



1 Appeal from Deschutes County.

2 Michael J. Lilly, Portland, filed the Petition for Review  
3 and argued the cause for Petitioner Coats. With him on the  
4 brief were John W. Gould and Spears, Lubersky, Campbell and  
5 Bledsoe, Portland.

6 Robert W. Lovlien, Bend, filed the Petition for Review and  
7 argued the cause for Petitioner Rose. With him on the brief  
8 were Gray, Fancher, Holmes and Hurley, Bend.

9 Richard L. Isham, Bend, filed the brief and argued the  
10 cause for Respondent Deschutes County.

11 REYNOLDS, Chief Referee; COX, Referee; BAGG, Referee;  
12 participated in this decision.

13 REMANDED

14 5/15/81

15 You are entitled to judicial review of this Order.  
16 Judicial review is governed by the provisions of Oregon Laws  
17 1979, ch 772, sec 6(a).

1 REYNOLDS, Chief Referee.

2 NATURE OF THE PROCEEDINGS

3 Petitioners appeal the Deschutes County Year 2000  
4 Comprehensive Plan, Ordinance PL-20, and its implementing  
5 ordinance, Ordinance PL-15. Petitioners challenge that portion  
6 of the plan and its implementing ordinance which relate to  
7 surface mining in Deschutes County. Petitioner Rose owns land  
8 which was zoned SMR (surface mining reserve) in accordance with  
9 the county's zoning ordinance. Petitioner Coats is a surface  
10 miner and aggregate producer in Deschutes County. Petitioners  
11 contend that the Deschutes County plan and implementing  
12 ordinance fail to adequately protect mineral and aggregate  
13 resources for future generations.

14 STATEMENT OF FACTS

15 Deschutes County adopted certain amendments to the  
16 "Deschutes County Year 2000 Comprehensive Plan" (Ordinance  
17 PL-20) and the "Deschutes County Zoning Ordinance of 1979"  
18 (Ordinance PL-15) on September 17, 1980. Ordinances PL-20 and  
19 PL-15 were first adopted on November 1, 1979 and submitted to  
20 the Land Conservation and Development Commission on November 7,  
21 1979, for acknowledgement. By order dated March 26, 1980, LCDC  
22 returned the county plan and implementing ordinances to the  
23 county for additional consideration. Hearings were held on the  
24 amendments to the ordinances prior to their adoption on  
25 September 17, 1980.

26

1        Protection of Surrounding Area.

2        The amendments as they relate to surface mining set up two  
3 zones: surface mining and surface mining reserve.

4        Essentially, the county placed in the surface mining (SM) zone  
5 all sites actually being utilized at the time of plan adoption,  
6 and placed in the surface mining reserve (SMR) zone inactive  
7 and undeveloped sites. As might be expected, the SM zone  
8 allows mineral extraction as a permitted use. The use,  
9 however, can be subjected to certain conditions set forth in  
10 the site plan. Policy 5(c) of the comprehensive plan provides,  
11 in part, as follows:

12            "Operating, reclamation or site plan conditions  
13 or standards shall consist of reasonable conditions or  
14 standards used in the state to mitigate the adverse  
15 environmental and aesthetic effects of surface mining  
16 although specific requirements shall vary with the  
17 conflict level found to exist at the site. Conflict  
18 Level IV surface mines shall meet stringent conditions  
19 and standards, and these conditions shall exceed those  
20 normally used at sites of lesser conflict levels."<sup>1</sup>

21        Policy 8 of the plan sets forth the following requirements with  
22 respect to particularly sensitive areas:

23            "Further, in areas such as F-14 forestry,  
24 residential, agricultural, wildlife sensitive areas  
25 (i.e., near sites), intensive recreational or other  
26 particularly sensitive areas, the mining and  
27 associated operations shall be subject to more  
28 restrictive standards to keep noise, dust, erosion and  
29 other hazards to a level compatible with the adjacent  
30 uses. Such standards may include requirements for  
31 barrier isolation, set backs, restricted operating  
32 times, concomitant reclamation, limits to active  
33 mining area, limits to mining lifetime, restrictions  
34 on on-site processing and other similar restrictions  
35 reasonably related to possible adverse impacts."

