BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

CONROY ZIPPEL, JIM WARD and BROUCK HAYNES, Petitioners, vs. JOSEPHINE COUNTY, Respondent, and YVONNE B. BIENCOURT TRUST, Intervenor-Respondent.	LUBA Nos. 93-172 and 93-192 FINAL OPINION AND ORDER

Appeal from Josephine County.

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

No appearance by respondent.

Timothy J. Sercombe, Portland, filed the response brief and argued on behalf of intervenor-respondent. With him on the brief was Preston Thorgrimson Shidler Gates & Ellis.

Holstun, Referee; Sherton, Referee, participated in the decision.

REMANDED 03/08/94

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 approving a conditional use permit authorizing intervenor to remove and crush rock and operate an asphalt batching plant.

MOTION TO INTERVENE

Yvonne B. Biencourt Trust, the applicant below, moves to intervene in this appeal on the side of respondent. There is no opposition to the motion, and it is allowed.

FACTS

The relevant facts are stated in the intervenor's brief, as follows:

> "This controversy concerns land located around 1 1/4 miles west of Interstate 5 and approximately 14 miles north of Grants Pass. The property borders Grave[s] Creek, a stream flowing from east to west. It is located about one-half mile west of 'Sunny Valley,' a small, unincorporated settlement near an Interstate exit.
>
> "The land use application concerns two tax lots owned by [intervenor] and part of a larger area owned by Biencourt family members. Tax Lot 100, a 152 acre parcel, lies south of Grave[s] Creek and is zoned Forest Commercial. Tax Lot 500, north of the creek, is 182 acres and zoned Exclusive Farm.
>
> "During the 1920s and 1930s hydraulic gold mining occurred along Grave[s] Creek. Massive quantities of rock were dredged from the creek and nearby rock beds, and were washed and sifted for gold. The tailings were stockpiled on the south side of the creek. The area is known as the Leland Placer site.
>
> "The gravel tailings occupy a band 300 to 400 feet wide along nearly two miles of the south bank of

> Grave[s] Creek. The tailings are 6 to 40 feet deep. The rock is 'clean hard, river run rock' lacking a 'clay or organic component.' This means that 'there are very little dirty fines and [the rock] does not have to be washed' for aggregate crushing and batching.
>
> "Crushing and batching first occurred on the site in 1942, when the Highway Division used the rock to construct the old Pacific Highway. In 1953, the State Highway Commission leased the site for twenty years and it was used in the 1950s for periodic aggregate uses and to supply aggregate for the construction of Interstate 5.
>
> "That same year the property was purchased by the Biencourt family as part of a larger 500 acre ranch. The ranch was farmed from 1953 to 1963. Farming was unprofitable and the property has been used since for hay production and cattle grazing.
>
> "The State leased the site for aggregate operations again between 1977 and 1983. Rock crushing and batching occurred in 1981 and 1982. A 'special use permit' (a type of conditional use permit) was issued for crushing and batching in 1976 for this operation.
>
> "Josephine County, as part of its Goal 5 compliance, inventoried the Leland Placer site as a significant aggregate resource, 'an important source for major highway improvement.' The property was designated a '2B' site under the Goal 5 Rule, meaning that conflicting uses were identified. OAR 660-16-005. The site was denominated a '3C' site under OAR 660-16-010(3), protecting the aggregate uses but conditionally allowing conflicting uses.
>
> "On December 18, 1992, * * * a geologist for the Oregon Department of Transportation, wrote [intervenor] soliciting the opportunity to use the site for a 20.2 mile repaving project on Interstate 5. * * *
>
> "On February 18, 1993, [intervenor] applied for a conditional use permit to allow crushing and

batching operations on the site for the Interstate 5 work and other projects." Intervenor-Respondent's Brief 5-7.

INTRODUCTION

In their first through fourth and sixth assignments of error, petitioners contend the challenged decision violates applicable Josephine County Zoning Ordinance (JCZO) provisions. In their fifth assignment of error, petitioners allege the challenged decision violates Statewide Planning Goal 5 (Open Spaces, Scenic and Historical Areas, and Natural Resources) and comprehensive plan policies implementing Goal 5.

As explained above, the gravel tailings to be crushed and batched in conjunction with the asphalt batching plant are located on the 152 acre parcel (Tax Lot 100), which is zoned Forest Commercial (FC). The crushing and batching activity is to occur on Tax Lot 100. As relevant, JCZO 3.025 provides:

> "In an FC District, the following uses and their accessory uses are permitted * * * upon satisfactory demonstration of compliance with the standards of this Ordinance. Additional criteria for review of every use permitted conditionally are addressed in [JCZO] 15.212 through 15.215.[1]
>
> "* * * * *

[1]JCZO 15.213 establishes general standards for approval of conditional uses. Under assignments of error three and four, petitioners contend the county failed to adequately demonstrate compliance with two of those standards.

"2. Cement and asphalt batching, rock processing and crushing, subject to [JCZO] 14.137.[2]

"* * * * *

"4. [M]ining and processing of aggregate * * * subject to [JCZO] 14.136 and 14.138.[3]

"* * * * *"

The access road for the aggregate operations on Tax Lot 100 will cross the 182 acre parcel (Tax Lot 500) to the north. That parcel is zoned Exclusive Farm (EF). As relevant, JCZO 6.025 provides:

"In an [EF] District, the following uses and their accessory uses are permitted when authorized by the hearings officer upon satisfactory demonstration of compliance with the standards of this ordinance. Additional criteria for review of every use permitted conditionally are addressed in [JCZO] 15.212 through 15.215.

"1. [P]rocessing of aggregate * * * subject to [JCZO] 14.136 and 14.138.

"* * * * *"[4]

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[2]JCZO 14.137 establishes a number of standards that apply specifically to cement and asphalt batching, rock processing and crushing. Under their first and second assignments of error, petitioners contend the county failed to adequately demonstrate compliance with two of those standards.

