BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

TONQUIN HOLDINGS, LLC,
Petitioner,

vs.

CLACKAMAS COUNTY,
Respondent,

and

FRIENDS OF ROCK CREEK, RAINDROPS TO REFUGE, and FRIENDS OF THE TUALATIN RIVER NATIONAL WILDLIFE REFUGE,
Intervenors-Respondents.

LUBA No. 2011-025

FRIENDS OF ROCK CREEK,
Petitioner,

vs.

CLACKAMAS COUNTY,
Respondent,

and

TONQUIN HOLDINGS, LLC,
Intervenor-Respondent.

LUBA No. 2011-026

FINAL OPINION
AND ORDER

Appeal from Clackamas County.

Steven L. Pfeiffer, Portland, filed a petition for review and a response brief and argued on behalf of petitioners/intervenors Tonquin Holdings, LLC. With him on the brief were Seth J. King and Perkins Coie LLP.

Erin Madden, Portland, filed a petition for review and a response brief and argued on behalf of petitioner/intervenor Friends of Rock Creek. With her on the brief was Cascadia Law PC.

D. Daniel Chandler, Assistant County Counsel, Oregon City, filed a response brief and argued on behalf of respondent.

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

REMANDED 08/26/2011

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

Opinion by Holstun.

NATURE OF THE DECISION

Petitioners appeal a county hearings officer's conditional use approval for a new surface mining operation on a 35.5 acre parcel.

THE PARTIES

Petitioner Tonquin Holdings LLC (Tonquin) is the owner of the property and the applicant below. In LUBA 2011-025, Tonquin challenges conditions imposed by the county's hearings officer in approving its application. Friends of Rock Creek (FORC), Raindrops to Refuge, and Friends of the Tualatin River National Wildlife Refuge (collectively Friends) move to intervene on the side of respondent. There is no opposition, and the motions are granted.

In LUBA 2011-026, Friends challenge the hearings officer's interpretation and application of certain portions of the county's zoning and development ordinance. Tonquin moves to intervene on the side of respondent. There is no opposition and the motion is granted. LUBA Nos. 2011-025 and 2011-026 have been consolidated for LUBA review.

REPLY BRIEFS

Tonquin moves to submit a reply brief to respond to new matters raised in the county's response brief. Friends also move to submit a reply brief to respond to new matters raised in Tonquin's response brief. There is no opposition, and the motions are granted.

FACTS

The subject property is located at the intersection of SW Tonquin Road and SW Morgan Road in unincorporated Clackamas County. The subject property consists of approximately 35.5 acres. The surrounding area is a mix of rural residences, rural businesses, conservation areas, publically owned property, and active and reclaimed mining quarries. Immediately bordering the property are the Tualatin River National Wildlife Refuge (Wildlife Refuge) to the north, a gun club north of Tonquin Road, a reclaimed quarry

presently used by Tualatin Valley Fire and Rescue to the east across Morgan Road, an active quarry to the southeast across Morgan Road, rural residences to the south, open space associated with the Rock Creek floodplain to the west, and a dog kennel to the northwest.

The property is zoned Rural Residential Farm and Forest–5 Acre (RRFF–5) and is undeveloped except for an electrical transmission line that traverses the eastern portion of the property from north to south. In the past, the property supported agricultural and some forestry uses, but is not currently in agricultural or forest use. The property falls within the Tonquin Geologic Area, a 17 square mile geological feature within Washington and Clackamas Counties. The property includes a basalt deposit, which Tonquin proposes to mine.

The property also contains three wetlands, one of which is the primary focus of these appeals. Wetland A is approximately 1.01 acres in size and is located entirely within the property towards its eastern end. Wetland B straddles the northern portion of the property line shared with the Wildlife Refuge. Although Wetland B is predominately located on the Wildlife Refuge, approximately .72 acre of Wetland B is located within the subject property. Wetland C straddles the subject property's western property line. Approximately .42 acre of Wetland C is located on the subject property with the remainder of Wetland C extending onto neighboring residential property to the southwest, referred to as the Kramer property. The portion of Wetland C located on the Kramer property is subject to a conservation easement for the benefit of Clackamas County. Under Tonquin's proposed mining plans, the 2.2 acre of wetlands on the subject property (Wetland A and portions of Wetlands B and C) would be mined with the prerequisite that Tonquin obtain all necessary state and federal permits. Record 26. Tonquin also proposed to mitigate the impacts of mining those wetlands through a wetlands bank, if necessary, as a result of state and federal permitting. Record 1103.

Tonquin submitted its application for a conditional use permit to establish a new surface aggregate mining operation on the property on June 10, 2010. A public hearing was

held on the application on October 28, 2010. County staff initially recommended a denial of the permit, but changed their position after Tonquin submitted additional information into the record during the first open comment period following the hearing. On February 22, 2011, the hearings officer issued an order approving the application and attached over 130 conditions. Two of those conditions are at issue in Tonquin's appeal—Condition #55 and Condition #13f. Condition #55 prohibits Tonquin from mining the portions of Wetlands B and C located on the property.[1] Condition #13f requires all unmined wetlands to be subject to a conservation easement for the benefit of the Surface Water Management Agency of Clackamas County (SWMACC).[2]

FIRST ASSIGNMENT OF ERROR (TONQUIN)

The subject property is zoned RRFF-5, and the proposed surface mine is a conditional use in the RRFF-5 zone. The Clackamas County Zoning and Development Ordinance (ZDO) conditional use approval criteria are set out at ZDO 1203.01.[3] The conditional use approval

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[1] Condition #55 states:

> "The Quarry operator shall not excavate Wetlands B and C. These wetlands shall be protected through wetland buffers as prescribed by [Clackamas County Water Environment Services (WES)] regulations. The applicant shall submit a revised site plan to the Planning Division and WES showing required vegetated buffers around Wetlands B and C." Record 40-41.

[2] Condition #13f states:

> "Following approval from SWMACC of buffers to wetlands and Rock Creek, along with any associated Buffer Variance related thereto, all buffers, remaining wetlands and portions of Rock Creek located on the subject site shall be protected within a Conservation Easement for the benefit of SWMACC." Record 43-44.

[3] ZDO 1203.01 states in pertinent part:

> "The Hearings officer may approve a conditional use pursuant to Section 1300 if the applicant provides evidence substantiating that all the requirements of this ordinance relative to the proposed use are satisfied and demonstrates that the proposed use satisfies the following criteria:
>
> "* * * *

criterion at issue in Tonquin's first assignment of error is ZDO 1203.01(D). ZDO 1203.01(D) prohibits approval of a conditional use if the conditional use would "alter the character of the surrounding area in a manner that substantially limits, impairs, or precludes the use of surrounding properties for the primary uses allowed in the underlying zoning district." *See* n 3. The "primary uses" of land within the RRFF-5 zone for purposes of this assignment of error include "public and private conservation areas" described by ZDO 309.03(D) and "fish and wildlife management programs" contained within ZDO 309.03(E).[4] The hearings officer determined that the Wildlife Refuge to the north of the subject property which is the site of the larger portion of Wetland B qualifies as a "public conservation area" and is also subject to a "fish and wildlife management program." Record 26. Additionally, the hearings officer concluded that a conservation easement held by the county on the portion of Wetland C extending onto the Kramer property to the south of the subject property constitutes a "private conservation area." *Id.* The hearings officer interpreted ZDO 1203.01(D) to prohibit approval of a conditional use permit that "substantially limits, impairs, or precludes" these "primary uses" of adjacent RRFF-5 zoned property.

The hearings officer ultimately found that allowing Tonquin to mine Wetlands B and C as proposed would likely cause the remaining portions of those wetlands on adjoining properties to cease functioning as wetlands:

> "I find that there is substantial evidence in the record that if partially filled, Wetlands B and C are likely to be degraded by a lack of sufficient water,

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> "D. The proposed use will not alter the character of the surrounding area in a manner that substantially limits, impairs, or precludes the use of surrounding properties for the primary uses allowed in the underlying zoning district."

[4] ZDO 309.03 lists the "primary uses" of land within the RRFF-5 zone. Among those "primary uses" are the following:

> "D. Public and private conservation areas and structures for the conservation of water, soil, forest, or wildlife habitat resources;
>
> "E. Fish and wildlife management programs[.]"

> changed circulation patterns, potential dewatering, introduction of weeds and invasive plan species, and loss of wildlife habitat. In short, the record shows that if [Wetlands B and C are] partially filled, the remaining portion of the wetlands have a likelihood of no longer functioning as wetlands. This represents a substantial impairment or limitation to a primary use under ZDO 1203.01(D). * * *." Record 28-29.

