the county "may require the applicant to make such modifications to the site plan as are necessary to fulfill the requirements of the site-specific ESEE analysis

Turning first to DCC 18.52.020, petitioners identify no "setbacks," "standards," or "conditions" that they believe the county should have applied in place of the DCC 18.52.090, 18.52.110 and 18.52.140 setbacks, standards and conditions that the county applied in this case. If the ESEE Findings and Decision actually adopted definitions for dust-sensitive use and noise-sensitive use as part of the Program to Meet the Goal for site 303, the last sentence of DCC 18.52.020 would require that those definitions be applied. As we have already explained, the Program to Meet the Goal includes no such definitions.

The many references in DCC Chapter 18.52, to the "ESEE analysis," *see* n 14, do introduce an ambiguity. That is because the term "ESEE analysis" appears nowhere in the "ESEE Findings and Decision" for site 303 that appears at Record 1796-1810. Although it is possible that when the county used the term "ESEE analysis" it meant to refer to the entire ESEE Findings and Decision document, it seem far more likely to us that the county intended to refer to the portion of the ESEE Findings and Decision document where decisions were made that require some future action, *i.e.*, the Program to Meet the Goal.

---

* * *." DCC 18.52.110(J) governs drilling and blasting and refers to the "site-specific ESEE analysis." DCC 18.52.110(P) requires the applicant to demonstrate that "[a]ll impacts of the mining activities identified in the ESEE analysis for the specific site are addressed and have been resolved at the time of site plan approval or before the start of mining activity." DCC 18.52.110(L) requires that "Fish and wildlife values and habitat required by the site-specific ESEE analysis to be conserved and protected [must be] conserved and protected." DCC 18.52.140(A) allows crushing "[w]hen a site has been designated for crushing of mineral and aggregate materials under the site-specific ESEE analysis."

LUBA is required to apply a deferential standard of review under ORS 197.829(1).[15] Whether the county's interpretation of DCC Chapter 18.52 that sections that refer to "ESEE analysis" refer only to the "Program to Meet the Goal" is "inconsistent with" the "express language" of those DCC Chapter 18.52 sections, within the meaning of ORS 197.829(1)(a), "depends on whether the interpretation is plausible, given the interpretive principles that ordinarily apply to the construction of ordinances under the rules of *PGE[v. Bureau of Labor and Industries*, 317 Or 606, 859 P2d 1143 (1993)]." *Foland v. Jackson County*, 215 Or App 157, 164, 168 P3d 1238, *rev den* 343 Or 690, 174 P3d 1016 (2007). LUBA's task is not to determine whether the county's interpretation of DCC 18.52.090(B) is "'correct' in some absolute sense of choosing among various plausible interpretations, but, instead, merely whether that interpretation satisfied *PGE*'s first level threshold of plausibility." *Siporen v. City of Medford*, 231 Or App 585, 599, 220 P3d 427 (2009), *review allowed* 348 Or 13 (2010).

Petitioners are undoubtedly correct in arguing that if the county intended to limit the inquiries required under those sections of DCC Chapter 18.54 to the Program to Meet the Goal, it could have done so much more clearly by inserting the words "Program to Meet the Goal" instead of the words "ESEE analysis." Nevertheless, given that the planning

---

[15] ORS 197.829(1) provides:

> The Land Use Board of Appeals shall affirm a local government's interpretation of its comprehensive plan and land use regulations, unless the board determines that the local government's interpretation:
>
> "(a) Is inconsistent with the express language of the comprehensive plan or land use regulation;
>
> "(b) Is inconsistent with the purpose for the comprehensive plan or land use regulation;
>
> "(c) Is inconsistent with the underlying policy that provides the basis for the comprehensive plan or land use regulation; or
>
> "(d) Is contrary to a state statute, land use goal or rule that the comprehensive plan provision or land use regulation implements."

obligation that is imposed by OAR chapter 660, division 16 is composed of an Inventory, Conflict Resolution/ESEE Consequences, and Program to Meet the Goal phases, and decision making is to occur in the final phase, the county's interpretation of the DCC is at least as plausible as petitioners' proffered interpretation. The county's interpretation is also not "contrary to [the] rule that the * * * land use regulation implements." ORS 197.829(1)(d). *See* n 15.

This subassignment of error is denied.

B. The County's Interpretation of the DCC 18.04.030 Definitions of Noise-Sensitive Use and Dust-Sensitive Use

The DCC 18.04.030 definitions of dust-sensitive use and noise-sensitive use were set out earlier at note 12 and are set out again here.

> "'Dust-sensitive use' means real property normally used as a residence, school, church, hospital or similar use. Property used in industrial or agricultural activities is not 'dust-sensitive' unless it meets the above criteria in more than an incidental manner. Accessory uses such as garages and workshops do not constitute dust-sensitive uses."

> "'Noise-sensitive use' means real property normally used for sleeping or normally used as schools, churches, hospitals or public libraries. Property used in industrial or agricultural activities is not 'noise-sensitive' unless it meets the above criteria in more than an incidental manner. Accessory uses such as garages or workshops do not constitute noise-sensitive uses."

The reference in the above definitions to "real property" and to particular kinds of uses that are normally housed in structures arguably permits at least two significantly different interpretations.

Under the first interpretation, a dust-sensitive use would include all of the real property (the entire lot or parcel) that is developed with a "residence, school, church, hospital or similar use." Similarly, under the first interpretation, a noise-sensitive use would include the entire lot or parcel that is developed with a dwelling or other building where people sleep or with "schools, churches, hospitals or public libraries." We understand petitioners to favor this interpretation or something close to it. Under that interpretation, petitioners' entire 60-

acre parcel, or at least all parts that are used in conjunction with their residence, would be considered a dust-sensitive use and a noise-sensitive use for purposes of applying screening and setback standards.[16]

Under the second interpretation, since both interpretations refer almost exclusively to uses that are carried out for the most part in structures, and structures provide refuge from noise and dust, the emphasis would be on the structures that house those uses. Under this interpretation, only the structures used for residences, schools, churchs, hospitals or similar uses would qualify as dust-sensitive uses. Similarly, only the structures used for sleeping or the structures "normally used as schools, churches, hospitals or public libraries" would qualify as noise-sensitive uses. As we explain below, the county adopted a variation on the second interpretation.

1. Noise-Sensitive Uses

With regard to the definition of noise-sensitive uses, the county adopted the following interpretive findings:

> "The Board finds from the testimony of staff that the County has consistently interpreted the term 'noise-sensitive use' to apply to just those portions of the property that include the structure that defines the use and the area within 25 feet of the noise-sensitive use toward the noise source. See OAR 340-035-035(3)(b).[17] In addition the Board finds ample support in the text and

---

[16] Petitioners contend that nonstructural uses must be considered in measuring the required setbacks. Under that view, the setbacks would have to be measured from the driveway that provides access to dwellings. As compared to the dwellings, portions of the driveway are much closer to the proposed mining.

[17] The Oregon Department of Environmental Quality (DEQ) has adopted "Noise Regulations for Industry and Commerce." DEQ's definition of "noise sensitive property" is identical to the county's definition of "noise-sensitive use," except that DEQ's definition of "noise sensitive property" does not include the last sentence of the county's definition that excludes accessory uses. For purposes of measuring noise in applying those regulations, OAR 340-035-035(3)(b) provides:

> "Unless otherwise specified, the appropriate measurement point shall be that point on the noise sensitive property, described below, which is further from the noise source:
>
> "(A) 25 feet (7.6 meters) toward the noise source from that point on the noise sensitive building nearest the noise source;

> context of the provision itself. The Board agrees with the applicant's argument that the definition's reference to an activity—sleeping—that customarily occurs and is commonly understood to occur indoors and to require peace and quiet and the definition's reference to a series of other uses—schools, churches, hospitals, and public libraries—that are commonly understood to occur within a structure and to require an absence of disturbing noises to protect the kinds of activities within a structure and to require an absence of disturbing noises to protect the kinds of activities—learning, praying, healing and reading—supports an interpretation that the scope of the definition of 'noise sensitive use' should refer to just the structure within which the use occurs." Record 21.

The county's findings go on to point out as additional contextual support for the county's interpretation that: (1) the other sections of the DCC commonly measure setbacks from structures, (2) a contrary interpretation would preclude new non-structural uses in the SMIA zone within 250 feet of mines, (3) measuring setbacks from undefined activities or accessory uses of property that might be associated with the structure would be difficult and uncertain, (4) the exclusion of garages and workshops suggests only structures were intended to qualify as noise-sensitive uses. Record 21-22.

The board of county commissioners then noted that "the Hearings Officer found the applicant's arguments to be 'plausible' but ultimately decided against the applicant on this issue." Record 22. The board of commissioners then concluded as follows:

> "[T]he Board finds the applicant's interpretation and the long-standing interpretation of the County to be the better interpretation of the two and hereby determines to overturn the Hearings Officer's interpretation. For purposes of applying the standards of DCC Chapter 18.52 and to be consistent with the DEQ regulations from which the definition of 'noise sensitive use' is derived, the Board finds that the extent of a noise or dust sensitive use is the structure, excluding any garage or outbuilding with the 25-foot noise measure location serving as a reference point for measuring noise impacts in applying DCC 18.52.110(H)." Record 22-23.

