

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

3  
4 DAVID COMDEN and SHARON COMDEN,  
5 *Petitioners,*

6  
7 vs.

8  
9 COOS COUNTY,  
10 *Respondent,*

11 and

12  
13  
14 OREGON RESOURCES CORPORATION,  
15 *Intervenor-Respondent.*

16  
17 LUBA No. 2007-217

18  
19 FINAL OPINION  
20 AND ORDER

21  
22 Appeal from Coos County.

23  
24 Micheal M. Reeder, Eugene, filed a petition for review and argued on behalf or  
25 petitioners David Comden and Sharon Comden. With him on the brief was Arnold Gallagher  
26 Saydack Percell Roberts & Potter, PC.

27  
28 No appearance by Coos County.

29  
30 Steven W. Abel, Portland, filed a response brief and argued on behalf of intervenor-  
31 respondent Oregon Resources Corporation. With him on the brief were Sarah S. Curtiss and  
32 Stoel Rives, LLP.

33  
34 BASSHAM, Board Member; HOLSTUN, Board Chair; RYAN, Board Member,  
35 participated in the decision.

36  
37 AFFIRMED

02/21/2008

38  
39 You are entitled to judicial review of this Order. Judicial review is governed by the  
40 provisions of ORS 197.850.

**NATURE OF THE DECISION**

Petitioners appeal county approval of a conditional use permit for a mineral sands mining operation on a parcel zoned for forest use.

**MOTION TO INTERVENE**

Oregon Resources Corporation (ORC), the applicant below, moves to intervene on the side of respondent. There is no opposition to the motion, and it is allowed.

**FACTS**

On May 29, 2007, ORC applied for a conditional use permit to allow a mineral sands mining operation on two separate tracts zoned Forest Use that are currently being used for timber production. The first tract is 1,831 acres in size, and is leased from the Weyerhaeuser Company (the Weyerhaeuser site). The second tract is 320 acres in size, and is known as the Shepherd site. ORC withdrew the Shepherd site from the application, following the initial public hearing before the planning commission.

The Weyerhaeuser site is located approximately 15 to 20 miles south of Coos Bay and is adjacent to the Coquille Indian Tribe's organic cranberry farm. ORC proposes to mine certain portions of the tract to remove approximately 600,000 to 700,000 tons of mineral sands per year for twenty years, resulting in approximately 67,000 truck trips per year to an off-site processing facility. The operation is proposed to run 24 hours a day, 7 days a week, 340 days a year.

The county planning commission held a public hearing, at which a number of opponents testified against the application, particularly the proposal to mine the Shepherd site. As noted, following the planning commission hearing ORC withdrew that site from consideration, and submitted additional evidence to address issues raised at the hearing regarding mining of the Weyerhaeuser tract. On August 9, 2007, the planning commission issued a decision approving mining of the Weyerhaeuser tract. Petitioners appealed the

1 planning commission decision to the county board of commissioners (BOC). The BOC held  
2 a public hearing and, on October 5, 2007, upheld the planning commission’s decision to  
3 approve the conditional use permit, subject to 13 conditions of approval. This appeal  
4 followed.

5 **FIRST ASSIGNMENT OF ERROR**

6 Coos County Zoning and Land Development Ordinance (ZLDO) 4.8.400 establishes  
7 standards for conditional uses in the Forest Zone. In relevant part, ZLDO 4.8.400 requires  
8 findings that:

9 “A. The proposed use will not force a significant change in, or  
10 significantly increase the cost of, accepted farming or forest practices  
11 on agriculture or forest lands; and

12 “B. The proposed use will not significantly increase fire hazard or  
13 significantly increase fire suppression costs or significantly increase  
14 risks to fire suppression personnel[.]”

15 ZLDO further states that the foregoing standards “are designed to make the use compatible  
16 with forest operations and agriculture and to conserve values found on forest lands.”

