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

VALYNN CURRIE,
*Petitioner*,

vs.

DOUGLAS COUNTY,
*Respondent*,

and

BJORN VIAN,
*Intervenor-Respondent*.

LUBA No. 2020-050

FINAL OPINION
AND ORDER

Appeal from Douglas County.

D. Rahn Hostetter and Benjamin Boyd, Enterprise, filed the petition for review. D. Rahn Hostetter argued on behalf of petitioner. With them on the brief was Hostetter Law Group, LLP.

No appearance by Douglas County.

Souvanny Miller, Portland, filed the response brief and argued on behalf of intervenor-respondent. With her on the brief was Miller Nash Graham & Dunn LLP.

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

REMANDED 08/12/2020

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

Opinion by Rudd.

## NATURE OF THE DECISION

Petitioner challenges the board of commissioners' approval of a conditional use permit authorizing an aggregate quarry on a 73-acre site.

## MOTION TO INTERVENE

Bjorn Vian (intervenor) seeks to intervene on the side of the county. The motion is unopposed and is granted.

## FACTS

Situated on the east-facing slope of a steep ridge that extends north from the North Umpqua Highway, the subject property is 73 acres in size and part of a 280-acre tract. The tract includes two existing dwellings, with one located south and one located northeast of the subject property, as well as a recreational vehicle (RV) park located east of the subject property. Nearby uses outside of the tract include a mobile home park located east of the subject property; residentially developed properties located adjacent to the North Umpqua River, east and south of the subject property; and a cattle ranch located west of the subject property.

The subject property is zoned Exclusive Farm Use-Grazing (F-G) and is subject to a mineral resources overlay. In the 1950s, a quarry was operated on 10 to 15 acres of the tract. In 2018, intervenor applied to the county for a conditional use permit (CUP) to reopen and expand the quarry operation onto the subject property. The board of commissioners approved the CUP and petitioner appealed

that decision to LUBA. *Currie v. Douglas County*, 79 Or LUBA 585 (2019) (*Currie I*).

Petitioner argued in *Currie I* that the record did not support the county's conclusion that the proposed quarry use was compatible with existing uses, or that the quarry use would not force a significant change in or increase the cost of farm and forest practices on surrounding lands devoted to farm or forest use. We agreed and remanded the county's decision approving the CUP, holding:

> "The county's decision is not supported by substantial evidence as explained in the discussion of the second assignment of error. The county must identify the surrounding uses, explain the characteristics of the surrounding uses and set forth the substantial evidence establishing that the applicable approval criteria are met with respect to air quality/dust, water quality, noise, wildlife, and farm and forest impacts." *Currie I*, 79 Or LUBA at 609.

On December 17, 2019, the county received a request from intervenor to proceed on remand. On January 27, 2020, the board of commissioners remanded the matter back to the planning commission for an additional evidentiary hearing. On February 20, 2020, the planning commission conducted the remand hearing. On March 26, 2020, the planning commission approved the CUP. On April 13, 2020, the board of commissioners affirmed the planning commission decision.

This appeal followed.

## SECOND ASSIGNMENT OF ERROR

Petitioner's second assignment of error alleges that the county committed three procedural errors. For the reasons set forth below, we deny this assignment of error.

### A. First Subassignment of Error

Petitioner's first subassignment of error is that the county "denied [petitioner's] right to present new evidence (including expert testimony) addressed to the new evidence offered by [intervenor]." Petition for Review 20. The notice of the planning commission hearing stated:

> "Only those parties qualified at the first Planning Commission hearing on this matter will be allowed to participate at the February 20 hearing (per section 2.200.5 of the Land Use and Development Ordinance (LUDO)). New parties will not be qualified at the February 20th hearing."[1] Record 215 (boldface omitted).

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[1] LUDO 2.200.5 provides:

> "In cases where a matter has been referred back to the Planning Commission from the Board, only those individuals or agencies who were given party status at the first evidentiary hearing on the matter shall be allowed as parties in the matter when reheard by the Commission."

