

1 BEFORE THE LAND USE BOARD OF APPEALS
2 OF THE STATE OF OREGON

3
4 MARK J. MAZESKI and DIANA CROSBY)
5 MAZESKI,)
6)
7 Petitioners,)
8)
9 vs.)
10)
11 WASCO COUNTY,)
12)
13 Respondent,)
14)
15 and)
16)
17 HOOD RIVER SAND, GRAVEL AND)
18 READY-MIX, INC.,)
19)
20 Intervenor-Respondent.)

LUBA No. 94-074
FINAL OPINION
AND ORDER

21
22
23 Appeal from Wasco County.

24
25 Mark J. Mazeski, Mosier, filed the petition for review
26 and argued on his own behalf.

27
28 No appearance by respondent.

29
30 Steven L. Pfeiffer and Michael C. Robinson, Portland,
31 filed the response brief. With them on the brief was Stoel
32 Rives Boley Jones & Grey. Michael C. Robinson argued on
33 behalf of intervenor.

34
35 HOLSTUN, Referee; KELLINGTON, Chief Referee,
36 participated in the decision.

37
38 REMANDED 10/20/94

39
40 You are entitled to judicial review of this Order.
41 Judicial review is governed by the provisions of ORS
42 197.850.

1 Opinion by Holstun.

2 **NATURE OF THE DECISION**

3 Petitioners appeal a conditional use permit for a sand
4 and gravel mining operation.

5 **MOTION TO INTERVENE**

6 Hood River Sand, Gravel & Ready-Mix, Inc., the
7 applicant below, moves to intervene in this proceeding on
8 the side of respondent. There is no opposition to the
9 motion, and it is allowed.

10 **FACTS**

11 The subject 8.5 acre parcel is zoned A-1, an exclusive
12 farm use zone. The subject property is located within the
13 Columbia River Gorge National Scenic Area and is subject to
14 the Columbia River Gorge Overlay zone, an environmental
15 protection overlay zone included in the Wasco County Land
16 Use and Development Ordinance (LUDO).

17 On October 15, 1992, intervenor submitted an
18 application for a conditional use permit for a sand and
19 gravel mining operation. The county planning commission
20 approved the application, subject to 18 conditions.

21 Both petitioners and intervenor appealed the planning
22 commission decision to the governing body (county court).
23 The county court approved the requested conditional use
24 permit, modifying three of the planning commission's
25 conditions of approval. That decision was appealed to this
26 Board and was remanded to allow petitioners an opportunity

1 to rebut certain evidence. Mazeski v. Wasco County, 26 Or
2 LUBA 226 (1993).¹

3 On remand the county court held an evidentiary hearing,
4 and again approved the conditional use permit, adopting
5 additional findings in support of its decision. This appeal
6 followed.

7 **FIRST ASSIGNMENT OF ERROR**

8 **A. Introduction**

9 Because the subject property is located in the Columbia
10 River Gorge Overlay district, the provisions of LUDO 3.790
11 apply. Subsections D and E are relevant to the first
12 assignment of error.

13 "D. Determination of Visual Impact

14 "Prior to approval of any building permit or
15 other land use action the Planning Director
16 shall determine the level of impact the
17 proposed development will have on the visual
18 quality of the Gorge. The level of impact
19 shall be based upon the following factors:

20 "1. The level of development proposed by the
21 applicant.

22 "2. Visibility of proposed development from
23 Interstate 84, Highway 30 West, and
24 Washington Highway 14.

25 "3. Visibility of proposed development from
26 Columbia River, Scenic Viewpoints and
27 Vistas.

¹The local record in the prior appeal is included as part of the record in this appeal. We cite the prior local record in this opinion as "Old Record," and cite the record compiled on remand as "New Record."

1 "E. Standards and Criteria for Development

2 "Approval of uses permitted in the underlying
3 zone shall be based on findings which show
4 that the proposed use complies with the
5 following applicable standards and criteria:

6 "1. The site is not visible from any of the
7 major transportation routes.

8 "2. The site is not visible from the
9 Columbia River or any scenic viewpoint
10 or vista.

11 "3. The site is not within fifty (50) feet
12 of any bluff lines or cliffs.

13 "4. The site will not obstruct any portion
14 of any scenic view from Interstate 84,
15 Highway 30 West, or any scenic viewpoint
16 or vista.

