BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

DEL RIO VINEYARDS, LLC,
Petitioner,

and

A TO Z WINEWORKS, LLC,
Intervenor-Petitioner,

vs.

JACKSON COUNTY,
Respondent,

and

ROGUE AGGREGATES, INC.,
Intervenor-Respondent.

LUBA No. 2014-054

FINAL OPINION
AND ORDER

Appeal from Jackson County.

Michael J. Gelardi, Portland, filed the petition for review and argued on behalf of petitioner and intervenor-petitioner. With him on the brief was Davis Wright Tremaine, LLP.

No appearance by Jackson County.

Mark S. Bartholomew, Medford, filed the response brief and argued on behalf of intervenor-respondent. With him on the brief was Hornecker Cowling, LLP.

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

REMANDED 12/02/2014

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 Del Rio Vineyards, LLC and intervenor-petitioner A to Z Wineworks, LLC (collectively petitioners) appeal a hearings officer's decision approving aggregate extraction related activities on lands zoned Woodland Resource (WR).

FACTS

Intervenor-respondent Rogue Aggregates, Inc. (intervenor) operates an aggregate mining and asphalt manufacturing operation on a 68-acre portion of tax lot 500, a 79-acre parcel located just outside the town of Gold Hill. Tax Lot 500 is split-zoned Aggregate Resource (AR) (68 acres) and Woodland Resource (WR) (12 acres). Intervenor also owns adjacent properties, described from north to south as Tax Lots 400, 401, 102, and 103 (to the east of tax lot 102). Tax lots 400, 401, 102 and a large portion of tax lot 103 are zoned WR, and the remainder of tax lot 103 is zoned AR. A map of the subject properties that is taken from Record 580 is included in the Appendix. For clarity, we have added "WR" to the properties shown on the map that are zoned WR and added "AR" to the portion of Tax Lot 103 that is zoned AR.

The WR zone is a county zone that implements Statewide Planning Goal 4 (Forest Land). Jackson County Land Development Ordinance (LDO) 4.3.1. Mining activities in the WR zone are subject to conditional use review. LDO 4.3.3 and Table 4.3-1. In September 2013, the applicant applied for approval of various mining related uses on tax lots 500, 401, 400, 102, and 103. First, the application sought approval of an electric conveyor to transport crushed rock from the AR-zoned portion of tax lot 500, across the WR-zoned portions of tax lots 500, 102, and 103, to a stockpile area and scale located on the WR-

zoned portion of tax lot 103. Second, the application sought approval of an existing stockpile and stormwater detention area on tax lot 401. Third, the application sought approval of a future expansion of the existing stockpile area and approval of future stormwater detention facilities on the WR-zoned portion of tax lot 103. Finally, the application also requested that the hearings officer confirm in his decision that the county had previously approved use of an existing 20-foot wide, gravel surfaced haul road on tax lots 500, 103, 400 and 401, which provides access from N. River Road to applicant's aggregate mining operation on tax lot 500. Record 2. The haul road is up to 18% grade in places.

The planning director approved the application subject to conditions, and petitioners appealed the decision to the hearings officer. The hearings officer approved the application subject to the conditions included in the staff decision. This appeal followed.

FIRST ASSIGNMENT OF ERROR

Prior to 1993, 20 acres of tax lot 500 was zoned AR, with the rest of the property zoned WR. In 1994, the county approved a comprehensive plan amendment and zone change to rezone an additional 48 acres of tax lot 500 from WR to AR (the 1994 decision). Record 203-206. The 1994 decision prohibited the use of a road located to the southwest of the mining site for access to the mining site, and required an easement over a neighboring property, described in the zone change decision as "Bristol Silica," for access to the mining site. Record 205. The Bristol Silica property is tax lot 103 and at some point intervenor acquired tax lot 103. As noted, tax lot 103 is split-zoned and a small portion is zoned AR, while the larger portion is zoned WR.

In June, 1997, the county approved a site plan for aggregate extraction on tax lot 500 (the 1997 decision). Record 669-78. The record does not include a site plan map depicting the approved mining site plan. That approval included a condition similar to the 1994 rezone decision, requiring use of an easement over the Bristol Silica property, tax lot 103. Record 677.

The hearings officer found that the haul road was approved in the 1994 decision and the 1997 decision. Record 10-11. We understand the hearings officer to have based his decision on (1) the existence of the haul road on some portion of the subject tax lots at the time of the 1994 rezone decision and the 1997 site plan review decision, and (2) the requirement in the 1994 rezone decision and the condition of approval of the 1997 site plan review decision for an easement over the Bristol Silica property.[1] Record 10-11, 24.

