BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

DAVID POTO, GILBERT DAVIS,
and RICHARD BALL,
Petitioners,

vs.

LINN COUNTY,
Respondent,

and

KEN WEBER and RENAYE WEBER,
Intervenors-Respondents.

LUBA No. 2012-065

FINAL OPINION
AND ORDER

Appeal from Linn County.

Anne C. Davies, Eugene, filed the petition for review and argued on behalf of petitioners.

No appearance by Linn County.

Tia M. Lewis and Myles Conway, Bend, filed the response brief and Tia M. Lewis argued on behalf of intervenors-respondents. With them on the brief was Schwabe, Williamson & Wyatt, P.C.

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

REMANDED 03/12/2013

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

Petitioners appeal a county decision that approves a plan amendment and zone change to allow an expansion of a gravel mining operation.

MOTION TO INTERVENE

Ken Weber and Renaye Weber, the applicants below, move to intervene on the side of the county. The motion is granted.

REPLY BRIEF

Petitioners move for permission to file a reply brief to respond to new matters raised in the response brief. The reply brief is allowed.

FACTS

The subject property is an 84.11-acre parcel zoned exclusive farm use that is owned by intervenors, on which operates an existing 33-acre quarry. The existing 33-acre quarry site was previously included in the county's inventory of significant aggregate sites under Statewide Planning Goal 5 (Natural Resources, Scenic and Historic Areas, and Open Spaces) as a "Significant Site Without Conflicting Uses." Record I 17.[1] A conditional use permit issued in 1981 (1981 permit) approved mining on 25 acres of the 33-acre site, and authorized a temporary portable asphalt batching plant on seven acres south of the approved mining area.[2] Record I 600. A 1997 county decision approved modifications to the 1981 permit.[3] Record I 596-599.

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[1] The record in this appeal includes the incorporated record from LUBA No. 2011-044. We refer to pages from that incorporated record as "Record I" and pages from the record in LUBA No. 2012-065 as "Record II."

[2] We cannot tell from the record and the parties' arguments whether a batching plant has ever operated on the property.

[3] The 1997 decision approved changes to the operating conditions for the mining activity, and did not list "batching" as a "primary processing" activity allowed on the property. Record I 597.

In the application that led to the decision in this appeal, intervenors applied (1) to add an additional 4.1 acres adjacent to the existing 33-acre quarry to the county's Goal 5 inventory of significant aggregate sites, (2) to amend the Goal 5 inventory designation of the entire 37.1 acre site to identify it as a "Significant Site with all Conflicts Minimized," and (3) to amend the zoning map to apply an Aggregate Resource Overlay to the site. Intervenors' proposal includes mining, crushing and processing aggregate into asphalt cement in an onsite batching plant.

A planted vineyard is located approximately 2,000 feet north of the quarry site. Land to the north of the quarry site is zoned exclusive farm use and farm/forest, and contains dwellings, timber, and row crops. Land to the west of the quarry site is zoned farm/forest and rural residential, and contains dwellings and two other quarries. Land to the south and east of the quarry site is zoned farm/forest and exclusive farm use, and contains pasture and timber.

In 2011, the county approved the applications and petitioners appealed that decision to LUBA. After petitioners filed the petition for review, the county sought a voluntary remand of the 2011 decision and LUBA remanded the decision. *Poto v. Linn County*, __ Or LUBA __ (LUBA No. 2011-044, October 27, 2011) (*Poto I*).

The county conducted proceedings on remand, and at the conclusion of the proceedings on remand, the county again approved the applications. This appeal followed.

INTRODUCTION

We begin with a brief overview of the relevant Goal 5 administrative rules and a statute that applies to the part of the application that seeks approval of an on-site asphalt cement batching plant, and of the county's decision.

A. OAR 660-023-0180(5)

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 any conflicts with

certain uses within that impact area, and (3) determine reasonable and practicable measures that would minimize any identified conflicts.

B. ORS 215.301

On land zoned exclusive farm use, ORS 215.283(2)(b)(B) and (C) and ORS 215.298 conditionally allow the batching of aggregate into asphalt cement in connection with gravel mining on the land. However, ORS 215.301 prohibits the county from approving an application for batching of aggregate into asphalt cement within two miles of a planted vineyard, except for batching operations "under a local land use approval on October 3, 1989, or a subsequent renewal of an existing approval." As noted, a planted vineyard is located approximately 2,000 feet from the subject property.

