BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

THOMAS M. BURKE, TERRY DORVINEN
and WILSON CULWELL,
Petitioners,

vs.

CROOK COUNTY,
Respondent,

and

EAGLE CREST, INC.,
Intervenor-Respondent.

LUBA No. 2004-081

FINAL OPINION
AND ORDER

Appeal from Crook County.

David J. Peterson, Portland, filed the petition for review and argued on behalf of petitioners. With him on the brief was Max M. Miller, Jr., and Tonkon Torp LLP.

Jeffrey M. Wilson, County Counsel, Prineville, filed a joint response brief and argued on behalf of respondent.

Kristin L. Udvari, Portland, filed a joint response brief and argued on behalf of intervenor-respondent. With her on the brief was Nancy Craven and Ball Janik LLP.

HOLSTUN, Board Chair; BASSHAM, Board Member; DAVIES, Board Member, participated in the decision.

AFFIRMED 10/06/2004

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 that grants conditional use approval for a destination resort.

MOTION TO INTERVENE

Eagle Crest, Inc., the applicant below, moves to intervene on the side of respondent. There is no opposition to the motion, and it is allowed.

FACTS

The proposed destination resort would be located on approximately 1,800 acres and would include approximately 900 units. The Planning Commission held public hearings on the proposal on April 9, 2003, April 30, 2003 and May 21, 2003 and adopted its decision on June 4, 2003. Petitioners appealed that June 4, 2003 decision to LUBA and to the County Court. The County Court dismissed petitioners' local appeal on June 18, 2003. That June 18, 2003 County Court decision was also appealed to LUBA. We dismissed petitioners' appeal of the June 4, 2003 Planning Commission decision, concluding that the Planning Commission decision was not the county's final decision in this matter. *Burke v. Crook County*, 45 Or LUBA 516 (2003). However, we remanded the County Court's June 18 decision dismissing petitioners' local appeal. *Burke v. Crook County*, 46 Or LUBA 413 (2004). Following our remand, the County Court conducted a hearing on April 7, 2004. The County Court adopted its final decision on May 5, 2004, and this appeal followed.

INTRODUCTION

Destination resorts are allowed in the county's EFU-3 zone as a conditional use. Crook County Zoning Ordinance (CCZO) 3.030(2)(W).[1] CCZO Article 6 is entitled

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[1] As relevant, Crook County Zoning Ordinance (CCZO) 3.030(2) provides:

"**Conditional Uses Permitted**.

1 “Conditional Uses.” CCZO 6.020 sets out approval criteria for conditional uses.[2] CCZO

2 3.030(4) sets out two criteria, which apply in addition to the general conditional use criteria at

3 CCZO 6.020, when conditional uses are approved in the EFU-3 zone.[3]

> “In an **EFU-3 Zone**, the following use[s] and their accessory uses are permitted when *authorized in accordance with the requirements of Article 6 of this Ordinance* and this section.
>
> “* * * * *
>
> “(W) Destination Resorts may be allowed as a Conditional use subject to all applicable standards of the DRO Zone, Article 12.” (Emphasis added.)

[2] CCZO 6.020 provides:

> **“General Criteria**
>
> “In judging whether or not a conditional use proposal shall be approved or denied, the [Planning] Commission shall weigh the proposal’s appropriateness and desirability or the public convenience or necessity to be served against any adverse conditions that would result from authorizing the particular development at the location proposed and, to approve such use, shall find that the following criteria are either met, can be met by observance of conditions, or are not applicable:
>
> “(1) The proposal will be consistent with the Comprehensive Plan and the objectives of the zoning ordinance and other applicable policies and regulations of the County.
>
> “(2) Taking into account location, size, design and operation characteristics, the proposal 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.
>
> “(3) The location and design of the site and structures for the proposal will be as attractive as the nature of the use and its setting warrants.
>
> “(4) The proposal will preserve assets of particular interest to the County.
>
> “(5) The applicant has a bona fide intent and capability to develop and use the land as proposed and has some appropriate purpose for submitting the proposal, and is not motivated solely by such purposes as the alteration of property values for speculative purposes.”

