BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

DEL RIO VINEYARDS, LLC,
Petitioner,

vs.

JACKSON COUNTY,
Respondent,

and

ROGUE AGGREGATES, INC.,
Intervenor-Respondent.

LUBA No. 2015-104

FINAL OPINION
AND ORDER

Appeal from Jackson County.

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

Joel C. Benton, County Counsel, Medford, filed a response brief and argued on behalf of respondent.

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

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

REMANDED 05/17/2016

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

Opinion by Ryan.

NATURE OF THE DECISION

Petitioner appeals a decision by the county hearings officer approving aggregate extraction related activities on lands zoned Woodland Resource (WR).

REPLY BRIEF

Petitioner moves for permission to file a reply brief to respond to new matters raised in the response brief. The alleged new matters are responses contained in the county's and intervenor-respondent Rogue Aggregates, Inc. (intervenor's) response briefs that some of petitioner's assignments of error should fail based on reasons that are not set out in the challenged decision. Intervenor objects to the reply brief. The matters raised in the response briefs qualify as "new matters" within the meaning of OAR 661-010-0039, and the reply brief is allowed.

FACTS

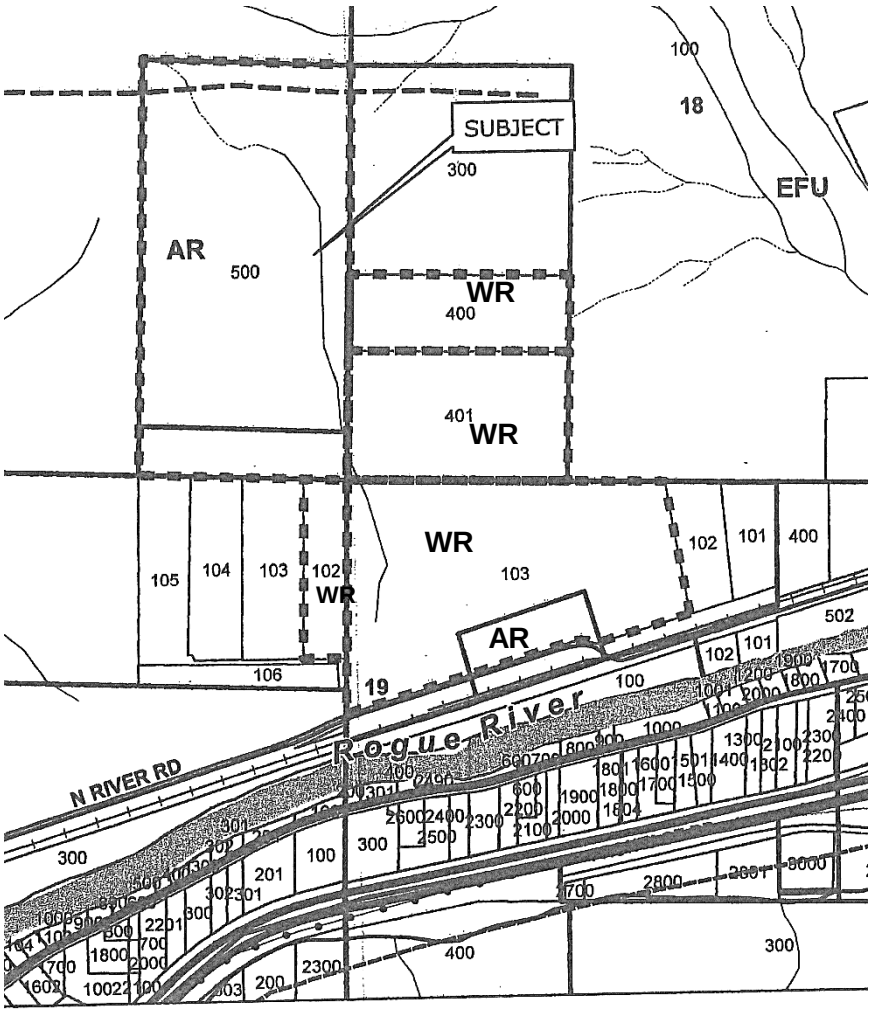
The challenged decision is the county's decision on remand from *Del Rio Vineyards, LLC v. Jackson County*, 70 Or LUBA 368 (2014), *aff'd* 270 Or App 599, 351 P3d 89 (2015) (*Del Rio Vineyards I*). We take the facts from *Del Rio Vineyards I*:

> "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 [below]. 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. * * *." 70 Or LUBA at 370.



Petitioner is the owner of a vineyard and winery located approximately 1,500 feet to the east of intervenor's mining operation.

