BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

McKAY CREEK VALLEY ASSOCIATION and CHRIS CLARK KING, Petitioners, vs. WASHINGTON COUNTY, Respondent, and KARBAN CORPORATION, Intervenor-Respondent.	LUBA No. 92-238 FINAL OPINION AND ORDER

Appeal from Washington County.

Robert L. Liberty, Portland, filed the petition for review and and argued on behalf of petitioners.

David C. Noren, Sr. Assistant County Counsel, Hillsboro, filed a response brief and argued on behalf of respondent.

Timothy V. Ramis and William A. Monahan, Portland, filed a response brief. With them on the brief was O'Donnell, Ramis, Crew & Corrigan. Timothy V. Ramis argued on behalf of intervenor-respondent.

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

REMANDED 04/22/93

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

Opinion by Holstun.

NATURE OF THE DECISION

Petitioners appeal a county decision granting approval for an aggregate processing, stockpiling and transshipment facility.

MOTION TO INTERVENE

Karban Corporation, the applicant below, moves to intervene in this proceeding. There is no opposition to the motion, and it is allowed.

FACTS

The proposed aggregate processing facility would occupy approximately 9 acres of the subject 35 acre property. The subject property is located approximately one mile west of the North Plains Urban Growth Boundary and is zoned exclusive farm use (EFU). The property is currently a filbert orchard. As proposed, with the exception of the 9 acres to be occupied by the aggregate processing facility, the property would remain in orchard use.

No rock will be extracted at the subject property. Neither will rock be processed into asphalt or cement at the subject property. Rock will be transported to the site by train from a mine 38 miles to the west.

> "[Intervenor's] operation is limited to an office, an off loading facility to take rock from the train to a surge pile and the processing operation. Material will be taken from the surge pile and conveyed to a series of crushers. Crushed material will be screened and fed by conveyer to stockpiles. Materials from the

> stockpile will be loaded onto out-bound trucks. The site will be operated by ten site-based employees. Four of the employees will be truck drivers who haul much of the average 200 out-bound loads per day. The remaining loads will be taken from the site by contract haulers." (Record citations omitted.) Intervenor's Brief 4.

On August 6, 1992, the county hearings officer approved the request. That decision was appealed to the board of county commissioners, which approved the request.

FIRST AND SECOND ASSIGNMENTS OF ERROR

Counties may authorize certain mining and processing facilities in EFU zones.

> "The following uses may be established in any area zoned for exclusive farm use subject to ORS 215.296:
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> "* * * * *
>
> "(d) Operations conducted for:
>
> "(A) Mining and processing of geothermal resources as defined by ORS 522.005 and oil and gas as defined by ORS 520.005, * * *;
>
> "(B) Mining of aggregate and other mineral and other subsurface resources subject to ORS 215.298;
>
> "(C) Processing, as defined by ORS 517.750, of aggregate into asphalt or portland cement; and
>
> "(D) Processing of other mineral resources and other subsurface resources."

ORS 215.213(2).[1]

Washington County Community Development Code (CDC) 340-4.1(J) duplicates the provisions of ORS 215.213(2)(d) quoted above, and incorporates other related EFU statutory provisions. Petitioners argue the proposed aggregate processing facility is not permitted by either ORS 215.213(2)(d) or the CDC.[2]

ORS 215.213(2)(d) was amended in 1989. Or Laws 1989, ch 861, § 1. The statute is awkwardly worded, and the legislative history cited by the parties is not particularly helpful in explaining the intended meaning of ORS 215.213(2)(d). However, there does not appear to be much doubt that the language of ORS 215.213(2)(d)(C) quoted above was intended to reverse previous LUBA decisions holding that the language "processing of aggregate and other mineral resources," which appeared in ORS 215.213(2)(d) prior to the 1989 amendments, did not include batching and blending of aggregate into asphalt and portland cement.[3]

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[1]ORS 215.213 governs nonfarm uses in the county's EFU zone because the county has designated marginal lands pursuant to ORS 197.247. ORS 215.288(2).