In their first assignment of error, petitioners argue that the hearings officer erred when he concluded that the 1994 decision and the 1997 decision approved the existing haul road on tax lots 500, 103, 400, and 401. Petitioners assert that the hearings officer improperly construed those prior county decisions.[2]

Intervenor responds that the hearings officer properly interpreted the 1994 and 1997 decisions as approving the haul road. In support, intervenor

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[1] The decision notes that "[a]erial photographs establish [the haul road's] existence at least as far back as 1995. * * * There is testimony that the road follows the alignment of a road that was built to fight a wildfire in the 1980s." Record 5.

[2] LUBA is authorized to reverse or remand a decision if the local government "[i]mproperly construed the applicable law." ORS 197.835(9)(a)(D).

cites (1) the requirement in the 1994 and 1997 decisions to use an easement across the Bristol Silica property for access to the mining site, (2) a transcript of the planning commission hearing on the 1994 rezone application in which the new location of the haul road was discussed, and (3) a map appended to a report on limestone deposits that depicts a road from tax lot 103 across the WR-zoned portions of tax lot 103 and 500 to the AR-zoned portion of tax lot 500. Record 427, 438. Intervenor also responds that petitioners' arguments are collateral attacks on the 1994 and 1997 decisions.

We disagree with intervenor that petitioners' arguments are a collateral attack on the 1994 and 1997 decisions. Rather, petitioners' arguments challenge the hearings officer's 2014 decision that relied on the 1994 and 1997 decisions to conclude that the haul road has been previously authorized.

We agree with petitioners that the hearings officer erred in concluding that the 1994 rezone decision approved use of the haul road on tax lots 500, 400, 401, and 103. Nothing in the text of the 1994 rezone decision indicates that the county approved anything other than the rezoning of a portion of tax lot 500 to AR. The requirement in the decision to use an easement over tax lot 103 for the haul road did not approve the use of haul road, which was not the subject of the rezoning application or decision, and in fact, the 1994 rezone decision did not approve any *uses*. And the 1994 decision certainly did not have the effect of approving the haul road on tax lots 400 or 401 where it is now located, on property that was not subject to the 1994 rezoning decision and which was subject to different zoning and land use approval requirements.

We also agree with petitioners that the hearings officer erred in concluding that the 1997 decision approved use of the haul road on the tax lots on which it is currently located: 500, 400, 401, and 103. The 1997 decision

identifies the subject of the site plan review application as the portion of tax lot 500 that is zoned AR, and contains three references to access roads to the mining site. The first reference provides that "use of an easement across the Bristol Silica property is required" for a haul road. Record 670. The second reference describes the access to tax lot 500: "[t]he parcel has an easement to Wards Creek Road, a county owned and maintained road." Record 669. Wards Creek Road is located to the north of tax lot 500. The third reference to access in the 1997 decision is in applying the then-applicable operating standards from LDO 244.040 to the site plan review application.[3]

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[3] The 1997 decision provides:

> "Access: All on-site roads in the mining operation, *and access roads from the extraction site to a public road* shall be designed and constructed to accommodate the vehicles and equipment which will use them, and shall meet the following standards:
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> "A) All access roads within 100 feet of a paved county road or state highway shall be paved unless the applicant demonstrates that other methods of dust control will be implements;
>
> Finding: The applicant has stated that he will comply with this standard.
>
> "B) Access roads within the Extraction Area shall be maintained in a manner by which all applicable DEQ standards for vehicular noise control and ambient air quality are or can be satisfied;
>
> Finding: The applicant has stated that he will comply with this standard.
>
> "C) Access roads within the Extraction Area shall be maintained in a dust-free condition at all points within 250 feet of a

Although it is a closer question, we also do not think the requirement in the 1997 decision for an easement over tax lot 103 authorized the haul road's location on tax lot 103. The decision's only specific description of access to the property is over an easement running from tax lot 500 to the north, that connects it to Wards Creek Road, a public road, that is clearly not the location of the existing haul road. Nothing in the language of the decision supports the hearings officer's conclusion that the 1997 decision approved the location of the haul road on any other tax lots except possibly the AR-zoned portion of tax lot 500, the subject of the application. Certainly the decision includes no reference to or identification of the haul road's location on tax lots 400 and 401. Accordingly, we agree with petitioners that the hearings officer erred in concluding that the 1997 decision authorized the use of the haul road on any other tax lot other than the AR-zoned portion of tax lot 500, the subject of the application.

Petitioners' first assignment of error is sustained.

SECOND ASSIGNMENT OF ERROR

In their second assignment of error, petitioners argue that the hearings officer erred in failing to adopt findings regarding the application's compliance with LDO 4.4.8. LDO 4.4.8 provides operating standards and criteria for mining operations. The planning director identified LDO 4.4.8 as an applicable approval criterion, and found that its provisions were satisfied or

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> dwelling or other use determined to conflict with surface mining operations existing on the effective date of this ordinance.
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> Finding: The applicant has stated that he will comply with this standard." Record 675 (emphasis added).

could be satisfied with conditions. Record 690-95. The hearings officer's decision does not include any findings addressing LDO 4.4.8.

