BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

MURPHY L. CLARK, Petitioner, vs. JACKSON COUNTY, Respondent, and DARRELL STANLEY and EUGENE STANLEY, Intervenors-Respondent.	LUBA No. 88-114 FINAL OPINION AND ORDER

Appeal from Jackson County.

Murphy L. Clark, Eagle Point, filed the petition for review and argued on his own behalf.

Wendie L. Kellington, Medford, filed a response brief and argued on behalf of respondent.

Daniel C. Thorndike, Medford, filed a response brief and argued on behalf of intervenors-respondent. With him on the brief was Blackhurst, Hornecker, Hassen & Thorndike and Ervin B. Hogan.

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

REMANDED 03/31/89

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

Opinion by Holstun.

NATURE OF THE DECISION

Petitioner challenges a board of county commissioners' order granting a conditional use permit for a surface mining operation on 40 acres of land zoned Exclusive Farm Use (EFU).

MOTION TO INTERVENE

Darrel and Eugene Stanley, the applicants below, move to intervene in this proceeding on the side of respondent. There is no opposition to the motion, and it is allowed.

FACTS

On June 9, 1988 the Jackson County Department of Planning and Development (department) gave notice that the planning director had tentatively approved a conditional use permit to allow intervenors-respondent (intervenors) "to conduct surface mining of shale deposits over a 10-15 year period * * *." Record 182. According to the department's notice, recipients of the notice who opposed approval of the application could request a public hearing or submit information concerning the application. Id. The notice further stated that if a public hearing was not requested by June 19, 1988, "the application will be processed subject to the requirements set forth in the Jackson County Land Development Ordinance." Id.

Petitioner raises Simmental cattle on property he owns located a short distance from the proposed mining site.[1] Petitioner requested a hearing on June 16, 1988. The Jackson County Planning Commission held a hearing on the application on

July 25, 1988, and continued the hearing until August 15, 1988. By order dated August 24, 1988, the planning commission approved the conditional use permit.

In a letter dated September 1, 1988, petitioner appealed the planning commission's decision to the board of commissioners. Following a hearing on October 19, 1988, the board of commissioners, by order dated November 25, 1988, denied petitioner's appeal and approved the conditional use permit. Petitioner appeals the board of commissioners' November 25, 1988 order.

FIRST ASSIGNMENT OF ERROR

> "Petitioner was prejudiced by the county's error in applying Sec. 285.03 1), Jackson County Land Development Ordinance, in that petitioner and other interested persons were not notified of the completed land use application in a timely fashion. The Planning Staff proceeded to tentatively grant the application prior to notice having been given. Petitioner was cast into the role of appellant before the Planning Commission prior to any information other than that submitted by respondents Stanley being received."

Petitioner argues the county did not follow the procedure set forth in Jackson County Land Development Ordinance (LDO) 285.035 for considering conditional use permit applications. LDO 285.035 provides in pertinent part:

> "1) Upon verification of the completeness of an application for a * * * conditional use permit, * * * the Department shall send written notice to all property owners of record consistent with the notice requirements of Section 285.040(2). The notice shall state the applicant's name, the location by address and legal description of the property, and the general nature of the application.

"2) If no written request for a hearing on an application is made to the Department within 10 days of mailing of notice, the application may be denied or approved with or without conditions authorized by this ordinance based on a determination by the Department of the application's compliance with the requirements of this ordinance and other applicable requirements of law. * * *

"3) When a request for a hearing has been filed within the 10 day limit, the Department may not issue a permit and shall set the application for public hearing. * * * * *

"4) The Planning Director is authorized to determine whether a request for a public hearing is valid, based upon a reasonable contention by those requesting the hearing, that the application may not be in compliance with the Land Development Ordinance or other legal requirements necessary for issuance of a permit, or the applicant desires a hearing. Notice of the decision of the Director shall at minimum be furnished in writing to the individual(s) requesting the hearing. A decision of the Planning Director that the request for hearing is invalid may be appealed pursuant to the provisions of Section 285.020. No permits may be issued until the appeal period has expired."