That the county may have interpreted the definition in a particular way in the past lends little support to the county's interpretation. Similarly, the fact that DEQ has adopted a

---

"(B) That point on the noise sensitive property line nearest the noise source."

rule that expressly requires that noise be measured at a point 25 feet from a noise sensitive building lends little support for the county's interpretation of its definition, which does not expressly require that noise be measured at a point located 25 feet from the building. Further, as we have already explained, the definition is ambiguous in that there is language in the definition that would permit it to make the entire lot or parcel noise-sensitive or only the structure noise-sensitive. However, the context cited by the county adds some additional support to its interpretation that the structure is the noise-sensitive use. We do not see that the county is reversibly wrong in determining that it will measure noise in the same way that DEQ measures noise under its regulations, at a point 25 feet from the structure toward the noise source. If, as we conclude, the county's interpretation that noise-sensitive uses are limited to the structures described in the county's definition is not reversibly wrong, we do not understand petitioners to object to the county's decision to measure noise at a point 25 feet from the structure toward the noise source, since that would result in a more stringent standard than measuring from the structure. To the extent petitioners assign error to that aspect of the county's interpretation we reject the challenge, because petitioners make no attempt to show that aspect of the interpretation, in and of itself, affected the decision in this matter.

For the reasons explained above, we find the county's interpretation is plausible. Moreover, that interpretation is at least as plausible as petitioners' interpretation. We therefore defer to the county's interpretation. *Siporen*, 231 Or App at 599; *Foland*, 215 Or App at 164.

2. Dust Sensitive Uses

We set out below a portion of the county's explanation of its interpretation of the DCC 18.04.030 definition of dust-sensitive use:

> "The Board finds that, with regard to the scope of a 'dust-sensitive use,' the considerations are similar to those that inform the Board on how to interpret 'noise-sensitive use.' The Board notes that the definition is almost identical

> to the definition of 'noise-sensitive use" and likely was intended to parallel the noise-sensitive use definition. This is evident from the fact that, in almost every case in DCC Chapter 18.52 and 18.56 where 'noise-sensitive uses' is referred to there is a parallel reference to 'dust-sensitive uses,' as if they are to be treated as one and the same. Additionally, the same amendments excluding garages and workshops were made to both definitions simultaneously in Ordinance 91-038." Record 23.

The board of commissioners ultimately concluded that in applying setbacks, screening and operational standards that involve dust-sensitive uses, dust-sensitive uses are limited to the structures described in the definition.

For essentially the same reasons we find the county's interpretation of noise-sensitive use plausible, we find the county's interpretation of dust-sensitive use plausible, and we defer to that interpretation as well.

This subassignment of error is denied.

The second assignment of error is denied.[18]

THIRD ASSIGNMENT OF ERROR (HOFFMAN)

DCC 18.52.110 sets out "General Operation Standards" for mining sites. With some exceptions, DCC 18.52.110(B) requires that mining sites ("screened uses") be screened from certain "protected uses."[19] In their third assignments of error, petitioners Hoffman contend

---

[18] Throughout their petition for review, petitioners Hoffman repeat their argument that the county improperly interpreted the definitions of noise-sensitive use and dust-sensitive use in applying various criteria in DCC Chapter 18.52. To simplify, we reject all of those arguments here and do not further consider the parties' dispute about whether the county interpreted those definitions too narrowly.

[19] The text of DCC 18.52.110(B) is set out below:

> "Screening.
>
> "1. The site is screened to meet the standards specified in DCC 18.52.110(B)(2), unless one of the exceptions in DCC 18.52.110(B)(6) applies.
>
> "2. Performance Standard. When screening is required by DCC 18.52.110(B)(1), it obscures the view of the screened uses from the protected uses with the methods and to the extent described in DCC 18.52.110(B)(5).
>
> "3. Protected Uses.

"a. Noise-sensitive or dust-sensitive uses existing on the effective date of Ordinance No. 90-014.

"b. Public parks and waysides.

"* * * * *

"4. Screened Uses.

"a. All equipment stored on the site.

"b. All crushing and processing equipment.

"c. All excavated areas * * *.

"5. Types of Screening.

"a. Natural Screening. Existing vegetation or other landscape features which are located on the surface mining site within 50 feet of the boundary of the site, and which obscure the view of the screened uses from the protected uses, shall be preserved and maintained.

"b. Supplied Screening. Supplied vegetative screening is screening not already existing and which is added to the site, such as hardy plant species. Plantings shall not be required to exceed either a density of six feet on center or a height of six feet at the commencement of mining. Supplied earthen screening shall consist of berms covered with earth and stabilized with ground cover.

"6. Exceptions. Supplied screening shall not be required when and to the extent that any of the following circumstances occurs:

"a. The natural topography of the site offers sufficient screening to meet the performance standard in DCC 18.52.110(B)(2).

"b. Supplied screening cannot meet the performance standard in DCC 18.52.110(B)(2) due to topography.

"c. The applicant demonstrates that supplied screening cannot reliably be established or cannot survive for a 10 year period due to soil, water or climatic conditions.

"d. Screened uses that are visible from the protected uses will be concluded and will either be removed or reclaimed within 18 months.

"e. The surface miner and the owner or authorized representative of the owner of the protected use execute and record in the Deschutes County Book of Records a mitigation agreement that waives screening requirements and describes and adopts an alternate program or technique.

the county erred by approving a mining request that does not supply the screening for the proposed mining site that is required by DCC 18.52.110. The challenged decision concerning DCC 18.52.110(B) and the parties' arguments concerning DCC 18.52.110(B) are exceedingly complex. We have attempted to simplify but likely have not succeeded.

A. The Hoffmans' Residence

One of the dwellings on petitioners' property was in existence in 1990 and qualifies as a noise and dust-sensitive use and therefore is a "protected use" under DCC 18.52.110(B)(3)(a). Most of the proposed mining site is not visible from the Hoffmans' residence, but apparently a portion of the existing headwall is visible from that residence.[20] Pertinent county findings concerning the Hoffmans' residence are set out below:

> "[T]he Board finds that due to topographical considerations, namely the location of the intervening ridge on the Hoffman property, there is no possibility of screening any views there might be of the headwall from the pre-1990 Hoffman residence. Staff testified and the Board finds that the ridge is undulating and rocky and any vegetation planted to screen the headwall would not likely survive and, thus, be a futile attempt at further screening the mining site and the headwall. Therefore, the Board finds that any views of the headwall from the pre-1990 Hoffman residence would be subject to the exception of DCC 18.52.110(B)(6).
>
> "This finding, however, is based solely on the intervening ridge. The Board does not find, as the applicant argues, that DCC 18.52.110(B)(6)(b) can be interpreted to mean man-made topography. That subsection must be read in conjunction with (a) such that the topography referred to in (b) is linked to the 'natural' topography in (a). To find otherwise would lead to the absurd situation of allowing a property owner to severely alter a property then claim an exemption from the very provision designed to protect the surrounding uses from the impacts of that alteration." Record 24-25.

> "7. Continued Maintenance. Vegetative screening shall be maintained and replaced as necessary to assure the required screening throughout the duration of the mining activity."

[20] The residence is located northeast of the subject property, near the Deschutes River. Looking southwest from the residence over a ridge on the Hoffmans' property most of the mining site is not visible. However, a portion of the headwall apparently is visible and it may be that any expansion of that headwall likely would also be visible.

Turning first to the reasoning in the second paragraph, we understand the reference to "man-made topography" to be a reference to the mined headwall. That headwall is visible from the Hoffmans' residence as "an excavated area," within the meaning of DCC 18.52.110(B)(4)(c), only because Latham's mining activity has created and will enlarge that headwall. The distinction the county is attempting to draw between natural topography and man-made topography is hard to understand. To illustrate, it seems clear that a proposed mine in a natural depression that would be within plain view of all surrounding properties would qualify for the DCC 18.52.110(B)(6)(b) screening exception (because screening would be ineffective to block the view of the mine from the properties at a higher elevation). It would appear that mining in such a depression could be approved under DCC 18.52.110(B)(6)(b) without screening, even though the mine would be clearly visible from surrounding properties. But a proposal to mine property located on top of a natural hill, which is similarly in plain view of all surrounding properties, would not qualify for the DCC 18.52.110(B)(6)(b) screening exception. Under the county's reasoning this different result is required because mining the side of a hill that is visible to its neighbors creates "man-made topography."

The distinction that the county draws is hard to understand—and is doubly hard to understand in view of the county's resolution of the screening issues concerning Tumalo State Park, which we discuss below. In its response brief, Latham argues the county is misreading the DCC 18.52.110(B)(6)(b) exception to apply only to natural topography. However, petitioner Latham does not assign error to the county's interpretation in its petition for review in LUBA No. 2009-062 and has not filed a cross-petition for review in this appeal (LUBA No. 2009-061) or included a cross assignment of error in its response brief in this appeal We therefore do not consider Latham's challenge to the county's interpretation further.

The first paragraph quoted above expresses the county's reasons for not requiring screening for the Hoffman dwelling. That paragraph is equally hard to understand. The county's findings appear to be proceeding on the assumption that Latham could be required to secure permission from the Hoffmans to install the "supplied screening" described in DCC 18.52.110(B)(5)(b) on the ridge that is located on the Hoffmans' property. Since the Hoffmans are opposing the proposed mining, that seems highly unlikely. In addition, the findings suggest the elevated topography of the ridge on the Hoffmans' property is a topographical *constraint* that precludes screening. However, unless we are missing something, the elevated ridge on the Hoffmans' property actually presents a topographic *opportunity* to install supplied screening that might block the view of the headwall from the Hoffmans' residence. Without the intervening ridge, the much higher elevation of the headwall would likely make it impossible to plant vegetation that would grow tall enough to screen the view of the headwall from the Hoffman dwelling.