[2]Although the county may regulate uses in its EFU zones more stringently than ORS chapter 215 requires, the statutory EFU zoning requirements are minimum standards and control where they conflict with more permissive standards in the county's EFU zone. Kenagy v. Benton County, 112 Or App 17, 826 P2d 1047 (1992). Therefore, our discussion of the first two assignments of error focuses on the statutory language.

[3]Prior to its amendment in 1989, ORS 215.213(2)(d) authorized the following in EFU zones:

Panner v. Deschutes County, 14 Or LUBA 1, 7-8, aff'd 76 Or App 59 (1985); Gearhart v. Klamath County, 7 Or LUBA 27, 33 (1983). What arguably is not clear, and what the legislative history fails to establish, is whether the language ultimately adopted allows facilities such as the one challenged in this appeal.

The county did not determine that the disputed aggregate processing facility is authorized under paragraphs (A), (B) or (C) of ORS 215.213(2)(d). However the language of those paragraphs provides context, albeit confusing context, for the interpretation of paragraph (D), upon which the county did rely in making the challenged decision.

A. Mining and Processing of Geothermal Resources and Oil and Gas (ORS 215.213(2)(d)(A)

ORS 215.213(2)(d)(A) authorizes both "mining" and "processing" of geothermal resources, oil and gas. Because none of those resources are at issue in this appeal, it is clear that this section does not apply. However, it is worth noting that a different section of the same 1989 legislation defined "mining" to include "processing." Or Laws 1989, chapter 861, section 7 (codified at ORS 215.298). Therefore it is not clear what, if anything, authorizing "processing" adds to ORS 215.213(2)(d)(A).

"Operations conducted for the mining and processing of geothermal resources as defined by ORS 522.005 or exploration, mining and processing of aggregate and other mineral resources or other subsurface resources."

B. Mining of Aggregate and Other Resources (ORS 215.213(2)(d)(B))

ORS 215.213(2)(d)(B) authorizes "mining" of both "aggregate" and "other mineral and other subsurface resources." However, as noted above, ORS 215.298 defines mining as including processing. In view of that definition, it could be argued that a facility for processing aggregate could be authorized under ORS 215.213(2)(d)(B), although such processing would be subject to ORS 215.298 which, among other things, requires that a site be "included on an inventory in an acknowledged comprehensive plan." ORS 215.298(2).

C. Processing of Aggregate into Asphalt or Cement (ORS 215.213(2)(d)(C))

ORS 215.213(2)(d)(C) authorizes "[p]rocessing, as defined by ORS 517.750, of aggregate into asphalt or portland cement[.]" "Processing" is defined in ORS 517.750(11) as including, among a number of other things, "the batching and blending of mineral aggregate into asphalt and portland cement[.]" The county correctly recognized that the words "into asphalt or portland cement" in ORS 215.213(2)(d)(C), therefore, must mean the "processing" authorized under that subsection must result in asphalt or portland cement. Otherwise, the words "into asphalt or portland cement" in ORS 215.213(2)(d)(C) would have no meaning, since "processing" alone, as used in ORS 215.213(2)(d)(C), would allow aggregate to be processed

into asphalt or portland cement in any event.

The county also concluded that processing into asphalt or portland cement allowed under ORS 215.213(2)(d)(C) must occur entirely on-site.[4] However, there appears to be nothing in the statute explicitly limiting aggregate processing facilities to those that conduct final batching and blending into asphalt or portland cement on the same site where the initial processing of aggregate material occurs. Intervenor raised this point before the hearings officer, but the hearings officer's decision rejected ORS 215.213(2)(d)(C) as a source of statutory authority for the disputed facility. Intervenor did not argue before the board of county commissioners that the hearings officer erred in concluding the proposed facility is not authorized by ORS 215.213(2)(d)(C). Neither did intervenor appeal the board of county commissioners' decision agreeing with this aspect of the hearings officer's determination to this Board. In addition, intervenor did not file a cross-petition for review challenging the county's determination that ORS 215.213(2)(d)(C) does not authorize the challenged facility.

