

1 BEFORE THE LAND USE BOARD OF APPEALS
2 OF THE STATE OF OREGON

3
4 JILL ANDERSON,
5 *Petitioner,*

6
7 and

8
9 LAURA COCHRAN,
10 *Intervenor-Petitioner,*

11
12 vs.

13
14 YAMHILL COUNTY,
15 *Respondent,*

16
17 and

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19 ORETEX FARMS LLC, JCB FARMS LLC,
20 and CHRISTOPHER BRYAN,
21 *Intervenors-Respondents.*

22
23 LUBA No. 2020-025

24
25 FINAL OPINION
26 AND ORDER

27
28 Appeal from Yamhill County.

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30 Doug Hageman, Portland, filed a petition for review and argued on behalf
31 of petitioner. With him on the brief was Oxbow Law Group, LLC.

32
33 Jeffrey L. Kleinman, Portland, filed a petition for review and reply brief
34 and argued on behalf of intervenor-petitioner.

35
36 Timothy S. Sadlo, Yamhill County Counsel's Office, McMinnville, filed
37 a joint response brief and argued on behalf of respondent.

1 Corinne S. Celko and Alex J. Berger, Portland, filed a joint response brief.
2 Corinne S. Celko argued on behalf of intervenors-respondents. With her on the
3 brief was Emerge Law Group.

4
5 RUDD, Board Chair; RYAN, Board Member; ZAMUDIO, Board
6 Member, participated in the decision.

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8 AFFIRMED 08/19/2020

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

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NATURE OF THE DECISION

Petitioner appeals a county board of commissioners decision approving site design review for a marijuana and hemp processing facility on land zoned for exclusive farm use (EFU).

MOTION TO STRIKE

Intervenor-petitioner (intervenor) included in her petition for review a modified version of a document included in the record. The modified document shows the location of intervenor’s residence relative to the property that is the subject of the land use decision on appeal. Respondent and intervenors-respondents (collectively, respondents) move to strike the modified document.

Our review is generally limited to the record. ORS 197.835(2)(a) (“Review of a decision under ORS 197.830 to 197.845 shall be confined to the record.”). Intervenor has not argued that the graphic is properly allowed pursuant to a motion to take evidence outside the record under OAR 661-010-0045. Rather, intervenor argues that the graphic is intended as an aid to our review. Reply Brief 1. This is not a basis for allowing extra-record evidence. The motion to strike is granted.

FACTS

The subject property is approximately 22.7 acres in size. It is bordered to the west by Jaquith Road, a road running roughly parallel to the Yamhill/Washington County border. The subject property and the parcels to its

1 north and west are zoned Exclusive Farm Use 40 (EF-40). The properties to the
2 south of the subject property are zoned Agriculture/Forestry Large Holding (AF-
3 20). The subject property is improved with three agricultural buildings and a
4 residence. Intervenors-respondents (the applicant) plan to utilize the three
5 existing agricultural buildings for their marijuana and hemp operation. As shown
6 on the site plan submitted to the county for approval,

7 “two 1,500-gallon water storage tanks will be placed adjacent to the
8 northernmost agricultural building, the 3,500-square foot structure.
9 Approximately 10,000-square feet of marijuana and/or hemp will be
10 cultivated within the existing 6,400-square foot and 3,500-square
11 foot agricultural buildings located near the applicant’s northern
12 property line. The third existing agricultural building is a 1,100-
13 square foot structure, located near the southeast corner of the
14 residence, which the applicant will use as the processing facility.
15 This 1,100-square foot building to be used as the processing facility
16 is located approximately 300 feet from the nearest off-site residence,
17 which is located on the adjoining parcel to the north * * *.
18 Additionally, the applicant will farm between 5- and 10-acres of
19 hemp on the property. A new, approximately 10,000-square foot,
20 agricultural building is planned for construction in 2020 or 2021.
21 Approximately 3,500-square feet of this new building will be used
22 for hemp/marijuana processing with the remaining area used for
23 other agricultural activities including drying/curing of plant
24 material, storage, and an administrative office. This future proposed
25 agricultural building will be located approximately 30-feet from the
26 applicant’s western property line and to the south of the existing
27 1,100-square foot building. In addition, there are two shipping
28 containers located on the property that will be used to store farm
29 equipment.” Record 8-9.