Finally, the last two sentences in that paragraph conclude that due to the "undulating and rocky" nature of the ridge screening vegetation "would not likely survive" and for that reason "the exemption of DCC 18.52.110(B)(6)" applies. If, in adopting that finding, the county intended to rely on DCC 18.52.110(B)(6)(c), which provides an exception where, "[t]he applicant demonstrates that supplied screening cannot reliably be established or cannot survive for a 10 year period due to soil, water or climatic conditions," that intent is stated too obscurely. All of the discussion in the county's findings concerning the Hoffmans' residence cite and discuss DCC 18.52.110(B)(6)(b), and the county never expressly cites to DCC 18.52.110(B)(6)(c).[21] If the county was intending to invoke DCC 18.52.110(B)(6)(c) it needs to do so more clearly.

[21] We understand Latham to present an additional argument that the county's decision not to require screening should be affirmed because the line of sight from the Hoffmans' dwelling to the exposed headwall is almost entirely obscured by the ridge on the Hoffmans' property and installing supplied screening along Latham's northern property line would serve no purpose, because it too would be screened by the intervening

This subassignment of error is sustained.

B. Tumalo State Park

The existing headwall is visible from the upper eastern part of Tumalo State Park. The hearings officer imposed a condition requiring that no part of the mine be visible from the upper part of Tumalo State Park. The board of county commissioners disagreed with the hearings officer's reasoning and the board of county commissioners did not require any screening to obscure the views from Tumalo State Park.

The board of county commissioners' findings regarding whether DCC 18.52.110(B) requires screening to screen views of the mine from Tumalo State Park appear at Record 25-26. The county's reasoning is so difficult to follow that we cannot be sure we understand that reasoning. If we understand the county's reasoning, it should have required that Latham provide the supplied screening required by DCC 18.52.110(B)(5)(b), even if it would not be effective to screen views of the mine from Tumalo State Park. However, even if we understand the county's reasoning, petitioners do not appear to have the same understanding of the county's reasoning that we do, and it is easy to see how petitioners would not identify the reasoning that we think the county is relying on. In this circumstance, we believe it is appropriate for LUBA to sustain this subassignment of error and remand so that the county may confirm that LUBA has a correct understanding of its reasoning or, if not, to better explain the reasoning behind its decision not to require screening for Tumalo State Park.

The board of county commissioners identified three interpretive issues that needed to be resolved to decide whether screening is required under DCC 18.52.110(B) to obscure views of the mine from Tumalo State Park. Record 25. We have reworded those issues

---

ridge on the Hoffmans' property, which is at a much higher elevation than the northern edge of Latham's property. That strikes us as a pretty good argument that the DCC 18.52.110(B)(6)(b) exception should apply here to waive the obligation to provide screening at or near the property line, notwithstanding the county's man-made topography rationale, because the respective elevations of the top of the headwall, the northern edge of Latham's property and the Hoffmans' dwelling are such that "[s]upplied screening cannot meet the performance standard in DCC 18.52.110(B)(2) due to [the] topography." However, the county did not adopt that reasoning.

slightly: (1) whether the ESEE Findings and Decision "Program to meet the Goal" mandates screening protection for Tumalo State Park in addition to the screening required by DCC 18.52.110(B), (2) whether DCC 18.52.110(B) is an absolute standard, and (3) whether the exception to the screening standard at DCC 18.52.110(B)(6)(b) applies in cases of man-made changes in topography.

1. The ESEE Findings and Decision "Program to Meet the Goal"

This part of the county's reasoning is relatively clear. The county concluded that Condition 23(b) in the Program to Meet the Goal for site 303 does not impose any obligation to screen views from Tumalo State Park, beyond the requirements of DCC 18.52.110(B).[22]

2. The DCC 18.52.110(B)(6)(b) Exception for Topography

Although the county addressed this issue last, it is analytically easier to address this issue before considering the other issue identified by the county—whether DCC 18.52.110(B) is an absolute standard. As we explain above in our discussion of the Hoffman dwelling, the board of county commissioners concluded that the exception provided by DCC 18.52.110(B)(6)(b) to allow approval of a proposal without screening where "[s]upplied screening cannot meet the performance standard in DCC 18.52.110(B)(2) due to topography" is inapplicable here because the headwall is man-made topography. The board of county commissioners confirmed that position in its findings regarding the need for screening to obscure mine views from Tumalo State Park:

> "[T]he hearings officer interpreted the exception in [DCC] 18.52.110(B)(6)(b) as not applying where the topography at issue is a manmade excavation. The Board agrees with the Hearings Officer's interpretation in this regard." Record 26.

[22] That condition is set out below:

> "Noise and visual impacts shall be mitigated by buffering and screening, with particular attention paid to screening from Tumalo State Park or the eastern, northeastern and southeastern boundaries[.]" Record 1807.

As we understand the record, the only possible exemption under DCC 18.52.110(B)(6) in this case from the screening requirements imposed by DCC 18.52.110(B)(1), (2) and (5) is DCC 18.52.110(B)(6)(b). The only possible conclusion that we can see, following the county's conclusion above that DCC 18.52.110(B)(6)(b) does not apply, is that no exceptions apply and the applicant must supply the screening required by DCC 18.52.110(B)(2), *i.e.*, "screening [that] obscures the view of the screened uses from the protected uses with the methods and to the extent described in DCC 18.52.110(B)(5)."

3. Whether DCC 18.52.110(B) is an Absolute Standard

The final piece of the county's reasoning concerning the screening required by DCC 18.52.110(B)(1), (2) and (5) is the most critical, and the least clear. Rather than require that the applicant provide the "supplied screening" that is required by DCC 18.52.110(B)(1), (2) and (5), the county finds that DCC 18.52.110(B) is not an absolute standard. Those findings are set out below:

> "[T]he Board agrees with [Latham] that the performance standard of protection set forth in the language of DCC 18.52.110(B)(2) is not absolute. Starting with the text and context of the ordinance provision, the Board finds that where the site is not obscured from surrounding protected uses by existing natural screening, the performance standard is set forth in DCC 18.52.110(B)(2). Read together with DCC 18.52.110(B)(5), the Board finds that provision requires use of supplied screening only to the extent set forth in the supplied screening standard. Supplied vegetative screening is not required to exceed a density of six feet on center or a height of six feet at the commencement of mining. *Therefore, the screening requirement can be discharged by supplying screening that is initially six feet in height, regardless of whether it will ultimately be effective in actually screening an excavated area from view.* Read in this light, the Board finds that a performance standard cannot reasonably be found to constitute an absolute 'no visual impact' screening standard." Record 26.

If we understand the above findings, the county determined that where the "supplied screening" described at DCC 18.52.110(B)(5) is required by DCC 18.52.110(B)(1) and (2), that supplied screening will be sufficient to comply with DCC 18.52.110(B)(2), without regard to whether that "supplied screening" will actually obscure the view of all of the

mining operation from Tumalo State Park. That interpretation seems to be consistent with the screening requirement of DCC 18.52.110(B)(2), which requires "screening [that] obscures the view of the screened uses from the protected uses *with the methods and to the extent described in DCC 18.52.110(B)(5)*." (Italics and underlining added.) The underlined language qualifies the burden to obscure views.

However, the county's findings fail to explain why it did not require that Latham install "supplied screening" along the subject property's northern property line, between the Tumalo State Park and the proposed mining operation, even though the county also found that none of the DCC 18.52.110(B)(6) exclusions from the screening obligation apply here. If our understanding of the county's interpretation of what DCC 18.52.110(B)(1), (2), (5) and (6) require is accurate, it was error for the county not to require supplied screening in that area, even if that screening would not be effective to entirely screen the entire mining operation from Tumalo State Park.

Finally, we readily admit that we are not sure we understand the county's interpretation of DCC 18.52.110(B)(1), (2), (5) and (6), and we do not mean to constrain the county from revising its interpretation to more clearly express its view of how those sections should be applied in this case.

This subassignment of error is sustained.

C. Fugitive Dust

In response to arguments by opponents below that the county should require screening to obscure the view of fugitive mining dust from protected uses, the county concluded that fugitive mining dust is not among the screened uses listed at DCC 18.52.110(B)(4). *See* n 19. Petitioners contend the county should nevertheless have required screening because the Conflict Resolution/ESEE Consequences portion of the ESEE Findings and Decision states, in part, "[s]cenic views from the Deschutes River corridor would be adversely affected by fugitive dust * * *." Record 1802. As we have already

explained, that statement is not part of the "Program to meet the Goal" for site 303, and the statement therefore does not have the regulatory effect that petitioners Hoffman contend it does.

This subassignment of error is denied.

D. Removal and Reclaimation Within 18 Months

As previously noted, DCC 18.52.110(B)(6) lists a number of exceptions where DCC 18.52.110(B)(1), (2) and (5) require that the view of screened uses from protected uses must be obscured. *See* n 19. We have already discussed the topographic exception that appears at DCC 18.52.110(B)(6)(b). Another exception appears at DCC 18.52.110(B)(6)(d)—where "[s]creened uses that are visible from the protected uses will be concluded and will either be removed or reclaimed within 18 months." We understand petitioners to argue that where screening is not required because another of the exceptions at DCC 18.52.110(B)(6) applies, DCC 18.52.110(B)(6)(d) nevertheless requires that such mining be concluded and the site reclaimed within 18 months. Petitioners misread DCC 18.52.110(B)(6)(d). DCC 18.52.110(B)(6)(d) is a separate, independent exception from the other exceptions that are set out at DCC 18.52.110(B)(6)(d). It does not operate as a limitation on the other exceptions.

