

1 BEFORE THE LAND USE BOARD OF APPEALS  
2 OF THE STATE OF OREGON  
3

4 DUANE JORGENSEN, RICHARD McDANIEL,  
5 DEBRA O'ROURKE, PAUL PETERSON,  
6 PAUL DALGLIESH, BOBBIE DALGLIESH  
7 and DOUG WATTS,  
8 *Petitioners,*  
9

10 vs.

11 UNION COUNTY,  
12 *Respondent,*  
13

14 and

15 R-D MAC, INC.,  
16 *Intervenor-Respondent.*  
17

18 LUBA No. 99-126  
19

20 FINAL OPINION  
21 AND ORDER  
22

23 Appeal from Union County.  
24

25 Debra O'Rourke, La Grande, filed the petition for review and argued on her own  
26 behalf. Richard McDaniel, La Grande, argued on his own behalf.  
27

28 No appearance by respondent.  
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30 Paul Hribernick, Portland, filed the response brief and argued on behalf of intervenor-  
31 respondent. With him on the brief was Black Helterline, LLP.  
32

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

36 REMANDED

37 03/09/2000  
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39 You are entitled to judicial review of this Order. Judicial review is governed by the  
40 provisions of ORS 197.850.  
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**NATURE OF THE DECISION**

Petitioners appeal the county’s approval of a conditional use permit to conduct an aggregate extraction operation.

**MOTION TO INTERVENE**

R-D Mac, Inc. (intervenor), the applicant below, moves to intervene on the side of the county. There is no opposition to the motion and it is allowed.

**FACTS**

The subject property is a 130-acre parcel zoned for exclusive farm use (EFU). It is listed in the county’s Statewide Planning Goal 5 inventory as a “1-B” aggregate resource site. The “1-B” designation generally indicates that there is some evidence of the existence of a Goal 5 resource, but the information is not adequate to determine whether that resource is significant. The property is located within an Airport Overlay Zone, and the southeast corner of the property is approximately 1,000 feet from the Union County Public Airport. Surrounding land uses consist of 5 to 40-acre farm parcels. The immediate area is characterized by a high water table with an average depth of five to six feet below the ground surface through late summer.

In March 1999, intervenor submitted an application to the county to extract aggregate from a 65-acre portion of the property. The March 1999 application also requested approval for associated crushing, concrete production, asphalt batching, storage, truck staging, an office and related uses. Intervenor proposed reducing the level of the water table in order to dig six pits, and allowing the pits to fill again with water once the aggregate has been extracted. The proposed operation will result in creation of six ponds from 6 to 13 acres in size located approximately 6,000 to 9,000 feet from the nearest runway at the county airport.

1 Intervenor concurrently applied for a “Bird Strike Analysis Conditional Use” permit.<sup>1</sup> The  
2 county processed both applications together and, on May 24, 1999, the planning commission  
3 approved both applications. Petitioners appealed to the board of county commissioners, who  
4 denied the appeal on July 14, 1999, thus approving the applications.

5 This appeal followed.

6 **FIRST ASSIGNMENT OF ERROR**

7 Petitioners argue that the county’s decision misconstrued applicable law, and failed to  
8 adopt adequate findings supported by substantial evidence, in failing to set standards  
9 pertaining to the quality and quantity of aggregate available, as required by Union County  
10 Zoning Ordinance (UCZO) 21.07(3)(A)(1).<sup>2</sup>

11 The county’s finding with respect to UCZO 21.07(3)(A)(1) states:

12 “\* \* \* We find that the Applicant has dug numerous test holes and believes  
13 that a large quantity of high-quality resource is available from preliminary  
14 information. We find that the Site was previously placed on the County’s ‘1-  
15 B’ inventory pending more complete information about the property. We find  
16 that under the State Land Use Planning laws, the Applicant may proceed with

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<sup>1</sup>As described below, the county’s ordinance requires a Bird Strike Conditional Use permit for any development that proposes to create water impoundments within a specified distance of the county airport.

<sup>2</sup>UCZO 21.07(3)(A) sets forth conditional use standards for mineral or aggregate extraction and processing, and provides in relevant part:

“Submitted plans and specifications shall contain sufficient information to allow the County staff or Planning Commission to set standards pertaining to:

“(1) *Location, quality, and quantity of resource available.*

“(2) Setback from property lines.

“(3) Location of vehicular access points.

“(4) Protection of pedestrians and vehicles through the use of fencing.

“(5) Prevention of the collection and stagnation of water at all stages of the operation.

“(6) Location and type of processing facilities.

“(7) Rehabilitation of the land upon termination of the operation.” (Emphasis added).

