BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

MARK J. MAZESKI and DIANA CROSBY MAZESKI, Petitioners, vs. WASCO COUNTY, Respondent, and HOOD RIVER SAND, GRAVEL & READY-MIX, INC., Intervenor-Respondent.	LUBA No. 94-091 FINAL OPINION AND ORDER

Appeal from Wasco County.

Mark J. Mazeski and Diana Crosby Mazeski, Mosier, filed the petition for review. Mark J. Mazeski argued on his own behalf.

No appearance by respondent.

Steven L. Pfeiffer and Michael C. Robinson, Portland, filed the response brief. Michael C. Robinson argued on behalf of intervenors-respondent.

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

REMANDED 10/20/94

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

Opinion by Kellington.

NATURE OF THE DECISION

Petitioners appeal an order of the county court approving a conditional use permit for an aggregate operation.

MOTION TO INTERVENE

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

FACTS

The subject property is an approximately 27 acre portion of a 42.17 acre parcel of land zoned Industrial and located within the City of Mosier Urban Growth Boundary (UGB). Approximately two acres of the subject property have been utilized for aggregate operations in the past. The challenged conditional use permit has a 40 year, limited approval duration.

INTRODUCTION

This appeal presents an unusual interpretive issue, because it involves a county decision applying city plan and zoning ordinance provisions. The subject property is located within the city's UGB.[1] The city and county have

[1]A small portion of the subject property is located within the city municipal boundary as well as inside the city UGB. There is no issue in this appeal concerning the county's authority over that property.

adopted an Urban Growth Management Agreement (agreement) determining that the county is responsible for the application of the city's plan and zoning ordinances to unincorporated lands within the city's UGB until such time as the city elects to annex such land.[2]

Under Clark v. Jackson County, 313 Or 508, 836 P2d 710 (1992) and ORS 197.829, LUBA is required to defer to a local government's interpretation of its own enactments, so long as the interpretation is not contrary to the express words, policy or purpose of the enactment.[3] Prior to Gage v. City of Portland, 319 Or 308, ___ P2d ____ (1994) (Gage), the court of appeals understood the deference rule of Clark and ORS 197.829 to apply to the interpretations of local

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[2]The parties agree that this Board may take official notice of the agreement.

[3]ORS 197.829 provides as follows:

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

enactments by all local government decision makers. The court in Gage determined that LUBA is only required to extend the deference required by Clark to a local government's interpretation of local enactments, where the interpretation is made by a politically accountable governing body that adopted the disputed regulations.[4] The court in Gage, supra, 319 Or 315, stated:

> "In essence, then, this court's decision in Clark requires LUBA, in certain circumstances, to defer to a local government's interpretation of its own ordinance. The local governing body responsible for the interpretation of that ordinance in Clark was the governing body of the county that had enacted the ordinance; therefore, this court had no occasion to address whether such deference must be given to an interpretation of an ordinance by someone other than the governing body, e.g., a hearings officer. The principles underlying this court's decision in Clark, * * * however, support the conclusion that the deference required by that decision does not apply to the interpretation of a local ordinance by a hearings officer -- when, as was true here, there was no appeal of the hearings officer's decision to the responsible political body."

Petitioners argue the county governing body, here the county court, is owed no deference when interpreting the city's zoning ordinances and plan provisions. Intervenor argues the county governing body is entitled to deference in applying city plan and zoning ordinance within the city's

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[4]In Watson v. Clackamas County, 129 Or App 428, 431-32, ___ P2d ___ (1994), the court of appeals determined the deference required by ORS 197.829 is owed only to local government governing bodies.

UGB under the terms of the agreement because the county court is politically accountable and required to apply those city provisions, and must adopt those provisions into the county code.