30 On December 5, 2019, the planning commission approved the site design
31 review application. Intervenor appealed that decision to the board of

1 commissioners. Record 556. On January 16, 2020, the board of commissioners
2 voted to uphold the planning commission approval and deny the appeal. This
3 appeal followed.

4 **PETITIONER’S FIRST ASSIGNMENT OF ERROR**

5 Yamhill County Zoning Ordinance (YCZO) 402.02(E) provides that
6 allowed uses in the EF-40 zone include a facility for the processing of farm crops
7 located on a farm operation providing “at least one-quarter of the farm crops
8 processed at the facility,” and that

9 “[t]he building established for the processing facility shall not
10 exceed 10,000 square feet of floor area exclusive of the floor area
11 designated for preparation, storage or other farm use or devote more
12 than 10,000 square feet to the processing activities within another
13 building supporting farm uses. The application will also be subject
14 to Section 1101, Site Design Review.” YCZO 402.02(E).

15 Petitioner’s first assignment of error is that the county misconstrued the
16 applicable law because the proposed use is not a facility for the processing of
17 farm crops.

18 YCZO 402.02(E) implements state law restricting uses allowed on farm
19 land. The version of ORS 215.283(1)(r) in effect at the time of the application
20 provided that allowed uses include:

21 “A facility for the processing of farm crops *or for the production of*
22 *biofuel, as defined in ORS 315.141*, if the facility is located on a
23 farm operation that provides at least one-quarter of the farm crops
24 processed at the facility, or an establishment for the slaughter,
25 processing or selling of poultry or poultry products pursuant to ORS
26 603.038. If a building is established or used for the processing

1 facility or establishment, the farm operator may not devote more
2 than 10,000 square feet of floor area to the processing facility or
3 establishment, exclusive of the floor area designated for preparation,
4 storage or other farm use. A processing facility or establishment
5 must comply with all applicable siting standards but the standards
6 may not be applied in a manner that prohibits the siting of the
7 processing facility or establishment.” ORS 215.283(1)(r) (2017),
8 *amended by Or Laws 2019, ch 410, § 8 (emphasis added).*

9 Petitioner argues in her first assignment of error that the applicant’s proposed
10 processing is not a use allowed outright in the EFU zone, and that the reference
11 to biofuel in the statute illustrates that the legislature intended that certain
12 methods of processing farm crops would not be allowed on farm land.
13 Specifically, petitioner maintains that “‘alter[ing] the physical makeup of
14 biomass’ goes beyond the scope of ‘processing farm crops.’” Petitioner’s Petition
15 for Review 11-12.

16 The application explains that hemp will be processed
17 “using closed loop ethanol extraction system, vacuum ovens, rotary
18 evaporators, scroll vacuum pumps, three chillers, a commercial
19 scale short path distillation system, and an isolate reactor with
20 chromatography machine to produce CBD extracts such as CBD
21 isolate and CBD distillate.” Record 614.

22 Similarly, marijuana will be processed

23 “using a closed loop hydrocarbon extraction system, vacuum ovens,
24 scroll vacuum pumps, rotary evaporators, a short path distillation
25 plant and two chillers to produce various THC extracts.” *Id.*

26 According to petitioner, these processes are comparable to the process of
27 converting biomass into biofuel. In turn, because ORS 215.283(1)(r) (2017)
28 identifies biofuel processing as an allowed use independent of farm crop

1 processing, but does not similarly identify hemp and marijuana processing,
2 petitioner argues the latter are prohibited by the statute.