1 the conditional use application once the Site is inventoried even though[,]  
2 when the inventory decision was made, there was insufficient data to fully  
3 protect the property on a Goal 5 program. We find that the County is  
4 committed to do a full Goal 5 program and analysis for this property during,  
5 or prior to, the next periodic review of the Goal 5 resources. *We find that*  
6 *because the property is already on an inventory, there is no need for the*  
7 *County to set any standards pertaining to the location, quality and quantity of*  
8 *the resource available* and that the Applicant/operator will provide  
9 information to the County regarding these factors as the Site is developed.  
10 \* \* \*” Record 26-27 (emphasis added).

11 Petitioners contend that the county erred in relying on the property’s 1-B listing in the  
12 county’s Goal 5 inventory to avoid its obligation to make the findings required under UCZO  
13 21.07(3)(A) regarding the location, quality and quantity of the resource available. Petitioners  
14 explain that a 1-B listing indicates that not enough information on the quality and quantity of  
15 the resource is currently available to complete the Goal 5 process with respect to that site.  
16 OAR 660-016-0000(5)(b).<sup>3</sup> Petitioners argue that UCZO 21.07(3)(A) contains no exception  
17 to its requirements when a site is listed in the county’s Goal 5 inventory, and even if it did,  
18 such an exception would not apply to a 1-B listing, which is predicated on the inadequacy of  
19 information on quality and quantity. The county’s interpretation of UCZO 21.07(3)(A) to  
20 impose such an exception, petitioners argue, misconstrues that provision.

21 Intervenor responds that the board of commissioners’ interpretation of  
22 UCZO 21.07(3)(A) is consistent with the express language of that provision, and must be

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<sup>3</sup>OAR 660-016-0000(5)(b) provides that:

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

1 affirmed. ORS 197.829(1); *Clark v. Jackson County*, 313 Or 508, 836 P2d 710 (1992).<sup>4</sup> In  
2 any case, intervenor argues, the county did make findings, supported by evidence in the  
3 record, that there is a large quantity of high-quality alluvial aggregate deposits on the subject  
4 property.

5 We agree with intervenor that the county’s interpretation is consistent with the  
6 express language of UCZO 21.07(3)(A). Contrary to petitioners’ view of that provision,  
7 UCZO 21.07(3)(A) does not mandate that the county “set standards” with respect to each of  
8 the elements described at UCZO 21.07(3)(A)(1) through (7). Instead, UCZO 21.07(3)(A)  
9 requires an applicant to submit sufficient information to *allow* the county to set standards  
10 with respect to the described parameters. In other words, the county’s obligations under  
11 UCZO 21.07(3)(A) are framed permissively rather than as a mandate. The county’s  
12 interpretation of UCZO 21.07(3)(A), that it does not require the county to set standards  
13 pertaining to quality and quantity of the resource under certain circumstances, is consistent  
14 with the text of that provision.

15 Petitioners also appear to argue under this assignment of error that  
16 UCZO 21.07(3)(A) requires the county to complete the Goal 5 process for the subject  
17 property in evaluating intervenor’s conditional use application. However,  
18 UCZO 21.07(3)(A) does not state such a requirement, and petitioners have not established

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<sup>4</sup>ORS 197.829(1) provides in relevant part that:

“The Land Use Board of Appeals shall affirm a local government’s interpretation of its comprehensive plan and land use regulations, unless the board determines that the local government’s interpretation:

- “(a) Is inconsistent with the express language of the comprehensive plan or land use regulation;
- “(b) Is inconsistent with the purpose for the comprehensive plan or land use regulation;
- “(c) Is inconsistent with the underlying policy that provides the basis for the comprehensive plan or land use regulation; \* \* \*”

1 that the county erred in deferring completion of the Goal 5 process for the subject property  
2 until periodic review.

3 The first assignment of error is denied.

#### 4 **SECOND ASSIGNMENT OF ERROR**

5 Petitioners argue that the county’s findings with respect to UCZO 2.04 are inadequate  
6 and not supported by substantial evidence.<sup>5</sup> UCZO 2.04 implements ORS 215.296(1) in  
7 requiring a finding that a proposed conditional use in an EFU zone will not (a) force a  
8 significant change in accepted farm practices on surrounding lands; or (b) significantly  
9 increase the cost of accepted farm practices on surrounding lands devoted to farm use.  
10 Petitioners explain that the proposed use requires dewatering the mining pits down to 65 feet  
11 below the surface, which, petitioners argue, will lower the water table in the general area. If  
12 so, petitioners argue, the proposed operation will significantly impact farming practices in  
13 the area that rely on a high water table for “subirrigation,” and significantly increase the cost  
14 of farming practices to replace the lost subirrigation.<sup>6</sup> Petitioners contend that “lowering the  
15 water table even a foot takes moisture out of the zone where crops can benefit from it[.]”  
16 Petition for Review 7-8.