[3] CCZO 3.030(4) provides

> “**Limitations of Specific Conditional Uses.** *In addition to the general standards and conditions that may be attached to the approval of a conditional use as provided by Article 6 of [the CCZO]*, the following limitations shall apply to a conditional use permitted in [CCZO 3.030(2)]. A use allowed under [CCZO 3.030(2)] may be approved where the County finds that the use will not:

1 The Planning Commission did not apply the criteria that appear at CCZO 6.020, when
2 it approved the disputed destination resort. In their first assignment of error, petitioners
3 assign error to that failure. In approving the disputed destination resort, the county did apply
4 the special destination resort approval criteria at CCZO 12.100. In their second assignment
5 of error, petitioners contend the county did not adequately demonstrate that the proposal
6 complies with CCZO 12.100(E).[4]

7 **FIRST ASSIGNMENT OF ERROR**

8 Although the Planning Commission applied what the county and intervenor-
9 respondent (respondents) contend are much more detailed and comprehensive destination
10 resort approval criteria at CCZO 12.100, respondents concede that the Planning Commission
11 did not apply the general conditional use approval criteria at CCZO 6.020. In responding to
12 petitioners' arguments that this failure requires remand, respondents offer a number of
13 reasons why the first assignment of error should be denied. We address only one of them.

14 Respondents contend petitioners should be barred from raising any issue concerning
15 whether the county should have applied CCZO 6.020, because petitioners did not raise that

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"(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.

"An applicant for a use allowed under [CCZO 3.030(2)] may demonstrate that the standards under subsections (A) and (B) of this section will be satisfied through the imposition of conditions. Any conditions so imposed shall be clear and objective." (Emphasis added.)

[4] As relevant, CCZO 12.100 provides:

"The Planning Commission or County Court shall approve a Development Plan for a Destination Resort if it determines that all of the following criteria are met:

"* * * * *

"(E) The development will be reasonably compatible with surrounding land uses, particularly farming and forestry operations. The destination resort will not cause a significant change in farm or forest practices on surrounding lands or significantly increase the cost of accepted farm or forest practices."

1 issue before the conclusion of the final evidentiary hearing in this matter before the Planning
2 Commission. Under ORS 197.835(3), the issues that may be raised in an appeal at LUBA are
3 "limited to those raised by any participant before the local hearings body as provided by * * *
4 ORS 197.763[.]"[5]

5 Petitioners concede that no party raised any issue before the close of the final
6 evidentiary hearing before the Planning Commission concerning the applicability of CCZO
7 6.020. However, petitioners contend that this failure does not bar them from raising that
8 issue before LUBA, because the county failed to list the criteria at CCZO 6.020 as criteria
9 that apply to approval of a destination resort in the EFU-3 zone. Under ORS 197.763(3)(b),
10 the notice that the county provides in advance of a hearing on a quasi-judicial land use
11 application is required to "[l]ist the applicable criteria from the ordinance and the plan that
12 apply to the application at issue[.]" The county's notice lists CCZO 3.030 and CCZO Article
13 12, but it does not list CCZO Article 6. ORS 197.835(4) provides:

14 "A petitioner may raise new issues to [LUBA] if:

15 "(a) The local government failed to list the applicable criteria for a decision
16 under ORS 197.195 (3)(c) or 197.763 (3)(b), in which case a petitioner
17 may raise new issues based upon applicable criteria that were omitted
18 from the notice. *However, [LUBA] may refuse to allow new issues to*
19 *be raised if it finds that the issue could have been raised before the*
20 *local government*[.]" (Emphasis added.)

21 ORS 197.763(1) and 197.835(3) impose a "raise it or waive it" rule to assist local
22 governments and permit applicants by placing a burden on participants in local permit
23 hearings to raise issues at a stage in a local permit proceeding that allows the local

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[5] ORS 197.763(1) provides:

> "An issue which may be the basis for an appeal to the Land Use Board of Appeals shall be raised not later than the close of the record at or following the final evidentiary hearing on the proposal before the local government. Such issues shall be raised and accompanied by statements or evidence sufficient to afford the governing body, planning commission, hearings body or hearings officer, and the parties an adequate opportunity to respond to each issue."