We remanded the county's decision in *Del Rio Vineyards I* because, as relevant here, we concluded that the mining activities proposed to be conducted on the portions of the Haul Road located on WR-zoned property are subject to (1) the Jackson County Land Development Ordinance (JCLDO) conditional use criteria that apply in the WR zone and (2) the JCLDO scenic resources criteria that apply due to the location of the property in a protected Scenic Resources

Area of Special Concern (ASC) viewshed. We also remanded the county's decision in order for the county to adopt adequate findings, supported by substantial evidence, that some of the applicable criteria were satisfied.

To recap, the initial application sought approval of mining activities in the WR zone, including a stockpiling area, scale, and stormwater detention facilities on the WR-zoned portion of Tax Lot 103, the property closest to North River Road. After our decision in *Del Rio Vineyards I*, intervenor also sought approval of the portions of the Haul Road located on WR-zoned portions of Tax Lots 500, 103, 400, and 401 for mining related activities.

Intervenor requested that remand proceedings commence, and the hearings officer held a hearing on the remand and left the record open for additional evidentiary submissions, rebuttal, and intervenor's final argument. At the conclusion of the remand proceedings, the hearings officer issued a decision approving the application. This appeal followed.

FIRST ASSIGNMENT OF ERROR

The record that was transmitted to the Board and the parties in *Del Rio Vineyards I* (Del Rio I Record) is part of the record of the proceedings in this appeal. Remand Record 3 (Table of Contents identifying "Del Rio Vineyard Record 2014-054" as a part of the record in the present appeal, and a retained exhibit pursuant to OAR 661-010-0025(2) and OAR 661-010-0025(4)(b)); *Foland v. Jackson County*, _ Or LUBA __ (Order, LUBA No. 2013-082, November 7, 2013) (in a remand proceeding, the record from prior local

proceedings on the same application is part of the record on remand unless the local government expressly excludes the prior record). During the remand proceedings, petitioner cited to the Del Rio I Record for evidentiary support for its arguments that the applicable approval criteria were not satisfied. Remand Record 54. Petitioner also requested that the hearings officer incorporate the Del Rio I Record into the record of the remand proceedings. *Id*. The hearings officer did not address petitioner's request to incorporate that record.

The hearings officer apparently did not have a copy of the Del Rio I Record for use during the remand hearing and proceedings. Rather, apparently the hearings officer possessed a copy of the record that the county planning staff compiled during the local proceedings that led to our decision in *Del Rio Vineyards I* (Local Record), which the hearings officer sometimes referred to as the "HO Record." The Local Record/HO Record, which was used by the county to prepare and transmit the Del Rio I Record to LUBA, largely is the same collection of documents. The main difference between the Del Rio I Record and the Local Record is that the records are paginated differently.

The hearings officer's decision contains a section entitled "Briefing Issue" that provides:

> "The Appellant's submittals make many dozens of page references to documents that are offered in support of its positions. These references do not correspond to the pagination of the record that is before the Hearings Officer. This pattern of referencing makes it extremely difficult to assess the factual bases that the Appellant asserts support his arguments.

> "For example, at page 133 of the record in this proceeding, the Appellant cites to 'Rec. 149; 153; 164; 173-75; 190; 191; 193-94; 464-65; 533-43.' These pages do not relate to the record before the Hearings Officer. Specifically, they do not refer to pages in the remand proceedings, and they could not because the page cites are numerically later than the page upon which these citations are made. Complicating matters further, the page references do not relate to the record in the proceedings that resulted in the HO Decision. This pattern is consistent throughout the Appellant's submittals.
>
> "The Hearings Officer speculates that these are reference to page numbers in the LUBA record. However, that record is not before the Hearings Officer, severely limiting his ability to identify reliably what the Appellant wants considered. The record of the HO Decision (the 'HO Record') contains 688 pages, a substantial portion of which consists of evidence to which the Appellant might be referring. The Hearings Officer has made an earnest effort to locate pages in that record to which the Appellant might be referring in his many page references, but it is uncertain whether that effort was successful for any given reference. The process is uncomfortably speculative, but in the absence of reliable references to this record, it can be no other way." Remand Record 10.

In its first assignment of error, petitioner argues that the hearings officer committed a procedural error that prejudiced its substantial rights in failing to consider relevant evidence that was either in the record or referenced and relied on by petitioner. ORS 197.835(9)(a)(B). According to petitioner, the hearings officer's refusal to consider that evidence because that evidence was not accompanied by citations to the Local Record page numbers was procedural error that warrants remand.

The county and intervenor (together, respondents) respond that petitioner is responsible for any procedural error committed by the hearings officer in failing to consider relevant evidence, because petitioner failed to cite to the Local Record after the hearings officer's confusion over the record citations became apparent during the hearings. We also understand the county to respond that the Del Rio I Record is not a part of the Remand Record because it was not "placed before" the hearings officer within the meaning of OAR 661-010-0025(2). Respondent's Brief 4-5.