17 ZLDO 4.8.400(A) is similar to and apparently derived from the standards for  
18 approving non-farm uses under ORS 215.296(1). However, ZLDO 4.8.400(A) does not  
19 implement that statute, which applies only to lands zoned exclusive farm use. A separate  
20 code standard, ZLDO 4.9.400(A), directly implements ORS 215.296(1) in the exclusive farm  
21 use zone.

22 In addressing ZLDO 4.8.400(A), the county rejected arguments by opponents that the  
23 proposed mining operation would significantly change or increase the cost of “accepted  
24 farming practices” on nearby lands used for farm use.<sup>1</sup> Petitioners argue under the first

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<sup>1</sup> The BOC findings state, in relevant part:

“The term ‘accepted farming practice’ is defined by statute and local code. Oregon statutes define ‘accepted farming practice’ as ‘a mode of operation that is common to farms of a similar nature, necessary for the operation of such farms to obtain a profit in money, and

1 assignment of error that the BOC misconstrued the applicable law, in limiting the scope of  
2 “accepted farming practices” evaluated under ZLDO 4.8.400(A) to farming activities on  
3 nearby lands “that are intended to make a profit (as compared to hobby farms).” Record 516.  
4 According to petitioners, the county assumed without any basis in the record that many  
5 farming activities on nearby lands are not intended to make a profit, but failed to identify  
6 such activities or define what the county meant by “hobby farms.” Petitioners argue that

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customarily utilized in conjunction with farm use.’ ORS 215.203(2)(c). The CCZLDO also defines ‘farm use’ by cross-referencing the definition of ‘farming practices’ in the Oregon Revised Statutes. CCZLDO 2.1.200. Accordingly, not all activities related to a farm use amount to an ‘accepted farming practice.’ Only those farming activities that are intended to make a profit (as compared to hobby farms) are accepted farming practices for the purposes of determining whether this criterion is satisfied. Opponents submitted oral and written testimony raising concerns regarding the potential from noise, dust, transportation, gorse, and water quality and quantity on surrounding properties and farming activities. The Planning Commission, however, in adhering to the definition of ‘accepted farming practice,’ concluded that much of the testimony did not relate to potential impacts on accepted farming practices.

“The BOC finds that the Planning Commission correctly concluded that farming practices identified in the written testimony are mostly near the proposed Shepherd mining site. The applicant withdrew the Shepherd mining site from the application; therefore, any evidence related to potential impacts associated with the Shepherd mining site was not relevant to the Planning Commission’s decision. Further, withdrawing the Shepherd site considerably diminished any potential impact on such farming activities, if any, because the proposed mining activities are farther from properties with established farming activities.

“The closest and most extensive farming practice belongs to the Coquille Indian Tribe (the ‘Tribe’) and consists of cranberry bog operations. The Tribe submitted a letter into the record saying that, after carefully reviewing the application, it did not oppose the proposed mineral sands operation. Notably, the area’s closest and most extensive farming practice operator did not raise the same concerns as the more distant neighbors claiming to engage in farming practices.

“The BOC finds that the Planning Commission, in reviewing the evidence before it, correctly determined that although there may be impacts associated with the proposed use, such impacts are not ‘significant.’ Any new use, whether allowed outright or conditionally, will have some impacts. The applicable criteria require, however, that such impacts rise to the level of ‘significant.’ An impact must be more than ‘de minimis’ or ‘potential’ in order to amount to a significant impact. Further, what is significant is within the governing body’s discretion. The Planning Commission, in exercising its discretion, determined that although there may be some impacts associated with the proposed use, such impacts did not amount to ‘significant’ impacts and are adequately mitigated.

“The applicant provided additional evidence to demonstrate that the proposed use will not result in a significant change in, or cause a significant increase in the cost of, accepted farming practices. This additional evidence addressed noise, dust, transportation, gorse and groundwater supply, and any potential impacts can be adequately addressed through conditions of approval.” Record 515-16.

1 simply because farm uses on nearby lands are small in scale is not a basis to dismiss them  
2 from the analysis as “hobby farms.”