1 government, as decision maker, a reasonable opportunity to address those issues in its
2 decision. ORS 197.763(3)(b) and ORS 197.835(4) place a corresponding burden on local
3 governments to identify the approval criteria that govern the application and provide that a
4 local government's failure to provide notice of the applicable approval criteria may excuse a
5 petitioner's failure to carry its burden to raise issues with regard to those approval criteria.
6 *1000 Friends of Oregon v. Benton County*, 20 Or LUBA 7, 10 (1990).

7 The final sentence in ORS 197.835(4)(a) requires that LUBA consider whether,
8 notwithstanding the local government's failure to list the criteria that give rise to an issue a
9 petitioner seeks to raise for the first time at LUBA, the petitioner nevertheless could have
10 raised that issue and, for that reason, should not be allowed to raise the issue at LUBA. In
11 essence, that final sentence provides that LUBA may consider whether, in this case, even
12 though petitioners were not told in advance of the Planning Commission hearing that the
13 CCZO 6.020 criteria might apply to the application, petitioners should have known that
14 CCZO 6.020 criteria might apply and could have raised the issue they now seek to raise for
15 the first time at LUBA in their first assignment of error. If LUBA concludes that petitioners
16 could have raised the issue, the final sentence of ORS 197.835(4)(a) provides that LUBA
17 may refuse to allow that issue to be raised for the first time at LUBA.

18 Although the nature of the inquiry required by the last sentence of ORS 197.835(4)(a)
19 is less than clear, we relied on that sentence in concluding that a petitioner was barred from
20 raising an issue at LUBA in a case that is similar to this one. In *Tandem Development Corp.*
21 *v. City of Hillsboro*, 33 Or LUBA 335 (1997), the petitioner assigned error to the city's
22 failure to apply Hillsboro Zoning Ordinance (HZO) Section 106 as an approval criterion in
23 approving a variance and argued that the city's failure to list HZO 106 as an approval
24 criterion excused its failure to raise that issue before the city. LUBA cited the last sentence
25 of ORS 197.835(4)(a) in concluding that petitioner could have raised the issue below and was
26 therefore barred from raising the issue at LUBA:

1 "This is not a case like *DeBates v. Yamhill County*, 32 Or LUBA 276 (1997),
2 where a petitioner can plausibly contend it was not informed of the existence
3 or possible applicability of a relevant code provision. HZC 106 to 111 are
4 collected in a separate chapter of the HZC entitled 'Variances.' When
5 petitioner appealed the challenged variances from the planning and zoning
6 hearings board to the city council, it quoted all of HZC 107 without reference
7 to HZC 106, which directly precedes HZC 107 on the same page of the HZC.
8 Petitioner does not contend it was unaware of the existence of HZC 106.
9 Under these circumstances, we conclude petitioner could have raised issues
10 arising out of the application of HZC 106 before the local government. ORS
11 197.835(4)(b) makes it appropriate to refuse to allow petitioner to raise those
12 issues at LUBA." 33 Or LUBA at 339-40 (footnote omitted).[6]

13 Unlike the petitioner in *Tandem Development Corp*., petitioners here do contend that
14 they were unaware of CCZO 6.020. In addition, CCZO 6.020 does not appear on the same
15 page as CCZO 3.030, as was the case with HZC 106 and 107. However, as we have
16 previously noted, CCZO Article 6 is expressly referenced twice—once in CCZO 3.030(2)
17 and once in CCZO 3.030(4)—and both references are stated in terms that seem to say
18 relevant conditional use approval criteria appear at CCZO Article 6. *See* ns 1 and 3. In fact,
19 it is those very references to CCZO Article 6 that petitioners now rely on in asserting that the
20 county erred in not applying the CCZO 6.020 criteria. Because the county's notice did list
21 CCZO 3.030, it is fair to assume that petitioners either read or should have read CCZO
22 3.030(2) and (4) in preparing to participate in the proceedings before the Planning
23 Commission. Had they done so, they would have seen the express reference to CCZO Article
24 6 and could have raised the issue they now attempt to raise for the first time at LUBA.
25 Accordingly, we conclude petitioners should be barred from doing so under the last sentence
26 of ORS 197.835(4)(a).[7]

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[6] When our decision in *Tandem Development Corp*. was decided, what is now codified at ORS 197.835(4)(a) was codified at ORS 197.835(4)(b).

