BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

E.M. EASTERLY and JAMES E. DAVIS,
Petitioners,

vs.

POLK COUNTY,
Respondent.

LUBA No. 2009-064

FINAL OPINION
AND ORDER

Appeal from Polk County.

E.M. Easterly, Salem and James E. Davis, Dallas, filed the petition for review and argued on their own behalf.

David Doyle, County Counsel, Dallas, filed the response brief and argued on behalf of respondent.

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

AFFIRMED 09/02/2009

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

Opinion by Bassham.

NATURE OF THE DECISION

Petitioners appeal a decision denying an application for a motorcycle race track on land zoned Acreage Residential 5-acre minimum (AR-5).

FACTS

A motorcycle race track is a conditional use in the AR-5 zone. Conditional uses in the AR-5 zone are generally allowed if found to be in harmony with the purpose and intent of the zone. Polk County Zoning Ordinance (PCZO) 119.070(B). The AR-5 zone has seven listed purposes. One of those purposes is to provide "larger acreage homesites which will be a buffer area between farm zones and higher density urban and urbanizing areas, thus reducing the conflicts between residential use and usual and normal farming practices." PCZO 128.510(B).

The subject property is a 3.18-acre parcel developed with a dwelling and an existing dirt motorcycle race track, located adjacent to the City of Dallas city limits and urban growth boundary. The applicant, petitioner Davis, built the race track on the property without first obtaining county approval. After neighbors complained about noise and dust, petitioner applied for conditional use approval. The hearings officer approved the racetrack, subject to a condition that petitioner take measures to ensure that no dust created by the race track use be allowed to leave the property. A neighbor appealed the hearings officer's approval to the county board of commissioners, which denied the application, finding that because petitioner could not ensure that no dust from the track would leave the property, petitioner failed to demonstrate that the proposed use is in harmony with the AR-5 zone purpose to be a buffer area between farm zones and urban lands.

Petitioner Davis appealed the county's denial to LUBA, challenging the county's apparent view that a conditional use in the AR-5 zone that would cause any amount of dust to leave the property must be denied, and noting that the AR-5 zone allows a number of

inherently dusty uses as both outright permitted uses and conditional uses. LUBA remanded, agreeing with the petitioners that the county had not articulated a "sufficient basis, or a sustainable interpretation of the relevant code provisions, to support denial of the proposed dirt motorcycle race track on the grounds that it is not in harmony with the purpose of the AR-5 zone to buffer urban uses from farm uses." *Davis v. Polk County*, 58 Or LUBA __ (LUBA No. 2008-150, Dec. 9, 2008), slip op 10. LUBA also remanded the decision to allow the county to consider whether PCZO 119.070(B) requires the county consider whether the conditional use must be in harmony with all seven purposes listed in PCZO 128.510.

On remand, the county board of commissioners held an evidentiary hearing on March 18, 2009. The commissioners further left the record open through April 1, 2009 for additional evidentiary submissions and rebuttal. On May 6, 2009, the board of commissioners issued a decision denying the application, concluding that the applicant failed to demonstrate that the race track would be in harmony with five of the seven purposes of the AR-5 zone.

This appeal followed.

FIRST ASSIGNMENT OF ERROR

Petitioners argue that "sustainable findings have not been adopted" to support denial. Petition for Review 3. As explained below, the county adopted extensive findings explaining why the proposed race track is not in harmony with the five applicable AR-5 zone purpose statements, and petitioners challenge those findings under the fifth assignment of error. It is not clear to us that petitioners' more general findings challenge under the first assignment of error is different from, or adds anything to, the findings challenges in the fifth assignment of error. Absent a more developed argument under the first assignment of error, the arguments therein do not provide a basis for reversal or remand.

The first assignment of error is denied.

SECOND ASSIGNMENT OF ERROR

Petitioners argued that the county erred in failing to summarize the bases for LUBA's remand in the notice of hearing on remand, contrary to ORS 197.763(3)(a) and (b).[1]

The notice provided by the county describes the proposed use, states the hearing is "specific to the LUBA No. 2008-150 remand that requires additional findings to address Polk County Zoning Ordinance Section 119.070(B)," and lists the applicable PCZO criteria. Record 331. Nothing in ORS 197.763(3) requires the notice of a hearing on remand to summarize LUBA's bases for remand. Such bases for remand are not "applicable criteria" for purposes of ORS 197.763(3)(b). The notice describes the proposed use and lists the applicable criteria. Petitioners have not demonstrated that ORS 197.763(3) requires more.[2]

The second assignment of error is denied.