Petitioner argues the planning department improperly approved the application "subject only to the right of one receiving notice of the approval to request a hearing." Petition for Review 6. Petitioner argues the county's action improperly forced him to assume the posture of an appellant, prejudiced his substantial rights, and therefore warrants reversal under ORS 197.835(8)(a)(B).[2]

Although the application apparently was filed with the planning department on April 15, 1988, the notice required by LDO 285.035(1) was not mailed until June 9, 1988.[3] The

June 9, 1988 notice sent by the planning department to petitioner identifies the applicants and the property and includes a general description of the application, as required by LDO 285.035(1). The notice also states there is a 10 day period in which to request a hearing on the application, as required by LDO 285.035(2).

Attached to the June 9, 1988 notice is an eleven page staff report which recommends approval of the requested conditional use permit with nine conditions of approval. The staff report also identifies applicable legal standards and includes findings of fact and a conclusion that the applicable standards are met. The staff report concludes with the following note:

> "NOTE TO THE APPLICANT:
>
> "A copy of this decision shall be mailed to property owners within 1000 feet of the subject parcel, who will have the right to request a hearing within ten (10) calendar days from the date of this decision. Thus, this decision is not effective until ten (10) calendar days following the date of this decision. If upon receiving such a request, a hearing is scheduled, this decision will be void pending the outcome of the hearing." (Emphasis added.) Record 196.

We agree with petitioner that the notice and the attached staff report go considerably beyond the minimum information required by LDO 285.035(1). As far as we can tell, the notice and attached staff report serve as: (1) the notice required by LDO 285.035(1); (2) a tentative approval of the request, which would become final if no written request for a hearing were received; and (3) a staff report and recommendation to the planning commission, if a hearing were requested.

The county argues that it reads the language in LDO 285.035 requiring "notice" and a description of "the general nature of the application" broadly. According to the county, it simply interpreted LDO 285.035(1) "to require of [the county] an explanation of the general nature of the application, including potential approval of the application absent a request for hearing." Respondent's Brief 7. The county also notes other sections of the LDO require the planning director to make tentative determinations concerning the adequacy of an application.[4]

We agree with the county and intervenor (respondents) that the county committed no error in proceeding as it did. The county clearly could not approve the application prior to expiration of the ten day period provided by LDO 285.035(2) for requesting a hearing before the planning commission. The county did not purport to do so. The county simply stated, as a part of the notice required by LDO 285.035(1), its tentative decision under LDO 285.035(2) and provided a staff report in the event a hearing was requested. Although nothing in LDO 285.035(1) explicitly requires the county to provide notice of what its decision will be in the event a hearing is not requested, or what its recommendation to the planning commission will be in the event a hearing is requested, we find nothing in LDO 285.035(1) that precludes provision of such information in the notice required by that subsection.

Even if the county had committed error by providing

petitioner with the planning director's tentative decision, such error would be procedural. We are empowered to reverse or remand for procedural error only if petitioner's substantial rights were prejudiced by the error. ORS 197.835(8)(a)(B); Hummel v. City of Brookings, 13 Or LUBA 25, 37 (1985); Mason v. Linn County, 13 Or LUBA 1, 4-5, aff'd sub nom Mason v. Mountain River Estates, 73 Or App 334, 698 P2d 529, rev den, 299 Or 314 (1985).

Petitioner offers three arguments in support of his contention that the procedures followed by the county prejudiced his substantial rights. First, petitioner contends he was forced to assume the role of an appellant and to overcome the planning director's approval. Second, petitioner contends he was required to object to the county's procedures to preserve his right to assert procedural error on appeal. Finally, petitioner argues the notice he was provided allowed insufficient time to evaluate the application and prepare for the planning commission hearing.

The staff report attached to the notice apparently would have become the basis for the planning director's decision to approve the conditional use permit, had a hearing not been requested. However, by its terms, the staff report was not a decision the petitioner had to overcome. Until a final decision was made by the county, the burden of proof remained on the applicant, and the obligation to develop a record and adopt findings to support its decision concerning the

application remained on the county.

The planning director's tentative approval became nothing more than a recommendation to the planning commission, following petitioner's request for a hearing. The LDO explicitly provides for the planning director to make recommendations on pending applications to the planning commission. The planning commission was in no way bound to follow such a recommendation of the planning director. The planning commission indicated during its deliberations that it frequently does not accept the recommendation of the planning director. We find that being apprised on June 9, 1988 of what the planning director's recommendation to the planning commission would be if a hearing were requested did not prejudice petitioner's substantial rights.

