BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

PROTECT GRAND ISLAND FARMS,
Petitioner,

vs.

YAMHILL COUNTY,
Respondent,

and

BAKER ROCK RESOURCES,
Intervenor-Respondent.

LUBA No. 2012-047

FINAL OPINION
AND ORDER

Appeal from Yamhill County.

Courtney Johnson, Portland, filed the petition for review. Courtney Johnson and Maura Fahey argued on behalf of petitioner. With her on the brief were Ralph Bloemers and Crag Law Center.

No appearance by Yamhill County.

Timothy S. (Todd) Sadlo, filed the response brief and argued on behalf of intervenor-respondent.

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

REMANDED 10/09/2012

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

Opinion by Ryan.

NATURE OF THE DECISION

Petitioner appeals Ordinance 873, a decision approving a post acknowledgement plan amendment and a zoning map amendment to allow gravel mining.

MOTION TO INTERVENE

Baker Rock Resources, the applicant below (intervenor) moves to intervene on the side of the respondent. The motion is granted.

REPLY BRIEF

Petitioner moves for permission to file a reply brief to respond to new matters raised in the response brief. Intervenor moves to strike the portion of the reply brief that begins on page 2 under the heading "Inadequate Findings Rebuttal" that intervenor argues does not respond to new matters raised in the response brief. While we tend to agree with intervenor that the subsection of the reply brief from pages 2 through 5 is not limited to "new matters," explaining why would lengthen an already lengthy opinion and, further, rejecting that subsection would not affect our resolution of any assignment of error. We allow the reply brief.

FACTS

The subject property is a 225-acre site on the southern end of Grand Island in Yamhill County, bordered on the south by SE Upper Island Road, on the north by a slough that is the outlet for Skeeter Creek, on the west by a portion of Willamette Mission State Park, and on the east by the main channel of the Willamette River.[1] Grand Island is a 3,882 acre island located between Lambert Slough (on the west) and the main channel of the Willamette River (on the east). Soils on the island are Class II soils. Farms on the island grow fruits,

[1] The record in this appeal includes the record of the county's 2011 decision adopting Ordinance 865, an ordinance that added the subject property to the county's inventory of significant aggregate sites. The record of Ordinance 865 is cited in this opinion as "2011 Record XXX." The record of the county's decision adopting Ordinance 873 is cited in this opinion as "2012 Record XXX."

vegetables, seeds and grains, and draw visitors to pumpkin patches and other agritourism activities. Farms on the island irrigate with both surface water and groundwater. Grand Island is served by a few public roads that generally circle the island, and it is connected to the rest of the county by a single bridge.

Intervenor proposes to sequentially mine over a 30 year period approximately 175 acres of the subject property in three to nine acre cells, with the non-mined areas continuing to be farmed. After mining is concluded, the subject property will be used for fish and wildlife habitat, wetlands, and public recreation, if allowed by applicable law. 2012 Record 29; 112.

INTRODUCTION

OAR 660-023-0180 sets out standards governing a post-acknowledgment plan amendment to allow gravel mining. As a general overview, and as relevant here, the rule requires the county to (1) determine an impact or study area, (2) identify conflicts with certain uses within that impact area, and (3) determine reasonable and practicable measures that would minimize identified conflicts.[2]

The first step, identifying the impact area, is governed by OAR 660-023-0180(5)(a), which requires that:

> "The local government shall determine an impact area for the purpose of identifying conflicts with the proposed mining and processing activities. The impact area shall be large enough to include uses listed in subsection (b) of this section and shall be limited to 1,500 feet from the boundaries of the mining area, except where factual information indicates significant potential conflicts beyond this distance."

After the impact area is identified, OAR 660-023-0180(5)(b) provides, in relevant part:

[2] OAR 660-023-0180(1)(g) defines "minimize a conflict" to mean "to reduce an identified conflict to a level that is no longer significant. For those types of conflicts addressed by local, state, or federal standards (such as the Department of Environmental Quality standards for noise and dust levels), to 'minimize a conflict' means to ensure conformance to the applicable standard."

> "The local government shall determine existing or approved land uses within the impact area that will be adversely affected by proposed mining operations and shall specify the predicted conflicts. For purposes of this section, 'approved land uses' are dwellings allowed by a residential zone on existing platted lots and other uses for which conditional or final approvals have been granted by the local government. For determination of conflicts from proposed mining of a significant aggregate site, the local government shall limit its consideration to the following:
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> "(A) Conflicts due to noise, dust, or other discharges with regard to those existing and approved uses and associated activities (e.g., houses and schools) that are sensitive to such discharges;
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> "(B) Potential conflicts to local roads used for access and egress to the mining site within one mile of the entrance to the mining site unless a greater distance is necessary in order to include the intersection with the nearest arterial identified in the local transportation plan. Conflicts shall be determined based on clear and objective standards regarding sight distances, road capacity, cross section elements, horizontal and vertical alignment, and similar items in the transportation plan and implementing ordinances. Such standards for trucks associated with the mining operation shall be equivalent to standards for other trucks of equivalent size, weight, and capacity that haul other materials;
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> "* * * * *
>
> "(E) Conflicts with agricultural practices; and
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> "(F) Other conflicts for which consideration is necessary[.]"

The county ultimately concluded that the proposed mining operations would create conflicts with sensitive uses and agricultural practices, but that all identified conflicts could be minimized with reasonable and practicable measures. In its assignments of error, petitioner challenges various aspects of the county's decision.