We reject both of respondents' responses. First, the county has already confirmed that the record transmitted by the county in this proceeding includes the Del Rio I Record. Remand Record 3 (Table of Contents identifying "Del Rio Vineyard Record 2014-054" as a part of the record in this appeal, and a retained exhibit pursuant to OAR 661-010-0025(2) and OAR 661-010-0025(4)(b))). That position is consistent with OAR 661-010-0025(4)(b) and *Foland*.

Second, petitioner and the hearings officer simply failed to communicate. *Bremer v. Employment Division*, 52 Or App 293, 295, 628 P2d 426 (1981) ("[w]hat we have here is a failure to communicate[]") (*quoting* Cool Hand Luke (Warner Brothers, 1967)). As far as we can tell, petitioner preferred citing to the Del Rio I Record and the HO preferred using the Local Record/HO Record. The consequence of this failure of communication was that petitioner's

citation to pages in the Del Rio I Record were ineffective to allow the hearings officer to locate and review those pages in the Local Record.

If the hearings officer intended to only consider evidence that was referenced by citation to the Local Record, the hearings officer was obligated to clearly inform all participants to the proceeding of that decision, and allow the participants the opportunity to obtain a copy of the Local Record from which to cite.[1] The hearings officer stated at the beginning of the remand hearing that "the record also includes the volume of material from the original hearing." Petition for Review App. C 2. The hearing also included a discussion about "a different pagination system." Petition for Review App. C 13. However, the hearings officer's opening statement does not identify what is meant by "the volume of material from the original hearing" or specify any particular procedure to be used by parties to identify documents by citation to the record, and we are not cited to any statements during the hearing in which the hearings officer clearly informed the participants in the hearing of his decision that the parties must cite to pages in the Local Record. That decision was not apparent until the hearings officer issued his final decision approving

[1] Another way to address the issue would have been for the county's planning staff to provide the hearings officer with a copy of the Del Rio I Record. The county planning department retains the original records of decisions that are appealed to LUBA, and presumably would have a copy to provide to the hearings officer. As parties to *Del Rio Vineyards I*, all the parties before the hearings officer already had copies of the Del Rio I Record.

the application that includes the "Briefing Issues" section quoted above, that takes the position that he did not in some cases consider evidence referenced by petitioner because it was not referenced with citation to the Local Record.

In its fourth assignment of error, petitioner argues that the hearings officer's failure to consider evidence referenced by petitioner regarding the sources of and impacts to agriculture from dust that is generated on the property was a procedural error that prejudiced its substantial rights. We agree with petitioner that the hearings officer erred by failing to clearly inform the participants in the proceeding that they must cite to pages in the Local Record. That failure led petitioner to cite to pages in the Del Rio I Record, which apparently the hearings officer did not have before him, with the consequence that the hearings officer did not consider the cited evidence in reaching his decision on the application. As discussed in more detail in the fourth assignment of error, that failure was a procedural error that prejudiced petitioner's substantial right to participate in a full and fair hearing. *Muller v. Polk County*, 16 Or LUBA 771, 775 (1988).

Petitioner's first assignment of error is sustained.

SECOND ASSIGNMENT OF ERROR

As explained in *Del Rio Vineyards I*, the Haul Road traverses both WR-zoned property and AR-zoned property. Mining uses are permitted outright in the AR-zone, and are conditional uses in the WR zone. For that reason, the

portions of the Haul Road located on WR-zoned property are subject to the conditional use standards of the JCLDO.

In the second assignment of error, petitioner argues that the mining, rock crushing and asphalt manufacturing uses occurring on the AR-zoned portions of intervenor's property must satisfy the conditional use standards at JCLDO because those mining uses are accessed by the Haul Road. Petitioner cites *Wilson v. Washington County*, 63 Or LUBA 314 (2011), *Roth v. Jackson County*, 38 Or LUBA 894 (2000), and *Bowman Park Neighborhood Association v. City of Albany*, 11 Or LUBA 197 (1984) for support for that argument. In *Wilson*, we held that an access road/driveway to a winery is an accessory use to the winery, and upheld the county's denial of a permit for the winery on an EFU-zoned parcel where the zoning of the access road parcel did not allow wineries. In *Roth*, we held that an access road/driveway to a winery is an accessory use to the winery and that the county erred in approving the winery where the residential zoning of the access road/driveway did not allow wineries. In *Bowman Park*, we held that an access road/driveway to an industrial use was an accessory use to the industrial use, and that the city erred in approving the industrial use where the residential zoning of the access road/driveway did not permit industrial uses.