Because intervenor did not file an appeal or file a cross-petition for review arguing the county erred in

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[4]Apparently, some or all of the aggregate to be processed at the proposed facility will ultimately be processed into asphalt or portland cement, but no final batching and blending into asphalt or portland cement would occur on-site.

failing to interpret ORS 215.213(2)(d)(C) as authorizing the challenged facility, we decline to consider whether ORS 215.213(2)(d)(C) authorizes aggregate processing facilities, such as the one challenged in this appeal, which complete the processing of aggregate into asphalt or cement off-site.[5]

D. Processing of Other Mineral and Subsurface Resources (ORS 215.213(2)(d)(D))

ORS 215.213(2)(d)(D) authorizes the "[p]rocessing of other mineral resources and other subsurface resources." Petitioners argue this subsection plainly authorizes "processing" of resources other than aggregate. Therefore, petitioners argue, the county erred in relying on ORS 215.213(2)(d)(D) to authorize the disputed facility, which does process aggregate.

The county interpreted ORS 215.213(2)(d)(D) to authorize it to permit facilities which process aggregate, but do not process that aggregate on-site into asphalt or portland cement. The county reasoned that aggregate processing, where the final batching and blending occurs off-site, constitutes "processing of other mineral resources" authorized under ORS 215.213(2)(d)(D). The

[5]Even if we were to reach the issue, it is not clear from the record whether all of the aggregate to be processed at the subject facility ultimately is to be used for asphalt or cement. As explained in the text, such ultimate disposition of the aggregate apparently is required for facilities authorized by ORS 215.213(2)(d)(C).

county advances a number of public policy and common sense reasons why it believes the legislature could not have intended, on the one hand, to authorize more intensive and disruptive facilities producing asphalt and cement as end products under ORS 215.213(2)(d)(C) but, on the other hand, to prohibit less intensive and less disruptive processing facilities where the final stage of the asphalt and cement production process is completed off-site, under ORS 215.213(2)(d)(D).

Whatever may be said for the county's public policy and common sense arguments, the words of the statute cannot be read to say what the county says they do. As petitioners correctly note, the county "has switched the object of the adjective 'other' from 'minerals' to 'processing.'" Reply Brief 1. ORS 215.213(2)(d)(D) permits "processing of other mineral resources", i.e. mineral resources other than aggregate. The county's interpretation of ORS 215.213(2)(d)(D) effectively amends it to permit "other processing of aggregate resources." While the county may well be correct that the legislature intended that such aggregate processing be allowed, that is not what the statute says. It is beyond the county's and this Board's authority to rewrite the statute to say what the legislature may have meant to say. Monaco v. U.S. Fidelity & Guar., 275 Or 183, 188, 550 P2d 422 (1976); Southwood Homeowners v. City of Philomath, 106 Or App 21, 23-24, 806 P2d 162 (1991).

Moreover, the legislative history cited by the parties does not provide a sufficient basis for concluding the county is correct about what the legislature intended, even if we agreed the statute is sufficiently ambiguous to allow consideration of that legislative history.

E. Summary

We reject the county's reliance on ORS 215.213(2)(d)(D) to authorize the disputed aggregate processing facility. That paragraph of ORS 215.213(2)(d) authorizes processing of mineral and subsurface resources other than aggregate. Therefore, ORS 215.213(2)(d)(D) does not authorize facilities such as the one at issue in this appeal.

The question of whether an aggregate processing facility which processes aggregate that is ultimately processed into asphalt and portland cement (but where the batching and blending of the asphalt and cement occurs off-site) could be approved in an EFU zone under ORS 215.213(2)(d)(C) is not properly presented in this appeal. Therefore, we do not consider whether ORS 215.213(2)(d)(C) is properly interpreted to authorize such facilities or, if so, whether the disputed facility would qualify under such an interpretation of ORS 215.213(2)(d)(C).[6]

[6]On remand, if the county elects to consider whether the disputed facility could be authorized under ORS 215.213(2)(d)(C), it should also consider whether the CDC provision corresponding to ORS 215.213(2)(d)(C) also authorizes the disputed facility, since the CDC provision may regulate more stringently than the statute. Kenagy v. Benton County, supra.

The first and second assignments of error are sustained.