17 The county found compliance with UCZO 2.04 and ORS 215.296 based in part on a  
18 hydrologic study submitted by intervenor. The hydrologic study, authored by a registered  
19 geologist, concluded that the potential drawdown in the water table, the so-called “cone of  
20 depression,” from any of the dewatered mining pits would not exceed 87 feet from the edge  
21 of the pit and thus would have no measurable off-site impacts. The county concluded that,

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<sup>5</sup>Petitioners also argue under this assignment of error that the county’s decision is inconsistent with UCZO 21.01, 21.03, 21.06 and 21.07(3)(C). However, the assignment of error discusses only UCZO 2.04 and ORS 215.296, and their argument based on other criteria is inadequately developed for our review. *Deschutes Development v. Deschutes Cty.*, 5 Or LUBA 218, 220 (1982).

<sup>6</sup>“Subirrigation” is apparently the use of a high water table to water crops and pasture, obviating or reducing the need for above-ground irrigation.

1 given the required setbacks from the property line, any impacts on the water table would be  
2 confined to the subject property, or would be “minor in nature” and not come near any of the  
3 wells that have been identified on adjacent properties. Record 12.

4 Petitioners argue that a reasonable person would not rely on the hydrologic study to  
5 demonstrate compliance with UCZO 2.04 and ORS 215.296, because it “does not guarantee  
6 that there will be no offsite effect on the water table and surrounding well[s].” Petition for  
7 Review 7. Petitioners also identify several alleged flaws in the study: its calculations are  
8 based on a well depth of 120 feet, rather than on shallower depths where water moves faster  
9 through the soil; it failed to include data from one of the well logs; and it is inconsistent with  
10 a hydrologic study conducted for another mining operation at a different, but geologically  
11 similar site. Finally, petitioners contend that the county failed to address issues raised below  
12 regarding the impact of dewatering on subirrigation and neighboring wells.

13 Intervenor responds, and we agree, that UCZO 2.04 and ORS 215.296 do not require  
14 a guarantee of no off-site adverse impacts. Those criteria instead require that the proposed  
15 use will not force a *significant* change in accepted farm practices or *significantly* increase the  
16 cost of those practices. Intervenor also disputes that the hydrologic study is flawed for any  
17 of the reasons petitioners assert. We agree with intervenor that petitioners have not  
18 demonstrated either that the study is flawed in the manner described or, if so, that the flaws  
19 so undermine its conclusion that a reasonable person would not rely on it. We conclude that  
20 the county’s finding of compliance with UCZO 2.04 and ORS 215.296 with respect to  
21 impacts from dewatering is supported by substantial evidence. Finally, we disagree with  
22 petitioners that the county failed to address the impacts of dewatering on subirrigation and  
23 neighboring wells; the county did address those issues, Record 7-9, and petitioners do not  
24 identify any error in those findings.

25 The second assignment of error is denied.

1 **THIRD ASSIGNMENT OF ERROR**

2 In this assignment of error, petitioners contend that the county erred in finding  
3 compliance with or failing to consider a number of code provisions and comprehensive plan  
4 policies that, petitioners argue, require that the proposed use be compatible with adjacent or  
5 nearby uses. However, the only provisions petitioners discuss are UCZO 21.06(1) and Union  
6 County Land Use Plan (LUP) Goal 3, Plan Policy 4, and we confine our analysis to that  
7 discussion.

8 Plan Policy 4 implements Statewide Planning Goal 3 (Agricultural Land), and  
9 provides:

10 “That the rural character and farming activities of agricultural uses will be  
11 protected to preserve the scenic attractiveness and economic, social, and  
12 physical living conditions desirable to farm families.”

13 UCZO 21.06(1) requires that

14 “A conditional use shall ordinarily comply with the standards of the zone  
15 concerned for uses permitted outright except as specifically modified by the  
16 Planning Commission in granting the conditional use.”

