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BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

JAN13'10 PM 3:07 LUBA

ROBERT CROCKER, CHRISTINE CROCKER,
MIKE GOSS, BECKY GOSS,
MERVIN HAYS, PAM HAYS, FRANK HOFFMAN,
RICHARD PORTER, VIRGINIA PORTER,
JERRY SCHRAM and JUANICE SCHRAM,
Petitioners,

vs.

JEFFERSON COUNTY,
Respondent,

and

HIGH DESERT ORGANIX, LLC,
Intervenor-Respondent.

LUBA No. 2009-096

FINAL OPINION
AND ORDER

Appeal from Jefferson County.

Bruce W. White, Bend, filed the petition for review and represented petitioners. With him on the brief was Bruce W. White, LLC.

David C. Allen, Madras, filed a joint response brief and argued on behalf of respondent. With him on the brief were Steven W. Abel, Elaine R. Albrich, Eric L. Martin and Stoel Rives LLP.

Elaine R. Albrich, Portland, filed a joint response brief. With her on the brief were Steven W. Abel, Eric L. Martin, Stoel Rives LLP and David C. Allen. Steven W. Abel argued on behalf of intervenor-respondent.

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

REMANDED 01/13/2010

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

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NATURE OF THE DECISION

Petitioners appeal a county decision approving a composting facility on land zoned exclusive farm use (EFU).

FACTS

Intervenor-respondent (intervenor) applied to the county for a conditional use permit and site plan review to build a facility for composting feedstock on a 40-acre portion of a larger property. The subject property is zoned EFU and is located approximately three miles northeast of the City of Madras. The proposed facility includes storage areas for hay and wood chips, storage bunkers, three blend piles, two stormwater retention ponds, seventeen compost windrows, a shop building, a storage building, scale house and office building.¹ Intervenor proposes to compost a mix of manure, plant screenings and wood chips at the facility. Water for the facility will be obtained from a well located on the property to the north, from a hydrant located to the west, and from water storage tanks on the property. Access to the facility is via an access easement that crosses private property to the south of the subject property.

The planning commission approved the application, and the decision was appealed to the county Board of Commissioners (BOC). The BOC approved the application, and this appeal followed.

FIRST THROUGH THIRD ASSIGNMENTS OF ERROR

A. Introduction

ORS 215.283(2)(k) authorizes counties to approve “[a] site for the disposal of solid waste approved by the governing body of a city or county or both and for which a permit has

¹ A “windrow” is “**1** a: a row of hay raked up to dry before being rolled or pitched into cocks; b: a similar row (as of grain) for drying; **2** : a row heaped up by or as if by the wind; * * * [.]” *Webster’s Third New International Dictionary*, 2620 (1981).

1 been granted under ORS 459.245 by the Department of Environmental Quality together with
2 equipment, facilities or buildings necessary for its operation” on EFU-zoned land. Jefferson
3 County Zoning Ordinance (JCZO) 301.4(N) implements the statute.

4 Shortly after submitting its conditional use application to the county, intervenor
5 applied to the Oregon Department of Environmental Quality (DEQ) under ORS Chapter
6 459.245 for a solid waste disposal permit to operate the facility.² Under DEQ’s State Agency
7 Coordination (SAC) program with the Land Conservation and Development Commission
8 (LCDC), which is required under ORS 197.180, and under OAR 340-093-0070(3)(b), a local
9 government must issue an affirmative Land Use Compatibility Statement (LUCS) before
10 DEQ will issue a solid waste disposal permit.³ After intervenor filed its applications with the
11 county, the county issued a “conditional” LUCS to DEQ.

12 At the time the county made its final decision approving the application, the DEQ
13 permit application was pending. The county imposed a condition of approval requiring
14 intervenor to secure a solid waste disposal permit from DEQ prior to construction or
15 development of the facility:

16 “The Applicant shall obtain DEQ approval for the Project under ORS 459.245
17 and OAR 340-09-0020 prior to construction or any development and shall
18 maintain DEQ approval throughout the duration of the facility’s operations.”
19 Record 8.