Petitioner's second argument concerning prejudice is also without merit. We require parties claiming error in local procedures to make their objections known to the local decision maker so that it may have an opportunity to correct procedural errors prior to rendering a final decision. See e.g., Mason v. Linn County, supra, 13 Or LUBA at 4. Although petitioner may be correct in his contention that some local decision makers are annoyed by procedural objections, such annoyance does not constitute prejudice to petitioner's substantial rights.

Turning to petitioner's final argument, the planning commission hearing was first scheduled for July 11, 1988. That hearing was reset at petitioner's request for July 25, 1988, so

that petitioner could participate in the proceeding in person. Petitioner did not appear personally but appeared through counsel only on July 25, 1988. The July 25, 1988 hearing was continued to August 15, 1988 to allow petitioner's counsel additional time to present evidence. Intervenor agreed to extensions to the 120 day deadline for a final decision on the requested conditional use permit imposed by ORS 215.428. We find petitioner's claim that he was given inadequate time to evaluate the application and prepare for the planning commission hearing to be without merit.

The first assignment of error is denied.

SECOND ASSIGNMENT OF ERROR

> "Jackson County erred in finding the conditional use to be compatible with farm uses under Sec. 218.060 1), Jackson County Land Development Ordinance."

LDO 218.040 includes among the permissible conditional uses in the EFU zone "[o]perations conducted for the exploration, mining, and processing of aggregate and other mineral resources or other subsurface resources." LDO 218.040 explicitly provides all conditional uses must conform with LDO 218.060. LDO 218.060 provides as follows:

> "* * * STANDARDS REQUIRED OF ALL CONDITIONAL USES:
>
> "1) A conditional use may be approved by the County only when findings can be made that * * * the proposed use and/or new parcel:
>
> "A) Is compatible with farm uses described in subsection (2) of ORS 215.203 and is consistent with the intent and purposes set forth in ORS 215.243, as specified in Section 218.020 [sic 218.010]; and,

"B) Does not interfere with accepted farming practices, as defined in paragraph (c) of subsection (2) of ORS 215.203, on adjacent lands devoted to farm use; and

"C) Does not adversely alter the stability of the overall land use pattern of the area; and

"D) Is situated upon generally unsuitable land for the production of farm crops and livestock, considering the terrain, adverse soil or land conditions, drainage and flooding, vegetation, location, and size of tract, unless findings conclusively demonstrate that:

"i) The proposed use will result in a more efficient and effective use of the parcel in view of its value as a natural resource.

"ii) No feasible alternative sites in the area exist which shall have less impact on agricultural land.

"E) The proposed use will not adversely affect sensitive fish and wildlife pursuant to Section 280.110(3)(E)."

In this assignment of error, petitioner challenges the county's finding that the proposal complies with LDO 218.060(1)(A). Petitioner's third assignment of error, discussed infra, challenges the county's finding concerning LDO 218.060(1)(D).

The standards contained in LDO 218.060(1), which the county applies to all conditional uses in the EFU zone, are nearly identical to the standards set out in ORS 215.283(3). We, therefore, note that with regard to mineral resource extraction operations in the EFU zone, the county's standards are more stringent than those required by ORS 215.203 to 215.337. Under

ORS 215.283(2)(b), "mining and processing of aggregate and other mineral resources or other subsurface resources" may be allowed in an EFU zone "subject to the approval of the governing body or its designate," without application of the standards in ORS 215.283(3).[5]

As we explained in Stefansky v. Grant County, 12 Or LUBA 91 (1984), in construing the language in ORS 215.283(3)(a) that is nearly identical to the language in LDO 218.060(1)(A),

> "in order to show that the use is compatible, the county must describe the farm uses in the area and explain why the proposed use will be compatible with these existing agricultural uses." Id. at 94.

LDO 218.060(1)(A) also requires consistency with LDO 218.010 which, inter alia, expresses an intent "to prevent obstructive, damaging, or nuisance uses or activities which are not compatible with agriculture * * *."