To avoid having the proposed mine cause the portions of Wetlands B and C located on adjacent properties to cease functioning as wetlands, the hearings officer imposed Condition 55, which prohibits excavation of Wetlands B and C, and requires that the wetland and a buffer area around the wetlands be protected from mining. Although Tonquin does not assign error to the hearings officer's findings regarding Wetland B, it does assign error to the hearings officer's findings regarding Wetland C.

In its first subassignment of error, Tonquin argues the hearings officer misconstrued ZDO 1203.01(D) in two ways—first by failing to give sufficient and correct meaning to the word "substantially," and second by failing to apply ZDO 1203.01(D) with sufficient geographic scope. In its second subassignment of error, Tonquin argues that even if the hearings officer did not misconstrue ZDO 1203.01(D), his decision is not supported by substantial evidence. We address each subassignment of error in turn.

A. Misconstruction of Applicable Law

In reviewing Tonquin's challenges to the hearings officer's interpretation of ZDO 1203.01(D), our standard of review is whether the hearings officer "[i]mproperly construed the applicable law[.]" ORS 197.835(9)(a)(D). Because the challenged decision was not rendered by the county governing body, the deferential standard of review that would otherwise apply under ORS 197.829(1) and *Siporen v. City of Medford*, 349 Or 247, 259, 243 P3d 776 (2010) does not apply in this case.

1. Substantially

Although the hearings officer did not specifically explain his understanding of the word "substantially" in ZDO 1203.01(D), we see no support for Tonquin's assertion that he

did not understand that a proposed conditional use only violates ZDO 1203.01(D) if it "*substantially* limits, impairs, or precludes the use of surrounding properties for the primary uses allowed in the underlying zoning district." By any reasonable measure, if the proposed mine would cause the off-site portions of Wetlands B and C on adjoining property to "no longer function[] as wetlands," that impact would qualify as a "substantial[] limit[], impair[ment], or preclu[sion of] the use of surrounding properties for [a] primary use[] allowed in the underlying zoning district." We reject Tonquin's suggestion that the hearings officer failed to appreciate that conditional uses only violate ZDO 1203.01(D) if they "alter the character of the surrounding area in a manner that *substantially* limits, impairs, or precludes the use of surrounding properties for the primary uses allowed in the underlying zoning district."

Tonquin also argues the hearings officer misconstrued ZDO 1203.01(D) by finding it could be violated by a mere "likelihood" of impact:

> "The hearings officer does not quantify the degree of likelihood so it could theoretically be only a *de minimis* threat. In any event, pursuant to LUBA's construction of the term 'substantially' in *Henkel* [*v. Clackamas County*, 56 Or LUBA 495 (2008)], the likelihood must be very high in order to violate [ZDO] 1203.01(D). * * *"[5] Tonquin Petition for Review 7.

Friends respond that ZDO 1203.01(D) imposes no such burden on the hearings officer.

We agree with Friends that the word "substantially" in ZDO 1203.01(D) modifies the words "limits, impairs, or precludes" and that ZDO 1203.01(D) does not require the hearings officer to find such limits, impairment or preclusion are "very likely." Again, ZDO 1203.01(D) requires the hearings officer to find "[t]he proposed use will not alter the character of the surrounding area in a manner that substantially limits, impairs, or precludes the use of surrounding properties for the primary uses allowed in the underlying zoning

[5] *Henkel* concerned a ZDO requirement that after a permit application is denied a "substantially similar" application could not be submitted sooner than two years after the permit denial. In *Henkel*, we concluded that that code language required that the applications be "very similar."

district." ZDO 1203.01(D) does not expressly require the hearings officer to find a particular degree of "likelihood" of the proscribed alteration of the character of the surrounding properties. Therefore, the question under ZDO 1203.01(D) reduces to a straightforward substantial evidence question. Is the hearings officer's finding that mining the portions of Wetlands B and C located on the subject property would result in a violation of ZDO 1203.01(D) supported by substantial evidence? We address that question under Tonquin's second subassignment of error below.

2. Adjacent Property

Tonquin relies on our decision in *Gordon v. Clackamas Country*, 10 Or LUBA 240 (1984), to conclude that the hearings officer erred by finding impacts to adjoining properties to the north and south were adequate to support a finding that mining the portions of Wetlands B and C on the subject property will have impacts on those adjoining properties that violate ZDO 1203.01(D). *Gordon* concerned an airport expansion that would have required acquisition of adjoining residential properties, with the result that the persons occupying those to-be-acquired residential properties would be dislocated. In rejecting the petitioner's ZDO 1203.01(D) challenge in *Gordon*, we explained:

> "As to the issue of persons having to relocate, the Board notes that [ZDO] 1203.01(D) does not impose an absolute prohibition on a use which alters the character or other uses of the surrounding properties. The provision simply requires that the use not alter the character of the surrounding area in a way which 'substantially limits' surrounding uses allowed in the underlying zone. Neither the petitioners nor respondents define what that area is, but the Board believes it is only reasonable to consider the area to be larger than that immediately [a]ffected by new construction at the airport. The Board concludes that dislocation of persons immediately adjacent to the proposed use does not violate [ZDO] 1203.01(D)." 10 Or LUBA at 271.

From the above language in our decision in *Gordon*, Tonquin attributes two conclusions to LUBA. The first conclusion is that "after *Gordon*, a proper application of [ZDO 1203.01(D)] will require the decision-maker to define the term 'substantially,' identify any projected impacts, and then consider whether those impacts rise to the level of

'substantially,' adversely affecting surrounding uses." Tonquin Petition for Review 8. The second conclusion is "that a conditional use could permissibly have more substantial impacts on parties closest to a proposed conditional use (including dislocating existing uses) and yet not 'substantially' limit, impair, or preclude primary uses for purposes of [ZDO] 1203.01(D). *Id.*

Tonquin reads far too much into the above quoted language from *Gordon*. The quoted paragraph addressing ZDO 1203.01(D) from our decision in *Gordon* comes near the end of a 57-page slip opinion that resolves twenty-four assignments of error. Given the small role the above-quoted paragraph played in our decision in *Gordon*, it is appropriate to view that language in context, and viewed in context that language in *Gordon* does not reach either of the hard and fast conclusions that Tonquin attributes to LUBA.

It appears from our decision in *Gordon* that the persons who were going to be "displaced" occupied residential properties that were to be condemned to expand the airport. In that context, the quoted paragraph can be read simply to say that the "surrounding area" referred to in ZDO 1203.01(D) is not properly limited to the adjoining properties that are to be acquired for the airport expansion and the surrounding area is properly viewed as including some of the properties that will remain occupied by non-airport uses after that airport expansion and may be impacted by airport operations. The present case does not present such a circumstance.

We do not read our decision in *Gordon* to announce any hard and fast rules. It does not "require the decision-maker to define the term 'substantially,' identify any projected impacts, and then consider whether those impacts rise to the level of 'substantially' adversely affecting surrounding uses." And it does not preclude the possibility that in particular cases impacts to adjoining uses *only* may be sufficient to constitute a violation of ZDO 1203.01(D). Indeed as Friends point out, a number of subsequent cases have considered application of ZDO 1203.01(D) where only impacts on adjacent uses were in dispute, and

LUBA did not conclude that the focus on adjoining property in those cases was too narrow. *Moore v. Clackamas County*, 26 Or LUBA 40. 46-48 (1993); *Reynolds v. Clackamas County*, 21 Or LUBA 412, 415-17 (1991). To the extent Tonquin reads our decision in *Gordon* for the general proposition that ZDO 1203.01(D) may not be applied to adjoining properties only and could not be violated if any substantial limits, impairment or preclusion attributable to the conditional use are limited to adjoining properties, we reject that reading.

Tonquin's first subassignment of error is denied.

B. Substantial Evidence

1. The Hearings Officer's Findings Concerning Wetlands B and C

In the findings quoted at the beginning of our discussion of this assignment of error, the hearings officer ultimately concluded that if the portions of Wetlands B and C located on Tonquin's property are mined, the remaining portions of the Wetland B and C likely would "no longer function[] as wetlands" and that such an impact on Wetlands B and C "represents a substantial impairment or limitation to a primary use under ZDO 1203.01(D). * * *" In reaching that ultimate conclusion and decision that Condition #55 is necessary to assure compliance with ZDO 1203.01(D), the hearings officer explained at some length that he relied in large part on expert testimony by Friends' expert Joseph D. Leyda of Leyda Consulting Inc. (LCI) regarding potential impacts to off-site wetlands rather than expert testimony provided by Tonquin's experts Westlake and Terra Science, Inc (TSI). We set out those findings in some length below:

> "5. The applicant's primary argument with respect to all three wetlands is that they can be filled without the need of any County permits and are subject only to the state wetland fill regulations. Exhibit 89, TSI memorandum. Alternatively, the applicant has provided expert testimony stating that the wetlands are not of very high resource value and that the wetland functions that they provide can be compensated by mitigation off site. Exhibit 115, Exhibit 2. Finally, the applicant argues that filling those portions of Wetlands B and C on the subject property 'as proposed by the applicant, would minimize and avoid substantial probability of impact or injury to offsite wetland, wildlife,

and wildlife habitats...' Exhibit 115, TSI memorandum. This conclusion appears to be based at least in part [on] recommended conditions identified in Exhibit 115, Exhibit 2.