17 Petitioners contend that the county has previously interpreted UCZO 21.06(1), part of  
18 the general standards for conditional uses, to require a “test of compatibility” with adjacent  
19 and nearby land uses within the applicable zone. With respect to both UCZO 21.06(1) and  
20 Plan Policy 4, petitioners argue that the proposed use will generate dust, fumes and noise that  
21 are incompatible with neighboring farm residences and which will fail to preserve the  
22 physical living conditions desirable to farm families. In particular, petitioners point out that  
23 an asthmatic resides in one nearby farm residence, and that the county failed to consider  
24 whether these provisions require site-specific standards to protect that person from dust and  
25 fumes. In addition, petitioners contend that the county erred in failing to consider the  
26 cumulative impacts of dust, fumes, noise, etc. from the entire operation. Finally, petitioners  
27 cite several issues that the county allegedly failed to properly consider: traffic impacts,

1 lowered property values, impacts on aesthetics, inadequate contamination monitoring, and  
2 contamination of irrigation ditches and nearby creeks.

3 **A. Plan Policy 4**

4 Intervenor responds that Plan Policy 4 is not an approval criterion applicable to  
5 conditional use permit applications, and that petitioners have not identified any code or plan  
6 provision that requires that such applications comply with Plan Policy 4.

7 Petitioners' assertion that Plan Policy 4 is a mandatory applicable approval criterion  
8 rests on the terms of that provision considered in context with the following language from  
9 the plan introduction:

10 “\* \* \* The Plan map and the Plan policies together comprise the legally-  
11 binding portion of the Plan.

12 “Plan policies are statements intended to supplement the Plan map, and to be  
13 used as guidelines by both private and public sectors in interpreting the Plan  
14 and for other land use planning decisions. Again, such policy statements have  
15 the same level of legality or importance as the Plan map itself. Any planning  
16 decisions knowingly made contrary to the policies should be supported with  
17 findings justifying such actions. Policies may serve as the basis of appealing  
18 a planning decision.

19 “Plan recommendations are recommendatory rather than statutory, and are  
20 intended as suggested measures to assist in implementation of the Plan.” LUP  
21 6.

22 Intervenor contends that the above-quoted passage indicates that plan policies such as  
23 Plan Policy 4 are merely “guidelines,” rather than mandatory approval criteria applicable to  
24 specific land use decisions. *See Downtown Comm. Assoc. v. City of Portland*, 80 Or App  
25 336, 339-41, 722 P2d 1258, *rev den* 302 Or 86 (1986) (discussing the nonmandatory status of  
26 guidelines). Intervenor notes that the passage contemplates that land use decisions can be  
27 contrary to the policies, although such contrary decisions “should be supported with findings  
28 justifying such actions.” However, the passage can also be read to support the view that plan  
29 policies are more than mere guidelines. The passage distinguishes between plan policies and  
30 nonmandatory plan recommendations; it requires findings if a land use decision is made

1 contrary to the policies; and it states that policies can serve as a basis for appealing (and  
2 hence potentially reversing) a planning decision.

3 Although the challenged decision does not specifically address the applicability of  
4 Plan Policy 4, it does contain a general determination that comprehensive plan standards do  
5 not apply to conditional use applications:

6 “We find that a conditional use application is in compliance with the County’s  
7 comprehensive plan if it meets the conditional use standards and unless there  
8 is a specific provision incorporating the [comprehensive plan] standards, they  
9 are not applicable in a conditional use application. We find that Union  
10 County’s conditional use ordinance does not have a standard which  
11 incorporates its comprehensive plan goals and policies. Accordingly, we  
12 conclude that the County’s comprehensive plan standards do not apply to the  
13 application.” Record 32.

14 The foregoing interpretation does not address any particular conditional use criteria  
15 or comprehensive plan language; it relies on the absence from the conditional use criteria of  
16 any language incorporating comprehensive plan standards. It is unclear under such  
17 circumstances whether the county’s interpretation is adequate for review and entitled to the  
18 deference generally accorded local government interpretations of local provisions.  
19 ORS 197.829(1). Even if adequate and subject to a deferential standard of review, it is not  
20 clear that such an interpretation of a land use regulation would trump a facially conflicting  
21 comprehensive plan provision, given the hierarchical superiority of comprehensive plans.  
22 However, the comprehensive plan provision at issue here, Plan Policy 4, does not expressly  
23 state, and is not worded so as to necessarily imply, that the provision applies in the context of  
24 specific land use applications. The introductory plan language petitioners rely on is  
25 internally inconsistent and is of little assistance in determining whether Plan Policy 4 is a  
26 mandatory approval criterion applicable to conditional use permits in EFU zones. In short,  
27 nothing in the comprehensive plan drawn to our attention facially conflicts with the board of  
28 commissioners’ interpretation of the conditional use criteria. We conclude that, even if the  
29 county’s interpretation is inadequate and thus not subject to deferential review, petitioners

1 have not established that Plan Policy 4 is a mandatory approval criterion applicable to  
2 conditional use permit applications.