This subassignment of error is denied.

E. Screening for the Crusher

DCC 18.52.140(A)(2) requires that "[i]f a crusher is to remain on the site for longer than 60 days in any 18-month period, the applicant shall demonstrate that it will be screened in accordance with DCC 18.52.110(B)." To address this requirement, the county adopted the following findings:

> "* * * The Board finds that due to the location of the proposed southwestern crushing site in the bowl of the applicant's mining site and the existing * * * intervening ridges and vegetation, the approved processing site would be screened from most protected uses. For the reasons set forth in the findings under DCC 18.52.110(B), which are incorporated herein by reference, the only protected uses that need be considered are the two pre-1990 dwellings located in the impact area across the Deschutes River in between Highway 20

> and Tumalo State Park and the upper elevation areas around the knob in Tumalo State Park. The applicant proposes to screen the processing equipment in the southwestern location behind the existing stockpiles. The Board finds that screening is feasible." Record 70.

Petitioners first argue that "the two pre-1990 dwellings located in the impact area across the Deschutes River in between Highway 20 and Tumalo State Park and the upper elevation areas around the knob in Tumalo State Park" are not the only "protected uses." Petitioners specifically mention the "Todd dwelling and Hoffman dwelling." Petition for Review 33. However, petitioners neither acknowledge nor challenge the first sentence of the above findings that the location of the crusher in a bowl and the intervening ridges and vegetation will screen the crusher "from most protected uses." Petitioners do not even allege the crusher would be visible from the Todd or Hoffman dwellings. We reject petitioners' first argument as insufficiently developed. *Deschutes Development v. Deschutes Cty*, 5 Or LUBA 218, 220 (1982).

Petitioners' second argument is a one-sentence argument that faults the county for not including a condition of approval requiring retention of the stockpile mentioned in the findings. Latham contends that petitioners fail to explain why condition 3, which requires that equipment be kept "behind site-obscuring earthen berms," is not sufficient to ensure retention of the stockpile. Record 71. To the extent a condition of approval was required to ensure the proposed screening is provided, we agree with Latham that petitioner has not shown that condition 3 is inadequate.

This subassignment of error is denied.

The third assignment of error is sustained, in part.

FOURTH ASSIGNMENT OF ERROR (HOFFMAN)

DCC 18.52.090(B) requires that "[s]torage and processing of mineral and aggregate material" must be no closer than one-quarter mile from any noise or dust sensitive use.[23]

[23] DCC 18.52.090(B) provides in part

There are stockpiles of previously removed soil overburden within one-quarter mile of the Hoffman and Todd dwellings, which are both noise and dust sensitive uses. That overburden is being retained for reclamation. The county adopted the following findings in which the county concluded that the one-quarter mile setback required by DCC 18.52.090(B) does not apply unless mineral and aggregate material is being retained for "eventual sale to ultimate users:"

> "Based upon the context of the term 'storage' as used in the provision and its link to processing, the Board agrees with applicant that, for the purposes of applying this provision, piles of material being maintained on site for eventual use in reclamation are not regulated under this provision. In reviewing the listing of stored materials in this provision in conjunction with processing and equipment storage, this provision is aimed at addressing stock piles that are being actively worked, such as by being repeatedly added to and subtracted from during ordinary operation of the mine, and that are held on site for eventual sale to ultimate users. Thus, the Board finds such piles should be treated differently from piles of overburden or reclamation materials, since there is continual activity associated with the former, whereas the piles of topsoil being retained on the property for eventual use in reclamation are inactive except at the time of the topsoil is stripped and when the material is taken up for use in reclamation." Record 36.

Petitioners argue there is nothing in the language of DCC 18.52.090(B) that distinguishes between stored mineral and aggregate material based on its planned ultimate use.

In this case the county's contextual analysis, set out above, is an exercise that manufactures and resolves an ambiguity that does not exist. There does not appear to be any dispute that top soil that is removed and stored to be used later in reclamation qualifies as "mineral and aggregate material." DCC 18.04.030 defines the term "mineral" to include both "aggregate" and "soil." DCC 18.52.090(B) straightforwardly requires that when

---

> "Storage and processing of mineral and aggregate material, and storage of operational equipment which creates noise and dust, shall not be allowed closer than one-quarter mile from any noise or dust sensitive use or structure existing on the effective date of Ordinance No. 90-014 * * *."

"mineral and aggregate material" is either stored or processed, that storage or processing must be kept one-half mile from protected uses. The county's interpretation of DCC 18.52.090(B) only to apply where the "storage and processing of mineral and aggregate material" concerns mineral and aggregate material that will ultimately be sold inserts a qualification that is simply not present in the text of DCC 18.52.090(B). ORS 174.010 precludes interpretations that insert or delete words. *Western Land & Cattle, Inc. v. Umatilla County*, 230 Or App 202, 210, 214 P3d 68 (2009). The county's interpretation of DCC 18.52.090(B) effectively inserts words of limitation that are simply not there, and for that reason the county's interpretation is not "plausible." *Siporen*, 231 Or App at 599.

The fourth assignment of error is sustained.[24]

FIFTH ASSIGNMENT OF ERROR (HOFFMAN)

A. Five-Acre Excavation Limit and Ongoing Incremental Reclamation

Condition 23(e) of the Program to Meet the Goal for site 303 is set out below:

> "Excavation shall be limited to five acres with ongoing incremental reclamation (subject to DOGAMI review and approval)[.]" Record 1807.

Petitioners argue the county erred by granting conditional use and site plan approval without requiring that excavation be limited to five acres and by failing to require ongoing incremental reclamation.

With regard to the five-acre limit, Latham points out that the five-acre excavation limit is separately imposed by DCC 18.52.110(K).[25] In addition, the county imposed condition of approval 8, which provides as follows:

---

[24] Petitioners make additional arguments under the fourth assignment of error that we need not and do not consider.

[25] DCC18.52.110(K) is another of the DCC18.52.110 General Operation Standards and provides:

> "Extraction Site Size. The size of the area in which extraction is taking place as part of a surface mine does not exceed five acres. For the purpose of DCC 18, the extraction site size does not include access roads, equipment storage areas, processing equipment sites, stockpiles, areas where reclamation is in progress and similar accessory uses which are

> "The owner/operater shall limit the extraction area to an area of no greater than five acres at one time. * * *" Record 71.

We fail to see how DCC 18.52.110(K) and condition of approval 8 are not sufficient to ensure compliance with the five-acre limitation imposed by condition 23(e) of the Program to Meet the Goal for site 303.

To address the requirement for ongoing incremental reclamation, the county adopted the following findings:

> "* * * Finally, the opponents cite to Condition [23](e) from the ESEE's Program to Meet the Goal, which states that 'excavation shall be limited to five acres with ongoing incremental reclamation (subject to DOGAMI review and approval)'. Condition [23](e) provides no additional support for the opponents' position because it expressly makes review of any ongoing incremental reclamation subject to DOGAMI review and approval. It is clear from DCC 18.52.130 that any review and approval of incremental reclamation would be up DOGAMI to review and approve through a separate process before DOGAMI.
>
> "It might be possible for the County to require as a condition of approval that no use permit can be issued under DCC 18.52.130 unless the applicant were to submit a DOGAMI-approved reclamation plan, including ongoing incremental reclamation. However, the Board finds such a requirement would intrude upon DOGAMI prerogatives to determine what reclamation techniques are appropriate and when they should be applied. In this case, DOGAMI already signaled, by its letter of May 6, 2008, that it does not believe that concurrent reclamation would be practical.
>
> "Finally, the Board recognizes that the concept of 'ongoing incremental reclamation' as expressed in Condition [23](e) presents no standard for it to judge when such activities should begin, when an area was completely mined that would allow for such activities to begin or when a mined out area is needed as a staging area for the next mining area and can't be reclaimed. The Board finds that the County has limited competence in reclamation matters and is not sure that it could even describe what it might be looking for in a plan that proposes 'ongoing incremental reclamation.' The Board notes that DOGAMI's reclamation plan regulations, found at OAR 632 Division 30 do not mention the concept of 'ongoing incremental reclamation'. Given all this,

---

necessary to the mining operation. An exception to this standard may be allowed as part of site plan review if the applicant demonstrates that mining techniques normally associated with the specific type of mining in question and commonly used in the surface mining industry require a larger extraction site size."

> the Board finds it has no jurisdiction to address reclamation issues. If during the course of a mining operation, issues arise as to whether the 5-acre excavation limit is exceeded, these issues will be addressed as an enforcement matter on a case-by-case basis." Record 29.

