

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28
29
30
31
32
33
34
35
36
37
38
39
40
41
42
43
44
45

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

RALPH ECKIS, KAREN ECKIS, FRANK)
McCOY, ANNIE McCOY, ROBERT)
PARRISH, SHARON PARRISH, CARL S.)
YAILLEN, PATRICIA FREDERIC,)
and RICHARD FREDERIC,)
Petitioners,)
vs.)
LINN COUNTY,)
Respondent,)
and)
G & G ROCK QUARRY, INC.,)
MERLYN E. BENTLEY, and)
HELEN BENTLEY,)
Intervenors-Respondent.)

LUBA No. 90-132
FINAL OPINION
AND ORDER

Appeal from Linn County.

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

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

Steven Schwindt, Canby, represented intervenors-respondent.

Frank M. Parisi, Portland, filed an amicus brief on behalf of the Oregon Concrete & Aggregate Producers Assoc., Inc.

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

REMANDED 09/11/91

1

2 You are entitled to judicial review of this Order.

3 Judicial review is governed by the provisions of ORS

4 197.850.

1 Opinion by Sherton.

2 **NATURE OF THE DECISION**

3 Petitioners appeal Linn County Ordinance and Order
4 #90-610, which (1) adopts an amendment to the Linn County
5 Comprehensive Plan (plan) adding a 25 acre site to the
6 plan's inventory of aggregate resource sites; and
7 (2) approves a conditional use permit for aggregate
8 extraction and processing on 10 acres of the site.¹

9 **MOTION TO INTERVENE**

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

14 **MOTION TO APPEAR AS AMICUS**

15 The Oregon Concrete & Aggregate Producers Association,
16 Inc. moves to appear as an amicus in this proceeding. There
17 is no opposition to the motion, and it is allowed.

18 **FACTS**

19 County decisions to add the subject 25 acre site to the
20 plan's aggregate resource site inventory and to approve a

¹The title of the challenged decision is "Ordinance and Order #90-610 Adopting Additional Findings & Conditions on Remand to Supplement and Amend Ordinance & Order #88-712 Approving an Amendment to the Aggregate Resource Inventory & a Conditional Use Permit." Record 1. As explained more fully infra, Ordinance and Order #88-712 was remanded by this Board in Eckis v. Linn County, ___ Or LUBA ___ (LUBA No. 89-005, March 14, 1990) (Eckis I). It is actually Ordinance and Order #88-712 which contains the operative language adopting a comprehensive plan amendment and approving a conditional use permit.

1 conditional use permit for aggregate extraction and
2 processing on 10 acres of the site were previously appealed
3 to this Board in McCoy v. Linn County, 16 Or LUBA 295
4 (1987), aff'd 90 Or App 271 (1988) (McCoy) and Eckis I,
5 supra.² In McCoy, we stated:

6 "In the summer of 1986, * * * Merlyn E. Bentley
7 [intervenor] began an aggregate extraction and
8 processing operation on a portion of a 70.77 acre
9 parcel in rural Linn County. The parcel is
10 designated Farm/Forest by the [plan] and is zoned
11 Farm/Forest (F/F).

12 "The land uses surrounding the parcel include
13 grazing, wood lots and residences. There are
14 eight dwellings within 2,400 feet of
15 [intervenor's] aggregate resource site. The
16 properties surrounding the subject parcel are
17 designated and zoned F/F or Exclusive Farm Use
18 (EFU).

19 "Aggregate extraction and processing is a
20 conditional use in the F/F zone. On September 24,
21 1986, the Linn County Planning and Building
22 Department (Planning Department) notified
23 [intervenor] that his aggregate mining activities
24 required a county conditional use permit.
25 [Intervenor] subsequently filed an application for
26 a conditional use permit for aggregate extraction
27 and processing on an unspecified portion of the
28 70.77 acre parcel. Sometime thereafter, the
29 Planning Department informed [intervenor] that his
30 proposed mining activities also required a plan
31 text amendment to add the proposed extraction site
32 to the plan's inventory of aggregate resource
33 sites." McCoy, 16 Or LUBA at 298.

²The county records in the McCoy and Eckis I appeals are incorporated into the record in this appeal. We cite the McCoy record document as "Record (M)," the Eckis I record document as "Record (E)" and the additional record document filed by the county in this appeal as "Record."

1 In McCoy, we remanded the county's decision because the plan
2 amendment did not comply with Statewide Planning Goals 5
3 (Open Spaces, Scenic and Historic Areas, and Natural
4 Resources) and 6 (Air, Water and Land Resources Quality),
5 and because the conditional use permit did not comply with
6 Linn County Zoning Ordinance (LCZO) 21.435.5.a.³

7 After the decision challenged in McCoy was remanded,
8 the county amended LCZO 21.435.5.a. Intervenor
9 subsequently submitted another application for a plan
10 amendment to add the subject 25 acres to the plan aggregate
11 resource site inventory and for a conditional use permit to
12 conduct an aggregate extraction and processing operation on
13 a portion of the site. Record (E) 538-545. On December 28,
14 1988, after a de novo evidentiary hearing with regard to all
15 approval criteria, including the amended LCZO 21.435.5.a,
16 the county board of commissioners adopted Ordinance and
17 Order #88-712 approving the plan amendment and conditional
18 use permit. That decision was appealed in Eckis I, and was
19 remanded for failure to comply with Goals 5 and 6 and the
20 amended LCZO 21.435.5.a.

³LCZO 21.660.1 requires conditional use permits for aggregate extraction and processing to comply with the criteria of LCZO 21.480. However, we explain in McCoy, 16 Or LUBA at 315 n 1, that the parties agree (1) we may treat Ordinance #87-096, which deleted LCZO 21.480 from the county code prior to the decision appealed in McCoy, as having recodified LCZO 21.480 as the identically worded LCZO 21.435.5, and (2) the standards of LCZO 21.435.5 apply to a conditional use permit for aggregate extraction and processing in the F/F zone. Therefore, in this opinion, we refer to LCZO 21.435.5.

1 After Ordinance and Order #88-712 was remanded, the
2 board of commissioners conducted several additional public
3 hearings on the subject application, at which considerable
4 new evidence regarding compliance of the proposed plan
5 amendment and conditional use permit with Goals 5 and 6 and
6 LCZO 21.435.5.a was submitted. On October 15, 1990, the
7 board of commissioners adopted Ordinance and Order #90-610,
8 which includes new findings addressing Goals 5 and 6 and
9 LCZO 21.435.5.a and new conditions of approval for the
10 conditional use permit.⁴ Record 1-56.

11 This appeal followed.

12 **INTRODUCTION**

13 Although the petition for review contains extensive
14 argument, it does not contain separate assignments of error,
15 as required by OAR 661-10-030(3)(d). Failure to comply with
16 this rule does not warrant striking the petition for review
17 or dismissing the appeal. See Hilliard v. Lane County
18 Comms, 51 Or App 587, 595, 626 P2d 905, rev den 291 Or 368
19 (1981) (LUBA is not to invoke technical rules of pleading).
20 Therefore, we will consider the arguments expressed in the
21 petition for review, but only to the extent they allege

⁴It is clear that the conditions of approval adopted by Ordinance and Order #90-610 replace those adopted by Ordinance and Order #88-712. It is not clear that the findings adopted by Ordinance & Order #90-610 addressing Goals 5 and 6 and LCZO 21.435.5.a replace, rather than supplement, those adopted by Ordinance and Order #88-712. However, since the parties treat the findings adopted in support of Ordinance & Order #90-610 as completely replacing the findings adopted by Ordinance and Order #88-712 to address Goals 5 and 6 and LCZO 21.435.5.a, we do so as well.

1 errors clearly enough to afford the other parties an
2 adequate opportunity to respond. Van Sant v. Yamhill
3 County, 17 Or LUBA 563, 566 (1989); Freels v. Wallowa
4 County, 17 Or LUBA 137, 140-41 (1988); Schoonover v. Klamath
5 County, 16 Or LUBA 846, 848 n 4 (1988); Standard Insurance
6 Co. v. Washington County, 16 Or LUBA 30, 33 (1987).

7 The arguments in the petition for review are divided
8 into sections on Goal 5, Goal 6 and LCZO 21.435.5.a. We
9 shall follow the same structure in this opinion.

10 **GOAL 5**

11 **A. Inventory**

12 **1. Resource Quantity**

13 Goal 5 states "the location, quality and quantity of
14 [mineral and aggregate] resources shall be inventoried."⁵
15 (Emphasis added.) The county's findings address the issue
16 of the quantity of aggregate resource at the 25 acre site,
17 and conclude that "at least 600,000 cubic yards of aggregate
18 resources exist on the site."⁶ Record 11. Petitioners

⁵Sections (2) and (3) of OAR 660-16-000 provide in relevant part:

"(2) A 'valid' inventory of a Goal 5 resource under subsection
(5)(c) of this rule must include a determination of the
* * * quantity of each of the resource sites. * * *

"(3) * * * A determination of quantity requires consideration
of the relative abundance of the resource (of any given
quality). The level of detail that is provided will
depend on what is available or 'obtainable.'"