FIRST ASSIGNMENT OF ERROR

Before addressing petitioner's specific arguments set forth in the first assignment of error, we note that the county adopted approximately 77 pages of findings in support of the decision. Those findings are broken into sections with headings that correspond to the applicable sections and subsections, as relevant, of OAR 660-023-0180(5) and other

applicable approval criteria. The findings also contain a broad section entitled "Rebuttal Findings" totaling 27 pages, at 2012 Record 71 through 98. Petitioner's first assignment of error alleges that the county misconstrued applicable law and that the findings it adopted are inadequate in several ways.[3] In support of its arguments that the county misconstrued applicable law, petitioner quotes isolated findings contained in the decision without citing to or acknowledging other findings in the decision that address the same approval criteria that are the subject of the findings that petitioner challenges, and that address arguments advanced below concerning those criteria. The better practice to demonstrate that a local government misconstrued the applicable law or adopted a decision that is not supported by adequate findings is to address and as necessary assign error to all findings adopted in support of a decision that a particular criterion is or is not satisfied. Otherwise a petitioner runs the risk that relevant and potentially dispositive findings are not challenged in the petition for review. That is particularly the case where the decision is well organized so that it is not difficult to locate and assign error to all the findings regarding a particular approval criterion. Against that backdrop, we address petitioner's first assignment of error.

In its first assignment of error, we understand petitioner to argue that the county misconstrued applicable law by limiting its review of conflicts to only the three conflicts listed in OAR 660-023-180(5)(b)(A), "conflicts due to noise, dust or other discharges" and not considering the conflicts listed in OAR 660-023-0180(5)(b)(B) through (F), roads, agricultural practices and other conflicts. Petitioner points to a finding at 2012 Record 72 in

[3] LUBA is authorized to reverse or remand a land use decision if the county "[i]mproperly construed the applicable law." ORS 197.835(9)(a)(D). In addition, adequate findings supporting a quasi-judicial decision must identify the relevant approval standards, set out the facts which are believed and relied upon, and explain how those facts lead to the conclusion of compliance with the approval standards. *Sunnyside Neighborhood v. Clackamas Co. Comm.*, 280 Or 3, 20-21, 569 P2d 1063 (1977).

support of its argument.[4] Intervenor responds by pointing to other findings contained in the county's 77 pages of findings that address additional conflicts beyond those listed in OAR 660-023-0180(5)(b)(A) that show that the county properly considered all of the conflicts that it was required to consider under OAR 660-023-0180(5)(b). 2012 Record 37-51, 72-98.

We agree with intervenor. Petitioner's argument reads in isolation two sentences from the county's 77 pages of findings that address only some conflicts, while ignoring several pages of findings that make clear that the county considered all conflicts required to be considered under OAR 660-023-0180(5)(b). More importantly, petitioner does not argue with any specificity that the county failed to consider a particular source of conflict. Absent any such argument, petitioner's assignment of error provides no basis for reversal or remand of the decision.

In another portion of the first assignment of error, petitioner argues that the county misconstrued applicable law in limiting its analysis of conflicts with agricultural practices under OAR 660-023-0180(5)(b)(E) to conflicts from dust and noise discharges, based on the following finding:

> "It is not reasonable to conclude that people and their homes within 1,500 feet of the project will not be impacted, but that 'farm practices' taking place over the entire island will be significantly impacted." 2012 Record 89 (underlining in original.)

Again, intervenor points to several other pages of findings in the county's decision to show that the county did not limit its consideration of conflicts with agricultural practices to noise and dust discharges. 2012 Record 49-52; 77-87. We agree with intervenor that the county

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[4] That finding is found under the heading "Minimization of Conflicts" and under the subheading "Flooding" and states:

> "The Goal 5 rule limits the 'conflicts' that a local government can consider in deciding whether or not to approve a request for a post-acknowledgement plan amendment. A county is allowed to consider 'conflicts due to noise, dust, or other discharges.' * * *"

properly applied OAR 660-023-180(5)(b)(E) in considering conflicts with agricultural practices, particularly where, again, petitioner does not address other findings that undercut petitioner's argument, or argue with any specificity that the county failed to consider a particular source of conflict.

Finally, in the first assignment of error petitioner argues that the county misconstrued applicable law in limiting the "impact area" under OAR 660-023-0180(5)(a) to 1,500 feet when it considered conflicts with agricultural practices under OAR 660-023-0180(5)(b)(E). Petitioner cites a finding at 2012 Record 72 in support of its argument.[5] Intervenor points to other findings at 2012 Record 36 and 50 that make clear that for purposes of conflicts with agricultural practices, the county considered conflicts with agricultural practices on the entire 3,882 acre island.[6] We agree with intervenor. The finding cited by petitioner is most fairly

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[5] That finding is located in a section of the decision entitled "Rebuttal Findings, Impact Area" and provides:

> "Opponents have suggested that groundwater impacts, or flooding impacts, or dust, or noise impacts, or traffic impacts, will potentially harm farm uses on the entire island. Based on those claims, opponents have requested that the impact area be extended to include the entire island. There is no rational basis for many of the claims of the opponents that the proposal will harm uses miles away from the site. The record contains ample evidence of uses and practices taking place on the island. Potential conflicts identified by opponents are either addressed by the mine plan and conditions, or are not supported by scientifically verifiable data. The County acknowledges all of the information that is has received regarding farm uses taking place on the island, and concludes that none of those uses are likely to be impacted 'significantly' by the proposed operation – not within 1,500 feet, and not elsewhere on the island beyond 1,500 feet." 2012 Record 72.