Condition 23(e) clearly requires "ongoing incremental reclamation (subject to DOGAMI review and approval)." The May 6, 2008 DOGAMI letter referenced in the findings does state that "[c]oncurrent reclamation within the active mine slot does not appear feasible." Record 772. But that letter goes on to say:

> "* * * At some point when the active excavation reaches the 100-foot setback, the required 1 ½ (H) : 1 (V) final benched slope will be created. At that time it may be reasonable for to begin reclamation of the pit floor if operations allow. * * *" *Id.*

It is not obvious to us that "concurrent reclamation" (which the DOGAMI staff person thought might be infeasible is necessarily the same thing as "ongoing incremental reclamation." Apparently at some point the DOGAMI staff person thought it might be possible to begin reclamation while mining was still in progress. It is not obvious to us why that might not constitute "ongoing incremental reclamation." If some form of ongoing incremental reclamation is possible and does not run afoul of other DOGAMI requirements, there is no reason to believe DOGAMI would not require "ongoing incremental reclamation," as called for by condition 23(e) in the county's Program to Meet the Goal, if the county included such a condition of approval.

The current board of commissioners can either attempt to explain what it thinks the 1990 board of commissioners meant by "ongoing incremental reclamation," when that requirement was imposed in 1990, or it can leave it to DOGAMI to make that determination. Whatever ongoing incremental reclamation means, it is not an absolute requirement under Condition 23(e). The exact meaning of the parenthetical qualification "(subject to DOGAMI review and approval)" is not entirely clear to us, but given the deference the county is entitled to in interpreting that language, we believe the county could write a condition requiring "ongoing incremental reclamation" to expressly provide that DOGAMI is free to

determine whether "ongoing incremental reclamation" is possible or desirable and that DOGAMI may modify or waive that requirement altogether in its permitting process as DOGAMI sees fit. But the county cannot simply abandon the requirement in Condition 23(e) by claiming it lacks expertise in reclamation and does not understand the meaning of the condition the county imposed in 1990 when it adopted its Program to Meet the Goal for site 303.

This subassignment of error is sustained in part.[26]

B. Latham's Approved Reclamation Plan

We are not sure we understand this subassignment of error. Petitioners Hoffman appear to argue that Latham is not presently in compliance with its DOGAMI approved reclamation plan for the current mining operation. Petitioners also argue "[t]here is no basis for the County to be approving this land use application based on approval of an outdated reclamation plan that is inconsistent with the current operations." Petition for Review 39.

The county did not approve the disputed application based on Latham's current reclamation plan, and we do not see how whether Latham is currently in compliance with its existing reclamation plan has any bearing on the decision that is before us in this appeal, which requires that DOGAMI approve a reclamation plan for the proposed mining expansion.

This subassignment of error is denied.

[26] Petitioners Hoffman also argue that the county erred by utilizing DCC 18.52.100(K), which excludes certain areas such as access road and equipment storage areas when computing extraction site size. Petitioners argue that "DCC 18.52.020 requires that the stricter Plan ESEE standard apply." Petition for Review 39. Petitioners do not identify what that "stricter Plan ESEE standard" might be or whether that standard is located in the Program to Meet the Goal. We reject the argument as insufficiently developed.

C. DOGAMI Approved Site Reclamation Plan for the Proposed Mining

Under DCC 18.52.170, following site plan approval, no mining can begin under the approved site plan until a "use permit" is issued. A use permit may not be issued until the site's "reclamation plan has received final approval."[27]

In addressing another requirement, DCC 18.52.130, which requires a DOGAMI approved reclamation plan "[p]rior to the start of mining" in cases where DOGAMI will require a reclamation plan, the county adopted the following finding:

> "The Board will require as a condition of approval that the applicant submit an approved DOGAMI reclamation plan, consistent with this site plan approval." Record 66.

The challenged decision includes the following condition:

> "21. Applicant shall not start crushing on site prior to obtaining a use permit for the proposed mining operation from the County. The use permit shall not be granted until applicant provides a revised reclamation plan from DOGAMI or proof from DOGAMI that no revised site reclamation plan for the site is needed." Record 73.

Petitioners Hoffman argue the county erred by limiting condition 21 to the start of crushing and that the condition should have also prohibited mining until DOGAMI has granted final approval for a reclamation plan for the proposed mining.

Latham argues that DCC 18.52.170 independently requires that the county issue a use permit, prior to the commencement of mining under the approved site plan, and precludes issuance of the needed use permit until DOGAMI has granted final approval for a reclamation plan for the proposed mining. Because all of this is required independently by

---

[27] DCC 18.52.170 is set out below:

> "Following site plan approval and prior to starting any surface mining activities on the site, the Planning Director or designee shall physically review the site for conformance with the site plan. When it is determined by the Planning Director or designee that all elements of the approved site plan required for mining have been completed and the reclamation plan has received final approval, the Planning Director or designee shall issue a use permit. No mining activity shall start prior to the issuance of such use permit."

DCC 18.52.170, Latham argues that condition 21 is not needed to ensure compliance with DCC 18.52.170 and any shortcoming condition 21 may have is not a basis for reversal or remand. The county joins in that response.

Latham and the county appear to be correct that DCC 18.52.170 would preclude issuance of the use permit that is necessary to commence mining under the disputed site plan until DOGAMI has granted final approval for a reclamation plan. The failure to reference mining as well as crushing in condition 21 is harmless error.

This subassignment of error is denied.[28]

The fifth assignment of error is sustained, in part.

SIXTH ASSIGNMENT OF ERROR (HOFFMAN)

In this assignment of error, petitioners Hoffman challenge the county's findings concerning air quality and fugitive dust.

A. The Dust Control Plan

DCC 18.52.110(A)(1)(b) requires that "[r]oads within the surface mining parcel which are used as part of the surface mining operation [will be] constructed and maintained in a manner by which all applicable DEQ standards for vehicular noise control and ambient air quality are or can be satisfied." DCC 18.52.110(C) requires that "[t]he discharge of contaminants and dust created by the mining operation and accessory uses to mining [will] not exceed any applicable DEQ ambient air quality and emissions standards." The county found that the only DEQ standard that the applicant had to address under these sections of the DCC is the fugitive dust emission standard that appears at OAR 340-208-210.[29] In concluding that the applicant adequately addressed DCC 18.52.110(A)(1)(b) and DCC

[28] Petitioners again argue that the current mining on the property is inconsistent with the terms of the permit that was issued to Latham's predecessor, Cascade Pumice. We again fail to see what that has to do with the current decision.

[29] We discuss the fugitive dust emission standard under Latham's third assignment of error below. The text of OAR 340-208-210 is set out later in this opinion at n 37.

18.52.110(C), the county relied in large part on the one-page dust abatement plan that appears at Record 3775.

Petitioners first argue the county failed to require resolution of dust conflicts that are discussed in the Conflict Resolution/ESEE Consequences section of the ESEE Findings and Decision for site 303. We again reject petitioners' attempt to convert that analysis into a regulation that must be directly applied in this matter.

With regard to the one-page dust abatement plan, petitioners identify some things that the dust abatement plan does not address, but petitioners do not explain why those omissions support a conclusion that the dust abatement plan is inadequate.

Finally, petitioners challenge a finding that the dust abatement plan "will maintain all dust on-site." Record 39. With the exception of dust from the headwall, the county concluded that the dust abatement plan would be effective to keep dust from migrating off-site to impact dust-sensitive uses. Petitioners contend there is no evidentiary basis for that conclusion.

We discuss the county's apparent view that OAR 340-208-210 requires that all dust be maintained on-site in our discussion of Latham's third assignment of error below and conclude that the rule does not impose such a standard. The conclusion that the dust abatement program will maintain all dust on-site is therefore unnecessary to the decision. The dust abatement program that the applicant proposes is more varied than petitioners acknowledge, and without a more developed argument, we reject their evidentiary challenge.[30]

---

[30] Latham provides the following description of that program:

> "Given the nature of the fugitive dust standard, Petitioners' complaints about the imprecision of the dust [abatement] plan are not well taken. The dust [abatement] plan referred to by Petitioners addresses the most important of the dust control factors outlined in OAR 340-208-210 – application of water. However, this is not the extent of Latham Excavation's dust abatement efforts: The record shows that as part of their dust abatement strategies Latham Excavation proposed to use soil sealants in addition to water to control dust on exposed areas,

This subassignment of error is denied.

B. Failure to Apply All Applicable DEQ Standards

As noted above, DCC 18.52.110(C) requires that "[t]he discharge of contaminants and dust created by the mining operation and accessory uses to mining [will] not exceed any applicable DEQ ambient air quality and emissions standards." We understand petitioners to argue that the "applicable" DEQ ambient air quality and emissions standards include the OAR 340-208-0450 particle fallout limitation and the OAR 340-208-0110 visible air contaminant emissions standard.

Latham appears to suggest the qualification that the county is only obligated to consider "applicable" DEQ ambient air quality and emissions standards means the county has broad discretion to determine which standards are "suitable" for county consideration. Latham's Response Brief 43. We reject the suggestion. If there are DEQ ambient air quality and emissions standards that by their terms apply to a mining operation such as the one proposed, DCC 18.52.110(C) requires that the county find that the contaminants and dust that will be created by the mining operation will not exceed those standards. The county's perception of the "suitability" of making the inquiry the county required of itself when it adopted DCC 18.52.110(C) has nothing to do with it. The county's findings are set out below:

> "In his testimony before the Board, DEQ representative Frank Messina emphasized the DEQ nuisance standard and taking reasonable steps to prevent emissions from the site. The visible air contaminant standard of OAR 340-208-110 measures opacity of emissions from a source and is limited in its applicability to defined emission sources such as industrial smoke stacks, and its only applicability to this site would be to emissions from the crushers

---

to require loads on trucks transporting excavated material to be covered and to remove accumulated material from the paved access road and that they are committed to renewing treatment of exposed areas as necessary. The evidence shows that enough water is available for application to cover the 24-hour evaporation rate. In its condition of approval addressing dust issues (Condition 9) the County's decision did not distinguish between operating hours and non-operating hours, and it requires application of the mulch as necessary." Latham's Response Brief 42.