⁶The appealed ordinance supplements and amends Ordinance #88-712, which
simply states that the plan "inventory of aggregate resources is amended to

1 contend this finding is not supported by substantial
2 evidence in the whole record.⁷

3 The county's determination that there are at least
4 600,000 cubic yards of aggregate resource on the site
5 proposed to be added to its plan aggregate resource site
6 inventory is based on two sources of information. One is
7 the May 16, 1990 testimony of a driller who drilled six test
8 holes on intervenors' property. The driller testified that
9 in five of the test holes he found "two to three feet of
10 overburden [and] 21 to 23 feet of basalt rock." Record 172.
11 The driller further stated that the property dips in a
12 northeasterly direction, and that the "last test hole showed
13 eight to twelve feet [of basalt] as an average in that
14 area." Record 173. The driller concluded that "doing some
15 [calculations] from the test holes * * * there's in the neck
16 of the woods of [650,000 to 700,000 cubic] yards in that 25
17 acre block * * *." Record 173-74. The other source of
18 evidence supporting the county's determination of resource
19 quantity is a letter to intervenors from a geologist, dated

include the 25 acre land area" shown on certain maps. Record (E) 15. The parties assume the findings addressing Goal 5 inventory requirements adopted by the county in support of the plan amendment (Record 10-22) constitute the required plan inventory information, and we proceed on that assumption for the purposes of this opinion.

⁷Petitioners also contend the county's resource quantity and quality findings "are not based on accurate information, in violation of OAR 660-16-000(4)." Petition for Review 4. However, petitioners do not argue that OAR 660-16-000(4) imposes a stricter evidentiary standard than the substantial evidence standard. We therefore assume for the purposes of this opinion that if the county's decision is supported by substantial evidence, it does not violate any requirement of OAR 660-16-000(4).

1 July 23, 1990, which estimates there are 615,000 cubic yards
2 of aggregate resource in "the proposed expansion area."
3 Record 80.

4 Petitioners do not dispute that six test holes were
5 drilled, or that the results of such tests are as described
6 in the driller's testimony.⁸ What petitioners do dispute is
7 whether the six test holes were actually located on the 25
8 acre site proposed to be added to the plan inventory and,
9 therefore, whether the results from the six test holes
10 provide substantial evidence of the quantity of rock
11 resource present on that 25 acre site.

12 We have reviewed all evidence in the record on this
13 issue cited by the parties. The proposed 25 acre inventory
14 area is a rectangle 632 ft. in width (east-west) and 1750
15 ft. in length (north-south), located within intervenors' 71
16 acre parcel. On April 25, 1990, intervenors' attorney
17 submitted to the county a map "showing the drill test
18 locations for recent testing on the effected [sic] property"
19 (first map). Record 792. The record does not indicate who
20 prepared the first map. The first map depicts three test
21 holes located within the perimeter of the southwestern
22 corner of the proposed inventory area. However, the other

⁸Petitioners also do not dispute the basic method used by the driller, geologist and county to calculate volume of aggregate resource, namely multiplying the thickness of the layer of basalt underlying the surface by the surface area. The county's figure of 600,000 cubic yards represents a layer of basalt approximately 15 feet thick underlying a 25 acre area.

1 three test holes are depicted as located along the eastern
2 boundary of intervenors' 71 acre parcel, some 400 to 500
3 feet to the east of the eastern boundary of the proposed
4 inventory area. On the first map, all six test holes are
5 shown to be well south of the north-south midpoint of the
6 proposed inventory area. Record 794. At the May 16, 1990
7 hearing, the driller testified that the test holes were
8 located as shown on the first map. Record 192-94. The
9 driller also testified that he drilled "three [holes] on
10 each side of the property in a sort of northwest direction
11 in line." Record 172.

12 On May 31, 1990, intervenors submitted to the county a
13 map depicting the six test holes as being located in each
14 corner of, and at the midpoint of the western and eastern
15 boundaries of, the proposed inventory area (second map).
16 Record 619. We are cited to nothing in the record
17 indicating who prepared the second map or that the driller
18 ever endorsed the second map or withdrew his affirmation of
19 the first map. Also on May 31, 1990, intervenors submitted
20 to the county a videotape showing various views of
21 intervenors' property and the existing quarry. The
22 videotape includes sightings of two or three different white
23 stakes, which the unidentified narrator says intervenor
24 Helen Bentley told him were the sites of test holes.
25 However, it is impossible to tell from the videotape whether
26 the location of these stakes is consistent with either the

1 first or second map.

2 The controversy over the location of the test hole
3 sites was raised below and addressed by the county in its
4 findings. The county concluded that "the six drill holes
5 * * * were located within the [proposed inventory] site and
6 that they supply credible evidence as to the quantity of the
7 aggregate resource at the site." Record 11. Based on the
8 results from these test holes, as expressed and interpreted
9 in the testimony of the driller and geologist,⁹ the county
10 concluded the proposed inventory site contains at least
11 600,000 cubic yards of aggregate resource.¹⁰ Id.

⁹It is reasonably clear from the geologist's letter (Record 285B) and testimony (Record 80) that the geologist viewed the existing pit and proposed inventory area himself, but relied on the results from the driller's test holes and the driller's testimony in making his calculation of resource quantity. We are not cited to anything in the record to indicate the geologist himself drilled any test holes or performed additional subsurface testing. Consequently, we believe the geologist's quantity estimate is itself dependent upon the location of the driller's test holes.

¹⁰The county also found that even if the proposed inventory site was underlain by only 382,000 cubic yards of aggregate resource, that would be sufficient to warrant including the site on the plan inventory. Record 11. The county contends petitioners conceded the evidence in the record supports a decision that there are at least 382,000 cubic yards of aggregate resource in the proposed inventory site.

We do not find petitioners made such a concession. Petitioners argued below that if the test holes were located as shown on the first map, then the portion of the drilled area lying within the proposed inventory site would be underlain by 328,000 cubic yards of aggregate. However, petitioners contended such amount is insufficient to warrant inclusion on the plan inventory, under provisions describing the inventory process and defining unimportant sites that were added to the plan inventory by Ordinance No. 84-184. Record 100; Petition for Review App B. Furthermore, petitioners did not concede that the evidence in the record is adequate to establish where the six test holes are located or that evidence from six

1 Substantial evidence is evidence a reasonable person
2 would rely upon in reaching a decision. City of Portland v.
3 Bureau of Labor and Ind., 298 Or 104, 119, 690 P2d 475
4 (1984); Douglas v. Multnomah County, ___ Or LUBA ___ (LUBA
5 No. 89-086, January 12, 1990), slip op 13. In determining
6 whether a decision is supported by substantial evidence, we
7 consider all the evidence in the record to which we are
8 cited, including evidence which refutes or detracts from
9 that relied on by the local government decision maker.
10 Younger v. City of Portland, 305 Or 346, 360, 752 P2d 262
11 (1988).

12 We agree with the county that the testimony of the
13 driller and geologist would be substantial evidence in
14 support of a decision that a 25 acre area circumscribed by
15 the locations of the six test holes producing the results
16 shown in the record, contains 600,000 cubic yards of
17 aggregate resource. However, we cannot agree with the
18 county that there is substantial evidence in the record to
19 support a conclusion that the six test holes at issue were
20 located so as to provide credible evidence about the
21 proposed inventory site. Based on the evidence discussed
22 above, a reasonable person would not conclude that the test
23 holes were located as shown on the second map, or that all

test holes located as shown on the first map would be adequate to support a decision to include the entire 25 acre site on the plan inventory.

1 six test holes were within the proposed inventory area.¹¹

2 This subassignment of error is sustained.

3 **2. Resource Quality**

4 The county addresses the quality of the aggregate
5 resource underlying the proposed inventory area in its
6 findings. Record 11-14. The county finds the resource is
7 very hard basalt of high quality, and concludes that "the
8 resource quality is such as to justify its listing as an
9 aggregate resource site." Record 12.

10 Petitioners contend the county's determination of
11 resource quality is not supported by substantial evidence in
12 the record. According to petitioners, because there is not
13 substantial evidence in the record that the six test holes
14 were drilled on the proposed inventory site, neither the
15 test results from those samples nor the testimony of the
16 driller and geologist based on those test holes can be
17 substantial evidence of resource quality of the proposed
18 inventory site. Petitioners also argue that testimony by

¹¹A reasonable person might conclude the six test holes were located as shown on the first map, given the driller's affirmation of that map. However, as we explained in Eckis I, supra, slip op at 13, drill logs in the record of this case demonstrate there is great variability in the presence and thickness of a subsurface basalt layer at sites within 1,000 ft. of the existing quarry. Further, the driller testified that the thickness of the basalt layer lessened markedly towards the northeast of intervenors' property. The area circumscribed by six test holes located as shown on the first map would include only approximately the southern 40% of the proposed inventory area. Given these circumstances, we do not think a reasonable person would rely on six test holes located as shown on the first map to determine the quantity of basalt underlying the proposed 25 acre inventory site.

1 users of rock from the existing quarry regarding the quality
2 of that rock is not substantial evidence of the quality of
3 the resource underlying the entire 25 acre site. Eckis I,
4 slip op at 15.

5 We have reviewed all evidence in the record on this
6 issue cited by the parties. That evidence can be divided
7 into three categories. The first is rock sample laboratory
8 test results in the record of Eckis I. Record (E) 417-18.
9 As far as we can tell, the deficiencies in this evidence,
10 explained in Eckis I, slip op at 14 n 6, 15, have not been
11 remedied.

