BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

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| AL VIZINA, JAN VIZINA, DON HAYTER, KAREN HAYTER, VERN LIESINGER, SHARON LIESINGER, RUSSELL STEINHAUER, and JUANITA STEINHAUER, Petitioners, vs. DOUGLAS COUNTY, Respondent, and STANLEY PAROZ, Intervenor-Respondent. | LUBA No. 89-007<br>FINAL OPINION AND ORDER |

Appeal from Douglas County.

Roland A. Johnson, Roseburg, filed the petition for review and argued on behalf of petitioners. With him on the brief was Walton, Nilsen, Walker and Johnson, P.C.

No appearance by respondent Douglas County.

Wallace D. Cegavske, Roseburg, filed a response brief and argued on behalf of intervenor-respondent. With him on the brief was Cegavske and Associates, P.C.

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

REMANDED 06/16/89

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

Opinion by Sherton.

NATURE OF THE DECISION

Petitioners seek review of a January 10, 1989 order of the Douglas County Board of Commissioners approving a conditional use permit to allow mining and processing of aggregate on a ten acre portion of a 426.28 acre parcel in the Farm Forest (FF) and Exclusive Farm Use - Grazing (FG) zoning districts.

MOTION TO INTERVENE

Stanley Paroz moves to intervene on the side of respondent Douglas County in this review proceeding. There is no opposition to the motion, and it is allowed.

FACTS

A county decision to approve the subject conditional use permit was reviewed by LUBA in Vizina v. Douglas County, ___ Or LUBA ___ (LUBA No. 88-014, August 26, 1988) (Vizina I).[1] In Vizina I, we stated:

> "[Intervenor-respondent (intervenor)] filed an application with Douglas County (county) for a conditional use permit for aggregate mining and processing on ten acres adjoining the northern boundary of a 426.28 acre parcel. The parcel contains a house and two mobile homes occupied by family members and a rental dwelling. It is used primarily for grazing sheep.
>
> "Steinhauer Road crosses the subject parcel in an east-west direction, towards its southern end. Access to the quarry site was proposed to be by a driveway extending north from the western end of the developed portion of Steinhauer Road.
>
> "Property to the north and northwest of the subject parcel is zoned FF. The other property surrounding the subject parcel is zoned FG. Several smaller parcels (5 to 20 acres) with residences adjoin the

subject parcel to the northeast and adjoin the portion of Steinhauer Road to the east of the subject parcel. Other properties adjoining the subject parcel are larger parcels in farm use.

"The house nearest to the proposed quarry site is located 2,000 feet to the southeast, but this house is topographically screened from the quarry site by a ridge. The closest house not visually screened from the quarry site is approximately 2,700 feet to the southwest." Vizina I, slip op at 3-4.

In Vizina I, we remanded the county order approving the subject conditional use permit. We determined the county's findings were inadequate to demonstrate compliance with Douglas County Comprehensive Plan (plan) Mineral and Energy Resources Policy Implementation Statements 2.a and 3. We also found the county's decision failed to satisfy the compatibility criterion in Douglas County Land Use and Development Ordinance (LUDO) 3.39.050.1[2] because of

"* * * (1) the failure of the findings to address compatibility with other uses potentially permitted on adjacent land zoned FF and FG, and (2) lack of substantial evidence to support the conclusion that the proposed use is or can be made compatible with the approximately six unscreened residences with regard to dust and noise impacts." Vizina I, slip op at 15.

After our remand of Vizina I, the board of commissioners remanded the decision to the planning commission, which held a public hearing limited to the deficiencies identified in Vizina I. Record II 45-49. On November 17, 1988, the planning commission adopted an order approving the conditional use permit, with adoption of additional findings and one additional condition. The planning commission's decision was appealed to the board of commissioners by petitioners and others.

The board of commissioners reviewed the planning commission's decision based on the record in Vizina I and the additional record established before the planning commission on remand. The board of commissioners held a hearing at which those who qualified as parties before the planning commission could present argument. Record II 3, 13. On January 10, 1989, the board of commissioners adopted an order affirming the planning commission's decision. This appeal followed.

FIRST ASSIGNMENT OF ERROR

> "The Decision is inconsistent with the Douglas County Comprehensive Plan, specifically the third policy implementation statement of the Mineral and Energy Resources element of the Comprehensive Plan."

Plan Mineral and Energy Resources Policy Implementation Statement 3 (M&E Policy Implementation 3) provides, as relevant:

> "Prior to the County granting permits for new aggregate or mineral extraction operations, the applicant shall have met all other regulations as required by * * * the State Department of Geology and Mineral Industries." Plan, p. 6-106.

On remand, the county adopted the following finding:

> "1. The proposed use will meet applicable Department of Geology and Mineral Industries regulations." Record II 31.

Petitioners argue that the county's finding is inadequate because it states a conclusion without providing any explanation for how the conclusion was reached. Petitioners contend the county's finding must explain what the county found to be the facts, and also explain why those facts led to the conclusion reached by the county. Petitioners contend the

county's finding is insufficient to demonstrate that the proposed use will meet Department of Geology and Mineral Industries (DOGAMI) regulations because it does not (1) identify the applicable DOGAMI regulations, (2) set out facts relating to compliance with those regulations, or (3) explain why such facts demonstrate that the proposed use will comply with those regulations.

Petitioners further assert that applicable DOGAMI regulations require the applicant to submit a reclamation plan meeting the criteria of OAR 632-35-025, prior to issuance of any surface mining permit. Petitioners argue:

> "As the Applicant did not submit for the County's consideration the evidence required by OAR 632-35-025, the applicable DOGAMI regulation has not been satisfied as a matter of law, and the County has no way of finding whether the Applicant will be able to reclaim the site as required by law." Petition for Review 10.

Intervenor argues that the record shows the county was made aware that the regulations of OAR Chapter 632, Division 30, implementing the Oregon Mined Land Reclamation Act, are the DOGAMI regulations applicable to the proposed use. Intervenor contends this Board has never held that a county must specify in its findings, by number, each regulation involved in a determination that a proposed use can meet applicable state agency regulations.

Intervenor also argues that the reclamation plan for the proposed use <u>is</u> in the record of the initial county proceedings. Record I 176-183. Intervenor claims there is

evidence in the record that this reclamation plan meets the applicable DOGAMI regulations. Intervenor points to the on-site inspection report of a DOGAMI reclamationist, which recommends DOGAMI approval of the reclamation plan. Record I 215-217. According to intervenor, "[p]etitioners have the burden of asserting and explaining specific grounds of error." Intervenor's Brief 4. Intervenor argues petitioners did not raise the issue of the adequacy of the reclamation plan before the county; and, therefore, the county was not required to specifically address the plan's adequacy in its findings.