THIRD ASSIGNMENT OF ERROR

In *Davis*, LUBA addressed the second, third and fourth assignments of error and sustained them, remanding the decision to the county to (1) reconsider its denial under PCZO 128.510(B) for the reasons stated in LUBA's opinion, and (2) determine whether the county must consider all of the seven purpose statements listed in PZCO 128.510.

Petitioners argue that when LUBA sustained the second, third and fourth assignments of error, the Board necessarily agreed with each of the petitioners' arguments under those assignments of error. Petitioners argue that included within the second assignment of error

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[1] ORS 197.763(3) provides, in relevant part:

> "The notice provided by the jurisdiction shall:
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> "(a) Explain the nature of the application and the proposed use or uses which could be authorized;
>
> "(b) List the applicable criteria from the ordinance and the plan that apply to the application at issue[.]"

[2] In addition, petitioners do not demonstrate that any alleged notice defect prejudiced their substantial rights. ORS 197.835(9)(a)(B). Petitioners were aware of the bases for remand.

in *Davis* was an argument that the county board of commissioners failed to find that the county board of commissioners has the power to grant a conditional use application. We understand petitioners to argue that PCZO 119.070(A) requires such a finding.[3] The petition for review submitted in *Davis* did indeed have a one-sentence argument to that effect, although the remainder of the second assignment of error was devoted to challenging the county's findings under PCZO 119.070(B). *See* Appendix C attached to the Petition for Review in the present appeal.

We disagree with petitioners that our remand in *Davis* encompassed or addressed every individual argument set out in the second, third and fourth assignments of error, or that the county erred in failing to address on remand whether the county commissioners have the power to grant a conditional use application under PCZO 119.070(A). Our decision did not specifically address the petitioners' one-sentence argument regarding PCZO 119.070(A), possibly because the argument was both undeveloped and nonmeritorious on its face. PCZO 119.070(A) requires the *hearings officer or planning director* to find that he or she has the power to grant the conditional use, but does not require any such finding from the board of commissioners. Presumably there are some types of PCZO conditional use applications that the hearings officer and planning director are not authorized to consider, but petitioners did not attempt to explain why the board of commissioners might lack such authority or why the board is required to make a finding under PCZO 119.070(A).

In any case, when LUBA sustains an assignment of error it does not necessarily mean that LUBA agrees with every individual argument or sub-argument the petitioner advances in

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[3] PCZO 119.070 provides that, in relevant part:

> "Before granting a conditional use, the Hearings Officer or Planning Director shall determine:
>
> "(A) That he or she has the power to grant the conditional use.
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> "(B) That such conditional use, as described by the applicant, will be in harmony with the purpose and intent of the zone."

that assignment of error, or that on remand the local government is obligated to address every argument or sub-argument therein. Our decision in *Davis* clearly described the two bases for remand, neither of which involved PCZO 119.070(A). If petitioners believed that LUBA erred in failing to resolve petitioners' one-sentence argument regarding PCZO 119.070(A), petitioners' only remedy was to appeal our decision to the Court of Appeals. ORS 197.850.

The third assignment of error is denied.

FOURTH ASSIGNMENT OF ERROR

Petitioners argue that when petitioner Davis requested that the county schedule a hearing on LUBA's remand in *Davis*, the county attempted to charge him a $660 fee for the remand hearing, pursuant to Resolution 08-08, which authorizes such a fee. Petitioners objected to the fee, and the county apparently went ahead with the remand hearing without requiring Davis to pay the fee.

On appeal, petitioners contend that the remand fee is inconsistent with ORS 215.422. The county responds that the remand fee is authorized by ORS 215.422(c).[4] In any case, the county argues, the only means to challenge the remand fee or Resolution 08-08 is via a writ of review filed within 60 days of the resolution's adoption.