Intervenor responds that petitioners are precluded from raising the issue raised in the second assignment of error because no party raised the issue prior to the close of the record at or following the final evidentiary hearing, as required by ORS 197.763(1) and ORS 197.835(3). Petitioners respond by citing ORS 215.416(11)(a)(D) and (E), which requires the hearings officer to conduct a de novo hearing on the applications at which "[t]he presentation of testimony, arguments and evidence shall not be limited to issues raised in a notice of appeal[.]" We understand that response to take the position that where the challenged decision results from an appeal of an initial decision on a permit issued without a hearing, ORS 197.763(1) and ORS 197.835(3) do not limit the issues that may be raised in an appeal to LUBA.

If that is petitioners' position, we reject it. ORS 215.416(11)(a)(E) provides in relevant part that "[t]he de novo hearing required by subparagraph (D) of this paragraph shall be the initial evidentiary hearing required under ORS 197.763 as the basis for an appeal to the Land Use Board of Appeals." ORS 197.763(1) additionally requires that "issues shall be raised and accompanied by statements or evidence sufficient to afford the governing body * * * and the parties an adequate opportunity to respond to each issue." ORS 215.416(11)(a)(D) and (E) operate at the initial de novo evidentiary hearing to allow all issues to be raised, not after that evidentiary hearing to allow issues not raised at the de novo hearing to be raised at LUBA.

Petitioners also cite Record 534, 540, 541, and 585 in support of their response that they raised issues regarding below compliance with LDO 4.4.8. Petitioners contend that, having raised issues regarding compliance with LDO

4.4.8 below, petitioners may challenge the adequacy of the findings to demonstrate the proposal complies with the criterion.

We have reviewed the cited record pages, and we disagree with petitioners that there is anything on those pages that shows petitioners raised any issue regarding compliance with LDO 4.4.8. ORS 197.763(1) requires that issues not only be raised, but also be accompanied by statements or evidence sufficient to afford the local decision maker an opportunity to respond. What is "sufficient" depends upon whether the governing body, planning commission, hearings body or hearings officer and the parties are afforded an adequate opportunity to respond to each issue. *See Boldt v. Clackamas County*, 107 Or App 619, 623, 813 P2d 1078 (1991) (fair notice to adjudicators and opponents is sufficient). The cited pages do not show that fair notice was provided.

The planning director's decision that was appealed to the hearings officer concluded that all of the operating standards in LDO 4.4.8 were or could be satisfied with conditions. Record 690-95. Petitioners' cited record pages generally express concern about impacts to property values, air quality, noise, and traffic from the proposed expansion of the mining operation onto adjacent properties, but do not refer to LDO 4.4.8 or use any of its operative terms. *Spiering v. Yamhill County*, 25 Or LUBA 695, 712 (1993) (issue is waived if not sufficiently raised to enable a reasonable decision maker to understand the nature of the issue; discussion of specific provisions or their operative terms is sufficient). Accordingly, we agree with intervenor that having failed to raise an issue regarding compliance with LDO 4.4.8, petitioners are precluded from raising the issue for the first time at LUBA or challenging the hearing's officer's failure to adopt findings regarding LDO 4.4.8. *Lucier v. City of Medford*, 26 Or LUBA 213, 216 (1993) (in order to

raise the issue of whether findings of compliance with an applicable approval criterion are adequate, the petitioner must demonstrate that issues regarding compliance with that criterion were raised below).

The second assignment of error is denied.

THIRD ASSIGNMENT OF ERROR

In their third assignment of error petitioners argue that the hearings officer failed to adopt adequate findings regarding applicable LDO criteria that address fire safety.

A. LDO 8.7.1

LDO 8.7.1 contains wildfire protection standards that in relevant part require fuelbreaks and access designed and constructed to specified widths. The planning director's decision did not adopt findings addressing LDO 8.7.1 but imposed a condition of approval that requires a fire safety inspection to "verify that the Wildfire Safety Standards of Section 8.7.1 are in place" prior to issuance of building permits. Record 696-97. The hearings officer reviewed the evidence in the record—including a letter from the Rogue River Fire District stating that some aspects of the mining operation are "conducive to ignition and spread of * * * Wildfire" and a separate letter stating that the district will provide the required inspections—and concluding that "the standards of Section 8.7 are adequately addressed by the Staff Decision." Record 20-21.