We understand intervenor to argue that, where an approval standard requires the county to determine that a proposed use will meet a state agency's regulations, a general statement of that conclusion is a sufficient finding. We also understand intervenor to contend the county's findings have to identify, and address compliance with, a specific state agency regulation only if compliance with that specific regulation was raised as an issue in the county proceedings. We disagree.

The county's decision to approve the subject conditional use permit must be supported by findings which identify the criteria the county considers applicable, state the facts which the county relies on, and explain why those facts demonstrate the criteria are met. ORS 215.416(9); Sunnyside Neighborhood v. Clackamas Co. Comm., 280 Or 3, 20-21, 569 P2d 1063 (1977); Green v. Hayward, 275 Or 693, 706-708, 552 P2d 815 (1976); Standard Insurance Co. v. Washington County, ___ Or LUBA ___

(LUBA No. 87-020, September 1, 1987), slip op 21.

On numerous occasions, we have stated that findings which merely state the conclusion that a standard is met, and do not explain how the facts lead to that conclusion, are inadequate. McNulty v. City of Lake Oswego, 15 Or LUBA 16, 24 (1986), aff'd 83 Or App 275 (1987); Bruck v. Clackamas County, 15 Or LUBA 540, 541 (1987). We have previously held that where compliance with relevant comprehensive plan policies is an approval standard, a conclusional statement that the decision complies with the comprehensive plan is an insufficient finding. DLCD v. Klamath County, ___ Or LUBA ___ (LUBA No. 87-019, August 28, 1987), slip op 8-9. We also stated that a county ordinance requiring gravel operations to "comply with all applicable air, noise and water quality regulations of all county, state or federal jurisdictions" requires findings that "'[t]he application complies . . .' with particular environmental standards." (Emphasis added.) Allen v. Umatilla County, 14 Or LUBA 749, 755 (1986).

We agree with petitioners the conclusional finding that "[t]he proposed use will meet applicable [DOGAMI] regulations" is insufficient to demonstrate compliance with M&E Policy Implementation 3. Where a county approval standard requires that a proposed use meet the applicable regulations of particular local, state or federal agencies, county findings must (1) identify the regulations the county considers applicable;[3] (2) set out any facts necessary to a

determination of compliance with those regulations; and (3) explain how those facts lead to a decision on compliance.[4] See Bowman Park v. City of Albany, 11 Or LUBA 197, 221 (1984).

However, that the challenged county findings are inadequate to demonstrate compliance with M&E Policy Implementation 3 is not necessarily sufficient grounds for reversal or remand of the county's decision. ORS 197.835(10)(b) provides:

> "Whenever the findings are defective because of failure to recite adequate facts or legal conclusions or failure to adequately identify the standards or their relation to the facts, but the parties identify relevant evidence in the record which clearly supports the decision or a part of the decision, the board shall affirm the decision or the part of the decision supported by the record and remand the remainder to the local government, with direction indicating appropriate remedial action."

In this case, the record contains an explanation by intervenor's attorney that the applicable DOGAMI regulations are found in OAR Chapter 632, Division 30, implementing the Oregon Mined Land Reclamation Act and requiring DOGAMI approval of a mined land reclamation permit (MLRP). Record II 52. Petitioners do not point to contrary evidence in the record. In fact, in the petition for review, petitioners also refer to the applicable DOGAMI regulations as being those implementing the Oregon Mined Land Reclamation Act.[5]

Intervenor also cites evidence in the record demonstrating the proposed use meets the requirements of DOGAMI regulations for obtaining a MLRP. The record contains intervenor's

September 22, 1987 application to DOGAMI for a MLRP, including intervenor's proposed reclamation plan. Record I 175-183. The record also contains DOGAMI reclamationist Allen H. Throop's report on his September 30, 1987 on-site inspection of the subject site. Record I 172-174. At the conclusion of the report, the reclamationist recommends that the MLRP be approved.

We agree with intervenor that we can infer from the DOGAMI reclamationist's recommendation of MLRP approval that he found intervenor's proposal to comply with DOGAMI regulations for MLRPs. We are cited to no evidence in the record contradicting the facts in intervenor's MLRP application, challenging Throop's qualifications as a reclamationist or otherwise detracting from the conclusion that intervenor's application complies with DOGAMI regulations. Petitioners do not present argument to demonstrate that the MLRP application in the record fails to comply with specific provisions of OAR Chapter 632, Division 30.

In these circumstances, we conclude the evidence identified by the parties in the record clearly supports findings that the provisions of OAR Chapter 632, Division 30 are the DOGAMI regulations applicable to the proposed use, and that the proposed use meets these regulations. Therefore, the evidence in the record clearly supports the county's conclusion that the proposed use complies with M&E Policy Implementation 3.

The first assignment of error is denied.

SECOND ASSIGNMENT OF ERROR

> "The Decision is inconsistent with the Douglas County Comprehensive Plan, specifically the second policy implementation statement of the Mineral and Energy Resources element of the Comprehensive Plan. "

Plan Mineral and Energy Resources Policy Implementation Statement 2 (M&E Policy Implementation 2) provides, as relevant to sections A through D of this assignment of error:

> "Where required, review of applications for the development of aggregate resources shall consider the impact of such an operation on:
>
> > "a. Surrounding land uses in terms of satisfying Department of Environmental Quality standards for noise, dust, visual impact as well as impacts on traffic created as a result of the operation.
> >
> > " * * * * * *"

In Vizina I, we said:

> "[M&E] Policy Implementation Statement 2a requires the county, in reviewing applications for the development of aggregate resources, to consider the impact of such an operation on surrounding land uses in terms of whether the proposed use will satisfy DEQ standards for noise, dust, visual and traffic impacts. Thus, the county is required to make a determination in its findings of whether the proposed use will meet applicable DEQ standards." (Footnote omitted; emphasis in original.) Vizina I, slip op at 9.

A. Traffic and Visual Impacts

On remand, the county adopted the following finding:

> "3. There are no applicable DEQ rules or standards for visual or traffic impact." Record II 31.

Petitioners argue this finding is inadequate to comply with M&E Policy Implementation 2.a, because the county is wrong about the existence of applicable DEQ regulations concerning

visual and traffic impacts. We address the DEQ regulations asserted by petitioners to be applicable below.[6]

1. OAR 340-20-120

With regard to traffic impacts, petitioners argue that OAR 340-20-120 applies to the proposed aggregate operation, and requires an approved traffic plan to assure attainment of air quality standards.

Intervenor responds that OAR 340-20-120 is not applicable to the proposed use. Intervenor contends the terms of OAR 340-20-120 make that regulation's requirement for a parking and traffic circulation plan applicable only upon a determination by the DEQ that control of parking spaces and traffic circulation is necessary in certain geographic areas. According to intervenor, there is no evidence that the county is the subject of such a determination.