3 This subassignment of error is denied.

4 **B. UCZO 21.06(1)**

5 Petitioners also dispute the county’s findings of compliance with UCZO 21.06(1), in  
6 which the county concluded that, to the extent UCZO 21.06(1) is an approval criterion, the  
7 impacts of the proposed operation on adjoining property have been mitigated to the point  
8 where the proposed use is compatible with its surroundings.

9 Petitioners’ arguments to the contrary simply express petitioners’ disagreement with  
10 the county, and do not demonstrate that the county’s findings are inadequate or not supported  
11 by substantial evidence. Petitioners cite no authority that requires the county to adopt site-  
12 specific standards to address specific medical problems of adjoining residents, nor any  
13 requirement that the county consider cumulative effects of dust, noise, etc. With respect to  
14 the other compatibility issues that the county allegedly failed to consider, intervenor argues  
15 that those issues were not raised below and are thus waived. ORS 197.763(1).<sup>7</sup> In any case,  
16 intervenor points to findings that address those issues as well as supporting evidence. We  
17 agree with intervenor that, even if the cited issues were raised below, the county adopted  
18 findings addressing those issues. Petitioners point to evidence that is inconsistent with those  
19 findings, but if a reasonable person would rely on the evidence the county chose to rely on,  
20 the choice between conflicting evidence is up to the county. *Dodd v. Hood River County*,

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<sup>7</sup>ORS 197.763(1) provides:

“An issue which may be the basis for an appeal to the Land Use Board of Appeals shall be raised not later than the close of the record at or following the final evidentiary hearing on the proposal before the local government. Such issues shall be raised and accompanied by statements or evidence sufficient to afford the governing body, planning commission, hearings body or hearings officer, and the parties an adequate opportunity to respond to each issue.”

1 317 Or 172, 179, 855 P2d 608 (1993); *Tigard Sand and Gravel Inc. v. Clackamas County*, 33  
2 Or LUBA 124, 138, *aff'd* 149 Or App 417, 943 P2d 1106 (1997).

3 This subassignment of error is denied.

4 The third assignment of error is denied.

5 **FOURTH ASSIGNMENT OF ERROR**

6 Petitioners argue that the county’s approval of the bird strike conditional use permit  
7 misconstrues UCZO 16.09 and 20.10(3)(e), and is not supported by adequate findings or  
8 substantial evidence. Petitioners explain that intervenor’s application for a bird strike permit  
9 was supported by a study, authored by a wildlife biologist. However, petitioners contend  
10 that the study is flawed or inadequate for several reasons, and that the county’s findings do  
11 not demonstrate compliance with UCZO 16.09 and UCZO 20.10(3)(e).

12 **A. UCZO 16.09**

13 UCZO 16.00 to 16.09 provide the applicable criteria for bird strike conditional use  
14 permits. In relevant part, UCZO 16.09(2) requires that:

15 “\* \* \* A bird strike study shall consider:

16 “(a) A description of the proposed project, its location in relation to the  
17 airport, and the bird strike study area, which shall include at least the  
18 project site, the airport property, all lands within the bird strike hazard  
19 planning area and other surrounding habitat areas which form the local  
20 bird ecosystem;

21 “(b) A description of existing and planned airport operations and air traffic  
22 patterns and a history of any available bird strike incidents.

23 “(c) Baseline information on existing bird habitats, species and populations  
24 including seasonal populations of waterfowl, gulls and other bird  
25 species using the area;

26 “\* \* \* \* \*

27 “(e) An evaluation of the anticipated effect of the proposal on bird habitats  
28 in the study area and on bird activity and flight patterns. This  
29 evaluation shall consider proposed mitigation measures that meet the  
30 requirements of [UCZO 16.09(5)]; and

1           “(f) An evaluation of the anticipated effect of the proposal on the  
2           population density, behavior patterns and species composition of birds  
3           within the bird strike study area.”

4           The county adopted findings with respect to UCZO 16.09(2)(a) through (f), as  
5 follows:

6           “We find that the Applicant submitted a bird strike study and addendum. We  
7           find that these documents specifically address each element of this approval  
8           criterion a. through f. We find that the study was developed by professional  
9           wildlife biologists and coordinated with the FAA [Federal Aviation  
10          Authority] and the FAA’s technical representative. We find that FAA and  
11          USDA [United States Department of Agriculture], Animal Damage Control  
12          Unit comments have been incorporated into the scope of the study and the  
13          final bird strike study conclusions. Accordingly, this criterion is met.”  
14          Record 47.