Petitioners argue, and we agree, that the hearings officer's findings are inadequate to address LDO 8.7.1. First, the planning director's decision contains no findings addressing LDO 8.7.1, but defers determination of compliance to a future inspection by the fire district. The hearings officer's findings similarly do not explain why LDO 8.7.1 is met or why the evidence in

the record supports a conclusion that it is feasible to meet the requirements of LDO 8.7.1, where the only evidence in the record is that the fire district has concerns about wildfire and will perform the required inspections.

B. LDO 3.1.4.B(3)(b)

LDO 3.1.4.B(3)(b) requires the applicant to show that:

> "The proposed use will not significantly increase fire hazard, significantly increase fire suppression costs, or significantly increase risks to fire suppression personnel. Further, it must be demonstrated that the use will comply with the fire safety requirements in Chapter 8[.]"

The planning director concluded that the proposed uses satisfy LDO 3.1.4(B)(3)(b) and noted that a fire safety inspection will be required. Record 690. The hearings officer relied on the letter from the fire district described above that it will provide the required fire inspections to conclude that the proposed uses satisfy LDO 3.1.4(B)(3)(b). Record 20-21.

Petitioners argue that the hearings officer's findings regarding LDO 3.1.4(B)(3)(b) are inadequate to explain why that standard is satisfied. According to petitioners, the decision fails to determine whether intervenor's proposed uses increase fire hazard, fire suppression costs, or risks to fire suppression personnel, and the only evidence in the record supports a determination that intervenor's use of heavy equipment could increase the risk of fire and that the haul road may not provide adequate access for fire response. Record 158. Intervenor responds that the hearings officer's findings are adequate.

We agree with petitioners that the findings are inadequate to explain why LDO 3.1.4(B)(3)(b) is satisfied, where the evidence in the record is that the fire district expressed concerns about the risk of fire and the findings do not

address whether any risks are present from the proposed uses or otherwise explain why LDO 3.1.4(B)(3)(b) is satisfied.

The third assignment of error is sustained.

FOURTH ASSIGNMENT OF ERROR

LDO 3.1.4(B)(1)(b) requires the applicant to show that "[a]dequate public facilities (e.g., transportation) are available or can be made available to serve the proposed use[.]" The planning director found that LDO 3.1.4(B)(1)(b) is satisfied, and imposed a condition of approval requiring documentation from the county's roads department that a commercial approach permit has been issued, and that the roads department concurs with the conclusions of intervenor's traffic engineer that no further traffic impact study is required.[4] Record 688. The hearings officer's decision includes no findings specifically addressing LDO 3.1.4(B)(1)(b).

In their fourth assignment of error, petitioners argue that the hearings officer's findings fail to address whether the local roads are adequate to serve the proposed uses. Intervenor responds that the hearings officer's findings regarding a different criterion, Section 4.3.1(D) of the county's transportation system plan, also serve to explain why LDO 3.1.4(B)(1)(b) is satisfied. Record 21-22.

We disagree with intervenors that the findings addressing Section 4.3.1(D) of the county's transportation system plan are an adequate substitute

[4] The county's roads department required a limited traffic impact study to determine the safety of road approaches and the need for turn lanes or other safety measures. Record 566. The traffic impact study did not recommend any mitigation. Record 681.

for findings addressing LDO 3.1.4(B)(1)(b). Section 4.3.1(D) of the county's transportation system plan provides:

> "Regardless of whether adequate capacity exists, changes in land use and new or expanded development proposals will not be approved if they will create, or would worsen, a safety problem on a public transportation system or facility. If a problem would be created or worsened without mitigation, then a mitigation plan that resolves the safety concern must also be approved and included in the proposal in order for the land use change and/or development proposal to be approved. Where a safety concern exists, study by a registered professional engineer with expertise in transportation will be considered to determine if a problem would be created or worsened."

Section 4.3.1(D) of the county's transportation system plan is focused on the safety of the transportation system, while LDO 3.4.1(B)(1)(b) requires a broader analysis of the "adequacy" of the transportation facilities, which may include safety consideration but also could include capacity and other considerations. Remand is necessary for the county to adopt findings addressing the requirements of LDO 3.4.1(B)(1)(b).

The fourth assignment of error is sustained.

FIFTH ASSIGNMENT OF ERROR

LDO 9.3 regulates development on steep slopes, defined in LDO 9.3.1(B) as "slopes in excess of 20% that are also composed predominantly of expansive soils[.]" LDO 9.3.1(C) provides:

> "Prior to approval of development, the natural slope at the development site will be determined. The applicant may bring in a slope determination prepared by a qualified professional or Jackson County may use available information to calculate or determine the natural slope at the development site. This may include, but is not limited to, slopes as determined by Jackson County GIS Services, distances and calculations derived from USGS maps, and topographical surveys."

If development on steep slopes is proposed, then a geohazard report is required and mitigation may be required. LDO 9.3.1(C)(2)-(4).