36        Policies 5(c) and 8 are implemented, at least in part, in

1 the county's SM zone provisions contained in the Deschutes  
2 County Zoning Ordinance (zoning ordinance), sec 4.100, as  
3 amended on September 17, 1980. The purpose clause of the  
4 zoning ordinance provides:

5 "The purpose of the surface mining zone is to  
6 allow the extraction of non-renewable surface mining  
7 materials needed by the community while protecting the  
8 health, and safety of adjoining residences and uses.  
9 The materials are both necessary and beneficial to the  
10 economy and their availability shall be balanced  
11 against the protection of adjoining land owners and  
12 uses."

13 Subsection 5 of sec 4.100 of the zoning ordinance requires  
14 a 100 foot setback from the part of a property line of a site  
15 "adjacent" to a residential dwelling, regardless of the  
16 proximity of the dwelling to the site. It also requires a 300  
17 foot setback from roads that are in Landscape Management Areas,  
18 as defined in the comprehensive plan, as well as any stream or  
19 lake. A shorter setback but not less than 100 feet, may be  
20 allowed if it can be shown it will cause no additional negative  
21 visual or aesthetic impact.

22 Subsection 7 of sec 4.100 sets forth the site plan  
23 requirements and the authority of the planning director to  
24 impose conditions on operation of a site. Regardless of the  
25 conflict level of a proposed site, the planning director may  
26 impose restrictions on the hours, days and noise levels of  
operation of the site. The planning director may also require  
that the applicant for site plan approval provide dust free  
access roads near residential areas. When surface mining

1 operations are in Conflict Level III or higher, the planning  
2 director may require additional visual screening of the site  
3 from public view by means of landscaped berms, hedges, walls,  
4 fences or similar devices. He may also, if he determines an  
5 "unusually high level of conflict exists," require off-site  
6 stockpiling and processing of the resource material. Sec  
7 4.100(7) and (8).

8 Subsection 9 of sec 4.100 specifies the procedure to be  
9 followed upon filing of a site plan and sets forth the basis  
10 upon which the planning director's decision to ultimately  
11 approve a site plan is to be based:

12 "The planning director or hearings body's  
13 decision shall be based on the impact of the proposed  
14 use on nearby streets and roads, and the economic,  
15 social and environmental impact on the community."

16 Protection of A Resource Site.

17 Not only does the comprehensive plan, in conjunction with  
18 the zoning ordinance, provide for the imposition of conditions  
19 on the operation of a surface mining site, the comprehensive  
20 plan and zoning ordinance also provide, under certain  
21 circumstances, for conditioning development on adjacent lands  
22 in order to limit future conflicts with natural resource site  
23 management. Policy 2 of the comprehensive plan provides that  
24 protection of surface mining sites must include review and  
25 placement of appropriate conditions on development of adjoining  
26 land so as to assure compatibility. This policy further  
provides that it shall be assumed land designated surface

1 mining reserve will ultimately be mined.

2 Policy 10 also states the importance of protecting resource  
3 sites from incompatible development. It provides that:

4 "To reduce this problem timely utilization of the  
5 product shall be encouraged. Also, increased set  
6 backs, screening or other requirements for  
7 residential, recreational or other conflicting  
8 development on adjacent land shall be required where  
9 feasible."

10 The above policies as they relate to restricting  
11 development on adjacent lands have been implemented to a  
12 limited degree in two places in the zoning ordinance. However,  
13 the county's authority to condition or restrict development on  
14 adjacent lands does not apply to lots or building sites in  
15 existence prior to the effective date of the county's  
16 comprehensive plan and zoning ordinance. Section 5.250 of the  
17 zoning ordinance specifies with respect to lands adjoining SM  
18 or SMR zones:

19 "Lots or parcels transferred or created after the  
20 effective date of this amendment which abut an SM or  
21 SMR zone may be required to establish setbacks in  
22 excess of those required in the zone in which the lot  
23 or parcel is located. The total setback to be  
24 established will be determined by the planning  
25 director after meeting with the applicant; in any case  
26 the setback shall not exceed 100 yards. The purpose  
of the additional setback is to provide sight and  
sound screening from the the adjoining mining  
operation."