3 ORC responds that the county correctly concluded that farming practices that are not  
4 intended to make a profit are not “accepted farming practices” as that term is defined in  
5 ORS 215.203(2)(c). According to ORC, the county used the phrase “hobby farms” as a  
6 shorthand reference for farming practices that are not intended to make a profit. ORC argues  
7 there is no need to define that phrase or identify particular practices that the county believes  
8 are not intended to generate a profit and hence are not “accepted farming practices.”

9 In any case, ORC argues, the BOC adopted the planning commission’s findings,  
10 which address each of the alleged impacts on farming practices identified by opponents, and  
11 conclude that the proposed mining operation will not force a significant change in, or  
12 significantly increase the cost of, accepted farming practices on agriculture or forest lands.  
13 Record 410-11. ORC contends that even if the BOC erred in characterizing “much” of the  
14 testimony as not relating to “accepted farming practices,” the BOC and the planning  
15 commission found, based on substantial evidence in the record, that any impacts on farming  
16 practices will not be *significant*. For example, ORC argues that many opponents testified  
17 that noise from the mining operation will disturb cattle and other livestock, but the county  
18 reasonably relied on a noise study commissioned by ORC to conclude that noise from the  
19 operation would not adversely affect nearby livestock.

20 We agree with ORC, at least in the abstract, that the county did not err in concluding  
21 that farming practices that are not intended to generate a profit are not “accepted farming  
22 practices” for purposes of ZLDO 4.8.400(A). The county reasonably relied on the statutory  
23 definition of the identical phrase at ORS 215.203(2)(c), to determine the meaning of that  
24 phrase as used in ZLDO 4.8.400(A). However, petitioners are also correct that the county’s  
25 findings make no attempt to identify which farming practices on which nearby lands are  
26 “accepted farming practices” and which are not. If the county intends to rely on the

1 definition of “accepted farming practices” to disqualify unspecified farming practices from  
2 the analysis because they are intended to generate a profit, it seems incumbent on the county  
3 to identify which practices are not considered for that reason. The question is whether that  
4 flaw requires remand, or whether it is, as ORC argues, harmless error given the county’s  
5 other findings.

6 As ORC notes, the BOC adopted the planning commission findings as its own.  
7 Record 520. Petitioners do not challenge the planning commission findings at Record 410-  
8 11. Those findings address alleged impacts on farming practices relating to noise, dust, truck  
9 traffic, gorse management, groundwater supply, and water quality, and conclude in each case  
10 that the weight of the evidence indicates that any impacts on accepted farming practices in  
11 the area will be insignificant, particularly given the conditions imposed on the mining  
12 operation, which are intended to ensure that impacts remain insignificant.<sup>2</sup> Those findings  
13 appear to address all such impacts, without distinguishing between “accepted farming  
14 practices” and farming practices not intended to generate a profit. Absent some challenge to  
15 those findings from petitioners, we agree with ORC that the county’s findings that the  
16 proposal complies with ZLDO 4.8.400(A) are adequate and supported by substantial  
17 evidence. Therefore, any inadequacies in the BOC findings regarding the BOC’s view of  
18 farming practices that are not intended to generate a profit are, at most, harmless error.

19 The first assignment of error is denied.

20 **SECOND ASSIGNMENT OF ERROR**

21 Under the second assignment of error, petitioners advance a miscellaneous set of  
22 challenges to the BOC’s findings under ZLDO 4.8.400(A). We address each in turn.

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<sup>2</sup> Gorse is an invasive, highly flammable species of brush that apparently thrives in areas without a forest overstory. ORC submitted a gorse management plan that, the county concluded, would sufficiently control gorse when timber is cut on the subject property to clear the ground for mining. Petitioners do not challenge those findings or the adequacy of the management plan.