[6] Findings at 2012 Record 36 state in relevant part:

> "* * * The area of analysis considered by the Board in this case includes the entire island, where factual information (testimony submitted) alleged impacts beyond 1,500 feet. Notice of the Board hearing was provided to the entire island. The Board has considered testimony received in reaching its conclusion that [intervenor's] conceptual mining and reclamation plan, and the limiting Conditions of Approval, effectively minimize potential conflicts to properties and uses within 1,500 feet of the site, and beyond 1,500 feet and including the entire island."

Findings at 2012 Record 50 state in relevant part:

read to consider conflicts with agricultural practices on the entire island, and the findings cited by intervenor provide additional support for that reading.

The first assignment of error is denied.

SECOND AND FIFTH ASSIGNMENTS OF ERROR

OAR 660-023-180(5)(b)(E) requires the county to consider conflicts with agricultural practices and minimize conflicts with agricultural practices. OAR 660-023-0180(5)(c) provides that minimizing identified conflicts with agricultural practices means conforming to the requirements ORS 215.296. That statute, in turn, requires the county to determine whether the proposed use would force a significant change in or significantly increase the cost of agricultural practices on nearby lands.[7] The county concluded that the mining operation will not force a significant change in or significantly increase the cost of agricultural practices under OAR 660-023-0180(5)(b)(E) and ORS 215.296 because all identified conflicts with agricultural practices will be minimized through conditions that the county imposed in the decision. In its second and fifth assignments of error, petitioner

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> "For purposes of this analysis the entire 'area' under consideration is Grand Island. No significant impacts have been identified within 1,500 feet of the proposed mining area, and it is therefore highly unlikely that impacts could be identified beyond 1,500 feet. * * *"

[7] ORS 215.296 provides in relevant part:

> "(1) A use allowed under ORS 215.213 (2) or (11) or 215.283 (2) or (4) may be approved only where the local governing body or its designee finds that the use will not:
>
> > "(a) Force a significant change in accepted farm or forest practices on surrounding lands devoted to farm or forest use; or
> >
> > "(b) Significantly increase the cost of accepted farm or forest practices on surrounding lands devoted to farm or forest use.
>
> "(2) An applicant for a use allowed under ORS 215.213 (2) or (11) or 215.283 (2) or (4) may demonstrate that the standards for approval set forth in subsection (1) of this section will be satisfied through the imposition of conditions. Any conditions so imposed shall be clear and objective."

challenges various aspects of the county's conclusion that the mining operation will not conflict with agricultural practices.

A. Second Assignment of Error

As noted, there are only a few public roads on Grand Island. Trucks will transport gravel from the site to intervenor's processing facility in Dayton using public roads on the island. During the proceedings below, petitioner and others argued that truck traffic generated by the mining operation would significantly increase the cost of agricultural practices due to conflicts between the gravel transport trucks and other traffic using the public road in conjunction with customary agricultural practices, including travel by oversized and/or slow moving farm equipment and passenger and bus traffic visiting farms and farm stands. Opponents also argued that the gravel trucks using the public road would force a significant change in and significantly increase the cost of farming berries due to possible berry taint from diesel exhaust. 2011 Record 512. With respect to traffic conflicts along the public road, intervenor's traffic study recommended road improvements, including widening of Grand Island Road to accommodate additional gravel truck traffic and minimize conflicts with passenger vehicles travelling on the part of the haul route that is one of the main roads on the island.[8]

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[8] OAR 660-023-0180(5)(b)(B) requires the local government to consider:

> "Potential conflicts to local roads used for access and egress to the mining site within one mile of the entrance to the mining site unless a greater distance is necessary in order to include the intersection with the nearest arterial identified in the local transportation plan. Conflicts shall be determined based on clear and objective standards regarding sight distances, road capacity, cross section elements, horizontal and vertical alignment, and similar items in the transportation plan and implementing ordinances. Such standards for trucks associated with the mining operation shall be equivalent to standards for other trucks of equivalent size, weight, and capacity that haul other materials[.]"

Petitioner does not challenge the county's conclusion that the mining proposal satisfies OAR 660-023-0180(5)(b)(B) and we do not address that subsection in our resolution of the second assignment of error.

In the second assignment of error, petitioner argues that the county misconstrued ORS 215.296 when the county found that it does not have the authority to prevent gravel trucks from using the public roads to transport gravel.[9] According to petitioner, that misunderstanding of ORS 215.296 caused the county to fail to consider evidence in the record regarding increases in costs to agricultural operations from delays in transporting farm equipment caused by the difficulty in large farm equipment and large gravel trucks trying to negotiate the same public roads and from additional traffic conflicts that will impact farm stands and agritourism practices, and the county's findings are inadequate where the findings fail to address that evidence.

The county adopted several pages of findings, some of which point out that the county has no authority to prevent gravel trucks from using the public roads. We tend to agree with petitioner that whether the county has the authority to prevent gravel trucks from using public roads is legally irrelevant; the question is whether ORS 215.296 is met. If the county had concluded that the proposal does not comply with ORS 215.296 due to conflicts that cannot be mitigated between truck traffic and farm practices, the county could deny the proposed mining under OAR 660-023-0180. But the county concluded otherwise, and we do not see that the county's view regarding its authority to regulate truck traffic on public roads plays any role in that conclusion.