17 "5. The site is not unsuitable for the
18 proposed development or could otherwise
19 result in a negative impact on the
20 scenic quality of the Gorge."

21 As an initial point, our review of the arguments
22 presented under this assignment of error is complicated by
23 several factors. First, the challenged decision adopts
24 lengthy findings which are not altogether clear and
25 consistent in their interpretation and application of the
26 relevant LUDO provisions. Second, petitioners generally
27 take the approach of separately challenging individual
28 findings or parts of findings, without explaining why the
29 challenged finding or part of a finding, by itself, is
30 essential to the challenged decision. See Bonner v. City

1 of Portland, 11 Or LUBA 40, 52 (1984). Finally, the
2 relevant LUDO provisions themselves are hard to follow.²

3 In their first assignment of error, petitioners
4 challenge the county's findings that the proposed
5 development complies with LUDO 3.790(E)(5), quoted above.

6 **B. The County's Findings and Petitioners' Challenges**

7 The county's findings regarding LUDO 3.790(E)(5), as
8 relevant, are set forth and discussed below:

9 "33. Two subsections of § 3.790 guide the County's
10 assessment of the scenic impact of any use in
11 the [Columbia River Gorge Overlay] district.
12 Subsection (D) of that section provides the
13 mechanism by which the County will determine
14 the level of impact that a proposed use will
15 have on the 'visual quality of the Gorge.'
16 The level of impact, according to this

²For example, the relevance of LUDO 3.790(F) to the challenged decision is not clear. The approval standards and criteria at issue under this assignment of error apparently are established by LUDO 3.790(E), quoted above in the text. However, LUDO 3.790(F), which is not specifically cited by the county in its decision or in the response brief, and is only referenced in passing in the petition for review, apparently permits approval of a proposal that violates those approval standards, in certain circumstances.

"F. Design Requirements

"If a determination has been made that the proposed development does not comply with the standards and criteria of [LUDO 3.790(E)], the Approving Authority may impose reasonable conditions to meet the purpose of this district and to mitigate the visual impact. * * *"

The challenged decision finds that all of the standards in LUDO 3.790(E) are met. Some of those findings reference conditions of approval and state that the conditions "will mitigate any negative impact on the scenic quality of the Gorge." New Record 55. However, the challenged decision does not take the position that the proposal violates any of the requirements of LUDO 3.790(E), but nevertheless may be approved due to imposition of conditions under LUDO 3.790(F).

1 subsection, 'shall be based upon [the] three
2 factors [set forth in subsection D].' It is
3 clear the gravel pit is not and will not be
4 visible from the Columbia River, any
5 designated Scenic Viewpoints and Vistas,
6 Interstate 84, Highway 30 West, or Washington
7 Highway 14. Thus the level of visual impact
8 on the Gorge turns solely on the rather vague
9 standard of the 'level of the development
10 proposed.' Then, subsection (E) states the
11 five specific standards for determining
12 whether the visual impact of the proposed use
13 will comply with the scenic quality standards
14 of the Gorge. [Subsections (E)(1) through
15 (E)(4)] are outright prohibitions * * *. It
16 is clear that the proposed development does
17 not fall within any of these prohibitions.

18 "34. Based upon the above analysis, the only
19 visual issue is whether the proposed
20 development can satisfy the more vague and
21 general standard in Subsection (E)(5), as
22 guided by the impact level analysis of
23 subsection (D) -- will the 'level of
24 development proposed' by the applicant
25 'otherwise result in a negative impact on the
26 scenic quality of the Gorge'? Given that
27 [LUDO 3.790] first sets forth a number of
28 specific visual impacts and standards, this
29 broader subjective analysis leaves the County
30 with wide discretion to decide whether a
31 proposed use that is not inconsistent with
32 the specific prohibitions constitutes a
33 'level' of development which will have an
34 impermissible impact on the general scenic
35 qualities of the Gorge. * * *

36 "35. [T]he essential point is that the visibility
37 of this proposed use from the Gorge area as a
38 whole will not result in a negative impact on
39 its scenic quality. All the factual findings
40 and reasons expressed in findings 28 and 29 *
41 * * and in the relevant findings on visual
42 impacts in the Planning Office findings are
43 relevant and incorporated here, and they
44 establish without any doubt that the site is

1 not unsuitable for the proposed gravel
2 operation and that the level of operations
3 permitted by the conditional use approval
4 will not otherwise result in negative impacts
5 on the scenic quality of the Gorge taken as a
6 whole.