1           **A.     Area of Analysis**

2           Petitioners argue, first, that the county erred in failing to identify a geographic area in  
3           which to conduct the analysis of impacts on accepted farming practices under  
4           ZLDO 4.8.800(A). According to petitioners, LUBA has held that in addressing the similar  
5           significant change/significant cost standard at ORS 215.296(1), the county must (1) identify  
6           farming and forest practices that exist in the “surrounding area,” and (2) explain why the  
7           proposed use will not significantly change or significantly increase the cost of farm and  
8           forest practices within that area.<sup>3</sup> *Berg v. Linn County*, 22 Or LUBA 507, 511 (1992);  
9           *Schellenberg v. Polk County*, 21 Or LUBA 425, 440 (1991). Here, petitioners argue,  
10          ZLDO 4.4.800(A) differs from the statute by not limiting the area to “surrounding lands.”  
11          Therefore, petitioners argue, the county must address allegations of impacts on accepted farm  
12          or forest practices anywhere such impacts can be felt, which makes it even more necessary  
13          that the county determine the geographic area in which it will conduct the analysis of impacts  
14          under ZLDO 4.4.800(A).

15          ORC responds that because ZLDO 4.4.800(A) does not implement ORS 215.296(1)  
16          and in any case omits the phrase “surrounding area” or any similar phrase, the cases cited by  
17          petitioners are inapposite. Indeed, ORC argues that because ZLDO 4.4.800(A) lacks any

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<sup>3</sup> ORS 215.296 provides, in relevant part:

- “(1)     A use allowed under ORS 215.213(2) or 215.283(2) may be approved only where the local governing body or its designee finds that the use will not:
  - “(a)     Force a significant change in accepted farm or forest practices on surrounding lands devoted to farm or forest use; or
  - “(b)     Significantly increase the cost of accepted farm or forest practices on surrounding lands devoted to farm or forest use.
- “(2)     An applicant for a use allowed under ORS 215.213(2) or 215.283(2) may demonstrate that the standards for approval set forth in subsection (1) of this section will be satisfied through the imposition of conditions. Any conditions so imposed shall be clear and objective.”

1 particular geographic referent the county is under no obligation to identify a geographic area  
2 of analysis.

3 We agree with ORC that petitioners have not established that ZLDO 4.4.800(A)  
4 requires that the county identify a particular geographic area of analysis. As ORC notes,  
5 ZLDO 4.4.800(A) does not implement ORS 215.296(1) and cases interpreting the statute do  
6 not control how the county interprets and applies the code. As far as we can tell, the county  
7 sent notice of the application to all property owners within a 500-foot notice area of the two  
8 tracts proposed for mining, and received testimony from a number of property owners in the  
9 area that allege impacts on farm or forest practices. ORC responded with an analysis of  
10 impacts on alleged farming or forest practices, regardless of the distance from the two tracts  
11 or whether the property owners alleged that the practices were intended to generate a profit.  
12 Record 395-96. The planning commission and BOC chose to rely on that analysis to  
13 conclude that the proposed use will not significantly change or significantly increase the cost  
14 of farm and forest practices in the vicinity. In other words, it appears that the county  
15 considered any alleged impacts on farm and forest practices on any farm or forest property,  
16 regardless of distance from the mining site. While it might have been error to adopt a limited  
17 geographic area of analysis that excludes farm or forest properties affected by the mining  
18 site, the county instead appears to have considered impacts on farm and forest lands in a  
19 wide if undefined area and did not exclude any lands from consideration. If that is error,  
20 petitioners do not explain why.

21 **B. Accepted Forest Practices**

22 The BOC concluded that the proposed mining operation will not force a significant  
23 change in, or significantly increase the cost of, accepted forest practices, based primarily on  
24 testimony by representatives of Weyerhaeuser, which owns the subject property and many of



1 the nearby timber lands.<sup>4</sup> Petitioners argue, however, that the BOC findings do not identify  
2 any specific “accepted forest practices” on forest lands. Further, petitioners fault the county  
3 for rejecting their argument that ORC failed to identify other forest operations on lands not  
4 owned by Weyerhaeuser.