[7] We note that we would almost certainly reach a different conclusion if there were no express references to the CCZO Article 6 in CCZO 3.030(2) and (4) and the asserted legal basis for the arguable applicability of CCZO 6.020 appeared only in Article 6. Under ORS 197.835(4)(b), we do not expect that petitioners will comb the zoning ordinance for potentially applicable approval criteria that are not listed in the local government's notice of hearing. However, in this case no combing was required to discover the potential applicability of

The first assignment of error is denied.

SECOND ASSIGNMENT OF ERROR

A. The County's Findings Obligation under CCZO 12.100(E)

As previously noted, in approving a destination resort in the EFU-3 zone, the county was required to find the destination resort development would comply with the following approval criterion:

> "The development will be reasonably compatible with surrounding land uses, particularly farming and forestry operations. The destination resort will not cause a significant change in farm or forest practices on surrounding lands or significantly increase the cost of accepted farm or forest practices." CCZO 12.100(E).[8]

CCZO 12.100(E) imposes a "reasonable compatibility" requirement. It also requires that the county adopt other findings. Based on *Brown v. Union Co.*, 32 Or LUBA 168 (1996), a case that concerned ORS 215.296(1), petitioners summarize the county's additional findings obligation under CCZO 12.100(E) as follows:

> "Respondent's findings must (1) describe the farm practices on surrounding lands devoted to farm use; (2) explain why the project will not force a significant change in those practices; and (3) explain why the project will not significantly increase the cost of those practices." Petition for Review 21.

CCZO Article 6; all that was required was for petitioners to read the sections of the zoning ordinance that the county listed in its notice.

[8] Petitioners and respondents agree that that last sentence of CCZO 12.100(E) replicates the standards set forth in CCZO 3.030(4), *see* n 3, which requires that before a conditional use is approved in the EFU-3 zone, the county must find the conditional 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."

The above-quoted criteria of CCZO 3.030(4) are identical to the ORS 215.296(1) standards that apply to certain nonfarm uses in EFU zones. Petitioners arguments under the second assignment of error generally refer to CCZO 12.100(E) and do not develop a separate argument under similarly worded CCZO 3.030(4) and ORS 215.296(1). We follow the parties' lead and consider the arguments under the second assignment of error as being directed at CCZO 12.100(E).

We agree with that summary of the county's findings obligation under CCZO 12.100(E), and we do not understand respondents to contend otherwise.

However, petitioners go further and advance the following additional understanding of CCZO 12.100(E):

> "When incompatibility with farm uses is found, 'clear and objective' conditions must be imposed that resolve, not just mitigate, the incompatibility. ORS 215.296(2); *Thomas v. Wasco County*, 30 Or LUBA 302 (1996)." (Footnote omitted). Petition for Review 21-22.

In the omitted footnote, petitioners argue: "[i]n this regard, Respondent and its staff repeatedly misstate the law, all agreeing that mere mitigation of incompatibility impacts was sufficient." *Id*. at n 8. Petitioners take the position that if the proposed destination resort as proposed would be incompatible with farm uses in some way, the county is obligated to find that any conditions it imposes to address identified incompatibility must "resolve" the incompatibility, presumably by making the destination resort fully compatible with farm uses.

Respondents dispute that characterization of the county's obligation in this matter. As respondents correctly point out, *Thomas*, which petitioners apparently rely on for the above described principle, concerned a county standard that required nonfarm dwellings to be "compatible with farm use." 30 Or LUBA at 311 n 6. It did not concern a qualified compatibility standard like CCZO 12.100(E). The county's error in *Thomas* was that in applying a criterion that required a finding of "compatibility," the county found the proposed dwelling would be *incompatible* and then imposed a condition "to decrease the likelihood of this incompatibility becoming a problem." 33 Or LUBA at 311. In other words, the county failed to find the nonfarm dwelling would be compatible with farm use, as the county standard required. Respondents go on to argue:

> "Not only do Petitioners misstate the true holding of *Thomas*, they also fail to note that the very text of the 'no significant change/increased cost' standard of ORS 215.296(1) and CCZO 12.100(E) permits 'mitigation' as opposed to absolute 'resolution.' As noted above, the standard contains three significant modifiers: a proposal must be *reasonably* compatible, and it must not cause a

*significan*t change or *significantly* increase the cost of surrounding farm uses. These italicized modifiers make it clear that some impacts to surrounding uses are acceptable. The County's job is not to find that a resort proposal will have no impacts whatsoever. Rather, its job is to find that the impacts do not rise to the *significant* level set forth in ORS 215.296(1), and the impacts do not preclude *reasonable* compatibility under CCZO 12.100(E). LUBA case law supports this reading of the 'no significant change/increased cost' standard. *Gutoski v. Lane County*, 34 Or LUBA 215, *aff'd* 155 Or App 369, 963 P2d 145 (1998)." Respondents' Brief 24-25 (italics in original).

We agree with respondents' understanding of the burden imposed by CCZO 12.100(E).[9]

B. Inadequately Identified Farm Practices on Surrounding Lands (First Subassignment of Error).

Under this subassignment of error, petitioners contend the county's identification of farm practices on surrounding lands is inadequate. Petitioners also argue:

"[T]he existing [farm] practices are described far too generally – for example, no finding is made on whether any of these practices involve use of local roads, an important issue given the plentiful evidence in the record that increased traffic caused by the project will be incompatible with farm practices * * *. Without an adequate discussion of the impacted existing and potential farming practices, Respondent's findings regarding CCZO 12.100(E) and 3.030(4) are inadequate." Petition for Review 22-23.

The Planning Commission adopted approximately five pages of findings describing the farm and other uses on adjoining and nearby public and private properties. Record 29-33. The County Court summarized those findings regarding farm uses as follows:

"[T]he [County] Court finds that [the Planning] Commission's findings * * * provide an extensive description of all of the surrounding properties, including a list of the farming practices in the area: closed range grazing on BLM lands, and crop production and livestock grazing on private lands. Neither the Appellants nor any other citizen presented contradictory public testimony to

[9] We also agree with respondents that while some of the Planning Commission's findings can be read in isolation to conclude that the destination resort, as proposed, would be compatible with nearby farm uses even without conditions of approval, when the Planning Commission's and County Court's decisions are read in their entirety, it is clear that the county is relying on the large number of conditions of approval that it imposed to find that the proposed destination resort will be reasonably compatible with farm uses and will not cause significant changes in farm practices or significantly increase the cost of accepted farming practices.

> show that this is an incomplete description of adjacent properties or an inaccurate list of the farm uses in the area." Record 33-34.

Without a more developed argument under this subassignment of error, we do not agree with petitioners that the county's description of farm uses on surrounding lands in farm use was inadequate to allow the county to perform the required review under CCZO 12.100(E). [10]

The first subassignment of error is denied.

C. The Proposal Will Significantly Change and Increase the Cost of Farm Practices (Second and Third Subassignments of Error)

Petitioners begin their argument under this subassignment of error with the following argument:

> "Although it makes no new findings of its own, the County Court repeatedly states that the [Planning] Commission found that the proposed project would not have impacts on or increase the cost of farming to a 'significant' degree even in the absence of mitigation. RP 34. * * *" Petition for Review 23.

If petitioners meant to cite page 34 of the record, we do not see the statement that petitioners attribute to the County Court on page 34 of the record. If petitioners meant to cite to language at the top of page 36 of the record, we agree with respondents that petitioners misread the statement that appears on that page, which relates to a condition that the County Court felt was not needed for the proposal to comply with CCZO 12.100(E) but the County Court nevertheless imposed to monitor any unaticipated conflicts between farm uses and the proposed resort that may occur in the future.

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[10] As we explain in more detail below, the potential for traffic conflicts between increased traffic that the proposed destination resort will generate has become the central dispute in this appeal and was a major topic of discussion below. We agree with petitioners later in this opinion that, given the importance of the issue of potential conflicts between farm traffic and other traffic once the resort is completed, the county's findings would be much stronger if they included a more detailed discussion of the particular kinds of farm related traffic that use the nearby roads, the types and levels of existing conflicts between farm traffic and nonfarm traffic, and how the proposed destination resort might affect those existing types and levels of existing conflicts.