OAR 340-20-120's requirement for a parking and traffic circulation plan is only applicable where the Environmental Quality Commission has determined that control of parking spaces and traffic circulation is necessary in specific geographic areas to ensure attainment and compliance with ambient air quality standards. OAR 340-20-120(1). Petitioners do not argue or demonstrate that the proposed use in in such an area. Petitioners have not shown the county was incorrect in concluding this rule is not applicable to the proposed use.

2. OAR 340-20-001 and 340-20-076

With regard to visual impacts, petitioners point out that

the proposed use includes rock crushing, which petitioners assert is identified as an air contaminant source by OAR 340-20-155, Table 1. According to petitioners, OAR 340-20-001 requires visibility impacts from air contaminant sources to be at the lowest possible level, but the county made no such finding concerning the proposed use. Petitioners also contend that OAR 340-20-276 requires new air contaminant sources to satisfy detailed visibility impact standards. According to petitioners, there is no evidence in the record that these visibility impact standards are satisfied by the proposed use.

Intervenor argues it is not fatal that the county did not specifically identify by number the applicable regulations in OAR Chapter 340, Division 20. Intervenor argues that rock crushers, as opposed to rock crushing, are the air contaminant sources regulated by OAR Chapter 340, Division 20. Intervenor points out that OAR 340-20-276 applies only to new air contaminant sources. Intervenor asserts that evidence in the record shows that the rock crusher which will be used as part of the proposed aggregate operation is the subject of a DEQ air contaminant discharge permit, has been found to comply with that permit and, therefore, meets the requirements of OAR Chapter 340, Division 20. Record I 219-224; Intervenor's Brief A-55.

Intervenor does not argue that the regulations of OAR Chapter 340, Division 20 cited by petitioners are not

potentially applicable DEQ regulations concerning visual impacts. Thus, intervenor effectively concedes the inadequacy of the county's conclusionary finding that there are no applicable DEQ visual impact regulations. However, we understand intervenor to argue that this aspect of the county's decision should nevertheless be affirmed because evidence in the record clearly supports a determination that the cited provisions of OAR Chapter 340, Division 20 are either inapplicable or satisfied.

We agree with intervenor that it is only the rock crusher to be used as part of the proposed aggregate operation that is identified by OAR 340-20-155(1), Table 1, Item 42, as an air contaminant source required to obtain an air contaminant discharge permit. We also agree with intervenor that the visibility impact analysis requirements of OAR 340-20-276 apply only to the issuance of air contaminant discharge permits for new "major sources" or "major modifications" of sources, as defined in OAR 340-20-225. Intervenor cites evidence in the record which clearly demonstrates that the rock crusher proposed to be used has obtained a DEQ air contaminant discharge permit. This evidence clearly supports the county's determination that OAR 340-20-276 is not applicable to the proposed use.

OAR 340-20-001 states, in relevant part:

> "Notwithstanding the general and specific emission standards and regulations contained in this Division, the highest and best practicable treatment and control

of air contaminant emissions shall in every case be provided so as to maintain * * * visibility reduction * * * and other deleterious factors at the lowest possible levels. * * * " (Emphasis added.)

The above-quoted regulation provides that its requirement for highest and best practicable treatment and control of air contaminant emissions applies, notwithstanding the emission standards and regulations contained elsewhere in Division 20. Thus, obtaining an air contaminant discharge permit does not automatically satisfy this regulation. We cannot determine from the county's decision or the evidence cited in the record that this regulation is not a DEQ regulation concerning visual impacts, is otherwise inapplicable to the proposed use or is satisfied by the proposed use. Therefore, the county's decision does not comply with M&E Policy Implementation 2.a with regard to OAR 340-20-001.

3. OAR 340-21-015

Petitioners contend that OAR 340-21-015(2) prohibits the emission of any air contaminant that does not meet certain visibility limitation standards and, therefore, is an applicable DEQ regulation concerning visual impacts. Petitioners assert there is no evidence in the record that the proposed use would meet these standards.

OAR 340-21-015 is found in a division of the DEQ rules establishing "General Emission Standards for Particulate Matter." This regulation, by its terms, applies to "new air contaminant sources" and "existing air contaminant sources."

Petitioners do not argue that the proposed use involves "air contaminant sources" in addition to the proposed rock crusher. Petitioners do not explain why the air contaminant discharge permit issued by DEQ does not ensure that the rock crusher proposed to be used at the site will meet this standard.[7] We will not make petitioners' legal arguments for petitioners. Deschutes Development v. Deschutes County, 5 Or LUBA 218, 220 (1982).

4. OAR 340-24-010

Petitioners contend that OAR 340-24-010 is an applicable DEQ regulation which prohibits operation of vehicles which produce visible emissions. Petitioners argue there is no evidence that the increased truck traffic resulting from the proposed use will comply with this standard. At oral argument, petitioners maintained this regulation is applicable to diesel trucks using Steinauer Road.

Intervenor argues that OAR 340-24-010 is inapplicable to the proposed use because it only applies to motor vehicles driven on public roads, and the proposed use will only affect private lands and roads. According to intervenor, OAR 340-20-010 is also inapplicable because it excludes diesel vehicles, and there is evidence in the record that the vehicles used will be diesel powered vehicles that meet all DEQ standards.

Intervenor does not argue that OAR 340-24-010 does not concern "visual impacts," as that term is used in M&E Policy

Implementation 2.a. Intervenor does not cite evidence in the record clearly demonstrating that this regulation is inapplicable because the proposed use does not involve the use of motor vehicles on public roads.[8] However, the evidence cited by intervenor, uncontradicted by petitioners, does clearly support a determination that this regulation is inapplicable because the trucks involved in the proposed use will be diesel trucks.

This subassignment of error is sustained, in part, with regard to the inadequacy of the county's findings to address OAR 340-20-001.

B. Dust

The county's findings addressing compliance with DEQ dust regulations[9] state:

> "The use as proposed will meet DEQ standards for * * * dust * * *." Record II 34.

1. OAR 340-21-030 and 340-21-060

Petitioners argue that OAR 340-21-030 prohibits the emission of particulates in excess of certain amounts. Petitioners argue that OAR 340-21-060 prohibits "fugitive emissions" from creating "nuisance conditions," as defined in OAR 340-21-050. Petitioners contend there is no evidence in the record to demonstrate that the county considered these regulations in reaching its conclusion, or that the proposed use will meet these standards.