"6. A report provided FORC by Leyda Consulting Inc. ('LCI') found that presently, Wetland C is performing most ecological functions at a moderate or high level. The LCI report seems to agree with the TSI report that all three wetlands are perched wetlands which are fed by surface water and some shallow groundwater. The LCI reports that in particular, the water quality and aquatic support functions of Wetland C are very healthy at this time. The report goes on to state that all of these functions are related and that compromising one may compromise others and destabilize the entire system. Exhibit 47, Attachment 6. Specifically, the LCI report finds that removing the portion of both Wetland B and C will alter the perched groundwater flow which currently feeds the balance of those wetlands, threatening the supply of water to the wetlands. The LCI report states that this impact cannot be mitigated through drip line or other surface water systems intended to mitigate for loss of surface and groundwater inputs into the wetlands. In addition, the report states that those types of mitigation systems can change the circulation patterns of the wetland and introduce invasive plant seeds and pollutants into the wetland. The LCI report also states that the applicant's wetland buffer report shows anticipated surface water flows going toward the mine if portions of Wetland B and C are filled. The result, according to LCI is that the water sources currently feeding the wetlands may simply seep out of the mine walls resulting in the wetlands becoming dewatered. All of these conclusions are reiterated and supported by additional research in a second LCI report dated December 6, 2010. Exhibit 112, Attachment 3. In particular, this report found that attempting to mitigate the loss of surface and subsurface water to Wetlands B and C through the application of treated stormwater is likely to harm the wetlands and at a minimum change the plant communities in the wetlands and allow an invasion of weeds.

"Both LCI reports also found that 'Wetland C provides suitable habitat for red-legged frogs and other native amphibians.' Exhibit 47, Attachment 6. According to LCI, filling of Wetland C would reduce habitat area for both red-legged frogs and blue herons and other species. This information is substantiated by Jim Kramer's onsite observation of red-legged frogs and western pond turtles on his portion of Wetland C. Exhibit 108. The presence of these species was confirmed in LCI's sensitive species report dated September 28, 2010. Exhibit 77.

"7. In reviewing the above argument, I find the applicant's position to be unpersuasive. The applicant's position that the presence of the

wetlands is academic because they can filled by application to DSL and the Army Corps is rebutted by the fact that the wetlands are part of this application. Furthermore, the applicant's assertions that the wetlands will continue to function and will not be substantially impaired are conclusory and do not attempt to rebut the specific information provided in the LCI reports discussed above. Finally, the applicant's offer of additional conditions as set forth in the TSI report of December 9, 2010 (Exhibit 115) while valuable to preserve unfilled wetlands, do not address the central problems identified by opponents which are discussed in more detail below.

"8. After reviewing the evidence identified above and the entire record, I have reached the following conclusions with regard to Wetlands B and C.

"a. First, the water inputs to both wetlands are a combination of surface flows, shallow groundwater flows and some precipitation. There is disagreement between the parties on the question of whether all three wetlands are hydrologically connected to Rock Creek. However, as a whole, the record shows that the mining operation is unlikely to eliminate the total supply of water to Wetlands B and C, so long as the existing wetland boundaries are retained and protected. This conclusion is supported by the hydrology reports discussed above. Therefore, the presence of Wetlands B and C, and the fact that they both straddle boundaries with surrounding properties is not a fact, by itself, upon which to deny this application for failure to comply with ZDO 1203.01(D).

"b. Second, I find that the record shows that the applicant's proposed elimination and filling of portions of Wetlands B and C will substantially limit and impair the conservation uses that those wetlands are dedicated to on surrounding lands. The conservation uses at issue are directly related to retaining the wetlands as functioning wetlands for all the ecological and habitat purposes that wetlands provide. These wetlands are perched wetlands which are dependent mostly upon flows from the upland areas immediately surrounding them. The applicant's wetland assessment, found in the application binder at 'Tab J' found that all three wetlands 'are generally in good condition with only scattered areas of non-native or invasive weeds and little or no disturbance.' The opponents' evidence similarly suggested that Wetlands B and C are healthy and currently have high wetland function. The two LCI reports and other evidence in the record convinces me that mining through a portion of Wetlands B and C will reduce their ecological and wildlife habitat value as wetlands and is likely to substantially

> reduce or eliminate the conservation use which the wetlands have been preserved to maintain." (Footnotes omitted.)

2. Tonquin's Substantial Evidence Challenge

Substantial evidence is evidence a reasonable person would rely on in making a decision. *Dodd v. Hood River County*, 317 Or 172, 179, 855 P2d 608 (1993). It is not unusual for a land use decision to be supported by a record that includes conflicting expert testimony regarding whether applicable approval criteria are satisfied. LUBA will generally not second guess a land use decision maker's choice between conflicting expert testimony, so long as it appears to LUBA that a reasonable person could decide as the decision maker did based on all of the evidence in the record. *Westside Rock v. Clackamas County*, 51 Or LUBA 264, 294 (2006); *Cadwell v. Union County*, 48 Or LUBA 500, 507-08 (2005); *Angel v. City of Portland*, 22 Or LUBA 649, 659, *aff'd* 113 Or App 169, 831 P2d 77 (1992). Tonquin argues that the expert testimony that the hearings officer's relied on in the above findings is not evidence a reasonable person would believe, for five reasons. We set out each of those reasons, followed by Friends' responses and our resolution of this subassignment of error below.

a. LCI Has Never Studied Wetland C on the Property

Tonquin first argues that because LCI "has not studied or even visited Wetland C on the Property * * * [LCI] is not qualified to render a reliable opinion upon the relationship between Wetland C and the off-site wetland with which it is connected." Tonquin Petition for Review 10.

b. LCI's Failure to Consider Mitigation Proposals

Tonquin next contends that LCI failed to consider a number of mitigation proposals offered by Tonquin. The final written comment period in this matter closed on December 9, 2010. Record 9. In a December 9, 2010 letter submitted by Tonquin's expert TSI, TSI suggested a condition of approval to limit mining to the dry season "to thus minimize off-site

hydrologic impacts and prevent potential impacts to wildlife that may utilize said wetlands during the wet season for breeding and rearing." Record 1228. Tonquin also contends it offered to monitor and manage hydrologic flows to attempt to maintain existing hydrologic conditions. Finally, "Tonquin agreed to mitigate impacts to wetlands in accordance with state and federal permit requirements." Tonquin Petition for Review 10.

c. Tonquin's Rebuttal of LCI

Tonquin argues:

> "[C]ontrary to the Hearings Officer's conclusion, Tonquin's experts did rebut [LCI]'s testimony. For example, Westlake noted that the watershed for each wetland greatly exceeded the area identified by [LCI] and explained that the Quarry would 'disturb, at most, approximately 25% of that watershed area.' Further, Westlake explained that Tonquin would design and implement water quantity and quality bioswales to allow clean, low flow stormwater to re-enter wetland areas. Flow rates would be monitored and adjusted as needed, and the entire system would be designed to satisfy Water Environment Services permitting requirements. * * *" Tonquin Petition for Review 11.

d. LCI's Testimony Was More Generalized

Tonquin contends that LCI's testimony was "more generalized than that offered by TSI and Westlake and relied upon published research that was offered without any foundation and did not take into account the specific context of the Quarry and the wetlands on the Property[.]" Tonquin Petition for Review 11.

e. County Staff's Position

County staff took the position "that the County does not regulate wetlands in the unincorporated areas of the County" and also took the position that a condition of approval to require state and federal agency approval for mining would be sufficient to "ensure appropriate wetland mitigation." Tonquin Petition for Review 12. Tonquin contends this staff position lends evidentiary support to its position.

3. Friends' Response to Tonquin's Substantial Evidence Challenge

With regard to "a" above, Friends reply that Wetland C "is one wetland, which straddles the property line between the proposed quarry site and the Kramer property." Friends' Response Brief 14. Friends argue that since (1) LCI had access to the portion of Wetland C on the Kramer property, (2) there is no evidence that the Tonquin and Kramer portions of Wetland C differ in any material way, and (3) LCI had access to all of the information submitted by Tonquin's expert, there no reason to believe LCI's testimony is based on inadequate information.