The agreement is adopted by both the city council and the county court. Reasonably read, the agreement requires the incorporation of city zoning ordinance and comprehensive plan provisions into the county's zoning ordinance and comprehensive plan for purposes of allowing the county to make land use decisions within the city's UGB. The county is politically accountable for making land use decisions within the city's UGB and is the final decision maker as to those decisions.[5] While the city actually adopts the city plan and zoning ordinance the county applies within the UGB, the relevant portions of those documents are "incorporated" into the county's code. Therefore, by operation of law, the city's plan and zoning ordinance are the legal equivalent of county plan and zoning ordinance provisions concerning the land within the UGB. We believe the most reasonable reading of Gage requires that we should extend the deference required by ORS 197.829 and Clark to the county court's interpretation of city plan and zoning ordinance provisions

[5]Under this agreement, the county is required to consider city recommendations and city input concerning pending applications, and the city may appeal county decisions that it disagrees with. The city appealed the county planning commission's decision in this matter to the county court, but not to this Board.

when the county makes a land use decision within the UGB.

FIRST ASSIGNMENT OF ERROR

> "The county court failed to make adequate findings of fact and conclusions of law and make a decision that was supported by substantial evidence in the record to establish that the rock extraction operation will be consistent with the City of Mosier Comprehensive Plan."

Petitioners argue the challenged decision is inconsistent with three plan policies: Policy 5(A); Policy 6(C) and Policy 7(A). We address each of petitioners' arguments concerning the proposal's compliance with these policies separately below.

A. Plan Policy 5(A)

Policy 5(A) provides:

> "[D]evelopment shall be prohibited in areas of known severe geologic hazard."

As we understand it, petitioners contend the county's interpretation of "severe geologic hazard" is erroneous, and that the record lacks substantial evidence to support findings that Policy 5(A) is satisfied. Petitioners argue the subject property is a known severe geologic hazard area. Petitioners cite a letter from the applicant's consultant (Cornforth letter), acknowledging that the subject property "is within an area of known severe geologic hazard." 1R 128.[6] Petitioner also cites a document (Geologic Hazards of

[6]The original three-volume record is cited as "1R." The first record submitted by the county for this appeal proceeding is cited as "2R." The supplemental record submitted in this appeal is cited as "3R."

Parts of Northern Hood River, Wasco, and Sherman Counties, Oregon) prepared by the Department of Mineral Industries (hereinafter DOGAMI Bulletin), which lists "mass movement" as a geologic hazard. Further, petitioners contend the DOGAMI Bulletin establishes the subject property is within an area subject to talus slope failure, and that the possibility of such failure amounts to a severe geologic hazard.

Intervenor agrees that Policy 5(A) prohibits any development in an area defined as a severe geologic hazard. However, intervenor points out the challenged decision defines and interprets "severe geologic hazard" as follows:

> "[S]erious hazards which can either not be controlled, can occur suddenly or would affect a large area. * * *" 3R 36.

Intervenor also states the challenged decision specifically interprets the term "severe" to mean "of a great degree; serious." 3R 35. Intervenor contends that while the subject property may be subject to geologic hazards, the subject property is not within an area of severe geologic hazard, as the county interprets those terms under Policy 5(A).

We are required to defer to a governing body's interpretation of its own enactments, so long as the interpretation is not contrary to the express words, policy or purpose of the enactment. Clark, supra. The court of appeals has determined the meaning of this deferential scope of review, as follows:

> "The question for LUBA and us is not what the local legislation in fact means, but whether the local government's interpretation of it is so wrong as to be beyond colorable defense. * * *" Zippel v. Josephine County, 128 Or App 458, 461, _____ P2d ____ (1994).

The county's interpretation of the meaning of severe geologic hazard, as used in Policy 5(A) is not so wrong as to be beyond colorable defense, and we defer to it.