Intervenor argues there is uncontraverted evidence in the

record that the rock crusher to be used as part of the proposed agregate operation meets these DEQ standards. Intervenor points out that the DEQ Air Contaminant Discharge Permit Application Review Report for the rock crusher states that fugitive emissions are considered negligible when the plant is operated in compliance with permit conditions," and recommends approval of the permit. Record II 223. Intervenor notes that the rock crusher's approved air contaminant discharge permit includes limits on emissions of particulates and fugitive emissions. Record II 220. Finally, intervenor points out that the November 5, 1987 DEQ source inspection report found the rock crusher to be operating in compliance with the permit conditions and notes "no dust problem." Record II 224.

We agree with intervenor that there is substantial evidence in the record to support the county's decision that the proposed use meets OAR 340-20-030 and 340-20-060 with regard to the rock crusher to be used in the aggregate operation. Petitioners present no argument and cite no evidence that these regulations apply to aspects of the proposed use other than the rock crusher.

2. OAR 340-31-015

Petitioners maintain that OAR 340-15-015 prohibits concentrations of particulates in excess of certain specified levels. Petitioners argue the decision lacks findings of fact specifically showing how the county reached the conclusion this standard is met by the proposed use. Petitioners also argue

there is nothing in the record to show the county considered the application of this regulation to the proposed use.

Intervenor argues that OAR 340-31-015 is not applicable to the proposed use. Intervenor points out that OAR Chapter 340, Division 31 deals with ambient air quality. Intervenor notes that the purpose statement for this division provides that its ambient air quality standards are not generally meant to be used as a means of determining the acceptibility of emissions from a particular source. OAR 340-31-010(2). Intervenor argues that when an air contaminant source operates under a DEQ air contaminant discharge permit, it can be presumed that OAR 340-31-015 does not apply unless the source is deemed singularly responsible for causing violations of ambient air quality standards. According to intervenor, there is no evidence in the record that meeting ambient air quality standards is a problem in the county, or that the subject rock crusher is singularly responsible for any violations.

Section (2) of OAR 340-31-015 ("Purpose and Scope of Ambient Air Quality Standards") provides:

> "Ambient air quality standards are not generally applicable as a means of determining the acceptibility or unacceptability of emissions from specific sources of air contamination. * * * However, in the case of a source or sources which are deemed to be singularly responsible for ambient air quality standards being exceeded in a particular locality, the violation of such standards shall be due cause for imposing emission standards more stringent than those generally applied to the class of sources involved. * * * "

It is clear from the above-quoted rule provision that

OAR 340-31-015 is not a standard generally applicable to the approval of a particular use involving an air contaminant source. Petitioners neither argue nor cite evidence in the record demonstrating that, because ambient air quality standards would be violated in the subject area due to the proposed use, this regulation is applicable in this case. Therefore, the county's failure to discuss compliance with this regulation in its findings, and the absence of evidence in the record demonstrating consideration of this regulation, are not grounds for reversal or remand of the county's decision.

This subassignment of error is denied.

C. Noise

The county's finding addressing compliance with DEQ noise regulations[10] states:

> "The use as proposed will meet DEQ standards for noise * * *." Record II 34.

Petitioners argue the county's finding is simply a conclusion that DEQ noise standards will be satisfied by the proposed use. Petitioners state that OAR 340-35-035 establishes specific noise pollution standards for the proposed use. According to petitioners, the county's finding is inadequate because it does not identify the applicable DEQ regulations, state the facts the county found to be true or explain how those regulations will be met. Petitioners contend that mere recitations of the evidence offered by Harry Reeder on behalf of intervenor are not adequate findings.

Intervenor argues there is evidence in the record which supports a determination that the proposed use will comply with OAR 340-35-035. Intervenor argues that the county was entitled to rely on the expert testimony of Reeder, a registered acoustical engineer, who based his testimony on field measurements, calculations and a visit to the subject site. According to intervenor, Reeder's testimony states the noise level limit established by OAR 340-35-035(1)(d) for blasting, and establishes that the proposed use will meet that limit. Intervenor also contends Reeder's testimony establishes that DEQ's lowest noise standard for commercial/industrial uses, 45 dBA, is for quiet areas at night. According to intervenor, Reeder testified that the proposed use would produce about 20 dBA from normal operations, and 25-30 dBA from blasting, as measured at the nearest down valley house.

As we explained under the first assignment of error, supra, such a conclusion of compliance with state agency regulations is inadequate because it does not identify the regulations the county considers applicable, set out any facts necessary to a determination of compliance with those regulations, or explain how those facts lead to a decision on compliance. However, as we also stated under the first assignment, an inadequate finding is not necessarily sufficient grounds for reversal or remand of the county's decision. Under ORS 197.835(10)(b), we are nevertheless required to affirm this aspect of the county's decision if the parties identify evidence in the record which

clearly supports the decision.

In this case, we find that the uncontraverted testimony of Reeder, an expert whose qualifications are not contested by petitioners, clearly supports a determination that the proposed use will meet the DEQ noise standards for blasting found in OAR 340-35-035(1)(d)(A). Intervenor's Brief A-39 to A-41. Reeder's testimony also establishes that the proposed use will meet DEQ's standards for allowable noise levels from industrial sources as measured in quiet areas. OAR 340-35-035(1)(c), Table 9. Intervenor's Brief A-36 to A-37. Thus, we can also conclude that the proposed use would meet the less stringent standards for allowable noise levels from existing or new noise sources as measured at the nearest noise sensitive property. OAR 340-35-035(1)(a), Table 7 and 340-35-035(1)(b), Table 8.

However, OAR 340-35-035(1)(b)(B) imposes an additional requirement on new industrial noise sources located on previously unused sites. OAR 340-35-015(47) defines "previously unused industrial or commercial site" as:

> " * * * property which has not been used by any industrial or commercial noise source during the 20 years immediately preceding commencement of construction of a new industrial or commercial source on that property. * * * "

The county's original February 17, 1988 decision includes a finding that "[a] shale pit has been worked on the subject property for at least 30 years." Record I 97. However, the DOGAMI site inspection report in the record states the proposed aggregate operation includes <u>two</u> extraction sites - Site A,

which will be used on a one-time basis for no more than a year; and Site B, about 1/2 mile away, which is intended as the long-term aggregate source for the proposed use. Record I 100, 172. The report further states it is Site A which has been mined since 1953. The parties identify no evidence in the record clearly supporting a determination that Site B is not a previously unused industrial or commercial site.

OAR 340-35-035(1)(b)(B) provides that the noise levels generated or indirectly caused by operation of a new industrial or commercial noise source on a previously unused site cannot increase certain ambient statistical noise levels by more than 10 dBA in any one hour, as measured at an appropriate measuring point specified in OAR 340-35-035(3)(b).[11] The parties do not identify evidence in the record which clearly supports a determination that the proposed use satisfies OAR 340-35-035(1)(b)(B), or that OAR 340-35-035(1)(b)(B) is not applicable to the proposed use.[12]

This subassignment of error is sustained with regard to the county's failure to address the applicability and satisfaction of the DEQ noise standard in OAR 340-35-035(1)(b)(B) with regard to Site B.

