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**NATURE OF THE DECISION**

Petitioner appeals a county board of commissioners’ decision approving a modification to a conditional use permit allowing the intensification of an existing quarry.

**MOTION TO INTERVENE**

Kerry Gulick and Linda McEwan (intervenors), the applicants below, move to intervene on the side of the county. There is no opposition to the motion and it is allowed.

**FACTS**

The subject property is a 15-acre portion of a 280-acre parcel that is zoned for exclusive farm use (EFU). In 1998, the county granted a conditional use permit for intervenors to operate a rock quarry on the 15-acre site, limited to 10,000 cubic yards of material per year, and a cumulative total of not more than 80,000 cubic yards of material removed within the 15-acre site. The 1998 conditions of approval also limited to 15 the number of daily truck round trips from the quarry.

The parcels in the surrounding area are zoned for agricultural use, and are generally used for livestock grazing, including the portions of the parent parcel outside the 15-acre quarry site. Petitioner owns a residence that is located 1,200 feet from the southeast corner of the quarry, and several other residences are located between 1,200 and 2,500 feet from the quarry.

In 2013, intervenors applied to the county to modify the conditions of approval of the 1998 conditional use permit, to facilitate both temporary and permanent intensification of the quarry. The temporary intensification is intended to supply rock for a two-year project to resurface a forest service road.

1 The temporary conditions allow intervenors to quarry up to 70,000 cubic yards  
2 of material from the 15-acre site, with a maximum cumulative limit of 500,000  
3 cubic yards. In addition, the temporary conditions allow intervenors to  
4 increase daily truck traffic up to 75 round trips, operate an asphalt batch plant  
5 on the site for up to three months, and expand the permitted hours of operation,  
6 crushing, blasting, and hauling.

7 Once the two-year period expires, the quarry would operate under new  
8 permanent conditions of approval. Under those conditions, intervenors could  
9 quarry up to 10,000 cubic yards per year, with a maximum cumulative limit of  
10 500,000 cubic yards. Blasting and crushing are limited to 30 days per year.  
11 All other conditions imposed under the 1998 permit would continue to apply.

12 The planning commission held a hearing on the application and  
13 approved the proposed modifications. Petitioner appealed the planning  
14 commission decision to the county board of commissioners. The board of  
15 commissioners conducted an on-the-record hearing and, on February 4, 2014,  
16 issued its decision upholding the approval, with amended conditions. This  
17 appeal followed.

18 **FIRST AND FOURTH ASSIGNMENTS OF ERROR**

19 Under the first and fourth assignments of error, petitioner argues that the  
20 county's findings regarding the impacts on nearby residences, with respect to  
21 noise, dust, and property values, are inadequate and not supported by  
22 substantial evidence.

23 Baker County Zoning and Subdivision Ordinance (ZSO) 602.B is a  
24 conditional use permit standard requiring a finding that:

25 "Taking into account location, size, design and operating  
26 characteristics, the proposal will have a minimal adverse impact  
27 on the (1) livability, (2) value, and (3) appropriate development of

1 abutting properties and the surrounding area compared to the  
2 impact of development that is permitted outright.”

3 The county adopted ten pages of findings addressing ZSO 602.B and the issues  
4 that petitioner raised regarding noise and dust impacts, and the impacts on  
5 property values, on surrounding lands. Record 32-42. Those findings  
6 generally compare the impacts of the intensified mining operation against the  
7 impacts of the existing mining operation, and conclude that as conditioned and  
8 limited, the intensified mining operation will have minimal additional adverse  
9 impacts on surrounding properties.

10 Under a portion of the fourth assignment of error, petitioner argues that  
11 the county failed to address the actual inquiry posed by ZSO 602.B, that is, a  
12 comparison of adverse impacts of the proposed use and the impacts of  
13 development permitted outright in the EFU zone. Without that comparison,  
14 petitioner argues, the county is in no position to conclude that proposed use has  
15 only minimal adverse impacts on the livability, value and appropriate  
16 development of property in the surrounding area.