7 "* * * The County Court finds that the
8 development will not result in a negative
9 impact on the scenic quality of the Gorge for
10 the following reasons: The record
11 demonstrates that the level of development
12 proposed by the applicant is consistent with
13 past use of the site and that various
14 conditions of approval will mitigate any
15 negative impact on the scenic quality of the
16 Gorge. The County Court notes that the
17 scenic quality of the Gorge is already
18 impacted in some fashion by the existence of
19 the pit and interprets LUDO § 3.790(E)(5) to
20 take into account existing scenic quality of
21 the Gorge in this determination.

22 "The proposed development will not be visible
23 from Interstate 84, Highway 30 West or
24 Washington Highway 14. The County Court
25 finds that Husky and State Roads are not
26 relevant to the determination required in
27 this section.

28 "Finally, the record reveals that the
29 proposed development will not be visible from
30 the Columbia river, scenic viewpoints and
31 vistas. Based on the above, the County Court
32 finds that LUDO § 3.790(E)(5) is met."
33 (Emphases added.) New Record 51-56.

34 Petitioners' central challenge under this assignment of
35 error is based on their reading of the above findings as
36 adopting an interpretation of LUDO 3.790(E) that the county
37 need not consider impacts on the scenic qualities of the
38 Gorge, except with regard to the vantage points identified
39 in LUDO 3.790(D)(2) and (3) and

1 LUDO 3.790(E)(1) through (4). According to petitioners, the
2 "Scenic quality of the Gorge" referred to in LUDO
3 3.790(D)(5) is not limited to the scenic quality of the
4 Gorge as viewed from the places identified in
5 LUDO 3.790(D)(2) and (3) and LUDO 3.790(E)(1) through (4).
6 Petitioners contend such a construction of LUDO 3.790(E)(5)
7 renders that section meaningless. Instead, petitioners
8 argue, the Gorge referred to in LUDO 3.790(E) is the area
9 identified in LUDO 3.790(G).³

10 The findings are less than clear on the point, and
11 intervenor's brief does not explicitly address or refute
12 petitioners' contentions. Nevertheless, we reject
13 petitioners' interpretational challenge. The county's
14 findings quoted above can be read to take the position that
15 the county determines whether the proposed use has the
16 proscribed "negative impact on the scenic quality of the
17 Gorge" first by performing the visual impact analysis
18 required by LUDO 3.790(D) and adopting the site visibility
19 and other findings required by LUDO 3.790(E)(1) through (4).
20 Thereafter, site-specific findings concerning other vantage
21 points located within the area defined by LUDO 3.790(G),
22 including Husky and State Roads which are cited by

³LUDO 3.790(G) provides a description of the area subject to the Columbia River Gorge Overlay Zone. Petitioner contends, and intervenor does not dispute, that the area described in LUDO 3.790(G) includes the back sides of ridges and other areas that would not have to be considered in addressing LUDO 3.790(D)(2) and (3) and LUDO 3.790(E)(1) through (4).

1 petitioners, are not required. Rather, the balance of the
2 consideration required by LUDO 3.790(E)(5) is highly
3 subjective and is satisfied by considering the "level of
4 development proposed" and the visual impacts of that "level
5 of development" on the Gorge as a whole, taking into
6 consideration existing conditions at and near the site.⁴
7 That interpretation of LUDO 3.790(E)(5) is well within the
8 county's interpretive discretion under ORS 197.829 and Clark
9 v. Jackson County, 313 Or 508, 836 P2d 710 (1992).

10 **1. Definition of Operative Terms**

11 Petitioners contend the county erred by not defining
12 "level of development" as that concept is used in LUDO
13 3.790(D)(1) and "suitability," "negative impact," and
14 "Scenic Qualities of the Gorge" as those concepts are used
15 in LUDO 3.790(E)(5).

16 Intervenor contends petitioners waived their right to
17 assert these interpretational issues by not raising them in
18 the prior appeal. We agree with intervenor.⁵

⁴Although the decision could be clearer on the point, we take the references in the findings to the "Gorge as a whole" as referring to the larger area petitioners contend the county is required to consider in applying LUDO 3.790(E)(5). Some of the findings and conditions clearly address visual impacts on sites other than those identified in LUDO 3.790(D)(2) and (3) and 3.790(E)(1) through (4).