We believe LDO 218.060(1)(A) requires the county to find the particular mining operation intervenors propose will not be "obstructive, damaging, or [a] nuisance" or incompatible with the type of agriculture existing in the area. LDO 218.010. We assume, because the county's EFU zone allows mining as a conditional use, that mining operations are not viewed by the county as inherently incompatible. Rather, under LDO 218.060(1)(A), compatibility must be determined on a case-by-case basis.

The county's findings relevant to LDO 218.060(1)(A) are as follows:

"(i) Darrell and Eugene Stanley are currently using the subject property and surrounding adjacent approximately 800 acres for seasonal livestock grazing which is considered a farm use as a part of their farming operations.

"(ii) The Stanleys have located two other similar quarry and connecting haul road operations on their adjoining property and have found them to be compatible uses with seasonal livestock grazing.

"* * * * *

"(iv) All other lands for one to two miles away from the subject site are similar marginal agricultural lands used for only seasonal livestock grazing or timber and firewood cutting.

"(v) The soils on the quarry site are Class VI type and unusable for any intensive farm use as indicated in the Soils [sic] Conservation Service information sheets.

"(vi) Other Basaltic Shale operations that the applicant is aware of in the Jackson County area are in similar seasonal livestock grazing areas with one exception. That site is located on the Eagle Point (West of Highway 62) area. The quarry has been found to have a history of disputes between the quarry operators and surrounding residents.

"(vii) The fences and gates provided in three locations along the access road will provide control of animal locations for seasonal grazing operations."

"* * * * *

"* * * the pattern of large open area, fences and large parcels preclude the proposed use from interfering with farming practices on adjacent properties. Further, access to the quarry site is along a haul road entirely on the applicants [sic] owned or leased property with a minimum of 300 foot setbacks from private property lines along the entire route to Highway 140, eliminating potential interference of truck hauling activities with other neighbors' farming activities." Record 9-10.

Petitioner argues the county's findings are inadequate as a matter of law, and the evidence in the record does not support the findings.

We do not agree with petitioner that the above findings are inadequate as a matter of law. The findings identify another mining operation, with residents nearby, that has encountered conflicts, whereas the mining operations conducted on adjoining property are claimed to have been compatible with adjoining seasonal grazing. The findings also identify the farm uses in the area and explain the county's view that access limitations and buffering from adjacent farm uses will eliminate interference. Petitioner does not explain why these findings are inadequate.

Turning to the evidentiary support for the county's finding that LDO 218.060(1)(A) is satisfied, intervenors point to the following evidence in the record bearing on LDO 218.060(1)(A):

(1) Testimony of a water resources expert that water quality on petitioner's adjoining property would not be affected. Record 73.

(2) Testimony that the property would be better suited for grazing after the site is mined and reclaimed because rock out croppings would be eliminated, making the property better suited for forage. Record 74.

(3) Testimony by intervenors' water expert (who also raises Simmental cattle) that in view of the distance of the site from petitioner's property and the nature of the operation, there would be no adverse impact on petitioner's cattle operation. Record 109-110.

(4) A letter signed by intervenors saying they have leased mining sites next to seasonal grazing

operations in the past without conflicts with such grazing operations. Record 263.

We do not believe it is reasonable to assign significant weight to the intervenors' letter. However, intervenors' water/cattle expert's testimony is sufficient in our view to support the county's decision that the compatibility requirement of LDO 218.060(1)(A) is met.

The second assignment of error is denied.

THIRD ASSIGNMENT OF ERROR

> "Jackson County erred in finding the use to be situated upon generally unsuitable land for the production of farm crops and livestock under Sec. 218.060 1) A) [sic 218.060(1)(D)], Jackson County Land Development Ordinance."

Although petitioner cites LDO 218.060(1)(A) in the above-quoted assignment of error, it is clear from his argument under the third assignment of error that it is the county's finding of compliance with LDO 218.060(1)(D) that petitioner challenges.

Citing Hearne v. Baker County, 14 Or LUBA 743, 746 (1986), petitioner argues the county is required to find (1) the subject 40 acres is generally unsuitable for farm use, and (2) any of intervenor's land suitable for farm use outside the subject 40 acres will be preserved. Petitioner argues the county did not and cannot make such findings.[6]

A. General Unsuitability of the 40 Acres.

There is no dispute that LDO 218.060(1)(D) requires the county to find that the 40 acres proposed for mining is

generally unsuitable for "production of farm crops and livestock, considering the terrain, adverse soil or land conditions, drainage and flooding, vegetation, location and size of tract." In addition, there do not appear to be significant disputes regarding the facts in the record. Rather, the dispute between the parties appears to be limited to the appropriateness of the conclusion the county reached based on the facts in the record.