THIRD ASSIGNMENT OF ERROR

Under this assignment of error, petitioners allege the county erred by failing to require that the subject property be placed in a Mineral and Aggregate Overlay District. CDC 379-1.1 explains the intent and purpose of the Mineral and Aggregate Overlay District as follows:

> "The purpose of the Mineral and Aggregate Overlay District is to protect mineral and aggregate resources for future use, to provide for the development and utilization of resources currently needed for economic development consistent with the requirements of LCDC statewide Goal 5 and to regulate resource extraction and processing activities to balance their impact on existing adjacent land uses."

The Mineral and Aggregate Overlay District is made up of two elements -- District A and District B. District A is limited to certain specified land use districts, including the EFU district. CDC 379-2.1. Mineral and Aggregate Overlay District A applies:

> "* * * to sites upon which extraction, processing and stockpiling activities are currently undertaken and to sites which may be identified for extraction, processing and stockpiling activities in the future. * * *"

Mineral and Aggregate Overlay District B may be applied in any zoning district and, generally, is applied to properties within 1000 feet of District A sites. Mineral and Aggregate Overlay District A designations were applied when the

county's comprehensive plan was adopted and may also be applied through amendments to the plan. CDC 379-4.1. The subject property is not included in a Mineral and Aggregate Overlay District.

CDC 379-17 provides, in pertinent part, as follows:

> "Nonconforming Uses and Uses Established by Conditional Use Permit
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> "Notwithstanding other provisions of this Code, the following provisions shall be applicable to District A:
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> "* * * * *
>
> "379-17.5 All new mineral and aggregate related uses must comply with the provisions of [CDC] Section 379."

Petitioners' argument under this assignment of error relies in large part on CDC 379-17.5. That reliance is misplaced for two reasons. First, the subject property is not designated Mineral and Aggregate Overlay District A, so the provisions of CDC 379-17.5 simply are inapplicable. Second, the proposed use is neither a nonconforming use nor a conditional use.[7] CDC 379-17.5 does not require that the subject property be placed in a Mineral and Aggregate Overlay District A in order to approve the disputed facility.

In addition, respondent and intervenor cite a number of

[7]Although the county at one time included provisions for conditional uses in its code, and the CDC includes provisions specifically allowing previously approved conditional uses to continue, the current CDC does not include provisions for approval of new "conditional uses" as such.

CDC and plan provisions which, they argue, make it sufficiently clear that the county was not required to place the subject property in a Mineral and Aggregate Overlay District to grant the challenged approval. Specifically, respondent and intervenor argue CDC section 379, and the related plan provisions that section implements, make it sufficiently clear that only processing and stockpiling that occurs in conjunction with on-site extraction is within the regulatory ambit of that CDC section 379.[8] They argue the county was well within its interpretive discretion when it determined that processing and stockpiling is only subject to application of Mineral and Aggregate Overlay District A and regulation under CDC section 379 where it occurs together with extraction of mineral resources at the same site. Clark v. Jackson County, 313 Or 508, 836 P2d 710 (1992); Goose Hollow Foothills League v. City of Portland, 117 Or App 211, ___ P2d ___ (1992); West v. Clackamas County, 116 Or App 89, ___ P2d ___ (1992); Cope v. Cannon Beach, 115 Or App 11, 836 P2d 775 (1992), rev allowed 315 Or 643 (1993). We agree with respondent and intervenor.

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[8]Respondent contends the plan provisions implemented by CDC section 379 explicitly refer to resource "extraction" and express a desire to protect such resources for extraction and minimize adjoining property from the impacts of such extraction. CDC 379-4.2 establishes criteria for Mineral and Aggregate Overlay District A designation and includes a requirement for

> "[a] report from a certified geologist, mining engineer or qualified engineering testing firm verifying the location, type, quality and quantity of mineral and/or aggregate resources. * * *" CDC 379-4.2(B).

Nothing in CDC section 379 explicitly limits the application of Mineral and Aggregate Overlay District A to sites where extraction of mineral resources is at least part of the use proposed. However, we agree the focus of the CDC section 379 regulatory provisions is resource extraction and the need to protect mineral resources for extraction and protect adjoining properties from the effects of such extraction. Reading CDC section 379 to have the more limited application argued by respondent and intervenor is not inconsistent with the apparent purpose of the section, and that more limited interpretation is not clearly wrong. See Goose Hollow Foothills League v. City of Portland, supra, 117 Or App at 217. We therefore agree with respondent and intervenor that the county's interpretation of the regulatory scope of CDC section 379 is within its interpretive discretion.