With regard to "b" above, LCI's August 12, 2010, September 28, 2010 and December 6, 2010 submittals appear at Record 533-647, 738-51 and 1189-1207. Due to the timing of the December 9, 2010 submittal by TSI, LCI did not have an opportunity to respond to the dry season mining condition specifically. However, Friends point to earlier testimony by LCI expressing concern that even during the dry season, mining within the portions of Wetlands B and C on Tonquin's property has the potential to dewater subsurface wetland waters on the off-site portion of Wetlands B and C. Record 542-43. With regard to Tonquin's offers to monitor and manage hydrologic flows, Friends cite to testimony by LCI that questioned the efficacy of Tonquin's proposals and took the position that some of the proposed mitigation measures might themselves harm the adjacent wetlands. Record 540-43; 1198-99. And finally, with regard to Tonquin's proposal to rely on mitigation required under state and federal permitting to avoid harm to the wetlands, LCI testified and cited studies that question the efficacy of such mitigation. Record 1201-03.

With regard to "c" above, we understand Friends to argue that the cited rebuttal simply establishes that LCI and Tonquin's experts presented conflicting testimony and that nothing in the cited rebuttal sufficiently undermines LCI's testimony to make it less than substantial evidence.

As previously noted, LCI's testimony in this matter appears at Record 533-647, 738-51 and 1189-1207. With regard to "d" above, Friends contend that a review of LCI's extensive testimony in the record easily dispels the notion that it is too generalized to constitute substantial evidence, and Friends argue there is nothing wrong with relying in part on published scientific research.

Finally, with regard to "e" above, Friends contend county staff is simply wrong about whether it has authority to regulate wetlands; and, in any event, staff's legal position about whether the county has authority to regulate wetlands and its conclusion about the adequacy of mitigation required by state and federal permitting agencies is not "evidence" the hearings officer was required to address.

4. LCI's Testimony Constitutes Substantial Evidence

In resolving Tonquin's substantial evidence challenge, LUBA does not independently weigh the evidence to determine how LUBA would have decided the issues presented to the hearings officer. *1000 Friends of Oregon v. Marion County*, 116 Or App 584, 587-88, 842 P2d 441 (1992). Rather, the question LUBA must answer is whether Tonquin's experts' testimony "so undermines" LCI's testimony that a reasonable person would not rely on LCI's testimony to conclude that Wetlands B and C cannot be partially mined without causing damage to the remaining part of the wetland that violates ZDO 1203.01(D). *Angel v. City of Portland*, 22 Or LUBA at 659. Friends' responses are an adequate answer to the reasons Tonquin advances in arguing that LCI's testimony should not be viewed as substantial evidence. We conclude that LCI's testimony easily qualifies as evidence a reasonable person would rely on to conclude that mining of the portions of Wetlands B and C located on Tonquin's property would cause the portions of those wetlands located off-site to cease functioning as a wetland, lose habitat value and thus result in "a substantial impairment or limitation to a primary use under ZDO 1203.01(D)." Record 28-29. Because the hearings officer specifically cites to the conflicting expert testimony and identifies evidence he found

to be persuasive and evidence he did not find persuasive, this is not a case where the hearings officer failed to appreciate that he was presented with conflicting expert testimony on relevant issues. *See Molalla River Reserve v. Clackamas County*, 42 Or LUBA 251, 268-69 (2002) (findings recognized conflicting evidence); *compare Gould v. Deschutes County*, 59 Or LUBA 435, 457 (2009) (where LUBA could not tell if the hearings officer recognized there was conflicting evidence). Where there is conflicting believable expert testimony, which is the case here, the choice between that believable expert testimony is for the hearings officer, and LUBA will not second guess that choice.

Tonquin's first assignment of error is denied.

SECOND ASSIGNMENT OF ERROR (TONQUIN)

Throughout the proceedings before the county, Tonquin proposed to mine the three wetlands located on its property (including Wetlands B and C), assuming the required federal and state permits to mine those wetlands can be obtained. As previously noted, the hearings officer's Condition #55 prohibits Tonquin from mining the portions of Wetlands B and C located on Tonquin's property. *See* n 1. Condition #13f goes further, and requires that Tonquin grant the Surface Water Management Agency of Clackamas County (SWMACC) a conservation easement to limit use of and allow SWMACC access to the portions of Wetlands B and C on Tonquin's property. *See* n 2. Tonquin argues that, together, those conditions constitute an impermissible uncompensated taking of private property in violation of the Fifth Amendment of the United States Constitution. Tonquin limits its constitutional challenge to Wetland C and does not challenge Conditions #55 and #13f with regard to Wetland B.

As relevant here, the Fifth Amendment states, "nor shall private property be taken for public use, without just compensation."[6] Specifically, Tonquin argues that those conditions constitute an "exaction" of Tonquin's property as a condition of development approval. Tonquin argues that to impose such an exaction without incurring the obligation to pay just compensation, under *Dolan v. City of Tigard*, 512 US 374, 391, 114 S Ct 2309, 129 L Ed 2d 304 (1994) the county is obligated to make an individualized determination that the exaction is roughly proportional to the impacts of the proposed mine.

A. Waiver

LUBA's scope of review is "limited to those [issues] raised by any participant before the local hearings body[.]" ORS 197.835(3). Under ORS 197.763(1), issues must be raised sufficiently, prior to the close of the record, to give the parties and decision maker "an adequate opportunity to respond to each issue.[7] The county contends that Tonquin failed to raise its constitutional issue before the record closed.

Tonquin responds that it had no opportunity at the proceedings below to raise the specific challenge to Condition #13f that it now brings to LUBA. Condition #13f applies only to "remaining wetlands." *See* n 2. As we understand Tonquin's argument, it had no objection to Condition #13F applying to any "remaining wetlands" after Tonquin completed any mining of Wetlands A, B and C that might receive federal and state agency permit approval, as proposed in its application. According to Tonquin, Condition #55, which

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[6] Article I, section 18 of the Oregon Constitution similarly states, "Private property shall not be taken for public use, nor the particular services of any man be demanded, without just compensation[.]" However, Tonquin does not assign error under Article I, section 18.

[7] ORS 197.763(1) states:

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

rendered all of Wetlands B and C on Tonquin's property "remaining wetlands" for purposes of Condition #13f by prohibiting all mining within those wetlands, was not included in any staff recommendations, and there was no other indication from the county that those wetlands would be subject to restriction beyond a buffer from the property line. Accordingly, Tonquin contends it would have objected to Condition #13f below had it known prior to the close of the record that the hearings officer intended to impose Condition #55 to preclude the possibility that any part of Westland B and C could be mined, even if federal and state permits to mine the wetlands could be obtained.

We agree with Tonquin. It was apparent that Tonquin proposed to conduct mining operations within the portions of Wetlands B and C on the subject property and would have objected below to any condition that interfered with that objective. Condition #55, which made Condition #13f more restrictive than Tonquin contemplated at the hearing, was not known to Tonquin until after the record closed. Thus, Tonquin did not waive the constitutional challenge it asserts in its second assignment of error.

B. Tonquin's Taking Challenge

It is undisputed that the hearings officer did not adopt the rough proportionality findings that would be required if Tonquin's takings challenge is properly analyzed under *Dolan*. The county argues that the *Dolan* rough proportionality analysis does not apply to conservation easements, such as the one that the hearings officer required in this case.

The rough proportionality requirement that applies to exactions derives from the Supreme Court's decisions in *Dolan* and *Nollan v. California Coastal Comm'n*, 438 US 825, 831-32, 107 S Ct 3141, 97 L Ed 2d 677 (1987). In explaining the basis for the rough proportionality requirement in *Lingle v. Chevron USA Inc*., 544 US 528, 547, 125 S Ct 2074 161 L Ed 2d 876 (2005), the Supreme Court explained:

> "*Nollan* and *Dolan* both involved dedications of property so onerous that, outside the exactions context, they would be deemed *per se* physical takings. * * * As the Court explained in *Dolan*, these cases involve a special

> application of the 'doctrine of 'unconstitutional conditions,' which provides that 'the government may not require a person to give up a constitutional right -- here the right to receive just compensation when property is taken for a public use -- in exchange for a discretionary benefit conferred by the government where the benefit has little or no relationship to the property.' * * *"

After quoting the above language from *Lingle*, the Oregon Supreme Court recently observed:

> "Thus, under *Lingle*, in circumstances in which the government exacts 'dedications of property so onerous that, outside the exactions context, they would be deemed *per se* physical takings,' the Supreme Court subjects the government's exaction to a *Nollan/Dolan* analysis. * * * Under that analysis, the government is precluded from making the exaction and must pay just compensation for the real property that it acquires unless the exaction is 'roughly proportional' to the effect of the proposed development."