⁵In any event, we do not agree with petitioners' suggestion that the county necessarily is required to adopt findings specifically defining every code provision it applies in granting land use permit approval. The county's findings adequately discuss the code provisions in which the words cited by petitioners appear and explain why the county believes those provisions are satisfied.

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2. Adequacy of the Findings

The county's findings addressing LUDO 3.790(D)(2) and (3) and LUDO 3.790(E)(1) through (4) are not challenged. Petitioners dispute the county's findings that the level of extraction will be consistent with historic levels of extraction, pointing out that there is no condition of approval limiting the rate of extraction to historic levels.

The findings concerning rate of extraction do not appear to be critical to the county's concerning visual impacts. The county adopted other findings in support of its conclusions that the site is not unsuitable for the proposed gravel operation and that the proposed level of operation would not result in a negative impacts on the scenic quality of the Gorge taken as a whole.⁶ Those findings acknowledge that gravel pits have certain inherent visual impacts during various stages of development and reclamation, due to the nature of those operations. The findings go on to point out, however, that a gravel pit already exists on the site and no structures are planned or allowed by the decision.⁷ The findings acknowledge the pit

⁶The findings reaching this conclusion appear at Record 55 and incorporate by reference findings which appear at New Record 43 through 47.

⁷We reject petitioners' contention that the county may not take the visual impacts associated with the existing pit into consideration in assessing the visual impacts that may be associated with the proposed operation.

1 will be expanded, but find that the expansion will not be so
2 extensive as to change the visual nature of the existing
3 pit. The findings also point out operations are planned to
4 take advantage of natural topographical and vegetative
5 screening as much as possible. The findings go on to cite a
6 number of other conditions, which the county concludes show
7 the site is "not unsuitable for the proposed development"
8 and that the proposed development will avoid "negative
9 impact on the scenic quality of the Gorge." New Record 54-
10 56.

11 Petitioners challenge the effectiveness of the cited
12 conditions to mitigate visual impacts.⁸ However, the county
13 is not required to show that each and every condition
14 imposed will mitigate all visual impacts of the proposed
15 use. In view of the subjective nature of the ultimate legal
16 standard in LUDO 3.790(E)(5) and the impacts associated with
17 the existing pit on the subject property, we cannot say the
18 county court erred in concluding that the proposal complies
19 with LUDO 3.790(E)(5).

20 The first assignment of error is denied.

⁸For example, petitioners concede that certain conditions will mitigate visual impacts from some adjoining properties, but complain the conditions do not address the view from all areas in the Gorge as defined by LUDO 3.790(G). Petitioners argue the condition imposed to limit lighting impacts, will not address other kinds of visual impacts. Petitioners concede the required erosion control plan may mitigate visual impacts, but argue such mitigation is not sufficient to comply with LUDO 3.790(E)(5).

1 **SECOND ASSIGNMENT OF ERROR**

2 The proposed sand and gravel mining operation is a
3 conditional use in the A-1 zone. LUDO 3.210(D)(4). The
4 approval criteria for conditional uses are set out at
5 LUDO 5.020. LUDO 5.020 requires findings that the standards
6 set forth at LUDO 5.020(A) through (J) "are * * * met, can
7 be met by observance of conditions, or are not applicable."
8 LUDO 5.020(A) requires that "[t]he proposal is consistent
9 with the goals and objectives of the Comprehensive Plan and
10 implementing ordinances of the County. Wasco County Plan
11 Goal 5 Policy 2(D) provides:

12 "Rock pits should be located in areas that are not
13 visible from major public highways or road
14 corridors."

15 Petitioner concedes Wasco County Plan Goal 5 Policy
16 2(D) is not a mandatory approval criterion, but argues the
17 county should be required to explain why it chose not to
18 comply with the policy.

19 "Based on the use of the word 'should' it is not
20 mandatory to find compliance with this policy.
21 However, since compliance is encouraged, the
22 County should explain [why] it chose not to comply
23 with this policy. * * *" Petition for Review 29.