In their fifth assignment of error, petitioners argue that the hearings officer erred in failing to adopt findings regarding LDO 9.3.1. According to petitioners, there is evidence in the record that the tax lots contain "steep slopes."

Intervenor responds that LDO 9.3.1 does not apply to the applications because there is nothing in the record to indicate that the subject tax lots contains expansive soils, and in addition the evidence in the record is that the slope of the existing haul road is between 13 and 18%. We agree with intervenor that absent any argument in the petition for review that the subject tax lots contain "expansive soils," petitioners' arguments provide no basis for reversal or remand.

The fifth assignment of error is denied.

SIXTH ASSIGNMENT OF ERROR

LDO 3.2.2 provides:

> "New uses, substantial expansions or significant changes *to multi-family, commercial, industrial or public/quasi-public uses or development* require a site plan review to verify compliance with the applicable development standards of this Ordinance except as provided by Section 3.2.2(A) below." (Emphasis added).

In their sixth assignment of error, petitioners argue that the county erred in failing to require site plan review pursuant to LDO 3.2.2 for intervenor's proposed uses of the subject tax lots for the conveyor, stockpiling, stormwater detention, and road access to the aggregate site. Intervenor responds that LDO 3.2.2 by its terms only requires site plan review for "new uses, substantial expansions or significant changes to multi-family, commercial, industrial or

public/quasi-public uses." LDO 13.2 is entitled "Use Classifications." LDO 13.2.3, 13.2.4, 13.2.5 and 13.2.8 set out the "use categories" "Residential Uses," "Commercial/Office Uses," "Industrial/Manufacturing Uses" and "Parks/Public/Quasi-Public Uses," respectively. LDO 13.2.2 sets out "Resource Uses," and the proposed uses are classified in LDO 13.2.2(C) as one of those resource uses.[5]

Petitioners do not argue that any of the proposed uses are "multi-family, commercial, industrial or public/quasi-public uses." Absent a more developed argument that under the LDO the proposed uses fall within one or more of the categories of uses that require site plan approval under LDO 3.2.2, petitioners' arguments under this assignment of error do not provide a basis for reversal or remand.

The sixth assignment of error is denied.

SEVENTH ASSIGNMENT OF ERROR

LDO 3.1.4(B)(3)(a) requires the county to find that "[t]he use will not force a significant change in, or significantly increase the cost of, accepted farming or forest practices on agriculture or forest lands[.]" LDO 3.1.4(B)(1)(a) requires the county to find, as relevant here, that "[t]he proposed use will cause no significant adverse impact *on existing or approved adjacent*

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[5] LDO 13.2.2(C) provides that mineral and aggregate resource uses include:

> "[A]ctivities that primarily involve extraction of mineral and aggregate materials from below the subsoil of a site. On-site accessory uses and activities may include surface stockpiling of mined materials, processing and crushing, truck scales and office or caretaker's buildings necessary to conduct, or ensure the security of, on-site mining operations."

uses in terms of scale, site design, and operating characteristics (e.g., hours of operation, traffic generation, lighting, noise, odor, dust, and other external impacts)." (Emphasis added.) In their third assignment of error, petitioners challenge the hearings officer's findings that those LDO provisions are satisfied.

A. LDO 3.1.4(B)(3)(a)

Three farms are located in close proximity to the subject property. Petitioner's vineyards (Del Rio Vineyards) are planted approximately 1,500 feet to the east of the subject property. The Mendoza farm, which farms alfalfa and raises cattle, is located to the west of the subject property. The Boesch farm, which produces fruit, including strawberries, nuts, and other crops and raises chickens, eggs, and lamb, is located a mile west of tax lot 500.

The owners and operators of the nearby farms presented testimony regarding the impact of dust and silica drift from the blasting operations on tax lot 500, and from the conveyor and stockpiling activities on the WR-zoned tax lots, on their farm practices. Those impacts include the potential to affect photosynthesis of the Mendoza farm's alfalfa plants that could retard growth; possibly disqualifying the Mendoza farm from its attempt to certify as an organic farm; and the consumption of silica dust by cattle feeding on the alfalfa, which makes the alfalfa less digestible. The effects on farming practices on the Boesch farm were described as dust on the strawberry crops that is absorbed into the berries and damages their quality; and the increased risk of spider mites that can damage crops, which requires the farm to spend more money to eradicate the mites. The effects on the farming practices on the Del Rio vineyards were described as dust and dust mites on the grapes that requires use of pesticides that would otherwise not be needed.