West Linn Corporate Park, L.L.C. v. City of West Linn, 349 Or 58, 81, 240 P3d 29 (2010).

As previously noted, Condition #13j requires in part that "all * * * remaining wetlands * * * on the subject site shall be protected within a Conservation Easement for the benefit of SWMACC." *See* n 2. The Record Oversized Exhibits include a copy of the form of conservation easement used by SWMACC and a portion of the text that form is set out below:

"

> "[T]he owner of the real property described in Exhibit A and, hereinafter referred to as **Grantor,** does hereby grant, bargain, sell and convey unto Surface Water Management Agency of Clackamas County , hereinafter referred to as **Grantee or SWMACC**, a perpetual, nonexclusive conservation easement to protect the integrity, viability, conveyance and water quality functions of the sensitive area and associated buffer located on the subject's property * * *. Within the conservation easement no roadways, driveways, buildings, structures or fences shall be constructed. Any removal of native plants, land disturbance, or other development activity is prohibited. Any proposed activity consistent with the purpose of this easement is subject to review and approval by the Grantee. The conservation easement includes the right to access and inspect conservation easement areas, storm drainage and all related facilities through, under and along the * * * property[.]" (Bold type and underscoring in original.)

We conclude that requiring such a conservation easement without compensation would constitute a *per se* physical taking, if the requirement were was imposed outside the

context of an exaction.[8] The conservation easement required by Condition #13(f) and made applicable to Wetland C by Condition #55 essentially makes Wetland C part of a public surface water management system and transfers to SWMACC several important sticks in the bundle of property rights possessed by the property owner. The county argues that because the conservation easement does not grant the general public any right to use the property, the required conservation easement should not be viewed as within the category of "dedications of property so onerous that, outside the exactions context, they would be deemed *per se* physical takings." We reject the county's suggestion that a right of public access is a *sine qua non* of physical takings. Indeed the Supreme Court's seminal physical invasion taking case concerned a law that granted cable television companies rights to install equipment on private property, without granting any rights to the general public. *Loretto v. Teleprompter Manhattan CATV Corp*., 458 US 419, 102 S Ct 3164, 73 L Ed 2d 868 (1982). It follows under *Lingle* and *West Linn Corporate Park* that to avoid the county's obligation to pay just compensation for the exacted easement the hearings officer must adopt the rough proportionality findings required by *Dolan*, demonstrating that the exaction of the easement for Wetland C is roughly proportional to the effect of the proposed development.

Tonquin's second assignment of error is sustained.[9]

SECOND ASSIGNMENT OF ERROR (FRIENDS)

As noted in our discussion of Tonquin's first assignment of error, ZDO 1203.01(D) requires that an applicant establish that "[t]he proposed use will not alter the character of the surrounding area in a manner that substantially limits, impairs or precludes the use of

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[8] In reaching this conclusion we assume of course that the easement is "required" rather than "voluntary" and that there is no other relevant factor that might render the required easement something other than a physical taking.

[9] Tonquin does not argue that Condition #55 would violate the Federal takings clause if the hearings officer had not also exacted the easement imposed in Condition #13f, and we express no opinion on whether Condition #55 would violate the Federal takings clause, if the county had not also exacted the easement that is required by Condition #13f.

surrounding properties for the primary uses allowed in the underlying zoning district." *See* n 3. In its second assignment of error, Friends argue that the hearings officer "failed to address expert criticisms that the quarry will substantially limit or impair the conservation uses of surrounding properties by significantly diminishing the only forested wildlife movement corridor in the area." Friends Petition for Review 28. To restate Friends' argument using the terms of ZDO 1203.01(D), we understand Friends to argue that existing conservation uses on surrounding properties are "primary uses allowed in the underlying zoning district" and there was expert testimony below that the proposed quarry will significantly reduce the width of the existing wildlife corridor and thereby "alter the character of the surrounding area in a manner that substantially limits, impairs or precludes the use of surrounding properties for the primary uses allowed in the underlying zoning district." Friends argue that although this issue was raised below, and the issue concerns a relevant approval criterion, the hearings officer failed to adopt any findings to respond to the issue and that failure requires remand. *City of Wood Village v. Portland Metro Area LGBC*, 48 Or App 79, 87, 616 P2d 528 (1980); *Norvell v. Portland Metro Area LGBC*, 43 Or App 849, 853, 604 P2d 896 (1979); *Eckis v. Linn County*, 19 Or LUBA 15, 29 (1990).

As noted earlier, LUBA's scope of review is "limited to those [issues] raised by any participant before the local hearings body[.]" ORS 197.835(3). Under ORS 197.763(1) issues must be raised sufficiently, prior to the close of the record, to give the parties and decision maker "an adequate opportunity to respond to each issue. *See* n 7. Tonquin responds that Friends failed to raise this issue under ZDO 1203.01(D) below and therefore may not raise the issue for the first time at LUBA.

The testimony below concerning this issue includes the following August 12, 2010 statement by LCI:

> "The BR report documents significant natural resource features in Figure 4. In the area of the proposed mine, acorn woodpecker (listed as Sensitive Species – Vulnerable by the State of Oregon), basalt cliff outcrops, huge

> basalt fields, dead shrews, a cavity tree, and bobcat scat were observed and reported (p. 18). The presence of the species and landforms to the north and south demonstrate the value of the proposed quarry property as a wildlife corridor. The on-site wetlands, and wetlands associated with Rock Creek and the Rock Creek 100-year flood plain are mapped in the BR report as Title 3 wetlands, and the forest land to the east provides important upland habitat to support associated wildlife movement.
>
> "Examination of regional air photos (Figure 2) shows a forested corridor that includes the proposed mine property, the wildlife refuge, and private lands to the south. Apparent on the air photos is the existing gravel mine on the east side of SW Morgan Road. At present, wildlife can move through a forested corridor approximately 1,300 feet wide, from the edge of the Rock Creek wetlands to SW Morgan Road. If the mine is approved, that corridor would be reduced to only 300 feet wide along the base of the wildlife refuge, and as little as 150 feet near the northwest corner of the Kramer property. This funneling will likely create human-wildlife interactions that may be detrimental to the wildlife and prevent full habitat use." Record 545.

Tonquin argues that although Friends raised a number of issues under ZDO 1203.01(D), this issue was not one of them. Tonquin contends the issue raised in the above-quoted text was raised under other criteria, not under ZDO 1203.01(D), and the hearings officer therefore cannot be faulted for addressing it as an issue under ZDO 1203.01(D). Tonquin argues Friends is therefore barred from assigning error to the hearings officer's failure to adopt findings that respond to this issue.

As we explained in *Graser-Lindsey v. City of Oregon City*, 56 Or LUBA 504, 510 (2008):

> "ORS 197.763(1) and 197.835(3) require 'fair notice to adjudicators and opponents, rather than the particularity that inheres in judicial preservation concepts.' *Boldt v. Clackamas County*, 107 Or App 619, 623, 813 P2d 1078 (1991). A petitioner adequately raises an issue under ORS 197.763(1) and 197.835(3) by citing the relevant legal standard, presenting argument that includes the operative terms of the legal standard, or taking other actions to raise the issue such that the city knows or should know that the issue is one that needs to be addressed in its decision. *Reagan v. City of Oregon City*, 39 Or LUBA 672, 690 (2001).

In a December 9, 2010 letter to the hearings officer, Friends' attorney addressed a number of issues under the heading "ZDO 1203.01(D)." Record 1178-82. One of the issues is as follows:

> "The applicant's argument also fails to address the impacts on Wetland C, which extends onto the Kramer property to the south and is held in a conservation easement by the county. [LCI's] comments provide substantial evidence including technical data and analysis as to how and why the loss of Wetland C on the proposed quarry property will substantially limit, impair or preclude the use of the conservation easement held by the county for conservation purposes. Finally, the applicant fails to address the potential that the loss of the wildlife habitat on this property, which is part of an important wildlife corridor stretching from local natural areas to the south through the Refuge to the north, has to *substantially limit or impair* the ability of other natural areas in the surrounding area to meet their conservation goals. *See* Attachment 3 at 17.[10]
>
> "Because the applicant has not established that the proposed quarry will comply with ZDO 1203.01(D) with regard to the use of surrounding properties for conservation purposes, the county should deny the permit application." Record 1181-82. (Emphasis added.)