We disagree with petitioner that any of those cases compel a conclusion that the mining uses occurring on the AR-zoned portions of the property are required to satisfy the conditional use standards of the WR-zone. The holdings

in each of those cases conclude that the *driveway* is an accessory use to the primary use, and therefore the driveway may not be approved if the primary use is not allowed in the zone over which the driveway crosses. Those cases dictate in the present case that the accessory driveway in the WR zone is subject to the WR conditional use standards that would apply to a mining use in the WR zone. We held as much in *Del Rio Vineyards I*. However, those cases do not stand for the very different proposition that the primary mining activities that occur *only* in the AR zone are themselves subject to the WR zone conditional use standards. We reject petitioner's attempt to extend the holdings in the above-cited cases to include that proposition.

In another portion of the second assignment of error, petitioner argues that the hearings officer erred in failing to consider whether emissions and dust that result from stockpiling, loading, and hauling activities occurring on the Haul Road satisfy JCLDO 3.1.4(B) and JCLDO 7.1.1(J). Petitioner's argument is not well developed in this portion of the second assignment of error, and we understand the argument to be related to and further developed in petitioner's arguments under the fourth and fifth assignments of error. The fourth assignment of error argues that the hearings officer erred in concluding that dust from vehicle emissions and activities on the Haul Road does not cause significant adverse impacts on existing or adjacent uses, including farm or forest uses, and the fifth assignment of error argues that the hearings officer erred in concluding that the dust from the Haul Road does not have a

significant impact on identified scenic views. Accordingly, we address those arguments under the fourth and fifth assignments of error.

Petitioner's second assignment of error is denied.

THIRD ASSIGNMENT OF ERROR

JCLDO 1.7.6 provides in relevant part:

> "Any documented violation of previous land development ordinances related to permissible activities or structures on land that also violate this Ordinance will continue to be a violation subject to all penalties and enforcement under this Ordinance. Likewise, previous judgments rendered under past ordinances remain enforceable. Except as provided for in Chapter 10, when a violation of this Ordinance exists on a property, the County will not approve any application for building or land use permits on that property unless such application addresses the remedy for the violation. Where a violation of any other local ordinance, state, or federal law has been documented on property to the satisfaction of the County, such violation must be corrected prior to application for a land use or development permit on that property, unless the violation can be remedied as part of the development application."

JCLDO 1.8.2(A) provides:

> "When a violation of this Ordinance is documented to exist on a property, the County will deny any and all development permits, unless such application addresses the remedy for the violation, or the violation has otherwise been corrected."

During the remand proceedings, petitioner and others introduced evidence regarding alleged violations of the JCLDO, including allegations that an extension of the Haul Road onto adjacent federal property is a trespass; allegations that mining is being conducted on Tax Lot 500 and Tax Lot 103, the AR-zoned portions of the property, in a manner that is inconsistent with the

approved 1997 site plan; and that stockpiling and rail car loading is occurring in the public right of way on North River Road. The hearings officer refused to consider the allegations and the issue of whether JCLDO 1.7.6 and 1.8.2(A) required him to deny the permit, because he concluded that the issue was beyond the scope of the remand in *Del Rio Vineyards I*. Petitioner argues that the hearings officer erred in refusing to consider whether JCLDO 1.7.6 and JCLDO 1.8.2(A) required him to deny the permit. Intervenor responds that the alleged violations are not "documented" and accordingly, JCLDO 1.7.6 and JCLDO 1.8.2(A) do not require the hearings officer to deny the applications.

We agree with petitioner that the hearings officer erred in failing to address petitioner's arguments regarding JCLDO 1.7.6 and JCLDO 1.8.2(A). Petitioner's argument relates to activities and violations that allegedly occurred after the hearings officer's initial decision and our decision in *Del Rio Vineyards I*. Those issues could not have been raised in the proceedings leading to *Del Rio Vineyards I*. On remand, the hearings officer must consider whether the JCLDO provisions that petitioner cites require him to deny the application. *See Schatz v. Jacksonville*, 113 Or App 675, 680, 835 P2d 923 (1992) (issues may be considered on remand that were not or could not have been dispositively resolved on their merits in the appeal that resulted in the remand). We do not mean to suggest, however, that the argument and evidence that petitioner submitted is sufficient to establish that "a violation of [the JCLDO] is documented to exist on a property[.]" On remand, the hearings

officer can consider in the first instance intervenor's argument that the alleged violations are not "documented" within the meaning of JCLDO 1.7.6 and JCLDO 1.8.2(A).

The third assignment of error is sustained.