12 The second category of evidence is test results and
13 testimony based on or derived from the six test holes
14 drilled on April 11, 1990. Record 618. This category
15 includes the testimony of the driller and geologist and the
16 results of laboratory tests performed on combined samples
17 from four of the six test holes.¹² Record 80, 173, 669-70.
18 It also includes a letter from OCAPA discussing the
19 significance of the laboratory test results. Record 666.
20 Because we agree with petitioners, supra, that there is not
21 substantial evidence in the record to establish these six
22 test holes were drilled on the proposed inventory site, we
23 also agree with petitioners that the evidence derived from

¹²The letter from the laboratory indicates samples #2, 3, 4 and 6 were combined for testing. Record 669. There is nothing in the record to indicate to which of the holes shown on either the first or second map samples #2, 3, 4 and 6 correspond.

1 these test holes is not adequate to establish the quality of
2 the aggregate resource underlying the site.

3 The final category of evidence is oral and written
4 testimony from users of rock from the existing pit. Record
5 183-84, 672-74. Certainly the quality of the rock produced
6 by the existing quarry is relevant to a determination of the
7 quality of the aggregate resource underlying the proposed
8 inventory site. However, for the reasons stated in Eckis I,
9 slip op at 14-15, we do not believe it is reasonable to base
10 a decision on the quality of the aggregate resource
11 underlying the entire 25 acre site on evidence of the
12 quality of the rock in the existing quarry alone.

13 This subassignment of error is sustained.

14 **3. Determination of Significance**

15 OAR 660-16-000(1) provides in relevant part:

16 "* * * Based on the evidence and [the] local
17 government's analysis of those data, the local
18 government then determines which resource sites
19 are of significance and includes those sites on
20 the final plan inventory." (Emphasis added.)

21 OAR 661-10-000(5)(c) provides in relevant part:

22 "Include on Plan Inventory: When information is
23 available on location, quality and quantity, and
24 the local government has determined a site to be
25 significant or important as a result of the data
26 collection and analysis process, the local
27 government must include the site on its plan
28 inventory * * *." (Emphasis added.)

29 The county addresses the relative significance of the
30 proposed inventory site in its findings. Record 14-22. The

1 county concludes that the site contains a sufficient
2 quantity of aggregate resources ("600,000 plus cubic yards")
3 of sufficient quality ("high quality basaltic rock usable in
4 a variety of applications") to justify a determination that
5 it has "high relative value" within the county and,
6 therefore, warrants inclusion on the county's aggregate
7 resources inventory. Record 22.

8 Petitioners contend the county's determination of "high
9 relative value" (i.e. significance) is conclusory and not
10 supported by an adequate statement of reasons. Petitioners
11 argue the county must explain why a particular amount and
12 quality of resource makes the site significant, not merely
13 compare the subject site to other sites. Petitioners also
14 contend the county's finding of "high relative value" and
15 decision to add the subject site to its plan inventory are
16 not supported by substantial evidence in the record, in that
17 they are based on determinations of resource quantity and
18 quality which themselves are not supported by substantial
19 evidence in the record.

20 The county's findings compare the quantity and quality
21 of aggregate resource at the subject site to that of other
22 sites on the plan inventory, identified in a Department of
23 Geology and Mineral Industries (DOGAMI) report, or
24 identified by petitioners in the proceeding below. The
25 findings generally conclude the resource at the subject site
26 is superior to most or all of the other sites. Petitioners

1 do not challenge these findings except to say that such
2 comparisons are not an adequate basis for determining the
3 significance of the subject site under OAR 660-16-000. We
4 disagree with petitioners. There is nothing wrong with the
5 approach taken by the county in its findings addressing
6 relative value and significance of the resource site.

7 However, petitioners are correct that the county's
8 significance determination depends on the resource quantity
9 and quality determinations which we found not to be
10 supported by substantial evidence, supra. Accordingly, we
11 also conclude the county's determination of resource site
12 significance is not supported by substantial evidence in the
13 record.

14 This subassignment of error is sustained.

15 **B. Identification of Conflicting Uses**

16 Goal 5 requires that conflicting uses for inventoried
17 resource sites be identified. OAR 660-16-005 provides:

18 " * * * This is done primarily by examining the
19 uses allowed in broad zoning districts established
20 by the jurisdiction (e.g., forest and agricultural
21 zones). A conflicting use is one which, if
22 allowed, could negatively impact a Goal 5 resource
23 site. Where conflicting uses have been
24 identified, Goal 5 resource sites may impact those
25 uses. * * *"

26 In Ordinance and Order #88-712 (remanded in Eckis I),
27 the county identified agriculture, residential uses and
28 mining of aggregate as conflicting with the proposed
29 aggregate resource site. Record (E) 22. Petitioners

1 contend the challenged decision fails to identify any uses
2 as conflicting with the proposed resource site. Petitioners
3 argue that under the "law of the case" doctrine, as
4 explained in Portland Audubon v. Clackamas County, 14
5 Or LUBA 433, aff'd without opinion 80 Or App 593 (1986), the
6 county is obligated to identify agriculture, residential
7 uses and mining as conflicting with the proposed aggregate
8 resource site. Petitioners also argue the county's
9 determinations that agriculture, residential uses and mining
10 are not conflicting uses misconstrue applicable law or are
11 not supported by substantial evidence in the record.

12 The "law of the case" or "waiver" doctrine means that
13 after a local government decision is remanded by this Board,
14 and a subsequent local government decision adopted in
15 response to the remand is appealed to this Board, only
16 issues that could not have been raised in the first appeal
17 may be raised in the later appeal. Mill Creek Glen
18 Protection Assoc. v. Umatilla Co., 88 Or App 522, 527, 746
19 P2d 728 (1987); Highway 213 Coalition v. Clackamas County,
20 17 Or LUBA 1284, 1294 (1989); Hearne v. Baker County, 16
21 Or LUBA 193 (1987), aff'd 89 Or App 282, rev den 305 Or 576
22 (1988); Portland Audubon v. Clackamas County, supra. The
23 "law of the case" doctrine does not limit a local
24 government's ability to adopt a different decision, or
25 different findings in support of its decision, after its
26 initial decision is remanded by this Board, and we are aware

1 of no such restriction. See Strawn v. City of Albany, ___
2 Or LUBA ___ (LUBA No. 90-169, May 13, 1991), slip op 8-9.
3 Therefore, we consider separately petitioners' challenges to
4 the appealed decision's alleged failure to identify certain
5 uses as conflicting uses.

6 **1. Mining**

7 Petitioners argue that mining of the aggregate resource
8 inherently conflicts with preservation of the proposed
9 aggregate resource site and must be identified as a
10 conflicting use.

11 Amicus OCAPA argues that petitioners' view of Goal 5 is
12 incorrect. Amicus argues that Goal 5 applies to two kinds
13 of resource areas, ones to be protected from development
14 (such as wilderness areas and wildlife habitat) and ones to
15 be protected for development (such as mineral and aggregate
16 resources and energy sources). Therefore, according to
17 amicus, development of a mineral and aggregate resource
18 site, i.e. mining, is precisely what is contemplated by
19 Goal 5, and is not a conflicting use of the site.

20 We agree with amicus OCAPA. The purpose of protecting
21 an aggregate resource site pursuant to Goal 5 is for
22 eventual use of the resource through mining. Therefore,
23 mining is not a conflicting use for such a site.

24 This subassignment of error is denied.

25 **2. Residential Uses**

26 Petitioners contend the county's determination that

1 residential uses do not conflict with the proposed inventory
2 site is not supported by substantial evidence. Petitioners
3 cite numerous items in the record which they contend provide
4 evidence of conflicts between residential uses and the
5 proposed aggregate resources site.

6 We believe petitioners' disagreement with some of the
7 county's findings concerning the extent of impacts of the
8 proposed aggregate resource site on existing residential
9 uses results in their mischaracterizing the county's
10 decision with regard to whether residential uses are
11 conflicting uses. Fairly read, the challenged decision
12 determines the proposed aggregate resource site would have
13 impacts on the existing residences in the area (Record 32),
14 refers to them as "conflicting residential uses" (Record 36)
15 and includes an economic, social, environmental and energy
16 (ESEE) analysis of the consequences of such conflicts
17 (Record 32-37). We therefore conclude the challenged
18 decision does identify residential uses as conflicting uses
19 for the purposes of its Goal 5 analysis.

20 This subassignment of error is denied.

21 **3. Agriculture**

22 The challenged decision finds that soils with "marginal
23 agricultural value" are "much in evidence throughout the
24 general area." Record 31. With regard to groundwater, the
25 decision finds that the subject area "relies entirely on
26 wells to supply domestic, [live]stock and agricultural

1 needs." Record 26. The decision discusses the evidence in
2 the record regarding groundwater impacts and concludes
3 designation of the resource site for aggregate extraction
4 purposes will have "no groundwater impact either in terms of
5 quality or quantity." Record 28-29.