D. Ground Water Impacts

After our remand in Vizina I, the county adopted the following finding:

> "The use as proposed will meet DEQ standards for * * * water quality. * * *" Record II 34.

Petitioners argue that although the county adopted the above-quoted conclusionary finding, it is apparent that the county ignored applicable DEQ regulations concerning ground water impacts. Petitioners contend "the issue of ground water impacts is a required approval criterion." Petition for Review 14. Petitioners argue the county's finding that waste water discharge from the proposed use is subject to a DEQ permit (Record I 101) does not demonstrate that DEQ regulations concerning ground water will be satisfied. Petitioners further argue that because the county did not consider the quantity or quality of the ground water at the subject site, it cannot determine whether the proposed use will harm the groundwater. Petitioners specifically claim that the county failed to address or find compliance with OAR 340-41-029(2)(A), 340-41-120(3)(C) and 340-45-015(1)(D).

Intervenor argues that M&E Policy Implementation 2.a does not require consideration of DEQ water quality standards. Intervenor argues that consideration of whether the proposed use satisfies DEQ water quality standards was not one of the bases for our remand of the county's decision in Vizina I. According to intervenor, because the county was not required to determine compliance of the proposed use with DEQ water quality standards, the county's mention of it in its finding is mere surplusage.

Both the Court of Appeals and LUBA have determined that the doctrine of "waiver" applies to LUBA's proceedings. Under the

doctrine of waiver, after a land use decision is remanded by LUBA and a local government adopts a decision on remand, a party is precluded from raising issues in a subsequent LUBA appeal. Mill Creek Glen Protection Assoc. v. Umatilla Co., 88 Or App 522, 526-527, 746 P2d 728 (1987); Hearne v. Baker County, 89 Or App 282, 288, 748 P2d 1016, rev den 304 Or 576 (1988); Portland Audubon v. Clackamas County, 14 Or LUBA 433, 436-437, aff'd 80 Or App 593 (1986).

Petitioners' second assignment of error claims that the decision is inconsistent with M&E Policy Implementation 2.[13] The only issue raised by petitioners in Vizina I with regard to compliance with M&E Policy Implementation 2 was the lack of findings addressing whether the proposed use will satisfy DEQ standards for noise, dust, visual and traffic impacts, as required by M&E Policy Implementation 2.a. Petitioners do not argue the requirement of M&E Policy Implementation 2 for findings on compliance with DEQ ground water standards could not have been raised in the first appeal to LUBA. Petitioners cannot claim for the first time here that M&E Policy Implementation 2 requires a determination of whether the proposed use complies with DEQ ground water standards.[14]

This subassignment of error is denied.

E. Destruction of Wildlife Habitat

Petitioners argue that M&E Policy Implementation 2 requires consideration of the impacts of the proposed use on destruction

of wildlife habitat. Petitioners further argue there is no evidence in the record that the wildlife habitat issue was considered by the county or that the proposed use complies with this standard.

Intervenor argues that consideration of impacts of the proposed use on destruction of wildlife habitat is required by M&E Policy Implementation 2.c, which was not a subject of the remand in Vizina I. Intervenor argues that because petitioners did not raise this issue in their first appeal to LUBA, they are precluded from raising it in this second appeal proceeding.

We agree with intervenor that this issue was not raised in Vizina I. Therefore, for the reasons stated under the previous subassignment of error, this issue cannot be raised in this appeal.

This subassignment of error is denied.

The second assignment of error is sustained in part.

FOURTH ASSIGNMENT OF ERROR

> "The Decision is inconsistent with Sections 3.3.150 and 3.5.125 of the Land Use and Development Ordinance which provide that a Conditional Use Permit in the FF and FG zones cannot be granted unless granting the permit would not materially alter the stability of the overall land use pattern of the area."

FIFTH ASSIGNMENT OF ERROR

> "The Decision is in violation of Sections 3.3.150 and 3.5.125 of the Douglas County Land Use and Development Ordinance in that the Decision does not adequately address the issue of interference of the proposed quarry on forest and farm uses and practices on adjacent lands devoted, or suitable, for such uses."

These assignments of error were raised by petitioners, and decided adversely to them, in their first appeal. See Vizina I, slip op at 10-11. Petitioners' arguement under these assignments of error is based entirely on the findings and record of the county's original February 17, 1988 decision in this matter. Petitioners do not argue that the county's proceedings on remand altered its decision in any way relevant to the issues sought to be raised in these assignments of error.[15] We decline to reconsider the ruling on these issues made in Vizina I.

The fourth and fifth assignments of error are denied.

SIXTH ASSIGNMENT OF ERROR

> "The Decision is in violation of the County's Land Use and Development Ordinance, Section 3.39.050(1), in that the County did not adopt adequate findings, supported by substantial evidence, that the proposed quarry is or will be made compatible with existing adjacent permitted uses and other uses permitted in the underlying FF and FG zones."

LUDO 3.39.050.1 requires that any proposed conditional use meet the following approval criterion:

> "The proposed use is or may be made compatible with existing adjacent permitted uses and other uses permitted in the underlying zone."

Petitioners first complain that the county's findings are generally inadequate because the county nowhere explains what it means by compatibility. Petitioners argue this failure prevents proper review of the decision by LUBA.

The county's decision on remand includes the following finding:

> "In our opinion compatibility does not mean that absolutely no impact could result to adjoining uses. Some impact must be permissible, or no use could be made of any property. The question is whether the impact would significantly interfere with those uses." Record II 34.

It is clear from the findings quoted above that the county did explain the definition of compatibility it applied in making its decision. We, therefore, reject petitioners' challenge that the county erred by failing to explain its interpretation of "compatibility."

A. Six Unscreened Residences

In Vizina I, we found the county's decision failed to comply with LUDO 3.39.050.1 in part because of a lack of substantial evidence in the record to support the county's determination that the proposed use is or can be made compatible with approximately six unscreened residences, with regard to dust and noise impacts. Vizina I, at slip op 14-15.

Petitioners recognize that the county received on remand additional evidence relating to dust and noise impacts of the proposed use. However, petitioners do not attack the substantiality of that evidence to support the county's decision, but rather attack the adequacy of the county findings on dust and noise impacts. See Petition for Review 20-21.

In Vizina I, slip op at 13, we specifically found that the county's findings concerning compatibility of the proposed use with existing adjacent uses regarding noise and dust impacts were adequate to demonstrate compliance with LUDO 3.39.050.1.

