BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

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| MICHAEL O'MARA, NAOMI O'MARA, DONALD COOPER, VICKIE COOPER, GERALD HELBLING, CHRISTI HELBLING, ELINOR JEAN GADWAY, AVIS S. WHITE, and LORI ANN BUSH, Petitioners, | |
| vs. | |
| DOUGLAS COUNTY, Respondent, | LUBA No. 92-166<br>FINAL OPINION AND ORDER |
| and | |
| BRACELIN-YEAGER EXCAVATION & TRUCKING, INC., Intervenor-Respondent. | |

Appeal from Douglas County.

Allen L. Johnson and Bill Kloos, Eugene, filed the petition for review. With them on the brief was Johnson & Kloos. Bill Kloos argued on behalf of petitioners.

Paul E. Meyer, Assistant County Counsel, Roseburg, filed a response brief and argued on behalf of respondent.

Steven W. Abel and Gregory G. Lutje, Portland, filed a response brief. With them on the brief was Schwabe, Williamson & Wyatt. Steven W. Abel argued on behalf of intervenor-respondent.

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

HOLSTUN, Referee, concurring.

REMANDED 03/10/93

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 appeal a decision of the board of county commissioners approving a conditional use permit to allow screening and crushing of aggregate and an asphalt batch plant on land zoned Heavy Industrial (M-3).

**MOTION TO INTERVENE**

Bracelin-Yeager Excavation & Trucking, Inc., the applicant below, moves to intervene in this proceeding on the side of respondent. There is no opposition to the motion, and it is allowed.

**MOTION TO FILE AMENDED BRIEF**

On December 31, 1992, intervenor-respondent (intervenor) moved for permission to file an amended response brief. There is no opposition to the motion, and it is allowed.

**FACTS**

The subject property is a 56.4 acre parcel located west of Highway 99. A Southern Pacific Railroad track lies between the subject parcel and Highway 99. The South Umpqua River flows through the middle of the parcel. The portion of the parcel on the east side of the river is zoned M-3. The portion of the parcel on the west side of the river (essentially a gravel bar) is zoned Exclusive Farm Use - Grazing (FG). In 1990, the county granted a conditional use permit to the previous owner of the property to remove

gravel from the FG zoned portion of the property. This removal was completed in 1991, and the gravel was stockpiled on the M-3 zoned portion of the parcel. The parcel also contains two residences and a maintenance shop.

The subject parcel is adjoined on the north by properties zoned M-3 and Community Commercial (C-2). It is adjoined on the west by properties zoned FG and in farm use. Some of these FG zoned parcels are occupied by dwellings. The subject parcel is adjoined on the south by Rural Residential (5R) zoned property containing dwellings. To the east of the subject parcel, across Highway 99, are properties zoned Farm-Forest (FF), 5R, C-2 and Limited Commercial (C-1). These properties contain dwellings, a recreational vehicle park and a motel.

Intervenor applied for a conditional use permit to allow crushing and screening of aggregate and operation of an asphalt batch plant. After a public hearing, the county planning commission denied intervenor's application. Intervenor appealed the planning commission's decision to the board of commissioners. After conducting a de novo review of the record before the planning commission, the board of commissioners adopted a decision approving intervenor's application. This appeal followed.

**FIRST ASSIGNMENT OF ERROR**

> "An asphalt concrete plant is not a use allowed conditionally under the language of the M-3 zone; the county has misconstrued the applicable law."

The M-3 zone lists the following as a conditionally permitted use:

> "Operations conducted for the exploration, mining and processing of aggregate and mineral resources or other subsurface resources." Douglas County Land Use and Development Ordinance (LUDO) 3.22.100(5).

The challenged decision approves the proposed use as "mining and processing of aggregate" under LUDO 3.22.100(5). Record 1-2.