² ORS 459.245(1) provides:

“If the disposal site meets the requirements of ORS 459.005 to 459.105 and 459.205 to 459.385 and rules of the Environmental Quality Commission adopted pursuant thereto, the Department of Environmental Quality shall issue the permit. Every completed application shall be approved or disapproved within 60 days after its receipt by the department. *Except as provided in ORS 459.055* or for a permit issued under the process set forth in ORS 517.952 to 517.989, if the department fails to act within the time allowed, the application shall be considered approved unless an extension of time is granted by the commission on a showing of good cause by the department.” (Emphasis added.)

³ A Land Use Compatibility Statement, or LUCS, is generally a document issued by a local government at the request of a permitting agency, such as DEQ, to determine whether a proposal pending before the agency is consistent with the local government’s comprehensive plan and land use regulations.

1 **B. First Assignment of Error**

2 ORS 215.283(2)(k) provides in relevant part:

3 “The following nonfarm uses *may be established*, subject to the approval of
4 the governing body or its designee in any area zoned for exclusive farm use
5 * * *

6 “* * * * *

7 “(k) A site for the disposal of solid waste approved by the governing body
8 of a city or county or both and for which a permit has been granted
9 under ORS 459.245 by the Department of Environmental Quality
10 together with equipment, facilities or buildings necessary for its
11 operation.” (Emphasis added.)

12 In their first assignment of error, petitioners argue that the county misconstrued applicable
13 law in approving the proposed facility before the facility was granted a solid waste disposal
14 permit from DEQ under ORS 459.245. In support of their first assignment of error,
15 petitioners argue that the use of the phrase “for which a permit has been granted” in ORS
16 215.283(2)(k) requires that DEQ first issue a permit under ORS 459.245, before a county can
17 issue conditional use approval for a solid waste facility. Petitioners also argue that a related
18 statute, former ORS 215.213(1)(g)(1979), governing the siting of solid waste disposal
19 facilities in Marion, Polk, Clackamas, Washington and Multnomah counties, provides
20 context for interpreting the use of the phrase “has been granted” as used in the statute. ORS
21 215.213(1)(g)(1979) provided that a solid waste disposal facility in any of the counties named
22 above is allowed to be established on EFU zoned land if the facility “has been ordered to be
23 established by the Environmental Quality Commission [EQC].” Petitioners maintain that
24 because that statute was enacted at the same time as the statute at issue, and contains
25 language requiring the establishment of a landfill if it “has been ordered” to be established by
26 EQC, it provides context indicating that the legislature intended prior action by DEQ, or the
27 EQC, as relevant, prior to local government approval of solid waste disposal facilities on
28 certain EFU-zoned land.

1 Intervenor and the county (respondents) respond that when all relevant language is
2 considered, the statute allows the county to approve a conditional use permit for a solid waste
3 disposal facility under ORS 215.283(2)(k) even though a DEQ permit has not yet been
4 issued. According to respondents, the statute’s use of the words “may be established” means
5 that the county may *approve* a conditional use application before a DEQ permit has been
6 issued, as long as the approval does not allow the use to be *established* until all other
7 conditions precedent to the establishment of the use have been met, including receipt of a
8 DEQ permit. Respondents argue that petitioners’ reading of ORS 215.283(2)(k) fails to give
9 meaning to all of the relevant language in the statute.

10 Respondents also disagree that ORS 215.213(1)(g)(1979) provides relevant context
11 for interpreting ORS 215.283(2)(k). Respondents point out that ORS 215.213(1)(g)(1979)
12 allowed landfills as uses permitted outright on EFU-zoned land in certain counties, without
13 the necessity for any local government land use approvals, consistent with the statutory
14 scheme that provides that uses specified in ORS 215.283(1) are uses allowed outright that
15 may not be subject to additional local governmental approval standards. *Brentmar v. Jackson*
16 *County*, 321 Or 481, 496, 900 P2d 1030 (1995). Respondents note, correctly, that uses
17 specified in ORS 215.283(2) may be subject to additional local government approval
18 standards. *Id.* Therefore, respondents argue, any context provided by reference to uses
19 identified in ORS 215.283(1) is not particularly relevant to uses identified in ORS 215.283(2)
20 in terms of local government approval timing, because the uses identified in ORS 215.283(1)
21 are not subject to additional local approval standards.