6 With regard to surface water, the decision finds it was
7 credibly alleged by the owner of the property adjoining the
8 proposed resource site to the west (Yaillen property) that
9 "water discharges from the quarry operation [have]
10 interfered with farming activities" on that property.
11 Record 30. The decision further states that water
12 discharged from the proposed resource site in a northerly
13 and westerly direction "could pass in a diffuse manner onto
14 the Yaillen property." Id. The findings also note there is
15 an increased potential for pollution of the surface water
16 discharged by the aggregate extraction operation on the
17 proposed resource site, due to the crusher being placed
18 inside the pit for noise mitigation purposes. Record 31.
19 However, the findings further state the surface water
20 discharge impact on the Yaillen property "was described as
21 more of a nuisance than something which impeded agricultural
22 activity." Record 31. Finally, in the environmental
23 consequences portion of the ESEE analysis, the findings
24 state that "surface water discharge may have a limited
25 negative effect on agricultural activities on land to the
26 west and potentially the area's waters." Record 36.

1 Based on the above, the decision concludes that
2 "agricultural operations [in] the area of the proposed
3 [resource site] do not appear to be impacted by the
4 utilization of this site for the purposes of aggregate
5 resource extraction." Record 31. In the economic section
6 of its ESEE analysis, the decision also states that the
7 proposed aggregate resource site "does not have a
8 substantial adverse impact on the resource use of adjoining
9 land in the area."¹³ Record 33.

10 Petitioners contend the above described findings
11 constitute a determination by the county that agriculture is
12 not a use which conflicts with the proposed aggregate
13 resource site. Petitioners argue this determination is not
14 supported by substantial evidence in the record.

15 The county argues that in view of the amount of
16 conflicting evidence in the record, it should not be
17 compelled to make a specific determination on whether
18 agriculture is a "conflicting use" for the proposed resource
19 site. The county also argues that regardless of whether it
20 specifically identified agriculture as a conflicting use, it
21 complied with Goal 5 by fully considering conflicts between
22 the proposed resource site and agriculture in the area in
23 its ESEE consequence analysis.

¹³This section of the ESEE analysis also states that costs which may result from surface water discharges from the proposed resource site onto the Yaillen property are "non-quantifiable." Record 33.

1 As explained above, Goal 5 and OAR 660-16-005 require
2 identification of uses which conflict with inventoried
3 resource sites. Although the county did not make an
4 explicit determination on whether agriculture is a
5 conflicting use, the above described findings, fairly read,
6 state there are no substantial conflicts between agriculture
7 and the proposed resource site and, therefore, constitute a
8 determination that agriculture is not a conflicting use.¹⁴
9 Accordingly, we consider the parties' arguments regarding
10 whether this determination is supported by substantial
11 evidence in the record.

12 **a. Groundwater**

13 With regard to groundwater impacts, petitioners
14 describe alleged shortcomings and discrepancies in the
15 evidence in the record concerning the subsurface geology of
16 the area. Petitioners argue that in view of the different
17 geologic models used by Rehm (sloping uniform layers), Gless
18 (fault blocks) and Redfern (ancient landslides), the
19 county's finding that a single model had been used by all
20 geology experts except Redfern (petitioners' geologist), and
21 reliance on that supposed single model, is not supported by

¹⁴It is true that the county refers to impacts on agriculture in the economic and environmental sections of its ESEE analysis. Record 33, 36. However, these findings simply reiterate the county's conclusion that the proposed resource site will have no significant impacts on agriculture. We note these ESEE analysis findings are supported by substantial evidence only if the county's basic conclusion that the proposed resource site will have no significant impacts on agriculture is supported by substantial evidence.

1 substantial evidence.

2 Petitioners also present two arguments why the county's
3 conclusion that the existing pit is not a groundwater
4 interceptor is not supported by substantial evidence in the
5 record. First, according to petitioners, the numerous
6 examples in the record of evidence that groundwater flows
7 into the existing quarry pit from the floor or walls
8 outweigh the few contrary observations of a dry pit.
9 Second, petitioners argue the static level measurements of
10 existing wells in the record establish that water levels
11 have dropped dramatically since 1987, due to the operation
12 of the existing quarry.

13 Petitioners further argue the county's finding that use
14 of the proposed resource site for aggregate extraction will
15 not significantly alter the total area available for
16 groundwater recharge, because the site constitutes only 0.5%
17 of the recharge area, is not supported by substantial
18 evidence. According to petitioners, the finding is based on
19 the Gless report, but Gless conceded in testimony that the
20 recharge area for wells tapping a perched or other confined
21 aquifer could be far smaller than the seven square mile
22 regional aquifer. Finally, petitioners contend the county's
23 findings that groundwater quality will not be impacted by
24 the proposed resource site due to blasting or excavation,
25 because rock removal will be limited to a layer of Columbia
26 River basalt which is underlain by an impermeable clay

1 layer, are not supported by substantial evidence.

2 We have reviewed the evidence in the record concerning
3 groundwater cited by all parties. The evidence in the
4 record is conflicting with regard to the subsurface geology
5 of the area, the nature of the aquifers in the area, whether
6 aggregate extraction operations on the proposed resource
7 site would intercept groundwater flows affecting the
8 existing wells in the area, the significance of recorded
9 fluctuations in static water levels in area wells, the
10 effects of blasting and other issues.

11 Where the local record contains conflicting believable
12 evidence, the choice of which evidence to believe belongs
13 with the local government decision maker. City of Portland
14 v. Bureau of Labor and Ind., 298 Or 104, 119, 690 P2d 475
15 (1984); Braidwood v. City of Portland, 24 Or App 477, 480,
16 546 P2d 777 (1976); Wentland v. City of Portland, ___
17 Or LUBA ___ (LUBA No. 91-054, September 4, 1991), slip op 8;
18 Douglas v. Multnomah County, supra, slip op at 14. In this
19 case, we conclude the evidence in the record is such that a
20 reasonable person could conclude as the county did, that
21 designation of the proposed resource site for aggregate
22 resource use will not have a significant impact on
23 groundwater quantity or quality. Younger v. City of
24 Portland, supra.

25 **b. Surface Water**

26 As explained above, the county's findings recognize

1 that there have been impacts on agricultural use of the
2 Yaillen property due to surface water discharge from the
3 existing quarry, and that there will be an increased
4 potential in the future for pollution of surface water
5 discharges from the aggregate extraction operation due to
6 the crusher being required to be placed in the pit.
7 However, the challenged decision concludes that any impacts
8 on agricultural use of the Yaillen property will not be
9 substantial. Petitioners argue that conclusion is not
10 supported by substantial evidence.

11 The decision concedes there will be impacts on
12 agricultural use of the Yaillen property due to surface
13 water discharges from aggregate extraction operations at the
14 proposed resource site. Record 30, 36. However, we are
15 cited to no evidence in the record establishing the nature
16 and magnitude of those impacts. We therefore conclude the
17 county's determination that such impacts are not significant
18 is not supported by substantial evidence in the record.

19 **c. Subject Property**

20 Petitioners contend there is evidence in the record
21 that the subject property has been used for agricultural
22 purposes. Petitioners argue there is no evidence in the
23 record that aggregate extraction operations at the proposed
24 resource site will not conflict with continued use of the
25 subject property for agriculture.

26 Fairly read, the county found that soils on the subject

1 property are "of marginal agricultural value." Record 31.
2 The county also argues that findings adopted in Eckis I
3 support a conclusion that the subject property is "of
4 minimal agricultural value." Record (E) 20-21. However,
5 the county cites no evidence in the record supporting these
6 conclusions.

7 There is evidence in the record that the subject
8 property has been used for agriculture. Record (M) 364,
9 487. We are cited to no evidence in the record regarding
10 the impacts of the proposed resource site designation on
11 that agricultural use.

12 In view of the lack of evidence in the record
13 concerning (1) the impacts of surface water discharge from
14 aggregate extraction operations on agricultural use of the
15 Yaillen property; and (2) the impacts of the proposed
16 aggregate resource site designation on agricultural use of
17 the subject property, the county's determination that
18 agriculture is not a conflicting use is not supported by
19 substantial evidence in the record.

20 This subassignment of error is sustained, in part.

21 **C. ESEE Consequence Analysis**

22 Goal 5 and OAR 660-16-005(2) require that where
23 conflicting uses are identified, the local government must
24 determine the economic, social, environmental and energy
25 (ESEE) consequences of the conflicts. As explained in the
26 preceding section, the county's ESEE analysis includes

1 inadequately supported statements that the economic and
2 environmental consequences of conflicts between the proposed
3 resource site and agricultural use are insignificant and,
4 therefore, is deficient. We address below petitioners'
5 additional arguments alleging inadequacy of the county's
6 ESEE analysis, particularly with regard to conflicts with
7 residential use, to the extent our analysis might be helpful
8 to the parties on remand.

9 **1. Economic Consequences**

10 **a. Resource Value**

11 Based on royalties of \$.45 to \$.50 per cubic yard paid
12 by the county and ODOT to mine rock resources in the subject
13 area, and there being 600,000 cubic yards at the proposed
14 resource site, the county concluded that the "in place"
15 value of the resource is approximately \$275,000.
16 Record 32-33. The county also found, based on prices being
17 paid for processed rock in the area, that after extraction
18 and processing, the aggregate resources on the subject site
19 would have a value "on the order of \$3 million." Record 33.

20 Petitioners argue that the value of the aggregate
21 resource is irrelevant to determining the economic
22 consequences of adverse impacts due to conflicting uses.
23 Petitioners also argue that the county's findings on
24 resource value are not based on substantial evidence in the
25 record, because (1) the county's determinations of resource
26 quantity and quality are not supported by substantial

1 evidence, (2) the amount of royalties paid by the county and
2 ODOT are not in the record, and (3) there is no evidence
3 that the prices paid for processed aggregate relied on by
4 the county were for products similar to that produced from
5 the proposed resource site.