Turning to the county's findings under ORS 215.296, the county concluded that ORS 215.296 is met, because Condition 12 requires that portions of the affected public roads be widened, and because Condition 14 requires intervenor to post on-site signs that notify truck drivers that they are required to yield to farm machinery, school buses and pedestrians. The county concluded that the conditions are sufficient to minimize conflicts with traffic

[9] The county adopted findings that provide in relevant part that "[t]he intent of ORS 215.296 is to protect agricultural practices from significant impacts, not to prohibit use of public roads by legitimate industries solely because they use vehicles that travel through farmland." 2012 Record 94.

generated by agricultural practices on the island, including traffic from farm equipment and farm stand visitors in buses and passenger vehicles to the point that they are not "significant" under ORS 215.296. 2012 Record 114-16. In the reply brief, petitioner argues that Condition 14 is inadequate because it does not directly require intervenor or its truck drivers to yield to farm machinery and other farm traffic, but merely requires intervenor to post a sign notifying its drivers of the requirement. However, we do not see that the requirement to post a sign that notifies truck drivers regarding the operation's rules is significantly different from or has any less of an effect on the behavior of the truck drivers than a direct condition imposed on intervenor. We think that, notwithstanding the findings at 2012 Record 94, when all of the relevant findings are taken into account, the county properly understood its obligation under ORS 215.296 and analyzed the evidence regarding impacts to farm practices, and concluded that the impacts to agricultural traffic will be minimized through Conditions 12 and 14.

With regard to the claims that diesel exhaust from the gravel trucks may significantly increase the cost of berry farming and operation of a farm stand, intervenor responds that there is no evidence in the record to support the claim that diesel exhaust will taint berries. Other than the concerns expressed by a berry farmer who stated his intent to someday open a farm stand on his farm, petitioner does not point to any evidence in the record that diesel exhaust will have a significant effect on berry farming or will significantly increase the cost of berry farming. Absent any such evidence, we think it was reasonable for the county to conclude that there would be no significant effect on crops growing along the public road and that the evidence in the record supports the county's decision that OAR 660-023-0180(5)(b)(E) and ORS 215.296 are met.[10]

[10] The county found, in relevant part:

The second assignment of error is denied.

B. Fifth Assignment of Error

In its fifth assignment of error, petitioner challenges the county's conclusion that the proposed mining operation will not conflict with agricultural irrigation practices. As part of its mining plan, intervenor proposes to mine the upper 23 foot layer of aggregate under "wet" conditions (i.e without reducing the existing water level in the mine pit) during the winter months, and to mine the lower 21-foot layer of aggregate in a partially "dry" or "dewatered" condition during the summer months.[11] As part of the dewatering operations, intervenor

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> "* * * Homes and crops exist on roads used by gravel trucks and every manner of vehicle all over the state, without any significant impact to any of them. * * *
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> " * * * * *
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> "Nothing that has been proposed by the applicant will impact the existing or proposed farm practices of anyone along the public road that the applicant has proposed to use to remove product from its property. * * *." 2012 Record 91-92.

[11] Intervenor's application included in relevant part a description of the proposed mining methods and mitigation measures related to ground water:

> "* * * Currently, the plan is to mine the upper 23-foot thick sand and gravel horizon under natural or 'wet' conditions during the winter months, and to mine the lower 21-foot thick sand and gravel horizon in a dewatered or 'dry' condition during the summer months. Although a preferred method might be year-round 'dry mining' the dual method is designed to ensure that (1) the mine ponds are flooded with natural ground water when there is the greatest likelihood of an overtopping flood event and (2) to roughly coincide with irrigation usage of ground water. Surface water is the primary source of irrigation water during the summer months and ground water is the primary source during the winter. Typical irrigation practices during the year involve no water use during December and January, intermittent ground water use between January and June, surface water use from June to September, and ground water use between September and November.
>
> "The potential impacts of this mining approach will be further mitigated through another proposed Baker Rock mining practice. Baker Rock will construct a recharge trench along the northwestern and northern property boundaries. * * * This trench will be constructed to a depth sufficient to facilitate the reinjection of the pumped water and limit the impact of localized dewatering on adjacent landowners' abilities to obtain water from their domestic and as applicable, their irrigation wells during dewatering operations. This practice will also return virtually all of the pumped water to the local Willamette Aquifer. As discussed above, ground water and surface water are used conjunctively to meet the agricultural demands of the area. Mining activities will be timed to limit potential interference between competing ground water uses during the May through November timeframe. As a result, there should be

proposes to lower the water level in the mine pit to approximately 50 feet above mean sea level, and to construct a recharge trench along the northwestern boundary of the property and reinject water that is pumped from the mine pit into the trench, with eventual return of the water to the Willamette Aquifer. Intervenor also proposes to time its dry mining operations to limit interference with groundwater uses from May to November. 2011 Record 2020-24. Intervenor identified fifteen wells within 1,500 feet of the subject property's boundaries, thirteen of which are irrigation wells that take water from the Willamette Aquifer. 2011 Record 2070.

The county found that intervenor had identified the potential conflicts between its proposed dewatering operations and irrigation practices, and that intervenor had minimized the potential conflicts through the proposed mining plan's use of the recharge trench process and the timing of intervenor's operations to have the least effect on water levels when irrigation wells are in use. The county concluded that there would be no impact on the water levels of the wells within the impact area. 2012 Record 42, 51, 76-77. The county also imposed Condition 24 that requires intervenor to monitor groundwater levels in the aquifer and supply the data to well owners in the area, and Condition 25 that requires intervenor to take corrective action if well deepening of any of the wells within the impact area is required.