With regard to the evidentiary support for the challenged decision, intervenor argues that petitioners misinterpret the Cornforth letter.[7] Intervenor maintains the Cornforth letter makes it clear that any slope slippage would occur slowly and is correctable. Intervenor states:

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[7]The Cornforth letter responds to the words used in condition 3, which includes the words "known severe geologic hazard." The letter then states with respect to that wording of condition 3:

> "In my opinion, this language [referring to area of severe geologic hazard] is misleading because the entire site is located in an area that is commonly referred to as a geologic hazard, i.e., it is an area marked on geologic maps as ancient landslide terrain. We are well aware of this condition (which is fairly common in Oregon), and the intent of the development is to extract the rock and retain the stability of the ground around the quarry. The italicized part of the opening sentence [areas of known severe geologic hazard] suggests that no development would be possible because the quarry is within an area of known geologic hazard. I do not think that this is the intent of the County and suggest that this opening sentence be reworded as follows:
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> > "'Prior to excavation of any portion of the site, a slope stability report shall be submitted and approved by DOGAMI which will show that development of the site will not cause unstable conditions within the area of known geologic hazard.'
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> "* * * * *" 1R 128.

> "[I]t is clear [the Cornforth letter does] not state that the site is within an area of severe geologic hazard and, in fact, stated that it is simply in an area of geologic hazard." Respondent's Brief 5.

Intervenor also points out DOGAMI wrote a letter in which it stated that it agreed with the Cornforth letter that the conditions on the site indicate that potential instability is localized (1R 295); and that while there was a potential for slope failure, appropriate engineering could prevent slope failure.[8] 1R 296.

Substantial evidence is evidence a reasonable decision maker would rely upon to reach a conclusion. Younger v. City of Portland, 305 Or 346, 752 P2d 262 (1988). Further, it is not LUBA's function to substitute its judgment concerning particular evidence for that of the local decision maker. 1000 Friends v. Marion County, 116 Or App 584, 842 P2d 441 (1992). We have reviewed the evidence cited by the parties. The evidence can be characterized as conflicting. However, nothing to which we are cited so undermines the county's conclusions to make the conclusions unreasonable. Accordingly, we agree with intervenor that the record contains substantial evidence to support the county's conclusion that the subject property is not within

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[8]Specifically, another DOGAMI letter states:

> "It is DOGAMI's opinion that the slope stability issue can be handled to prevent adverse impacts. * * *" 1R 297.

an area of severe geologic hazard.

This subassignment of error is denied.

B. Plan Policy 6(C)

Plan policy 6(C) provides:

> "The impacts of major development project proposals shall be consistent with or enhance the social, environmental and economic quality and rural character of the community."

Petitioners argue:

> "[T]he County's decision to approve the subject request violates this criterion as it applies to the affects of dust, noise, traffic and visual degradation on the environment and rural character of the community." Petitioners' Brief 14.

> "[I]f this criterion, requiring that impacts of major development projects * * * shall be consistent with the environment and character of the community, has any meaning, it means that a rock pit of this size cannot be operated within a scenic rural community of 300 people. The impacts associated with this operation may be minimized by the conditions, to some extent. However, the impacts have not been reduced to a level of impact that is consistent with the rural atmosphere of this quiet and relaxed small town community." Petitioners' Brief 31.

The challenged decision determines the proposal does not constitute "major" development as required by policy 6(C). 3R 41-42.[9]

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[9]The findings that the proposal does not constitute "major" development are summarized as follows:

> (1) Aggregate operations have occurred on two acres of the subject property since the early 1970's;

While the question here is a close one, we conclude the county's determination that the proposal is not major development is not "so wrong as to be beyond colorable defense," and we defer to it.[10] Zippel, supra.

This subassignment of error is denied.

C. Plan Policy 7(A)

Plan policy 7(A) provides as follows:

> "[A]reas where residential development exists shall be protected from encroachment of incompatible land uses."

Petitioners contend the proposal violates Policy 7(A) because it is incompatible with nearby residential uses. Petitioners also argue the conclusion in the challenged decision that review of the final development plan will

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> (2) The proposal requests a conditional use permit, not a comprehensive plan map or zoning map amendment which changes the anticipated development in the zone;
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> (3) The proposal requests a conditional use permit on only 27.66 acres of a 42.17 acre parcel;
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> (4) Only a small portion of the site is within the City of Mosier, while the remainder of the site is within the Mosier Urban Growth Boundary;
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> (5) The proposed operation has fewer operations with potentially adverse effects than previous operations which involved rock crushing, rock stockpiling, batch plant and concrete operations on the subject property;
>
> (6) The aggregate extraction will occur in four phases over a period of 40 years, minimizing the impact of the proposal. 3R 41-43.