17 Intervenor offers no meaningful response to this argument. Petitioner is  
18 correct that the county’s findings fail to conduct the comparison required by  
19 ZSO 602.B. No findings cited to us evaluate the adverse impacts of the  
20 proposed use on the livability, etc., of surrounding property, compared to the  
21 impacts of development permitted outright in the EFU zone. That comparison  
22 appears to be central to the question of whether the proposed use will have a  
23 “minimal adverse impact.” While the county might limit the required  
24 comparison to the net impacts of the *proposed* use, *i.e.*, the aspects of the  
25 mining operation that will be intensified beyond the limits imposed on the 1998  
26 conditional use permit, the findings offer no basis to avoid making the

1 comparison between the impacts of the proposed use and impacts of  
2 development permitted outright in the EFU zone. Remand is necessary for the  
3 county to conduct the comparison required by ZSO 602.B and adopt more  
4 adequate findings addressing that standard.

5 The remainder of petitioner’s arguments under the first and fourth  
6 assignments of error challenge the adequacy of the county’s findings  
7 addressing ZSO 602.B, and argue that those findings are not supported by  
8 substantial evidence. Because remand to address the comparison required by  
9 ZSO 602.B will almost certainly require new evidence and findings, there is no  
10 point in resolving petitioner’s challenges to the existing findings and evidence.

11 The fourth assignment of error is sustained, in part. The Board does not  
12 reach the remaining arguments in the first and fourth assignments of error.

13 **SECOND ASSIGNMENT OF ERROR**

14 The county’s decision adopted a number of findings and imposed several  
15 conditions regarding dust, including requiring intervenors to abide by the  
16 current Dust Abatement plan, to gravel the haul road, and to provide water to  
17 abate dust during rock crushing. In response to questions regarding the source  
18 of water for dust control, the applicants introduced testimony that the operation  
19 would use an existing water right as the source of water for dust control.

20 Petitioner argues that the record includes no evidence that there is an  
21 “adequate” amount of water available to control dust, and the findings fail to  
22 address that issue. Petitioner cites *Sanders v. Yamhill County*, 34 Or LUBA 69,  
23 88-89 (1998), for the proposition that in order to reach a conclusion that  
24 “adequate” amount of water is available to reduce dust and protect air quality,

1 the county must compare the amount of water needed against the amount of  
2 water available.<sup>1</sup>

3 Intervenor respond that no issue was raised below prior to the close of  
4 the record regarding the quantity of water available or the amount needed to  
5 control dust, and that the issue raised under the second assignment of error is  
6 waived. ORS 197.763(1).<sup>2</sup> Intervenor note that in pleadings to the board of  
7 commissioners petitioners attempted to raise issues regarding water quantity  
8 and availability, but the commissioners struck those arguments from  
9 petitioner’s pleadings and did not consider them, because they were based on  
10 evidence not in the record before the planning commission. Record 38, 42.

11 Petitioner has not demonstrated that the issue regarding the adequacy or  
12 quantity of water available was raised prior to the close of the record at or  
13 following the final evidentiary hearing. Before the planning commission,  
14 petitioner questioned whether the applicants possessed a water right or permit  
15 to provide water for dust control. *See, e.g.*, Record 739 “Where will any needed

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<sup>1</sup> Petitioner cites no approval standards requiring a demonstration that there is an “adequate” supply of water, nor identifies the approval standard that that issue would go to. Possibly, that issue could be raised under the “minimal adverse impact” standard at ZSO 602.B or other standards, but petitioner provides no assistance on that point.

<sup>2</sup> ORS 197.763(1) provides:

“An issue which may be the basis for an appeal to [LUBA] 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.”

1 water come from?”). Apparently in response to those questions, the applicants  
2 provided evidence that they have water rights or access to water sources that  
3 can be used to control dust. However, no question was raised about the  
4 adequacy or quantity of water available until the appeal to the board of  
5 commissioners. The commissioners concluded that that issue was not within  
6 their scope of review, and specifically rejected from consideration petitioner’s  
7 arguments and evidence on that point.

8 Generally, when a local government adopts findings that a specific issue  
9 has been waived, on appeal to LUBA a petitioner cannot assign error to the  
10 merits of the issue without first successfully challenging the finding that the  
11 issue was waived. *McGovern v. Crook County*, 60 Or LUBA 177, 183 (2009).  
12 Petitioner has not demonstrated that the issue of the adequacy of the water  
13 supply was raised prior to the close of the evidentiary record, or successfully  
14 challenged the commissioners’ finding that the issue was waived. Petitioner’s  
15 arguments under the second assignment of error provide no basis for reversal or  
16 remand.