24 The county court interpreted Plan Goal 5 Policy 2(D) as
25 imposing a guideline, not a mandatory approval criterion.
26 This interpretation is consistent with prior interpretations
27 by this Board and the appellate courts of plan and land use
28 regulation provisions employing nonmandatory language.
29 Downtown Comm. Assoc. v. City of Portland, 80 Or App 336,

1 772 P2d 1258, rev den 302 Or 86 (1986); Stotter v. City of
2 Eugene, 18 Or LUBA 135 (1989); Bennett v. City of Dallas, 17
3 Or LUBA 450, aff'd 96 Or App 645 (1989); McCoy v. Tillamook
4 County, 14 Or LUBA 108, 118 (1985). Therefore, the county
5 was not required to adopt findings demonstrating compliance
6 with Plan Goal 5 Policy 2(D).⁹

7 The second assignment of error is denied.

8 **THIRD ASSIGNMENT OF ERROR**

9 LUDO 5.020(B) requires that the county adopt findings
10 demonstrating compliance with the following criterion:

11 "Taking into account location, size, design and
12 operational characteristics of the proposed use,
13 the proposal is compatible with the surrounding
14 area and development of abutting properties by
15 outright permitted uses."

16 As under the first assignment of error, petitioners
17 separately attack findings and parts of findings without
18 explaining why those findings are critical to the challenged
19 decision. We agree with intervenor that some of the
20 challenged findings are not critical to the challenged
21 decision. However, other findings adopted to address LUDO
22 5.020(B) clearly are critical to the county's decision, and
23 are challenged by petitioners.

⁹To the extent the county was required to adopt findings addressing Plan Goal 5 Policy 2(D), it did so. Petitioners dispute the adequacy of those findings to demonstrate compliance with Plan Goal 5 Policy 2(D), but, as previously noted, the county is not required to demonstrate compliance with nonmandatory provisions in its comprehensive plan.

1 **A. Interpretational Findings**

2 **1. Three Parts of LUDO 5.020(B)**

3 The findings adopt a detailed interpretation of
4 LUDO 5.020(B), describing that criterion as initially
5 requiring a three part inquiry: (1) determination of
6 location, size, design and operational characteristics of
7 the proposed use, (2) determination of the surrounding area,
8 and (3) determination of permitted uses in the zone. The
9 county court adopted findings addressing each of these three
10 inquiries, and petitioners do not challenge this aspect of
11 the county's findings concerning LUDO 5.020(B).

12 **2. Meaning of Compatibility**

13 The county's findings go on to state that based on the
14 above three part inquiry, the county is then required to
15 "determine whether the proposed use is compatible with the
16 surrounding area and development of abutting properties by
17 outright permitted uses." New Record 37. The county
18 explained its understanding of the meaning of the term
19 "compatible" as follows:

20 "* * * The term 'compatible' is not defined in the
21 code but the County Court finds compatible to mean
22 'capable of existing or operating together in
23 harmony.' The County Court finds this definition
24 does not preclude some negative impact but only
25 precludes such negative impacts as prevents the
26 uses from existing in harmony." Id.

27 Petitioners do not challenge the above explanation of
28 what is required for compatibility.

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3. Visual Impacts

The county adopted the following finding:

"* * * The County Court finds that view of this site from abutting properties will not result in incompatibility between those properties and the proposed [use] because view does not have a substantial impact relative to LUDO 5.020(B). New Record 39.

We understand the above quoted finding to express an interpretation that in determining compatibility, as defined immediately above, view impacts are not a significant consideration. While that construction of the term "harmony" as used in the county's definition of "compatible" is a relatively narrow one, we cannot say it is clearly wrong. We therefore reject petitioners' challenge to the county's interpretation concerning the role of visual impacts under LUDO 5.020(B).

This subassignment of error is denied.

B. Critical Findings

1. Historic Rate of Extraction

The county found the rate of operation or extraction "will not change significantly in the future, and thus * * * the impact of the operations on the surrounding area will not become less compatible because of this approval." New Record 39.

As petitioner correctly notes, there are no conditions of approval which would limit the rate of extraction to historic levels. Petitioner also contends the finding

1 concerning continuation of historic levels of extraction and
2 operation is not supported by substantial evidence in the
3 record. We agree with petitioner. In fact, petitioner
4 cites statements by the applicant's representative that if a
5 demand exists in the future for more sand and gravel than
6 has historically been removed on a daily basis, additional
7 sand and gravel will be extracted and removed to meet that
8 demand. Old Record 279.