Petitioner argues that the county's conclusion that the proposed mining activities will not affect groundwater levels and therefore will not significantly increase the cost of farm practices under ORS 215.296(1) is not supported by substantial evidence in the record. Petitioner argues that lowering the water level around an irrigation well will result in a significant increase in the cost of irrigation because the well will need to be deepened at

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very little water loss from the Willamette Aquifer during this operation cycle. There should also, consequently, be negligible impact to the two domestic wells * * * that lie immediately to the northwest of the site. * * * With regard to the irrigation wells * * * completed along the southeastern edge of the site, it is anticipated that their proximity to and recharge from the Willamette River to the Willamette Aquifer will mitigate any impacts of the mining activities." 2011 Record 2024.

significant expense, and the well holder will not have a guarantee that the deeper water from the well will have priority over earlier irrigation rights.

Petitioner cites to evidence in the record that the majority of farm parcels near the subject property irrigate with groundwater during the summer months and that the ground water permits for wells near the subject property allow irrigation from spring through summer. 2011 Record 2497. In contrast, petitioner argues, intervenor's expert wrongly concluded based on correspondence with only one nearby farm that most farms rely on surface water to irrigate during the summer months and the county's findings adopt that incorrect conclusion.[12] Accordingly, petitioner argues, the county wrongly concluded that groundwater wells will not be affected by the mining operations during the dewatering operation.

Contrary to petitioner's claim, we understand intervenor's site evaluation to have identified the fifteen wells within the impact area, and noted that all but two of the wells are irrigation wells. 2011 Record 2070. Based on the presumed use of those irrigation wells for irrigation during the times when the permits allow, intervenor's expert concluded that use of the recharge trench and timing the mining operations to avoid affecting groundwater levels during the time of year when groundwater, rather than surface water, is used for irrigation would maintain groundwater levels in the Willamette Aquifer that supplies the wells. 2011 Record 2024-26. There is nothing in the evidence cited by petitioner that calls into question the conclusion that with the proposed minimization measures, groundwater levels will not be affected.

Second, petitioner argues that the county erred in relying on intervenor's proposed retrenching method where no condition of approval requires that method to be used. In

[12] The county found in relevant part that "[t]he timing associated with dewatering is such that irrigation demand by many of the larger farm operations during the dry season is typically (although not always) met with surface water, and not groundwater, sources." 2012 Record 42.

Culligan v. Washington County, 57 Or LUBA 395, 401 (2008), we held that an applicant's promise or statement regarding a proposed development is not an adequate substitute for a condition of approval that is necessary to ensure compliance with applicable approval criteria, even if that promise or statement occurs in the application narrative. In *Neste Resins Corp. v. City of Eugene*, 23 Or LUBA 55, 67 (1992), we remanded a city decision approving a comprehensive plan map amendment that allowed more residential development than the previous designation, where the evidence demonstrated that public school facilities were not available to meet the potential need generated by the new designation but the city did not condition its approval of the plan amendment or limit development to ensure compliance with Goal 11 at the time it approved the amendment.

Intervenor's proposed operation and reclamation plan submitted to DOGAMI states that use of the recharge trench is one of the methods intervenor will use to ensure that groundwater levels and irrigation wells are not impacted. 2011 Record 2024, 2184 Condition 18 also requires intervenor to obtain an operating permit from DOGAMI. As far as we can tell from the record, at the time the county made its decision, DOGAMI had not yet issued its permit or approved the proposed operating and reclamation plan at 2011 Record 2004-2188. Absent such an approval of the plan and issuance of the permit, and where the county relied on the recharge trench method to find that impacts to groundwater levels would be minimized, we agree with petitioner that the county should have conditioned approval of the application on use of that recharge trench method.

The fifth assignment of error is sustained, in part.

THIRD ASSIGNMENT OF ERROR

All but eleven acres of the subject property is within the county's Floodplain (FP) overlay zone and the Willamette River and nearby creeks flood portions of the property regularly during the winter months. Petitioner's third assignment of error includes two

subassignments of error that relate to the issue of flooding of the property and the property's location within the FP overlay zone.

A. First Subassignment of Error

OAR 660-023-0180(5)(b)(A) provides:

> "The local government shall determine existing or approved land uses within the impact area that will be adversely affected by proposed mining operations and shall specify the predicted conflicts. For purposes of this section, 'approved land uses' are dwellings allowed by a residential zone on existing platted lots and other uses for which conditional or final approvals have been granted by the local government. For determination of conflicts from proposed mining of a significant aggregate site, the local government shall limit its consideration to the following:
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> "(A) Conflicts due to noise, dust, *or other discharges* with regard to those existing and approved uses and associated activities (e.g., houses and schools) that are sensitive to such discharges[.]" (emphasis added).

In the first subassignment of error under its third assignment of error, we understand petitioner to argue that the county misconstrued OAR 660-023-0180(5)(b)(A) when it concluded that floodwater that leaves the subject property after a flood event is not an "other discharge[]" under that rule. Petitioner argues that floodwater leaving the property is an "other discharge[]" under OAR 660-023-0180(5)(b)(A) and the county was required to consider conflicts from floodwaters that discharge from the property, and "minimize" those conflicts with (1) reasonable and practicable measures and (2) by ensuring conformance with state and federal permitting requirements. *See* n 2.