1 Petitioners also cite testimony that was presented to the Planning Commission by
2 opponents of the destination resort. Petitioners continue to argue that the County Court either
3 inaccurately believed no conditions were necessary to address the conflicts that this testimony
4 suggested may be expected between farm uses and the proposed resort or that the conditions
5 the County Court imposed are inadequate to eliminate all potential incompatibilities.

6 Again, we agree with respondents that petitioners misunderstand the obligation the
7 county has in addressing CCZO 12.100(E). To the extent petitioners allege under this
8 subassignment of error that the county's findings are inadequate to demonstrate that the
9 proposed destination resort will be "reasonably compatible" with farm uses or will not cause
10 a significant change in farm or forest practices or significantly increase the cost of accepted
11 farming practices, respondents cite the following unchallenged findings:

12 "The [Planning] Commission's findings also explain that the resort will not
13 'significantly' impact or 'significantly increase the cost' of these farm
14 practices for a variety of reasons: (1) Central Oregon has a history of co-
15 existence of resorts and rangeland; (2) the extensive open space and relatively
16 low density of the resort compared to other Central Oregon resorts will
17 maintain consistency with the crop production and grazing uses in the area; (3)
18 all homeowners will sign a waiver of remonstrance agreeing not to complain
19 about any farming or predator control activities on EFU properties; (4) the
20 volumes of traffic on the roads serving the resort and farm uses will remain
21 within the acceptable volumes for the road classifications; (5) the affected
22 intersections will be improved, thereby ensuring that all traffic, including farm
23 traffic, can move safely and efficiently through the intersections; (6) the
24 minimum external setbacks and fencing will provide sufficient distance
25 between farm activities and resort development; and (7) the topographical
26 features of the resort property and adjacent properties provide a natural buffer
27 between the resort and farm uses.

28 "With the exception of the issue of traffic impacts on farm uses, the
29 Appellants do not point to any evidence that undermines these findings. * * *"
30 Record 34.

31 We address petitioners' arguments concerning allegations of traffic conflicts in more
32 detail below. With regard to their arguments concerning other conflicts, those arguments are
33 in large part based on a misunderstanding of the County Court's decision and are

insufficiently developed to demonstrate error in the above quoted findings. In addition to the above quoted findings, respondents cite other county findings that address non-traffic conflicts with farm uses. Petitioners do not explain why those findings are inadequate to respond to allegations of non-traffic conflicts.

The second and third subassignments of error are denied.

D. Impacts of Increased Traffic on Surrounding Farm Practices (Fourth Subassignment of Error)

During the proceedings before the Planning Commission, opponents of the proposed destination resort testified that, among other things, traffic from the destination resort would conflict with farm traffic on nearby roads.[11] The Planning Commission adopted lengthy findings addressing traffic issues and the County Court relied in part on those findings in concluding that the proposed destination resort traffic would not result in conflicts that violate CCZO 12.100(E). The County Court adopted additional findings. The county relied almost entirely on certain intersection improvements and the fact that with those improvements all affected roadways and intersections would continue to operate within acceptable levels of service, in support of its ultimate finding that the proposed destination resort would not cause traffic conflicts that would violate CCZO 12.100(E). Petitioners argue "that the increased traffic caused by the project will not cause noncompliance with technical traffic standards regarding mobility, capacity and safety * * * is irrelevant to the compatibility of that traffic with surrounding land uses and its impact on farming." Petition

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[11] The evidence cited by petitioners includes: (1) a four-page letter, only two pages of which are in the record, which expresses concern about vehicular/livestock collisions and impacts of traffic on farming (Record 871-72); (2) a letter and an e-mail message from petitioner Dorvinen in which he expresses general concern about potential traffic impacts and points out that running cattle on existing roads is already difficult (Record 565-66, 736-37); (3) a letter from an adjoining rural residential property that includes expressions of concern about the potential impact increased traffic on Shumway Road and Alfalfa Road will have on "tractors and other large agricultural vehicles as well as cattle drives on these roads" (Record 707); (4) statements by a number of opponents that increased traffic associated with the proposed resort would conflict with existing rural and farm traffic (Record 661-62); (5) a statement that roads in their existing condition are not safe for farm equipment and that farm equipment is now sometimes run off the road (Record 666).