C. The County's Decision

The county approved with conditions intervenors' application to add the 37.1-acre site to the county's inventory of "Significant Sites with all Conflicts Minimized." Record II 16. The county adopted findings concluding that the batching plant authorized by the 1981 permit on the originally approved mining site is exempt from the statutory prohibition on batching operations within two miles of a planted vineyard. We discuss those findings in detail below in our resolution of the third assignment of error. With respect to the proposed batching operation on the expanded 37.1-acre site, the county did not conduct a conflicts analysis as required under OAR 660-023-0180(5)(b) due to insufficient information. Instead, the county imposed a condition requiring that any future proposal to allow batching activity on the expanded 37.1-acre site be reviewed through a land use process with public participation that must include an analysis of conflicts between batching and existing and approved uses on surrounding lands. Record II 30-31. We discuss that part of the county's decision in our resolution of the second assignment of error.

THIRD ASSIGNMENT OF ERROR

A portable cement batching plant is proposed in the application. Record I 41. As noted, a planted vineyard is located approximately 2,000 feet from the subject property, and the location of that planted vineyard less than two miles from the subject property triggers application of ORS 215.301. Therefore, the batching proposed by the application is prohibited unless the county finds that the exemption in ORS 215.301(2) applies.

A 1981 conditional use permit previously authorized a portable asphalt batching plant on seven acres of the 33-acre portion of the resource site that was, at that time, listed on the county's inventory of "Significant Sites With No Conflicts," to be located to the south of the 25 acres approved for mining. Record I 600. A 1997 county decision modified the 1981 approval. Record I 597-99. In its original decision that was appealed in *Poto I*, in response to arguments below that ORS 215.301 prohibits the county from approving batching on the property, the county adopted the following findings:

> "Concerns were raised relating to potential impacts of a temporary asphalt batching plant on agricultural practices, including the potential for impact on the Marks Ridge Winery operation. The record shows that the winery is located less than two miles from the subject property. Winery owners and area residents have registered concerns with the applicant's plan to site a temporary asphalt batching plant on the subject property. Project opponents cite ORS 215.301(1) which states that no application shall be approved to allow batching and blending of mineral and aggregate into asphalt cement within two miles of a planted vineyard. However, Subsection 2 of ORS 215.301 contains an exception to this provision stating that the prohibition shall 'not be construed to apply to operations for batching and blending of mineral and aggregate under a local land use approval on October 3, 1989 or a subsequent renewal of an existing approval.'
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> "The record demonstrates that a portable asphalt mixing/batching plant has been authorized on the subject property since 1981. A conditional use permit issued by the county in connection with CU-83-80/81 authorized an aggregate mining operation, crushing and blasting activity and a portable asphalt mixing plant on the subject property. The Board finds that the authorization granted under this permit remains valid. [Linn County Code] LCC 921.543(A) required the applicant to 'initiate the mining of aggregate' within two years of the date of final conditional use approval to vest its rights under the conditional use permit. The record demonstrates that the mining of aggregate

> materials was first initiated on the subject property in the 1940s. The record further demonstrates that the mining of aggregate has been conducted on a regular, ongoing and continuous basis since the conditional use permit was issued in 1981. 'Mining activity' and 'development' (the two terms that define 'initiation of mining' under LCC 921.543) were initiated at the site within two years of the issuance of the conditional use permit. As a result, the rights granted under the conditional use permit have vested to the property owner, making the operation exempt from the statutory prohibition on asphalt batching operations as stated in ORS 215.301(1)." Record I 25.

On remand, the county adopted identical findings. Record II 30. Based on these findings, the county's apparent position is that ORS 215.301(1) is no impediment to batching operations authorized under the 1981 permit, or any future batching operations on the expanded 37.1-acre site.

In their third assignment of error, petitioners argue that the county's findings that ORS 215.301(1) does not prohibit the proposed batching operation are inadequate and that the county misconstrued applicable law in making that determination.[4] Petitioners argue that the exemption in ORS 215.301(2) does not apply, because a 1997 modification of the 1981 permit did not list batching as a primary processing activity allowed on the site, and that the county's findings fail to address the effect of the 1997 modification on the 1981 permit.