The third assignment of error is denied.

FOURTH ASSIGNMENT OF ERROR

In order to approve the disputed aggregate processing facility the county is required to make the following finding:

> "The proposed use does not materially alter the stability of the overall land use pattern of the area[.]" CDC 340-4.2(C).

Under this assignment of error, petitioners challenge the county's findings with regard to CDC 340-4.2(C) (hereafter the stability standard), and the evidentiary support for

those findings.

A. Burden of Proof

Petitioners cite findings that they argue demonstrate the county improperly placed the burden on petitioners to demonstrate noncompliance with the stability standard, rather than placing the burden on the applicant to demonstrate compliance with that standard. We do not agree.

Arguably, some of the county's findings (in isolation) express a view that petitioners failed to show the proposed facility will violate the stability standard.[9] However, we agree with intervenor that those findings, when read in context with other findings which specifically refer to the county's reliance on evidence and arguments submitted by the applicant, simply show the county was taking care to address and express a position concerning the evidence submitted by petitioners.[10] As intervenors suggest, the county's

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[9]For example the challenged decision includes the following finding:

> "The Board [of County Commissioners] agrees with the Hearings Officer that the evidence provided by opponents that little change has occurred in the area during a period when the County as a whole has grown, does not mean that any introduction of a new use must materially alter the land use pattern of the area. * * *" Record 64.

[10]For example the county adopted the following findings immediately after the findings quoted in n 9, supra:

> "In fact, we agree with the Hearings Officer that aerial photos from the past tell us virtually nothing about the future. The applicant's analysis and evidence on existing farm uses convinced the Board [of County Commissioners] that the

findings appear to be adopted to assure this Board that the county properly considered the evidence detracting from its ultimate decision as well as the evidence supporting that decision. See Douglas v. Multnomah County, 18 Or LUBA 607, 619 (1990). While a local government is not required to discuss in its findings the evidence it does not rely on to support its decision, doing so may well improve the local government's chances of success on appeal to this Board, depending on the quality and quantity of conflicting evidence. Id.; see Younger v. City of Portland, 305 Or 346, 358-60, 752 P2d 262 (1988) (explaining the standard applied by appellate courts in reviewing LUBA decisions resolving substantial evidence challenges).

We do not believe the county's efforts in its findings to address the evidence submitted by petitioners establishes an improper shifting of the burden of demonstrating compliance with the stability standard to petitioners.

B. The Findings of Compliance with the Stability Standard

Petitioners contend the county's finding confuse the stability standard with CDC 340-4.2(A), which requires findings that the proposed use is "compatible with farm uses" (hereafter the compatibility standard). Petitioners contend that as a result of this confusion, the county failed to adopt adequate findings supported by substantial

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location, use, and direction of traffic onto Highway 26 will not materially alter the stability of the area." Record 64.

evidence demonstrating compliance with the stability standard.[11] Petitioners also allege that adding the disputed processing facility to the area, of itself, violates the stability standard.

The findings adopted by the county explain the subject property is located close to a major highway, which will reduce the impact of truck traffic on local roads and nearby properties.[12] Other findings cited by petitioners address the compatibility of the proposed use with adjoining agricultural uses.[13] Petitioners contend that these

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[11]In large part, petitioners' evidentiary challenge is based on their position that while the evidence in the record of compatibility of the proposed facility with nearby agricultural uses may support the county's ultimate finding concerning the compatibility standard, such evidence is irrelevant to the stability standard.

[12]The county's findings concerning the stability standard follow the approach outlined in our decision in Sweeten v. Clackamas County, 17 Or LUBA 1234 (1989). The county selected a reasonably definite area for consideration, examined the types of uses existing in the area, and explained why the county believes the proposed use will not materially alter the stability of the existing uses in the area.