22 In interpreting the meaning of a statute, our task is to discern the intent of the
23 legislature. ORS 174.020. At the first level of the analysis, we examine the text and context
24 of the statute. *PGE v. Bureau of Labor and Industries*, 317 Or 606, 610-11, 859 P2d 1143
25 (1993). “Establish” is not specifically defined in the statute, but one of its ordinary meanings
26 is “to place, install, or set up in a permanent or relatively enduring position esp. as regards

1 living quarters, business, social life, or possession * * * and to bring into existence, create,
2 make, start, originate, found, or build usu[ally] as permanent or permanence in view.”
3 *Webster’s Third New International Dictionary*, 778 (1981). The statute contains two
4 prerequisites in order to establish, *i.e.* bring into existence, or build, a composting facility: (1)
5 the local government has approved the use; and (2) DEQ has issued a permit. The fact that
6 both local and DEQ approvals are listed in the statute means that approvals by both
7 government bodies and/or agencies are required. It does not mean that one government body
8 or agency’s approval is dependent on or a prerequisite of the other.

9 The plain language of the statute restricts a solid waste disposal facility from being
10 “established” prior to DEQ permitting, but does not prohibit local government approval of
11 the facility that is conditioned on receipt of the DEQ permit prior to establishment or building
12 of the facility. Petitioners’ focus on the phrase “a permit has been granted” found in ORS
13 215.283(2)(k) fails to give effect to all relevant provisions of the statute. We agree with
14 respondents that the plain language of ORS 215.283(2)(k) does not prohibit the county from
15 *approving* a conditional use permit application for a solid waste disposal facility before DEQ
16 has issued a permit under ORS 459.245, as long as the approval is properly conditioned to
17 require that DEQ issue the permit before the use can be *established*. Finally, for the reasons
18 pointed out by respondents, we do not think that ORS 215.213(1)(g)(1979) provides
19 particularly relevant context for interpreting ORS 215.283(2)(k).

20 Petitioners also argue that the fact that ORS 459.245, which is referenced in ORS
21 215.283(2)(k), requires automatic approval of a “completed application” if approval within
22 60 days does not occur, points to the legislature’s intent to require a DEQ permit prior to a
23 local government approving a solid waste disposal facility. However, ORS 459.245
24 specifically exempts solid waste facilities on EFU-zoned land, which are governed by ORS
25 459.055, from any streamlined approval process. *See* n 2.

1 Finally, petitioners dispute that the adopted and approved SAC program between
2 LCDC and DEQ, which dictates that a DEQ permit cannot be issued until receipt of an
3 affirmative LUCS from the county, negates the express language of ORS 215.283(2)(k). We
4 agree with petitioners that any part of the SAC program that is in conflict with the express
5 language of a statute cannot be given effect. However, we do not understand the county to
6 have relied on the SAC program to determine that it has authority to approve the proposed
7 facility; rather, the county relied on ORS 215.283(2)(k) to approve the facility. More
8 importantly, as explained above, ORS 215.283(2)(k) does not require that a DEQ permit
9 precede county approval, only that a DEQ is issued prior to establishment of the facility. For
10 that reason, the SAC program appears to be consistent with the statute.