5 ORC responds that the county’s findings are adequate to demonstrate compliance  
6 with ZLDO 4.8.800(A). We generally agree. The findings discuss the Weyerhaeuser  
7 testimony, found at Record 275, and describe the only forest practice that Weyerhaeuser  
8 indicated would be impacted. Because the focus of ZLDO 4.4.800(A) is to evaluate impacts  
9 on farm and forest practices, we see no error in describing only those practices that affected  
10 landowners identify, particularly where the landowner indicates that other practices will not  
11 be affected. Petitioners do not explain why ZLDO 4.8.800(A) requires more, or identify any  
12 particular forest practice that the county should have, but failed to consider. As noted above,  
13 ZLDO 4.8.800(A) does not implement ORS 215.296(1), and to the extent petitioners rely on

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<sup>4</sup> The BOC findings state, in relevant part:

“The applicant’s mineral sands operation will not force a significant change in, or significantly increase the cost of, accepted forest practices. Weyerhaeuser Company is a commercial timber owner in the area and submitted written testimony that, in its experience, the applicant’s operations would not force a significant change in, or significantly increase the cost of, forest practices in the area. The appellants argued that this is not credible or relevant evidence, because the applicant leases the property from Weyerhaeuser. Although this is true, the BOC finds that this is not a basis for discrediting Weyerhaeuser’s written testimony. In Weyerhaeuser’s view, the only potential change in forest practices is the lost growth Weyerhaeuser will have in plantations that are temporarily removed for mining, but this change is not a significant change because these areas will be replanted by the applicant in accordance with their Department of Geology and Mineral Industries permit. Further, the applicant proposes to mine 20-acre areas at a time, and the timing of mining operations in any particular area will be coordinated with the landowner’s forest operations.

“The BOC rejects the appellants’ argument that the applicant failed to identify other forest operations in the area that may be impacted. The applicant addressed the issue raised concerning groundwater depletion by mineral sands operations, allegedly injuring young trees owned by local tree farmers. The applicant addressed this concern. The proposed use does not involve any groundwater withdrawals. Further, a registered geologist \* \* \* testified that the proposed mine sites do not intersect a regionally important groundwater aquifer, and any groundwater is hydrologically isolated from existing water wells by deeply incised drainages. The BOC finds the potential for the proposed use to impact the availability of groundwater for purposes of growing young trees or irrigating tree farms is minimal to none.” Record 516.

1 cases interpreting the statute to argue that the code standard requires an exhaustive *pro forma*  
2 description of all farm and forest practices on nearby lands, we reject the argument.

3 As for forest operations on lands not owned by Weyerhaeuser, we understand  
4 petitioners to argue that the record includes no “evidence to show other forest operations in  
5 the area,” and the county erred by failing to require ORC to address impacts on forest  
6 operations on non-Weyerhaeuser lands. Petition for Review 8. However, petitioners do not  
7 assert that forest operations on other lands are any different from those on Weyerhaeuser  
8 lands. Moreover, the county did address the one issue apparently raised by opponents  
9 regarding impacts on “local tree farmers.” Petitioners do not challenge those findings or  
10 explain why additional findings are required.

### 11 **C. Accepted Farming Practices**

12 Finding No. 8, quoted in relevant part above in n 1, addresses impacts on accepted  
13 farming practices. Petitioners argue that the findings specifically identify only the adjacent  
14 Coquille Indian Tribe cranberry farm, and fail to describe accepted farming practices on  
15 other nearby resource lands. Further, petitioners contend that the county erred in relying on  
16 the Tribe’s lack of opposition to the proposed use to conclude that the mining operation will  
17 not significantly change or significantly increase the cost of farming practices on the Tribe’s  
18 land.