The forty acres contains significant rock outcroppings. It appears that more than 25% of the 40 acres is rocky outcrops based on a U.S. Soil Conservation Service letter which refers to a larger area. However, it is not clear from the record exactly what percentage of the 40 acres is rocky outcrops. The topography of the 40 acres is steep and there is no source of water for irrigation. Due to poor soils and lack of irrigation, the 40 acres is of limited value for grazing. However, the 40 acres apparently has been and can continue to be used as part of the larger farm unit for seasonal grazing of cattle for several months out of the year.

Even if we assume the 40 acres cannot be used successfully as a self sufficient farm unit, that does not mean the 40 acres is generally unsuitable for grazing livestock, a farm use. Pilcher v. Marion County, 2 Or LUBA 309 (1981); Stringer v. Polk County, 1 Or LUBA 104, 108 (1980). The record clearly shows the 40 acres has been used for livestock grazing as part of the larger livestock operation conducted on the farm unit

encompassing the 40 acre site. Although the record also shows the 40 acres, viewed in isolation, has constraints which limit its suitability for livestock grazing, the county's findings fall short of showing the 40 acres is generally unsuitable for grazing in view of its past use for such purposes. See Walter v. Linn County, 6 Or LUBA 135, 138 (1982).

We stop short of determining that in view of the past use of the 40 acres for grazing purposes the county could not adopt findings that show the 40 acres is generally unsuitable for such purposes. See 1000 Friends of Oregon v. LCDC (Umatilla County) 85 Or App 88, 96, 735 P2d 1295 (1987). However, although we cannot say as a matter of law the past use of the property precludes a finding that the property is generally unsuitable for grazing, the evidence in the record of such use is a substantial obstacle in making such a finding.

This subassignment of error is sustained.

B. Preservation of Land Suitable for Farm Use.

Following our first decision in Hearne v. Baker County, supra, Baker County's decision on remand was appealed to LUBA in Hearne v. Baker County, ___ Or LUBA ___ (LUBA No. 87-030, October 21, 1987). On appeal of our second decision in Hearne v. Baker County, the Court of Appeals affirmed our interpretation of ORS 215.283(3)(d) to require that in creating a parcel for a nonfarm dwelling (1) the nonfarm parcel, viewed as a whole, must be generally unsuitable for farm use and (2) any land included within the nonfarm parcel that is suitable

for farm purposes must be preserved.[7]

We agree with the county that neither our decisions nor the Court of Appeals' decision in Hearne v. Baker County support petitioner's argument that the county was required to show the intervenor's approximately 800 acre ownership, other than the 40 acres proposed for mining, will remain in farm use.[8]

The Hearne v. Baker County cases simply say that lands suitable for farm use that may be included within a nonfarm parcel created for a nonfarm dwelling must be preserved for potential farm use (i.e., by siting the dwelling on land unsuitable for farm use). The Hearne v. Baker County cases do not say creating a nonfarm parcel for a nonfarm dwelling from a larger farm parcel requires under ORS 215.283(3)(d), a county to show that the remainder or parent parcel is preserved for farm use. Protection for farming operations on the parent or remainder parcel is achieved through ORS 215.283(3)(a)-(c), which require compatiblity and proscribe interference with farming operations or material alteration of the overall land use pattern.

In our view, LDO 218.060(1)(D) only requires a showing that the proposed use will be located on land generally unsuitable for farm use.[9] In this case, this requires that the 40 acres be generally unsuitable for farm use. Allowing mining on the 40 acre portion of the larger 800 acre farming unit does not convert the entire 800 acre parcel into a nonfarm parcel. LDO 218.060(1)(D) does not, as petitioner argues, require a

finding that suitable land on the remaining portion of the 800 acre farm unit will be preserved.[10]

This subassignment of error is denied.

The third assignment of error is sustained.

The county's decision is remanded.