3 We agree with respondents that this issue was not raised below and has
4 been waived. ORS 197.763(1) provides:

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

12 Petitioner argues that she preserved this issue by presenting testimony that

13 “[t]his proposed hemp and cannabis processing site is unlike
14 anything else in the immediate area and would be better sited on the
15 valley floor, in an industrial zone, away from families.

16 “* * * * *

17 “Yamhill County cannot look at this as a simple EF-40 zone and site
18 design review. There are multiple overriding factors that preclude
19 applicant from this sort of industrial processing.” Record at 901,
20 1138.

21 The purpose of the “raise it or waive it” requirement is “to afford the
22 governing body, planning commission, hearings body or hearings officer, and the
23 parties an adequate opportunity to respond to each issue.” ORS 197.763(1).
24 Broad statements that a use would be better sited in an industrial zone, or
25 describing the use as having industrial characteristics, are not sufficient to advise
26 the county that petitioner challenged whether the use is farm crop processing for

1 purposes of the code, and the issue is therefore waived. *Neil v. Columbia County*,
2 74 Or LUBA 442, 454 (2016) (holding general concerns that development would
3 degrade the rural quality of the neighborhood were insufficient to raise the issue
4 of consistency with specific comprehensive plan policies).

5 Petitioner’s first assignment of error is denied.

6 **PETITIONER’S SECOND ASSIGNMENT OF ERROR**

7 Petitioner’s second assignment of error is that the county misconstrued the
8 term “use” and made inadequate findings required by YCZO 1101.02. For the
9 reasons set forth below, we deny this assignment of error.

10 **A. First Subassignment of Error**

11 YCZO 1101.02(A) provides:

12 “The review of a site development plan shall be based upon
13 consideration of the following:

14 “1. Characteristics of adjoining and surrounding uses;

15 “2. Economic factors relating to the proposed use;

16 “3. Traffic safety, internal circulation and parking;

17 “4. Provisions for adequate noise and/or visual buffering from
18 noncompatible uses;

19 “5. Retention of existing natural features on site;

20 “6. Problems that may arise due to development within potential
21 hazard areas.

22 “7. Comments and/or recommendations of adjacent and vicinity
23 property owners whose interests may be affected by the
24 proposed use.”

1 Petitioner argues that the plain language of the code requires the county
2 consider the surrounding and adjoining *uses*, and that the county instead and
3 improperly focused on the *zoning* of surrounding and adjoining properties.
4 Petitioner’s Petition for Review 16-17. We agree with respondents that this
5 assignment of error does not provide a basis for remand.

6 YCZO 202 defines “use” as “[t]he purpose for which land or a building or
7 structure is used, designed, arranged or intended, or for which it is occupied or
8 maintained.” The county described the uses surrounding the subject property—
9 that is, the purpose for which the surrounding properties are used—in great detail.

10 The findings explain:

11 “Land uses in the surrounding area are passive forest uses with little
12 logging activity evident, as well as some agricultural and rural
13 residential uses scattered throughout the surrounding area.
14 Agricultural uses in the area appear to be fruit or nut orchards, hay
15 production, Christmas tree cultivation and livestock pasturage. An
16 adjacent parcel to the southeast is a commercial-scale fruit or nut
17 orchard. The remaining adjacent parcels appear to be dedicated to
18 passive forest and rural residential uses. The nearest dwelling to the
19 proposed 1,100-square foot processing facility is approximately 300
20 feet away, on the parcel immediately to the north; there is also a
21 home approximately 500 feet to the southwest and a home roughly
22 700 feet to the east of the proposed processing facility. The future
23 new 10,000-square foot building that will house approximately
24 3,500 square feet of processing space will be the southernmost
25 building on the property and will be located approximately 100 feet
26 south of the existing 1,100-square foot building.” Record 11-12.