11 **C. Second Assignment of Error**

12 In their second assignment of error, petitioners argue that even if the county properly
13 approved the application prior to issuance of a DEQ permit, the county's condition requiring
14 intervenor to secure a DEQ permit is improper because the condition does not require that the
15 facility approved by the county must be identical to the facility that is ultimately approved by
16 DEQ. Respondents answer that neither ORS 215.283(2)(k) nor any other statute or JCZO
17 provision requires consistency between a conditional use approved by the county and the
18 permit issued by DEQ. Therefore, respondents argue, condition 1 is proper.

19 We agree with respondents that ORS 215.283(2)(k) and JCZO 301.4(N) do not
20 require, either explicitly or implicitly, a determination of consistency between the county's
21 permit and the DEQ permit. If DEQ issues a permit for a facility that is different in operation
22 or design from the facility approved by the county, we agree with respondents that in that
23 event the applicant would not be able to establish the county-approved use without seeking a
24 modification of the county-approved facility to comport with the DEQ permit.

1 **D. Third Assignment of Error**

2 In their third assignment of error, petitioners argue that the BOC’s finding that the
3 buildings proposed to be located on the facility are “necessary” for the operation of the
4 composting facility under ORS 215.283(2)(k) is inadequate and is not supported by
5 substantial evidence in the record. As explained above, ORS 215.283(2)(k) allows a solid
6 waste disposal facility “together with equipment, facilities or buildings necessary for its
7 operation” on EFU land. The BOC found:

8 “The buildings associated with the Project (the shop building, storage
9 building, a scale house, and an office building) will be constructed in the
10 future and are considered necessary structures used in conjunction with the
11 composting operations.” Record 2.

12 Petitioners argue that the findings are inadequate because the decision fails to identify
13 operational characteristics of composting facilities or identify the function of the proposed
14 buildings, or explain how the proposed buildings support those operational characteristics.
15 Further, petitioners argue, the BOC’s conclusion is not supported by substantial evidence in
16 the record.⁴

17 Respondents answer that although the county’s findings are brief, they are adequate to
18 recognize that the proposed buildings are a necessary part of the composting operation, given
19 the proposed “Composting Facility Operations Plan” and the “Composting Facility Design
20 and Construction Plan” found at Record 537-665. According to respondents, those plans
21 explain that the shop and storage building provide a place for the operator to store equipment
22 and supplies, and the office provides a place for the operator to store necessary records that

⁴ Under ORS 197.835(9)(a)(C), LUBA is authorized to reverse or remand a land use decision if it determines that the local government:

“Made a decision not supported by substantial evidence in the whole record[.]”

Under OAR 661-010-0071(2)(a), LUBA is authorized to remand a land use decision where:

“The findings are insufficient to support the decision, except as provided in ORS 197.835(11)(b)[.]”

1 are required to be kept on the premises. Respondents also argue that even if the findings are
2 somehow deficient, evidence in the record clearly supports the county's decision that the
3 proposed structures are necessary for operation of the facility under ORS 215.283(2)(k).
4 Therefore, respondents argue, under ORS 197.835(11)(b), LUBA may affirm the county's
5 decision on this issue.⁵

6 LUBA may affirm a decision with inadequate findings pursuant to ORS
7 197.835(11)(b) when doing so allows us to remedy minor oversights and imperfections in
8 findings, but not when doing so will require LUBA to assume the role of the local
9 government in weighing evidence. *Terra v. City of Newport*, 36 Or LUBA 582, 589-90
10 (1999); *Marcott Holdings, Inc. v. City of Tigard*, 30 Or LUBA 101, 122 (1995). LUBA will
11 affirm a local government's decision, notwithstanding inadequate findings, where the
12 evidence in the record makes a finding of compliance with the applicable standard "obvious"
13 or "inevitable." *Id.* In the present appeal, we think respondents have met the rather heavy
14 burden of pointing to evidence in the record which "clearly supports" the BOC's finding that
15 the proposed buildings are "necessary" for operation of the composting facility. Petitioners
16 cite to no contradictory evidence in the record. Based on the plans at Record 537-665, we
17 agree with the county that the record "clearly supports" a finding that the proposed buildings
18 are "necessary" for the composting facility.