As noted, in the challenged decision, the county required any batching activity conducted on the site to receive approval through a land use process that will analyze conflicts with existing and approved land uses under OAR 660-023-0180(5)(b):

> "[T]he Board finds there is insufficient evidence on the nature, duration and scope of a batching operation to conduct the conflicts analysis under OAR 660-023-0180(5)(b). The evidence in the record shows that these operations are temporary and vary in intensity and duration depending on the job. Therefore, the Board finds any batching activity must receive approval though

[4] 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).

a land use process with equivalent participatory rights as the present process *to address the conflict analysis*." Record II 30-31 (emphasis added).[5]

In a footnote, the Board noted:

> "The Board acknowledges that the future conflict analysis for the batching may result in a finding that all conflicts cannot be minimized, thereby necessitating an ESEE analysis and a plan amendment to change the designation of the site from "significant with all conflicts minimized." *Id*. at 31.

The county imposed the following condition of approval, Condition 5, under OAR 660-23-0180(5)(c):

> "To minimize conflicts related to batching, the property owner shall obtain County land use approval *prior to conducting batching operations at the batch plant site authorized under [the 1981 permit.] The land use review shall include any conflict analysis required under applicable County Code and Administrative Rule, and shall verify establishment of the screening required pursuant to [the 1981 permit.]*" Record II 38 (emphases added).

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[5] OAR 660-023-0180(5)(b) 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;
>
> "* * * * *
>
> "(E) Conflicts with agricultural practices; and
>
> "(F) Other conflicts for which consideration is necessary[.]"

OAR 660-023-0180(5)(c) provides that where conflicts are identified "[t]he local government shall determine reasonable and practicable measures that would minimize the conflicts identified * * *. To determine whether proposed measures would minimize conflicts to agricultural practices, the requirements of ORS 215.296 shall be followed rather than the requirements of this section. * * *"

In their response brief, intervenors concur with the county's finding that the batching operation authorized by the 1981 permit is exempt from the statutory prohibition in ORS 215.301(1). Response Brief 14. However, intervenors argue that because the county required "new" asphalt batching operations to receive future land use approval, petitioners' argument that the challenged decision violates ORS 215.301 should be denied as premature. According to intervenors "[w]hile the existing land use permits governing the site authorize the use of a portable asphalt mixing plant, the Findings and Decision for the present request do not authorize this use without further land use approval." *Id*. We understand intervenors to argue that the county's conclusion that ORS 215.301 is not an impediment to batching operations authorized under the 1981 permit is non-binding *dicta*, and that the appropriate time for petitioners to raise their challenges under ORS 215.301 is when intervenors apply for the future land use approval required under Condition 5.

The prohibition on batching imposed in ORS 215.301 is separate from and independent of the conflicts analysis required under OAR 660-023-0180(5)(b). Based on the county's findings, the county's decision appears to conclusively resolve the question of whether ORS 215.301 prohibits batching operations under the 1981 permit, and signify that the county intends to limit the future land use approval required under Condition 5 to the separate question of whether batching operations as authorized under the 1981 permit or as proposed in the current application are allowed under Goal 5. If so, then the county's conclusions regarding ORS 215.301 are not mere *dicta*.

On the merits, we agree with petitioners that the county's findings regarding ORS 215.301 are inadequate to respond to petitioners' arguments regarding the effect of the 1997 modification of the 1981 permit. Those findings also fail to recognize that the 1981 permit authorized batching of gravel extracted from a 33-acre site that was listed in the county's inventory of Significant Sites With No Conflicts, whereas batching proposed in the new application proposes batching of gravel extracted from a 37.1-acre site that will be listed in

the county's inventory as a Significant Site With All Conflicts Minimized. Presumably it is that difference in the proposal that led the county to conclude that the proposed batching plant would require additional review under OAR 660-023-0180(5).

On remand, the county must address petitioners' arguments regarding the possible effect of the 1997 permit modification on the exception provided by ORS 215.301(2) for batching plants that were authorized prior to 1989. The county will also need to consider whether its position that the proposed batching plant will require additional review under OAR 660-023-0180(5) to be allowed under a future permit application renders the exception provided by ORS 215.301(2) for batching plants that were authorized prior to 1989 inapplicable.