Deschutes County's subdivision ordinance (PL-14) also  
requires that any final plat of a subdivision or map of a  
partition which adjoins an SM or SMR zone show the existence of  
such zone on the plat or map in relation to the subdivision or

1 partition's boundaries. The existence and location of the zone  
2 must be entered on the deeds for the lots created by the  
3 subdivision or partition. The county subdivision ordinance  
4 does not, however, specifically grant the county authority to  
5 restrict development on lots within subdivisions or partitions  
6 adjacent to SM or SMR zones. Thus, the only actual authority  
7 prescribed by ordinance by which the county may restrict  
8 development on lots adjoining SM or SMR zones is that conferred  
9 by sec 5.250 of the zoning ordinance quoted above relating to  
10 increased setback provisions.

11 Conversion from SMR to SM.

12 The comprehensive plan policies relating to SM and SMR  
13 designations specify that the surface mining reserve zone is  
14 intended to preserve for future use resource sites not deemed  
15 necessary at present to satisfy the county's resource needs. A  
16 change from the SMR to the SM zone must occur if the county  
17 finds (1) the site is needed to meet the next five year  
18 resource requirements of the county and (2) the site is in the  
19 closest proximity to the resource utilization area, or is  
20 otherwise the most economically available at the time.

21 Finally, the county's comprehensive plan policies provide  
22 that it shall be the responsibility of the county planning  
23 department to continually study the quality, location, quantity  
24 and type of mineral and aggregate resources in the county in  
25 order that there be up-to-date information upon which to make  
26 informed decisions about local mineral and aggregate

1 resources. A surface mining committee is required to be formed  
2 to assist in this process and is to consist of two miners, two  
3 residents in close proximity to a mining zone and a fifth  
4 member chosen by the remaining four members of the committee.

5 OPINION ON THE MERITS

6 For purposes of this opinion, we construe petitioners'  
7 primary assignments of error to be the following:

8 (1) That it was a violation of Goal 5 to set up a reserve  
9 zone which does not permit present extraction of mineral  
10 resources;

11 (2) That the process for changing a zone from SMR to SM  
12 violates Goal 5 because meeting the criteria is so difficult  
13 the process will effectively prohibit zone changes from being  
14 allowed;

15 (3) That the site plan requirements for development or  
16 expansion of sites within SM zones err in that their focus is  
17 in protecting neighborhood lands rather than the natural  
18 resource;

19 (4) That the conflict levels by which sites are  
20 categorized according to the severity of their potential  
21 conflict with adjacent properties violate Goal 5 because (a)  
22 the conflict level for a site may dictate the extent to which  
23 utilization of the site's resource may be conditioned by the  
24 site plan, and (b) the conflict levels were improperly  
25 established;

26 (5) That the SMR zone does not adequately protect natural

1 resources for use by future generations.

2 To summarize our holding in this case, we conclude that  
3 Goal 5 does not prohibit a county from establishing a reserve  
4 zone for mineral sites. We also conclude that the process for  
5 seeking a change in zone from SMR to SM is not so unreasonable  
6 on its face that we would be presently justified in declaring  
7 it in violation of Goal 5. In addition, we conclude as a  
8 general proposition that Goal 5 does allow a jurisdiction to  
9 permit less than full utilization of the resource potential of  
10 a site when on or off-site conflicting uses have first been  
11 properly identified.

12 However, we do conclude that the county's plan and zoning  
13 ordinance violate Goal 5 in that they fail to set forth a  
14 balancing process whereby uses which may conflict with future  
15 utilization or preservation of mineral or aggregate resources  
16 will be balanced against the present or future need for these  
17 resources.

18 Discussion.

19 Goal 5 states as its purpose:

20 "To conserve open space and protect natural and  
21 scenic resources."

22 To achieve the above, Goal 5 requires that programs be  
23 developed by local governments that will "protect...natural  
24 resources for future generations..." It requires inventorying  
25 of the location, quality and quantity of such resources as  
26 mineral and aggregate resources. The goal also provides:

1 "Where no conflicting uses for such resources  
2 have been identified, such resources shall be managed  
3 so as to preserve their original character. Where  
4 conflicting uses have been identified the economic,  
5 social, environmental and energy consequences of the  
6 conflicting uses shall be determined and programs  
7 developed to achieve the goal."