19 The first, second and third assignments of error are denied.

⁵ ORS 197.835(11)(b) provides:

"Whenever the findings are defective because of failure to recite adequate facts or legal conclusions or failure to adequately identify the standards or their relation to the facts, but the parties identify relevant evidence in the record which clearly supports the decision or a part of the decision, the board shall affirm the decision or the part of the decision supported by the record and remand the remainder to the local government, with direction indicating appropriate remedial action."

1 **FOURTH ASSIGNMENT OF ERROR**

2 JCZO 301.5 provides that the county may approve a composting facility only where
3 the use:

4 “A. Will not force a significant change in accepted farm or forest practices
5 on surrounding lands devoted to farm or forest use; and

6 “B. Will not significantly increase the cost of accepted farm or forest
7 practices on surrounding lands devoted to farm or forest use.”

8 JZCO 301.5 also provides:

9 “The applicant may demonstrate that these criteria will be satisfied through the
10 imposition of conditions. Any conditions so imposed must be clear and
11 objective.”

12 The county adopted two pages of findings in support of its conclusion that the application
13 complies with JCZO 301.5.⁶ In the fourth assignment of error, petitioners argue that the

⁶ The county found:

“To satisfy JCZO 301.5 and be allowed as a conditional use in the RL zone, the Project must not force a significant change in accepted farm practices on surrounding lands devoted to farm use or significantly increase the costs of such farm practices on surrounding lands. For purposes of evaluating potential impacts to farm uses, the County adopts the Applicant’s proposed 2-mile analysis area from the boundary of the Project site (‘Analysis Area’). The majority of the land within the Analysis Area is zoned RL or exclusive farm use, and the farming activities are predominately dryland farming or vacant rangeland, although there are a few irrigated farmland parcels, as shown on Applicant’s Analysis Area map in the record.

“The Project can be characterized as an outdoor storage area for greenstock, with hay bunkers constructed in a 200 by 200 area to hold the feedstock. The bunkers will contain the greenstock, lime, soft rock, sawdust, and pumice, and Applicant will move the greenstock from the bunkers to the windrows as necessary. Each windrow will be approximately 500 to 800 feet long, 12 feet wide, and 6 feet tall, once the facility is fully operational. Windrows will be spaced approximately 15 feet apart, center to center. As explained in the Maul Foster Alongi Water Quality Letter dated June 10, 2009, water must be applied to the windrows to maintain moisture levels between 35 to 55 percent for the most part efficient composting. The facility will also be operated under an operations plan, as approved by DEQ. The operations plan provides best management practices and operational protocols to manage dust, odor, and other vectors (e.g., birds) associated with the Project. These measures will minimize the likelihood of greenstock being carried by wind or birds onto adjacent lands and contaminating farming operations within the Analysis Area. For additional assurance, a condition is imposed requiring Applicant to control the spread of noxious weeds in the Analysis Area. In addition, Applicant will provide a vegetative barrier along the north and west boundaries of the Project site, as conditioned below.

1 county's findings that the proposed composting facility will not force a significant change in
2 accepted farming practices and will not substantially increase the cost of accepted farm
3 practices on lands devoted to farm use are inadequate and are not supported by substantial
4 evidence in the record. ORS 197.835(9)(C); OAR 661-010-0071(2)(a). Petitioners argue
5 that county erred in relying on the applicant's Operations Plan and its recommendation to
6 implement Best Management Practices (BMP) to mitigate the possibility of contamination to
7 the closest farm property to the proposed facility from the spread of weeds, seeds, and dust,

"All stormwater will be managed on-site and the Applicant has demonstrated that the Project poses no potential risk of contamination to surface water or groundwater. The on-site stormwater management system (lined retention ponds and berms) is designed to handle a 100-year, 24-hour storm event, or up to 2.8 inches of rain. The stormwater system and the management protocols ensures that no stormwater will be discharged off-site or into off-site drainages. Given the geology of the area, will logs in the area, and other evidence in the record, the Project does not pose a risk to groundwater or irrigation sources in the area.