27 The above description of the activities on adjacent lands describe uses such as
28 residences, fruit and nut orchards, and livestock pasturage. The residential uses

1 are present on EF-40 and AF-20 zoned parcels and allowed as dwellings in
2 conjunction with farm or agricultural use. The findings explain that

3 “[t]he Very Low Density Residential District (VLDR) and Low
4 Density Residential District (LDR) are the districts intended to
5 accommodate rural residential development. YCZO Sections 502
6 and 503. However, neither the subject property nor the surrounding
7 parcels are zoned VLDR or LDR.” Record 12.

8 The purpose of the EF-40 zone is

9 “to identify and protect land designated as Exclusive Farm Use on
10 the Comprehensive Plan that is suitable and desirable for
11 commercial agricultural operations and other uses which are
12 compatible with such operations. * * * In Exclusive Farm Use
13 Districts, nonfarm residential and other development which might
14 likely be affected by normal farm management practices, will be
15 limited or prohibited so as to maximize the productivity potential of
16 vicinity farmlands.” YCZO 402.01.

17 The purpose of the AF-20 zone is

18 “to identify and protect lands designated as Agriculture/Forestry
19 Large Holding on the Comprehensive Plan, that are a mixture of
20 agricultural and forest management operations, and other uses
21 which are compatible with such operations.* * * Uses of land and
22 water which do not provide for a sustained production of crops,
23 livestock and forest products or for the proper conservation of soil
24 and water resources and fish and wildlife habitat shall be limited or
25 prohibited.” YCZO 403.01.

26 In evaluating the characteristics of adjoining and surrounding uses, the
27 county determined that the residential use of the area was subordinate to the
28 resource use. Findings must “(1) identify the relevant approval standards, (2) set
29 out the facts which are believed and relied upon, and (3) explain how those facts

1 lead to the decision on compliance with the approval standards.” *Heiller v.*
2 *Josephine County*, 23 Or LUBA 551, 556 (1992). Here, the county identified the
3 characteristics of the adjoining and surrounding uses and concluded that the
4 residences were accessory to farm use. The findings explain that that conclusion
5 is based upon the applicable zoning and the type of housing allowed in those
6 zones. Petitioner argues that “[t]he fact that, for instance, many residences in the
7 surrounding area are intended to be dwellings in conjunction with farm or forest
8 use does not make the existence of the dwelling any less a use of land.” However,
9 petitioner fails to acknowledge the county’s finding explaining that, under its
10 comprehensive plan, one of its goals is to

11 ““[c]onserve Yamhill County’s farmland for the production of crops
12 and livestock * * *.’ The State of Oregon deems marijuana to be a
13 crop for farm use purposes. ORS 475B.526. Both the state and
14 Yamhill County have concluded that EFU land should be used for
15 farming including hemp/marijuana production/processing, which is
16 what applicant intends to do under its application.” Record 12.

17 It is clear that the county found that, although the dwellings exist, they are not
18 the dominant characteristic of adjoining and surrounding uses and that supporting
19 farm use is a fundamental objective in the underlying zones. The county did not
20 misconstrue the term “use,” and the findings are adequate to explain the county’s
21 reasoning.

22 The first subassignment of error is denied.

1 **B. Second Subassignment of Error**

2 Petitioner’s second subassignment of error is that the county made
3 inadequate findings in response to specific issues raised below concerning
4 “Douglas Fir trees grown on a parcel less than a mile to the north,” the alleged
5 “rural residential character of the area and its tourism uses,” and prior use of the
6 subject property as a tree farm. Petitioner’s Petition for Review 18-19. Petitioner
7 argues that the county failed to adequately address these concerns and cites
8 *Norvell v. Portland Metro. Area Local Gov’t Boundary Comm’n*, 43 Or App 849,
9 853, 604 P2d 896 (1979), for the proposition that it was required to do so.
10 Petitioner maintains that the county’s failure to do so renders the findings
11 inadequate.