17 The second assignment of error is denied.

18 **THIRD ASSIGNMENT OF ERROR**

19 ZSO 301.06.C is a conditional use standard applicable in the EFU zone  
20 that requires a finding that the “use is situated on a parcel or portion of a parcel  
21 which is generally unsuitable for the production of [farm] crops and livestock  
22 considering the terrain, adverse soil or land conditions, drainage and flooding,  
23 vegetation and location and size of the tract.”

24 On appeal to the county board of commissioners, petitioner argued that  
25 ZSO 301.06.C is not met because the 280-acre parent parcel, including the 15-  
26 acre mining site, is suitable for grazing, as shown by the fact that the 265 acres

1 exclusive of the mining site is currently grazed. Because the 15-acre mining  
2 site is located on land that is suitable for grazing, petitioner argues, ZSO  
3 301.06.C is not met and the application cannot be approved.

4 The board of commissioners first found that no issue had been raised  
5 before the close of the record before the planning commission regarding the  
6 “generally unsuitable” requirement of ZSO 301.06.C. Record 43. The  
7 commissioners concluded that issue “is not appropriate to raise in an appeal.”  
8 *Id.* Although the decision does not cite it, the apparent basis for that  
9 conclusion is ZSO 1104.03.B.4, which provides that an appeal to the board of  
10 commissioners is a “record review,” and “[n]o new testimony” will be received.  
11 The commissioners apparently understand ZSO 1104.03.B.4 to limit their  
12 review to the issues raised before the planning commission.

13 As an alternative finding, the commissioners addressed the “generally  
14 unsuitable” language of ZSO 301.06.C and concluded that because the 15-acre  
15 site is already impacted by the existing mining operation, it is not suitable for  
16 the production of crops or livestock, even if the remaining 265 acres of the  
17 property continues to be available for its current use, grazing. *Id.*

18 Before LUBA, petitioner assigns error to the county’s failure to adopt  
19 findings of compliance with ZSO 301.06. However, petitioner does not  
20 challenge the commissioners’ conclusion that the “generally unsuitable” issue  
21 raised during the local appeal was not raised in the record before the planning  
22 commission and that issue is waived. Nor does petitioner challenge the  
23 commissioners’ finding that the proposed use is appropriately located on a  
24 portion of the parcel, the 15-acre existing mining site, which is already  
25 impacted and unsuitable for farm use.



1           Intervenor responds, and we agree, that petitioner’s arguments under this  
2 assignment of error provide no basis for reversal or remand. Because the  
3 county expressly found that the issue was waived below, petitioner must  
4 successfully challenge that finding before proceeding to argue on the merits of  
5 the issue. *McGovern*, 60 Or LUBA at 183. Petitioner contends that the issue  
6 was raised before the planning commission at Record 738-40. However,  
7 nothing in the cited pages refers to the “generally unsuitable” standard or ZSO  
8 301.06.C.

9           Even if the issue were not waived, petitioner does not appear to  
10 recognize that the commissioners in fact concluded that the proposed use is  
11 located on a portion of the property that is unsuitable for grazing, because it is  
12 located on an existing 15-acre quarry. Petitioner appears to understand ZSO  
13 301.06.C to require a finding that the entire parent parcel is unsuitable for farm  
14 use. However, ZSO 301.06.C requires a finding that the proposed use is  
15 situated on a parcel *or a portion of a parcel* that is generally unsuitable. The  
16 county’s finding that the proposed use is located on an existing 15-acre mining  
17 site that is unsuitable for grazing appears to be entirely adequate to demonstrate  
18 that ZSO 301.06.C is met.

19           The third assignment of error is denied.

20           **FIFTH ASSIGNMENT OF ERROR**

21           ZSO 301.06.F.1 requires that an applicant for a conditional use permit in  
22 the EFU zone provide an “[e]xplanation acceptable to the County”  
23 demonstrating that “[e]xisting public services, utilities and road systems are  
24 adequate to accommodate the proposed use, or that any such need will be  
25 provided by the applicant.”

1           The county found compliance with ZSO 301.06.F.1 based primarily on a  
2 letter submitted by the county roadmaster, opining that the “conditions of these  
3 haul roads are suitable for truck traffic that will be generated during this  
4 reconstruction project.” Record 265. In addition, the county imposed a  
5 condition that requires the applicant to repair any damage to county roads that  
6 may occur as part of the road reconstruction project, and to require before and  
7 after assessments of road conditions by the county roadmaster.