19 Petitioners are correct that the BOC decision does not specifically describe any  
20 particular accepting farming practices. Although petitioners do not cite or challenge the  
21 planning commission decision that the BOC incorporated, that decision also does not  
22 specifically identify accepted farming practices. Instead, as explained above, the planning  
23 commission decision describes a number of alleged impacts on accepted farming practices  
24 that opponents asserted, such as noise, dust, traffic, gorse, groundwater supply and quality,  
25 and concludes based on ORC’s evidentiary responses to those assertions that “any potential

1 impacts on accepted farming practices do not rise to the necessary level of significance[.]”  
2 Record 410.

3 If the county were applying ORS 215.296(1) or a code provision implementing that  
4 statute, under the cases cited above the county’s failure to identify the accepted farming  
5 practices in the area would likely require remand. However, ZLDO 4.8.800(A) does not  
6 implement ORS 215.296(1), and it is not necessarily the case that the county must undertake  
7 the same analysis required under the statute. *But see Thomas v. Wasco County*, 35 Or LUBA  
8 173, 190 (1998) (the county must identify accepted farm and forest practices in the  
9 surrounding area under code standards similar to but that do not implement ORS 215.296(1),  
10 at least where the county failed to address evidence by an adjacent forest operator that the  
11 proposed use will cause specific changes in his forest practices). In any case, even if  
12 ZLDO 4.8.800(A) requires more identification of specific accepted farming practices than  
13 found in the county’s findings, as noted petitioners do not challenge the planning  
14 commission’s conclusion that the potential impacts of the proposed use on farm or forest use  
15 in the area are insignificant. The BOC adopted those planning commission findings. Given  
16 those unchallenged findings, remand to require the county to specifically identify accepted  
17 farm practices in the area would seem to be pointless.<sup>5</sup> We conclude that any inadequacy in  
18 the county’s findings with respect to identifying specific accepted farming practices in the  
19 area is harmless error.

20 With respect to the Tribe’s cranberry operation, petitioners argue that mere lack of  
21 opposition from the Tribe is not substantial evidence of insignificant impacts on the adjacent

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<sup>5</sup> Petitioners do not argue that the nature of the nearby farm uses and farming practices was unknown to the county. Many of the opposing comments describe farm and forest uses occurring on nearby properties, including horse breeding, exotic livestock, dairy, cranberry production and timber operations. ORC responded by submitting evidence such as noise studies concluding that the proposed mining will not significantly affect any of these farm or forest operations, and the county chose to rely on that evidence. Under these circumstances, remand to require the county to adopt findings that describe specific farm or forest practices on nearby lands seems like a *pro forma* exercise.

1 cranberry operation. ORC responds that the fact that the Tribe “thoroughly considered the  
2 ORC proposal” and does not oppose it is some evidence of insignificant impacts on the  
3 Tribe’s adjacent farm operation. Record 384. Further, ORC argues that the county did not  
4 rely solely on the Tribe’s letter, but also relied on the studies and evidence ORC submitted to  
5 refute the opponents’ claims of significant impacts. We agree with ORC that petitioners  
6 have not demonstrated that the county’s findings rely entirely on the Tribe’s lack of  
7 opposition. The county’s findings regarding the Tribe’s cranberry operation are adequate  
8 and are supported by substantial evidence.

9 **D. Withdrawal of the Shepherd Site**

10 As noted above, ORC withdrew the Shepherd site from the application, after  
11 opposition arose from nearby neighbors. The BOC found that “any evidence related to  
12 potential impacts associated with the Shepherd mining site was not relevant to the Planning  
13 Commission’s decision” and further that the withdrawal of the Shepherd site “considerably  
14 diminished any potential impact on such farming activities, if any, because the proposed  
15 mining activities are farther from properties with established farming activities.” Record  
16 515.

17 Petitioners challenge that finding, arguing that there is no evidence supporting a  
18 conclusion that the impacts of mining on the Weyerhaeuser site “would not affect the  
19 accepted farming or forest practices of opponents near the Shepherd site.” Petition for  
20 Review 10. While acknowledging that most of the opponents’ farm and forest operations in  
21 the area are located closer to the Shepherd site than to the Weyerhaeuser site, petitioners  
22 argue nonetheless that some operations are located near the Weyerhaeuser site and that  
23 opponents testified regarding impacts from both sites.