> (already subject to DEQ-issued ACDPs [air contaminate discharge permits]) or to emissions from well-defined stock piles. The evidence indicates that application of this standard is not predictive but is only after the fact and requires a specially trained 'reader' to be in the field at the time emissions are being experienced. The particle fall-out standard is an ambient air quality standard set forth at OAR 340-208-110. According to DEQ rules, ambient air quality standards are generally not used to determine the acceptability or unacceptability of emissions from a particular source of air contamination, but are more commonly used to determine the adequacy or effectiveness of emission standards for <u>all</u> sources in a general area. OAR 340-202-0050(2). Application of such an assessment tool by DEQ would depend upon DEQ making a determination that a particular source was 'singularly responsible' for a violation of ambient air quality standards in a particular area and then determining that such an assessment tool was appropriate. OAR 340-208-0050(2).
>
> "Even if the Board were to require the applicant to conduct particle fall-out monitoring and to submit reports to the County, the County does not have the expertise to interpret the report data and then apply it. Thus, the Board finds that this is a tool better suited for use by DEQ using its specialized knowledge of the air quality standards. The Board notes that the approved ACDPs for the crushers includes conformance with these standards as conditions of approval for the crushing operations, but does not attempt to predict up front under what set of circumstances the standards will be met. In view of DEQ's manner of applying these standards through its ACDPs, the Board is not going to go further than DEQ and apply these additional DEQ standards as standards of approval. *The Board believes that, with the exception of the headwall, the objective sought by both these standards can be achieved by ensuring that the applicant has an adequate dust control program and means to prevent dust from coming off such sources under the general nuisance standard*." Record 46 (underlining in original, italics added).

The county's findings quoted above come dangerously close to finding that the county can avoid its obligation to determine whether the proposed mining will violate the standards set out at OAR 340-208-0450 and OAR 340-208-0110, citing as a reason that the county lacks the expertise to do so. Like Latham's suggestion that the county can avoid that obligation if it feels it is "suitable" not to apply those standards, that finding would be without merit. The county obligated itself to address and find that the mine will not violate applicable DEQ standards when it adopted DCC 18.52.110(C). If the county now believes

that obligation is too onerous, it may modify or repeal DCC 18.52.110(C), but the county is not free to avoid that obligation in this proceeding by finding that it is too difficult to do so.

However, the county's findings that it is difficult to predict in advance whether mining that will occur in the future will comply with the standards at OAR 340-208-0450 and OAR 340-208-0110 seems accurate in view of the nature of the standards and the lack of current knowledge of how much dust that mining will produce. With that difficulty in mind, the county's final finding, which is emphasized above, seems adequate to express why the county believes the standards at OAR 340-208-0450 and OAR 340-208-0110 will be met by the dust abatement measures Latham has proposed. Petitioners offer no focused challenge to that finding.

This subassignment of error is denied.

C. Inadequate Conditions of Approval

Petitioners Hoffman challenge the following findings:

> "As noted above, the Board determined the only air quality standard appropriate to apply here is the nuisance standard emphasized by DEQ in its testimony before the Board. In applying the standard, the Board finds the applicant need only show that it is feasible to meet the standard; the Board can then ensure compliance by attaching appropriate conditions. In this case, under the DEQ nuisance fugitive dust standard feasibility depends upon whether Applicant has sufficient tools at its disposal to reasonably control fugitive dust emissions." Record 47.

Petitioners first challenge the county's "feasibility" finding:

> "Such complete discretion given to an applicant does not establish 'feasibility' or an adequate or enforceable condition to approval to ensure that Code criteria can be met. Under the feasibility test of *Meyer v. City of Portland*, 67 Or app 274, 678 P2d 741, *rev den* 297 Or 82 (1984), there is no showing that solutions to certain problems are likely to succeed where findings are inadequate to establish what will actually be done. *See Gould v. Deschutes County*, 216 Or App 150, 159, 171 P3 1017 (2007)." Petition for Review 44-45.

Latham responds as follows:

> "* * * Assuming for the purposes of responding to this argument that the *Meyer* 'feasibility' standard is the appropriate standard, the nature of the standard here requires little in the way of proof of feasibility. All that is required is that the mining operator take 'reasonable precautions." Latham's Response Brief 44.

We agree with Latham.

The focus of petitioners' remaining challenge under this subassignment of error is Condition 9, or more accurately the portion of Condition 9 quoted below:

> "9. The owner/operator shall control dust created by the mining operation and its associated activities so as to meet applicable DEQ standards and to prevent dust to the surrounding dust-sensitive uses. The dust control measures shall include, at a minimum:
>
> "a. Regular watering of unpaved portions of the access road and interior roads, as needed.
>
> "b. Application of the dust-suppressant and/or sealant products that meet State regulations to exposed areas that are not regularly being worked by applicant and that are not subject to vehicular travel. Renewal and maintenance of such treated areas as necessary.
>
> "* * * * *
>
> "e. Keeping the paved access road connecting to Johnson Road as dust free as possible.
>
> "* * * * *." Record 71-72.

Citing *Sisters Forest Planning Committee v. Deschutes Cty.*, 198 Or App 311, 108 P3d 1175 (2005), petitioner contends the above conditions are too vague. Petitioners also argue the language used in Condition 9(e) does not precisely match a finding that appears on page 47 of the decision.[31]

[31] The finding is as follows:

> "* * * The DEQ menu of practices also recognizes the prompt removal from paved driveway areas of earth or other material that does or may become airborne. OAR 340-208-0210[(2)](g). The Board will include [that practice] as a condition of approval." Record 49.

The fire siting standards at issue in *Sisters Forest Planning Committee* bear little resemblance to the OAR 340-208-0210(2) "reasonable precautions" standard. The above conditions are not any more vague than some of the OAR 340-208-0210(2) "reasonable precautions" standard they were imposed to address. For example, OAR 340-208-0210(2)(a) calls for use of water or chemicals to control dust "where possible." *See* n 37. We also do not see that the failure to achieve a complete match between the wording of the cited findings and the wording of condition 9(e) provides a basis for remand.

This subassignment of error is denied.

The sixth assignment of error is denied.

SEVENTH ASSIGNMENT OF ERROR (HOFFMAN)

A. Noise Impacts Identified in the Conflict Resolution/ESEE Consequences Portion of the ESEE Findings and Decision

Another of the General Operation Standards that applies in site plan review is DCC 18.52.110(H), which requires that mining noise that is audible off-site must "not exceed DEQ noise control standards."[32] The county's findings regarding DCC 18.52.110(H) appear at Record 52-55. One of the conditional use criteria, DCC 18.52.140(A), also requires compliance with DEQ noise standards and also requires screening.[33] The county's findings regarding DCC 18.52.140(A) appear at Record 69-70.

---

[32] The complete text of DCC 18.52.110(H) is set out below:

> "Noise. Noise created by a mining operation, vehicles, equipment or accessory uses which is audible off the site does not exceed DEQ noise control standards, due to topography or other natural features, or by use of methods to control and minimize off-site noise, including, but not limited to: Installation of earth berms; placing equipment below ground level; limiting hours of operation; using a size or type of vehicle or equipment which has been demonstrated to meet applicable DEQ noise control standards; relocation of access roads, and other measures customarily used in the surface mining industry to meet DEQ noise standards."

[33] The complete text of DCC 18.52.140(A) is set out below:

> "Crushing. When a site has been designated for crushing of mineral and aggregate materials under the site-specific ESEE analysis in the surface mining element of the Comprehensive Plan, the following conditions apply:

Petitioners argue the county erred by limiting consideration of noise impacts to structures, rather than more broadly interpreting noise-sensitive uses to include activities in conjunction with those structures, and by failing to consider noise impacts identified in the Conflict Resolution/ESEE Consequences portion of the ESEE Findings and Decision. These arguments are resolved adversely to petitioners by our resolution of their second assignment of error. Although petitioners do not cite it, they may be relying on DCC 18.52.110(P). *See* n 14. We have already concluded that although DCC 18.52.110(P) requires the county to resolve mining impacts identified in the Program to Meet the Goal, DCC 18.52.110(P) does not require the county to consider mining impacts that are discussed in the Conflict Resolultion/ESEE Consequences portion of the ESEE Findings and Decision but not carried forward into the Program to Meet the Goal. The Program to Meet the Goal includes Condition 23(b), which provides as follows:

> "(b) Noise and visual impacts shall be mitigated by buffering and screening, with particular attention paid to screening from Tumalo State Park or the eastern, northeastern and southeastern boundaries[.]" Record 1807.

If petitioners are arguing that Condition 23(b) imposes obligations concerning noise that go beyond the considerations required by DCC 18.52.110(H) and DCC 18.52.140(A), the argument is not sufficiently developed for review. *Deschutes Development v. Deschutes Cty*, 5 Or LUBA at 220.

This subassignment of error is denied.