6 We believe the economic value of the aggregate at the
7 proposed resource site is relevant to evaluating the
8 economic consequences of conflicts between use of the site
9 for aggregate extraction purposes and other uses of property
10 in the area. However, we already concluded the county's
11 determination of the quantity of resource at the proposed
12 site is not supported by substantial evidence. Furthermore,
13 we are cited to no evidence in the record supporting the
14 royalty and processed aggregate price figures relied on in
15 the county's findings. Consequently, we agree with
16 petitioners that the county's determinations of the "in
17 place" and processed values of the aggregate found at the
18 proposed resource site are not supported by substantial
19 evidence in the record.

20 This subassignment of error is sustained, in part.

21 **b. Reduction in Residential Value**

22 In Eckis I, supra, slip op at 21, we determined that
23 reduction in property values is a relevant economic impact
24 of the proposed aggregate resource site on surrounding
25 residential (and agricultural) uses, and that it had been
26 raised as such in the county proceedings. In the challenged

1 decision, the county considers the effects of the proposed
2 resource site on residential property values and finds:

3 "[T]he impact appears to be a slight decrease in
4 the value of the residential improvements
5 installed on perhaps a total of six residences
6 including [intervenor's], Leffler, McCoy, Bilyeu
7 (Shiloh), Eckis and Crenshaw. The assessor's
8 figures for the estimated loss in value are
9 approximately \$2,000 per residence, or if the
10 [Bilyeu to] Shiloh sale is as portrayed, it
11 constitutes loss of \$9,000 - \$10,000. * * * the
12 assessor's calculations reflect a slight loss of
13 marketability for the improvements on the
14 property. Accordingly, we estimate a potential
15 economic loss of approximately \$10,000 to \$15,000
16 in conjunction with sales of property in the area
17 during the course of the aggregate resource
18 extraction operation." (Emphasis added.)
19 Record 33.

20 Petitioners contend the county conclusion emphasized
21 above is not supported by the findings or by substantial
22 evidence in the record. First, petitioners argue that even
23 if the county's projected value losses for individual
24 properties are correct, and the Bilyeu (Shiloh) property has
25 lost \$10,000 in value and the other five residences \$2,000
26 each, the correct total reduction in residential property
27 value would be \$20,000 not \$10,000 to \$15,000. Second,
28 petitioners argue that the value reduction figures relied on
29 by the county reflect only value loss due to the current
30 quarry operation, and do not take into consideration
31 additional loss of value due to aggregate extraction from
32 the entire 25 acre proposed resource site.

33 The county findings appear to accept that the Bilyeu to

1 Shiloh sale might have reflected a residential property
2 value loss of \$9,000 to 10,000.¹⁵ Given that amount of
3 loss, and the county's estimate that five other residences
4 will each lose \$2,000 in value, we agree with petitioners
5 that it is unclear how the county arrived at the \$10,000 to
6 \$15,000 total residential property value loss estimate. The
7 parties cite no evidence in the record to support this
8 estimate. Further, the parties cite no evidence in the
9 record demonstrating that the estimated loss figures relied
10 on by the county take into consideration the designation and
11 future use of the entire 25 acre proposed resource site,
12 rather than simply the effect of the existing quarry
13 operation. We therefore agree with petitioners that the
14 findings on residential property value loss are not
15 supported by substantial evidence in the record.

16 This subassignment of error is sustained.

¹⁵We note a possible alternative interpretation of the county's findings is that if the Bilyeu to Shiloh sale is portrayed as reflecting no loss of property value, then the total loss in value reflected by the other five named residences is \$9,000 - \$10,000. However, findings adopted in support of the conditional use permit approval state that the Bilyeu property sold in 1989 for \$10,000 less than its 1986 list price. Record 47. On the other hand, these findings also state the county believes that any failure by the Bilyeu's to recapture the full value of their residential improvements is not due to the operation of the quarry. Record 48. In sum, we are unable to determine with any certainty what the county believes concerning loss in value of the Bilyeu (Shiloh) property due to the proposed resource site.

1 **2. Social Consequences**

2 **a. Livability**

3 In Eckis I, supra, slip op at 21, we determined that
4 reduction in livability is a relevant social impact of the
5 proposed aggregate resource site on surrounding residential
6 uses, and that it had been raised as such in the county
7 proceedings. In the challenged decision, the county found,
8 as relevant:

9 "[T]he social consequences of protecting the
10 resource site in terms of liveability [sic] will
11 be to decrease it in the subjective view of a
12 group of nearby residents [petitioners] who
13 perceive the area as providing mainly rural
14 residential benefits. For other physically
15 impacted individuals any livability change is
16 within their limits of toleration. The * * *
17 general social impact on livability in Linn County
18 will be positive as the population perceives a
19 benefit to their occupations and lifestyle from
20 having this [aggregate] resource available."
21 Record 35.

22 Petitioners argue they demonstrated below that the
23 proposed resource site would adversely impact area
24 livability due to dust, noise, traffic, effects on
25 groundwater, wastewater discharge and loss of property
26 value. Petitioners contend the impacts they allege are
27 concrete, rather than subjective, and have definite adverse
28 consequences on livability. Petitioners argue the county's
29 social consequence findings are inadequate because they fail
30 to address these impacts and their consequences.

31 We understand the above quoted county conclusion

1 regarding social consequences of the conflicts between the
2 proposed resource site and residential uses in the area to
3 rely on findings elsewhere in the decision (Record 23-31)
4 which establish the impacts of these conflicts. We address
5 the adequacy of the county findings concerning groundwater,
6 wastewater discharge and loss of property value supra. We
7 consider below petitioners' challenges to the adequacy of or
8 evidentiary support for the findings concerning dust, noise
9 and traffic impacts and the consequences of these impacts on
10 the livability of the area.

11 With regard to dust, the findings state there was
12 testimony from some neighbors that dust from the existing
13 quarry settles on their properties and is a nuisance. The
14 findings also state other neighbors testified that
15 intervenors' dust abatement efforts are successful and that
16 occasionally farming activities in the area produce greater
17 dust impacts than the quarry. Record 26. The findings
18 further state that based on this conflicting evidence, wind
19 charts and Department of Environmental Quality (DEQ) air
20 contaminant discharge and DOGAMI mining permit conditions
21 requiring dust control measures, the county concludes the
22 Eckis residence may be affected by dust from the proposed
23 resource site, but only to a limited degree, not
24 sufficiently to significantly affect the livability of the
25 Eckis property. The findings state the county concludes the
26 Crenshaw residence will not be affected by dust from the

1 proposed resource site. Id.

2 Petitioners contend the findings that dust from the
3 proposed resource site will not significantly impact the
4 livability of the Eckis and Crenshaw properties are not
5 supported by substantial evidence.

6 We have reviewed the evidence in the record cited by
7 the parties concerning the dust impact issue. The DEQ air
8 contaminant discharge permit for intervenors' crusher allows
9 an increase in particulate emissions of 4.5 tons per year.
10 Record 628. The DEQ permit report notes that the crusher
11 has "an attached water spray dust control system," but does
12 not explain the effects of such a system. Id. There is
13 evidence that dust from the existing quarry has had an
14 impact on the livability of the Eckis and Crenshaw
15 residences to the south. Record 508, 570, 576. There is
16 also evidence in the record that the Ellis, Leffler and
17 Bilyeu (Shiloh) residences to the north and southeast have
18 not been impacted by dust from the quarry. Record 187, 725,
19 870. However, the parties do not cite credible evidence in
20 the record that the prevailing wind in this area during the
21 summer months is from a direction other than north.¹⁶ In

¹⁶The county cites a map in the record entitled "Impact Areas." Record 822. This map consists of three ovals enclosing the existing quarry site, hand drawn on what appears to be an assessor's map. The ovals are labelled "sight," "wind" and "sound." The oval labelled "wind" encloses only the Leffler residence, not the Eckis and Crenshaw residences. However, petitioners challenge the credibility of this map, arguing there is no evidence in the record substantiating its basis or source. Neither the map itself, nor anything else in the record to which we are cited,

1 the absence of such evidence, we do not believe a reasonable
2 person would conclude the livability of the Eckis and
3 Crenshaw properties will not be significantly affected by
4 dust from the proposed resource site.

5 With regard to noise impacts, the county found in
6 relevant part:

7 "[T]he Bentley, Leffler, Bilyeu (Shiloh), Yaillen,
8 Eckis and Crenshaw properties will in some degree
9 be impacted by noise generated from the crusher at
10 the quarry operation, but in no case will the
11 impact be such to exceed allowable noise
12 standards.

13 * * * * *

14 "[T]he level of disturbance that the noise causes
15 for the various residents, is * * * very
16 subjective with people living closer to the pit
17 reporting little or no disturbance and those
18 living farther away reporting intense disturbance.
19 While this phenom[on], in part, might result
20 from people's varying hearing ability and
21 topography, the evidence is clearly persuasive to
22 show that noise tolerance is a subjective
23 phenom[on] dictated in no small part by a
24 person's attitudes and expectations toward the
25 area in which he or she lives. In this case, it
26 appears obvious that the witnesses' attitude
27 toward the quarry location dictates in large part
28 how much impact it has on them.