FOURTH AND FIFTH ASSIGNMENTS OF ERROR

Petitioner's fourth and fifth assignments of error relate to the dust that all parties and the hearings officer agree is present to various degrees in the canyon in which intervenor's mining operations occur. The dispute between the parties centers on the source of that dust, and consequently on how the effects of that dust on agricultural practices and on scenic resources should be analyzed for purposes of the conditional use criteria and the scenic resources criteria.[2]

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[2] In *Del Rio Vineyards I*, we described the farm practices and alleged impacts as:

> "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.
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> "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

A. Fourth Assignment of Error

JCLDO 3.1.4(B)(3)(a) requires the county to consider the effects of a proposed conditional use on agricultural practices and determine that:

> "The use will not force a significant change in, or significantly increase the cost of, accepted farming or forest practices on agriculture or forest lands[.]"

In its fourth assignment of error, petitioner first argues, as it argued in the second assignment of error, that the hearings officer erred in failing to evaluate the mining uses occurring on the AR-zoned portion of the property for compliance with JCLDO 3.1.4(B)(3)(a).[3] For the reasons explained in our resolution of the second assignment of error, we reject that argument.

Petitioner next argues that the hearings officer committed a procedural error that prejudiced its substantial rights when the hearings officer refused to

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> 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." 70 Or LUBA at 380.

[3] Petitioner also cites JCLDO 3.1.4(B)(1)(a), however, petitioner does not develop an argument regarding JCLDO 3.1.4(B)(1)(a) under the fourth assignment of error, and we do not consider that provision.

consider evidence cited by petitioner that dust from the Haul Road and stockpiling activities on WR-zoned Tax Lot 103 "force[s] a significant change in, or significantly increase[s] the cost of, accepted farming * * * practices on agriculture or forest lands" under JCLDO 3.1.4.B(3)(a) because that evidence was not accompanied by citations to the Local Record. In concluding that JCLDO 3.1.4(B)(3)(a) was satisfied, the hearings officer found that:

> "The Appellant provides no evidence to dispute these observations and more importantly, the Appellant provides no evidence to establish that the Haul Road specifically burdens its operation at all.[5]
>
> "[5] The Appellant cites to several statements of 'specific impacts from the dust to agriculture', but Hearings Officer was unable to locate these documents because of the citation issue identified in Briefing Issue section above. To his recollection these statements concerned the impact of dust on the presence and control of insects." Record 16.

In the above-quoted paragraph and footnote, the hearings officer makes clear that he did not consider evidence introduced and relied on by petitioner that dust from hauling activities on the haul road increases farming costs within the meaning of JCLDO 3.1.4.B(3)(a) because he was unable to locate that evidence in the record. That evidence was provided by petitioner at Remand Record 166-168, and also by citation to the Del Rio I Record. For the reasons explained above in our resolution of the first assignment of error, absent clear instructions to the parties during the remand proceedings that the hearings officer would not consider evidence that was not presented by citation to the

Local Record, failing to consider that evidence was a procedural error that prejudiced petitioner's substantial rights.

Petitioner next argues that the hearings officer improperly shifted the burden of proof from intervenor to petitioner and other opponents of the permit to demonstrate that impacts from dust created by stockpiling and hauling activities on the Haul Road and the WR-zoned portion of Tax Lot 103 will "force a significant change in, or significantly increase the cost of, accepted farming * * * practices on agriculture or forest lands" under JCLDO 3.1.4.B(3)(a). According to petitioner, it is intervenor's burden to demonstrate that the activities will *not* force a change in or significantly increase the cost of farming practices.

During the remand proceedings, an opponent introduced photographs of the WR-zoned portion of Tax Lot 103 showing a cloud of dust in the stockpiling/gravel storage area, and argued that the dust in the photograph emanates from the Haul Road and the stockpiling activities on the WR-zoned property. The hearings officer concluded:

> "Fugitive dust is a significant impact of the aggregate operation. The many photographs in the record establish its prevalence in the atmosphere at least at some times, and as the Hearings Officer determined in the HO Decision, it affects the nearby agricultural operations and other uses. The issue here, however, is not dust in general but according to LUBA, the dust that is attributable to the Haul Road.
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> "As noted above, the extent of dust that is depicted in the Appellant's photographs, including those at Record 292-98 and 500-01, is very significant, *but the Appellant's failure to separate*