> "1. If a crusher is to be located less than one-half mile from a noise-sensitive use or structure existing on the effective date of Ordinance No. 90-014, the applicant shall demonstrate through a noise report from a qualified, registered sound engineer or similarly qualified professional, that the crusher can meet all applicable DEQ industrial and commercial noise control standards as designed and located, or by methods including, but not limited to: Modification or muffling of the crusher; placement of the crusher below grade or behind berms.
>
> "2. If a crusher is to remain on the site for longer than 60 days in any 18-month period, the applicant shall demonstrate that it will be screened in accordance with DCC 18.52.110(B)."

B. Crusher Noise Impacts

DCC 18.52.140(A) applies to crushing of mineral and aggregate resources. *See* n 33. The county's findings that the proposal complies with DCC 18.52.140(A) appear at Record 69-70. As petitioners correctly note, DCC 18.52.140(A) applies where "a crusher is to be located less than one-half mile from a noise-sensitive *use or structure*." We understand petitioners to argue the county's decision to limit noise-sensitive uses to structures fails to give effect to the word "use" in DCC 18.52.140(A), and the county should instead have imposed the requirements of DCC 18.52.140(A) wherever a crusher is to be sited less than one-half mile from any of the noise-sensitive uses identified in the Conflicts Resolution/ESEE Consequences portion of the ESEE Findings and Decision.

Once again, we reject petitioners' argument that Conflict Resolution/ESEE Consequences portion of the ESEE Findings and Decision must be given regulatory effect, for the reasons set out in our discussion of the second assignment of error. The county's decision to include the word "use" in DCC 18.52.140(A) lends some support to petitioners' position that it is improper to interpret the term "noise-sensitive use" to encompass only the noise-sensitive structure plus 25 feet. But we do not agree with petitioners that the county's interpretation and application of DCC 18.52.140(A) leaves the word "use" with no meaning. If any Program to Meet the Goal identified a nonstructural "use" and required that noise impacts on that nonstructural use had to be resolved at the permit stage, DCC 18.52.140(A) would apply to any crusher located less than one-half mile from such a nonstructural noise-sensitive use. The interpretation that the county rejected is petitioners' contention that noise-sensitive uses necessarily include all noise sensitive uses that are identified and discussed in the Conflict Resolution/ESEE Consequences phase of the planning process, without regard to whether those noise-sensitive uses were carried forward and made part of the regulatory "Program to Meet the Goal." The use of the word "use" in DCC 18.52.140(A) does not require that petitioners' broader understanding of noise-sensitive uses be adopted.

This subassignment of error is denied.

The seventh assignment of error is denied.

EIGHTH ASSIGNMENT OF ERROR (HOFFMAN)

DCC 18.52.050(B) sets out conditional uses that "are permitted subject to site plan review." DCC 18.52.050(B)(2) authorizes:

> "Crushing of mineral and aggregate materials on sites designated for crushing in the ESEE analysis in the surface mining element of the Comprehensive Plan."

The Program to Meet the Goal for site 303 includes the following statement: "The Board finds that processing on site will be allowed." Record 1807. The DCC includes the following definition of "surface-mining processing:"

> "'Surface mining, processing' * * * includes crushing, washing, milling and screening as well as batching and blending of mineral aggregate into asphaltic concrete and portland cement concrete. * * * DCC 18.04.030.

Because the DCC 18.04.030 definition of "processing" includes "crushing" and the Program to Meet the Goal allows "processing," the board of county commissioners found that under DCC 18.52.050(B)(2), crushing is authorized on site 303 and a conditional use:

> "* * * The ESEE's Program to Meet the Goal allows for 'processing.' The definition of 'surface mining, processing' included in the zoning ordinance implementing the ESEE's Program to Meet the Goal may appropriately be considered in determining the Board's intent on what is to be included in the term 'processing.' The definition of processing in the zoning ordinance includes crushing and accordingly, crushing is allowed at Site 303, subject to the conditional use standards in DCC Chapter 18.52." Record 4.

Petitioners argue that although "processing" is "allowed" under the Site 303 Program to Meet the Goal, allowing processing is not sufficient to "designate[]" site 303 for "crushing," as those terms are used in DCC 18.52.050(B)(2). Petitioners also point out that there is a reference in the Site 303 Program to Meet the Goal that lists crushing and

processing separately, from which petitioners infer that processing does not include crushing.[34]

With regard to petitioners' narrow understanding of the term "designate," Latham argues:

> "Petitioners' argument rests almost entirely upon the hyper-technical argument that the reference in the ESEE [Program to Meet the Goal] to 'processing" was not definite enough under the dictionary definition of 'designate' * * *.
>
> "A review of the dictionary definition of the term 'designate' shows that the term is not nearly as narrow or technical as Petitioners claim it to be. According to the definition cited by Petitioners, the term also means to 'specify'. In that sense, the intent of the term 'designate' in DCC 18.52.050(B)(2) * * * is simply that there must be some indication of intent expressed in the ESEE [Program to Meet the Goal] that crushing is to be allowed at the site. Its use in that context is not a term of art, and a plain, ordinary interpretation of the term is all that is needed * * *." Latham's Response Brief 48.

We agree with Latham that the language in the Program to Meet the Goal that "processing on site will be allowed" was sufficient to establish that Site 303 is "designated for" processing.

Turning to the issue of whether designating a site for processing is sufficient to designate the site for crushing, as Latham argues, the DCC 18.04.030 definition of "surface mining, processing" was adopted at the same time the ESEE Program to Meet the Goal was adopted for Site 303, and there is no reason to believe that when the board of commissioners used the term "processing" that it used the term in a narrow sense that does not include crushing. Apparently "processing" is allowed at a number of sites and specifically prohibited or restricted at a number sites. But none of the Programs to Meet the Goal specifically allow

---

[34] That language from the Site 303 Program to Meet the Goal is set out below:

> "* * * The Board finds that Surface Mining Ordinance 90-014, adopted as part of this surface mining package, allows mining activities such as extraction, processing, crushing, batching, and other mining-dependent uses as permitted or conditional uses and activities in the zone. * * *" Record 1808.

"crushing." If petitioners' understanding of the word "processing" is correct, crushing is not allowed at any of the county's mineral and aggregate sites.

Finally, the separate references to processing and crushing in the Site 303 Program to Meet the Goal do not carry the inference that petitioners suggest.[35] Petitioners' argument that the Program to Meet the Goal for Site 303 does not designate that site for crushing is without merit.

The eighth assignment of error is denied.

FIRST ASSIGNMENT OF ERROR (LATHAM)

In its first assignment of error, petitioner Latham argues the county misapplied DCC 18.52.090(B), which provides as follows:

> "Storage and processing of mineral and aggregate material, and storage of operational equipment which creates noise and dust, *shall not be allowed closer than one-quarter mile from any noise or dust sensitive use or structure* existing on the effective date of Ordinance No. 90-014, unless the applicant demonstrates that:
>
> "1. Due to the parcel size, topography, existing vegetation or location of conflicting uses or resources, there is no on-site location for the storage and processing of material or storage of equipment which will have less noise or dust impact; and
>
> "2. All noise control and air quality standards of DCC 18 can be met by the proposed use for which the exception is requested."

Latham requested approval for three locations for processing. Record 502; 2915. Like the county, we refer to those three locations as the northeastern, southeastern and

---

[35] As the county explained in its decision:

> "While opponents present a plausible argument that the specific ESEE analysis for this site separates crushing from processing and thus, by negative inference, crushing is not allowed, that argument is not borne out by the context of the relevant paragraph. That paragraph describes the provisions of Ordinance 90-014, the Surface Mining Ordinance, and reflects the differentiation that ordinance makes in how different mining activities are reviewed. Extraction and processing in general are permitted subject only to site plan review; crushing and batching are conditional uses. Read in that way, the Site 303 ESEE analysis merely reflects the structure of the Surface Mining Ordinance, it does not prohibit 'crushing' at the site as opponents allege." Record 2054.

southwestern locations. None of the three processing locations are "closer than one-quarter mile from any noise or dust sensitive use or structure[.]" Nevertheless, in its decision, the board of county commissioners determined that only the southwestern processing location complies with DCC 18.52.090(B). After repeating its position that setbacks from noise and dust sensitive uses should be measured from structures, the board of county commissioners adopted the following explanation for that conclusion:

> "* * * The Board finds, however, that the opponents' testimony is persuasive that the crushing and processing will produce sufficient dust that *those standards* will be violated if the crushing and other processing is not limited to the one southwestern site shown on the site plan. Locating the crushing and other processing in this site, because it is in a depression and behind the existing stockpiles, will prevent the possibility of dust reaching the pre-1990 structures and the park." Record 37 (emphasis added).

We are not sure what standards the county is referring to when it refers to "those standards" in the above findings. Petitioner Latham argues that DCC 18.52.090(B) simply prohibits siting processing "closer than one-quarter mile from any noise or dust sensitive use or structure," unless one of the exceptions set out at DCC 18.52.090(B)(1) or (2) applies. Petitioner Latham argues that because none of its proposed processing sites is closer than one-quarter mile from any noise or dust sensitive use or structure, its proposed processing locations comply with DCC 18.52.090(B) as a matter of law.

The county offers the following defense of the board of commissioners' decision:

> "While not directly interpreting * * * that code provision, the [board of county commissioners] obviously believed that the code allowed for prohibiting processing sites beyond the one-quarter mile. The record included evidence that each of the processing sites were more than one-quarter mile from the pre-1990 dust and noise-sensitive uses. Thus the [board of county commissioners] found that the pre-1990 dust and noise-sensitive uses would be affected by the processing of the mined materials if they were located in the northeastern and southeastern sites. This finding is not contrary to the express language of DCC 18.52.090(B) that sets a minimum distance, not a maximum distance that such uses must be place[d]." Respondent's Brief 3.