[10]Because we sustain the county's interpretation that the proposal does not constitute "major development," Policy 6(C) is inapplicable to it and we do not consider petitioners' other arguments concerning Policy 6(C).

assure compatibility between the proposal and nearby residential uses is erroneous. As we understand it, petitioner contends county review over the proposal's final development plan will be meaningless because the conditions of approval are too vague to be enforceable.

Intervenor argues the challenged decision determines Policy 7(A) is inapplicable to the proposal because the proposal will occur within an industrial and not residential zoning district and, therefore, will not "encroach" into residential development. Intervenor states the challenged decision correctly interprets the term "encroachment" to mean "to intrude generally on the rights or possessions of another. * * *" 3R 51. Intervenor maintains the challenged decision further determines that "encroachment" in the context of Policy 7(A) prohibits only the actual invasion of an incompatible land use into a residentially developed area, but that it does not prohibit proposals that are merely adjacent to residential developments. 3R 51-52.

The county's interpretation of the term "encroachment is not beyond colorable defense, and we defer to it. Therefore, we agree with intervenor that Policy 7(A) is violated because the proposal will not invade a residentially zoned area.

This subassignment is denied.

The first assignment of error is denied.

SECOND ASSIGNMENT OF ERROR

> "The county court failed to make adequate findings of fact and conclusions of law and make a decision that was supported by substantial evidence in the record in order to establish that the rock extraction operation will have minimal adverse impact on the (A) livability, (B) value, and (C) appropriate development of abutting properties and the surrounding area compared to the impact of development that is permitted outright."

Petitioners contend the proposal violates Mosier Zoning Ordinance (MZO) 5.1(2)(B), which provides:

> "Taking into account location, size, design and operation characteristics, the proposal will have a minimal adverse impact on the livability compared to the impact of development that is permitted outright." (Emphasis supplied.)

Petitioners contend "the [City of Mosier] livability should be evaluated, with proper findings, from [the citizens'] perspective." Petition for Review 35. Petitioners argue that mining has been conducted in the community for some time, but "none of the past extraction operations have been of the caliber of this approval." Petition for Review 36. According to petitioners, the City of Mosier has historically been "quiet and rural," and all past uses on this subject property and an adjacent Oregon Department of Transportation (ODOT) site have less impact.[11]

[11]Petitioners also argue it is inappropriate to include the prior uses of the adjacent ODOT site in the MZO 5.1(2)(B) analysis because the ODOT pit is not currently in production and may be an unlawful use. However, we do not understand how these allegations bear on the proposal's compliance with MZO 5.1(2)(B). Regardless of whether the ODOT site is not currently in production and that it may operate unlawfully when it is in production, does not alter the fact that the ODOT site has a particular appearance and

Petition for Review 37. Finally, petitioners contend the challenged decision will only minimize, but not eliminate, conflicts Id.

The county determined that MZO 5.1(2)(B) "permits some adverse impact as long as it is minimal." 3R 56. The county goes on to explain that MZO 5.1(2)(B) is not a relevant approval criterion to the proposal, as follows:

> "The starting point for this analysis is comparison to the development that is permitted outright in the industrial zone. The March 22, 1993 staff report notes that all uses in the [i]ndustrial [z]one are conditional uses. Therefore, there is no comparison to make under this criteria [sic]. For this reason, the County Court finds that this criteria [sic] is not a mandatory approval standard for this application." 3R 56.

This interpretation is consistent with the express words of MZO 5.1(2)(B), and we do not believe it is inconsistent with the words, policy or purpose of that MZO section. Therefore, we must defer to the county's interpretation that MZO 5.1(2)(B) does not apply because there are no uses permitted outright in the city's Industrial zoning district.

The second assignment of error is denied.