8 The first question is whether it would be a violation of  
9 Goal 5 for a county to establish a reserve zone for mineral and  
10 aggregate resources. We conclude that as a general  
11 proposition, a county may establish a mineral reserve zone  
12 consistent with Goal 5. Goal 5 requires protection of  
13 resources for future generations. The goal does not speak to  
14 present utilization of natural resources nor does it require  
15 that all mineral and aggregate resources be made available for  
16 development at once. In the absence of such a requirement, we  
17 do not believe it is a violation of Goal 5 for a county to  
18 establish a mineral and aggregate reserve zone provided the  
19 zone so established is adequate to protect the resource for  
20 future generations.

21 The second question is whether the process established by  
22 the comprehensive plan for seeking a change in zone from SMR to  
23 SM is so unreasonable on its face that we would be justified in  
24 declaring it in violation of Goal 5 at the present time. The  
25 process basically requires that the applicant for a change in  
26 zone from SMR to SM demonstrate a need for the resource in  
order to meet the county's resource needs for the next five  
years.<sup>2</sup> The applicant must also show that the site is in the  
closest proximity to the utilization area of any other sites or

1 that the site is the most economically feasible. We believe  
2 the county's requirements are not on their face unreasonable  
3 standards for an applicant to meet.

4 The county is required by its comprehensive plan policies  
5 to maintain a study of the quality, location, quantity and type  
6 of mineral and aggregate resources in the county. The county  
7 must make this study available to an applicant who requests a  
8 zone change, and the information contained in that study should  
9 be of assistance to the applicant in proving what the resource  
10 needs for the county will be for the next five years.

11 Requiring an applicant for a change in zone to prove a need  
12 for the zone change as well as a lack of available, alternative  
13 or better suited sites for the zone change is certainly not  
14 novel to land use planning in Oregon. Such a requirement was  
15 imposed on all zone changes by the Supreme Court in Fasano v.  
16 Washington County Commissioners, 264 Or 574, 507 P2d 23 (1973),  
17 and existed in Oregon as a general law requirement until  
18 recently eliminated in Neuberger v. City of Portland, 288 Or  
19 155, \_\_\_ P2d \_\_\_ (1979). The fact that it may be difficult to  
20 prove there is a need to allow development of an applicant's  
21 resource site in order to meet the needs of the county for a  
22 five year period is not alone grounds for declaring the need  
23 requirement in violation of Goal 5. Presumably, if a need in  
24 fact exists in the county for additional mineral and aggregate  
25 resources, this need can be expressed to and felt by the  
26 appropriate county officials. It has not been demonstrated

1 that the criteria can not be met with the result that sites  
2 designated SMR will never be allowed to be developed to meet  
3 the resource needs of the county. We do not believe the  
4 criteria on their face are so unreasonable as to be in  
5 violation of Goal 5.<sup>3</sup>

6 The third question in this case is whether, as a general  
7 proposition, Goal 5 allows a jurisdiction to permit less than  
8 full utilization of a mineral or aggregate resource site when  
9 on or off-site conflicting uses have first been identified. We  
10 believe that it does. Goal 5 contains a built in conflict  
11 resolution mechanism: the requirement that the county develop  
12 a program which will achieve Goal 5's purpose of protecting  
13 natural resources. If the purpose of Goal 5 were to require  
14 full utilization of the resource potential of the site  
15 notwithstanding conflicting uses, there would be little point  
16 in requiring development of a program. All the goal would  
17 require is that regardless of whether conflicting uses for the  
18 site had been identified, the resource should be managed to  
19 preserve its original character.

20 The critical question involved in this appeal is whether  
21 Deschutes County has in its plan and implementing ordinance  
22 developed an adequate program to achieve Goal 5's objective  
23 when conflicting uses are identified. We again quote from Goal  
24 5:

25 "\*\*\*Where conflicting uses have been identified the  
26 economic, social, environmental and energy consequences of  
the conflictng uses shall be determined and programs

1 developed to achieve the goal."