The county adopted findings that conclude that flood water that leaves the property is not an "other discharge[]" within the meaning of OAR 660-023-0180(5)(b)(A):

> "14.1.3 'Flooding' is not listed in the Goal 5 rule as a conflict that needs to be minimized. 'Flooding' is also not a 'discharge' that fits into the category of 'other discharges' in the Goal 5 rule. *Webster's* uses almost an entire column to define 'discharge' with the closest definition being 'a flowing or issuing out.' It is the <u>river</u> that discharges floodwaters, <u>not</u> neighboring lands, which are the recipients of floodwater.

> "14.1.4 There is good reason for not lumping 'flooding' into the phrase 'other discharges" in the standard that requires an applicant to prove to the county that all 'discharges' have been 'minimized.' The design and regulation of mining operations in Oregon is the responsibility of the Department of Geology and Mineral Industries (DOGAMI). If a site designed to 'discharge' stormwater or process water, an applicant is required to prove to DOGAMI that EPA/DEQ standards are met. It is not the County's responsibility to issue state or federal permits, or to judge local land use proposals on whether they meet applicable state or federal standards. The applicant need only demonstrate the feasibility of applying for and obtaining necessary permits." 2012 Record 72-73 (underlining in original).

Petitioner argues that the county's findings fail to address the definition of "floodway" at Yamhill County Zoning Ordinance (YCZO) 202.00, which defines "floodway" as "[t]he channel of a river or other watercourse and the adjacent land areas that must remain unobstructed in order to discharge the base flood without cumulatively increasing the water surface more than one foot." According to petitioner, under the YCZO definition all land in the FP overlay district "discharges" flood waters. Petitioner also points out that the mining plan proposes to channel existing water on the subject property into a pit and a wash water pond, and if the pit and/or the pond overflow during a flood event, they will discharge that water from the pit or the pond. As such, petitioner argues, the county is required to consider and minimize conflicts from those discharges and ensure conformance with the state and federal permitting requirements applicable to floodway discharges.

Intervenor responds that the county correctly concluded that floodwater is not an "other discharge[]" within the meaning of OAR 660-023-0180(5)(b)(A), because DOGAMI has the exclusive authority to regulate floodway mining design, and where the mining plan will discharge storm (or flood) water or process water, DOGAMI will require all discharges of water from the mining site to comply with Environmental Protection Agency (EPA) and Oregon Department of Environmental Quality (DEQ) regulations.

First, we fail to see how the county's definition of "floodway" assists in determining the meaning of "other discharges" under LCDC's administrative rule. The fact that the

YCZO definition of "floodway" uses the term "discharge" has little if any bearing on the meaning of "discharge" as used in a state administrative rule and we think the county correctly looked to the dictionary definition of "discharge" to determine whether floodwaters are a "discharge" under the rule. However, that definition is not particularly helpful in resolving the issue. What is most helpful, however, is to look at context provided by the rest of the rule. The rule requires the local government to consider "conflicts *from proposed mining of a significant aggregate site*," and specifically requires consideration of "noise" and "dust" "discharges" that are created by the mining. That strongly suggests that LCDC was concerned with conflicts from discharges similar to noise or dust that are created by and/or result from the mining activities, not with discharges that are unrelated to or would occur independently of the mining activity. Where a discharge is not created by the mining activity, such as the case of floodwaters enveloping and then leaving the subject property during a flood event, without connection to the mining activities, we do not think that the floodwater leaving the property is a "discharge" under the rule. That appears to be equally true where the mining activities will be pumping existing water on the property into a pond or pit, but that water would have remained present on the property even without the mining activity, albeit in a more dispersed form. That interpretation also finds support in the exclusive authority of DOGAMI to regulate discharges of storm water and process water from a mining site and determine whether those discharges comply with EPA and DEQ standards.

The remainder of petitioner's first subassignment of error argues that the county failed to "ensure conformance to the applicable [state or federal] standard" and depends on our agreement with its premise that floodwater is an "other discharge[]." Where we conclude above that floodwater is not a "discharge" within the meaning of the rule, the rule does not require the county to consider whether conflicts from flood water leaving the property can be

minimized, and the remainder of petitioner's first subassignment of error provides no basis for reversal or remand of the decision.

B. Second Subassignment of Error

YCZO Section 901 contains the regulations governing land within the FP overlay zone. YCZO 901.07 provides general standards for floodplain development. As relevant to this appeal, YCZO 901.07(F) provides in relevant part that "* * * no fill or levee shall extend into a floodway area. * * *" Intervenor's mining plan proposed, and the county approved, construction of a 6 to 18 foot tall noise attenuation berm, and construction of an approximately 100 foot tall berm surrounding the wash water pond for flood control purposes. In its second subassignment of error, petitioner argues that the county's findings are inadequate where the decision approves the noise berm and the wash water pond berm without adopting findings to explain why such berms are not prohibited by YCZO 901.07(F) in the floodway.

The county adopted findings that YCZO 901.09(B) applies to the proposed mining operation. YCZO 901.09 sets out "Floodway or Watercourse Development Standards," and YCZO 901.09(B) provides:

> "* * * all development in the floodway shall be prohibited unless certification is provided by a registered professional engineer demonstrating through hydrologic and hydraulic analyses * * * * that the proposal will not result in any increase in flood levels during the occurrence of the base flood discharge."

The county concluded that intervenor had satisfied YCZO 901.09(B) by providing the required certification. 2012 Record 74.