The third assignment of error is sustained.

FIRST AND SECOND ASSIGNMENTS OF ERROR

A. First Subassignment of Error (Impact Area)

OAR 660-023-0180(5)(a) requires the county to determine an impact area:

> "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. * * *"

In the decision challenged in *Poto I*, the county determined that an impact area of 1,500 feet from the mining area was sufficient. On remand, in response to testimony submitted during the initial hearings and an assignment of error in the petition for review in *Poto I*, intervenors studied potential conflicts between the mining and domestic wells and structures within one mile of the subject property and additional wells located further than one mile from the subject property that were identified by petitioners. Intervenors' experts concluded that the vibration levels from blasting have not and would not cause damage to structures or wells within one mile of the subject property. The county concluded that the evidence submitted

by intervenors' experts showed that there were no significant potential conflicts with domestic wells located within one mile of the subject property. Record II 17-18.

In a portion of the first assignment of error, petitioners argue that the county erred in failing to expand the impact area beyond 1,500 feet from the subject property, because expansion was required once area residents submitted "factual information" indicating significant potential conflicts with domestic wells and structures from blasting activity. According to petitioners, once such "factual information" is submitted, the county has no choice but to expand the impact area, evaluate the identified conflicts and determine minimization measures as required under OAR 660-023-0180(5)(b) and (c).

When "factual information" is submitted indicating "significant potential conflicts" beyond the initial 1,500-foot impact area, a county has at least two choices. First, it can expand the impact area to include the site of the identified significant *potential* conflicts. When such *potential* conflicts are then evaluated under OAR 660-023-0180(5)(b), it may turn out that there is no conflict or significant conflict at all, and no minimization measures must be required under OAR 660-023-0180(5)(c). It is not clear whether that is what the county did in the present case. Alternatively, where the "factual information" is disputed, a second option is to accept evidence on whether the alleged conflict is indeed a significant potential or actual conflict. If the local government concludes based on substantial evidence that there is in fact no significant potential conflicts beyond the initial 1,500-foot impact area, the local government can decline to expand the 1,500-foot impact area, and proceed to evaluate conflicts within the 1,500-foot impact area under OAR 660-023-0180(5)(b) and (c). In the present case, it is not clear which path the county took, but in either case it leads to the same place. We discuss and reject below petitioners' evidentiary challenges to the county's findings, based on the testimony of intervenors' expert, that mine blasting in fact does not impact wells within one mile of the site. Given that conclusion, petitioners' arguments that

the county erred in failing to expand the 1,500-foot impact area to evaluate conflicts with residential wells within one mile of the site do not provide a basis for reversal or remand.

In another portion of the first subassignment of error, petitioners argue that ORS 215.301 and the location of a planted vineyard 2,000 feet from the subject property are "*per se* adequate factual information" that indicates significant potential conflicts beyond 1,500 feet from the subject property, and that the county was therefore obligated to expand the impact area to include the vineyard. Petition for Review 7-8. We reject that argument for several reasons. First, as noted above the county's findings can be fairly read to have established an impact area of one mile, and that area includes the planted vineyard. Second, nothing in the text of the statute indicates that it is intended to require in all cases that where a planted vineyard is located within two miles of a proposed batching plant the local government must under the Goal 5 rule expand the impact area to include the vineyard. ORS 215.301 is a law, and cannot reasonably be understood to be the "factual information" referenced in OAR 660-023-0180(5)(a). Finally, petitioners do not point to any "factual information" in the record that indicates significant potential conflicts to the vineyard from the mining operation.

The first subassignment of error under the first and second assignments of error is denied.

B. Second Subassignment of Error (Conflicts Analysis)

OAR 660-023-0180(5)(b) provides in relevant part that:

> "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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> "* * * * *

"(F) Other conflicts for which consideration is necessary[.]"