Petitioner's attorney's statement quoted above expressly addresses the applicant's and the county's obligations under ZDO 1203.01(D) and was submitted in response to Tonquin's position that application of ZDO 1203.01(D) should not be limited to immediately adjacent properties. The statement and attachment include language that is almost identical to the operative language of ZDO 1203.01(D), and the statement expressly references ZDO 1203.01(D) in raising the issue. The above-quoted argument by Friends' attorney is unquestionably adequate to raise the issue presented in Friends' second assignment of error.

On the merits, Tonquin argues that the hearings officer's findings adequately addressed the wildlife corridor issue. First, Tonquin suggests that "wildlife use," which Friends refers to in making its ZDO 1203.01(D) argument under this assignment of error, is

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[10] Attachment 3 at 17 is page 17 of LCI's December 9, 2010 letter to the hearings officer which includes the following statement: "The proposed mine will *substantially impair, limit, or preclude uses* in an area larger than the adjoining properties, like nearby natural areas, where wildlife use could be substantially limited due to incursion into the wildlife corridor cause by the proposed quarry." Record 1205 (emphasis added).

not a "primary use" in the RRFF-5 district and therefore not within the protective scope of ZDO 1203.01(D). We reject this contention because the term "wildlife use" is sufficiently similar to "public and private conservation areas" and the "fish and wildlife management programs," which are primary uses in the RRFF-5 zone. ZDO 309.03(D) and (E). *See* n 4.

Tonquin next argues, correctly, that the hearings officer adopted findings addressing the effects of mining a portion of Wetlands B and C and also adopted findings addressing the potential noise impacts of mining on the Wildlife Refuge to the north. However, neither of those findings address the issue presented in Friends' second assignment of error.

In a December 9, 2010 letter to the hearings officer, Tonquin's expert TSI took the position that other wildlife corridors are the primary wildlife corridors in the area:

> "ODFW mentions the importance of the area as an intact movement corridor between the Tualatin and Willamette Rivers. The primary corridors for wildlife migration in this area are clearly the nearby Rock Creek Floodplain to the west and the Seely Ditch/Coffee Lake floodplain to the east and south. The mining operation will not preclude the use of these corridors for wildlife migration and is in fact providing naturally vegetated and undisturbed buffers in addition to noise berms around the periphery of the Property for the purposes of protecting resources such as Rock Creek." Record 1217.

The above might provide a basis for the hearings officer to respond to the issue presented in Friends' second assignment of error, but even if it does, remand is required under the cases cited above for the hearings officer to adopt a response.

Friends' second assignment of error is sustained.

FIRST ASSIGNMENT OF ERROR (Friends)

A. Introduction

To understand the parties' arguments under Friends' first assignment of error, some understanding of the structure of the ZDO is required for context. The ZDO is divided into "Sections." The 100-level Sections are in turn divided into subsections, but those subsections are also called "Sections." For example ZDO Section 100 (Introductory Provisions) is internally divided into additional Sections 101 (Title), 102 (Purpose and

Scope), 103 (District Designation) and 104 (Summary of Review Procedures). In this opinion we cite to the 100-level Sections that are in turn divided into additional Sections as "ZDO Section 100, ZDO Section 200, ZDO Section 300," and so on. We will cite to the Sections within the 100-level Sections by number only, omitting the word Section. Using ZDO Section 100 as an example, we would cite to the Sections within ZDO Section 100 as ZDO 101, ZDO 102, ZDO 103 and ZDO 104.

1. Zoning Districts

The County's many individual zoning districts are set out at ZDO Sections 300, 400, 500, 600 and 700. ZDO Section 300 is entitled "Urban and Rural Residential Districts," and there are 14 such zoning districts, including the RRFF-5 zoning district. As already noted, the subject property is zoned RRFF-5. The RRFF-5 zoning district appears at ZDO 309. ZDO 309.06 sets out the conditional uses that are authorized in the RRFF-5 district. ZDO 309.06(A)(6) authorizes mining operations as a conditional use.[11]

2. Special Use Requirements

While the county's individual zoning districts, including the RRFF-5 zoning district, impose some regulatory standards, the ZDO also imposes additional layers of regulation. One of those additional layers of regulation is set out at ZDO Section 800, which is entitled "Special Use Requirements." The 35 Special Uses range from "Cemeteries" to "Wireless Telecommunication Facilities." ZDO 808 and 835. ZDO 818 imposes Special Use Requirements on "Surface Mining." All parties agree the proposed mine is subject to the ZDO 818 Surface Mining Special Use Requirements.

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[11] The text of ZDO 309.06(A)(6) is set out below:

> "Operations conducted for the exploration, mining, and processing of geothermal resources, aggregate and other mineral resources, or other subsurface resources, subject to [ZDO] 818[.]"

3. Development Standards

A third potential layer of regulation is imposed by ZDO Section 1000, entitled "Development Standards." ZDO 1001 through ZDO 1022 set out 21 different sets of Development Standards that apply in a variety of different contexts. ZDO 1002 sets out Development Standards for "Protection of Natural Features." Friends contend the county should have applied three requirements that are imposed by ZDO 1002 on development.[12] The hearings officer concluded that ZDO "Section 1000 and specifically [ZDO] 1002, do not apply to aggregate mine proposals." Record 31. In its first assignment of error, Friends assign error to that finding.

B. The Hearings Officer's Decision

1. The Text of ZDO 1001.01 and 1001.02

In concluding that ZDO Section 1000 does not apply to the proposed aggregate mine, the hearings officer relied on ZDO 1001.01, which sets out the "Purpose" of ZDO Section

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[12] Friends describe the three provisions of ZDO 1002 that the county should have applied as follows:

> "First, ZDO 1002.02 provides that '[a]ll developments shall be planned, designed, constructed, and maintained with maximum regard to significant natural terrain features and topography, such as hillside areas, floodplains, and other significant land forms.' ZDO 1002.02(A). ZDO 1002.02 also requires that '[d]evelopments shall be planned, designed, constructed, and maintained to [a]void substantial probability of . . . [i]njury to wildlife and fish habitats.' ZDO 1002.02(B)(1)(d). Finally, ZDO 1002.07 provides that
>
> > "[d]evelopments on land that is outside the Metropolitan Service District Boundary and the Portland Metropolitan Urban Growth Boundary shall be designed to"
> >
> > "1. Protect native plant species, aquatic habitats, and endangered or otherwise important wildlife species; and
> >
> > "2. Minimize adverse wildlife impacts in sensitive habitat areas, such as deer and elk winter range below 3,000 feet in elevation, riparian areas, and wetlands.
>
> "ZDO 1002.07(A)(1) and (2)." Friends Petition for Review 8-9.

1000 and ZDO 1001.02, which describes the "Application of [ZDO] Section [1000]." We set out the relevant text of those sections below:[13]

> "1001.01 PURPOSE
>
> [ZDO Section 1000] sets forth the general standards for development of property and associated facilities within the unincorporated area of Clackamas County. The purpose of [ZDO Section 1000] is to:
>
> "* * * * *
>
> "B. Insure that natural features of the landscape, such as land forms, natural drainageways, trees and wooded areas, are preserved as much as possible and protected *during construction*.
>
> "* * * * *."[14]
>
> "1001.02 APPLICATION OF [ZDO] SECTION [1000]
>
> "A. [ZDO] Section 1000 shall apply to partitions; subdivisions; *commercial and industrial projects*; multifamily dwellings; two- and three-family dwellings; and attached single-family dwellings where 3 or more dwelling units are attached to one another. * * *
>
> "B. The application of these standards to particular development shall be *modified* as follows:
>
> "1. Development standards which are unique to a particular use, or special use, shall be set forth within the district or in [ZDO] Section 800.
>
> "* * * * *." (Emphases added.)

2. The Hearings Officer's Reasoning

The hearings officer gave three reasons, based on the text of ZDO 1001 and 1002, for his conclusion that ZDO Section, and particularly ZDO 1002 do not apply to aggregate mines. We set out each of those reasons below.

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[13] Because it is sometimes unclear what "Section" the text of ZDO 1001 and 1002 is referring to, we have added text in brackets to clarify which Section the text is referring to.