[3]JCZO 14.136 establishes a number of standards that apply specifically to mining of aggregate. In their second assignment of error, petitioners contend the county misinterpreted one of the standards of JCZO 14.136.

[4]In their sixth assignment of error, petitioners allege the county erred by approving the access road across the EF zoned property, because the EF zone does not permit asphalt batching as either a permitted or conditional use.

FIRST ASSIGNMENT OF ERROR

JCZO 14.137(b) provides as follows:

> "No cement or asphalt batching plant shall operate for a period greater than 180 days at a single site."

The challenged decision adopts the following interpretation of JCZO 14.137(b):

> "* * * The meaning of this criterion is not clear. We do not interpret the criterion to limit the amount of batching that can be processed at any one site to that which can be processed during 180 days. Such an interpretation effectively limits the resource value of any aggregate site. (Note that this criterion applies as well to aggregate uses allowed outright in the Aggregate zoning district.) No purpose would be served by such an arbitrary interpretation.
>
> "Asphalt batching uses are periodic. We interpret the criterion to limit operations to any continual period of 180 days at a single site. By 'continual period' we mean the period of operations with only short interruptions in time. Once this period is exceeded batching operations could not resume without passage of a significant period of time. A significant period of time would be several months (at least 90 days)." Record 46.

Petitioners contend the above interpretation is inconsistent with the words of JCZO 14.137(b). Petitioners point out the above interpretation effectively permits permanent intermittent use of the subject property for asphalt batching. Petitioners contend the language of JCZO 14.137(b) does not envision continuous use of the property for an asphalt batching plant in successive 180-day periods separated by 90 day interruptions.

Under ORS 197.829, LUBA's scope of review of the county's interpretation of its own land use regulations is limited.[5] ORS 197.829 provides as follows:

> "[LUBA] shall affirm a local government's interpretation of its comprehensive plan and land use regulations, unless [LUBA] determines that the local government's interpretation:
>
> "(1) Is inconsistent with the express language of the comprehensive plan or land use regulation;
>
> "(2) Is inconsistent with the purpose for the comprehensive plan or land use regulation;
>
> "(3) Is inconsistent with the underlying policy that provides the basis for the comprehensive plan or land use regulation; or
>
> "(4) Is contrary to a state statute, land use goal or rule that the comprehensive plan provision or land use regulation implements."

ORS 197.829(1), (2) and (3) essentially codify the standard of review imposed by Clark v. Jackson County, 313 Or 508, 515, 836 P2d 710 (1992) ("* * * LUBA is to affirm the county's interpretation of its own ordinance unless the interpretation is inconsistent with the express language of the ordinance or its apparent purpose or policy."). Testa v. Clackamas County, ___ Or LUBA ___ (LUBA No. 93-098, January 4, 1994), slip op 12. The court of appeals, in construing the standard of review first enunciated in Clark, held that LUBA is required to affirm the local government's

[5]ORS 197.829 was adopted by the 1993 Oregon Legislature and became effective November 4, 1993.

interpretation unless it concludes the interpretation is "clearly wrong." Goose Hollow Foothills League v. City of Portland, 117 Or App 211, 843 P2d 992 (1992); West v. Clackamas County, 116 Or App 89, 840 P2d 1354 (1992); Cope v. City of Cannon Beach, 115 Or App 11, 836 P2d 775 (1992), aff'd 317 Or 339 (1993); see Friends of the Metolius v. Jefferson County, 123 Or App 256, 860 P2d 278, on recon 125 Or App 122 (1993). ORS 197.829(4) limits or qualifies the Clark standard of review in certain circumstances.[6]

Petitioners' argument rests largely on the language of JCZO 14.137(b). ORS 197.829(1). Petitioners do not contend the county's interpretation is inconsistent with any identified "purpose" or "underlying policy" in the JCZO or the Josephine County Comprehensive Plan. However, petitioners do contend the challenged interpretation is inconsistent with the Land Conservation and Development Commission's current rule implementing Goal 4 (Forest Lands).

OAR 660-06-025 identifies uses authorized in forest zones. OAR 660-06-025(4)(q) lists "[t]emporary asphalt and concrete batch plants as accessory uses to specific highway projects * * *, subject to standards set out at

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[6]In Cope v. City of Cannon Beach, supra, 115 Or App at 18, the court of appeals speculated that the limited scope of review of local government interpretations of acknowledged comprehensive plans and land use regulations under Clark "may well have the effect of making post-acknowledgment compliance with state law a matter of local option." ORS 197.829(4) presumably was passed to address this concern.

OAR 660-06-025(5)." Petitioners contend the county's interpretation effectively allows "permanent" asphalt and concrete batch plants and is therefore inconsistent with the rule.

Intervenor makes several points. First, petitioners make no attempt to show JCZO 14.137(b) implements OAR 660-06-025. Second, under OAR 660-06-003(1), OAR 660-06-025 did not apply to Josephine County until February 5, 1994, several months after the challenged decision was adopted. Finally, intervenor points out that even if the current Goal 4 rule does apply to the county, OAR 660-06-025(4)(f) allows "mining and processing of aggregate and mineral resources as defined in ORS Chapter 517" on forest land.[7] Intervenor contends that because the Goal 4 rule envisions permanent as well as temporary asphalt batching plants, the interpretation challenged under this assignment of error is not contrary to the Goal 4 rule in the way petitioners allege. ORS 197.829(4). We agree with intervenor.

Turning to the language of JCZO 14.137(b), we cannot say the challenged interpretation is "clearly wrong." The code states the asphalt batching plant may not "operate for a period greater than 180 days at a single site." (Emphasis added.) If the county wishes to construe JCZO as not imposing a limit on the number of periods of operation of up

[7]ORS 517.750(11) defines "processing" as including the "blending of mineral aggregate into asphalt and portland cement concrete."

to 180 days that may occur at a single site, provided they are interrupted by substantial periods of inactivity, we see nothing in the language of JCZO 14.137(b) that is inconsistent with that interpretation. See Langford v. City of Eugene, 126 Or App 52, 57-58, ___ P2d ___ (1994).