29 * * * * *

30 "[T]he operation's aggregate extraction and
31 processing site will occasionally result in noise
32 being produced by drilling and blasting, and
33 regularly by crushing, loading and rock hauling.

establishes the source of this map or the basis for the ovals drawn thereon. We do not find this map to be credible evidence of the prevailing wind direction in the area during the summer months.

1 The evidence [shows] that the noise of the
2 aggregate extraction and processing site * * * has
3 impacted numerous residences in the area and would
4 in all likelihood affect the location of
5 additional residences in the area particularly
6 those within 500 feet of the property." Record
7 24-25.

8 Petitioners contend the county's findings that the
9 noise impacts of the quarry have only a subjective (and
10 hence insubstantial) impact on livability of nearby
11 properties, dependent upon the resident's attitude toward
12 the quarry itself, are not supported by substantial evidence
13 in the record. Petitioners cite evidence in the record
14 concerning concrete impacts of noise from the existing
15 quarry (e.g., disturbance of children and animals, inability
16 to hold conversations, inability to hear birds and nature
17 sounds, loud impact noises which shake houses). See
18 Petition for Review 12. Petitioners argue that statements
19 in the record that noise is not a problem come from an
20 occasional visitor who is hard of hearing and a newcomer to
21 the area who had not experienced significant quarry
22 operations. Petitioners contend there is no evidence that
23 perception of significant impacts on livability due to noise
24 is the result of the observer's attitude toward the quarry.

25 The county's findings concede that noise from the
26 proposed resource site impacts several residences in the
27 area. We are cited to credible testimony from such
28 residents that the noise has a significant impact on the
29 livability of their property in specific ways. Record 430,

1 474, 479, 489, 508, 525, 576, 581. We are also cited to
2 evidence in the record that residents who testified that the
3 noise does not cause a significant impact on their
4 livability are hard of hearing, like noise or are newcomers
5 to the area. Record 188, 200, 860. We are cited to no
6 evidence to refute these claims or to support the county's
7 claim that certain residents perceive the noise impacts as
8 significant solely because of a negative attitude towards
9 the quarry.

10 The county's conclusion that there will be no
11 substantial effect on the livability of the identified
12 properties due to noise from the proposed resource site is
13 not supported by substantial evidence in the record. We
14 therefore agree with petitioners that the county's findings
15 do not adequately identify the social consequences on the
16 livability of the identified properties due to noise from
17 the proposed resource site.

18 With regard to traffic impacts, it appears there are no
19 findings in the county's Goal 5 analysis specifically
20 addressing the impacts of traffic from the proposed resource
21 site on the livability of properties in the area.¹⁷ The

¹⁷We note the section of the county's findings supporting the approval of a conditional use permit for 10 acres of the subject site does address traffic. Record 51-52. However, the county's decision does not incorporate those findings into its Goal 5 ESEE consequence analysis for the entire 25 acre resource site (see n 6). Furthermore, we conclude in any case that those findings are inadequate to address traffic impacts on livability, for the reasons stated infra.

1 traffic issue was raised by petitioners below, and is
2 relevant to livability. Record 484, 500, 504, 576. We
3 agree with petitioners that the county should have addressed
4 this issue in its ESEE consequence analysis.

5 This subassignment of error is sustained.

6 **b. Visual Impacts**

7 The county's findings on social consequences include
8 the following findings on visual impacts:

9 "* * * A review of the visual impact of the
10 [proposed resource] site shows that this impact
11 will be minimal with the operation's southern
12 exposure being the most apparent to nearby
13 residences and the public with only resource stock
14 piles visible from that location. The western
15 exposure visible from undeveloped agricultural
16 land is partially and can be completely screened
17 by vegetation,^[18] its northern and eastern
18 exposures are screened by topography and distance.
19 * * * the subject site is basically unremarkable
20 and we do not find that it will negatively impact
21 the aesthetics of any area with major significance
22 to the county." (Emphasis added.) Record 35-36.

23 The county's findings also state petitioners and intervenors
24 both submitted photographs, and intervenors submitted a
25 videotape, to establish the extent of the visual impacts of
26 the proposed resource site. Record 25. The findings
27 explain that although the aerial photographs submitted by
28 petitioners show the existing aggregate operation appears

¹⁸The county imposed on the challenged conditional use permit a condition requiring that a vegetative screen of evergreens be planted between the perimeter of the aggregate extraction site and the property lines. Record 54.

1 intrusive from the air, they do not establish that it is
2 particularly intrusive on the visual landscape from the
3 surrounding area, because the site is located at the top of
4 a rise. Id.

5 Petitioners argue the county's finding that the visual
6 impacts of the proposed resource site will be minimal is not
7 supported by substantial evidence in the record.
8 Petitioners argue that testimony in the record shows they
9 objected to the ugliness of the quarry and its visual
10 impacts on the neighborhood. Petitioners further argue the
11 videotape does not support the county's finding because the
12 quarry was not in operation on the day it was recorded and
13 it does not show views from neighboring properties or
14 residences.

15 Petitioners do not challenge the county's findings that
16 the proposed resource site is screened from the north and
17 east by topography, and is partially (and can be completely)
18 screened from the west by vegetation. Petitioners do not
19 specifically challenge the county's finding that only
20 resource stock piles will be visible from the south.
21 Petitioners also do not challenge the finding that the
22 proposed resource site is located at the top of a rise. We
23 understand petitioners simply to disagree with the county's
24 conclusion that resulting visual impacts will be minimal.

25 Accepting the unchallenged county findings on visual
26 impacts as correct, we find the evidence to which we are

1 cited in the record, and particularly the videotape
2 submitted by intervenors,¹⁹ is such that a reasonable person
3 could decide the proposed resource site will have minimal
4 visual impacts.

5 This subassignment of error is denied.

6 **3. Environmental Consequences**

7 Petitioners argue the county's findings that the
8 proposed resource site will have no environmental
9 consequences on groundwater is not supported by substantial
10 evidence. We rejected this argument in section B.3.a,
11 supra.

12 Petitioners also argue the county's findings
13 erroneously fail to address evidence submitted by
14 petitioners that noise and dust from the proposed resource
15 site would conflict with agricultural uses in the area.
16 Under section B.3, supra, we determine that the county's
17 decision not to identify agriculture as a conflicting use is
18 not supported by substantial evidence with regard to surface
19 water discharges and agricultural use of the subject
20 property. On remand, the county should also consider
21 whether evidence in the record indicates there are any
22 conflicts between agriculture and the proposed resource site

¹⁹Although the videotape does not show the existing quarry in operation, it does show views of the existing quarry site from the road to the south which support a finding of minimal visual impact. We also note that the existing quarry operation is at the southwestern corner of the proposed resource site and, therefore, future operations will be no closer to the road to the south than the existing quarry.

1 due to noise and dust.

2 This subassignment of error is sustained, in part.

3 **4. Energy Consequences**

4 Petitioners argue the county's finding of no increase
5 in energy consumption related to the proposed resource site
6 is not supported by substantial evidence. Record 37.
7 According to petitioners, the record shows deeper wells will
8 have to be dug in the subject area, requiring more energy
9 for pumping water.

10 Petitioners' argument here is based on their contention
11 that the extraction of aggregate from the proposed resource
12 site will result in the lowering of groundwater levels in
13 the aquifers tapped by wells in the area. However, in
14 section B.3.a, supra, we uphold the county's determination
15 that the proposed resource site will not affect groundwater
16 quantity.

17 This subassignment of error is denied.

18 **D. Decision to Limit Conflicting Uses**

19 The county has chosen to resolve conflicts regarding
20 use of the proposed resource site through a "limit
21 conflicting uses" approach, and has adopted findings
22 explaining its reasons for choosing the "limit conflicting
23 uses" option, as required by OAR 660-16-010(3). Record
24 37-38; see Eckis I, slip op. at 24. Petitioners contend
25 these findings are inadequate or are not supported by
26 substantial evidence in the record.

1 In Eckis I, slip op at 17 n 5, we stated:

2 "[U]nder OAR 660-16-010, the county's choice of a
3 program to achieve the goal [of resource
4 protection] must be 'based on the determination of
5 the economic, social, environmental and energy
6 consequences' of the conflicting uses identified
7 pursuant to OAR 660-16-005. The identification of
8 conflicting uses and ESEE consequence analysis in
9 turn depend on the resource inventory required by
10 OAR 660-16-000. * * *"20

11 We determine under sections A-C of this assignment of
12 error that the county did not properly complete the earlier
13 steps of the Goal 5 planning process. Accordingly, the
14 county has not established the necessary basis for
15 developing a program to achieve the goal pursuant to
16 OAR 660-16-010. Id.; League of Women Voters v. Klamath
17 County, 16 Or LUBA 909, 928 (1988). Therefore, no useful
18 purpose would be served by considering petitioners'
19 challenges to this part of the county's decision.

20 **GOAL 6**

21 Goal 6 provides in relevant part:

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

27 In Eckis I, slip op at 26-27, we stated:

28 "Goal 6 requires findings that a proposed use will
29 be able to comply with applicable environmental

²⁰We also pointed out in Eckis I, slip op at 25, that OAR 660-10-010(3) requires the reasons supporting the county's choice of the "limit conflicting uses" option to be set out in its comprehensive plan.