"The Applicant's traffic impact study demonstrates capacity on the area roads and acceptable levels of service. Thus, traffic associated with the Project will not adversely impact any farm-related traffic.

"The Applicant has adequately demonstrated that the Project's design, best management practices, and operational protocols ensure that there will be no significant change to farming practices within the Analysis Area.

"Given that the Project will not result in significant changes to farming practices, the Project will also not significantly increase farming costs within the Analysis Area. Factors that could increase farming costs are water contamination, weed contamination in crops, changes in farming patterns, lack of irrigation water, or overspray. The Applicant has demonstrated that all stormwater and runoff will be managed on-site and the Project will have no off-site impacts to surface water or groundwater. Best management practices and operational protocols like dust control, windrow turning, and screening and buffering will also prevent off-site spreading of seeds or particles that could significantly alter farming operations in the Analysis Area. These measures ensure that farmers within the Analysis Area will not incur extra expense in field hand time as a result of the Project. For additional assurance, a condition of approval is imposed requiring that the Applicant control the spread of noxious weeds. *Adequate water supply is available for the Project* and will not impact the water availability for farm irrigation, and the Applicant does not propose any aerial spraying that could impact adjacent farming operations. Accordingly, the Project will not significantly increase the cost of farming operations within the Analysis Area. In fact, the Project offers area farmers a local source of compost, which can help reduce operating costs, improve soil quality, and reduce costs associated with transporting the material to farms from non-local sources.

"As conditioned, the Project will not force a significant change in accepted farm practices on surrounding lands devoted to farm use and it will not significantly increase the costs of such farm practices on surrounding lands, and JCZO 301.5 is met." Record 3-4 (emphasis added.)

1 because the use of BMPs does not take into account sudden wind events during storage and
2 during mixing of windrows.

3 Respondents respond that the findings specifically address the potential for seeds
4 from the facility being blown onto adjacent properties and contaminating those crops, and
5 determined that the proposed operations plan and use of BMPs will minimize the likelihood
6 of contamination. Record 537-612. Respondents also point out that to the extent there might
7 be some change in farming practices on surrounding properties, there is no evidence in the
8 record that those changes will be “significant.”

9 With the exception of one of the county’s findings, that there is adequate water supply
10 to the property, an issue which we discuss below in our resolution of the sixth assignment of
11 error, we agree with respondents that the county’s findings are adequate to explain that, based
12 on the applicant’s operations plan and its recommendation that the facility use BMPs, that
13 with those practices in place, the proposed facility will not force a significant change in or
14 significantly increase the cost of accepted farming practices. Given petitioners’ criticisms of
15 the operations plan and the proposed BMPs, the county might well have chosen not to rely on
16 the operations plan. However, we cannot say that those criticisms so undermine the
17 operations plan as to render it evidence a reasonable decision maker would not rely on. The
18 operations plan constitutes substantial evidence on which the county was entitled to rely,
19 even where petitioners introduced conflicting evidence. *Von Lubken v. Hood River County*,
20 24 Or LUBA 271, 278 (1992), *rev’d and remanded on other grounds* 118 Or App 246, 846
21 P2d 1178 (1993).

22 The fourth assignment of error is sustained, in part.

23 **FIFTH ASSIGNMENT OF ERROR**

24 JCZO 414.6(D) requires that the proposed facility “will not adversely affect
25 agricultural or forestry uses.” In addressing JCZO 414.6(D), the county adopted the
26 following findings:

1 “JCZO 414.6(D) requires that the proposed development not adversely affect
2 agricultural or forestry uses. The Applicant demonstrated under JCZO 301.5
3 that the Project will not significantly impact farm uses within the Analysis
4 Area and therefore there is a basis to conclude that JCZO 414.6(D) is
5 satisfied.” Record 7.⁷

6 Petitioners argue that it was error for the county to find that because the application complies
7 with JCZO 301.5 it also complies with JCZO 414.6(D), because the two criteria require
8 different analyses and the county incorrectly qualified the “no adverse effect” standard of
9 JCZO 414.6(D) by relying on the “no significant effect” standard. Respondents respond that
10 the finding quoted above is adequate because the analyses under JCZO 301.5 and JCZO
11 414.6(D) are similar in their requirement that the county analyze negative impacts on farming
12 practices.