We do not mean to suggest we would interpret JCZO 14.137(b) in the manner the county has, if we were required to do so. In particular, the code language offers no support for establishing 90 days as the minimum length of interruption between periods of operation required by JCZO 14.137(b). We can see some practical problems with applying the interpretation of JCZO 14.137(b) adopted by the county, although the parties do not discuss the workability of the county's interpretation of JCZO 14.137(b) in different factual contexts. However, in view of our limited scope of review under ORS 197.829 and Clark and its progeny, we defer to the county's interpretation.

The first assignment of error is denied.

SECOND ASSIGNMENT OF ERROR

JCZO 14.137(g) and (h) impose the following requirements on cement and asphalt batching, rock processing and crushing:

> "g. The proposed development is compatible with and shall not adversely impact agricultural or forestry use on any adjoining land.
>
> "h. The proposed development is located on land generally unsuitable for agricultural or

> forestry uses for developments located in resource zones."[8] (Emphasis added.)

Petitioners contend the county erred by interpreting the term "forestry uses" narrowly in applying the generally unsuitable lands criterion of JCZO 14.136(h) and 14.137(h) while interpreting that term more broadly in applying the compatibility criterion of JCZO 14.136(g) and 14.137(g). Petitioners contend the broader interpretation given JCZO 14.136(g) and 14.137(g) is consistent with JCZO 1.006(73), which provides the following definition of "forest use, forest management:"

> "The management, production and harvesting of timber resources in accordance with the Forest Practices Rules, including (1) the production and the processing of forest products; (2) open space, buffers from noise, and visual separation of conflicting uses; (3) watershed protection and wildlife and fisheries habitat; (4) soil protection from wind and water; (5) maintenance of air and water; (6) outdoor recreational activities and related support services and wilderness values compatible with these uses; and (7) grazing land for livestock."

The challenged decision addresses the interpretational issue raised by petitioners as follows:

> "The opponents contend * * * that forestry uses include open space and fish and wildlife habitat.
>
> "* * * * *

[8]JCZO 14.136(g) and (h) establish identically worded criteria for the mining of aggregate, except that JCZO 14.136(g) refers to "forestry uses" while JCZO 14.137(g) refers to "forestry use." No party contends the plural/singular disparity is significant.

"[F]or aggregate sites classified as '3A' or '3C' Goal 5 sites, interpretation of 'forestry uses' to mean the production of trees and processing of forest products is consistent with the allowance by the Plan of aggregate uses on land suited for open space, wildlife habitat and recreational uses.

"We recognize that this is a more narrow meaning of 'forestry uses' under [JCZO] 14.136(h) and 14.137(h) than the meaning described for the term under [JCZO] 14.136(g) and 14.137(g). We are not convinced that the meaning of 'forestry uses' is the same in both instances. While 'forest use, forest management' is defined in [JCZO] 1.006(73), 'forestry use' is not and the terms may not be synonymous. 'Forestry use' suggests a use related to the production of trees and processing of forest products - uses which are 'forestry' and not the broader uses allowed in a forest (reflected in the original Goal 4 definition of 'forest uses'). If a consistent meaning of 'forestry use' is needed for [JCZO] 14.136 and 14.137, this narrow meaning is consistent with the text and context of the term.

"We are persuaded to give broader meaning to 'forestry uses' in the compatibility criterion than in the unsuitability criterion. It is appropriate to test compatibility of aggregate and batching operations against a number of uses for adjoining land, many of which are economically valuable 'forest uses.' On the other hand, preclusion of aggregate operations because land could be used for open space or wildlife habitat seems unduly harsh and raises issues of takings without just compensation." Record 52.

"* * * As noted earlier, we construe 'forestry uses' in the 'generally unsuitable' standard to refer to the production of trees and processing of forest products. Thus, we reject the construction of this standard that would preclude aggregate uses if the site could be used for open space or wildlife habitat. In our judgment, a construction of the standard to this effect for a '3A' or '3C' aggregate site recasts the Goal 5 conclusions

> earlier reached in the plan. We are obliged to interpret the code consistent with the Comprehensive Plan. [Petitioners'] construction and application of this standard effects a '3B' determination to fully allow conflicting uses for the aggregate site. * * *" Record 62.

Petitioners make no attempt to challenge the above explanation for why the county does not interpret the term "forestry uses" in the same way JCZO 1.006(73) defines "Forest Use, Forest Management." We find the county's explanation is adequate.

A closer question is presented with regard to the narrow construction given the term "forestry uses" in JCZO 14.136(h) and 14.137(h) in view of the broader construction given the same term in JCZO 14.136(g) and 14.137(g). Absent "some specific indication of a contrary intent, terms are read consistently throughout a statute." Columbia Steel Castings Co. v. City of Portland, 314 Or 424, 430, 840 P2d 71 (1992); see Knapp v. City of North Bend, 304 Or 34, 41, 741 P2d 505 (1987); Pense v. McCall, 243 Or 383, 389, 413 P2d 722 (1966). After Clark, it is unclear to us whether general rules of statutory construction are relevant in our review of local government interpretations of their comprehensive plans and land use regulations. However, even if the above mentioned rule of statutory construction could be applied in this case, it is not an absolute rule which necessarily requires that the county interpret the term "forestry uses" the same way in JCZO 14.136(g) and 14.137(g)

as in JCZO 14.136(h) and 14.137(h). Davis v. Wasco IED, 286 Or 261, 593 P2d 1152 (1979)(Linde, J., concurring).

This Board has deferred to county decisions giving different interpretations to the same code language found in different sections of its land use regulations. Weuster v. Clackamas County, 25 Or LUBA 425, 439 (1993). Indeed, the Clark decision itself supports the proposition that a local government may construe and apply identically worded code language appearing in different code criteria differently, where there are related code provisions that provide some justification for the different construction and application of such identical code language. Clark, 313 Or at 515-18.