1 standards, and is not satisfied by findings
2 stating only that the proposed use will be
3 required to comply with applicable environmental
4 standards. McCoy, 16 Or LUBA at 313-314; Spalding
5 v. Josephine County, 14 Or LUBA 143, 149 (1985);
6 see Allen v. Umatilla County, 14 Or LUBA 749, 755
7 (1986).[†] On the other hand, we have frequently
8 recognized that a local government may demonstrate
9 compliance with an applicable standard by
10 (1) determining that the proposal can comply with
11 the standard, if certain conditions are imposed;
12 and (2) imposing those conditions to ensure
13 compliance. Foland v. Jackson County, 18 Or LUBA
14 731, 779 (1990); Kenton Neighborhood Assoc. v.
15 City of Portland, 17 Or LUBA 784, 804 (1989);
16 McCoy, 16 Or LUBA at 301.

17
18

† * * * * *

19 "[W]e note that we do not believe Goal 6 imposes a
20 requirement that state or federal permits be secured before
21 a local permit can be approved, or that all of the
22 information that will be needed to secure state or federal
23 permits be developed in the local process. Rather, Goal 6
24 requires that local government findings explain why it is
25 reasonable to expect that applicable state and federal
26 standards can be met by the proposed use, based on the
27 information reasonably available."

28 We consider petitioners' arguments concerning the
29 compliance of the county's decision with Goal 6 with these
30 principles in mind.

31 **A. Noise**

32 The findings state that although certain tests
33 conducted on intervenors' behalf showed that crushing and
34 blasting produced noise levels at the Leffler residence
35 which exceeded applicable DEQ standards, "modifications in
36 operating procedures and/or testing protocols will result in
37 [intervenors] meeting the applicable environmental standards

1 for noise." Record 40. The findings further state the
2 county's conclusion that intervenors will be able to comply
3 with applicable noise standards requires the imposition of
4 specific conditions of quarry operation, including placing
5 the crusher in the pit, constructing noise berms, muffling
6 drilling equipment and using time delay blasting techniques.
7 Id. The findings finally state that during the next
8 blasting event, a test to determine compliance with noise
9 standards will be carried out and, if the standards are
10 violated, blasting will be suspended until the quarry
11 operator "establishes, to the satisfaction of the Planning
12 Director, following a publicly noticed hearing, its ability
13 to comply with the standards." Id.

14 Petitioners contend the tests upon which the county's
15 findings rely were conducted in the winter, when the wind
16 was from the south and carried noise from the quarry site
17 away from the impacted Leffler, Eckis and Crenshaw
18 residences. Petitioners argue intervenors submitted
19 evidence that the prevailing summer winds in the area are
20 from the north, which would increase noise levels at the
21 affected residences. Petitioners argue they raised this
22 issue below and the county should have addressed the issue
23 in its findings.

24 Petitioners also argue the county's determination that
25 the proposed quarry operation can meet applicable noise
26 standards with regard to blasting is not supported by

1 substantial evidence in the record. Petitioners argue the
2 data the county relies on are from a test established by the
3 U.S. Bureau of Mines to determine vibration or concussion
4 levels, not noise. Petitioners further contend intervenors
5 conceded in the proceedings below that DEQ noise standards
6 for blasting were not satisfied. Finally, petitioners argue
7 that the requirement in the findings for a future test to
8 determine whether blasting satisfies DEQ noise standards is
9 not sufficient to support the county's determination.

10 Where issues relevant to compliance with applicable
11 approval criteria are raised in local government
12 proceedings, the local government is required to address
13 those issues in its findings. Norvell v. Portland Metro

14 Area LGBC, 43 Or App 849, 853, 604 P2d 896 (1979); Benjamin
15 v. City of Ashland, ___ Or LUBA ___ (LUBA No. 90-065,
16 November 13, 1990), slip op 7; Grovers Beaver Electric
17 Plumbing v. Klamath Falls, 12 Or LUBA 61, 66 (1984).

18 Petitioners raised the issue of the effect of wind
19 conditions on the noise levels from quarry operations at the
20 Leffler, Crenshaw and Eckis residences in the county
21 proceeding. Record 347-48. The county should have
22 addressed this issue in its findings.

23 With regard to the evidentiary support for the county's
24 decision that blasting at the quarry site can comply with
25 applicable noise standards, we have reviewed the evidence
26 cited by the parties. That evidence consists of a statement

1 by intervenors' attorney that no testing to determine
2 whether noise levels from blasting comply with DEQ noise
3 standards was performed, and testimony by an employee of an
4 explosives company that tests showed blasting at the subject
5 site complies with U.S. Bureau of Mines vibration
6 standards.²¹ Record 163, 179. We agree with petitioners
7 that the county's decision that blasting at the proposed
8 resource site can comply with DEQ noise standards is not
9 supported by substantial evidence in the record.

10 This subassignment of error is sustained.

11 **B. Air Quality**

12 In Eckis I, slip op at 28, we agreed with petitioners
13 that findings which simply state the rock crusher to be used
14 at the proposed resource site has a DEQ air contaminant
15 discharge permit are not adequate to establish that the
16 proposed use of the site for aggregate extraction and
17 processing will comply with applicable air quality
18 standards. The challenged decision concludes that
19 compliance with the DEQ air contaminant discharge permit for
20 the crusher will insure compliance of the entire use with

²¹The county, in its findings and in its respondent's brief, refers to other evidence concerning noise in general, such as correspondence from DEQ. However, no party identifies the location of such evidence in the record. The record in this proceeding, which includes the local records from McCoy and Eckis I, is over 2,000 pages long. We will not search through that record to locate items of evidence. Morse Bros., Inc. v. Clackamas County, ___ Or LUBA ___ (LUBA Nos. 89-069 and 89-090, October 20, 1989), slip op 17 n 7; see Oregon State Parks v. City of Portland, 96 Or App 202, 205, 772 P2d 435 (1989).

1 applicable air quality standards. The decision includes
2 detailed findings explaining the reasons for the county's
3 conclusion, including that the DEQ permit itself imposes air
4 pollution control requirements on aspects of the use other
5 than the crusher. Record 41.

6 Petitioners argue that under our reasoning in Eckis I,
7 slip op at 26-28, the county cannot rely on the DEQ air
8 contaminant discharge permit for the crusher to establish
9 that the proposed use of the resource site can comply with
10 air quality standards.

11 The defect in the relevant county findings which we
12 identified in Eckis I was that the findings did not address
13 compliance of any aspect of the proposed use of the resource
14 site, other than the crusher, with applicable air quality
15 standards. The county has remedied that defect by adopting
16 findings which explain how the DEQ permit for the crusher
17 ensures that the entire operation will comply with air
18 quality standards. Petitioners do not challenge that
19 explanation.

20 This subassignment of error is denied.

21 **C. Groundwater**

22 As previously explained, the county determined that use
23 of the proposed resource site will not affect groundwater
24 quantity or quality in the area, and we uphold the county's
25 determination supra. Based on these findings, and the fact
26 that intervenors have obtained a DOGAMI permit for operation

1 of the existing quarry which includes conditions to protect
2 groundwater, the county concludes that use of the proposed
3 resource site will be able to comply with applicable
4 groundwater standards. Record 26-29, 41-43.

5 Petitioners' challenges to this aspect of the county's
6 decision depend upon their contention that the county
7 incorrectly determined use of the proposed resource site
8 will not affect groundwater quantity or quality. Therefore,
9 petitioners' arguments provide no basis for reversal or
10 remand.

11 This subassignment of error is denied.

12 **D. Surface Water**

13 In Eckis I, slip op at 29, we upheld the county's
14 determination that use of the proposed resource site will
15 comply with surface water quality requirements on the basis
16 of a DEQ letter (Record (E) 45) stating that the operation
17 could comply with applicable water quality standards so long
18 as water discharged from the pit is limited to surface water
19 runoff that accumulates therein and does not include
20 wastewater from intervenors' processing operations.
21 However, the decision challenged in Eckis I did not, as the
22 decision challenged here does, require that the crusher be
23 placed inside the pit to mitigate other environmental
24 impacts.

25 The challenged decision recognizes that relocating the
26 crusher inside the pit creates a greater potential for the

1 discharge of water from the pit to become contaminated by
2 processing wastewater. Record 43. The findings state:

3 "[W]e see no reason to conclude that
4 [intervenors'] operation cannot comply with the
5 surface water standards [and remain] exempt from
6 NPDES [National Pollutant Discharge Elimination
7 System] permit requirements. To do this,
8 [intervenors] must discharge only diffuse surface
9 water that has run into the pit and not any water
10 that has been contaminated by running through the
11 process area. * * * it appears that [intervenors]
12 can grade [the] process area to divert water
13 running across [the pit] into an area away from
14 the working surface of the quarry and by our
15 conditions [intervenors] will be required to do
16 so. Because the clay layer underlying the rock is
17 impermeable, runoff from the process area can be
18 held in a separate pond without negative
19 environmental impact. * * *

20 "If it becomes necessary for [intervenors] to pump
21 water from the process area settling pond, [they]
22 will only be allowed to do this following a public
23 hearing on the issue where [they] must demonstrate
24 [they have] an appropriate NPDES permit or an
25 exemption from its requirements."²² Record 44.