[13]The county relied in part on a report submitted by the intervenor. Record 159-70. The report includes the following discussion concerning the stability standard:

> "The land use pattern within the impact area boundaries is composed of both Agricultural (EFU) and Rural Industrial land designations and uses. The majority of the impact area is currently in agricultural use. The applicants have shown * * * [the proposed use] will be compatible with surrounding farm uses and [will] not interfere with farm practices occurring in the area. The proposed use is also compatible in appearance and operation with the adjacent rural industrial chip plant/log operation. Both the proposed use and the adjacent log operation process 'raw materials' into more refined products. Potential negative impacts of dust, noise, odors, vehicular traffic, rail traffic, vibration, and run-off will not affect

findings concerning compatibility do not address the stability standard because, while incompatibility might result in destabilization, compatibility of the proposed use will not necessarily assure stability of the land use pattern.

Although we agree with petitioners that the compatibility standard is not the same as the stability standard, we do not agree with petitioners' suggestion that findings concerning compatibility are irrelevant to the stability standard.[14] Furthermore, as explained below, the county did not rely entirely on findings concerning compatibility, and we conclude the county's findings as a whole are adequate to demonstrate compliance with the stability standard.

> the adjacent rural industrial site for the same reasons given for surrounding farm uses. Potential negative impacts are mitigated so surrounding properties are not affected. * * * The noise engineer has also determined that the proposed use will have similar noise levels as the log operation.
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> "The hours of operation for the proposed use will be similar to those worked by area farmers. The site will operate up to 6 days a week, beginning as early as 6:00 A.M. and ending as late as 10:00 P.M. from April through November, which is roughly the period that agricultural activity is at its peak. During these months, farmers are generally busy from sunrise to sunset with field preparation, planting, fertilizing, irrigating, harvesting, field burning and fall tillage activities.
>
> "From December to April, the applicant estimates that the site will operate less than 5 days a week with a maximum 6:00 A.M. to 6:00 P.M. workday. The reduced work schedule corresponds to slower periods in the agricultural and timber industry." Record 168-69.

[14]Similarly, we do not agree the evidence supporting those findings is irrelevant to the stability standard.

The findings cite the existence of two nearby rural industrial uses and the historical stability of the land use pattern as demonstrating that the introduction of the subject use would not materially alter the land use stability of the area.[15] In particular, the findings explain that while a limited number of industrial uses exist in the general vicinity, the general stability of the agricultural land use pattern has been maintained. The findings point out the existing industrial uses have existed in the area for many years and have not attracted other industrial uses. The findings go on to explain that the proposed industrial use, like some of the existing agricultural uses, will create some negative off-site impacts that may have the effect of discouraging rural residential use of the property. The findings suggest discouraging such rural residential use could have the effect of further stabilizing the existing, primarily agricultural land use pattern.

It is true the proposed aggregate processing facility will introduce an additional industrial facility where few industrial uses currently exist. The proposed use could encourage other property owners to seek approval for industrial, or other nonfarm, uses. Petitioners cite

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[15]The record includes aerial photographs demonstrating the relatively stable and generally agricultural nature of the land use pattern of the area.

evidence in the record that increased use of the nearby rail line by the subject facility may encourage such uses and note the City of North Plains apparently is contemplating the possibility of expanding its urban growth boundary and annexing property in the area.[16] We conclude the county's findings, which rely on evidence showing the historic stability of the area notwithstanding the existence of a limited number of industrial uses, are adequate. Those findings reject, as speculative, petitioners' contentions that the introduction of the subject facility will upset the historical stability of the area. In view of the limited number of existing industrial uses in the area, the detailed findings explaining the county's position that the proposed use can be rendered compatible with existing land uses, and the historical stability of the area despite rapid population growth and development in the county, we conclude the county's findings are adequate and supported by substantial evidence in the record.

The fourth assignment of error is denied.

The county's decision is remanded.

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[16]Petitioners assign great significance to this discussion concerning the possibility of a future urban growth boundary amendment and annexation by the City of North Plains. The hearings officer found that future adoption of an urban growth boundary amendment and annexation was speculative and controlled by factors independent of the disputed facility. Petitioners do not specifically challenge those findings or their evidentiary support.