Intervenor responds that the county was not required to adopt findings that YCZO 901.07(F) does not apply to the proposed mining operation where neither of the berms are required by the decision or necessary in order to implement intervenor's mining operations. We disagree with intervenor that neither of the berms are required by the decision,

particularly where the county relied on intervenor's plan to construct the noise berm to find that noise conflicts with sensitive uses could be minimized, and on its plan to construct the wash water pond berm to find that YCZO 901.09(B) is satisfied. We agree with petitioner that the county's findings are inadequate where the findings do not address petitioner's argument that YCZO 901.07(F) applies to the proposed mining operation or otherwise explain why YCZO 901.07(F) does not apply, or is satisfied. *Lucier v. City of Medford*, 26 Or LUBA 213, 218 (1993). On remand, the county must determine how YCZO 901.07(F) and 901.09(B) apply to the proposed berms.

The second subassignment of error under the third assignment of error is sustained.

FOURTH ASSIGNMENT OF ERROR

ORS 215.296(2) requires that any conditions imposed in order to demonstrate compliance with ORS 215.296(1) with respect to aggregate mining must be "clear and objective." *See* n 7. In its fourth assignment of error, petitioner argues that conditions 24 and 25 are not "clear and objective."

Intervenor responds that the conditions that petitioner challenges were proposed almost two years before the final decision was adopted by the county, and petitioner should have, but did not, raise the issue that it raises in the fourth assignment of error prior to the close of the initial evidentiary hearing. Having failed to do so, intervenor argues, petitioner is precluded under ORS 197.835(3) and 197.763(1) from raising the issue.[13]

[13] ORS 197.835(3) provides that in an appeal to LUBA "[i]ssues shall be limited to those raised by any participant before the local hearings body as provided by ORS 197.195 or 197.763, whichever is applicable." ORS 197.763(1) provides:

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

An issue is waived if it is not sufficiently raised to enable a reasonable decision maker to understand the nature of the issue. *Craven v. Jackson County*, 29 Or LUBA 125, 132, *aff'd* 135 Or App 250, 898 P2d 809 (1995). In its reply brief, petitioner cites a page in the record where it alleges the issue was raised. The citation is to a letter from an opponent of the mine that summarizes the applicable rule regarding when conflicts are minimized. It does not include any argument or any reference to any specific conditions of approval that the author thinks are not "clear and objective." We agree with intervenor that the issue presented in the fourth assignment of error was not raised below, and may not be raised for the first time on appeal. *Boldt v. Clackamas County*, 21 Or LUBA 40, 47, *aff'd* 107 Or App 619, 813 P2d 1078 (1991) (issues must be raised with sufficient specificity to give the local decision maker and the other parties a fair opportunity to respond to the issue).

The fourth assignment of error is denied.

SIXTH ASSIGNMENT OF ERROR

As explained above, the county identified three residences located northwest of the northern boundary of the subject property within 1,500 feet of the mining area as "sensitive uses" under OAR 660-023-0180(5)(b)(A). Intervenor submitted a noise study that concluded that noise from mining operations in Cells 17 and 18, the area of the property closest to the residences, would exceed allowed DEQ noise levels and would create conflicts with those residences unless the noise could be minimized.[14] The noise study proposed measures to minimize the effects of the noise on those residences, and the county concluded that all conflicts due to noise could be minimized with "reasonable and practicable measures," including construction of a noise berm and use of muffling equipment and barriers. 2012 Record 38-39; 84-86; 117.

[14] The applicable DEQ noise regulations are found at OAR 340-035-0035.

A. Location of Washing and Screening Plant

In a portion of its sixth assignment of error, petitioner argues that the county's findings are inadequate and not supported by substantial evidence because intervenor's noise study predicted the impact of noise levels from the washing and sorting plant based on his assumption that intervenor would locate the washing and sorting plant in the northwest corner of "Cell 3," but intervenor's conceptual mining plan proposes to locate the plant in the southeast corner of "Cell 27," approximately 2,500 feet from the nearest residence. 2011 Record 1534, 2308. Cell 3 and Cell 27 share a boundary along the southeastern corner of Cell 27 and the processing plant is proposed to be located in the southeastern corner of Cell 27, with the process water pond being located in the northwestern corner of Cell 3. 2011 Record 2001.

Intervenor responds that petitioner is precluded from raising the issue because the issue was not raised prior to the close of the initial evidentiary hearing. In its reply brief, petitioner cites several pages in the record where it alleges the issue was raised. However, we have carefully reviewed the cited record pages, and we agree with intervenor that the cited record pages do not raise the issue that is presented in the sixth assignment of error that challenges the effect, if any, of the location of the washing and screening plant on the evidentiary basis for the county's conclusion that conflicts with sensitive uses can be minimized with reasonable and practicable measures. Accordingly, the issue is waived.

B. Segmented Noise Berm

The noise study concluded that mining operations in Cells 17 and 18, the area of the property closest to the residences within the impact area, would exceed allowed noise levels. The study recommended construction of a six foot high berm on the northern boundary of the subject property that, along with other measures including excavating below ground surface and using a quieter excavator than the study assumed, would minimize the effects of noise from the mining operation on the affected residences. 2011 Record 2333-34. The findings

explain that during the proceedings, in response to concerns about the berm causing floodwaters to be re-routed, the berm was redesigned to be a segmented, vegetated berm up to 18 feet high. 2012 Record 85. Condition 21 requires a segmented berm. 2012 Record 117.