13 While we tend to agree with respondents that the evidence that the county may
14 consider in determining whether JCZO 414.6(D) is satisfied will likely be the same evidence
15 that the county considers in evaluating JCZO 301.5, we agree with petitioners that the county
16 erred in concluding that a determination that JCZO 301.5 is satisfied necessarily also means
17 that JCZO 414.6(D) is satisfied. The two standards require different analyses, and it is not
18 clear to us that despite those differences evidence that is sufficient to demonstrate that the
19 application complies with JCZO 301.5 is necessarily sufficient to demonstrate that the
20 application also complies with JCZO 414.6(D) The county’s findings are not sufficient to
21 explain why the county believes that the evidence is sufficient to demonstrate that the

⁷ The final decision incorporated by reference the staff report dated February 12, 2009 that concluded:

“As noted previously under Section 301.5(A), the proposed use will not adversely affect agricultural uses, as the proposal, as conditioned, will provide a locally-produced product that is appropriate to the nature of the existing surrounding uses. The uses that exist are generally devoted to farming, rangeland, or surface mining, and the compost facility is generally a similar impact to these existing uses. Further, the composting facility will be professionally operated, and will implement industry standard operating procedures that will minimize impacts to adjacent uses. As noted in the applicant’s proposal, the management has the ability to monitor and adjust operations as necessary.” Record 1088.

1 application complies with both standards and we agree with petitioners that, absent such an
2 explanation, the findings are inadequate.

3 The fifth assignment of error is sustained.

4 **SIXTH, SEVENTH AND EIGHTH ASSIGNMENTS OF ERROR**

5 **A. JCZO 602(C)**

6 JCZO 602(C) requires that an application for a conditional use must demonstrate that:

7 “Adequate facilities and services are available or can be made available to
8 serve the proposed use, including, but not limited to, water supply, sewage
9 disposal, electric power, law enforcement service and fire protection[.]”

10 The county found as relevant:

11 “Under JCZO 602(C), adequate facilities must be available to serve the
12 Project, including, but not limited to, water supply, sewage disposal, electric
13 power, law enforcement and fire protection. As discussed under JCZO 602(B)
14 above, there is adequate water supply for the Project. * * * Electricity and
15 police services are available, and fire service is available through a contract
16 with the Jefferson County Fire District. In addition, Applicant will have on-
17 site aboveground water storage to use for fire suppression. No other facilities
18 are within the scope of JCZO 602(C), and the Applicant has demonstrated
19 with the evidence in the record that there are adequate facilities available to
20 serve the Project.” Record 5.

21 **B. Sixth and Seventh Assignments of Error**

22 In their sixth assignment of error, petitioners argue that the county’s findings that
23 there is adequate water supply for the project are inadequate and that there is not substantial
24 evidence in the record to support the county’s conclusion. In their seventh assignment of
25 error, petitioners also argue that the county’s imposition of condition 18, which requires a
26 post-decision determination regarding the amount of water that is necessary to serve the
27 proposed facility, amounts to an unlawful deferral of a required finding.⁸

⁸ Condition 18 provides:

“Prior to being operational, the applicant shall provide documentation to the County Planning Department, that adequate water is available to serve the facility and the intensity of the proposed use.” Record 9.

1 JCZO 602(B), referenced above, focuses on the impact that the proposed development
2 will have on abutting and surrounding properties, while JCZO 602(C) focuses on the
3 availability of services to serve the proposed development.⁹ Petitioners argue, correctly, that
4 the county improperly relied on its determination that JCZO 602(B) was satisfied to conclude
5 that there is an adequate water supply for the proposed development, and that the county's
6 findings are inadequate to explain how JCZO 602(C) is met.