[14] Other unquoted portions of ZDO 1001.01 set out a variety of other purposes.

a. Mining is not Construction

The text of ZDO 1001.01(B) set out above provides that one of the purposes of ZDO Section 1000 is to "[i]nsure that natural features of the landscape, such as land forms, natural drainageways, trees and wooded areas, are preserved as much as possible and protected *during construction*." (Emphasis added.) The hearings officer found that ZDO Section 1000 is limited to "construction" and the hearings officer concluded that because mining is not construction, ZDO Section 1000 does not apply to mining.[15]

There are several problems with the hearings officer's first reason. The hearings officer read ZDO 1001.01(B) as though the qualifying words "during construction" refer to both of the antecedent obligations—the obligation to insure that natural features are "preserved as much as possible" and the obligation to insure that natural features are "protected." That reading is inconsistent with the "doctrine of the last antecedent." *See Concerned Homeowners v. City of Creswell*, 52 Or LUBA 620, 630 (2006) (applying doctrine). As the Supreme Court explained in *State v. Webb* 324 Or 380, 386, 927 P2d 79, (1996):

> "'In trying to ascertain the meaning of a statutory provision, and thereby to inform the court's inquiry into legislative intent, the court considers rules of construction of the statutory text that bear directly on how to read the text.' *PGE,* 317 Or at 611. The 'doctrine of the last antecedent' is a long-recognized grammatical principle used in interpreting the text of statutes. One expert on statutory construction describes the doctrine this way:
>
> > "'Referential and qualifying words and phrases, where no contrary intention appears, refer solely to the last antecedent.

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[15] The hearings officer's finding on this point is set out below:

> "Here the purpose statement of ZDO 1001.01 mandates protection of natural resources 'during construction.' The plain meaning of the word 'construction' is the building of a structure. However, the very nature of aggregate mining is very literally deconstruction not construction. In the absence of a definition of 'development' that explicitly includes aggregate mining in the definition, it would be contrary to the rules of statutory construction * * * to infer that aggregate mining operations are subject to ZDO [Section] 1000 and ZDO 1002." Record 31-32.

> The last antecedent is 'the last word, phrase, or clause that can be made an antecedent without impairing the meaning of the sentence.' Thus a proviso usually is construed to apply to the provision or clause immediately preceding it. The rule is another aid to discovery of intent or meaning * * *.
>
> "'Evidence that a qualifying phrase is supposed to apply to all antecedents instead of only to the immediately preceding one may be found in the fact that it is separated from the antecedents by a comma.' Norman J. Singer, 2A *Sutherland Statutory Construction* § 47.33, at 270 (5th ed 1992) (footnotes omitted)."

There is no comma setting off the qualifying phrase "during construction" from its antecedents in ZDO 1001.01(B), and we can see no reason to believe the county intended the qualifying words to apply to both antecedents. Therefore the hearings officer's interpretation is inconsistent with the doctrine of the last antecedent.

The doctrine of the last antecedent "is only a textual aid, and its application yields to more persuasive contextual evidence of the legislature's intent and to common sense." *Bridgeview Vineyards, Inc. v. State Land Board*, 211 Or App 251, 270, 154 P3d 734 (2007). Here, however, relevant context points in the same direction. First, if the county intended the qualifying words "during construction" to apply to both antecedents, that application of the qualifying words would appear to render the obligation to insure that natural features are "preserved as much as possible" meaningless, since the last antecedent imposes an even more demanding obligation that they be "protected." The county presumably did not mean for the first antecedent to be meaningless. ORS 174.010; *Tapscott v. City of Bend*, 57 Or LUBA 325, 332 (2008). Second, ZDO 1002.02(A) and (B) require that "developments shall be planned, designed, constructed, and maintained" to avoid or minimize impacts on natural features. ZDO 1002.02(A) and (B) are concerned with activity that predates and postdates construction and therefore lend contextual support for the petitioner's position that the hearings officer erroneously interpreted ZDO Section 1000 to be solely concerned with construction. Third, ZDO 1001.02(A) was set out earlier in the text, and, as petitioner

correctly points out, ZDO 1001.02(A) expressly provides that "[ZDO] Section 1000 shall apply to partitions [and] subdivisions." As defined by ZDO 202, the acts of partitioning and subdividing create new units of land and may facilitate construction, but partitions and subdivisions, in and of themselves, are not construction.

Additionally, even if ZDO Section 1000 could be correctly interpreted to be limited to construction, we are not persuaded by the hearings officer's conclusion that mining is "deconstruction not construction." Record 32. The hearings officer does not identify the source of his conclusion that "[t]he plain meaning of the word 'construction' is the building of a structure." The relevant definition of "construction" in *Webster's Third New Int'l Dictionary* (1981) is a bit broader:

> "**2 a** : the act of putting parts together to form a complete integrated object : FABRICATION <during the [construction] of the bridge* * * **c** : something built or erected * * *." *Id.* at 489.

And as Friends correctly point out, the proposal includes more than simply removing basalt from the ground. The proposal includes construction of roads, wells, berms and a parking lot. All of those parts of the proposal clearly qualify as construction. And finally, ZDO 1002 regulates "development," as do a number of the other Sections in ZDO Section 1000. We believe a surface mine clearly falls within the commonly understood meaning of "development."[16] Given that context, the hearings officer's narrow understanding of the term "construction" is erroneous.

In summary, the hearings officer erroneously relied on the ZDO 1001.01 Purpose statement and ZDO 1001.02 Application statement to conclude that ZDO Section 1000 is

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[16] The term "development" is not defined in ZDO 202 or ZDO Section 1000. *Webster's Third New Int'l Dictionary* (1981) 618 defines "development" as follows:

> "1: the act, process, or result of developing : the state of being developed : a gradual unfolding by which something (as a plan or method, an image upon a photographic plate, a living body) is developed <a new development in poetry> : gradual advance or growth through progressive changes : EVOLUTION <a stage of development> : a making usable or available <well worth development> * * *."

limited to construction, and even if ZDO Section 1000 could be construed to be limited to construction, development of the proposed mine qualifies as construction.

b. ZDO 1001.02(A) Lists the Activities that are Subject to ZDO Section and Mining is Not on the List.

The hearings officer next found that ZDO 1001 lists the activities that are subject to regulation under ZDO Section 1000, and concluded that mining is not one of the listed activities.[17]

ZDO 1001.02(A) provides that "[ZDO] Section 1000 shall apply to partitions; subdivisions; *commercial and industrial projects*; multifamily dwellings; two- and three-family dwellings; and attached single-family dwellings where 3 or more dwelling units are attached to one another. * * *" (Emphasis added.) Citing dictionary definitions of "commercial" and "industrial," Friends contend the hearings officer erred by failing to consider whether the proposed surface mine qualifies as a commercial or industrial project.

Tonquin responds that the hearings officer correctly determined that aggregate mining does not fall within any of the enumerated uses in ZDO 1001.02 because aggregate mining is not included in the ZDO 202 definitions of "commercial use" or "industrial use."[18]

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[17] The hearings officer finding on this point is set out below:

> "[T]he applicability provisions of ZDO 1001.02(A) identify a discrete list of land use proposals that are subject to ZDO Section 1000. * * * The list appears to be exclusive. There is no extending language such as 'including but not limited to.' Reading ZDO 1001.01 and 1001.02 together, the applicability of the provisions of ZDO 1000 and 1002 are limited to the list of construction projects identified in ZDO 1001.02. Aggregate mining projects are not on that list." Record 32.

[18] ZDO 202 defines "commercial use" as:

> "The use of land and/or structures for the conduct of retail, service, office, artisan, restaurant, lodging, daycare, entertainment, private recreational, professional, and similar uses."

ZDO 202 defines "industrial use" as:

> "The use of land and/or structures for the manufacturing or processing of primary, secondary, or recycled materials into a product; warehousing and associated trucking operations; wholesale trade; and related development."

Rather, "surface mining" is separately defined, and that definition does not characterize "surface mining" as either "commercial" or "industrial" in nature.[19] This omission is important, according to Tonquin, because other defined uses, such as "Adult Business," "Bed and Breakfast Inn," "Cogeneration Facility," and "Service Station" are characterized as "commercial" or "industrial" in their definitions.[20] In Tonquin's view, the omission of these terms signifies a legislative choice to preserve "surface mining" as a distinctly separate term from the broader categories of "industrial use" or "commercial use."

The term "commercial or industrial project" and for that matter the terms "commercial use" and "industrial use" are plainly general categories of uses that include more than one individual member. As defined by the county's code, "industrial use" includes the use of land for "processing primary, secondary, or recycled materials into a product." ZDO 202; *see* n 18. This definition clearly is sufficiently broad to apply to the on-site rock crushing proposed by Tonquin. The application itself states that "[e]xtracted material will be processed through a crusher to make the aggregate product desired." Record 1289.

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[19] ZDO 202 defines "surface mining" as:

> "Includes the mining of minerals by removing overburden and extracting a natural mineral deposit thereby exposed, or simply such extraction. Surface mining includes open-pit mining, auger mining, production of surface mining waste, prospecting and exploring that extracts minerals or affects land, processing to include rock crushing and batch plant operations, and excavation of adjacent offsite borrow pits other than those excavated for building access roads."