We decline to reconsider our ruling on this issue.

This subassignment of error is denied.

B. Other Uses Permitted in the FG and FF Zones

In Vizina I, slip op at 13, we also stated that the county's findings failed to comply with LUDO 3.39.050.1 because "they do not address compatibility with other uses of adjacent property potentially permitted under the FF and FG zones."

In its decision on remand, the county adopted the following additional findings[16] relevant to compatibility of the proposed use with other uses potentially permitted in the FG and FF zones:

> " * * * We have also imposed stringent conditions on the Applicant's hours of operation, quantity of rock to be removed, road maintenance, and operation of equipment to assure compatibility with other uses. * * *
>
> " * * * * * *
>
> " * * * The use as proposed will meet DEQ standards for noise, dust, air, and water quality. Those DEQ standards, together with the additional conditions imposed and to be imposed herein, are adequate to assure compatibility with adjacent * * * future permissible FF and FG uses * * *." Record II 33-34.

Petitioners contend the county's findings are inadequate because they are conclusionary. Petitioners argue that a compatibility criterion is not satisfied by a finding merely stating the proposed use will be compatible, citing Okeson v. Union County, 10 Or LUBA 1 (1983). Petitioners also argue that compliance with DEQ regulations is not in itself sufficient to assure compatibility. Finally, petitioners argue that no

evidence was introduced on remand that the proposed use will be compatible with other permitted uses in the FG and FF zones with regard to "visibility, traffic, air quality, ground water and wildlife habitat impacts." Petition for Review 21.

Intervenor disagrees that the county's determination of compatibility is based solely on its finding that the proposed use will comply with certain DEQ regulations. Intervenor argues this can be determined from reviewing the relevant testimony of Brundige and Reeder concerning dust and noise. Intervenor also argues that petitioners are precluded from arguing that the county erred by not considering visibility, traffic, air quality, ground water and wildlife habitat in assessing compatibility because those issues were not included in the scope of our remand in Vizina I. Intervenor contends the county was only required to consider the issues of dust and noise on remand. Intervenor argues in the alternative, without explanation, that the county's findings and evidence more than amply deal with these other issues.

Intervenor is mistaken about the scope of our remand in Vizina I. We found that the county had failed to adopt any findings concerning compatibility of the proposed use with uses permitted in the the FG and FF zones, other than the existing rural residences. The requirement that the county address compatibility of the proposed use with these other potentially permitted uses was not limited to the issues of dust and noise.

As we explained under the first assignment of error, findings must state the facts the county believed to be true and explain how those facts lead to the conclusion reached. In this case, the LUDO 3.39.050.1 standard requiring that this proposed conditional use is or may be made compatible with uses potentially permitted in the FG and FF zone requires findings which (1) identify the potentially permitted uses considered by the county; (2) set out the facts relied on by the county concerning the impacts of the proposed use; and (3) explain why those facts led the county to its conclusion on compatibility. See Champion International v. Douglas County, ___ Or LUBA ___ (LUBA No. 87-047, October 5, 1987), slip op 18; Marineau v. City of Bandon, 15 Or LUBA 375, 379-380 (1987).

We agree with petitioners that a mere conclusionary statement that a proposed use is compatible with other uses is inadequate to show compiance with an approval standard requiring compatibility. Okeson v. Union County, 10 Or LUBA at 4. However, in this case, the county's findings do not simply state the conclusion that the proposed use is compatible with other potentially permissible FG and FF uses. The findings explain that the county bases its conclusion on determinations that the proposed use will meet DEQ standards for noise, dust, air and water quality, and on conditions imposed concerning hours of operation, quantity of rock removed, road maintenance and equipment operation. Record II 33-34.

However, as we determined under sections B and C of the second assignment of error, the county's finding that the proposed use will meet DEQ regulations for noise and dust is itself impermissibly conclusionary. The same is true of the county's finding concerning the satisfaction of DEQ air and water quality regulations. Thus, the county's determination of compatibility with regard to each of these impacts can be affirmed only if the parties identify evidence in the record which clearly supports that determination. ORS 197.835(10)(b).

Under section B of the second assignment of error, we affirmed the county's conclusion that the proposed use will meet DEQ dust standards. Intervenor also identifies uncontraverted testimony in the record that compliance with DEQ dust standards will protect adjacent properties from all dust impacts. Intervenor's Brief A-55 to A-57. We find that the county's determination of compatibility with regard to dust is clearly supported by the evidence.

However, under section C of the second assignment of error, we found the county's determination that the proposed use complies with DEQ noise regulations was not clearly supported by the cited evidence in the record. Therefore, the county cannot rely on that determination to establish compatibility of the proposed use with other uses potentially permitted in the FG and FF zones with regard to noise.

With regard to compliance of the proposed use with DEQ water quality regulations, intervenor cites testimony of Frank

Brundige, an experienced aggregate operator, that the proposed use will meet all DEQ standards for wastewater discharge, and that those standards are adequate to protect all the uses which might be permitted around the subject property in the future. Intervenor's Brief A-58 to A-59. Intervenor also cites the DOGAMI site inspection report stating that there are no drainages affected by the operation, and will be no discharge of wastewater from the site into the waters of the state. Record I 216. In the absence of a challenge to Brundige's qualifications or an identification of contrary evidence in the record by petitioners, we conclude that the county's determination of compatibility of the proposed use with other potentially permitted uses with regard to water quality is clearly supported by evidence in the record.

With regard to compliance of the proposed use with DEQ air quality regulations, we found under the second assignment of error the county's determination that the proposed use complies with DEQ visual impact regulations was not clearly supported by the cited evidence in the record. Therefore, the county cannot rely on that determination to establish compatibility of the proposed use with other potentially permitted uses with regard to visual impacts. As to DEQ air quality standards other than those concerning dust or visibility, we are not cited to evidence in the record that clearly supports a determination that the proposed use will meet such standards, or to clear evidence that such standards are sufficient to assure

compatibility with potentially permitted uses with regard to air quality impacts other than dust.

Petitioners argue that in addition to the impacts discussed above, the county's findings on compatibility with potentially permitted uses in the FG and FF zones must also consider traffic and wildlife habitat impacts. Intervenor identifies no relevant findings on the compatibility of the proposed use with potentially permitted uses with regard to these issues. The parties do not identify evidence in the record which would clearly support such a determination of compatibility.

In summary, the county's findings are inadequate to demonstrate compatibility of the proposed use with other uses potentially permissible in the FG and FF zones. However, the parties cite evidence in the record which clearly supports such a determination with regard to dust and water quality. On remand, the county must adopt findings demonstrating that the proposed use is compatible with potentially permissible uses in the FG and FF zones with regard to noise, air quality (other than dust), traffic and wildlife habitat impacts.