Petitioners argue the above quoted LUDO provision, and similar provisions in the county's exclusive farm use zoning districts, were initially adopted in 1980. Petitioners contend that when adopted in 1980, this language copied ORS 215.213(2)(b) (1979), a statutory provision allowing the following in exclusive farm use zones:

> "Operations conducted for the exploration, mining and processing of geothermal resources as defined by subsection (4) of ORS 522.010, aggregate and mineral resources or other subsurface resources." (Emphasis added.)

Petitioners further argue that in Gearhard v. Klamath County, 7 Or LUBA 27, 33 (1982), we interpreted this statutory language, which had been adopted in Klamath County's code, as not including the manufacture of asphalt in an asphalt batch plant. According to petitioners, because LUDO 3.22.100(5) uses the same language as ORS 215.213(2)(b) (1979), it must be interpreted the same, absent some clear indication in the LUDO or its legislative

history to the contrary.[1] Smith v. Clackamas County, 313 Or 519, ___ P2d ___ (1992); Harvard Medical Park, Ltd. v. City of Roseburg, 19 Or LUBA 555 (1990); Joseph v. Lane County, 18 Or LUBA 41 (1989).

The Oregon Supreme Court decision cited by petitioners, Smith v. Clackamas County, concerned the interpretation of a county EFU zone nonfarm dwelling approval standard, where the language of that standard was identical to a statutory EFU zone nonfarm dwelling standard. We believe the Oregon Supreme Court opinion more closely paralleling the facts of this case is Clark v. Jackson County, 313 Or 508, 836 P2d 710 (1992). In Clark, the court interpreted a county approval standard for mining in an EFU zone, where the language of that standard was similar to a statutory standard for nonfarm dwellings in an EFU zone. The court pointed out differences between the county's approval standards for mining conditional use permits and its approval standards for nonfarm dwelling conditional use permits, and concluded this Board exceeded its review authority by requiring the county to interpret the code mining standard at issue consistently with the similarly

[1]Petitioners recognize that the EFU statute was amended in 1989 to specifically provide that the "processing * * * of aggregate into asphalt" may be conditionally allowed in an EFU zone. Or Laws 1989, ch 861, §2; codified at ORS 215.283(2)(b)(C). The county subsequently amended its EFU zones to include the language of ORS 215.283(2)(b)(C). LUDO 3.3.100(5), 3.4.100(5). However, petitioners maintain that until the county similarly amends the language of the M-3 zone in LUDO 3.22.100(5), it must interpret that language not to include asphalt plants.

worded statutory nonfarm dwelling standard. The court stated that "LUBA is to affirm the county's interpretation of its own ordinance unless LUBA determines that the county's interpretation is inconsistent with express language of the ordinance or its apparent purpose or policy." Clark, 313 Or at 515.

The LUDO does not contain a definition of "processing of aggregate."[2] The county apparently adopted the "processing of aggregate" language in LUDO 3.22.100(5) as part of its M-3 zone at a time when this Board had interpreted similar language in the EFU statute not to include asphalt plants. However, the purpose of the county's M-3 zone is "to provide * * * areas well suited for medium and heavy industrial development and uses[,] free from conflict with * * * other incompatible uses." LUDO 3.22.000. This is entirely different from the purpose of the county's EFU zones, which is "to provide areas for the continued practice of agriculture and permit * * * only those new uses which are compatible with agricultural activities." LUDO 3.3.000, 3.4.000. Additionally, the approval standards for conditional use permits for processing of aggregate in the M-3 zone are different from those of the EFU zones. Compare LUDO 3.3.150, 3.4.150,

[2]We note the mining statutes define "processing" to include the "batching and blending of mineral aggregate into asphalt." ORS 517.750(11). This definition was enacted in 1983. Or Laws 1983, ch 46, § 1.

3.22.100. Accordingly, we conclude it is not inconsistent with the language of LUDO 3.22.100(5), or the purpose or policy of the county's M-3 zone, to interpret "processing of aggregate" to include asphalt batch plants; and we defer to the county's interpretation.