[20] For example ZDO 202 defines "Bed and Breakfast Inn" as:

> "[P]rovides accommodations plus breakfast on a daily or weekly basis in an operator- or owner-occupied dwelling that is primarily used for this purpose. This use is operated as a *commercial* enterprise, encourages direct bookings from the public, and is intended to provide a major source of income to the proprietors. This level includes inns that operate restaurants offering meals to the general public as well as to overnight guests. Bed and breakfast inns are subject to Section 832 and all requirements of the underlying district." (emphasis added)

We also reject Tonquin's argument that "surface mining" is neither a "commercial nor industrial project" simply because the definition of "surface mining" does not expressly characterize surface mining as "commercial" or "industrial." While some of the ZDO 202 use definitions expressly characterize the defined use as commercial or industrial, others do not. ZDO 202 ("composting facility," daycare facility," "farmer's market," "home occupation," "hotel," "kennel," "recycling," "salvage/junk yard," and "small power production facility").[21] We reject Tonquin's contention that surface mining does not qualify as an "industrial use," as that term is defined by ZDO 202, or an "industrial project," as that term is used in ZDO 1001(A), simply because the ZDO 202 definition of surface mining does not expressly describe surface mining as an industrial use.

c. The ZDO 818 Special Use Requirements for Surface Mining Entirely Displace the ZDO Section 1000 Development Standards

As we explained above in the introduction, the ZDO applies separate levels of regulation. The text of ZDO 1001.02(B) set out earlier in this opinion expressly provides that the ZDO Section 1000 Development Standards may be "modified" by the Special Use Requirements set out at ZDO Section 800, which includes ZDO 818. We set out that text again below:

> "The application of these standards to particular development shall be modified as follows:
>
> "1. Development standards which are unique to a particular use, or special use, shall be set forth within the district or in [ZDO] Section 800."

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[21] For example, ZDO 202 defines "small power production facility" as:

> "A facility that produces energy primarily by use of biomass, waste, solar energy, wind power, water power, geothermal energy or any combination thereof, having a power production capacity that, together with any other facilities located at the same site, is not greater than 80 megawatts; and such facility is more than 50 percent owned by a person who is not a public utility, an electric utility holding company or an affiliated interest. When this definition differs from that in ORS 758.500, the definition in ORS 758.500 shall prevail."

The hearings officer found that under ZDO 1001.02(B) and ZDO Section 800, the regulation of surface mines under ZDO 818 entirely displaces ZDO Section 1000 and ZDO 1002.[22]

Even if we limit our consideration of the hearings officer's interpretation to the text of ZDO 1001.02(B) itself, his interpretation is difficult to square with the text of ZDO 1001.02(B). That text says standards in ZDO Section 1000 that would otherwise apply to development "shall be modified" by any ZDO Section 800 standards that apply to particular uses. The commonly understood meaning of "modify" is to limit or change—not to entirely displace. [23] To read the word "modified" to have the legal effect of entirely displacing ZDO Section 1000 is inconsistent with the commonly understood meaning of the term "modified." We agree with Friends that the "modifi[cation] of the ZDO Section 1000 standards required by ZDO 1001.0[2](B) is to be done with a scalpel rather than a machete." Friends Petition for Review 19.

That the ZDO Section 800 Special Use Standards do not entirely displace the ZDO Section 1000 standards is made even clearer by ZDO 801.01, which sets out how the regulations imposed by ZDO Section 800 are applied with other ZDO standards:

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[22] The hearings officer's findings on this point are set out below:

> "ZDO 1001.02(B) states that the development standards of ZDO [Section] 1000 shall be 'modified' by other standards for unique or particular uses pursuant to ZDO Section 800. ZDO * * * 801 states that 'Special uses shall be subject to the provisions the section that regulates the specific use and the provisions of the zoning district in which the special use will be located.' Aggregate mining is a listed special use in ZDO Section 818. No party disputes that ZDO Section 818 applies to the current proposal. Neither ZDO 1001.02(B)(1) nor the provisions of ZDO 818.01 (purpose) and 818.02 (applicability) state that the regulations in ZDO Section 1000 and [ZDO] 1002 are to be complied with in addition to those identified in ZDO * * * 818." Record 32.

The hearings officer went on to find "ZDO 1001 appears to contemplate completely separate sets of approval standards for surface mines to the exclusion of the other standards set forth [in] Section 1000." Record 33.

[23] *Webster's Third New Int'l Dictionary* (1981) 1452 defines "modify" in a number of ways, including the following:

> "3 a : to limit or restrict the meaning of * * * QUALIFY * * * 4 A : to make minor changes in the form or structure of : alter without transforming * * *"

> "Special uses are those included in Section 800. Due to their public convenience and necessity and their effect upon the surrounding area, these uses are subject to conditions and standards that differ from those required of other uses. Special uses shall be subject to the provisions of the section that regulates the specific use *and the provisions of the zoning district in which the special use will be located.* Special uses are permitted only when specified as a primary, accessory, limited or conditional use in the subject zoning district. Where a dimensional or development standard for a special use differs from that of the subject zoning district, the standard for the special use shall apply." (Italics and underscoring added.)

The italicized language is flatly inconsistent with the hearings officer's conclusion that ZDO 818 entirely displaces ZDO Section 1000. The subject property is in the RRFF-5 zoning district. ZDO 319. The italicized language says that the uses that are subject to special regulation remain subject to the regulations imposed by the zoning district. ZDO 309.09 provides that "[d]evelopment shall be subject to the applicable provisions of [ZDO] Section 1000 and 1100." The applicable provisions of ZDO 1000 therefore are also a provision of the RRFF-5 zoning district.

The underlined language in ZDO 801.01 makes it reasonably clear that the ZDO Section 800 standards do not entirely displace applicable ZDO 1000 standards. Read in conjunction with ZDO 1001.02(B), the underlined language states that where a ZDO Section 800 standard "differs" from a Section 1000 standard, the ZDO Section 1000 standard would be "modified," and give way to the ZDO Section 800 standard. Given the inherent ambiguity that is present in the word "differ" in this context, it may not be easy to determine whether one or more applicable ZDO Section 800 standard "differs" from applicable ZDO Section 1000 standards in a way that requires that the ZDO Section 800 standard apply to the exclusion of the ZDO Section 1000 standard. But the hearings officer was wrong in concluding that applicable ZDO Section 800 standards entirely displace ZDO Section 1000 standards. A ZDO Section 800 standard only displaces a ZDO Section 1000 standard if the ZDO Section 800 standard "differs" from the ZDO Section 1000 standard. The hearings officer has not established that for each applicable ZDO Section 1000 standard there is at

least one ZDO Section 800 standard that "differs," such that the ZDO 800 standard displaces the ZDO Section 1000 standard.

Because none of the three reasons given by the hearings officer support his conclusion that the ZDO 818 standards entirely displace ZDO Section 1000 and ZDO 1002 standards that would otherwise apply, Friends' first assignment of error must be sustained. On remand, the hearings officer must apply any applicable ZDO Section 1000 standards, unless he determines that there is an applicable ZDO 818 or other ZDO Section 800 standard that "differs" such that the ZDO 818 or other ZDO Section 800 standard applies and the ZDO Section 1000 standard does not apply.

Friends' first assignment of error is sustained.[24]

The county's decision is remanded.

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[24] In a separate subassignment of error, Friends argues the hearings officer's interpretation that the ZDO 818 regulations applied to surface mines entirely displace the ZDO Section 1000 standards is inconsistent with the county's comprehensive plan. Because we conclude that the hearings officer's interpretation is inconsistent with the text of the ZDO, we need not and do not consider petitioner's second subassignment of error. However, if we were required to decide that subassignment of error, the hearing officer's interpretation appears to be inconsistent with comprehensive plan policies set out below, since a central dispute in this appeal is whether the challenged decision adequately protects wetlands located on the subject property.

> "25.2 The County recognizes the U.S. Department of the Interior, Fish and Wildlife Service National Wetlands Inventory as a resource document for wetland identification in the County. Individual site development of inventoried lands will be reviewed for compliance with wetlands policies.
>
> "25.3 The County has insufficient information as to location, quality, and quantity of wetland resources outside of the Mt. Hood urban area and the Portland Metropolitan Urban Growth Boundary to develop a management program at this time. If such information becomes available, the County shall evaluate wetland resources pursuant to Goal 5 and OAR Chapter 660, Division 16, prior to the next Periodic Review. In the interim, the County will review all conditional use, subdivision, and zone change applications and commercial and industrial development proposals to assure consistency with Section 1000 of the Zoning and Development Ordinance and goals and policies of Chapter 3 of the Plan."