12 Petitioner states generally that arguments were raised in the proceedings
13 below concerning the characteristics of uses on surrounding and adjoining
14 properties. Petitioner’s Petition for Review 18. However, petitioner does not
15 explain the relevance of the prior use of the subject property as a tree farm, the
16 existence of a tree farm “less than a mile to the north,” the alleged rural residential
17 character of the area, or the alleged tourist uses. *Norvell* requires that findings
18 address arguments related to applicable criteria. Petitioner does not argue that the
19 county failed to make findings addressing the applicable criteria and petitioner
20 does not explain how the items she argues have not been addressed relate to the
21 approval criteria.

1 As respondents point out, the findings specifically address “[c]omments
2 and/or recommendations of adjacent and vicinity property owners whose interest
3 may be affected by the proposed use,” as required by YCZO 1101.02(A)(7). The
4 findings explain that

5 “the Board has received and considered numerous comments from
6 adjacent and vicinity property owners, and has considered all such
7 comments and recommendations. The application was processed
8 using the ‘Type B’ procedure, as described in section 1300 of the
9 YCZO, and neighboring property owners whose interests may be
10 affected submitted a variety of comments. Hearings were held
11 before the Planning Commission and the Board of Commissioners.
12 Conditions have been imposed, in part in response to comments
13 received. Several commenters raised issues that are unrelated to
14 applicable approval criteria or that do not constitute a proper basis
15 to deny this application, and are not addressed here.” Record 14.

16 The findings go on to address comments related to property values, safety and
17 security, use and disposal of chemicals, depletion and/or contamination of
18 groundwater and previously unpermitted buildings on the site. Record 14-16.

19 Petitioner fails to acknowledge these findings or challenge their adequacy. As
20 discussed above, the county found that, to the extent there are dwellings in the
21 immediate area, they are associated with farm use. There is no basis for reversal
22 or remand where “[p]etitioner’s argument * * * does not explain why the city’s
23 findings * * * are inadequate, but rather disagrees with the conclusion reached in
24 those findings.” *Knapp v. City of Corvallis*, 55 Or LUBA 376, 380 (2007).

25 The second subassignment of error is denied.

26 Petitioner’s second assignment of error is denied.

1 **INTERVENOR’S FIRST ASSIGNMENT OF ERROR**

2 Intervenor argues that “[r]espondent violated, misinterpreted and
3 misconstrued the applicable law, and failed to make adequate findings supported
4 by substantial evidence, in finding that the applicant met its burden of proving
5 compliance with [YCZO] 1101.02(A)(1), (4) and (7).” Intervenor’s Petition for
6 Review 4. Intervenor maintains that the county failed to adequately consider the
7 characteristics of adjoining and surrounding uses, provisions for adequate noise
8 and/or visual buffering from noncompatible uses, and comments and/or
9 recommendations of adjacent owners whose interests may be adversely affected
10 by the proposed use.

11 **A. Characteristics of the Surrounding Uses**

12 Intervenor argues that the county failed to consider the characteristics of
13 intervenor’s use. Intervenor resides with her adult son in a residence to the north
14 of the subject property on property zoned EFU-40. Intervenor’s son is severely
15 autistic and intervenor argues that her ability to manage her son’s medical
16 challenges will be difficult or impossible if the application is approved.
17 Intervenor argues that her residence was designed specifically to accommodate
18 her son’s unique needs and that structures planned for use as part of the marijuana
19 and hemp processing operation were previously constructed, without required
20 permits, after the applicant moved to the subject property. Intervenor argues that
21 the county failed to consider her unique circumstances and that this failure is

1 inconsistent with the county’s obligation to consider the character of her property
2 as an adjacent use. We disagree.