15          Petitioners challenge these findings and the study on several grounds. However, we note at  
16          the outset that UCZO 16.09(2) appears to set out informational requirements and does not  
17          itself consist of approval criteria. As the decision suggests, the actual approval criteria for a  
18          bird strike conditional use permit are found at UCZO 16.09(4) and (5). Petitioners do not  
19          challenge the county’s detailed findings of compliance with those approval criteria. Because  
20          UCZO 16.09(2) does not appear to impose approval criteria, it is questionable that any  
21          findings with respect to those provisions are required, or that inadequacy in those findings  
22          could provide a basis to reverse or remand the challenged decision. *See Gettman v. City of*  
23          *Bay City*, 28 Or LUBA 116, 119 (1994) (a local government determination that an  
24          inapplicable code standard is satisfied is harmless error, and provides no basis for reversal or  
25          remand). Accordingly, we confine our analysis to petitioners’ evidentiary challenges to the  
26          adequacy of the study to support the county’s decision, and do not address petitioners’  
27          challenge to the adequacy of the county’s findings of compliance with UCZO 16.09(2)(a)  
28          through (f).

29          Petitioners first argue that the study is inadequate under UCZO 16.09(2)(a) because it  
30          “only addressed the whole Grande Ronde Valley and the Ladd Marsh – Hot Lake area.”  
31          Petition for Review 17. Intervenor responds, and we agree, that the study appears to address

1 all the areas required by UCZO 16.09(2)(a), including out of state migratory species, and that  
2 petitioners do not explain what areas should have been addressed and were not.

3 Petitioners also argue that the study is flawed because its ultimate conclusion is based  
4 on evidence that departure air patterns from the airport take aircraft to the west away from  
5 the subject property. Petitioners cite to evidence that at least some planes depart from the  
6 airport in a pattern that takes them directly over the subject property.<sup>8</sup> Intervenor responds  
7 that the study’s conclusions and associated county findings regarding departure patterns are  
8 supported by substantial evidence in the record, and the choice between conflicting evidence  
9 belongs to the county. We agree. *Tigard Sand and Gravel Inc.*, 33 Or LUBA at 138.

10 Petitioners next argue that the study fails to establish “baseline information on  
11 existing bird habitats” as required by UCZO 16.09(2)(c). However, intervenor cites to  
12 portions of the study that appear to do just that. Petitioners do not explain why those  
13 portions of the study are insufficient to establish the information required by UCZO  
14 16.09(2)(c).

15 Finally, petitioners contend that the study is inadequate for purposes of  
16 UCZO 16.09(2)(e) and (f), because it fails to consider creation of non-waterfowl habitat, the  
17 puddling effect of pumped water applied to groundcover, and whether proposed mitigation is  
18 adequate. Intervenor responds that the study considered and the county adopted findings on  
19 non-waterfowl habitat and the application of pumped water to groundcover at agronomic  
20 rates. Intervenor also cites to findings and supporting evidence demonstrating that proposed  
21 mitigation will ensure compliance with relevant approval criteria. We agree with intervenor  
22 that petitioners’ arguments under this subassignment of error fail to establish that the study or  
23 the county’s findings are inadequate or unsupported by substantial evidence.

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<sup>8</sup>Part of the evidence petitioners cite to is a video that is not in the record, although petitioners’ argument suggests they believe that the video is in the record. No record objection was filed in this case contesting the omission of the video from the record.

1 This subassignment of error is denied.

2 **B. UCZO 20.10(3)(E)**

3 UCZO 20.10(3) provides criteria for construction within a Public Airport Zone, and  
4 provides in relevant part:

5 “\* \* \* [R]eview of the Site Plan in a Public Airport Zone shall assure that the  
6 following are not allowed:

7 “\* \* \* \* \*

8 “(E) Creation of water impoundments or landfills which would attract  
9 birds, creating bird strike hazards.”

10 The county’s finding of compliance with UCZO 20.10(3)(E) states:

11 “As explained in these findings, the proposed activity on the site will create  
12 water impoundments. However, these will not significantly alter bird flight  
13 patterns or behavior and will not create any significant increase in bird strike  
14 hazards. The proposed operation will include mitigating design features and  
15 will not create significant bird attractants or bird strike hazards.” Record 52.

16 Petitioners argue that UCZO 20.10(3)(E) is not met in this case, because that  
17 provision prohibits “creation of water impoundments or landfills which would attract birds,  
18 creating bird strike hazards.” According to petitioners, it is undisputed that intervenor  
19 proposes to create six water impoundments that will attract birds and create additional bird  
20 strike hazards. We understand petitioners to argue that the county’s finding of compliance  
21 with UCZO 20.10(3)(E) because the water impoundments will not “significantly” increase  
22 bird strike hazards is inconsistent with and unresponsive to that provision, which appears to  
23 broadly prohibit creation of additional bird strike hazards, regardless of whether those  
24 hazards are “significant.”