OAR 660-023-0180(5)(c) provides that where conflicts are identified "[t]he local government shall determine reasonable and practicable measures that would minimize the conflicts identified * * *. To determine whether proposed measures would minimize conflicts to agricultural practices, the requirements of ORS 215.296 shall be followed rather than the requirements of this section. * * *"

1. Domestic Water Wells

In the second subassignment of error under the first and second assignments of error, petitioners argue that the county's conclusion under OAR 660-023-0180(5)(b) that domestic wells and structures within one mile of the subject property will not be adversely affected by blasting operations is not supported by substantial evidence in the record. Petitioners submitted evidence of well damage and loss of water, the dates that the damage and loss of water were discovered, and the dates of blasting activity at the mine. Record I 215, 764. After remand, intervenors' experts submitted hydrology reports and a blasting vibration analysis to respond to petitioners' evidence. Intervenors' experts concluded that for all but two wells, the dates of the damage did not correlate to blasting activity, and that for the two wells with correlating dates, the damage was more likely caused by poor well construction and geologic and soil conditions. Record II 218-251; 815-845;1107-24. Intervenors' experts concluded that blasting at the mining site would not cause damage to wells in the future. Petitioners also submitted an expert report that concluded that the wells could have been damaged by past blasting and that blasting could cause damage to wells in the future, and that suggested further study of the issue. Record II 321-22.

The county concluded that intervenors' experts' evidence was more credible than petitioners' expert's evidence. The county specifically explained that it chose not to rely on petitioners' expert because it did "* * * not establish a causal link between the problems with the wells and the aquifer and activities at the [mine site], including blasting." Record II 22.

Petitioners argue that the county's findings are inadequate to explain why the county chose not to rely on petitioners' expert's evidence, and that the county erred in failing to address petitioners' and area resident's evidence that took the position that past blasting operations have caused damage to area wells.

Intervenors respond, and we agree, that the county's findings are adequate to explain why it chose to rely on intervenors' evidence. We also agree with intervenors that a reasonable person could reach the same conclusion that the county reached in choosing to rely on that evidence. The choice between conflicting evidence is the local decision maker's to make. *Younger v. City of Portland*, 305 Or 346, 358-60, 752 P2d 262 (1988).

2. Agricultural Practices (Planted Vineyard)

As explained above, the county declined to consider conflicts between the vineyard and the proposed batching plant under OAR 660-023-0180(5)(b). As we explain above, the county concluded in part that the record did not include sufficient evidence to allow it to specify the predicted conflicts between the planted vineyard and the proposed batching plant and determine whether any conflicts could be minimized.

In the second assignment of error, petitioners argue that ORS 215.301(1) mandates that the county determine, under OAR 660-023-0180(5)(b), that conflicts between the batching plant and the planted vineyard cannot be minimized. Stated differently, in petitioners' view ORS 215.301(1) predetermines the outcome of the county's Goal 5 conflicts analysis where an application seeks approval of a batching plant within two miles of a planted vineyard. Petition for Review 15.

We disagree with petitioners' contention that ORS 215.301 mandates the outcome of the county's conflicts analysis to require the conclusion that batching is a conflict that cannot be minimized, when the county eventually conducts that analysis for Goal 5 purposes. The Goal 5 conflicts analysis is concerned with an analysis of conflicts between the mining uses and agricultural practices within the impact area. If the evidence showed absolutely no

conflicts between a batching plant and a vineyard located closer than two miles from the property, under the Goal 5 rule the county could add the site to its inventory of Significant Resource Sites with All Conflicts Minimized, but would be prohibited from approving batching *under ORS 215.301* unless the exemption in ORS 215.301(2) applies.[6] Conversely, if the evidence showed conflicts that could not be minimized between a planted vineyard located within two miles of the mine and proposed batching at the mine, the county still could determine to fully allow the mining use. In that event the statute, but not the county's Goal 5 analysis, would still prohibit batching unless an exemption applies.

The second subassignment of error under the first and second assignments of error is denied.

FOURTH, SIXTH, AND SEVENTH ASSIGNMENTS OF ERROR

Intervenors argue that the fourth, sixth and seventh assignments of error raise issues that could have been, but were not, raised in *Poto I*, and that under the reasoning in *Beck v. City of Tillamook*, 313 Or 148, 831 P2d 678 (1992), petitioners are precluded from raising those issues in this appeal of the county's decision on remand.[7]

A. Fourth and Sixth Assignments of Error

In *Beck*, the Supreme Court held that issues that LUBA resolves in remanding a decision cannot be relitigated in a subsequent appeal of the decision on remand. LUBA has consistently understood *Beck* to stand for the additional proposition that issues that could

[6] That is not to say, however, that if the county concludes that batching is prohibited under ORS 215.301, the county must also conduct what would essentially be a meaningless conflicts analysis under OAR 660-023-0180(5)(b), since batching would not occur in that event.