The county is incorrect that the only means to challenge application of an appeal fee is by a facial challenge to the adopting resolution at the time the resolution is adopted. An appeal fee can be challenged in an appeal of a land use decision in which that fee is imposed.

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[4] ORS 215.422(c) provides, in relevant part:

> "The governing body may prescribe, by ordinance or regulation, fees to defray the costs incurred in acting upon an appeal from a hearings officer, planning commission or other designated person. The amount of the fee shall be reasonable and shall be no more than the average cost of such appeals or the actual cost of the appeal, excluding the cost of preparation of a written transcript. The governing body may establish a fee for the preparation of a written transcript. The fee shall be reasonable and shall not exceed the actual cost of preparing the transcript up to $500. In lieu of a transcript prepared by the governing body and the fee therefor, the governing body shall allow any party to an appeal proceeding held on the record to prepare a transcript of relevant portions of the proceedings conducted at a lower level at the party's own expense. If an appellant prevails at a hearing or on appeal, the transcript fee shall be refunded."

See Mazorol v. City of Bend, __ Or LUBA __ (LUBA No. 2009-038, July 29, 2009), slip op 6 (an as-applied challenge to an appeal fee is permissible, overruling LUBA precedent to the contrary). However, we need not and do not resolve the parties' contentions regarding whether the county's remand fee is consistent with ORS 215.422(c). The county did not impose or require any such fee in the present case as a condition of providing a hearing on remand, and therefore any attempted resolution of that issue would be advisory. Even if that issue were squarely before us, petitioners merely allege but make no attempt to demonstrate that the remand fee is inconsistent with ORS 215.422. *See Young v. Crook County*, 56 Or LUBA 704, *aff'd* 224 Or App 1, 197 P3d 48 (2008) (in an as-applied challenge to an appeal fee, the petitioner has the initial *prima facie* burden of demonstrating that the appeal fee is inconsistent with state statute). Petitioners' arguments under the fourth assignment of error do not provide a basis for reversal or remand.

The fourth assignment of error is denied.

FIFTH ASSIGNMENT OF ERROR

Under the fifth assignment of error, in five sub-assignments of error, petitioners challenge the county's findings that petitioners failed to demonstrate that the proposed race track is in harmony with each of the five applicable purpose statements listed in PCZO 128.510.[5]

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[5] In relevant part, PCZO 128.510 states that it is the "purpose and function" of the AR-5 zone to:

> "(A) Provide for the best use of the land based on the location, inherent limitations and ability to serve the functional needs of the area.
>
> "(B) Provide larger acreage homesites which will be a buffer area between farm zone and higher density urban and urbanizing areas, thus reducing the conflicts between residential use and usual and normal farming practices.
>
> "(C) Provide for the orderly growth of the urban areas so that as urbanization occurs, the supporting community will be able to afford the increased capital investments required for services to and within the new urban area and the costs of maintenance of utility facilities, rebuilding of arterial streets, protective services and desired social services.

As noted, one basis for remand in *Davis* was for the county to determine whether the county must consider and weigh each of the PCZO 128.510 purpose statements. The county concluded on remand that all applicable purpose statements must be considered, and went on to find that the proposed use was not in harmony with any of the five purpose statements it deemed to be applicable. Unfortunately, it is not clear from the findings (1) whether the county believes that an applicant must demonstrate harmony with all applicable purpose statements to gain approval, or (2) whether the county believes that harmony with some purpose statements might, in balance, be sufficient to grant approval even if the proposed use is not in harmony with other applicable purpose statements. This might seem an academic problem, given that the county found lack of harmony with all five applicable purpose statements, but it affects how we review petitioners' subassignments of error. In the former case, a valid finding of lack of harmony with a single purpose statement would be sufficient to support denial. *See Wal-Mart Stores, Inc. v. Hood River County*, 47 Or LUBA 256, 266, *aff'd* 195 Or App 762, 100 P3d 218 (2004) (to support a decision for denial, the county need only establish the existence of one adequate basis for denial). In the latter case, if petitioners demonstrate error or inadequacy with respect to at least one set of findings addressing individual purpose statements, LUBA would have to remand the decision for the county for further findings.