25 Intervenor responds that UCZO 20.10(3)(E) must be read together with the provisions  
26 governing bird strike conditional use permits at UCZO 16.08 and 16.09.<sup>9</sup> The focus of those

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<sup>9</sup>For example, UCZO 16.08(4) provides as follows:

1 code provisions, intervenor argues, is whether the proposed development creates a *significant*  
2 additional bird strike hazard. Intervenor argues that UCZO 20.10(3)(E) is a general plan  
3 review standard for development within the Public Airport Zone, while UCZO 16.08 and  
4 16.09 provide specific standards governing bird strike conditional use permits. Intervenor  
5 suggests that UCZO 20.10(3)(E) can be read consistently with UCZO 16.08 and 16.09 and, if  
6 the two sets of standards conflict, intervenor argues that the specific should control the more  
7 general standard.

8 We agree with petitioners that UCZO 20.10(3)(E) appears to flatly prohibit  
9 impoundments that create additional bird strike hazards, without the express qualifications  
10 stated in UCZO 16.08 and 16.09, and that the county’s findings are therefore unresponsive to  
11 the terms of UCZO 20.10(3)(E). The county’s findings do not address the apparent conflict  
12 between the two sets of standards. It may be, as intervenor suggests, that the standards can  
13 be read consistently with each other, or that any conflict can be resolved in favor of UCZO  
14 16.08 and 16.09. However, given our uncertainty regarding the role each standard plays in  
15 the county’s scheme of land use regulation, we decline to resolve that conflict in the first  
16 instance. That determination is better left to the county.

17 This subassignment of error is sustained.

18 The fourth assignment of error is sustained, in part.

19 **FIFTH ASSIGNMENT OF ERROR**

20 Petitioners argue that the county misconstrued the applicable law by failing to  
21 consider whether approval of the proposed mining operation was consistent with federal law

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“The Planning Commission shall make a final decision per [UCZO] 24.12 based on their determination whether the applicant has satisfactorily prepared a Bird Strike Study per [UCZO] 16.09 and the applicant has demonstrated the proposed water impoundment is not likely to result in a significant increase in hazardous bird movement across runways and approach corridors due to feeding, watering or roosting. Significant is defined as a level of increased flight activity by birds across approach corridors and runways that is more than incidental or occasional, considering the existing ambient levels of flight activity by birds in the vicinity.”

1 and the county’s obligations as recipient of federal aviation improvement grants, with respect  
2 to impacts on the county airport.

3 Intervenor responds that petitioners failed to raise any issue below regarding  
4 compliance with federal law or the county’s obligation as recipient of federal grants, and thus  
5 those issues are waived. Petitioners do not cite to any place in the record where such issues  
6 were raised. Accordingly, we agree with intervenors that such issues are waived. *Coyner v.*  
7 *City of Portland*, 23 Or LUBA 79, 82 (1992) (where the respondent contends an issue was  
8 not raised below, and the petitioner fails to cite any portions of the record which he contends  
9 demonstrate that he raised the issue during the local proceedings, that issue may not be raised  
10 in an appeal to LUBA).

11 The fifth assignment of error is denied.

12 **SIXTH ASSIGNMENT OF ERROR**

13 Petitioners argue that the groundwater and aquifer underlying the subject property is  
14 identified in the county’s comprehensive plan as a “3A” Goal 5 water resource, and that the  
15 county failed to address potential conflicts between the proposed use and that water resource,  
16 as required by UCZO 20.09(4).<sup>10</sup>

17 UCZO 20.09(1) provides that any land use action that could have an impact on  
18 specified types of significant Goal 5 resources must undergo county review “for appropriate  
19 public notification measures and conflict resolution.”<sup>11</sup> UCZO 20.09(3) provides that when

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<sup>10</sup>A “3-A” designation indicates that the resource is of such importance that the resource site should be protected and all conflicting uses prohibited. OAR 660-016-0010(1).

<sup>11</sup>UCZO 20.09(1) provides:

“Any land use action requiring County zoning or partitioning approval or any activity listed as a conflict in this ordinance which is within 1320 feet of or could have an impact on:

“A. Significant historical sites or structures,

“B. Significant scientific or natural areas,

1 a 3A designation has been made in the comprehensive plan, the applicant for a proposed use  
2 affecting that resource must either coordinate with responsible agencies to develop a plan  
3 which allows for both resource preservation and the proposed use, or undergo conditional use  
4 review.<sup>12</sup> UCZO 20.09(4) further provides that

5 “Under the conditional use process land use decisions will consider the  
6 economic, social, environmental, and energy consequences when attempting  
7 to mitigate conflicts between development and resource preservation.”