8           Petitioner argues that the roadmaster’s letter is insufficient to  
9 demonstrate that the existing county road system is adequate to accommodate  
10 truck traffic from the intensified mining operation. First, petitioner contends  
11 that the roadmaster referred to “haul roads,” which might be a reference to the  
12 haul roads internal to the subject property, and not a reference to county roads.  
13 Second, petitioner argues that the roadmaster failed to refer to the road  
14 “system” as required by ZSO 301.06.F.1. Intervenors respond, and we agree,  
15 that it is reasonably clear that the reference to “haul roads” is to the county  
16 roads between the mining site and the site for the forest road reconstruction  
17 project, not to internal haul roads, over which the roadmaster has no authority.  
18 Similarly, the roadmaster’s failure to refer to county roads as the road “system”  
19 does not establish that the roadmaster’s letter is insufficient to demonstrate  
20 compliance with ZSO 301.06.F.1.

21           Petitioner comes closer in arguing that the roadmaster’s letter discusses  
22 only the adequacy of county roads to accommodate the temporary truck traffic  
23 generated during the two-year forest road reconstruction project, and does not  
24 appear to consider the adequacy of the roads to accommodate traffic from the  
25 extended mining operation after the two year period. After the two year period  
26 expires, conditions limit the amount of rock mined to 10,000 cubic yards of

1 material per year, which is the same volume of mining allowed under the 1998  
2 conditional use permit, and truck traffic is limited to the 15 trips per day  
3 authorized under the 1998 permit. The county’s decision does, however,  
4 effectively extend the working life of the mine, increasing the cumulative  
5 maximum from 80,000 cubic yards to 500,000 cubic yards. That extension  
6 presumably will increase the cumulative or long-term impacts of truck traffic  
7 on county roads, even limited to 15 trips per day. Intervenors do not cite to any  
8 findings or evidence addressing whether county roads are adequate to  
9 accommodate the traffic impacts of the extended permanent mining operation.  
10 Accordingly, we agree with petitioner that the record and the county’s findings  
11 are inadequate in that respect.

12 The fifth assignment of error is sustained, in part.

13 **SIXTH ASSIGNMENT OF ERROR**

14 ZSO 301.06.A, implementing ORS 215.296, requires a finding that the  
15 proposed conditional use will not force a significant change in or significantly  
16 increase the cost of accepted farming or forest practices on nearby lands  
17 devoted to farm or forest use. The planning commission addressed ZSO  
18 301.06.A, quoting the findings supporting the 1998 conditional use permit, and  
19 found that current farm uses will not be impacted by the intensified mining  
20 operation, noting that “[n]o testimony was submitted stating farm uses were  
21 going to be impacted.” Record 46.

22 On appeal to the board of commissioners, petitioner argued that the staff  
23 report and planning commission decision failed to adequately identify farm  
24 practices on nearby lands devoted to farm use. The commissioners concluded  
25 that no issue had been raised before the planning commission regarding  
26 whether the identification of farm practices was incomplete, and therefore the

1 issue had been waived. Record 46. The commissioners also noted that the  
2 planning commission had quoted and relied upon the description of farm uses  
3 and practices in the 1998 conditional use permit approval, and had found that  
4 farm uses and practices in the area have remained unchanged since 1998. *Id.*

5 On appeal to LUBA, petitioner argues that the county’s decision does not  
6 adequately identify farm practices on nearby lands devoted to grazing.  
7 Petitioner recognizes that the county found that the issue was not raised in the  
8 planning commission record and was waived. However, petitioner does not  
9 challenge or assign error to that finding. Instead, petitioner complains that the  
10 county conclusion that the issue was waived, presumably pursuant to ZSO  
11 1104.03.B.4, means that “the internal appeal process insulates the final County  
12 decision maker having to comply with the rigorous requirements of ORS  
13 215.296 and the County equivalent (ZSO 301.06).” Petition for Review 20.  
14 However, as intervenors note, where waiver doctrines apply, the result may be  
15 that potentially legitimate issues regarding compliance with land use approval  
16 criteria are effectively beyond review if they are not raised at the appropriate  
17 juncture. That is the nature of waiver. Absent a demonstration that the issue of  
18 the adequacy of the identification of farm practices on nearby lands was raised  
19 below, or a challenge to the county’s finding that the issue was waived,  
20 petitioner’s arguments under this assignment of error do not provide a basis for  
21 reversal or remand.

22 The sixth assignment of error is denied.

23 The county’s decision is remanded.