The first assignment of error is denied.

**SECOND ASSIGNMENT OF ERROR**

> "The county failed to demonstrate that this asphalt concrete plant is a 'rural' use which is allowed at this rural site, outside an acknowledged urban growth boundary."

Petitioners contend the county erred by failing to determine whether the proposed use is urban or rural in nature. Schaffer v. Jackson County, 16 Or LUBA 871, 873 (1988) (plan/zone change to allow asphalt plant in rural industrial designated area). Petitioners argue the site of the proposed asphalt plant is "rural" land, because it is located outside an acknowledged urban growth boundary [UGB].[3] According to petitioners, the county may only approve an asphalt plant on rural land if it either (1) finds it is a "rural" use, or (2) adopts an exception to Statewide Planning Goal 14 (Urbanization). 1000 Friends of Oregon v. LCDC (Curry County), 301 Or 447, 477, 724 P2d 268 (1986).

[3]Prior to acknowledgment of its comprehensive plan and land use regulations, the county adopted a "committed" exception to Goals 3 (Agricultural Lands) and 4 (Forest Lands) for the M-3 zoned portion of the subject parcel.

This assignment of error alleges a violation of Goal 14. The county's comprehensive plan and land use regulations have been acknowledged under ORS 197.251. Once the county's plan and regulations are acknowledged, the acknowledged plan and land use regulations, not the statewide planning goals, apply to permit decisions such as the one at issue here. ORS 197.175(2)(d); Byrd v. Stringer, 295 Or 311, 316-17, 666 P2d 1332 (1983); Keudell v. Union County, 19 Or LUBA 394, 400 (1990). Because the county land use decision challenged in this proceeding is not "an amendment to an acknowledged comprehensive plan or land use regulation or a new land use regulation," we have no authority to reverse or remand the county's decision for failure to comply with the statewide planning goals. ORS 197.835(3) and (4); Highway 213 Coalition v. Clackamas County, 17 Or LUBA 256, 263 (1988).

The second assignment of error is denied.

**THIRD ASSIGNMENT OF ERROR**

> "The County has failed to apply or find compatibility with the [LUDO] flood hazard regulations, which are criteria that apply to this development."

Petitioners contend the county erred in failing to address the requirements of LUDO Article 30 (Floodplain Overlay (FP) District).

**A. Waiver**

Intervenor contends petitioners may not raise the issue

of compliance with LUDO Article 30 in this appeal, because it was not raised before the county. ORS 197.835(2), 197.763(1).

Petitioners do not contend they raised this issue prior to the close of the record at or following the evidentiary hearing below, as required by ORS 197.763(1). However, petitioners point out ORS 197.835(2)(a) provides that new issues may be raised before this Board if the county "failed to follow the requirements of ORS 197.763." Petitioners argue the county's notice of the evidentiary hearing before the planning commission failed to comply with ORS 197.763(3)(b) in that it failed to list LUDO Article 30 as containing criteria applicable to the subject application.[4]

The county's notice of the May 21, 1992 planning commission hearing does not identify provisions of LUDO Article 30 as criteria applicable to the subject application. Record 72. Therefore, if LUDO Article 30 establishes approval criteria applicable to the challenged decision, the county's notice of hearing did not comply with ORS 197.763(3)(b), in that it failed to identify applicable

[4]Because we remand the county's decision to address the applicability of LUDO Article 30 for the reasons stated below, we do not address petitioners' additional contentions that the county failed to follow the requirements of ORS 197.763 by (1) not having its staff report available at least seven days before the planning commission hearing, as required by ORS 197.763(4)(b); and (2) not making the oral statement at the beginning of the planning commission hearing, required by ORS 197.763(5)(a).

approval criteria, and petitioners may raise the county's failure to address those approval criteria as an issue in this appeal proceeding. ORS 197.835(2)(a); Terra v. City of Newport, ___ Or LUBA ___ (LUBA No. 92-068, January 22, 1993), slip op 16 n 10; Neuenschwander v. City of Ashland, 20 Or LUBA 144, 157 (1990). Thus, we must decide whether LUDO Article 30 establishes approval criteria applicable to the subject application.