The hearings officer found that the effects on farm practices from the dust from blasting that occurs on the AR-zoned tax lot 500 was not subject to review because mining activity is a permitted use in the AR zone and blasting activities were not the subject of the applications. Record 16. The hearings officer also relied on a video introduced by intervenor (Conveyor Video) taken from several locations along the conveyor from the processing area on tax lot 500 to the stockpile area on tax lot 103. The hearings officer characterizes the Conveyor Video as demonstrating that "the dust is a very localized drift, not a 'cloud' or a 'fog' as characterized by" neighboring farmers. Record 15. Accordingly, the hearings officer rejected the farmers' evidence that dust emanating from the conveyor or stockpiling activities at its terminus would "force a significant change in, or significantly increase the cost of, accepted farming or forest practices on agriculture or forest lands."

In their seventh assignment of error, petitioners first argue that the hearings officer's findings are inadequate to describe the farm practices on surrounding lands devoted to farm use. We disagree. The hearings officer's findings regarding this LDO section are comprehensive and detailed regarding the farming practices occurring on nearby farms. Those farming practices include pesticide spraying and the eradication of spider mites associated with growing wine grapes, alfalfa, strawberries, and other crops, and practices associated with raising cattle, lamb and chickens. Record 16-18.

Second, petitioners argue that the hearings officer erred in failing to consider the impacts of dust and emissions from use of the haul road on nearby farming practices. Petitioners point to evidence in the record that truck traffic on the haul road increases dust and emissions that damages wine grapes and creates "smoke taint" in wine produced from the grapes that is expensive to

remove. Record 149, 153. Intervenor responds that the hearings officer properly excluded impacts on nearby farming practices from the haul road because the haul road was previously approved in the 1994 and 1997 decisions.

For the reasons explained in our resolution of the first assignment of error, that conclusion is incorrect. The haul road is a use that has not previously been approved under applicable standards. Absent anything in the decision that considers whether the haul road use will "force a significant change in, or significantly increase the cost of, accepted farming or forest practices on agriculture or forest lands," remand is required for the hearings officer to make that determination.

Finally, we understand petitioners to challenge the hearings officer's conclusion that the amount of dust generated from the conveyor and stockpiling activities at its terminus is not sufficient to force a significant change in or significantly increase the cost of farming practices. The hearings officer chose to rely on the Conveyor Video over conflicting testimony to determine that LDO 3.1.4(B)(3) is met. We cannot say that his decision is not supported by substantial evidence in the record. ORS 197.835(9)(a)(C).

B. LDO 3.1.4(B)(1)(a)

LDO 3.1.4(B)(1)(a) requires the county to find, as relevant here, that "[t]he proposed use will cause no significant adverse impact on existing or approved *adjacent uses* in terms of scale, site design, and operating characteristics (e.g., hours of operation, traffic generation, lighting, noise, odor, dust, and other external impacts)." (Emphasis added). Three existing residences are located adjacent to the subject property. In a portion of their seventh assignment of error, we understand petitioners to argue that the hearings officer's findings are inadequate to explain why the proposed uses

satisfy LDO 3.1.4(B)(1)(a). First, we understand petitioners to argue that for the same reasons described above, the findings fail to address the impacts on adjacent properties from the haul road. Petition for Review 50, 52. For the reasons explained above, we agree with petitioners that the hearings officer erred in failing to address at all, under LDO 3.1.4(B)(1)(a), the impacts on adjacent properties from the haul road.

We also understand petitioners to argue that the hearings officer erred in failing to address impacts from the proposed conveyor, stockpiling and stormwater detention areas on "neighbors." Petition for Review 54. The hearings officer found that the proposed stockpiling and stormwater detention uses would not cause a significant adverse impact on any "adjacent uses." Record 11-12. Petitioners do not point to any adjacent uses that will be significantly adversely impacted from the stockpiling and stormwater detention uses or develop any argument regarding the proposed stockpiling and stormwater detention uses. Accordingly, this portion of the seventh assignment of error provides no basis for reversal or remand of the decision.

The hearings officer found that dust and noise from the conveyor would not cause a significant adverse impact on any adjacent uses. Record 12-15. The hearings officer relied on the Conveyor Video submitted by intervenor, described above, to conclude that the conveyor does not generate dust in amounts sufficient to cause a significant adverse impact on adjacent uses. Those findings are adequate to explain that the hearings officer chose to rely on intervenor's evidence rather than testimony from neighbors, a choice that is within his discretion.

The hearings officer also relied on the Conveyor Video to conclude that the noise it generates will not cause a significant adverse impact on adjacent

uses. The hearings officer found that the conveyor does not generate noise that is "deafening," and that the noise from the conveyor has less of an impact than the noise from "jake brakes" used on the haul road. Record 16. Petitioners assign error to those findings, arguing that merely because the noise from the conveyor is less than the noise generated from the haul road does not mean that noise from the conveyor will not cause a significant adverse impact on adjacent properties, and that the hearings officer improperly compared the noise from the conveyor to the noise from the haul road, rather than analyzing the impacts from both proposed uses. Petition for Review 55-56. We agree with petitioners that the hearings officer's finding that the noise is less than the noise from the haul road is inadequate to explain why the noise from the conveyor will not cause a significant adverse impact on adjacent uses.