If we understand the county correctly, it contends the one-quarter mile setback is merely a starting point and under DCC 18.52.090(B) the county can enlarge that setback if it thinks a larger setback is needed to keep dust from reaching a dust-sensitive use.

Even if the board of county commissioners had adopted the above reasoning as an express interpretation of DCC 18.52.090(B), we would reject that interpretation as inconsistent with the text of DCC 18.52.090(B), under ORS 197.829(1). *See* n 15. Zoning ordinances commonly establish minimum setbacks. For example almost all zoning ordinances impose minimum front yard, side yard and rear yard setbacks in their residential zones, so that houses must be set back at least a specified number of feet (the minimum number of feet) from the front, side and rear property lines. But so long as those minimum setbacks are observed, absent some language in the regulation to give the local government authority to enlarge the specified *minimum* setback in particular circumstances, the placement of the use on the lot or parcel is left up to the applicant, so long as the selected placement does not implicate other mandatory criteria. Under the county's interpretation of DCC 18.52.090(B), it is not a quarter-mile minimum setback at all. The minimum setback is whatever the board of commissioners ultimately determines it should be in a particular case. DCC 18.52.090(B) is simply not written to give the board of county commissioners any discretion to enlarge the one-quarter mile setback, much less unbridled discretion to do so. Even if DCC 18.52.090(B) were worded to give the county the kind of unbridled discretion the county contends it does, such a "standard" would almost certainly run afoul of ORS 215.416(8)(a).[36] *See State ex rel West Main Townhomes v. City of Medford*, 234 Or App

[36] ORS 215.416(8)(a) provides:

> "Approval or denial of a permit application shall be based on *standards and criteri*a which shall be set forth in the zoning ordinance or other appropriate ordinance or regulation of the county and which shall relate approval or denial of a permit application to the zoning ordinance and comprehensive plan for the area in which the proposed use of land would occur and to the zoning ordinance and comprehensive plan for the county as a whole." (Emphasis added.)

343, 346, 228 P3d 607 (2010) (interpreting ORS 227.173(1), which applies to cities and contains almost identical language to ORS 215.416(8)(a), to require that permit approval standards be "clear enough for an applicant to know what he must show during the application process.").

Latham's first assignment of error is sustained.

SECOND ASSIGNMENT OF ERROR (LATHAM)

In considering whether the proposed processing sites comply with the DCC 18.52.140(A) conditional use criteria for approval of "Crushing," the county appears to have limited its consideration to the southwestern site, relying on its earlier determination that the northeastern and southeastern processing sites do not comply with the DCC 18.52.090(A) minimum setback requirement. We understand petitioner Latham to argue that if its first assignment of error is sustained, the county's decision should also be remanded so that the county can consider whether the northeastern and southeastern processing sites comply with applicable conditional use approval criteria.

It is not entirely clear to us that the county relied entirely on its finding that the northeastern and southeastern site violate the DCC 18.52.090(A) minimum setback requirement, in limiting most of its analysis under the DCC 18.52.140(A) conditional use criteria to the southwestern site. If it did, because we sustain Latham's first assignment of error, the county must proceed to determine whether the northeastern and southeastern sites comply with the DCC 18.52.140(A) conditional use criteria. If the county had other reasons for not determining whether those sites comply with the DCC 18.52.140(A) conditional use criteria, the county needs to explain what those reasons are.

Latham's second assignment of error is sustained.

THIRD AND FOURTH ASSIGNMENTS OF ERROR (LATHAM)

The issue under this assignment of error concerns dust produced by the headwall that exists on the subject property. That headwall would be enlarged under Latham's mining

proposal. There does not appear to be any dispute that the headwall produces dust when there is active mining at the headwall. After mining has concluded below a section of the headwall, Latham proposes to apply mulch to the headwall to control dust. The parties dispute the efficacy of mulch in preventing or reducing wind driven dust from the headwall. The county ultimately concluded that the mulch would not be effective in preventing dust from the headwall reaching dust-sensitive uses in the area and imposed a condition that prohibits further mining of the headwall.

As we explained in our discussion of the Hoffmans' sixth assignment of error, under DCC 18.52.110, Latham, as the applicant, must "demonstrate that [certain] standards are or can be met by the surface mining operation." Since the challenged decision authorizes mining that would occur on the site in the future, DCC 18.52.110 requires that the applicant demonstrate that mining that will occur in the future will comply with specified standards. One of those standards is set out at DCC 18.52.110(C), which requires that "[t]he discharge of contaminants and dust created by the mining operation and accessory uses does not exceed any applicable DEQ ambient air quality and emissions standards." One of those DEQ standards is OAR 340-208-0210(2), which requires that Latham take "reasonable precautions to prevent particulate matter from becoming airborne."[37] DCC 18.52.110(C) and OAR 340-

[37] OAR 340-208-0210(2) provides:

> "No person may cause or permit any materials to be handled, transported, or stored; or a building, its appurtenances, or a road to be used, constructed, altered, repaired or demolished; or any equipment to be operated, without taking reasonable precautions to prevent particulate matter from becoming airborne. Such reasonable precautions may include, but not be limited to the following:
>
> "(a) Use, where possible, of water or chemicals for control of dust in the demolition of existing buildings or structures, construction operations, the grading of roads or the clearing of land;
>
> "(b) Application of asphalt, oil, water, or other suitable chemicals on unpaved roads, materials stockpiles, and other surfaces which can create airborne dusts;

208-0210(2) together require that Latham demonstrate that when carrying out the proposed mining in the future Latham will take "reasonable precautions to prevent" mining dust from becoming airborne. With regard to dust from the headwall, OAR 340-208-0210(2) requires that Latham take "reasonable precautions to prevent" mining related dust "from becoming airborne."

Latham contends that the county, which imposed a condition prohibiting further mining of the headwall, misread the obligation under DCC 18.52.110(C) and OAR 340-208-0210(2) to take "reasonable precautions to prevent" mining dust from becoming airborne as imposing a far more rigorous obligation—to take precautions that in fact will prevent mining dust from becoming airborne. The county's findings include the following:

> "As noted, the opponents have questioned whether any of these methods can be effective in addressing dust emissions from the headwall. The Board finds from testimony by the applicant and the map of treated areas that it treated a problem area of the headwall with the mulch and that the mulch did not hold up well. The Board notes, however, the presence of other unvegetated exposed cuts of similar material in the immediate area. The Board notes from the testimony that these headwalls build up a crust over time that reduces dust emissions. The Board notes that the headwall areas of the applicant's mining operation are not actively worked or disturbed and that over time a crust is expected to build up on the headwall as well. To assure the creation of this crust and because the Board finds the most persuasive testimony to be that of the applicant and the opponents that the [mulch] does not remain on the headwall, the Board finds that the headwall cannot be mined without creating dust in sufficient quantity that dust-sensitive uses will be affected. Therefore,

---

> "(c) Full or partial enclosure of materials stockpiles in cases where application of oil, water, or chemicals are not sufficient to prevent particulate matter from becoming airborne;
>
> "(d) Installation and use of hoods, fans, and fabric filters to enclose and vent the handling of dusty materials;
>
> "(e) Adequate containment during sandblasting or other similar operations;
>
> "(f) Covering, at all times when in motion, open bodied trucks transporting materials likely to become airborne;
>
> "(g) The prompt removal from paved streets of earth or other material that does or may become airborne."

> no further mining of the headwall will be allowed as part of the approval of this application." Record 49.

The issue for the county under DCC 18.52.110(C) and OAR 340-208-0210(2) is not, as the above findings seem to say, whether Latham has established that the mulch will be sufficient to keep dust from the headwall from becoming airborne. DCC 18.52.110(C) and OAR 340-208-0210(2) do not require that Latham successfully prevent dust from becoming airborne; instead DCC 18.52.110(C) and OAR 340-208-0210(2) require "taking reasonable precautions to prevent" dust "from becoming airborne." The DCC section and administrative rule do not require success in dust suppression, as the findings suggest; they require the taking of reasonable precautions, which may or may not be entirely successful.

It may be that the county meant to find that not mining the headwall and allowing the existing headwall to "build up a crust over time" is a reasonable precaution that must be taken under DCC 18.52.110(C) and OAR 340-208-0210(2). If so, the question likely would become whether a condition that would appear to prohibit mining much of the site qualifies as a "reasonable precaution." Absent a clearer indication in the county's decision that it intended to take that position, we will not assume that it did, and we express no view on the merits of such a position.

The fairest reading of the county's findings is that the county improperly interpreted DCC 18.52.110(C) and OAR 340-208-0210(2) to require that dust from the headwall must be successfully suppressed. Because that is an erroneous interpretation of DCC 18.52.110(C) and OAR 340-208-0210(2), remand is required.[38]

Latham's third assignment of error is sustained. We do not reach Latham's fourth assignment of error.

---

[38] In its fourth assignment of error, Latham challenges the evidence supporting the county's findings that mulch will not successfully suppress dust from the wall. Our resolution of the third assignment of error makes it unnecessary to resolve that assignment of error. However, the county is free on remand to consider petitioner Latham's claim that the county failed to take into consideration a second application of mulch to the headwall on May 13, 2008.

The county's decision is remanded.