**B. LUDO Article 30**

LUDO 3.30.270(1) requires that a permit be obtained "before construction or development begins within any area of flood hazard established in [LUDO] 3.30.500."[5] LUDO 3.30.500(2) establishes a Floodway District. There is no dispute that the entire subject parcel is within the floodway of the South Umpqua River. Record 145-46. LUDO 3.30.520(1) prohibits development in the Floodway District unless "an Oregon registered engineer or architect certifies that such encroachments (and cumulative like encroachments) shall not result in any increase in flood levels during the occurrence of a regional flood."

Petitioners argue that the proposed use constitutes

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[5]LUDO 3.30.200 defines "development" as:

> "Any man-made change to improved or unimproved real estate, including but not limited to buildings or other structures, mining, dredging, filling, grading, paving, excavation, or drilling operations located within the area of special flood hazard."

development in a Floodway District and, therefore, the above described LUDO Article 30 requirements for a flood hazard permit must be addressed at the time conditional use permit approval is granted.[6] Petitioners also point out that a general conditional use permit approval criterion requires that the county find "[t]he proposed use is compatible with any other criteria contained in specific zoning district regulations of the [LUDO]." LUDO 3.39.050(2). Petitioners contend the FP Overlay District provisions of LUDO Article 30 are such "specific zoning district regulations" and contain criteria applicable to the proposed use which must be addressed under LUDO 3.39.050(2).

As explained above, this Board is required to defer to a local government's interpretation of its own ordinances, unless that interpretation is contrary to the express words, policy or context of the local enactment. Clark v. Jackson County, supra. However, this Board may not interpret a local government's ordinances in the first instance, but rather must review the local government's interpretation of its ordinances. Weeks v. City of Tillamook, 117 Or App 449, 453-54, ___ P2d ___ (1992). Further, a local government interpretation must be adequate for such review, "a conclusory statement does not suffice as an interpretation

[6]Petitioners also argue the proposed use that must be considered by the county is not only the proposed asphalt plant itself, but also the stockpiling of aggregate planned to support its operation.

of [ordinance] provisions." Larson v. Wallowa County, 116 Or App 96, 104, ___ P2d ___ (1992).

The language of LUDO Article 30 and 3.39.050(2) is capable of more than one meaning and, therefore, requires interpretation. The challenged decision does not include an interpretation with regard to whether LUDO Article 30 establishes "criteria contained in specific zoning district regulations," with which the subject conditional use permit is required to be compatible under LUDO 3.39.050(2). Neither does it address whether LUDO Article 30 requires that a flood hazard permit be approved at the time of conditional use permit approval. Therefore, the challenged decision must be remanded for the county to interpret and apply these LUDO provisions in the first instance.

The third assignment of error is sustained.

**FOURTH ASSIGNMENT OF ERROR**

> "The county erred in concluding that ORS 215.301, prohibiting the siting of an asphalt batch plant within two miles of a vineyard, does not apply to the proposed use and in shifting to the opponents the burden of proving that the standard is not met."

ORS 215.301 provides, in relevant part:

> "Notwithstanding the provisions of ORS 215.213 and 215.283, no application shall be approved to allow batching and blending of mineral and aggregate into asphalt cement within two miles of a planted vineyard. * * *"

ORS 215.301 was enacted by Oregon Laws 1989, chapter 861, section 4. This 1989 Act is entitled "An Act relating to

uses allowed in exclusive farm use zones; creating new provisions; and amending ORS 215.213, 215.263 and 215.283."