Here, the county cites related and underlying plan provisions that it contends justify interpreting and applying the term "forestry uses," in JCZO 14.136(g) and JCZO 14.137(g) differently than it interprets and applies that term in JCZO 14.136(h) and JCZO 14.137(h). Petitioners do not explicitly challenge that explanation. The county's explanation provides a rationale for applying different meanings to the same words as they are used in different approval criteria. In the absence of a specific challenge to that rationale, we conclude it passes muster under the deferential standard of review we are required to apply under ORS 197.829 and Clark.

The second assignment of error is denied.

THIRD ASSIGNMENT OF ERROR

One of the criteria that must be satisfied for conditional use permit approval is JCZO 15.213(1)(a), which provides as follows:

> "The proposed use fully accords with all applicable standards of the County and State laws or regulations."

The county adopted the following findings explaining its interpretation of JCZO 15.213(1)(a):

> "* * * We interpret this criterion to require a showing that there are no unusual circumstances or conditions which would prevent issuance of required regulatory approvals. Requiring a conditional use applicant to have in hand all require[d] state permits before obtaining land use approval for the proposed use puts the cart before the horse. For the same reason, requiring a detailed analysis of every potential agency approval needlessly duplicates the work of state agencies with particular expertise in the are of regulation.
>
> "Thus, we believe this criterion requires the applicant to go forward with evidence on the general ability of the proposed use to obtain needed approvals by showing the absence of any unusual circumstances or conditions which would inhibit these approvals. If legitimate concerns are raised about particular approvals, the applicant may then respond to those concerns." Record 53.

In Vizina v. Douglas County, 17 Or LUBA 829, 835-36 (1989), we interpreted code language similar to that in JCZO 15.213(1)(a) to require that a county's "findings must (1) identify the regulations the county considers applicable; (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."[9] Petitioners contend JCZO 15.213(1)(a) has the legal effect of incorporating various state agency regulatory provisions and requires that the county demonstrate compliance with those regulatory provisions in this proceeding.

The three part findings requirement we stated in Vizina was based on different, albeit somewhat similar, code language. More importantly, our decision in Vizina predated the Oregon Supreme Court's decision in Clark and the legislature's adoption of ORS 197.829. Although the question is a close one, we conclude the county's interpretation of the obligation imposed by JCZO 15.213(1)(a), quoted supra, is one to which we are required to defer under ORS 197.829. As construed by the county, the challenged permit "fully accords with all applicable standards of the County and State Laws or regulations" so long as the applicant demonstrates during the local proceedings there are "no unusual circumstances or conditions which would prevent [subsequent] issuance of required regulatory approvals." Record 53. As the county explains in its decision, "[i]f legitimate concerns are

[9]The relevant code provision in Vizina required that "[p]rior 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." Vizina, supra, 17 Or LUBA at 833.

raised about particular approvals, the applicant may then respond to those concerns." Id.

The county ultimately concluded:

> "[C]ompliance with state regulatory programs can be achieved. There are no particular characteristics of the site or use that would suggest any more problems in obtaining regulatory approvals than those normally encountered by hundreds of these uses across the state." Record 54.

We consider below the county findings addressing particular permits and issues raised by petitioners. Our review of the petitioners' arguments concerning the county findings addressing JCZO 15.213(1)(a) is hampered somewhat because petitioners generally assume the county's findings must comply with the three part findings requirement stated in Vizina. However, we nevertheless consider petitioners' arguments to the extent they can be read to challenge the county findings addressing JCZO 15.213(1)(a), as construed by the county above.

A. Air Contaminant Discharge Permit

Air contaminant discharge permits are issued by the Oregon Department of Environmental Quality. Such permits are issued for the equipment used in asphalt batching rather than for a particular site. Relying in part on evidence submitted by intervenor that an air contaminant discharge permit was issued for a particular kind of equipment used at a different site, the county found the subject asphalt batching operation would be able to obtain an air

contaminant discharge permit. The county also found, and petitioners do not dispute, that there is nothing peculiar about the subject property that would prevent issuance of an air contaminant discharge permit.

Petitioners contend the county's findings are fatally flawed because the county did not identify the specific equipment that will be used at the subject property or establish that such equipment has a permit and is capable of complying with the terms of the permit.

We conclude the county's findings are adequate to demonstrate compliance with JCZO 15.213(1)(a), as the county interprets that standard. The findings establish that there is at least one kind of asphalt batching equipment that has received an air contaminant discharge permit and that "no unusual circumstances or conditions [exist] which would prevent issuance" of an air contaminant discharge permit. The county's findings are sufficient to establish compliance with JCZO 15.213(1)(a), with regard to the air contaminant discharge permit.

This subassignment of error is denied.

B. Stormwater Discharge Permit

Stormwater discharge permits are issued by the Oregon Department of Environmental Quality. The county's findings point out and rely on testimony by intervenor's expert that "the proposed operations can easily secure a stormwater permit and implement a pollution control plan." Record 53.

Intervenor cites other evidence in the record concerning the requirement for, and likelihood of obtaining, a stormwater discharge permit.

Although the county's findings are somewhat conclusory, as petitioners allege, we conclude they are adequate to demonstrate compliance with JCZO 15.213(1)(a), as interpreted above by the county.

This subassignment of error is denied.

C. Water Rights

The parties disagree about the amount of water that will be needed for the proposed use. Intervenor estimated approximately 1600 gallons per day would be needed. Petitioners estimated as much as 200,000 gallons per day will be required. The county's findings addressing the amount of water needed, and responding to petitioners' arguments concerning permits required for use of water, include the following:

> "The primary issue about regulatory approvals rested upon a misapprehension. The opponents argued that aggregate use would require large amounts of water. This might be true if there were a need to wash the aggregate for use in concrete or if the aggregate was commingled with soil. Neither of these possible circumstances are true here.
>
> "The proposed use is for an asphalt batching plant and not a concrete plant. The evidence shows that the rock is clean and not contaminated by clay or soil deposits.
>
> "[Intervenor] estimates around 1600 gallons/day of water will be used (primarily for dust

> spraying).[10] There will be no appropriation of surface water required. This amount of water can be obtained from groundwater in the area. No appropriation permit is required for industrial or commercial uses not exceeding 5,000 gallons/day. ORS 537.545(1). No permit is needed from Josephine County. * * *" Record 54.