[7] In the fourth assignment of error, petitioners argue that the county's findings are inadequate to address Linn County Code (LCC) 905.820(B)(15), which prohibits new or expanded gravel mining in areas designated Rural Residential or Rural Center. In the sixth assignment of error, petitioners challenge condition of approval 8, which gives the director of the planning and building department the authority to grant an exception to the operating hours in certain circumstances. In the seventh assignment of error, petitioners argue that the county's findings that Statewide Planning Goal 7 (Natural Hazards) and LCC 903.260(B)(1) are satisfied are inadequate and are not supported by substantial evidence in the record.

have been, but were not, raised in a first appeal of a decision that LUBA remands cannot be raised in an appeal of the decision on remand. *See, e.g. Wetherell v. Douglas County*, 60 Or LUBA 131 (2009), *DLCD v. Douglas County*, 37 Or LUBA 129 (1999), *Adler v. City of Portland*, 25 Or LUBA 546 (1993), among many others.

Petitioners concede that the issues raised in the fourth and sixth assignments of error could have been raised in the petition for review in *Poto I* but respond that *Beck* does not bar petitioners from raising new issues that they did not raise in their petition for review in *Poto I* because LUBA's decision in *Poto I* was the result of the county's motion for voluntary remand and consequently, LUBA has not yet resolved any issues in the appeal. We do not understand *Beck* to apply so narrowly. We addressed and rejected an identical argument in *Riggs v. Douglas County*, 37 Or LUBA 432 (1999), *aff'd* 167 Or App 1, 1 P3d 1042 (2000), where we explained:

> "Under petitioners' argument, on a subsequent appeal, a petitioner in a LUBA proceeding that is voluntarily remanded would be in a better position than a petitioner that obtained a final order by LUBA remanding the local government's decision. That is because under petitioners' argument, the petitioner in the voluntary remand could raise issues before this Board from the initial local government proceeding that the other petitioner would be prohibited from raising. An issue that could have been but was not raised in an *initial* petition for review may not be raised in a subsequent petition for review after remand proceedings, whether those proceedings result from a LUBA final order on the merits or a voluntary remand. Allowing a petitioner on appeal of a voluntarily remanded decision to raise pre-existing issues that the petitioner did not raise on the remand would be inconsistent with the policy the legislature enacted at ORS 197.805. * * * *Mill Creek Glen Protection Assoc. v. Umatilla County*, 88 Or App 522, 527, 746 P2d 728 (1987) (where an issue is not raised in the initial petition for review, it may not be raised during a later appeal, notwithstanding that the petitioners in the later appeal did not appear in the earlier appeal); *Cf. Hendgen v. Clackamas County*, 119 Or App 55, 58 n 3, 849 P2d 1135 (1993) (noting that where the petitioners had presented the issues *at every level of review* they are not precluded from raising them again on remand). *See also Hribernick v. City of Gresham*, 158 Or App 519, 520, 974 P2d 791 (1999) (where LUBA grants the local government and applicant motion for voluntary remand of a land use decision, the petitioner is not foreclosed from reasserting in subsequent

> proceedings any points that the petitioner raised before LUBA)." 37 Or LUBA at 450-51 (footnote omitted).

The law of the case doctrine is not dependent on whether LUBA reached a decision on the merits in the prior appeal. Rather, the doctrine precludes issues from being raised piecemeal throughout the course of appellate review, and is supported by the legislative policy at ORS 197.805 that "time is of the essence in reaching final decisions in matters involving land use * * *."

The fourth and sixth assignments of error are denied.

B. Seventh Assignment of Error

Petitioners also respond that even if the law of the case doctrine bars them from raising assignments of error four and six, they are not precluded from raising the seventh assignment of error because, during the proceedings on remand, intervenors' experts introduced new evidence regarding the impacts of blasting on an area of the property that is subject to "mass movement" hazards.[8] According to petitioners, the challenged decision adopts new findings based on that new evidence, and under ORS 197.763(7) petitioners are not precluded from raising the issue. We agree with petitioners that where the decision adopts new findings and relies on new evidence introduced during the proceedings on remand, petitioners are not precluded from challenging the adequacy of new findings that rely on that new evidence.