> *the Haul Road as the source of this dust - as distinct from blasting, crushing, screening and sorting - makes it impossible to conclude that it solely or even significantly results from the use of that road*.
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> "For example, the Appellant provided two photographs of a dump truck on North River Road, apparently immediately in front of the Applicant's sorting and loading operation on Tax Lot 103. Record 500-01. The accompanying description identifies the truck as having come from that operating area. Record 499. As the photographer's letter points out, the 'truck was enveloped in a cloud of dust all way back to the plant,' making the truck difficult to discern from the vantage of the photographer, about 1,000 feet behind. Record 499.
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> "While the photographs depict a very dusty condition that significantly limits the visibility of the truck and another vehicle on the road, *it is not possible to determine which aspects of the Applicant's operation are the sources. It is certainly not evident that it is caused by the Haul Road*.
>
> "The photographs capture a view of much of the valley that is occupied by that operation. And it is fair to say that the valley itself, not just North River Road, is burdened by a substantial amount of dust. It is very visible in the foreground of the photo as well as in the far background. *It may be that the dust is thicker in the area of the loading facility, but there is no way of understanding what part of the operation is the source.* The physical extent of the pollution (the Hearings Officer estimates that the ridge in the background is approximately 2 miles distant) clearly establishes that neither the truck itself nor the Haul Road is the source. It is much more likely that the blasting, crushing and screening operations in the Pit created that extent of dust, but that is not known." Remand Record 17-18 (emphases added and footnote omitted).

The hearings officer concluded that petitioner had failed to establish the source of the dust in the photographs as coming from the Haul Road and Tax Lot 103

rather than from blasting, crushing, screening, or sorting activities on the AR-zoned portion of the property. Petitioner argues that the hearings officer improperly shifted the burden to petitioner to prove the source of the dust is the Haul Road and stockpiles, rather than requiring intervenor to prove the source of the dust is not the Haul Road and stockpiles, and that the evidence in the record supports a conclusion that the dust originates from the Haul Road and stockpiles.

Intervenor responds that the hearings officer did not improperly shift the burden of proof but rather weighed the evidence introduced by intervenor, which he found supported a conclusion that the dust originated from somewhere other than the Haul Road, and the evidence introduced by petitioner and others, which he found did not support a conclusion that the dust originated from the Haul Road.

We agree with petitioner that the hearings officer appears to have improperly shifted the burden of proof to petitioner to prove that the source of the dust that is depicted in the photographs is the Haul Road and the stockpiling activities on the WR-zoned property. A local government does not improperly shift the burden of proof in finding that a petitioner did not present evidence showing that an approval criterion was not met, so long as the findings addressing the criterion also explain why the evidence that was submitted demonstrates that the approval criterion is satisfied. *Hannah v. City of Eugene*, 35 Or LUBA 1, 11-12, *aff'd* 157 Or App 396, 972 P2d 1230 (1998).

The hearings officer's findings do not explain why the evidence that was submitted by intervenor demonstrates that the source of the dust is not the Haul Road. Rather, the findings conclude that "it is not possible to determine which aspects of the Applicant's operation are the sources" of the dust. Remand Record 18.

Finally, petitioner argues that the hearings officer improperly construed JCLDO 3.1.4(B)(3)(a) in considering impacts to farm practices in isolation from each other, rather than considering the "cumulative effects" of all impacts to farm practices in order to determine whether the impacts will be "significant." *Von Lubken v. Hood River County*, 28 Or LUBA 362 (1994). Petitioner's argument is confusingly presented, but as we understand the argument, it is that under our holding in *Von Lubken*: (1) the hearings officer is required to reassess impacts from the conveyor system, which he previously determined were not significant and which determination we upheld in *Del Rio Vineyards I*; and (2) the hearings officer is required to assess as part of a "cumulative impacts" analysis mining activities in the AR-zone that are not subject to the conditional use standards, because those mining activities are served by the Haul Road.

If that is petitioner's argument, we disagree. Under our decision in *Von Lubken*, the county is required to assess the impacts of the *proposed conditional uses* on farm practices. Nothing in *Von Lubken* or anything else cited to us supports petitioner's theory that uses that are not subject to

conditional use criteria and/or are permitted uses in another zone are subject to a cumulative impacts analysis of the type described in *Von Lubken* because they are part of the same mining operation.

The fourth assignment of error is sustained, in part.

B. Fifth Assignment of Error

The property and the Haul Road are visible from a portion of Interstate 5 (I-5), which is located approximately 200 to 300 feet away. The county has designated that section of Interstate 5 a Scenic Resource Area of Special Concern.

Petitioner's fifth assignment of error implicates JCLDO 7.1.1(J)(3) and JCLDO 3.1.4(B)(1)(c). JCLDO 7.1.1(J)(3) requires the county to find in relevant part 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 that "[l]and use activities that have no significant visual impact will not attract undue attention, and must visually harmonize with existing scenic resources." JCLDO 3.1.4(B)(1)(c) requires the county to find that "[t]he proposed use is not a conflicting use certified in an adopted Goal 5 ESEE applicable to the parcel, or if an identified conflicting use, one that can be mitigated to substantially reduce or eliminate impacts[.]" The county has also identified mining operations and road development as "conflicting uses" for the I-5 scenic roadway corridor.