24 The county did not find, as petitioners assert, that mining of the Weyerhaeuser site  
25 would not affect farming or forest practices of operations located near the Shepherd site.  
26 Instead, the county found that withdrawal of the Shepherd site “considerably diminished any

1 potential impact” to operations located near the Shepherd site, given the increased distance  
2 between the Weyerhaeuser site and the opponents’ lands. Petitioners do not explain why that  
3 finding is erroneous or unsupported by the record. In addition, the county did not find that  
4 there would be *no* impacts, but rather that any impacts would be insignificant. As noted  
5 above, petitioners do not challenge that finding.

6 **E. Cumulative Impacts**

7 Petitioners contend that the county addressed types of individual impacts, such as  
8 noise, dust, traffic, etc., but failed to address the *cumulative* effects of noise, dust and other  
9 impacts. We understand petitioners to argue that even if the individual impacts of noise or  
10 dust are insignificant, the cumulative effect of noise combined with dust and other impacts  
11 may reach significance, and that the county erred in failing to consider that possibility.

12 ORC responds that petitioners cite to no evidence or testimony suggesting that the  
13 sum of impacts that are individually insignificant may exceed the threshold of significance.  
14 We agree with ORC that, absent some indication that the cumulative effect of individual  
15 impacts may reach significance, petitioners’ arguments under this sub-assignment of error do  
16 not provide a basis for reversal or remand.

17 **F. Groundwater**

18 Finally, petitioners argue that the county’s decision imposes no limit on how deep the  
19 applicant can mine for mineral sands. Petitioners note that during the BOC deliberations,  
20 commission members debated whether to limit depth to 60 feet, which is the maximum depth  
21 ORC indicated that it would mine, but decided not to do so. Record 505. Petitioners argue  
22 that without a condition of approval limiting mining depth to 60 feet, the county is in no  
23 position to conclude that groundwater supply and quality will not be significantly impacted.

24 ORC responds that the planning commission found, based on a hydrogeology study,  
25 that the proposed mining would have no impact on supply or quality of groundwater that is  
26 relied upon by area farm and forest operations, in part because the subject property is

1 hydrologically isolated from existing water wells by deeply incised drainages. Record 361-  
2 63. Petitioners do not challenge those findings, or that study, and we agree with ORC that  
3 petitioners have not demonstrated that a condition of approval limiting mining depth to 60  
4 feet is necessary to ensure compliance with ZLDO 4.8.400(A).

5 The second assignment of error is denied.

### 6 **THIRD ASSIGNMENT OF ERROR**

7 As noted above, ZLDO 4.8.400(B) requires a finding that “[t]he proposed use will not  
8 significantly increase fire hazard or significantly increase fire suppression costs or  
9 significantly increase risks to fire suppression personnel[.]” The county found that ORC has  
10 proposed sufficient measures to ensure that the mining operation will not significantly  
11 increase fire hazards, fire suppression costs, or risks to fire suppression personnel.<sup>6</sup>

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<sup>6</sup> The BOC findings state, in relevant part:

“The BOC finds that the application satisfies ZLDO 4.8.400(B) because the applicant’s mineral sands operation will not significantly increase fire hazards, fire suppression costs, or risks to fire suppression personnel.

“The applicant must comply with the Oregon Forest Practices Act (the ‘FPA’). The FPA is triggered by the applicant’s proposal to maintain logging roads and harvest trees on forestlands during the course of its mining activities. The FPA requires that at least 15 days before commencing such operations, the applicant must (i) provide notice to the State Forester that a forest operation will be conducted, (ii) acquire a special permit to operate power driven machinery on forestland, and (iii) provide notice to the State Forester and the Department of Revenue of the applicant’s intent to harvest timber.