26 The findings note petitioners contended below that
27 intervenors' berm construction, ditching and road watering
28 activities have resulted in pollutants and silt being
29 introduced into nearby streams, in violation of federal
30 water pollution and dredge and fill standards. Id. The
31 findings state these activities are mitigation measures
32 required by environmental protection agencies, and there is

²²The decision also imposes a condition on the conditional use permit approval that requires intervenors to grade the processing area in the pit to provide a separate holding pond from which there can be no discharge without an NPDES permit. Record 55.

1 no evidence they have resulted in chemical or acidic
2 pollutants entering waterways. The findings do not
3 explicitly concede these activities are causing silt to
4 enter nearby streams, but do state that intervenors "will be
5 required to prepare an anti-siltation plan and install such
6 structures as are necessary to implement it."²³ Id. The
7 findings also state that the conditions imposed will prevent
8 surface water runoff across the Yaillen property from
9 violating applicable water pollution standards.

10 Petitioners contend the county's finding that there are
11 no chemical or acidic pollutants entering waterways is not
12 responsive to petitioners' contention below that quarry
13 operations pollute the water in the pit, which petitioners
14 contend recharges groundwater. Petitioners also contend the
15 finding is inconsistent with uncontroverted evidence in the
16 record that quarry operations cause chemical changes to the
17 water in the pit.

18 The finding challenged by petitioners addresses whether
19 there are chemical or acidic pollutants in surface water
20 runoff from the subject property due to intervenors'
21 berming, ditching and road watering activities. We do not
22 understand petitioners to contest that point, but rather to
23 dispute whether the quarry operation causes pollutants to
24 enter water in the pit, and from there to enter groundwater.

²³This requirement is also imposed as a condition of conditional use permit approval. Record 55.

1 The county adopted detailed findings and imposed conditions
2 which address the issue of pollutants entering water in the
3 pit and the possibility of polluted water being discharged
4 from the pit to the surface. Petitioners do not point to
5 any inadequacy in these portions of the decision.
6 Furthermore, we uphold supra the county's determination that
7 the proposed use of the resource site will not affect
8 groundwater quality.

9 Petitioners also argue the findings concede that
10 intervenors' operation causes silt to enter nearby
11 waterways. Petitioners argue the finding that an
12 anti-siltation plan will be required does not constitute a
13 finding that the proposed use can comply with either federal
14 water quality or dredge and fill standards and, therefore,
15 does not satisfy Goal 6.

16 Whether the impacts of measures required to ensure that
17 the proposed use complies with applicable noise, dust and
18 water quality standards themselves comply with applicable
19 environmental quality standards is an issue relevant to
20 compliance with Goal 6. The county findings recognize that
21 petitioners raised below the issue of whether siltation from
22 intervenors' required berming, ditching and road watering
23 activities entering nearby streams complies with applicable
24 dredge and fill standards. The decision requires
25 intervenors to prepare and implement an anti-siltation plan.
26 Record 44, 55. **However, the decision does not determine**

1 that the required berming, ditching and road watering
2 activities, in themselves or in conjunction with an
3 anti-siltation plan, can comply with applicable
4 environmental quality standards with regard to siltation
5 impacts and, therefore, is inadequate to comply with Goal 6.

6 This subassignment of error is sustained, in part.

7 **LCZO 21.435.5.a**

8 LCZO 21.435.5.a establishes the following standard for
9 conditional use permits:

10 "The location, size, design and operating
11 characteristics of the proposed development will
12 be made reasonably compatible with and have
13 minimal impact on the livability and appropriate
14 development of abutting properties and the
15 surrounding neighborhood, with consideration given
16 to scale, bulk, coverage and density; to the
17 availability of public facilities and utilities;
18 to traffic generation and the capacity of the
19 surrounding road network; and to other related
20 impacts of the development."

21 **A. Impacts of the Proposed Use**

22 Petitioners challenge the adequacy of and evidentiary
23 support for county findings concerning the impacts of the
24 proposed conditional use on neighborhood property values,
25 views, noise, groundwater and traffic.

26 Except for traffic, the county findings of compliance
27 with LCZO 21.435.5.a addressing each of these impacts either
28 rely upon or are similar to the findings adopted by the
29 county to establish compliance with Goals 5 and 6.

30 Furthermore, petitioners' challenges to these findings are

1 similar to those made by petitioners with regard to the
2 Goal 5 and 6 findings. We resolved petitioners' challenges
3 to the Goal 5 and 6 findings, including Goal 5 ESEE analysis
4 social consequences issues regarding these types of impacts
5 on livability of the area, supra. We do not believe it
6 would be useful to discuss these issues further.

7 The only findings adopted by the county with regard to
8 traffic impacts are those addressing LCZO 21.435.5.a.
9 Record 51-52. The findings state that Ridge Drive, which
10 provides access to the subject property, is a paved county
11 road with traffic including cars, log trucks and farm
12 equipment. The findings also state that Ridge Drive has an
13 average daily traffic of 167 vehicles, and that during one
14 three hour period 23 cars and 7 trucks were counted. The
15 findings further state the proposed use will add
16 approximately 100 trucks per day (or eight additional trucks
17 per quarry working hour) to Ridge Drive traffic, mostly
18 entering and leaving the subject property from the west.
19 According to the findings, this increase is within the
20 capacity of Ridge Drive, and has "an impact which is not
21 significant." Record 52.

22 The findings further state there is a potential safety
23 problem because a school bus stop is located at or near the
24 point where the quarry access road intersects with Ridge
25 Drive. Record 51. The county therefore has imposed
26 conditions of approval requiring that (1) all trucks must

1 stop before leaving the access road; and (2) when a school
2 bus stops near the access road, no trucks can leave the
3 access road until the school bus departs. Record 54.

4 Petitioners argue the findings fail to address the
5 issue of impacts of the additional truck traffic on the
6 safety of children walking or riding bicycles along Ridge
7 Drive, which was raised below. Record 571-72. Petitioners
8 also argue the county's decision that the traffic impact is
9 not significant is not supported by substantial evidence.
10 Petitioners argue the county failed to consider that an
11 additional 100 trucks per day using the quarry, means an
12 additional 200 truck trips per day on Ridge Drive, as each
13 truck will make traverse Ridge Road twice in entering and
14 leaving the quarry. According to petitioners, this will
15 mean an additional 16.7 truck trips per hour during quarry
16 working hours, or one trip every 3.5 minutes. Petitioners
17 argue the current traffic figures for Ridge Drive equate to
18 1.6 to 2.3 truck trips per hour, or one every 26 to 37.5
19 minutes. Petitioners argue that such an increase in
20 frequency of truck traffic cannot be found to be
21 insignificant.

22 We agree with petitioners that the issue of safety of
23 persons currently walking, running and riding bicycles along
24 Ridge Drive was raised in the proceeding below, is relevant
25 to the impact of additional truck traffic on the
26 neighborhood's livability, and should have been addressed in

1 the county's findings. With regard to the evidentiary
2 issue, we understand the county's finding of an additional
3 eight trucks per hour due to operation of the quarry to
4 recognize that such trucks would necessarily traverse Ridge
5 Road in both entering and leaving the quarry, and to be
6 consistent with the projected increase of 100 trucks per
7 day, which petitioners do not challenge.

8 This subassignment of error is sustained, in part.

9 **B. Statement of Reasons**

10 Petitioners contend the county failed to adopt a
11 statement of reasons explaining why the proposed use meets
12 the criteria established in LCZO 21.435.5.a. Eckis I,
13 slip op at 49-50; Miller v. City of Ashland, 17 Or LUBA 147
14 (1988). According to petitioner, the decision does not
15 explain why the proposed use will be reasonably compatible
16 with or have minimal impact on "livability" of abutting
17 properties and the surrounding neighborhood, defined by the
18 county to be "the expectations [residents have] for health,
19 safety, and general well-being in light of surrounding
20 natural resources, neighbors, and applicable zoning laws."
21 Record 46.

22 In Eckis I, supra, we stated with regard to
23 LCZO 21.435.5.a:

24 "The county's decision to approve the subject
25 conditional use permit must be supported by
26 findings which not only identify the applicable
27 criteria and state the facts relied upon, but also
28 explain why those facts demonstrate that the

1 criteria are met. ORS 215.416(9); Sunnyside
2 Neighborhood v. Clackamas Co. Comm., 280 Or at
3 20-21; Green v. Hayward, 275 Or 693, 706-708, 552
4 P2d 815 (1976); Vizina v. Douglas County, 17
5 Or LUBA 829, 835 (1989); Standard Insurance Co. v.
6 Washington County, 16 Or LUBA 30, 45 (1987).

7 * * * * *

8 "We agree with petitioners that the county's
9 findings do not include a statement of reasons
10 explaining why the facts found concerning impacts
11 on neighboring properties lead to the conclusion
12 that the proposed use 'will be made reasonably
13 compatible with and have minimal impact on the
14 livability and appropriate development of abutting
15 properties and the surrounding neighborhood.'"
16 (Emphasis in original.)

17 We find the same deficiency in the decision challenged
18 in this appeal. The findings set out the definition of
19 "livability" which we upheld in Eckis I and describe at
20 least some of the impacts of the proposed use.²⁴ However,
21 the decision does not include a statement of reasons
22 explaining why the impacts found lead to the conclusion that
23 the proposed use will be reasonably compatible with and not
24 have more than minimal impact on the livability of the
25 abutting properties and surrounding neighborhood.

26 This subassignment of error is sustained.

27 The county's decision is remanded.

²⁴Deficiencies in the impact findings are discussed supra.