THIRD ASSIGNMENT OF ERROR

> "The County failed to make adequate findings of fact and conclusions of law and make a decision that was supported by substantial evidence in the

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particular operational aspects which make up the area to be analyzed under MZO 5.1(2)(B).

> whole record in order to establish that the location and design of the site for the proposal would be as attractive as the nature of the land use and its setting warrants."

MZO 5.1(2)(C) requires:

> "[t]he location of the site and structures for the proposal will be as attractive as the nature of the land use and its setting warrants."

Petitioners argue the findings are technically inadequate to establish compliance with this standard because they fail to explain how the proposal satisfies MZO 5.1(2)(C). The findings of compliance with MZO 5.1(2)(C) reference and rely upon other findings supporting the decision. We believe, reading the decision as a whole, that the findings are technically adequate because they state the applicable standard, describe the facts relied upon and explain why the facts led the county to conclude that MZO 5.1(2)(C) is satisfied.

As we understand it, petitioners also argue the record does not support a determination of compliance with MZO 5.1(2)(C).[12] Petitioners stress the rural nature of the City of Mosier, and argue that the adjacent ODOT pit with which the county compares the proposal should not be considered in determining the area "setting" and what it

[12]Petitioners also contend the word "warrants" should mean "justifies," and argues that a rock pit cannot be justified in the particular setting of the subject property. However, we do not understand why this would be the case.

"warrants."[13].

Petitioners explain that aggregate operations cause visual blight and converts the natural landscape into an unnatural landscape with sharp lines, contrasts and color differences as compared with adjacent natural settings. Petitioners argue the proposal will result in a "drastic, unwarranted and unjustified change to the landscape setting of the City of Mosier, * * *." Petition for Review 47.

The county determined that aggregate sites already exist in the immediate area. As to visual impact, the county found the proposed aggregate operation will be naturally screened from view and will not be visible from most vantage points. 3R 30-31. The county determined that, in view of the natural setting of the proposed use, the proposal is as attractive as its setting warrants. Further, the County imposed several conditions of approval to assure compliance with MZO 5.1(2)(C), as well as other standards."[14]

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[13]Specifically, petitioners state the following with reference to the ODOT site:

> "[A] bad land use decision in the past, the siting of the ODOT pit in its current location, does not warrant a second bad land use decision of siting the Hood River Sand & Gravel pit in Mosier." Petition for Review 46.

[14]For example, condition 3 requires "artificial weathering techniques to mitigate adverse visual impacts [to] the talus shall be according to the reclamation plan filed with DOGAMI." 1R 193. Condition 4 requires a reclamation plan which will maintain the attractiveness of the site after the end of aggregate extraction. Id. Condition 5 requires visual

Determining compliance with MZO 5.1(2)(C) is an inherently subjective exercise. While we have some sympathy for petitioners arguments, they essentially express disagreement with the county's conclusions about whether the proposal is as attractive as the setting warrants. While we might have reached a different conclusion than the county reached, the findings are adequate to establish the "location of the site and structures for the proposal will be as attractive as the nature of the land use and its setting warrants" as required by MZO 5.1(2)(C). Further, those findings are supported by substantial evidence in the whole record.[15]

The third assignment of error is denied.

FOURTH ASSIGNMENT OF ERROR

> The County failed to make adequate findings of fact and conclusions of law, identify the relevant standards, and make a decision that was supported by substantial evidence in the record by determining that the gravel pit would preserve assets of a particular interest to the community.

MZO 5.1(2)(D) requires:

> "The proposal will preserve assets of particular interest to the community."

Petitioners argue the scenic backdrop of the city

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screening from the Columbia River Highway. Id. Condition 13 prohibits disturbance that would increase turbidity on Rock Creek. 1R 195. Condition 18 requires enhancement and maintenance of the natural ridge buffer on the east boundary of the site. Id.