3 First, the county did not misinterpret or misconstrue its obligations under
4 the YCZO. The county’s interpretation of its code is entitled to deference as long
5 as that interpretation is consistent with the code’s express language, purpose and
6 underlying policy. ORS 197.829(1); *Siporen v. City of Medford*, 349 Or 247, 261,
7 243 P3d 776 (2010) (applying ORS 197.829(1)).¹ As we discussed in our
8 resolution of petitioner’s first assignment of error, the county’s interpretation of
9 residential uses is consistent with the express language of the code. The county
10 acknowledged the fact that residential uses occur in the area and noted that they
11 occur in dwellings associated with farm use. The definition of “use” includes

¹ ORS 197.829(1) provides:

“[LUBA] shall affirm a local government’s interpretation of its comprehensive plan and land use regulations, unless the board determines that the local government’s interpretation:

“(a) Is inconsistent with the express language of the comprehensive plan or land use regulation;

“(b) Is inconsistent with the purpose for the comprehensive plan or land use regulation;

“(c) Is inconsistent with the underlying policy that provides the basis for the comprehensive plan or land use regulation; or

“(d) Is contrary to a state statute, land use goal or rule that the comprehensive plan provision or land use regulation implements.”

1 “[t]he purpose for which land or a building or structure is used, designed,
2 arranged or intended, or for which it is occupied or maintained.” YCZO 202.
3 Although Intervenor’s adjacent dwelling was designed to accommodate the
4 unique needs of her son, the county’s conclusion that the property’s use as a
5 residence is subordinate to its designation for farm use is not inconsistent with
6 the text or context of the code.

7 Intervenor also contends that the county’s interpretation is inconsistent
8 with the purpose of site design review, which is

9 “to guide future growth and development in accordance with the
10 Comprehensive Plan and other related county ordinances, to provide
11 for an effective process and framework to review commercial and
12 industrial development proposals, to insure safe, functional, energy-
13 efficient developments which are compatible with the natural and
14 man-made environment, and to resolve potential conflicts that may
15 arise between proposed developments and adjacent uses.” YCZO
16 1101.01.

17 Although intervenor argues that the applicant’s structures were erected
18 without permits and that intervenor’s family has resided in their dwelling since
19 before the applicant’s proposed use arose, intervenor identifies nothing in the
20 code that requires the county, in evaluating compatibility with the natural and
21 man-made environment, to prioritize uses that were located in the area first or to
22 weigh the fact that construction permits for structures were obtained after
23 construction had already occurred. The primary use in the EF-40 zone is farm
24 use. The applicant’s proposed uses are farm uses. The county therefore concluded

1 that the proposed uses were consistent with the characteristics of adjoining and
2 surrounding uses. The county did not misconstrue or misinterpret its ordinance.

3 YCZO 1101.02(A)(1) requires consideration of the characteristics of
4 adjacent uses. Findings must identify the relevant criterion, identify the facts
5 relied upon, and explain how the facts lead to the ultimate conclusion. Findings
6 must be supported by substantial evidence—that is, evidence a reasonable person
7 would rely upon to make a decision. *Younger v. City of Portland*, 305 Or 346,
8 752 P2d 262 (1988). As discussed in our resolution of petitioner’s second
9 assignment of error, the findings explain the basis for the determination that
10 residences in the area are subordinate to, or allowed in conjunction with, farm
11 use.

12 We agree with respondents that the county considered the needs identified
13 by intervenor. As respondents point out, the reference in the decision to the
14 nearest dwelling being located 300 feet away from the building proposed for
15 processing is a reference to intervenor’s dwelling. Record 11. As discussed
16 below, specific technical reports in the record addressed potential impacts on
17 intervenor’s dwelling.

18 This subassignment of error is denied.

19 **B. Noise**

20 Intervenor argues that she provided “unrefuted evidence of noise impact
21 upon [her son] from the operation of the processing building.” Intervenor’s
22 Petition for Review 13. We agree with respondents that this is incorrect. The

1 evidence presented by intervenor relates to activity conducted by the subject
2 property's prior owner and a different operation. By contrast, the county relied
3 upon expert reports concerning noise and odor associated with the specific
4 processing facility being proposed. The noise engineer found that the processing
5 facility's heating, ventilation, and air conditioning (HVAC) equipment would be
6 the single loudest noise source from intervenor's property. Conditions of
7 approval imposed by the county include construction of a "masonry wall, to the
8 roofline, to partially enclose the HVAC units located on the north side of the
9 northernmost existing building, positioned to attenuate the sound of the units at
10 the dwelling located just north of the property line." Record 18.