Petitioners contend ORS 215.301 applies to asphalt plants, without regard to whether they are sited on land that is zoned for exclusive farm use (EFU). Petitioners argue the above quoted title of the 1989 Act "lists three separate and distinct functions." Petition for Review 13. Petitioners contend the section of the 1989 Act codified as ORS 215.301 is one of the "new provisions" created by the act. According to petitioners, such new provisions are not limited in scope to uses allowed in EFU zones. Petitioners further argue that the codification of this section in the portion of ORS ch 215 that deals with "Agricultural Land Use" does not, of itself, limit the effect of the section to only EFU zoned land. Petitioners also contend there is evidence in the record that there is a vineyard planted within two miles of the proposed asphalt plant site.

Intervenor argues that Article IV, section 20, of the Oregon Constitution limits every legislative act to one subject and requires that the subject of the act be expressed in its title. In re Traders' Guardianship, 191 Or 203, 212, 229 P2d 276 (1951); Warren v. Marion County, 222 Or 307, 321, 353 P2d 257 (1960). Therefore, the second provision in the subject 1989 Act's title, "creating new provisions," cannot be read separately from the relating clause, "relating to uses allowed in exclusive farm use

zones." According to intervenor, this means that ORS 215.301 applies only to asphalt plants sited in EFU zones, and not to an asphalt plant sited in an industrial zone. Intervenor also argues that the legislative history of the 1989 Act indicates the prohibition of ORS 215.301 was intended to apply only to asphalt plants sited in EFU zones.

We agree with intervenor that under Article IV, section 20, of the Oregon Constitution, all provisions of the 1989 Act must be related to uses allowed in EFU zones. Therefore, it is proper to interpret the provision in question to apply only to asphalt plants sited in EFU zones. Further, this is consistent with the language of ORS 215.301 itself. ORS 215.213 and 215.283 set out the uses allowed in EFU zones. The fact that ORS 215.301 begins by stating "[n]otwithstanding the provisions of ORS 215.213 and 215.283 * * *" means that it creates an exception to the provisions of ORS 215.213 and 215.283, namely by prohibiting asphalt plants in EFU zones in some circumstances where they would otherwise be allowed in EFU zones under ORS 215.213 or 215.283. We conclude ORS 215.301 does not apply to the subject application to site an asphalt plant in an industrial zone.

The fourth assignment of error is denied.

**FIFTH ASSIGNMENT OF ERROR**

> "The County erred in basing its finding of actual or potential compatibility upon an incorrect interpretation of the 'adjacent use' language [of

> LUDO 3.39.050(1)] and in failing to adequately identify, characterize, and address all adjacent uses and the potential impact on those uses."

LUDO 3.39.050(1) establishes the following approval criterion for conditional uses:

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

This assignment of error contends the county erred in identifying the "adjacent permitted uses" with which the proposed use must be compatible or be made compatible.

**A. Identification of Adjacent Area Considered**

Petitioners argue that where an approval standard requires examination of impacts on a geographic area, the decision maker must, as an initial step, delineate the area that is being examined. DLCD v. Curry County, 21 Or LUBA 130, 135 (1991); Benjamin v. City of Ashland, 20 Or LUBA 265, 271 (1990); Multnomah County v. City of Fairview, 18 Or LUBA 8 (1989). Petitioners argue the county failed to identify the area it considers to be "adjacent" for purposes of determining compliance with LUDO 3.39.050(1).

LUDO 3.39.050(1) requires the county to identify the "existing adjacent permitted uses," in order to be able to determine whether the proposed use "is or may be made compatible" with such uses. We agree with petitioners that a necessary step in identifying the "existing adjacent permitted uses" is identifying what constitutes the

"adjacent" area considered. For the reasons stated below, we conclude the county has done so.[7]

The county findings state:

> "[LUDO 3.39.050(1)] refers to 'adjacent' properties. The proposed asphalt plant location is located on a single tax lot within the proposed site, and thus the nearest adjacent properties include the adjoining tax lots, owned by [intervenor], zoned M-3, located to the north and west of the proposed asphalt processing plant.[8] The adjacent properties also include the Southern Pacific Railroad property and [Highway 99] located to the north and east of the site, the EFU lands located to the west of the site, and the single rural residential 5-acre parcel located approximately 1,200 feet south of the location of the proposed plant. It is these parcels which constitute the 'adjacent' [area]." Record 2-3.