1 for Review 27-28. As we explain below, we believe that while the county probably
2 overstates the significance of maintaining acceptable levels of service on nearby roads and
3 intersections in responding to concerns about general traffic/farm traffic conflicts and impacts
4 on farm costs and farm practices, we do not agree that maintaining acceptable levels of
5 service on those roads is *irrelevant* to the question of whether the anticipated increased traffic
6 is incompatible with farm traffic.

7 The Planning Commission's findings include the following:

> 8 "As a preliminary matter, the [Planning] Commission finds that the issue of
> 9 increased traffic on adjacent roadways is relevant to compatibility with both
> 10 the public and private parcels discussed below. As illustrated by the Traffic
> 11 Impact Analysis * * *, the primary roads upon which the adjacent properties
> 12 rely for local access (Shumway Road, Alfalfa Road, and Powel Butte
> 13 Highway) will continue to carry volumes of traffic that are well below the
> 14 maximum volumes that the Rural Major Collectors and the District Highway
> 15 are designed to accommodate. The assigned functional classifications (i.e.
> 16 Rural Major Collector, District Highway) reflect the roadway's intended
> 17 purpose, the anticipated speed and volume, and the adjacent land uses. Thus,
> 18 so long as the traffic volumes continue to be consistent with the volumes
> 19 anticipated for each functional classification, it is reasonable to assume that
> 20 the roads can continue to adequately serve the variety of uses that they were
> 21 designed to accommodate. Therefore, a mere increase in traffic volume alone
> 22 does not render the proposed resort incompatible with the other uses that the
> 23 Rural Major Collector and District Highway serve, including agricultural and
> 24 residential uses. A representative of Miller ranch testified that while traffic
> 25 may increase, it probably would not affect how they run their operation, and
> 26 was generally supportive of the request.[12]
>
> 27 "As a point of comparison, the [Planning] Commission finds it useful to note
> 28 that Highway 126 which is designated a Statewide Expressway and is
> 29 therefore designed to carry significantly higher volumes of traffic than Alfalfa,
> 30 Shumway, or Powell Butte Highway, is flanked by miles of agricultural and
> 31 residential uses that continue to function despite the higher volumes on the
> 32 expressway. For an additional comparison, Figure 3 in the Traffic Impact
> 33 Analysis describes 415 to 430 pm peak hour trips on a peak summer day on

[12] The Miller Ranch testimony and the memorandum of the applicant's traffic expert appear to be the only evidence cited by the county that can be read to contradict the general testimony cited by petitioners, see n 11, that direct farm traffic/vehicular traffic conflicts may result in incompatibility or require changes in farm practices, other than the evidence that acceptable levels of service will be maintained on all affected roads and intersections.

1 the Powell Butte Highway in 2003. At full buildout of the resort in 2023
2 * * *, Shumway Road will carry an estimated 220 resort trips in the pm peak
3 hour, and Alfalfa Road will carry an estimated 330 peak hour resort trips.
4 Thus, at full buildout, 20 years from now, the trips added to Alfalfa and
5 Shumway Roads by the resort will be significantly less than today's traffic on
6 the Powell Butte Highway, where standard agricultural practices are
7 common."

8 "In addition, although the increased volumes will affect the performance of
9 the study intersections, the Traffic Impact Analysis and related submittals by
10 the applicant * * * show that the impacts can be mitigated with intersection
11 improvements designed to increase capacity and maintain safety. * * *"
12 Record 28-29.

13 The County Court adopted the following additional findings to address traffic impact
14 concerns:

15 "The [Planning] Commission's findings analyze and respond to the
16 Appellants' comments regarding the impact of increased traffic on farm uses.
17 As the [Planning] Commission noted, CCZO 12.100(E) does not prohibit all
18 impacts on farm uses. Rather, it only prohibits development that would cause
19 a <u>significant</u> change in farm uses or <u>significantly</u> increase the cost of accepted
20 farming practices. The [Planning] Commission found that while public
21 comment suggested that any increase in traffic could potentially impact farm
22 uses, there is no evidence in the record that the impacts would rise to the
23 'significant' level set forth in the approval standard, nor is there any evidence
24 of significantly increased costs.