In a portion of the sixth assignment of error, petitioner argues that because the noise study did not consider a segmented berm, the county's conclusion that the segmented berm would minimize noise conflicts with the affected residences is not supported by substantial evidence in the record. Intervenor responds that the evidence in the record supports the county's conclusion that any conflicts from noise from the mining operations can be minimized with construction of a berm whether continuous or segmented, because the noise study recommended a combination of measures, and because conditions 20 and 21 require intervenor to monitor noise and take steps necessary to comply with DEQ noise standards. 2011 Record 2333-34; 2012 Record 117. We agree with intervenor. Petitioner does not point to any evidence in the record that demonstrates that the noise attenuation properties of a much taller, segmented berm differ significantly from the noise attenuation properties of a continuous, shorter berm, or that undermines the noise study's conclusion that with a combination of measures including construction of a berm, noise impacts from the mining operation can be minimized.

C. Construction of Noise Berm

In another subassignment of error, petitioner argues that the county's findings are inadequate because they fail to address noise impacts from construction of the noise attenuation berm. Intervenor responds that the noise study takes the position that DEQ's noise rules exempt construction noise. 2011 Record 2314; OAR 340-035-0035(5)(h). Petitioner does not challenge that conclusion. We agree with intervenor that the county was not required to consider the effect of noise from construction of the berm.

D. Adequacy of Condition 20

As noted, the county imposed Condition 20, which provides that "[m]ining activities shall operate within the applicable noise standards of the [DEQ]. The operator shall use mitigation measures * * * to achieve compliance." 2012 Record 117. Petitioner points out that funding has been withdrawn for DEQ's noise monitoring program, and argues that Condition 20 is not enforceable because DEQ does not review compliance with noise regulations. Intervenor responds that Condition 20 is enforceable by the county and the fact that DEQ's noise monitoring program is currently unfunded has no bearing on whether the county has the authority to impose and enforce Condition 20. We agree with intervenor.

The sixth assignment of error is denied.

SEVENTH ASSIGNMENT OF ERROR

In its seventh assignment of error, petitioner argues that the county's findings are inadequate under OAR 660-023-0180(5)(b)(A) and (E), because the findings fail to consider the impacts on sensitive uses and agricultural practices from dust discharged during construction of the noise berm. Intervenor responds that petitioner is precluded under ORS 197.763(1) and ORS 197.835(3) from raising the issue. *See* n 13. In its reply brief, petitioner cites several pages in the record where it alleges the issue was raised. We have carefully reviewed each of the record citations, and we agree with intervenor that the issue presented in the seventh assignment of error was not raised below, and may not be raised for the first time on appeal.

The seventh assignment of error is denied.

EIGHTH ASSIGNMENT OF ERROR

OAR 660-023-0180(5)(f) provides in part:

> "Where mining is allowed, the local government shall determine the post-mining use and provide for this use in the comprehensive plan and land use regulations. For significant aggregate sites on Class I, II, and Unique farmland, local governments shall adopt plan and land use regulations to limit post-mining use to farm uses under ORS 215.203, uses listed under ORS

> 215.213(1) or 215.283(1), and fish and wildlife habitat uses, including wetland mitigation banking."

The county imposed the following condition of approval:

> "Reclaimed Use. The site shall be sequentially reclaimed as it is mined, for use as fish and wildlife habitat, and eventual use for public recreation. * * * Upon final reclamation, the site shall be made available to the State of Oregon or other appropriate entity for dedication and use as a public park, if allowed by law. If no such entity is available to accept dedication of the property as public parkland, the applicant shall establish a conservation easement on the site allowing reasonable public access and use in perpetuity." 2012 Record 112.

In the eighth assignment of error, petitioner argues that the county's condition providing for future use of the property for park and "public recreation" use violates OAR 660-023-0180(5)(f) because those uses are not uses allowed by ORS 215.283(1) and are not farm uses under ORS 215.203, as the rule requires. In support of its argument, petitioner cites *Turner Community Assoc. v. Marion County*, 37 Or LUBA 324 (1999). In *Turner*, the county's decision included a condition of approval that specified that the future use of the gravel mine would be for "farming, wetland and wildlife habitat," but also allowed the county to approve instead "* * * other uses allowed, permitted subject to standards, or conditionally permitted in the underlying zone." *Id*. at 338. We agreed with the petitioner that the condition allowed uses listed under ORS 215.283(2) in contravention of OAR 660-023-0180(5)(f)'s direction that only uses allowed under ORS 215.283(1) or ORS 215.203 be allowed on the property after mining had concluded.

Intervenor responds that the condition that the county imposed in the present appeal is unlike the condition at issue in *Turner*. Intervenor argues that petitioner confuses the future uses that the county has allowed through the condition of approval with future uses that the county desires to occur on the property, but only "if allowed by law." 2012 Record 112. Intervenor points to findings that demonstrate that the county intends for the property to be used as fish and wildlife habitat and points out that the MR zoning of the property allows farm uses outright, and that intervenor's proposed reclamation plan indicates that future use

of the property will be as fish and wildlife habitat and wetlands. According to intervenor, the county has limited future use of the property in accordance with OAR 660-023-0180(5)(f) to fish and wildlife habitat use, and has merely in the condition of approval expressed a desire to assist in facilitating use of the property for a park if allowed by law at the time of final reclamation.

We agree with intervenor that the county's condition limiting future uses of the property is consistent with OAR 660-023-0180(5)(f). The condition limits future uses of the property to "fish and wildlife habitat" uses, notwithstanding the language in the condition referring to the possible future use of the property for park and public recreation uses, because the condition allows those park and recreation uses only "if allowed by law."

The eighth assignment of error is denied.

The county's decision is remanded.