The above quoted findings identify the "adjacent" area as including (1) the M-3 zoned tax lot that is part of the subject parcel and is located to the north of the tax lot on which the asphalt plant is proposed to be located; (2) the Southern Pacific Railroad property and Highway 99, located to the north and east of the proposed site; (3) a rural residential parcel located 1,200 feet south of the proposed plant location; and (4) EFU zoned lands located to the west

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[7]However, whether the identified area considered by the county complies with the requirements of LUDO 3.39.050(1) is addressed in the following subassignment.

[8]The subject parcel is comprised of three tax lots. Tax lot 900 is approximately 34 acres and is zoned FG. Tax lots 100 and 300 are each approximately 11 acres and are zoned M-3. The asphalt plant is proposed to be located on tax lot 300. Tax lot 100 adjoins tax lot 300 to the north. Tax lot 900 adjoins both tax lots 100 and 300 to the west. Record, Staff Exhibit 7 (Plat Map).

of the site. The identity of the property referred to in (1)-(3) is clear. There is some uncertainty with regard to the identity of the property referred to in (4), because the meaning of the term "site" in the above quoted finding is somewhat unclear. However, because the finding states the asphalt plant is proposed to be located on "a single tax lot within the proposed site," we believe the term "site" refers to the entire 56.4 acre parcel. Therefore, (4) refers to the EFU zoned properties adjoining the subject 56.4 acre parcel to the west.

This subassignment of error is denied.

**B. Interpretation of "Adjacent"**

Petitioners contend that if the above quoted findings are interpreted to identify as adjacent only those parcels or tax lots that share a common property line with the subject parcel or tax lot, such a county interpretation of "adjacent," as used in LUDO 3.39.050(1) would be improper. Although the LUDO does not define "adjacent," petitioners argue the county comprehensive plan specifically defines "adjacent land" to mean "parcels adjoining at a common boundary line or point, or which are situated within the near vicinity of each other." (Emphasis added by petitioners.) Plan, Appendix A at A-1. Petitioners point out that LUDO 1.060(1)(a) provides that any interpretation of the LUDO shall consider the plan. Petitioners also argue that the plan definition of "adjacent" to include more than

just abutting properties is consistent with the ordinary meaning of "adjacent." Stefan v. Yamhill County, 18 Or LUBA 820, 845 n 21 (1990). Finally, petitioners contend that land within the "near vicinity" of the subject property must include any land alleged to be adversely impacted by the proposed use.

Once again, this Board is required to defer to the county's interpretation of its own ordinances, unless that interpretation is contrary to the express words, policy or context of the local enactment. Clark v. Jackson County, supra. However, this Board may not interpret a local government's ordinances in the first instance, but rather must review the local government's interpretation of its ordinances. Weeks v. City of Tillamook, supra.

The term "adjacent" is capable of more than one possible meaning and, therefore, requires interpretation. The challenged decision does not interpret the term "adjacent," as it is used in LUDO 3.39.050(1). The decision does identify the properties the county considers to be "adjacent" to the subject site (see section A above). The challenged decision does not, however, explain the rationale on which the county's identification of these properties as "adjacent" is based. For example, the properties identified by the decision as "adjacent" include Highway 99, which does not abut the subject parcel, but do not include the M-3 zoned property that abuts the subject parcel to the north

and west. Therefore, we cannot infer from the county's identification of the properties it considers "adjacent" that the county interprets adjacent to mean abutting.[9]

The challenged decision must be remanded for the county to interpret the term "adjacent," as used in LUDO 3.39.050(1), in the first instance, and to explain how its interpretation leads to identifying certain properties as "adjacent."[10] Weeks v. City of Tillamook, supra; Larson v. Wallowa County, supra.