25 "The [Planning] Commission's findings explain that any change in the travel
26 time for a farm vehicle caused by additional delays at the affected
27 intersections would be mitigated by the transportation improvements required
28 by Conditions 30 and 31. As discussed below * * * those conditions are
29 mandatory conditions that will ensure that adequate mitigation measures are
30 employed in a timely manner to maintain the safety and functionality of all
31 affected roads and intersections. The [Planning] Commission also found that
32 a mere increase in volume on the affected roadways does not rise to the level
33 of a 'significant' impact because the traffic study demonstrates that the
34 volumes will remain well within the levels allowed for the roadway
35 designations. The [County] Court incorporates by reference the summary of
36 evidence on this issue presented in the March 14, 2004 Kittleson
37 memorandum.[13] The applicants provided no evidence to the contrary, aside

[13] The Kittleson memorandum makes the point that the Rural Major Collector classification for Shumway Road and Alfalfa Road "recognizes the needs of adjacent land uses, including farm uses." Record 154. The

> from simple speculation that it may be potentially more time-consuming to exit a farm parcel or to travel from one field to another. Therefore, it was reasonable for the [Planning] Commission to conclude that a mere delay in exiting or entering a farm property does not rise to the level of a significant impact under CCZO 12.100(E).
>
> "The Appellants argue that the [County] Court should disregard accepted road and intersection performance standards when determining whether the increased volumes will significantly affect farmers' ability to use the road system for agricultural purposes. The [County] Court finds that it was reasonable for the [Planning] Commission to rely upon the technical performance standards and volume levels set for each roadway because these criteria provide the only objective basis for the [Planning] Commission to determine whether the roads would continue to have the capacity to adequately serve all traffic in the area, including farm traffic. In summary, the [County] Court finds that the [Planning] Commission correctly determined that the traffic study * * * and supplemental data from the Applicant's professional engineers demonstrate that the resort will be reasonably compatible with the surrounding farm uses with the imposition of Conditions 30 and 31." Record 34-35.

There is some merit to petitioners' complaint that even if intersection improvements that are required by the challenged decision will maintain acceptable levels of service on Shumway, Alfalfa and Powell Butte Highway and key intersections, it does not necessarily follow that there will not be conflicts between the increased levels of traffic the proposed destination resort will generate on these roads and agricultural traffic (including livestock and large slow moving agricultural vehicles) seeking to negotiate these same roads. It would have perhaps been preferable if the county had asked for additional evidence regarding actual farm vehicle or livestock conflicts with existing traffic and additional evidence to project the impact that additional traffic from the proposal would have on that existing level of conflict. However, the opponent's testimony cited by petitioners is not very specific about how serious existing conflicts between farm and nonfarm traffic are or how the additional traffic would necessarily lead to a level of conflict that results in unreasonable incompatibility. It is clear

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memorandum also points out that "[t]here are ongoing agricultural practices adjacent to several higher volume facilities throughout Deschutes and Crook Counties, including Highway 126 and Powell Butte Highway." *Id*.

1 from the County Court's decision that the County Court does not share the opponents' view
2 of the seriousness of existing farm vehicle and livestock conflicts with nonfarm traffic. It is
3 fair to say the county chose to rely on the equally speculative testimony by the Miller Ranch
4 that the destination resort would not require changes in the way the ranch operated and on the
5 applicant's traffic engineer's suggestion that such conflicts should not be serious given the
6 nature of the roads that serve the farms and destination resort and the acceptable levels of
7 service on those roads. In view of the nature of the testimony on both sides of the issue about
8 the seriousness of such conflicts, we cannot say the County Court was unreasonable in
9 finding, based on that evidence, that the proposed destination resort will be reasonably
10 compatible with nearby farm uses and farm traffic, notwithstanding the additional traffic that
11 will be generated on the nearby roads and intersections.
12 This subassignment of error is denied.
13 The second assignment of error is denied.
14 The county's decision is affirmed.