“The applicant will be subject to compl[iance] with fire safety measures. Because the applicant’s operations are conducted within a Forest Protection District, or within one-eighth of a mile of a Forest Protection District, the applicant must observe certain fire safety precautions such as hiring watchmen and maintaining certain fire fighting equipment. Daniel Smith’s July 16, 2007 letter details the protocols that must be followed to prevent and control fires at the mine sites during the fire season. The Planning Commission imposed a condition of approval requiring the applicant to adhere to the defined fire prevention measures. Specifically, the applicant must ensure that all employees and contractors that work and operate on the subject property will be trained in fire prevention and suppression.

“The mineral sands operation involves operating internal-engine powered vehicles in the forest, just like timber operations that are allowed outright on the subject property. By the very nature of such activities in the forest, there is an increased potential for fire. However, the proposed use does not pose a threat to significantly increase fire hazards, the cost of fire protection, or the risk to fire suppression personnel. The applicant has proposed fire

1           Petitioners argue, however that the measures the applicant proposes are the same as  
2 those typically required of timber operations in the forest zone, which are seasonal,  
3 temporary and infrequent in nature. In contrast, petitioners argue, the proposed mining  
4 operation is a 24-hour a day, seven days a week, 340 days per year operation that will  
5 generate 67,000 truck trips per year, and last for 20 years. According to petitioners, the  
6 county failed to address arguments they raised below that the nature, intensity and duration  
7 of the proposed mining operation will significantly increase fire hazards.

8           ORC responds that the county’s findings are adequate to explain why the proposal  
9 complies with ZLDO 4.8.400(B). According to ORC, petitioners do not identify any  
10 evidence in the record that contradicts the evidence the county relied upon, or that indicates  
11 that the proposed measures will not be sufficient to ensure compliance with ZLDO  
12 4.8.400(B) given the nature, intensity and duration of the proposed mining operation.

13           If we understand petitioners correctly, they do not dispute the county’s finding that  
14 the measures imposed by the county are typical of those imposed on timber operations on  
15 forest lands, and that those measures are usually sufficient to ensure that such operations will  
16 not significantly increase the risk of fire. Petitioners argue, however, that the proposed  
17 mining operation is significantly more intensive and longer-lasting than such timber  
18 operations, involving many more truck trips within a given period of time, for example. We  
19 understand petitioners to argue, therefore, that there is a higher statistical chance that  
20 activities associated with the mining operation will cause a fire over a given period of time  
21 than there would be for seasonal, infrequent timber operations over the same period of time.

22           ORC responds that the BOC was well aware of the duration and intensity of the  
23 proposed mining operation, and there is no indication that the BOC failed to account for the  
24 nature of the proposed use in concluding that the imposed measures are sufficient to reduce

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prevention measures that are consistent with industry requirements, ensuring that all reasonably practical measures are taken to prevent fires.” Record 514-15 (rule and statutory citations omitted).

1 to insignificance the risk of fire. In addition, ORC argues that petitioners cite to no evidence  
2 supporting their assertion that the proposed measures are insufficient to ensure compliance  
3 with ZLDO 4.8.400(B) given the nature, intensity and duration of the proposed use.

4           Petitioners argued to the county that the proposed use will “increase fire hazards by  
5 the very nature and intensity of the operation.” Record 458. While the county did not adopt a  
6 specific finding addressing that argument, it clearly concluded to the contrary that the  
7 proposed measures will be sufficient to ensure that the proposed use will not significantly  
8 increase the risk of fire. To the extent petitioners challenge the evidentiary basis for that  
9 finding, we agree with ORC that petitioners have cited no evidence in the record supporting  
10 their argument that the nature and intensity of the proposed mining operation will  
11 significantly increase fire hazards notwithstanding the imposed conditions, and have not  
12 demonstrated that the county erred in relying on the evidence it did to reach the contrary  
13 conclusion.

14           The third assignment of error is denied.

15           The county’s decision is affirmed.