The decision concludes that a layer of dust visually impacts the I-5 scenic corridor. However, the hearings officer concluded that evidence in the record does not support a conclusion that the source of that dust that creates a visual impact on the viewshed from I-5 is from activities on the Haul Road or the WR-zoned portions of the property.

In its fifth assignment of error, petitioner argues that the hearings officer's decision is not supported by substantial evidence in the record. ORS 197.835(9)(a)(C). Petition for Review 43. According to petitioner, the record includes photographic evidence of dust in the vicinity of the Haul Road and the gravel storage area on WR-zoned Tax Lot 103 and of the layer of dust that is present in the protected viewshed, and that evidence undermines the hearings officer's conclusion. Petitioner also argues that the hearings officer improperly shifted the burden of proof to petitioner to prove that the dust that petitioner alleges has a significant impact on the I-5 scenic corridor emanates from activities on the WR-zoned parcels, rather than requiring intervenor to prove the source of the dust.

Intervenor responds that the hearings officer's findings explain that the Haul Road and stockpiles on the AR-zoned portion of the property located on Tax Lot 500 are watered in order to limit dust, pursuant to a DEQ permit requirement, and the evidence supports his conclusion that the dust that creates

scenic impacts from the I-5 corridor is not from the Haul Road or activities in the WR zone.[4] Remand Record 28-29.

As in the fourth assignment of error, we agree with petitioner that the hearings officer erred in shifting the burden of proof to petitioner to prove that the source of the dust that is depicted in the photographs is the Haul Road and the mining activities on the WR-zoned property. It is the applicant's burden to show that either the source of the dust is not from the WR-zone activities, or that it can minimize or has minimized the dust from those activities so that the hearings officer can conclude that the WR-zone mining activities do not significantly contribute to the cumulative dust problem in the protected viewshed that the hearings officer identified in his decision.

The fifth assignment of error is sustained.

SIXTH ASSIGNMENT OF ERROR

JCLDO 3.1.4(B)(1)(b) requires the county to find that "[a]dequate public facilities (e.g., transportation) are available or can be made available to serve the proposed use[.]" In its sixth assignment of error, petitioner argues that the hearings officer's decision that JCLDO 3.1.4(B)(1)(b) is met is not supported by substantial evidence in the record.

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[4] The hearings officer also imposed a condition of approval that requires the stockpiles on the WR-zoned property to be watered "consistent with the requirements of intervenor's DEQ permit." Remand Record 33.

During the prior proceedings, intervenor submitted into the record a Traffic Impact Statement (TIS) that assessed the safety, including sight distance from North River Road, of the driveways on intervenor's property and considered whether a left turn lane on North River Road was warranted. That TIS is found at Del Rio I Record 679-682. In *Del Rio Vineyards I*, we concluded that the county's findings were inadequate to explain why the local roads are "adequate" to serve the proposed mining uses. We concluded that JCLDO 3.1.4(B)(1)(b) requires a "broader analysis of the adequacy of the transportation facilities, which may include safety considerations but also could include capacity and other considerations." 70 Or LUBA at 378. The TIS was limited to evaluation of safety issues regarding the driveway access to intervenor's property, and therefore the analysis was too narrow. *Id*. at 377-78.

On remand, the hearings officer again concluded that JCLDO 3.1.4(B)(1)(b) was met. The hearings officer relied on two items to reach his conclusion. First, he relied on the TIS described above. Second, he relied on a memorandum from the county roads engineer that took the position that the county engineer reviewed the TIS and concluded the driveway access is safe, and that the public roads that serve the property are adequate to accommodate the expected additional vehicle trips. Remand Record 13-14, 146.

Petitioner argues that the hearings officer's conclusion is not supported by substantial evidence in the record. First, petitioner argues that the TIS does not measure the capacity or safety of any public roads serving the use and that

those public roads are "public facilities" within the meaning of JCLDO 3.1.4(B)(1)(b). We agree. The TIS is limited to analyzing the safety of the driveway approach to intervenor's property and does not measure the capacity of North River Road or any other local road serving the proposed use to accommodate the use.

Second, petitioner argues that the county road engineer's memorandum is not evidence regarding the capacity of the local roads to serve the proposed use. Rather, it is a conclusory statement that "[w]ith the information provided in the TIS, the Road Department was able to conclude adequate transportation facilities existed per LDO 3.1.4(B)(1)(b)." Remand Record 146. The engineer's memorandum also addresses the intersection of North River Road and Highway 99, and concludes that "since the application does not add trips to the intersection and there is not a demonstrated issue of safety or congestion, I must conclude the intersection is adequate." Remand Record 146.