This subassignment of error is sustained in part.

The sixth assignment of error is sustained in part.

THIRD ASSIGNMENT OF ERROR

> "The Decision impermissibly uses the imposition of conditions subsequent as a means to defer determinations of compliance with the mandatory approval criteria applicable to Conditional Use Permits, Douglas County Land Use Ordinance Article 39."

Under this assignment of error, petitioners generally

contend that the county may not defer a determination of compliance with a mandatory approval criterion through the imposition of conditions at the time of conditional use permit appproval. We consider each condition challenged by petitioners separately below.

A. Dust Abatement Condition

The county imposed the following condition in its original February 17, 1988 order approving the conditional use permit:

> "9. Road dust from truck traffic on the access road shall be abated by the application of oil based dust preventative." Record I 102.

In its January 10, 1989 order on remand, the county "reminded" the applicant that the previously imposed conditions remain in effect. Record II 3.

Petitioners argue that the above-quoted condition is deficient to ensure compliance with applicable DEQ dust regulations because

> "it does not articulate the appropriate DEQ dust abatement standard or advise the Applicant how much preventative is to be applied or how frequently the dust preventative is to be applied." Petition for Review 17.

We understand petitioners to contend (1) that the county has deferred the determination of compatibility of the proposed use with other permissible uses with regard to dust impacts, required by LUDO 3.39.050.1, by relying on the challenged condition to ensure future compatibility with regard to dust; and (2) that the challenged condition does not ensure compatibility because it is not sufficient to ensure compliance

with DEQ dust regulations.

We concluded under the sixth assignment of error that the county has determined the proposed use will be compatible with other permissible uses with regard to dust impacts, based on the county's determination that the proposed use will comply with DEQ dust regulations. We upheld the latter county determination in section B of the second assignment of error. Petitioners do not demonstrate that these county compatibility determinations with regard to dust impacts are dependent upon imposition of the challenged condition.

This subassignment of error is denied.

B. Noise Reduction Condition

The county imposed the following condition in its original February 17, 1988 order approving the conditional use permit, and stated in the order on remand that it continues to apply:

> "2. The equipment used at the site shall be muffled to the extent possible." Record I 102.

We understand petitioners to argue that the county determination of compatibility of the proposed use with other permissible uses with regard to noise, required by LUDO 3.39.050.1, must be based on a determination that the proposed use will not produce noise in excess of the limits established by OAR 340-35-035. Petitioners further argue the challenged condition is not adequate to ensure compliance with this DEQ noise regulation because it simply requires equipment used at the subject site be muffled "to the extent possible."

We found under the sixth assignment of error that the county's determination of compatibility of the proposed use with other permissible uses with regard to noise is inadequate because it relies on a determination of the proposed use's ability to comply with DEQ noise standards which we found inadequate in section C of the second assignment of error. The county's failure to determine that the proposed use can comply with OAR 340-35-035(1)(b)(B) identified in section C of the second assignment of error is not remedied by the imposition of the challenged condition.

This subassignment of error is sustained.

C. Compliance With DOGAMI Regulations Condition

Another condition imposed by the county in its initial order approving the conditional use permit and retained in its January 10, 1989 order on remand provides:

> "The quarry operation shall be conducted in compliance with Department of Geology and Mineral Industries permit regulations." Record I 102.

According to petitioners, if the applicant cannot demonstrate that he can mine and reclaim the subject property consistent with DOGAMI standards, the county cannot approve a conditional use permit for the proposed use by conditioning that approval on future compliance with DOGAMI regulations.

Intervenor argues that the county made the required detrmination of compliance with DOGAMI regulations, based on substantial evidence in the record, and has not deferred that determination through imposition of the challenged condition.

Under the first assignment of error, supra, we determined the county satisfied the requirement of M&E Policy Implementation 3 that it determine the proposed use will meet applicable DOGAMI regulations. Thus, the condition imposed does not substitute for the required determination of compliance.

This subassignment of error is denied.

The third assignment of error is sustained in part.

SEVENTH ASSIGNMENT OF ERROR

> "The Decision violates Section 2.200(3)(b) [sic 2.300(3)(b)] of the Douglas County Land Use and Development Ordinance in that the Decision adopted the Findings of the Planning Commission at a hearing colored by bias on the part of one Commissioner."

Petitioners contend that LUDO 2.300(3)(b) provides that no member of a decision making body shall take part in "any proceeding in which such member has bias * * *." Petitioners argue this provision was violated because a member of the planning commission participated in the planning commission hearing even though he had excused himself from voting at an earlier hearing because of a past association with counsel for the applicant.

Petitioners argue that the planning commission member in question should not have been allowed to participate in the planning commission hearing on remand simply because he excused himself from participation in a previous hearing due to a prior association with counsel for a party to the proceeding. Petitioners do not argue that the planning commission member in

question was biased. In the absence of such argument, petitioners provide no basis for finding a violation of LUDO 2.300(3)(b).

The seventh assignment of error is denied.

EIGHTH ASSIGNMENT OF ERROR

> "The Decision violated Section 2.300(3)(i) of the Douglas County Land Use Development Ordinance in that the County allowed a planning commissioner to view the site of the proposed quarry without giving the Petitioners an opportunity to offer rebuttal evidence and testimony, or to respond to such evidence."

LUDO 2.300(3)(i) provides that the approving authority, in conducting a hearing, shall:

> "Allow the parties to offer rebuttal evidence and testimony, and to respond to any additional evidence. The scope and extent of rebuttal shall be determined by the Approving Authority."

Petitioners argue that the planning commission violated LUDO 2.300(3)(i) by allowing a commissioner to present evidence obtained at a view of the subject property without allowing petitioners to rebut or comment on this evidence. Petitioners assert that LUBA has held that if decision makers visit a site that is the subject of a land use permit application, they must explain to all parties the information obtained from the site visit, and allow all parties the opportunity to rebut such information. According to petitioners, if a decision maker obtains information relevant to a land use application, without giving interested parties an opportunity to rebut such evidence, those interested parties are substantially prejudiced.

Intervenor concedes that a planning commission member was

allowed to comment on his view of the subject site at a time when the hearing had been closed to further input by petitioners. However, intervenor points out that the board of commissioners found, upon reviewing the entire record, that the facts recited by that member were already in the record. Intervenor argues that the board of commissioners' finding is equivalent to a ruling of harmless error. Intervenor contends that petitioners' challenge should be rejected because they do not contest this finding by the board of commissioners.