9 Although petitioner makes no real attempt to explain
10 why the finding concerning historic rate of extraction is
11 critical to the county's decision concerning compatibility,
12 the finding appears to have played a much more significant
13 role in the county's decision concerning LUDO 5.020(B) than
14 it did in its decision concerning negative visual impacts
15 under LUDO 3.790(E)(5). We cannot assume the finding is
16 mere surplusage. This subassignment of error is sustained.

17 **2. Compatibility of Existing Pit**

18 The county found that the existing pit, historically,
19 has operated compatibly with surrounding properties.
20 Petitioners contend that finding is not supported by
21 substantial evidence, citing letters in the record where
22 nearby property owners complain about various aspects of the
23 existing pit. While the evidence cited by petitioners is
24 not conclusive that the existing pit has not been compatible

1 with surrounding properties, intervenor cites no evidence
2 that the existing pit has been compatible.¹⁰

3 As with the finding concerning continuation of historic
4 extraction levels, we cannot assume the challenged finding
5 is mere surplusage. This subassignment of error is
6 sustained.

7 **3. Remaining Findings**

8 The findings most directly addressing and explaining
9 the county's position concerning LUDO 5.020(B) are as
10 follows:

11 "With respect to farm uses, the County Court finds
12 that the proposed use will be compatible with farm
13 uses because it should not interfere with their
14 continued or future operation. The County Court
15 finds that the numerous conditions of approval
16 required of this land use application will ensure
17 compatibility. * * * The County Court finds that
18 the determination of compatibility is buttressed
19 by the fact that the use has existed at this
20 location for a number of years without
21 compatibility complaints."^[11]

22 "With respect to the public roads and right-of-way
23 uses permitted in the A-1 zone, the County Court
24 finds that the proposed use will be compatible
25 with those uses because roads are not in any way

¹⁰Intervenor cites several conditions designed to address the concerns expressed in the letters cited by petitioners, however, these conditions do not refute the evidentiary value of these letters that past operations of the existing pit have not been compatible with surrounding properties.

¹¹The finding concerning lack of complaints is technically supported by the record, in the sense the record does not show formal complaints have been filed in the past with the county government. However, as noted above, there are two letters in the record cited by petitioners alleging the existing pit is not compatible with adjoining properties.

1 affected by the proposed use. * * * New Record
2 37-38.

3 The findings in the first paragraph quoted above are
4 repeated for "forest products" and for "other dwellings,
5 buildings, utility facilities, geothermal exploration, solid
6 waste disposal sites and horse operations."

7 We agree with petitioners that the above quoted finding
8 is a conclusion, and inadequate to explain why the proposed
9 use will have only "some negative impact" and will not have
10 "such negative impacts as prevents the uses from existing in
11 harmony." This is particularly true for the public roads
12 and right-of-way uses permitted in the A-1 zone. There is
13 no explanation for how sand and rock will be removed from
14 the site with affecting those roads and right-of-way uses.
15 As "compatible" is defined by the county, the findings of
16 compliance with LUDO 5.020(B) must demonstrate that the
17 negative impacts of the proposed use will not be such as to
18 prevent it from "existing in harmony" with "the surrounding
19 area and development of abutting properties by outright
20 permitted uses." The above findings fail to do so.

21 Intervenor contends the findings need not be perfect
22 and cites findings appearing later in the decision which
23 cite and provide some elaboration on the conditions of
24 approval referenced generally in the above quoted
25 findings.¹² Intervenor is correct that it is permissible

¹²Those findings are as follows:

1 for the county to impose conditions of approval to insure
2 compliance with the applicable approval criteria. Sigurdson
3 v. Marion County, 9 Or LUBA 163, ____ (1993). However, it
4 must be possible for this Board to determine from the
5 evidence in the record and the conditions imposed that the
6 relevant approval standard is met. Here, the compatibility
7 requirement imposed by LUDO 5.020(D), as defined by the
8 county, requires that the proposed use exist "in harmony"
9 with "the surrounding area and development of abutting
10 properties by outright permitted uses." The conditions
11 imposed by the county and described in footnote 12 may well
12 provide a basis for the county to adopt findings explaining
13 why it believes such is the case here. However, it is not
14 apparent from the findings the county did adopt or the

"* * * Any potential problems presented by pit expansion and operations have been resolved by means of conditions, including the condition limiting operations to Phase I only (Condition No. 4), the condition prohibiting excavation along the north boundary (Condition No. 1), the provision for a reclamation plan as required by DOGAMI (Condition No. 6), the requirement for an erosion control plan (Condition No. 7), the limitation of working hours (Condition No. 9), the requirement for DEQ permits and dust suppression efforts (Conditions No. 10 and 11), the condition requiring a forest-farm management easement to ensure no interference with farm operations on farm properties in the vicinity (Condition No. 13), the ban on permanent lighting (Condition No. 14), the condition regarding road safety and signs (Condition No. 17) and the restriction on stockpiling (Condition No. 18). The evidence indicates that a gravel operation that continues on the site under these conditions will remain compatible with the surrounding area and the potential outright permitted uses on abutting properties, including the farm uses. New Record 40.