2 Once the aggregate and mineral resources have been  
3 inventoried, the jurisdiction must establish a process whereby  
4 uses which may conflict with utilization or preservation of  
5 these resources for the future will be balanced against the  
6 present or future need for these resources. The balancing  
7 process must cause an analysis to be made of the economic,  
8 social, environmental and energy consequences of allowing the  
9 conflicting uses. The process must result in a showing of how  
10 the jurisdiction will decide, and on what standards, whether to  
11 allow the conflicting uses and, if so, with what conditions, if  
12 any.

13 We turn to an examination of Deschutes County's policies  
14 and implementing ordinances to determine whether it has  
15 established a balancing process required by Goal 5. We  
16 conclude it has not. Deschutes County's policies and  
17 implementing ordinances do not require that future conflicting  
18 uses be analyzed to determine the economic, social, energy or  
19 environmental consequences of allowing the uses before they may  
20 be allowed. Nor is there any process in Deschutes County's  
21 plan policies or implementing ordinance by which the county,  
22 once those consequences have been identified, decides whether  
23 the use should be allowed and if so, under what, if any,  
24 conditions. The only authority which the county has is to vary  
25 the setback requirements for development on lots created after  
26 the effective date of the plan and ordinance. If someone wants

1 to put a house on a pre-existing lot adjacent to a resource  
2 site and within the minimum setback requirements of the  
3 applicable zone, not only is the house automatically permitted  
4 but the county has no authority to restrict placement of the  
5 house so as to avoid or lessen the potential adverse impact of  
6 the house on the adjacent resource site. In addition, the  
7 county has no authority to require development of screening or  
8 other barriers on the lot to mitigate potential adverse  
9 consequences from development of the resource site.<sup>4</sup>

10 The conflict levels established by the county do not  
11 achieve the purpose of Goal 5 because the emphasis here is on  
12 restricting operation of the resource site rather than  
13 evaluating proposed conflicting uses for their adverse impact  
14 on the resource. Within each of these conflict levels, uses on  
15 land adjacent to resource sites may be allowed without any  
16 consideration of the consequences of the use or uses against  
17 the need to protect the resource. Failure to provide for  
18 consideration of the consequences of the conflicting use or  
19 uses is inconsistent with Goal 5.

20 For the foregoing reasons, Deschutes County's comprehensive  
21 plan and implementing ordinance must be remanded to the county  
22 for further proceedings consistent with this opinion.

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FOOTNOTES

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4 The county established five conflict levels (0 through IV)  
5 into one of which it placed every known resource site. The  
6 significance of the conflict level for a given site is that the  
7 higher the conflict level the more severe can be the  
8 restrictions on operation of the site.

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2  
10 It may be that, in a particular case, given the nature of  
11 the resource and its proximity to market areas outside the  
12 county, in determining whether to allow development of the use  
13 the county would be required to consider "need" for the  
14 resource in terms other than the county's need. We do not  
15 address this issue, other than to note its existence, because  
16 the particular case mentioned is not before us, at least to our  
17 knowledge.

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3  
19 We do not address, as an issue of violation of Goal 5,  
20 whether the "need" criteria are sufficiently specific to avoid  
21 ad hoc decision making which may result in discrimination in  
22 favor of some persons against others. See Anderson v. Peden,  
23 284 Or 313, 587 P2d 59 (1978). Not only is the specificity of  
24 the "need" criteria not a Goal 5 issue, we have no contention  
25 in this case that the county has adopted or is following a  
26 policy of unlawfully discriminating in favor of some persons  
27 against others. Anderson v. Peden, supra, 284 Or at 326.

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29 This is not to say that a county could not, as part of its  
30 comprehensive plan planning process, determine in advance some  
31 uses which could be permitted outright in areas adjacent to  
32 resource sites so as to avoid having to analyze each proposed  
33 use under the criteria in Goal 5 and employ a balancing test to  
34 determine whether the proposed use should be allowed. But, if  
35 the approach of determining in advance the uses which will be  
36 permitted outright is followed, the jurisdiction will have to  
37 still (1) determine the economic, social, environmental and  
38 energy consequences of the permitted uses and, (2) employ a  
39 balancing test to determine whether the uses should be allowed,  
40 given these consequences, and if so, under what, if any,  
41 conditions.