Intervenor cites testimony in the record that the nature of the rock explains the discrepancy between petitioners' estimate of the total amount of water needed daily and intervenor's estimate. The clean rock available at the subject property will not require washing for processing into aggregate for asphalt batching. We conclude that evidence is substantial evidence, i.e., evidence a reasonable person would believe, that the proposal will require approximately 1600 gallons of water a day, rather than the 200,000 gallons per day petitioners estimate. See Douglas v. Multnomah County, 18 Or LUBA 607, 617 (1990).

Petitioners' final challenge under this subassignment of error relates to the availability of the exemption from the requirement for permits for groundwater use provided by ORS 537.545(1)(f) for "[a]ny single industrial or commercial purpose in an amount not exceeding 5,000 gallons a day." Petitioners contend rock crushing and asphalt batching are properly viewed as separate industrial purposes and the

[10]Later in the decision, the county specifically concludes, based on the record, that approximately 1600 gallons of water per day will be required for the proposed operation. Record 56.

proposal will therefore not qualify for an exemption under ORS 537.545(1)(f) as a single industrial use.

We have no way of knowing for sure whether the Water Resources Commission would view the use of 1600 gallons of groundwater per day, primarily for dust control at an industrial rock crushing and associated asphalt batching operation as being for a single industrial purpose or two industrial purposes. However, although the county separately permits aggregate processing and asphalt batching, we are not persuaded those clearly integrally related aspects of the proposed operation would be viewed as separate industrial purposes rather than a single industrial purpose.[11] JCZO 15.213(1)(a) does not require that the county be correct in its assessment of the availability of the exemption provided by ORS 537.545(1)(f), only that the county reasonably conclude that the exemption will apply. We conclude the county reasonably found that the exemption will apply.

This subassignment of error is denied.

D. DOGAMI Permit

The county adopted the following findings in response to petitioners' contention that a permit will be required

[11]Even if they were, that might simply mean each industrial use separately would be entitled to withdraw 5,000 gallons of groundwater per day under the statutory exemption.

from the Oregon Department of Geology and Mineral Industries (DOGAMI):

> "Previous aggregate permits have been issued by DOGAMI for the site and the subject application is supported by DOGAMI. [DOGAMI] has granted the site a limited exemption from the requirements for a reclamation plan and bond because the mining will occur in areas already disturbed by mining operations." Record 54.

Petitioners contend they introduced evidence that only 11 acres of the 80 acre tailings site may qualify for an exemption from DOGAMI regulation as disturbed ground which has not revegetated. Petitioners contend the county erred by not specifically addressing this evidence.

Intervenor cites a DOGAMI report in the record that is based on a May 19, 1993 inspection of the subject property. The report resulted from petitioners' challenge to a DOGAMI grant of a limited exemption for the subject property. That report concludes the grant of a limited exemption "remains valid for the majority of the piles of dredge tailings on this site." Record 642.

We conclude the above findings that a limited exemption from DOGAMI permitting requirements has been granted for the subject property is supported by substantial evidence in the record.

This subassignment of error is denied.

E. Flood Damage Prevention Ordinance

One of the applicable "County * * * laws or regulations" that the county is required to address under

JCZO 15.213(1)(a) is the Flood Damage Prevention Ordinance. The county adopted the following findings:

> "Finally, a development permit will be required for the bridge under the Flood Damage Prevention Ordinance. There is nothing in this record to suggest that the technical requirements for a development permit, contained in that ordinance cannot be met. We find that the proposed location for this bridge (the site of a former bridge * * * connecting existing private roads) is reasonable, that the bridge and access roads will be compatible with existing and anticipated development and that the bridge use is consistent will applicable land use standards. The remaining engineering and technical issues can be decided as part of a [sic] administrative permit process following submission of technical plans for the bridge." Record 54.

Petitioners' entire argument under this subassignment of error is as follows:

> "Opponents challenged the failure of the County to find compliance with the Flood Damage Prevention Ordinance for all aspects of this development. Amended Statement in Opposition at 13, R 401. The county's findings in response are conclusory. * * *" Petition for Review 10.

Intervenor answers that it is petitioners' argument that is conclusory. We agree with intervenor that petitioners' argument under this subassignment of error is not sufficiently developed to warrant review. Deschutes Development v. Deschutes County, 5 Or LUBA 218, 220 (1982).

This subassignment of error is denied.

The third assignment of error is denied.

FOURTH ASSIGNMENT OF ERROR

JCZO 15.213(2)(b) requires that the county find, in approving a conditional use, "[t]hat the use will not be detrimental to the health, safety or general welfare of persons residing or working in the area where the proposed use would be located." Petitioners contend the county inadequately responded to an issue they raised concerning possible carcinogenic effects of dust associated with the quarrying operation, and improperly shifted the burden of proof. Petitioners also contend the county inadequately responded to testimony by Mrs. Ward, a neighbor who suffers from allergies and was adversely affected by rock crushing on the site in the past.