The seventh assignment of error is sustained, in part.

EIGHTH ASSIGNMENT OF ERROR

The subject tax lots are located in the county's Deer and Elk Habitat Area of Special Concern, identified in the LDO as Area of Special Concern (ASC) 90-1. LDO 7.1.1(C)(5) provides general development standards for discretionary land use permits for properties that are subject to an overlay zone. As relevant here, LDO 7.1.1(C)(5) requires the county to determine that the proposed uses will have "minimal adverse impact on deer and elk habitat based on" "[c]onsistency with maintenance of long-term habitat values of browse and forage, cover, sight obstruction" and "[c]onsideration of the cumulative effects of the proposed action and other development in the area on habitat carrying capacity[.]" In addition, LDO 3.1.4B(1)(c) requires mitigation of impacts from uses identified as conflicting uses in the county's Statewide Planning Goal 5 (Natural Resources, Scenic and Historic Areas, and Open Spaces) program.

Roads are specifically identified as conflicting uses in ASC 90-1 deer and elk habitat.

In their eighth assignment of error, petitioners argue that the hearings officer erred in failing to adopt findings regarding LDO 7.1.1(C)(5) and failing to require mitigation of impacts from the haul road under LDO 3.1.4(B)(1)(c). We understand intervenor to concede that the decision includes no findings regarding either criterion, but that LUBA should deny the assignment of error under ORS 197.835(11)(b) because the record "clearly supports" approval of the applications.[6]

We disagree with intervenor that the record "clearly supports" that LDO 7.1.1(C)(5) and LDO 3.1.4(B)(1)(c) are met in this case, within the meaning of ORS 197.835(11)(b). The "clearly supports" standard is considerably more demanding than the substantial evidence standard, and is generally only appropriately applied to approval standards that are objective or do not require interpretation or much discretionary judgment. *Waugh v. Coos County*, 26 Or LUBA 300, 306-08 (1993). We agree with petitioners that remand is required for the hearings officer to adopt findings addressing LDO 7.1.1(C)(5) and LDO 3.4.1(B)(1)(c).

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[6] ORS 197.835(11)(b) provides:

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

The eighth assignment of error is sustained.

NINTH ASSIGNMENT OF ERROR

The subject tax lots are located within the county's Scenic Resources Area of Special Concern (ASC) 90-9 for the protected views from the scenic roadway corridor of Interstate 5. LDO 7.1.1(J)(3) provides:

> "Special Findings Required
>
> "a) Within the scenic resource areas of special concern, any land use action subject to review by the Department will include findings demonstrating that the proposal will have no significant impact on identified scenic views, sites, stream and roadway corridors either by nature of its design, mitigation measures proposed, or conditions of approval; and
>
> "b) Land use activities that have no significant visual impact will not attract undue attention, and must visually harmonize with existing scenic resources. This can be accomplished through project designs that repeat the form, line, colors, or textures typical of the subject landscape, and designing the land use activity to blend into the existing landscape."

LDO 3.1.4(B)(1) additionally requires mitigation of impacts from conflicting uses. According to petitioners, the county's Goal 5 document identifies "mining operations" and "road development" as conflicting uses with ASC 90-9. We understand the hearings officer to have concluded that consideration of impacts from the haul road is not required because he concluded that the haul road was previously approved in the 1994 and 1997 decisions. We also understand the hearings officer to have concluded that LDO 7.1.1(J)(3) does not apply because the part of the conveyor that is visible from I-5 is located on the AR-zoned portion of tax lot 500. Record 19-20.

In a portion of their ninth assignment of error, petitioners argue that the hearings officer's findings are inadequate to explain why dust generated from the conveyor, stockpiling activities, and the dust generated from traffic on the haul road "will have no significant impact" on the protected viewshed. Intervenor responds that the hearings officer correctly concluded that because the haul road was previously approved, the hearings officer was not required to consider its visual impacts. Intervenor also responds that the evidence in the record "clearly supports" a conclusion that LDO 7.1.1(J)(3) is satisfied with respect to the conveyor and the stockpiling activities.

We agree with petitioners that the hearings officer's findings are inadequate. The hearings officer found that the visual impacts from the haul road are not subject to review because the haul road was previously approved in the 1994 and 1997 decisions. For the reasons we discuss in our resolution of the first assignment of error, that conclusion is incorrect. Accordingly, the hearings officer should have determined whether the visual impacts from the portions of the haul road that are located on WR-zoned properties "will have no significant impact" on the protected viewshed.