However, on remand the county devoted most of its findings to discussing PCZO 128.510(B), from which we surmise that the county believes that PCZO 128.510(B) is the most pertinent of the purpose statements. Further, the county's findings with respect to

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"(D) To provide for the efficient, redivision of acreage subdivisions which may occur in the area.

"* * * * *

"(F) To meet the needs of a segment of the population for non-urban, non-farm acreage homesites."

three of the four other applicable purpose statements essentially restate the county's main rationale for concluding that the proposed use is not in harmony with PCZO 128.510(B). As discussed below, that rationale is basically that the proposed race track creates significant negative externalities, such as dust, that impact adjacent urban and urbanizable lands, and petitioners have not quantified those dust impacts or demonstrated how such impacts could be reduced or mitigated so that the subject property will continue to serve the purposes of the AR-5 zone, particularly the function of acting as a buffer area rather than a net exporter of dust. Petitioners challenge that essential rationale under their subassignments of error. For the reasons set out below, we reject petitioners' challenges to that basic rationale. Accordingly, we shall analyze petitioners' subassignments of error together, with particular focus on the arguments concerning the county's findings with respect to PCZO 128.510(B).

As noted, PCZO 128.510(B) states that one purpose of the AR-5 zone is to provide "larger acreage homesites which will be a buffer area between farm zones and higher density urban and urbanizing areas[.]" The county adopted findings explaining the function of a "buffer area" contemplated by PCZO 128.510(B), particularly that uses within the buffer area must produce fewer negative externalities than the farm property it is intended to buffer, in this case dust and similar impacts from farm operations.[6] It then described the race track

[6] The county found:

> "* * * Properties in the AR-5 zone, as buffer properties, provide land on which dust, farm machinery noise, and other farm emissions can at least partially settle, be absorbed, or dissipate over before it reaches urban or urbanizing areas. Properties in the AR-5 zone increase the distance between farm zones and urban or urbanizing areas that reduces the amount of trespassing on farm land by urban residents. In sum, the buffer described in PCZO 128.510(B) is intended to reduce friction between farmers and urban dwellers, who are groups that have differing primary uses of their property.
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> "A buffer is intended to prevent or minimize a negative externality produced in one area from significantly affecting another area. If a buffer area, such as a property in the AR-5 zone, produces more of a negative externality, such as dust, noise, trespassing, crop theft, or vandalism than it mitigates, then the purpose of the buffer is defeated. A conditionally permitted use may produce some level of the negative externalities that the zone is intended to buffer; however, those externalities must be mitigated so that the buffer property produces less of the negative externalities than the property is intended to buffer." Record 260.

and the negative externalities it created during its period of illegal use, particularly with respect to dust, and concluded that such impacts far exceed the dust that is typical of farm use.[7] The county then explained that the impacts of a proposed motocross race will vary, depending on the details of the proposal, topographical features and the proximity to higher density urban or urbanizing areas. The county's findings discuss federal particulate matter standards promulgated by the Environmental Protection Agency (EPA), but ultimately conclude that "there is no standardized level of noise and dust that should be allowed to travel offsite that will ensure that any given property will continue to act as a buffer between farm zones and higher density urban or urbanizing areas."[8]

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[7] The county found:

> "* * * During the conditional use application process neighbors raised significant concerns about the negative externalities that were created by use of the motocross race track during the time it operated illegally. The track attracted spectators and participants that resulted in increased vehicle traffic to the property. According to evidence and testimony submitted by surrounding residents, use of the motocross race track also created high levels of noise and dust. Neighbors submitted photographic evidence showing dust billowing out of the track area as a result of using the motocross race track.
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> "The motocross race track proposed by the applicant is unique in that it would create multiple negative externalities, simultaneously over a relatively short period of time. These include noise and dust in particular. * * * The noise and dust created by the proposed motocross race track would be significantly different than the noise and dust created by activities located on farm zones. The noise and dust created on farm zones, through such activities as field plowing, grass seed harvesting, and livestock grazing, is spread over a large farm parcel. * * * The noise and dust created by the proposed motocross race track would be substantially different. Use of the track by 15 motorcycles at one time for several hours would create high levels of noise and dust from a concentrated area that contains less than one acre. * * * Consequently, the noise and dust created by the proposed motocross race track cannot be directly compared to noise and dust created by farm use, because the noise and dust sources are fundamentally different. * * *." Record 260-61.