The relevant county findings concerning JCZO 15.213(2)(b) are as follows:

> "Some concerns were raised about the purported carcinogenic effects of certain types of dust from quarrying operations. Evidence was introduced that air quality standards are being considered for crystalline silica and that ingestion of this type of particulate through occupational exposure can be dangerous.
>
> "The evidence presented on this was insufficient to establish this as a realistic concern. First, there was no showing that crystalline silica is emitted during extraction, crushing or batching of this type of rock. Second, there was no showing that any concentrations of silica are at a level where they could cause health effects.
>
> "According to the 'Recommended Standard for Occupational Exposure to Crystalline Silica' submitted by the opponents, silica is present in dusts of high quartz content. That study notes

> that free silica greater than 50 mg in a full shift sample is the level when protections may be needed. Air quality testing submitted for the Copeland aggregate site (which has a dustier cement plant operation than the asphalt plant proposed here) show quartz concentrations at the extraction site of 11 mg. There was no evidence that the Biencourt site possesses rock which will cause airborne silica in significant amounts. If the rock extraction was less dusty than the Copeland operations as suggested by the evidence, then less emissions than recorded for Copeland seem likely.
>
> "The Board of County Commissioners lacks the expertise and data to assess whether the proposed operations would harm workers at the site. The evidence presented shows that this type of operation is regulated by the U.S. Department of Labor, Mine Safety and Health Administration. We conclude that if there is a safety problem with silica for the proposed operations, that state and federal regulations would mitigate any impacts.
>
> "Mr. Ellig testified about a concern with emissions from asphalt plants. There was no evidence to support his contention that these emissions pose particular health hazards. We conclude that the proposed uses will not be detrimental to the health, safety or general welfare of persons residing or working in the area." Record 57.

Earlier in its decision, in addressing compatibility of the proposed use with agricultural and forestry uses on adjoining lands, the county adopted the following findings with regard to dust:

> "The primary impacts of the proposed development on adjoining lands are dust generation, noise generation, and truck and automobile traffic on the haul road and Leland Road. Dust generation will be minimal, given the relative clean nature of the rock, the graveling and oiling of the roads

and operational areas, and the water spraying to control dust. The only evidence concerning dust generation effects on agricultural operations came from Mrs. Ward who alluded to dust on hay during the 1981-82 operations. Given the distance of the Ward tract from the site, it is likely that this was dust generated from truck traffic on unpaved Sunnyglen Road. Truck traffic here will not use Sunnyglen Road." Record 48.

The second paragraph, and to a lesser degree the fifth paragraph, quoted above from page 57 of the record contain language that can be read to suggest the county improperly shifted the burden of proof from the applicant to the opponents. However, findings that there is a lack of evidence showing a particular standard is violated do not necessarily mean the burden of proof was improperly shifted. When those paragraphs are read in context with the other paragraphs quoted above, we conclude the county recognized the applicant has the burden of proof and did not improperly shift the burden to petitioners.[12]

In the third of the paragraphs from Record 57 quoted above the county found, based on the evidence submitted by petitioners and data from a dustier operation at a nearby site, that exposure to crystalline silica would not be a problem. Admittedly, the evidentiary foundation for those findings would be stronger had it been demonstrated that the

[12]At Record 48 the county adopted a finding that while it recognized "that the proponent has the burden of proof * * *, the absence from this record of any serious claim about impacts on forestry and farming operations is significant * * *."

rock at the subject property is similar to the rock at the other site. However, we do not find the lack of such a demonstration fatal. Moreover, as intervenor points out, the county also found that any safety problems that might be associated with the proposed operation would be subject to regulation by the U.S. Department of Labor, Mine Safety and Health Administration. The county found that such regulation would mitigate any impacts. Petitioners do not challenge this finding and it is sufficient by itself to support the county's conclusion that crystalline silica in dust emissions will not violate JCZO 15.213(2)(b).

With regard to the Ward testimony, the county did adopt the responsive findings quoted above. Petitioner does not attempt to explain why those findings are inadequate to address the concerns raised by Mrs. Ward. We conclude that they are adequate.

The fourth assignment of error is denied.

FIFTH ASSIGNMENT OF ERROR

We explained the manner in which the Goal 5 process works regarding historic resources in some detail in DLCD v. Yamhill County, 17 Or LUBA 1273, 1279-80, aff'd 99 Or App 441 (1989). In Nathan v. City of Turner, ___ Or LUBA ___ (LUBA No. 93-107, January 10, 1994), slip op 9, a case that also involved aggregate resources, we explained the manner in which the Goal 5 planning process works as follows:

> "The Goal 5 planning process, as explained in LCDC's Goal 5 administrative rule, involves

essentially three steps. Those steps and the options available to a local government under each step can be stated in outline form as follows:

"Step 1. Adopt inventory of Goal 5 resource sites. OAR 660-16-000.

"a. Collect information on potential Goal 5 sites. OAR 660-16-000(1)-(3).

"b. Make inventory decision.

"1. Do not include on inventory. OAR 660-16-000(5)(a).

"2. Delay Goal 5 process. OAR 660-16-000(5)(b).

"3. Include site on plan inventory OAR 660-16-000(5)(c).

"Step 2. Identify conflicts with Goal 5 resource sites. OAR 660-16-005.

"a. If no conflicts exist, preserve the site. OAR 660-16-005(1).

"b. Determine the economic, social, environmental and energy (ESEE) consequences of any identified conflicts. OAR 660-16-005(2).

"Step 3. Develop a program to achieve the goal. OAR 660-16-010.

"a. Preserve the site fully. OAR 660-16-010(1).

"b. Allow the conflicting use fully. OAR 660-16-010(2).

"c. Protect the site to some desired degree by limiting the conflicting uses. OAR 660-16-010(3)."

Mineral and aggregate resources are among the resources the county is required to conserve and protect under Goal 5.

There is no dispute that the county has included the subject property on its plan inventory of Goal 5 resource sites under Step 1, conducted the required conflict identification and resolution process under Step 2 and adopted what is referred to in Goal 5 parlance as a "3C" program to protect the identified mineral and aggregate resource (Step 3(c) in the above outline). The JCZO provisions discussed in the above assignments of error presumably comprise part of that 3C program.