1 conditions or the evidence cited by intervenor that such is
2 the case.

3 The third assignment of error is sustained, in part.

4 **FOURTH ASSIGNMENT OF ERROR**

5 LUDO 5.020(D) requires that the county adopt findings
6 demonstrating compliance with the following criterion:

7 "The proposed use will not unduly impair traffic
8 flow or safety in the area."

9 Petitioners contend the challenged decision will allow
10 increased truck traffic on roads in the area to remove sand
11 and gravel from the site. Petitioners argued below that the
12 nearby intersection of Husky and State Roads is unsafe, due
13 to an inadequate line of sight.

14 Intervenor points out that the county's findings refer
15 to two conditions of approval that address petitioners'
16 concerns about traffic safety in general and at the
17 intersection of Husky and State Roads specifically.
18 However, the county's findings make it clear that it is
19 relying on a continuation of the historic rate of operation
20 at the existing pit, in considering the truck traffic impact
21 in the area.

22 "LUDO § 5.020(D) requires a determination of
23 whether the proposed use will unduly impair
24 traffic flow or safety in the area. The County
25 Court finds that the word 'unduly' means
26 excessively. Therefore, the County Court finds
27 that some impact on traffic flow or safety * * *
28 is permitted, as long as it is not excessive. The
29 County Court relies on the historic rate of
30 operation of the pit, and the lack of comment from

1 the Wasco County Road Master regarding this issue.
2 The County Court finds that the proposed use will
3 not unduly impair traffic flow or safety in the
4 area." (Emphasis added.) New Record 41.

5 As petitioners correctly note, the lack of a response
6 from the Wasco County Road Master does not constitute
7 substantial evidence that LUDO 5.020(D) is satisfied. The
8 county is within its interpretive discretion to interpret
9 LUDO 5.020(D) as allowing some impact on traffic flow or
10 safety and only prohibiting such impacts if they are
11 excessive. But the above quoted finding explicitly "relies
12 on the historic rate of operation of the pit." As explained
13 earlier in this opinion, there is not substantial evidence
14 in the record that the historic rate of operation of the pit
15 will continue, and the decision is not conditioned to assure
16 continuation of that historic rate of operation. The county
17 need not accept petitioners' estimates of the number of
18 trucks that will be generated by the use as approved.
19 However, to the extent identification of the level of truck
20 traffic that will be generated by the use as approved is
21 necessary to determine compliance with LUDO 5.020(D), the
22 level of truck traffic identified in the findings must be
23 supported by substantial evidence or a condition limiting
24 the number of truck trips to the site must be imposed.

25 The fourth assignment of error is sustained.

26 **FIFTH ASSIGNMENT OF ERROR**

27 LUDO 5.020(H) requires that the county adopt findings
28 demonstrating compliance with the following criterion:

1 "The location and design of the site and structure
2 for the proposed use will not significantly
3 detract from the visual character of the area."

4 Petitioners contend the findings adopted by the county to
5 address LUDO 5.020(H) are inadequate and are not supported
6 by substantial evidence in the record.

7 Among the findings adopted by the county to address
8 LUDO 5.020(H), are the following:

9 "* * * Given the wording of this standard, the
10 Planning Commission (along with the County Court
11 on appeal) clearly has broad discretion to
12 consider the evidence as a whole and to determine
13 what 'significantly detracts' from the visual
14 character of the area and what does not. * * *

15 "* * * * *

16 "* * * Gravel pits are more often than not located
17 in rural areas, as recognized by the plan and
18 ordinance provisions allowing them as conditional
19 uses in rural and agricultural areas, and all
20 gravel pits have the characteristics of being a
21 'scar' that takes away vegetation and disturbs
22 topography. * * * It is not the intent of this
23 Ordinance standard to make it impossible to locate
24 a gravel pit, but instead to ensure that the
25 specific setting and proposed operations do not
26 work together to make the proposed gravel pit
27 particularly adverse to the local visual
28 character. The [petitioners] make no arguments *
29 * * of this type.