11 "The added wall is expected to provide a 5 to 10 dBA reduction in
12 the noise level of the condensers as measured from the north
13 residence. Using the more conservative condenser noise level
14 reduction of 5 dBA, the cumulative noise level from the full
15 operation of the proposed facility would drop from 42 to 39 dBA-
16 L50. At 39 dBA, the noise levels would be 11 dBA below the DEQ
17 [Oregon Department of Environmental Quality] nighttime standard
18 and to a person of average hearing would be considered quiet.
19 During periods of ambient background noise levels above 45 dBA
20 at the northern residence, it is likely the condensers would not be
21 audible." Record 1039.

22 The county found:

23 "The Board relies on the noise and odor technical reports prepared
24 by a registered professional engineer and submitted by the applicant,
25 as the most credible and expert testimony received regarding noise
26 and odor. As demonstrated in the noise report, the projected noise
27 levels at the applicant's property lines, if all noise-generating
28 machinery were operating concurrently and at full capacity, would
29 not exceed the most restrictive nighttime noise standard to ensure

1 compliance with DEQ noise limits. Nevertheless, the applicant has
2 offered to partially enclose the exterior HVAC units closest to the
3 northern property line to buffer the noise from such units while still
4 allowing them to continue to function as an air exchange system
5 (even though the units are not part of the processing facility). As a
6 condition of approval, the applicant is required to partially enclose
7 the HVAC units on the north side of the northern-most building on
8 the site with a masonry wall built up to the roof line of the building,
9 but allowing air to be exchanged from the sides.” Record 13-14.

10 Substantial evidence supports the county’s conclusions with respect to noise.

11 This subassignment of error is denied.

12 **C. Comments from Adjacent and Nearby Property Owners**

13 YCZO 1101.02(A)(7) requires consideration of “[c]omments and/or
14 recommendations of adjacent and vicinity property owners whose interests may
15 be affected by the proposed use.” Intervenor states that she incorporates her prior
16 arguments by reference and that “[a] reading of the appealed decision makes it
17 clear that many of [intervenor’s] comments and recommendations, including as
18 to re-siting on the applicant’s property, were not considered by the county at all.”
19 Intervenor’s Petition for Review 15.

20 We agree with respondents that YCZO 1101.02 (A)(7) does not require the
21 county to specifically reference in its decision every comment received. *Dayton*
22 *Prairie Water Ass’n v. Yamhill County*, 38 Or LUBA 14, 35, *aff’d*, 170 Or App
23 6, 11 P3d 671(2000) (so stating). Intervenor’s argument that her comments and
24 recommendations were not considered at all does not reflect the county’s analysis
25 as described herein and in our response to petitioner’s second assignment of error,
26 second subassignment. For example, intervenor complained that the operation

1 prior to the applicant's occupancy of the property "caused foul odors" which
2 impaired her son's breathing. Record 153-54. In discussing the comments
3 received from the public, the county found that

4 "the applicant has designed their indoor production and processing
5 facilities with significant odor control measures, such as activated
6 carbon filters on the intake and exhaust vents, and the use of ion
7 generators mounted either inside the building's air handler or in the
8 supply ductwork, which will ensure compliance with State odor
9 nuisance control requirements. The Board finds credible and relies
10 on the expert noise and odor technical reports by a licensed
11 professional engineer and submitted by the applicant. As
12 demonstrated by such noise and odor reports, the applicant's
13 proposed odor control system will comply with State odor control
14 requirements. As a condition of approval, the applicant will ensure
15 that the HVAC system for the structure or structures containing the
16 processing facilities will be equipped with activated carbon filters
17 or a similar device, and that the filters and similar devices will be
18 maintained to ensure noxious odors are mitigated while the
19 processing facility is operational." Record 16.