Goal 5 also requires that the county conserve and protect fish and wildlife areas and habitat. The Josephine County Comprehensive Plan Goal 7 is to "Preserve Valuable Limited Resources, Unique Natural Areas and Historic Features." Relying on policies 6 and 11 under plan Goal 7, petitioners argue the county erred by not completing the Goal 5 process for the subject property with regard to wildlife resources. Policies 6 and 11 are as follows:

> "6. The County shall provide for wildlife protection. * * * Areas outside [National Wild and Scenic Rivers or State Scenic Waterways] corridors are not yet clearly identified and will be classified as 1B sites until precise locations are determined, at which time ESEE analyses will be conducted. * * *"

> "11. When additional Statewide Planning Goal 5 resources are identified that have not previously been identified in the Plan or when adequate information is obtained on 1B sites, as defined by OAR 660-16-000(5)(b), the County shall fulfill the requirements of OAR 660-16-005(2) and apply applicable

> provisions contained in Chapter 14 of the [JCZO]."

1B sites are those for which some information exists, but the "information is not adequate to identify with particularity the location, quality and quantity of the resource site * * *." OAR 660-16-000(5)(b). Upon making such an inventory decision, the local government is required to include the site in its plan as a special category and commit to proceed through the Goal 5 process in the future. However, until that future action occurs, the rule provides that for 1B resource sites "[s]pecial implementing measures are not appropriate or required for Goal 5 compliance * * * until adequate information is available * * *." OAR 660-16-000(5)(b). A 1B inventory decision means the Goal 5 process is delayed for that site with regard to the particular resource for which that decision is made (see step 1(b)(2) in the outline above).

During the local proceedings, petitioners submitted evidence of the presence of wildlife and wildlife habitat on the subject property. Petitioners contend the evidence they submitted during the local permit proceedings obligates the county, under the plan Goal 7 policies quoted above, to include the subject property on the plan inventory of significant wildlife habitat and to complete the Goal 5 process with regard to wildlife habitat.

Intervenor agrees the above policies obligate the county to update its plan to address 1B wildlife habit

sites. However, intervenor disputes petitioners' contention that completion of the Goal 5 process for the subject property with regard to wildlife habitat must occur as part of this permit proceeding. Rather, intervenor contends, completion of the Goal 5 process for 1B wildlife habitat sites is to be a comprehensive county-wide process. Intervenor cites findings adopted by the county explicitly addressing this issue, which provide a number of reasons in support of the county's interpretation of the above policies as not requiring site-by-site completion of the Goal 5 process for wildlife habitat during individual postacknowledgment permit proceedings.[13]

Petitioners do not challenge the findings explaining why the county interprets the cited plan policies as not requiring completion of the Goal 5 process for wildlife habitat during this permit proceeding. The interpretation expressed in those findings is clearly within the county's interpretive discretion under Clark. Moreover, that interpretation is consistent with this Board's understanding of the requirement imposed by OAR 660-16-000(5)(b) for 1B resource sites. As we explained in Larson v. Wallowa

[13]Among the reasons cited by the county is the requirement of OAR 660-16-000(3) that the county consider the relative value of a particular resource site as compared to other resource sites in the county. The county notes this obligation would be difficult to satisfy in individual permit proceedings, where information concerning other sites may not be available and statutory time limits regarding permit decisions apply. See ORS 215.428(1).

County, 23 Or LUBA 527, 540, rev'd on other grounds 116 Or App 96 (1992):

> "OAR 660-16-000(5)(b) requires local governments to adopt plan provisions requiring them to complete the Goal 5 planning process for '1B' resource sites in the future, sometime during the postacknowledgment period. OAR 660-16-000(5)(b) also suggests these plan provisions 'should include a time frame for this review.' This implies the rule contemplates the adoption of plan provisions establishing a proposed schedule for completing the Goal 5 process as part of its legislative plan update process, rather than in conjunction with a specific development application. Plan Natural Resources policy 10 implements this rule requirement by providing the county will complete the Goal 5 process 'when information becomes available.' We believe this policy, like the rule, contemplates completion of the Goal 5 process in a plan update proceeding, not as part of a quasi-judicial proceeding on a development application."

The fifth assignment of error is denied.

SIXTH ASSIGNMENT OF ERROR

Under the terms of the challenged decision, access to the aggregate site from Leland Road, a county road located to the north of the subject property, will be via an existing private road crossing Tax Lot 500 and the bridge to be constructed across Graves Creek. The challenged decision also requires that the private road connecting the aggregate site to Leland Road be paved.

As noted earlier in introduction, Tax Lot 500 is zoned EF, an exclusive farm use zone. Tax lot 100, where the actual rock removal, processing and asphalt batching aspects

of the proposed use will be located, is zoned FC. The FC zone specifically allows both asphalt batching (JCZO 3.025(2)) and mining and processing of aggregate (JCZO 3.025(4)). The FC zone also specifically allows uses that are "accessory" to the uses specifically allowed. Therefore, there could be no question that a road used to access mining and processing of aggregate and an asphalt batching plant is allowable in the FC zone.

Petitioners apparently recognize the above, but argue the EF zone does not specifically allow asphalt batching uses.[14] Petitioners contend the private road connecting the asphalt batching use with Leland Road is therefore not allowed in the EF zone. Moreover, petitioners contend the county failed to apply ORS 215.296 to the use.[15]

Intervenor contends the issues set out above were not raised during the local proceedings and therefore may not be

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[14]Under the Exclusive Farm Use zoning statutes, processing of aggregate into asphalt is allowable. ORS 215.213(2)(d)(C). Assuming the lack of specific reference to asphalt batching in JCZO 6.025 means such use is not allowable in the county's EF zone, the EF zone is more restrictive than it is required to be under ORS chapter 215.