In addition, the hearings officer's findings do not address the evidence in the record regarding the visual impacts from dust from the conveyor, stockpiling activities, and the dust generated from traffic on the haul road, or determine whether, even if the land use activities have no significant impact on the protected viewshed, they will "not attract undue attention, and * * * visually harmonize with existing scenic resources" as required by LDO 7.1.1(J)(3)(b). Finally, the findings fail to address LDO 3.1.4(B)(1), which requires mitigation of impacts from conflicting uses, identified as mining operations and road development in ASC 90-9. We disagree with intervenor

that the evidence in the record "clearly supports" a finding that LDO 7.1.1(J)(3) and LDO 3.1.4(B)(1) are satisfied.

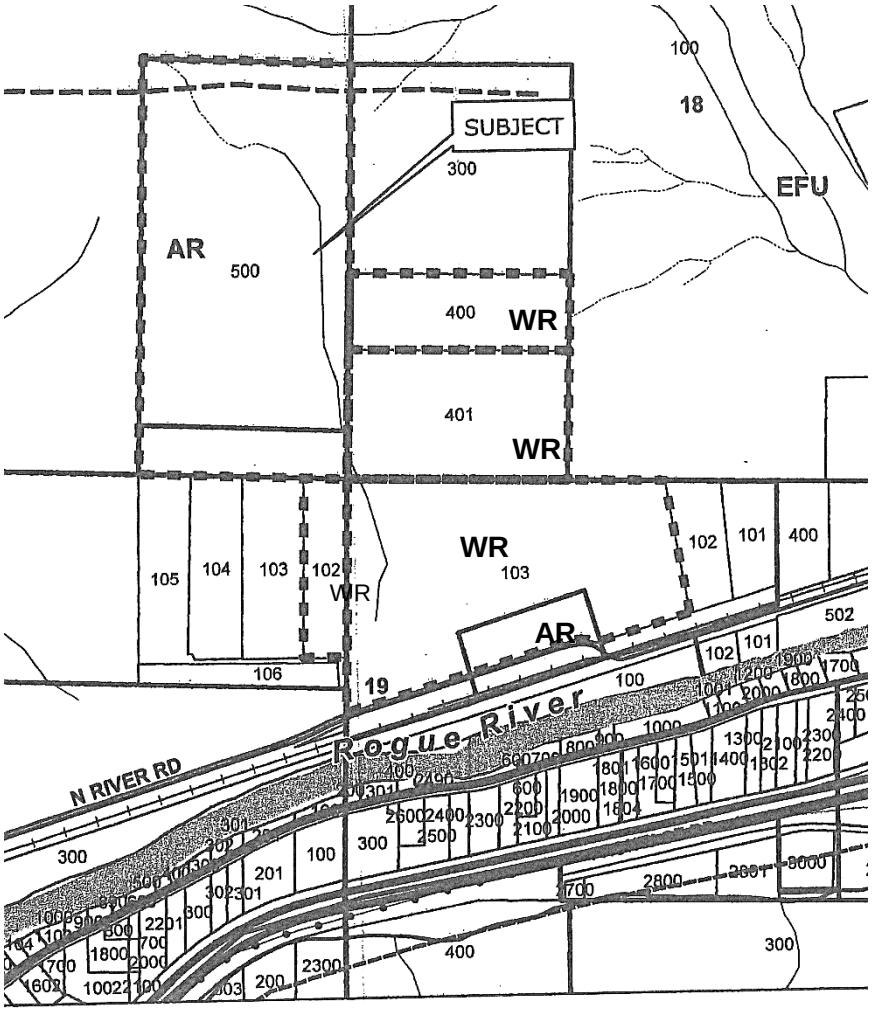
In another portion of the ninth assignment of error, petitioners argue that the hearings officer erred in failing to apply LDO 7.1.1(J)(3) to the view from the Rogue River. According to petitioners, the county has identified the Rogue River as a scenic stream corridor in the county's Goal 5 Background Document.

Intervenor responds that only the Upper Rogue River is identified as a scenic stream corridor, and that the portion of the Rogue River in the area of the subject properties is not a scenic stream corridor. We agree with intervenor that the county was not required to apply LDO 7.1.1(J)(3) to this portion of the Rogue River. Scenic streams are inventoried in Table 7.2 of the county's Goal 5 Background Document, and the location of the inventoried scenic stream is located in Townships 30, 31, and 32S, Range 3E, and Township 33S, Range 2E. Petition for Review Exhibit C, 14. As intervenor points out, the subject properties are located in Township 36, and therefore could not be visible from the protected portion of the Upper Rogue River.

A portion of the ninth assignment of error is sustained.

The county's decision is remanded.

Appendix


SUBJECT
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