We agree with petitioner that the hearings officer's conclusion that the transportation systems are adequate is not supported by substantial evidence in the record. The county road engineer's statements are not supported by any estimates or actual measurements of traffic volumes or capacity, and are simply conclusory statements based on (1) the TIS which, as we explain above, does not address capacity of North River Road or other roads to serve the proposed use, and (2) his unexplained conclusion that no trips will be added to a nearby intersection.

The sixth assignment of error is sustained.

SEVENTH ASSIGNMENT OF ERROR

JCLDO 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[.]"

In its seventh assignment of error, petitioner argues that the hearings officer erred in concluding that the application meets JCLDO 3.4.1(B)(3)(b). Petitioner first argues that the hearings officer erred in concluding that the batch plant on the AR-zoned portion of the property is not subject to review under JCLDO 3.1.4(B)(3)(b) because the batch plant is not located on the WR-zoned portion of the property, and is therefore not subject to the conditional use standards that apply to the proposed mining uses on the WR-zoned portions of the property. Intervenor responds, and we agree, that the batch plant is not subject to the conditional use review standards that apply in the WR zone because it is located on AR-zoned property.

Petitioner next argues that the hearings officer's decision is not supported by substantial evidence in the record because he failed to evaluate the fire hazard from intervenor's transporting of hot asphalt from the batch plant in trucks on the Haul Road, which is located on WR-zoned property, to other areas of intervenor's property. According to petitioner, that activity is subject to JCLDO 3.1.4(B)(3)(b), and the evidence in the record does not

support a conclusion that the proposed use of the Haul Road for transporting hot asphalt will not significantly increase fire hazard.

Intervenor responds by citing to a letter from the Oregon Department of Forestry (ODF) that concludes, after inspecting the property, that intervenor's mining operation has minimized the risks of fire by providing adequate road access, minimal vegetation, fuel breaks, and close access to water. However, petitioner points out that the batch plant is portable and was not located on the property at the time that ODF inspected the property, so any hazard from transporting hot asphalt on the Haul Road would not have been inspected by ODF. Petitioner argues that that is why the ODF letter does not specifically evaluate or address the risk of fire hazard due to the transport of hot asphalt from the batch plant on the Haul Road.

We do not understand intervenor to dispute that when the batch plant is located on the property, hot asphalt is transported from the batch plant on the Haul Road, and intervenor does not really respond to petitioner's argument except to cite the ODF letter. The hearings officer's findings also do not specifically address the transport of hot asphalt on the Haul Road. That is an issue that was raised below and appears to be relevant to compliance with JCLDO 3.1.4(B)(3)(b). Accordingly, we agree with petitioner that the hearings officer's finding that JCLDO 3.1.4(B)(3)(b) is met is not supported by substantial evidence in the record.

The seventh assignment of error is sustained.

EIGHTH ASSIGNMENT OF ERROR

In the eighth assignment of error, petitioner argues that the county committed a procedural error that prejudiced its substantial rights when the board of commissioners failed to "oversee" the remand proceeding. Petition for Review 57. According to petitioner, various provisions of the JCLDO require the board of county commissioners to conduct the remand proceedings.

JCLDO 2.6.10 is entitled "Remands" and provides in relevant part:

> "A remand of a decision may result from an order by the Land Use Board of Appeals, the Oregon Court of Appeals, the Oregon Supreme Court or by order of the Board of Commissioners pursuant to Section 2.6.10(A)."

JCLDO 2.6.10(A)(1)(a) through (f) then sets out six circumstances in which the county board of commissioners "may" remand a Type 3 decision such as the challenged decision. JCLDO 2.6.10(A)(4) allows the board of county commissioners to delegate a remand proceeding to a hearings officer. Finally, JCLDO 2.4.3 provides in relevant part:

> "The Hearings Officer will have authority to render a final decision on quasi-judicial land use applications and remands of those applications from LUBA when the Hearings Officer rendered the original decision, unless the remand requires an interpretation of the Comprehensive Plan or this Ordinance. When such interpretation is required, the Board of Commissioners may hear the remanded application (see Section 2.2)."

Respondents respond that all of the JCLDO provisions that petitioner cites are permissive, rather than mandatory, and nothing in the JCLDO requires the board of commissioners to conduct the proceedings on remand of a decision by

LUBA. In addition, respondents respond that nothing in LUBA's decision in *Del Rio Vineyards I* requires "interpretation" of the county's comprehensive plan or the JCLDO. We agree with both responses. The express language of all of the code sections cited and relied on by petitioner uses the permissive "may," rather than the mandatory "shall." Accordingly, the county did not commit a procedural error in failing to require the board of county commissioners to conduct the remand proceedings.

The eighth assignment of error is denied.

The county's decision is remanded.