This subassignment of error is sustained.

The fifth assignment of error is denied.

**SIXTH ASSIGNMENT OF ERROR**

> "The County erred in determining that 'residential structures on EFU lands are not permitted uses for purposes of application of [LUDO 3.39.050(1)].'"

Petitioners point out that LUDO 3.39.050(1) also requires a determination of compatibility with "other uses permitted in the underlying zone." Petitioners argue that LUDO 3.3.050 ("Permitted Uses") lists farm dwellings and

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[9]In view of the plan definition of "adjacent" quoted in the text, supra, and the requirement of LUDO 1.060(1)(a) that interpretations of the LUDO consider the plan, we seriously question whether an interpretation of "adjacent," as used in LUDO 3.39.050(1), to mean only abutting parcels or tax lots could be sustained.

[10]We also note that once the county has done so, it must then identify the "existing * * * permitted uses" on such adjacent properties, as a necessary basis for determining whether the proposed use "is or may be made compatible" with such adjacent uses, as required by LUDO 3.39.050(1). Whether the county must also identify the "other uses permitted in the underlying zone" for such adjacent properties is an issue raised by the sixth assignment of error, infra.

farm relative dwellings as permitted uses in the FG zone. Therefore, according to petitioners, the county improperly refused to consider "potential dwellings" on the adjacent FG zoned property to the west of the subject parcel in its compatibility analysis. Petition for Review 22. Petitioners argue the county erroneously interpreted the phrase "other uses permitted in the underlying zone" to exclude any uses which require discretionary factfinding prior to authorization, such as dwellings in the FG zone. See Kirpal Light Satsang v. Douglas County, 97 Or App 614, 776 P2d 1312, rev den 308 Or 382 (1989) (no inherent correlation between permitted uses and nondiscretionary uses).

Intervenor argues that the phrase "other uses permitted in the underlying zone" in LUDO 3.39.050(1) does not refer to the zones applied to adjacent properties at all, but rather to the M-3 zone applied to the subject parcel. Intervenor points out that LUDO 3.39.000 provides that one purpose of conditional use review is "* * * to insure that the use is made compatible with the permitted uses in the zone or other adjacent permitted uses which may be adversely affected." Intervenor argues that as farm dwellings are not permitted at all in the M-3 zone, the county committed no error in failing to consider potential farm dwellings.

LUDO 3.39.050(1) establishes the following approval criterion for conditional uses:

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

In this assignment of error, petitioners specifically challenge the county's failure to consider compatibility of the proposed use with potential farm dwellings on adjacent FG zoned land under the emphasized part of the above quoted standard.

The only arguably relevant findings in the challenged decision state:

> "[LUDO 3.39.050(1)] refers to those adjacent uses that are 'permitted uses.' The [LUDO] defines permitted uses as those uses 'permitted outright in a zoning district, and which comply with all of the regulations applicable in that district.' LUDO 1.090. Thus, for example, residential structures located on EFU lands are not permitted uses for purposes of application of this criterion." Record 3.

It is unclear whether the above quoted findings interpret both the "existing adjacent permitted uses" and "other uses permitted in the underlying zone" phrases of LUDO 3.39.050(1), or only the former phrase. Furthermore, even if these findings do purport to interpret the "other uses permitted" portion of LUDO 3.39.050(1), they do not constitute an interpretation sufficient for our review. They do not explain why residences in EFU zones are not "permitted uses" and do not explain the meaning of "the underlying zone."

The phrase "other uses permitted in the underlying

zone" in LUDO 3.39.050(1) is capable of more than one meaning.[11] The decision must be remanded for the county to interpret this provision of the LUDO in the first instance. Weeks v. City of Tillamook, supra; Larson v. Wallowa County, supra.

The sixth assignment of error is sustained.