FOOTNOTES

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[1] Petitioner and his wife own Yankee Creek Ranch. According to petitioner, his herd of Simmental cattle "is now regarded as one of the best, if not the best herd of polled fullblood Simmental cattle in the world." Record 112. Petitioner contends purchasers travel to the ranch from as far away as Australia and those purchasers "refuse to buy from operations which they perceive to be of a lesser standard because of the physical surroundings." Record 113.

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[2] ORS 197.835(8) provides as pertinent:

"* * * the board shall reverse or remand the land use decision under review if the board finds:

"(a) The local government * * *:

"* * * * *

"(B) Failed to follow the procedures applicable to the matter before it in a manner that prejudiced the substantial rights of petitioner;

"* * * * *"

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[3] We note that LDO 285.035(1) provides that "verification of the completeness of an application" is to precede written notice to adjoining property owners. Petitioner does not allege error concerning the delay in issuing the notice required under LDO 285.035(1).

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[4] The LDO sections cited by the county include: LDO 285.030(3) (authorizing conferences with the applicant to discuss application deficiencies), LDO 285.030(5) and (6) (authorizing the planning director to deny an application if applicable approval standards are violated), and LDO 285.035(4) (providing applicant the right to request the planning director to determine whether a request for hearing on an application is valid).

[5] The standards of ORS 215.283(3) are only required by statute to be applied to nonfarm dwellings.

[6] Petitioner also argues that the county's findings do not justify approval under the exception provided to the general unsuitability requirement in LDO 218.060(1)(D)(i) and (ii), quoted supra. However, neither the county nor the intervenor argue the county based its decision on the exception provided in 218.060(1)(D)(i) and (ii). Accordingly, we assume the county's decision was based on its finding of general unsuitability, not the exception provided in paragraphs (i) and (ii).

[7] The county points out the decisions in Hearne v. Baker County concerned ORS 215.283(3) which is applicable only to nonfarm dwellings, whereas the relevant standard in this case is LDO 218.060(1)(D). Because those cases concern a statutory standard required to be applied only to nonfarm dwellings, not the Jackson County Code, the county argues our reasoning and the Court of Appeals' reasoning in those decisions should not apply. The relevant language in LDO 218.060(1)(D) and ORS 215.283(3)(d) is identical. Although we disagree with petitioner's application of the Hearne v. Baker County decisions to this case, we believe it is appropriate to interpret LDO 218.060(1)(D) consistently with our interpretation of ORS 215.283(3)(d) in the Hearne v. Baker County cases. See McCaw Communications, Inc. v. Marion County, ___ Or LUBA ___ (LUBA No. 88-068, December 12, 1988), slip op 18; Goracke v. Benton County, 12 Or LUBA 128, 135 (1984).

The county also cites Mill Creek Glen Protection Assoc. v. Umatilla County, 88 Or App 522, 746 P2d 728 (1987) and Hearne v. Baker County, 89 Or App 282, 748 P2d 1016, rev den 305 Or 576 (1988) and argues petitioner waived his right to raise the arguments presented under the third assignment of error by failing to raise the issue during the county proceedings. The "law of the case" or "waiver" doctrine applies in our proceedings to prevent a petitioner from raising in a LUBA appeal issues that could have been raised in a prior LUBA appeal concerning the same matter. This is the first LUBA appeal concerning the county's decision in this matter and petitioner is not barred from raising issues in this appeal proceeding that were not raised before the county. See ORS 197.825(3); McNulty v. City of Lake Oswego, 14 Or LUBA 366,

370 (1986).

[8] It is not entirely clear exactly how many acres are contained in the ownership of which the 40 acre mining site is a part.

[9] If the principle discussed in Hearne v. Baker County applies at all in this case, it could be argued that any suitable land included within the 40 acres must be preserved for farm use. However, unlike the nonfarm dwelling at issue in Hearne v. Baker County which, if sited on land suitable for farm use, would, for all practical purposes, permanently remove that land from farm use, the proposed mining use in this case will not permanently remove land from farm use, as the 40 acres will be reclaimed and made suitable for seasonal grazing. We, therefore, disagree with any suggestion that no mining could occur on land suitable for agricultural purposes that might be included within the 40 acres even if the 40 acres viewed as a whole are generally unsuitable for farm use.

[10] However, we note the county's findings do suggest the remainder of intervenors' property now in farm use will remain in farm use.