[15]In this regard we note that the county was free to consider the ODOT aggregate site, regardless of whether it is representative of a "bad decision" as petitioners allege.

includes the talus slopes which are above the proposed mining operation. Petitioners argue this scenic backdrop is a valuable asset to the community. Petitioners contend the proposed aggregate operation will cause the talus slope to slump and slide, and will destroy the scenic backdrop of the city.

The challenged decision determines compliance with MZO 5.1(2)(D), in part, as follows:

> "[T]he 1988 Final Local Review Order for the City of Mosier Comprehensive Plan stated generally that the 'most common views or sights' from the city 'are the hillsides surrounding the City, Mosier Creek, and the Columbia River' and that '[t]he City protects these views by limiting the heights of buildings.' [Petitioners] then jump from these rather general and non-specific statements to a series of more specific value judgments * * *: 'The proposed rock pit is located at the base of the large talus slope that lies south of the City.' This talus slope is thus, [petitioners] argue, an asset of particular interest to the city. The gravel operations are likely to remove the slope, which 'will result in the destruction of a valuable asset, the scenic backdrop of the City.' The [County Court] notes first that the city and county comprehensive plans did not identify the specific talus slopes surrounding the proposed gravel pit as a particular 'majestic backdrop' for the city of significant scenic resource deserving of special protection. The evidence in the record does not establish these points independent of the comprehensive plans. * * *. More important, * * * the evidence in the record * * * establishes that the probable slope effects, from mining and especially from slope stability efforts, are not expected to destroy or greatly alter the existing appearance of the slopes above the pit. * * * The applicant's evidence in the record on visual impacts is persuasive and not rebutted and supports a finding

> and conclusion that the views of the slopes above the gravel pit * * * will be preserved. * * *." 3R 62-64.

These findings are equivocal on whether the talus slopes or the hillside including and above the proposed aggregate operation, are assets of particular interest to the community which must be preserved under MZO 5.1(2)(D). However, we assume, as the findings appear to, that the talus slopes are subject to the preservation requirement of MZO 5.1(2)(D).[16]

Intervenor cites the conditions of approval to establish compliance with this standard. Specifically, intervenor cites condition 2 which requires extensive slope stability review by DOGAMI; condition 18, which requires maintenance of a natural ridge buffer to the east boundary of the site; and condition 3, which requires artificial weathering intended to mitigate any adverse visual impacts.

There is evidence in the record to support the county's contention that under the conditions of approval, the talus slope above the subject property will remain stable and will not slump.[17] However, as we understand it, the proposal

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[16]We can make no such assumption about the hillside which apparently is situated beneath the talus slope, and address the role of this hillside in the determination of compliance with MZO 5.1(2)(D), infra.

[17]For example, a January 6, 1993 memorandum from DOGAMI indicates that potential slope instability is localized. 1R 295. A letter submitted by Landslide Technology on behalf of the applicant found that the talus slopes above the subject property "[a]re generally stable and suitable for quarry development." 1R 367.

will cause visual impacts to the hillside associated with the subject property. While, the county may anticipate that the area of these impacts will be "weathered," petitioners are correct that the challenged decision does not require the "weathering" to occur at any particular intervals or that such "weathering" meet any identified visual standard.[18]

We cannot tell from the challenged decision whether the county believes the hillside subject to the proposal is one of the "assets of particular interest to the community" which should be preserved under MZO 5.1(2)(D).[19] On remand, the county may directly address this issue. Assuming this hillside is an asset of particular interest to the city, the county must explain why it believes the proposal satisfies MZO 5.1(2)(D), as to that hillside.

The fourth assignment of error is sustained.

The challenged decision is remanded.

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[18]Petitioners contend condition 3 does not specify the "frequency of application of artificial weathering material," and that the applicant could ignore this condition until the expiration of the 40 year conditional use permit. Petitioners also contend that condition 3 contains no standards to measure the effectiveness of the proposed weathering technique. According to petitioners, even if the proposed weathering is completely ineffective, the applicant will nevertheless comply with condition 3.

[19]We also note that the challenged decision does not explain what the county believes the MZO 5.1(2)(D) term "preserves" means.