The board of commissioners considered this issue and adopted the following finding:

> "The individual Planning Commissioner who viewed the site and recited what he found, did so at a time no rebutting testimony [was] allowed. However, upon review of the entire record, we find that the facts recited by the Commissioner appear elsewhere in the record and substantially the same findings could have been entered without the evidence presented by the Commissioner." Record II 2-3.

The board of commissioners effectively conceded that the planning commission erred by not allowing rebuttal to the commissioner's recitation of his observations, but concluded this error was harmless because the facts given by the planning commissioner were already in the record. Petitioners do not challenge this determination by arguing either (1) the planning commissioner presented facts <u>not</u> already in the record, or (2) even if the facts <u>were</u> already in the record, it was still prejudicial to petitioners' rights not to be able to rebut the planning commissioner's testimony. Petitioners, therefore, do

not explain how the board of commissioners' decision is error.

The eighth assignment of error is denied.

The county's decision is remanded.

FOOTNOTES

[1] The county record in Vizina I is included in the county record in this review proceeding, and shall be cited as "Record I." The record compiled by the county after our remand in Vizina I shall be cited as Record II.

[2] LUDO 3.39.050.1 provides in part:

"The Approving Authority may grant a request for conditional use approval if * * *:

"1. The proposed use is or may be made compatible with existing adjacent permitted uses and other uses permitted in the underlying zone.

"* * * * *"

[3] While it may not always be essential to include numerical citations to each regulation considered applicable, so long as the applicable regulations are identified in some manner in the decision, we note that our review of a decision is facilitated by accurate, specific citations of applicable standards or criteria.

[4] In addition, we note that if compliance with a particular applicable regulation is raised as an issue in the county proceedings, the county must respond in its findings to the specific issue raised. City of Wood Village v. Portland Metro. Area LGBC, 48 Or App 79, 87, 616 P2d 528 (1980); Norvell v. Portland Area LGBC, 43 Or App 849, 853, 604 P2d 896 (1979); Allen v. Umatilla County, supra.

[5] OAR Chapter 632, Division 30 applies to all new mineral products operations except coal and metal-bearing ore operations. OAR Chapter 632, Division 35 contains parallel regulations which apply to new coal and metal-bearing ore operations. In their brief, petitioners cite Division 35 as the applicable division. This appears to be a typographical error or an oversight on their part.

[11] OAR 340-35-035(1)(b)(B) provides in relevant part:

"New Sources Located on Previously Unused Site.

"(i) No person owning or controlling a new industrial or commercial noise source located on a previously unused industrial or commercial site shall cause or permit the operation of that noise source if the noise levels generated or indirectly caused by that noise source increase the ambient statistical noise levels $L_{10}$ or $L_{50}$, by more than 10 dBA in any one hour, * * * as specified in subsection (3)(b) of this rule.

"(ii) The ambient statistical noise level of a new industrial or commercial noise source on a previously unused industrial or commercial site shall include all noises generated or indirectly caused by or attributable to that source, including all of its related activities. * * *"

OAR 340-35-015(59) defines "statistical noise level" as:

"* * * the Noise Level which is equalled or exceeded a stated percentage of the time. An $L_{10}$ = 65 dBA implies that in any hour of the day 65 dBA can be equalled or exceeded only 10 percent of the time, or for six minutes."

[12] The evidence to which we are cited in the record appears to suggest that this standard, if applicable to the proposed use, might not be met. At one point, Reeder testified that the sound level the six unscreened residences down the valley will hear from the proposed use is 10 to 12 dBA. Intervenor's Brief A-37 to A-38. At another point, Reeder testified that the noise levels to be expected at the down valley house nearest to the proposed operation would be around 20 dBA from normal operations, maybe 25 to 30 dBA from blasting. Intervenor's Brief A-41 to A-42.

[13] In their petition for review, petitioners also argue that failure to make specific findings showing adequate protection of water quality violates statewide land use planning goals. This claim also was not raised in Vizina I. However, in any

case, the county's comprehensive plan and land use regulations have been acknowledged by the Land Conservation and Development Commission, and the goals are not approval standards for land use decisions made under acknowledged plans and regulations. ORS 197.175(2)(d), 197.835(3).

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14

However, petitioners' sixth assignment of error concerning compliance with LUDO 3.39.050.1 is also based in part on their arguments under this subassignment concerning the adequacy of the county's finding that the proposed use will meet DEQ water quality standards. If relevant, and not precluded by waiver, we will consider petitioners' arguments under that assignment of error.

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15

We note that the use approved by the county in its January 10, 1989 order is the same as that approved by the county's November 17, 1988 order, save that an additional condition requiring preservation of the trees on intervenor's property to the south of the quarry site was added by the more recent order. Record II 3. Furthermore, the board of commissioners specifically limited the scope of the issues to be considered by the planning commission on remand, and the planning commission specifically limited the scope of its public hearing on remand, to those issues which were the bases for our remand in Vizina I. Record II 44-45, 48.

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16

As we noted in n 8 and n 9, supra, the "Findings of Fact" section of the county's decision also includes lengthy descriptions of testimony received on the dust and noise issues. For the reasons stated in n 8, we do not consider these recitations of evidence to be county findings of fact.

6

A finding that certain regulations do not apply to a decision may be stated in conclusional form. Of course, such a conclusion must be legally correct. However, petitioners wishing to challenge such a conclusion with regard to a particular regulation have an obligation to provide some explanation as to why the conclusion is erroneous, unless it is clear on its face that the particular standard does apply.

7

We note that the air contaminant discharge permit for the rock crusher proposed to be used at the subject site includes emissions limits for opacity that appear to satisfy the requirements of OAR 340-21-015. Record I 220. Furthermore, the DEQ November 5, 1987 source inspection report found the rock crusher to be in compliance with the permit conditions. Record I 224.

8

In fact, it seems clear that once trucks traveling to and from the aggregate extraction and processing site leave the private driveway on the subject property, they will be traveling on public roads.

9

We note that the section of the county planning commission's decision entitled "Findings of Fact," incorporated by reference into the board of commissioners' decision, contains lengthy descriptions of the testimony given by Frank Brundige concerning compliance of the proposed use with DEQ standards for noise, dust air and water quality. Record II 31-32. We have repeatedly held that such descriptions of evidence in the record are not findings of fact because they do not state what the county itself found to be true. See Hill v. Union County Court, 42 Or App 883, 601 P2d 905 (1979); McCoy v. Linn County, ___ Or LUBA ___ (LUBA No. 87-046, December 15, 1987), slip op 31, n 15, aff'd 90 Or App 271 (1988).

10

We agree with petitioners that the lengthy descriptions of Reeder's testimony and opponents responses concerning the noise issue found in the "Findings of Fact" section of the county's decision are not really findings of fact, for the reasons stated in n 8.