[15]ORS 215.296 establishes standards for approval of certain nonfarm uses in EFU zones, including mining and processing of aggregate resources and asphalt batching. ORS 215.296(1) requires that the county find the use will not:

> "(a) Force a significant change in accepted farm or forest practices on surrounding lands devoted to farm or forest use; or
>
> "(b) Significantly increase the cost of accepted farm or forest practices on surrounding lands devoted to farm or forest use."

raised for the first time in this appeal. To the extent the issues are reviewable, intervenor contends the following findings adequately explain why petitioners' argument lacks merit:

> "We do not interpret the zoning districts to require listing of private roads * * * as a permitted use. These land uses are accessory to any development on land and [are] implicitly allowed as part of a permitted or conditional use. Although the proposed access road traverses land zoned [EF], we see no reason to analyze whether * * * roads are a permitted use in that zoning district. We note that mineral and aggregate processing is a conditional use in the EF zoning district. [JCZO] 6.025(1). Roads for these purposes are an accessory use." Record 44.

A. Waiver

In response to intervenor's waiver argument, petitioners cited at oral argument several particulars in which the county failed to follow the requirements of ORS 197.763.[16] Such failures allow petitioners to raise issues at LUBA, even if they were not raised during the local proceedings. ORS 197.835(2)(a).

Intervenor does not specifically dispute petitioners' contentions concerning the county's failures to comply with the requirements of ORS 197.763. Intervenor does argue

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[16]Petitioners' contentions in this regard include: (1) the mailed notice of public hearing failed to list all applicable criteria, as required by ORS 197.763(3)(b); (2) the record does not show that the 197.763(4)(b) requirement that the staff report be available at least seven days before the hearing was satisfied; (3) the record does not show the county provided the statement at the commencement of the hearing required by ORS 197.763(5).

petitioners should not be allowed to identify such failures at oral argument in defense to its claims of waiver. Rather, intervenor argues, petitioners should be required to assert such defenses in a reply brief. See OAR 661-10-039.

We reject intervenor's argument. Where respondents argue in their briefs that issues raised in a petition for review are waived under ORS 197.835(2) because they were not raised below, a petitioner may assert any defenses that may be available under ORS 197.835(2)(a) or (b) in response to the waiver argument either at oral argument or in a reply brief.[17]

B. Roads as an Accessory Use in the EF Zone

The county findings quoted above are confusing. We understand the first sentence to state that the county's zoning ordinance does not specifically list private roads as permitted uses in any of its zoning districts. Consistent with the first sentence, the third sentence takes the position that the county, therefore, need not be concerned whether the disputed private road is specifically listed as a permitted use in the EF zone. We agree with and defer to this line of reasoning.

The second line of reasoning is expressed in the second, fourth and fifth sentences of the findings quoted

[17]Of course, petitioners may also at oral argument or in a reply brief provide citations to the record showing the disputed issues were raised during the local proceedings.

above. The second sentence states that private roads are accessory to uses that are allowed as permitted or conditional uses in the county's zoning districts. The fourth and fifth sentences state that mineral and aggregate processing is allowed as a conditional use in the EF zone and a private road providing access for mineral and aggregate processing is therefore allowed as an accessory use in the EF zone. We agree with and defer to this line of reasoning as well.

However, neither of the above described lines of reasoning is adequate to address the interpretational issue raised under this assignment of error. Although mineral and aggregate processing, and related accessory uses, are specifically allowed in the EF zone where the private roadway will be located, asphalt batching and its accessory uses are not specifically allowed in the EF zone.[18] We do not understand the county to interpret the term "processing," as used in JCZO 6.025(1), to include asphalt batching. Therefore, private roads, as accessory uses to asphalt batching, are not specifically allowed in the EF zone. It may be that the county interprets JCZO 6.025 to allow this private road on EF zoned land on some other

[18]The relevant provisions of the EF and FC zones are quoted in the introduction, supra.

basis.[19] However, that interpretation is neither included nor explained in the challenged decision. Therefore, we must remand the decision so that the county can supply an interpretation that responds to petitioners' argument. Gage v. City of Portland, 123 Or App 269, 860 P2d 282 (1993); Weeks v. City of Tillamook, 117 Or App 449, 453-54, 844 P2d 914 (1992); Larson v. Wallowa County, 116 Or App 96, 840 P2d 1350 (1992).

C. ORS 215.296

Exclusive farm use zoning statutory requirements apply directly to uses in exclusive farm use zones. Kenagy v. Benton County, 115 Or App 131, 134, 838 P2d 1076, rev den 315 Or 271 (1992); Kenagy v. Benton County, 112 Or App 17, 20 n2, 826 P2d 1047 (1992); see Forster v. Polk County, 115 Or App 475, 478 (1992). ORS 215.283(2)(b)(B) and (C) allow mining of aggregate and processing into asphalt, subject to ORS 215.296. Therefore, the standards imposed by ORS 215.296 apply. The challenged decision does not explicitly address ORS 215.296. We note the decision does apply JCZO 14.137(g) and 15.213(2)(d).[20] Those standards are

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[19]We express no view here on whether we would be required to defer to such an interpretation of JCZO 6.025(1), but we note that petitioners do not cite, and we are not aware of, any conflict such an interpretation would have with exclusive farm use statutory requirements.

[20]JCZO 14.137(g) requires that the county find the proposed asphalt batching "is compatible with and shall not adversely impact agricultural or forestry use on any adjoining land." JCZO 15.213(2)(d) requires that the county find conditional uses authorized in resource zones will "not

similar to ORS 215.296(1)(a), but intervenor does not argue the findings addressing JCZO 14.137(g) and 15.213(2)(d) are sufficient to demonstrate compliance with ORS 215.296(1)(a), and we do not consider here whether they are. See Peyton v. Washington County, 95 Or App 37, 39, 767 P2d 470 (1989). In any event, as far as we can tell, the county did not adopt findings addressing ORS 215.296(1)(b). Findings addressing the standards of ORS 215.296(1) are required to allow an access road serving the proposed use on land zoned for exclusive farm use.

The seventh assignment of error is sustained.

The county's decision is remanded.

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interfere seriously with accepted forest or agricultural practices on adjacent lands devoted to resource use."