We discussed the operation of this code provision in *Wetherell v. Douglas County*, 60 Or LUBA 131, 135-37 (2009), *aff'd*, 235 Or App 246, 230 P3d 976, *rev den*, 349 Or 57, 240 P3d 1097, 1098 (2010), and concluded that where an application was not modified on remand and petitioner had not identified anything in the comprehensive plan, land use regulations or elsewhere that would preclude the county from doing so, the county could

Petitioner asserts that she was denied a full and fair hearing and that her substantial rights were prejudiced because the planning commission did not allow application opponents who did not participate in the prior proceeding to submit testimony to address new evidence and argument presented by intervenor. Petitioner also argues that a person who resides downstream from the quarry and was Fisheries Program Manager for the Umpqua National Forest for 24 years (Dose) should have been allowed to testify.

ORS 197.835(9)(a)(B) provides that LUBA shall reverse or remand a land use decision if the local government fails to follow applicable procedure in a manner that prejudices petitioner's substantial rights. Where a petitioner seeks a remand under ORS 197.835(9)(a)(B), "the alleged procedural error must affect *petitioner's* rights, not the rights of others." *Bauer v. City of Portland* 38 Or LUBA 432, 436 (2000) (emphasis in original). Petitioner cannot base her allegation of procedural error on the county's failure to allow others to testify. We agree with intervenor that petitioner is not alleging that *she* was not allowed to present new evidence, including expert testimony, and is not alleging that Mr. Dose served as her expert and that his inability to testify prevented her from offering her expert. Thus, petitioner's claim of error is not a basis for reversal or remand.

Finally, in her first subassignment error, petitioner argues:

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apply LUDO 2.200.5 to limit an individual's participation to that of witness.

> "Despite rejecting all discussion and evidence of wetlands issues offered by [petitioner], Douglas County curiously (and erroneously) adopted a statement in its Decision that the alleged wetlands are, in any event 'outside the quarry site.'" Petition for Review 23.

Petitioner does not respond to intervenor's contention that she did not object below to exclusion of her wetland related material. Where there was an opportunity below to object to a procedural error, failure to make the objection below will result in an inability to make the argument at LUBA. *Woodstock Neighborhood Assoc. v. City of Portland*, 28 Or LUBA 146, 150-51 (1994). Accordingly, we reject this argument as well.

The first subassignment of error is denied.

**B. Second Subassignment of Error**

Petitioner's second subassignment of error is that her substantial rights were prejudiced because the time limits imposed by the county at the remand hearing prevented her from completing her oral testimony. Petitioner explains that intervenor was given 62 minutes for his presentation, while petitioner and other opponents were allotted five minutes each and, in total, used 41 minutes. Some opponents yielded their time to petitioner, resulting in petitioner being allowed to testify for 20 minutes.

A petitioner alleging a procedural error must identify both the procedure violated and the prejudice to his or her substantial rights. *Stoloff v. City of Portland*, 51 Or LUBA 560 (2006). Petitioner has not identified any legal requirement that opponents be given equal time to applicants to present verbal testimony, and we are aware of none.

Furthermore, demonstrating prejudice to substantial rights requires that the petitioner explain, with specificity, what would have been different had the correct procedures been followed. *Concerned Citizens of the Upper Rogue v. Jackson County*, 33 Or LUBA 70, 83 (1997). Even if opponents were entitled to equal time, petitioner has not explained with specificity what additional information she would have provided.

The second subassignment of error is denied.

**C. Third Subassignment of Error**

Petitioner's third subassignment of error is that the county's refusal to leave the record open for seven days after the evidentiary hearing before the planning commission prejudiced petitioner's substantial rights. Petitioner claims that ORS 197.763(6)(a) required the county to grant her request for an open record period after the remand hearing. ORS 197.763(6)(a) provides:

> "Prior to the conclusion of the initial evidentiary hearing, any participant may request an opportunity to present additional evidence, arguments or testimony regarding the application. The local hearings authority shall grant such request by continuing the public hearing pursuant to paragraph (b) of this subsection or leaving the record open for additional written evidence, arguments or testimony pursuant to paragraph (c) of this subsection."