30 "[Petitioners] further argue that future
31 extraction will 'compound' the visual problem, and
32 that a reclamation plan will not mitigate the
33 problem because such a plan, according to
34 [petitioners], will not be continuous and
35 simultaneous with extraction operations. The
36 County Court is satisfied that the evidence has
37 established that the proposed use will not
38 significantly detract form the visual character of
39 the area because:

- 1 "(a) This gravel pit already exists and that while
2 no gravel pit is a thing of beauty, there is
3 no evidence that the visual impact of this
4 pit has had or will have a particular strong
5 adverse impact on the visual character of the
6 surrounding area;
- 7 "(b) No structures are planned or will be allowed;
- 8 "(c) The relatively low rate of operations is not
9 expected to change in the future and pit
10 expansion will not be so extensive as to
11 change the visual nature of this pit;
- 12 "(d) Operations have been planned to take as much
13 advantage of natural topographical and
14 vegetative screening as possible;
- 15 "(e) Condition No. 4 limiting operations to Phase
16 I and requiring the maintenance of the hill
17 crest landform and the existing trees on the
18 hill has had the effect of preventing what
19 might have been significantly adverse visual
20 impacts by continuing to screen these
21 operations from key viewing areas;
- 22 "(f) The operation will not be visible from any
23 place or point that is entitled to particular
24 special protection of its scenic views, such
25 as the Columbia River, the main Gorge
26 highways, any scenic high points or vistas,
27 and the like;
- 28 "(g) Other conditions of approval -- including
29 erosion control (Condition No. 7), dust
30 suppression (Condition No. 11), the ban on
31 permanent lighting (Condition No. 14), and
32 limits on stockpiling (Condition No. 18) --
33 are directly intended to improve the visual
34 character of the operations or will have that
35 incidental effect; and
- 36 "(h) The required reclamation plan should mitigate
37 the visual problems with this pit in both the
38 short- and long-run.

1 The findings go on to address uncertainty about the timing
2 and type of reclamation efforts that will be required to
3 comply with safety concerns, but point out one of the
4 conditions of approval specifically requires that the
5 reclamation plan provide for both operational safety and
6 avoid visual blight.

7 The above findings are not without problems. For
8 example, finding (a) improperly relies, in part, on a lack
9 of evidence of past incompatibility. Finding (c) relies in
10 part on the unsupported assumption that past levels of
11 operation will continue. Petitioners' challenges generally
12 take the approach of either disagreeing with a finding or
13 pointing out why a cited condition of approval or finding is
14 inadequate to demonstrate avoidance of all potential visual
15 impacts, at all times, from all potential vantage points.
16 Petitioners piecemeal challenge is insufficient to show the
17 findings viewed as a whole are inadequate. We agree with
18 intervenor that the findings taken as a whole are adequate
19 to explain why the proposal complies with the requirement
20 imposed by LUDO 5.020(H).

21 The fifth assignment of error is denied.

22 **SIXTH ASSIGNMENT OF ERROR**

23 LUDO 5.020(J) and (K) require that the county adopt
24 findings demonstrating compliance with the following
25 criteria:

26 "(J) The proposed use will not significantly
27 increase the costs of accepted farm or forest

1 practices on surrounding lands devoted to or
2 available for farm and forest use.

3 "(K) The proposed use will not force a significant
4 change in accepted farm or forest practices
5 on surrounding lands devoted to or available
6 for farm or forest use."

7 Petitioners challenge a finding adopted by the planning
8 commission and claim that the finding is not supported by
9 "any evidence." Petition for Review 49.

10 Intervenor points out the county court adopted
11 additional findings on remand addressing these criteria, and
12 these findings are not challenged by petitioners. In some
13 respects those findings are similar to the planning
14 commission findings challenged by petitioners. However,
15 those findings also identify conditions of approval and
16 conclude that those conditions of approval will ensure
17 compliance with LUDO 5.020(J) and (K). Those unchallenged
18 findings provide an independent basis for the county's
19 determination that the proposal is consistent with LUDO
20 5.020(J) and (K).

21 The sixth assignment of error is denied.

22 The county's decision is remanded.