[8] The county's findings continue:

> "The noise and dust created by the proposed motocross race track would be concentrated into a small area during a relatively short period of time. In regards to dust, the EPA has developed particulate matter (PM) emission standards for all uses. So, at a minimum the proposed motocross race track would need to produce less than the EPA standards. The EPA standards for PM_{10}, which applies to road dust, are listed as an average over a 24 hour period. If the motocross race track operates for a period of four hours on a given day, as proposed by the applicant, and only created dust during that time, then the average dust emissions by the

Finally, the county considered whether the race track could be conditioned in a manner to ensure that dust impacts were mitigated to the point where the property would still retain its function as a buffer area, *i.e.*, produce less dust than would farm uses. The county faulted the applicant for not quantifying or estimating the amount of dust the race track would create, and for failing to submit a dust mitigation plan that details measures to reduce dust and demonstrates how effective those measures would be.[9] Ultimately, the county concluded:

> motocross race track during its four hours of operation could be six times the average that can be emitted over a 24 hour period and still comply with EPA dust emission standards.
>
> "While it is clear that the proposed motocross race track would be subject to the EPA particulate matter standards, the same as any use, dust emissions at the maximum EPA level may be too high in order to allow the subject property to act as a buffer between farm zones and urban or urbanizing areas when used as a motocross race track. A motor race track is a conditionally permitted use in the AR-5 zone because a motor race track is a use that stands to produce significant negative externalities that would require mitigation in order for the motor race track to be in harmony with the purpose and intent of the zoning district. The types of impacts a motor race track will have on neighbors will vary based on the specific proposal and location of the track. Based on the applicants' proposal, motor race tracks can have paved surfaces or dirt surfaces, and they can be enclosed or outside. They can be relatively large or small, and they can attract hundreds of spectators or a handful of spectators. The specific type of motor race track that could be allowed on any given AR-5 zoned property, and still allow the property to be in harmony with the purpose and intent of the zone, will vary from property to property. Consequently, there is no standardized level of noise and dust that should be allowed to travel offsite that will ensure that any given property will continue to act as a buffer between farm zones and higher density urban or urbanizing areas. The amount of dust, noise and other externalities that are associated with any conditionally permitted motor race track in the AR-5 zone must be reasonable for the specific location where the motor race track would be sited. This requires that the applicant consider relevant topographical features of the property and the proximity of the property to higher density urban or urbanizing areas." Record 261.

[9] Continuing, the county found:

> "In considering the applicant's proposal, the Polk County Hearings Officer recommended approval with several conditions including limiting days and hours of operation, limiting the number of riders allowed on the track at any given time, and requiring a vegetative noise buffer. These conditions provide a framework to mitigate, but not eliminate, the impacts of noise and increased traffic on neighboring property owners. The Hearings Officer also included a condition of approval requiring that the property owner take appropriate measures to insure that no dust created from activities associated with the motocross race track shall be allowed to leave the premises. If the proposed motocross race track produced no dust, the property would act as a dust buffer between farm zones and urban or urbanizing areas. The Board of Commissioners, however, found that requiring no dust to leave the premises to be unreasonable, and requested that the applicant provide a dust mitigation plan. The applicant

> "Without an understanding of the level of dust that would be created by use of the subject property as a motocross race track, and taking into consideration the other negative externalities associated with the proposed motocross race track including noise and vehicular traffic, the applicant has failed to demonstrate that the proposed motocross race track would allow the subject property to continue to act as a buffer between farm zones to the west, south and east and the City of Dalles contiguous to the north." Record 262.

Petitioners' main argument is that the county never articulated exactly what quantum of dust is permitted to leave the property consistent with its function as a buffer area, or any similar objective standard that the applicant could attempt to demonstrate compliance with. According to petitioners, "[t]he burden remains for Polk County to establish a set of conditions which permits a conditional use applicant to review and then provide a process whereby the applicant can respond to those criteria." Petition for Review 19. Similarly, petitioners argue that "it is the County not the applicant that must provide a legally sustainable dust abatement condition[.]" Petition for Review 23. To the extent the county relied on the EPA particulate standards, petitioners argue, the county first mentioned those standards in its final decision and never offered petitioners an opportunity to present evidence of compliance with the EPA standards.