8 Petitioners argue that the county conducted a conditional use process on a proposal that  
9 affects a 3A resource, but failed to address compliance with UCZO 20.09(4).

10 Intervenor responds, first, that no issue concerning UCZO 20.09 was raised below,  
11 and thus any such issues are waived. Further, intervenor disputes that the groundwater  
12 underlying the subject property is a 3A site on the county’s Goal 5 inventory or, if it is, that  
13 UCZO 20.09 includes such groundwater resources among the Goal 5 resources protected by  
14 that provision.

15 With respect to waiver, intervenor concedes that petitioners argued below that the  
16 subject property is an inventoried Goal 5 groundwater resource, and that “[a]llowing mining,

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“C. Significant aggregate resource sites,

“D. Big game critical wildlife habitat areas and big game winter range,

“E. Significant avian habitat,

“F. Significant wetlands, and

“G. Designated Scenic Waterways identified by the Union County Land Use Plan, shall be reviewed by the Planning Director for appropriate public notification measures and conflict resolution.”

<sup>12</sup>UCZO 20.09(3)(A) provides in relevant part:

“When a 3A or 3C (limit conflicting uses) decision has been made as indicated in the comprehensive plan, the applicant must, in coordination with the responsible agency, develop a management plan which would allow for both resource preservation and the proposed use. If the responsible agency and the applicant cannot agree on such a management plan, the proposed activity will be reviewed through the conditional use process. 3A sites will be preserved where potential conflicts may develop. \* \* \*”

1 processing and dewatering at this site compromises the Goal 5 water resource in the area.”  
2 Record 661. If petitioners are correct that the county identified the groundwater underlying  
3 the subject property as a 3A site in completing its Goal 5 process, then the county  
4 presumably developed a program to achieve the goal, *i.e.* to preserve the resource from  
5 conflicting uses. *See* OAR 660-016-0010(1) (all conflicting uses are prohibited on a 3A  
6 site); UCZO 20.09(3)(A) (“3A sites will be preserved where potential conflicts may  
7 develop”). Part of that program is, apparently, UCZO 20.09. While petitioners’ testimony  
8 did not cite UCZO 20.09, we conclude that that testimony was sufficient to raise the primary  
9 issue presented in this assignment of error: whether the county was required to protect an  
10 inventoried Goal 5 resource, groundwater, from conflicting uses. ORS 197.763(1); *see*  
11 *DLCD v. Curry County*, 33 Or LUBA 728, 733 (1997) (where an issue is adequately raised  
12 below, ORS 197.763 does not limit particular arguments related to that issue on appeal).

13           However, intervenor disputes that the groundwater underlying the subject property is,  
14 in fact, in the county’s Goal 5 inventory. Petitioners append to the Petition for Review  
15 various documents apparently from the county’s Goal 5 inventory. The county submitted  
16 different portions of the Goal 5 inventory that appear to designate “groundwater resources”  
17 as 3A, and prescribe different protections for confined and unconfined aquifers. However,  
18 we cannot determine from either submission whether petitioners are correct that the  
19 groundwater underlying the subject property is included in the county’s Goal 5 inventory or,  
20 if so, that that groundwater is subject to protection under UCZO 20.09. As intervenor notes,  
21 “groundwater” is not among the Goal 5 resources listed in UCZO 20.09(1). On the other  
22 hand, UCZO 20.09(3) appears to require protection of 3A-designated resources generally,  
23 without reference to the resources listed at UCZO 20.09(1). It is not clear whether UCZO  
24 20.09(3) and 20.09(4) apply to 3A resources such as groundwater that are not listed at UCZO  
25 20.09(1).

1           Where petitioners raise a legitimate issue below regarding compliance with an  
2 approval criterion, the local government must adopt findings responding to that issue. *Rouse*  
3 *v. Tillamook County*, 34 Or LUBA 530, 536 (1998); *Thomas v. Wasco County*, 30 Or LUBA  
4 302, 310 (1996). We conclude that petitioners raised a legitimate issue below regarding  
5 conflicts with a putative Goal 5 resource and compliance with UCZO 20.09. The county's  
6 findings do not address that issue and, accordingly, remand is appropriate for the county to  
7 do so. If the county determines that groundwater underlying the subject property is a 3A  
8 Goal 5 resource, then the county should also resolve intervenor's further contention that that  
9 resource is not among the Goal 5 resources that requires consideration under UCZO 20.09.

10           The sixth assignment of error is sustained.

11           The county's decision is remanded.