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[8] LCC 903.240 provides:

> "Mass movement is another hazard which may limit the density of development in some areas of Linn County. Man-induced causes of mass movement are the result of improper land use or lack of proper engineering. In a slide prone area, development can cause foundation instability which can eventually lead to mass wasting of the land. Man induced causes of failure on steep slopes include undercutting steep slopes, placing of excessive fill, indiscriminate blasting, improper handling of runoff, or improper placement of fill. Areas of mass movement topography have been identified by the Department of Geology and Mineral Industries (DOGAMI)."

A portion of the southeast corner of the property, outside of the mining area boundary, is subject to "mass movement topography," defined in LCC 900.020(A)(34) as:

> "'Mass movement topography' is evidence of slope instability. Mass movement topography may be caused by earth flow, slumping, rock slides, rockfall, mud flow, and mud slides. Unless specifically stated steep slope failures shall be considered a form of mass movement."

In their seventh assignment of error, petitioners argue that the county's findings are inadequate to explain how the applications satisfy the requirements of Statewide Planning Goal 7 (Natural Hazards) and LCC 903.260(B)(1). Petitioners first argue that the findings are inadequate because the findings rely on slope stabilization measures for mining and reclamation that are required by DOGAMI as part of the operating permit and reclamation process but fail to explain how DOGAMI's permitting process is sufficient to ensure compliance with Goal 7 and LCC 903.260(B)(1). Petitioners also argue that the decision fails to include findings addressing LCC 903.260(B)(2), which requires in relevant part that the county "shall require an applicant to provide a report from a qualified professional that states that the property is not subject to mass movement or that the site can safely be developed using specific construction and site preparation methods." Finally, petitioners argue that the reports that intervenors submitted do not provide substantial evidence that LCC 903.260(B)(2) is satisfied.

Intervenors respond that the county did not rely solely on the DOGAMI permit process to determine compliance with Goal 7 and LCC 903.260(B)(2). Intervenors point to additional findings the county adopted that conclude that the mass movement area falls outside of the mining area and no development will occur in the mass movement area, and argue that the county did not err in relying on intervenors' experts, qualified professional engineers, to determine under LCC 903.260(B)(2) that "the site can be safely developed." Record II 31. We agree with intervenors that the county's reliance, in part, on the DOGAMI-required slope stabilization measures to conclude that "the site can be safely developed" and

in part on intervenors' experts was not error, and that the evidence in the record supports the county's conclusion.

The seventh assignment of error is denied.

FIFTH ASSIGNMENT OF ERROR

A condition imposed by the county to minimize conflicts from blasting requires that "[m]easured ground vibration and air overpressure shall not exceed the limits specified in the National Fire Protection Association NFPA 495, Explosive Materials Code." Record II 39. Petitioners expert, Fellowes, took the position that using blasting limits specified in the NFPA 495 Explosive Materials Code could result in damage to neighboring wells because those limits require measured ground vibration levels to be less than .5 inches per second (ips), above the previous limit that limited the measured ground vibration during a blast to .3 ips. Record II 322; Record I 34. In their fifth assignment of error, petitioners argue that the county erred in failing to explain why it chose not to rely on petitioners' expert's evidence.

Intervenors point to evidence in the record from their expert, Feves, that relies on a summary of several studies on blasting effects on wells and buried utilities to conclude that a blasting standard of .5 ips would not result in damage to neighboring wells. Record II 833. The county relied on that evidence to conclude that even a blast at a limit of .5 ips would not cause damage to wells. Record II 21.

Petitioners' expert, Fellowes, did not take the position that measured ground vibration greater than .3 ips will cause damage to neighboring wells. Rather, petitioners' expert speculated that "any loosening of the acceptable peak particle velocity threshold could potentially be further contributory to the degradation of the performance of [neighboring wells]." Record II 322. Given that fairly equivocal statement and the unequivocal conclusion of intervenors' expert that a measured ground vibration level limit of .5 ips is too low to cause damage to wells, we do not think it was error for the county to not specifically respond to Fellowes' evidence or to explain why it chose not to rely on that evidence.

The fifth assignment of error is denied.

The county's decision is remanded.