Turning to the last point first, if the county had interpreted its code to the effect that the EPA particulate matter standards supply the relevant test, articulated that interpretation for the first time in its final decision, and denied the application for failure to present evidence of compliance with the EPA standards, we might well agree with petitioners that the county would be required to give petitioners an opportunity to present evidence regarding

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> has not quantified the level of dust that would be created by the motocross race track. Nor has the applicant provided a dust mitigation plan that details the strategies and their estimated effectiveness on reducing dust. It is also unclear what levels of engine emissions would be produced by 15 motorcycles traversing the track at any given time, many of which may use 2-cycle engines. The County believes that it would be possible for the applicant to devise mitigation measures that would allow a motocross race track to be established on the subject property and still allow the subject property to act as a buffer between farm zones and urban or urbanizing areas. However, the applicant failed to show that the levels of dust that would drift offsite from operation of the track would be reasonable based on the property's close location to contiguous urban residential properties." Record 261-62.

the EPA standards. *See Gutoski v. Lane County*, 155 Or App 369, 373-374, 963 P2d 145 (1998) (describing two minimum conditions that must exist to obtain remand for a new evidentiary hearing in such circumstances).[10] However, as we understand the county's findings the county did not interpret its code to effectively adopt the EPA standards as the relevant test, nor did the county deny the application for failure to demonstrate compliance with EPA standards. Indeed, while the county discussed the EPA standards, it seemed to reject those standards as insufficient to ensure that the proposed race track is in harmony with the applicable purpose statements, and went on to conclude that there is no "standardized level" of dust that applies in all circumstances to govern compliance with the conditional use standards.

Turning to petitioners' main theme that the county failed to supply a quantifiable or specific dust standard that petitioners could demonstrate compliance with, as noted the county rejected the position that there is a "standardized level" of dust that can generally be applied to conditional uses in the AR-5 zone, or to motocross race tracks in particular. The ultimate test, the county explained, is whether the proposed race track preserves the function of the AR-5 zoned property as a buffer area between farm uses and urban lands. The county found that preserving that function depends on a number of factors, including the design of the race track, the topography, proximity to urban areas, and the effectiveness of efforts

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[10] In *Gutoski*, the Court held:

> "We nevertheless agree with LUBA that, in certain limited situations, the parties to a local land use proceeding should be afforded an opportunity to present additional evidence and/or argument responsive to the decisionmaker's interpretations of local legislation and that the local body's failure to provide such an opportunity when it is called for can be reversible error. We also agree with LUBA, however, that *at least* two conditions must exist before it or we may consider reversing a land use decision on that basis. First, the interpretation that is made after the conclusion of the initial evidentiary hearing must either significantly change an existing interpretation or, for other reasons, be beyond the range of interpretations that the parties could reasonably have anticipated at the time of their evidentiary presentations. Second, the party seeking reversal must demonstrate to LUBA that it can produce specific evidence at the new hearing that differs in substance from the evidence it previously produced and that is directly responsive to the unanticipated interpretation." *Id.* at 373-74 (footnote and citations omitted, emphasis in original).

proposed to mitigate or reduce dust and other impacts. As we understand the county's findings, the property will continue to serve its function as a buffer area if the applicant demonstrates that the use, as proposed and mitigated, will produce fewer negative externalities than farm uses in farm zones so that the AR-5 zoned property will function as a buffer. Record 260.[11]

County staff suggested, in its staff report, that "one way the applicant could demonstrate that the subject property would continue to act as a buffer would be to show that the proposed track would produce equal to or less dust and noise than if the subject property were employed for farm use." Record 339. Petitioners quote that staff statement and appear to disagree with it, but do not explain why that view is erroneous. That staff statement appears to us to represent a reasonable means of demonstrating harmony with the PCZO 128.510(B) "buffer area" purpose statement. There may be other means, but we disagree with petitioners' general argument that the county was *obligated* during the proceedings below to create an objective test that defines a particular quantum of dust that can be externalized from the subject property. Arguably, it might have constituted error for the county to have created such an *ad-hoc* standard for the first time in a quasi-judicial proceeding. Certainly, petitioners have cited no authority that would obligate the county to create and apply such a standard in its remand proceedings.