**SEVENTH ASSIGNMENT OF ERROR**

> "The county's conclusion that the use as conditioned may be made compatible with existing permitted uses and other permitted uses * * * misconstrues the applicable law, [is] unsupported by adequate findings, unsupported by substantial evidence in the record, and improperly defers decision making to a later date without adequate provisions for participation by the petitioners."

In this assignment of error, petitioners challenge the adequacy of the findings and evidence supporting the county's determination that the proposed use "is or may be made compatible" with certain other uses, as required by LUDO 3.39.050(1). As we stated under the fifth assignment of error, supra, a necessary first step in demonstrating compliance with LUDO 3.39.050(1) is identifying the "existing adjacent permitted uses and other uses permitted in the underlying zone" with which the proposed use must be, or be capable of being made, compatible. For the reasons explained in the fifth and sixth assignments of error, the

[11]Although intervenor's proffered interpretation of "other uses permitted in the underlying zone" may be permissible, it is not the only possible interpretation of this provision.

county has not yet properly completed this first step. Therefore, no purpose would be served by further reviewing the county's determination of compliance with LUDO 3.39.050(1).[12]

The county's decision is remanded.

Holstun, Referee, concurring.

For reasons similar to those expressed in my dissent in Terra v. City of Newport, ___ Or LUBA ___ (LUBA No. 92-068, January 22, 1993), I do not agree with the majority's resolution of the fifth and sixth assignments of error in this case. I believe the portions of the decision interpreting and applying the LUDO provisions at issue in those assignments of error are adequate for our review, and I would not remand the decision for additional interpretation.

Under the fifth assignment of error, I would assume the county interprets the term "adjacent" in LUDO 3.39.050(1) consistently with the term "adjacent land," which is defined

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[12]We note petitioners argue that certain issues relevant to the compatibility requirement of LUDO 3.39.050(1) that were raised below, including effects on property values, lights and impacts on crops and farm animals, are not addressed in the county's findings. Relevant issues raised in the county proceedings must be addressed in the county's findings. Norvell v. Portland Metropolitan Area LGBC, 43 Or App 849, 852-53, 604 P2d 896 (1979); Broetje-McLaughlin v. Clackamas County, 22 Or LUBA 198, 215 (1991). The county should either address the issues raised by petitioners in its findings or explain in its findings why, under the county's interpretation of the compatibility requirement of LUDO 3.39.050(1), the issues are not relevant.

in the plan. In view of that definition, it is difficult to understand why the county identified the adjacent properties it did and excluded others. However, I see nothing in the decision to suggest the county subscribes to some different definition of "adjacent." I believe the question is whether the county correctly applied LUDO 3.39.050(1), not whether we have an adequate interpretation for review.

The sixth assignment of error presents only a slightly closer question. I recognize that with creative argument, some question can be raised about the meaning or application of almost any plan or land use regulation provision. However, I believe the "other uses permitted in the underlying zone" provision of LUDO 3.39.050(1) is reasonably clear on its face; and I do not agree that we need to remand this decision so that the county can first "interpret" LUDO 3.39.050(1). In fact, I believe the county has interpreted LUDO 3.39.050(1), and would reject the county's interpretation.

LUDO 3.39.050(1) establishes the following approval standard for conditional uses:

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

In my view that standard simply requires the county to make the required compatibility finding for existing permitted uses on adjacent properties and other permitted uses potentially allowable on such adjacent properties. The

county's effort to read in a requirement that approval of the permitted use not involve any discretion has no basis in the language of the code provision and should be rejected, even under the deferential standard of review required by Clark v. Jackson County, supra. The intervenor's argument that the "other uses permitted in the underlying zone" language of LUDO 3.39.050(1) refers to subject parcel rather than adjacent properties is, in my view, absurd. Moreover, there is absolutely no reason to suspect the county subscribes to that interpretation. I would reject intervenor's interpretation, rather than remand the decision with any suggestion that it could be adopted by the county on remand.