7 Petitioners also argue that the county erred in failing to determine the amount of water
8 that is needed in order for the facility to have an adequate water supply under JCZO 602(C),
9 and there is no evidence in the record regarding the amount of water that is needed to support
10 the applicant's operations plan, much of which relies on water to mitigate the potential
11 impacts of the facility on surrounding farms. Respondents respond by noting the three
12 sources of water that will supply water to the facility: (1) an on-site well up to 5,000 gallons
13 per day; (2) a Deschutes Valley Water District off-site hydrant; and (3) water stored in water
14 tanks on the property. However, respondents do not point to anything in the record that
15 indicates the projected amount of water that will be needed to serve the facility and
16 implement the applicant's operations plan that relies on water for various operational
17 practices. We agree with petitioners that, absent such evidence, there is not substantial
18 evidence in the record to support the county's finding that adequate water is available to
19 serve the development.

⁹ JCZO 602(B) requires the county to determine that the facility will have "minimal adverse impact on * * * abutting properties and the surrounding area compared to the impact of development that is permitted outright." In determining that JCZO 602(B) was met, the county determined in relevant part that:

"Applicant's oral and written testimony demonstrate that the Project will have no adverse impact on groundwater or surface water within the Analysis Area. High Desert has the ability to obtain water from the Deschutes Valley Water District in addition to an existing well (in an amount up to 5,000 gallons per day), and therefore the Project will have no impact on water availability for residential and irrigation wells in the Analysis Area. * * *" Record 4-5.

1 As noted, in the seventh assignment of error, petitioners argue that condition 18
2 amounts to an unlawful deferral of a finding that an applicable approval criterion is met.
3 However, because the county adopted findings that concluded that JCZO 602(C) is satisfied,
4 it does not appear that condition 18 deferred a finding of compliance with JCZO 602(C) to a
5 later determination. While it seems inconsistent for the county to determine there is adequate
6 water to serve the project and then impose a condition of approval requiring documentation
7 of the amount of water necessary to serve the development, we disagree with petitioners that
8 the county deferred finding compliance with JCZO 602(C).

9 The sixth assignment of error is sustained.

10 The seventh assignment of error is denied.

11 **C. Eighth Assignment of Error**

12 As noted above, the county found that fire service is available through a contract with
13 the Jefferson County Fire District, and that on-site water storage tanks will provide water for
14 fire suppression. In their eighth assignment of error, petitioners argue that the county's
15 finding that there are adequate fire protection services to serve the development are
16 inadequate.

17 Petitioners first argue that there is inadequate access for fire trucks because the access
18 easement has inadequate width in certain areas, and that there is no evidence in the record
19 that an agreement with the Jefferson County Fire Department exists. Respondents respond
20 that the relevant language of JCZO 602(C) provides that the applicant may show that
21 adequate services "can be made available," and that there is evidence in the record that the
22 county fire department has confirmed that it sees no obstacles to providing fire services. We
23 agree with respondents that there is evidence in the record to support the county's conclusion
24 that adequate fire services are or can be made available with respect to adequate access and
25 the available of fire protection services from the county fire department.

1 Petitioners also argue that the county's findings regarding fire protection are
2 inadequate due to the same lack of clarity and information regarding the amount of water
3 needed to operate the facility as set forth in the sixth assignment of error. The county's
4 findings appear to rely on the existence of on-site water storage for water suppression.
5 However, evidence in the record appears to suggest that those on-site water storage tanks are
6 also an integral part of the applicant's operations plan for minimizing dust and seed blowing
7 and for use in the windrows. On remand, the county must consider whether there is adequate
8 water supply for the proposed facility, including any water that will be stored on-site for
9 purposes of fire suppression.

10 The eighth assignment of error is sustained, in part.

11 The county's decision is remanded.