The reality is that when faced with an extremely subjective approval standard such as a requirement to show that the proposed use is "in harmony" with a zoning district purpose statement that properties in the zone function as a "buffer area," the applicant has the burden of presenting evidence to satisfy the standard, based on the applicant's best estimate as to what that subjective standard requires. In many if not most cases, local government planning

[11] Petitioners quote that finding at Record 260, and agree that it is "not unreasonable for the County to require dust generation less than would be allowed or generated by agricultural activities." Petition for Review 21. However, petitioners insist that the county "has so far failed to establish such a standard, and therefore, has failed to provide a sustainable code based rationale for denying" the application. *Id.*

staff will provide some assistance, in the staff report or elsewhere, by articulating what staff believe the standard requires. A prudent applicant in that circumstance will shape the evidentiary presentation to reflect that staff position, or other approaches proposed or reasonably anticipated to meet the subjective standard, which the final decision-maker may or may not adopt in the final decision. However, it is generally the applicant's responsibility to anticipate a range of reasonable interpretations or approaches to satisfying such a subjective approval standard, and to shape the evidence accordingly. *Gutoski*, 155 Or App at 374.

In the present case, county staff identified at least one way to satisfy PCZO 128.510(B), specifically to demonstrate that the proposed track would produce no more dust and noise than if the subject property were employed for farm use. Under that approach, an applicant could presumably proceed by first estimating how much dust or noise the subject property would externalize if employed for farm use. Then the applicant could estimate how much dust or noise the proposed conditional use would likely externalize, and describe methods to mitigate or reduce dust or noise impacts. Finally, the applicant could estimate how effective those methods would be, with the goal of demonstrating that, as mitigated, the conditional use would produce no more dust and noise impacts than would farm use of the property. The county commissioners appeared to have adopted the staff view of PCZO 128.510(B) or a similar view, ultimately denying the application because petitioners failed to quantify dust impacts or demonstrate how effective mitigation measures would be at reducing dust impacts of the race track that, the county found, will significantly exceed the dust impacts of typical of farm uses if unmitigated.

However, during the remand proceedings petitioners made no effort to submit the evidence suggested by the staff approach, or indeed to submit new evidence at all regarding dust impacts. Petitioners apparently chose to rely on the evidence submitted during the

initial proceedings.[12] As we understand it, that evidence suggested several means of reducing dust generation, such as watering portions of the race track, but did not attempt to quantify dust impacts, compare dust impacts of farm uses and the race track, with mitigation, or offer any similar evidence. Original Record 244-45. A reasonable decision maker could certainly view that evidence as insufficient to demonstrate compliance with PCZO 128.510(B), as the county has interpreted that standard. Petitioners do not challenge that interpretation, and in fact appear to agree with it. Petitioners should have reasonably anticipated during the proceedings on remand that the county commissioners would adopt that interpretation and petitioners should have presented evidence accordingly.

Petitioners' challenges to the findings directed at the other applicable AR-5 zone purpose statements fare no better. The other applicable AR-5 zone purpose statements seem much less pertinent to the proposed race track than does PCZO 128.510(B). The findings addressing those less-pertinent purpose statements adopt a similar rationale regarding dust impacts, and petitioners advance similar challenges. We reject those challenges for the reasons set out above.

The only set of findings that does not focus on dust impacts is that directed at PCZO 128.510(C), which states that one purpose of the AR-5 zone is to "[p]rovide for the orderly growth of the urban areas[.]" The county found that the subject property is of high priority to be included in the City of Dallas urban growth boundary and developed with urban uses, since it is exception land contiguous to city limits, water and sewer. Further, the city found that if the race track is authorized and the site is later annexed into the city the race track would essentially function as a nonconforming public amusement park surrounded by urban residential uses, and that it is unlikely that the city would zone the subject property

[12] Petitioners attach portions of a transcript of the hearing on remand, where the county commissioners repeatedly asked petitioner Davis if he intended to submit any further evidence regarding dust impacts or dust mitigation. Petitioner repeatedly declined. Petition for Review 18, n 12.

for public amusement purposes. Record 262. Therefore, the county concluded that approving the race track would not be in harmony with the purpose to provide for the orderly growth of the city. Petitioners disagree with this finding but do not explain why it is inadequate or erroneous.