20 Condition of approval 10 provides:

21 "The HVAC system for the structure containing the processing
22 facility shall be equipped and maintained with activated carbon
23 filters or similar device to ensure noxious odors are fully mitigated."
24 Record 17.

25 Intervenor's comments were considered.

26 This subassignment of error is denied.

27 Intervenor's first assignment of error is denied.

1 **INTERVENOR’S SECOND ASSIGNMENT OF ERROR**

2 Lastly, intervenor argues that “[r]espondent violated, misinterpreted and
3 misconstrued the applicable law, and failed to make adequate findings supported
4 by substantial evidence, in finding that the applicant met its burden of proving
5 compliance with [YCZO] 1101.02(A)(3).” Intervenor’s Petition for Review 16.
6 YCZO 1101.02(A)(3) requires that the county consider “[t]raffic safety, internal
7 circulation and parking.” The county determined that meeting the sight distance
8 standard from the west requires clearing vegetation at the southeast corner of the
9 subject property. The county imposed the following condition of approval:

10 “Prior to operation of the processing facility, the applicant shall
11 clear vegetation from the southeast corner of the applicant’s parcel
12 and/or public right-of-way, at the junction of NE Jaquith Road and
13 NE Mountain Top Road, in accordance with the clear-vision
14 standards provided in subsection 402.09(F) of the [YCZO]. In this
15 manner, the applicant shall ensure that sightlines are improved in
16 accordance with the standards both at the applicant’s driveway
17 accessing NE Jaquith Road, as well as at the junction of NE Jaquith
18 Road and NE Mountain Top Road, located at the southeast corner
19 of the applicant’s parcel. Work in the right-of-way shall be in
20 accordance with Public Works permit requirements. Clearing of
21 vegetation on any neighboring property is not required, but if any
22 such clearing is performed, it may only be done with such property
23 owner’s consent. Sight distances shall be maintained as required by
24 this condition for as long as the processing facility is operating.”
25 Record 18.

26 Intervenor disagrees with the county’s factual determination that achieving
27 the requisite sight distance does not require clearing property owned by a
28 neighbor. Intervenor’s Petition for Review 17. Intervenor argued below that

1 achieving the sight distance required clearing land on neighboring property, and
2 cited a survey in the record. Record 156-57, 165. “In evaluating the substantiality
3 of evidence in the whole record, we are required to consider whether supporting
4 evidence is refuted or undermined by other evidence in the record, but cannot
5 reweigh the evidence.” *Wilson Park Neighborhood Ass’n, Inc. v. City of*
6 *Portland*, 27 Or LUBA 106, 113, *aff’d in part, rev’d in part on other grounds*,
7 129 Or App 33, 877 P2d 1205, *rev den*, 320 Or 453 (1994). We see nothing on
8 the survey that compels a conclusion that it is necessary to enter another’s
9 property to accomplish the needed clearing. We will not reweigh the evidence
10 and, as intervenor conceded at the hearing, staff and the applicant indicated that
11 there was no need to enter adjacent property. Record 157. Further, the applicant
12 will either be able to meet the condition of approval or be unable to conduct the
13 hemp and marijuana operation. *Martucci v Jackson County*, 77 Or LUBA 252,
14 *aff’d* 293 Or App 513, 425 P3d 799 (2018) (holding that a condition of approval
15 requiring Oregon Department of Transportation (ODOT) authorization to
16 conduct clearing activity on ODOT property did not provide a basis for remand
17 because the applicant would either meet the condition or not meet the condition
18 and be unable to conduct its hauling operation).

19 This subassignment of error is denied.

20 Intervenor’s second assignment of error is denied.

21 The county’s decision is affirmed.