The fifth assignment of error is denied.

SIXTH ASSIGNMENT OF ERROR

The sixth assignment of error is that the "[f]inal order of denial is not supported by the conclusions cited," which appears to be a challenge to the adequacy of the findings. Petitioners first take issue with statements in the staff report that while the AR-5 zone allows farm uses as outright permitted uses, farm uses are "secondary uses" in the zone. Yet, the commissioners did not adopt the staff report as findings, and petitioners do not explain why statements in the staff report, even if erroneous, demonstrate inadequacy in the commissioners' findings or provide a basis for reversal or remand.

Petitioners next argue that the county failed to appreciate that a motorcycle race track is an allowable conditional use in the AR-5 zone, along with several other permitted and conditional uses that also produce "negative externalities," and that if the county wishes to essentially prohibit such uses it must do so through a legislative process. Relatedly, petitioners argue that the county failed to address the "real issue" on remand, which petitioners characterize as LUBA's order "requiring the [county] to provide a legally sustainable basis for denying [the application] when PCZO 128.530(H) clearly specifies that a motor racetrack is an allowable conditional use in the AR-5 zoning district[.]" Petition for Review 29.

Petitioners appear to read far more into our opinion remanding the original denial to the county than is warranted. We pointed out in *Davis* that the county's apparent "not one dust particle can leave the property" basis for denial appeared to be inconsistent with the text and context of the AR-5 zone, which permits a number of allowed and conditionally allowed

uses that inherently produce some dust that is likely to travel beyond the site that generates the dust. We remanded for the county to articulate a "sufficient basis, or sustainable interpretation of the relevant code provisions, to support denial of the proposed race track * * *." Slip op 10. As explained above, on remand the county did so. We did not mean to suggest in *Davis* that because the AR-5 zone allows a motor race track as a conditional use along with other permitted and conditional uses that similarly produce dust, the county is somehow obligated to approve the proposed race track, as petitioners appear to believe.

The sixth assignment of error is denied.

SEVENTH ASSIGNMENT OF ERROR

Under this assignment of error, petitioners repeat their argument that the county effectively adopted EPA dust particle standards as the applicable approval standard, and complain that the county erred in failing to notify petitioners that it would do so. Petitioners note that the EPA dust particle standards are essentially performance standards, that can be measured only once the track is operational, and if petitioners had known that the county intended to rely on the EPA standards they would resolved the issue by simply agreeing to a condition of approval requiring the race track to comply with those standards.

As explained above, we do not understand the county to have adopted the EPA dust particle standards as the applicable approval standard. Therefore, petitioners' arguments under this assignment of error do not provide a basis for reversal or remand.

The seventh assignment of error is denied.

EIGHTH ASSIGNMENT OF ERROR

Petitioners contend that the only basis for the original denial was dust impacts, but that on remand the county also cited "noise" as a negative externality that warrants denial. Because noise was not a basis for denial during the original proceedings, petitioners argue, the county cannot on remand cite noise as a new basis for denial.

In *Davis* we remanded the decision part to the county to determine whether other AR-5 zone purpose statements must be considered besides the "buffer area" purpose set out in PCZO 128.510(B), and the county on remand determined that all applicable purpose statements must be considered. It is certainly possible that in considering other purpose statements noise might become an issue, even though it had not been one of the original bases for denial under PCZO 128.510(B).

In any case, even if the county erred in citing noise impacts as an additional basis for denial, the county's principle basis for denial on remand is clearly dust impacts, judging from the amount of discussion of dust issues in the findings. We have sustained petitioners' challenges to the findings directed at dust impacts, and those findings appear to be sufficient, independent bases for denial. Petitioners do not contend otherwise. Accordingly, petitioners' arguments under this assignment of error do not provide a basis for reversal or remand.

The eighth assignment of error is denied.

The county's decision is affirmed.