In this case, the initial evidentiary hearing took place during the proceedings which were the subject of our remand. Because the planning commission hearing on remand was not the initial evidentiary hearing, ORS 197.763(6)(a) did not apply. *Noble v. City of Fairview*, 30 Or LUBA 180, 187 (1995), *aff'd*, 139 Or

App 325, 911 P2d 1287 (1996) (citing *Caine v. Tillamook County*, 25 Or LUBA 209 (1993); *Wentland v. City of Portland*, 23 Or LUBA 321 (1992)) ("[O]n remand, the ORS 197.763 procedural requirements for the conduct of an initial evidentiary hearing are not required."). Furthermore, although petitioner states in footnote 9 of her petition for review (and in her written testimony to the planning commission) that she was not provided a copy of the remanded staff report until immediately before the January 20, 2020 planning commission hearing, and thus had limited time to review the staff report, petitioner makes no attempt to explain what additional information she would have provided if she had received the staff report earlier and does not establish prejudice to her substantial rights.

The third subassignment of error is denied.

The second assignment of error is denied.

**FIRST ASSIGNMENT OF ERROR**

ORS 197.835(9)(a)(C) provides that LUBA will remand or reverse a local government decision where the decision is not supported by substantial evidence in the whole record. Petitioner's first assignment of error is that the planning commission's decision is not supported by substantial evidence, that is, evidence a reasonable person would rely upon to make a decision. *Younger v. City of Portland*, 305 Or 346, 752 P2d 262 (1988). Petitioner also argues that the county's findings are inadequate to explain why the applicable approval criteria are satisfied. As explained below, we deny the second, third and fifth subassignments of error because petitioner either failed to preserve the issue for

appeal, the issue was or could have been raised in the prior proceeding, or substantial evidence supports the planning commission's findings. With respect to the fourth and first subassignments of error, however, we agree with petitioner that the planning commission's findings are inadequate, and that its decision is not supported by substantial evidence.

### A. First and Second Subassignments of Error

LUDO 3.39.050(1) requires that a conditional use "is or may be made compatible with existing adjacent permitted uses and other uses permitted in the underlying zone." Petitioner's second subassignment of error is that the planning commission's findings fail to establish that the proposed use is compatible with "other uses permitted in the underlying zone" and that the record lacks substantial evidence on this issue. Petition for Review 11. Petitioner's first subassignment of error is that the planning commission's findings fail to establish that the proposed use is compatible with "existing adjacent permitted uses" and that the record lacks substantial evidence on that issue, as well. Petition for Review 10.

#### 1. "Other Uses Permitted in the Underlying Zone"

In *Currie I*, we agreed with petitioner that remand was required for the county to identify and describe *existing* adjacent permitted uses, and the quarry impacts on those uses, to determine whether the proposed use "is or may be made compatible with existing adjacent permitted uses." LUDO 3.39.050(1); *Currie I*, 79 Or LUBA at 601-02. However, we explained in *Currie I* that, *if* the petitioner was arguing that LUDO 3.39.050(1)'s requirement that the county find that "[t]he

proposed use is or may be made compatible with existing adjacent permitted uses and other uses permitted in the underlying zone" required an analysis of uses *not yet existing but permissible in the zone*, petitioner had not demonstrated that issue was preserved for LUBA review, and petitioner did not sufficiently develop that argument for LUBA review. *Currie I*, 79 Or LUBA at 602 (citing *Deschutes Dev. Co. v. Deschutes County*, 5 Or LUBA 218 (1982); ORS 197.835(3)). Accordingly, we did not address that argument. *Id.*

We agree with intervenor that petitioner may not attempt to develop that argument on remand and that the issue is waived on review. Response Brief 10. While intervenor does not cite it, intervenor's argument invokes *Beck v. City of Tillamook*, 313 Or 148, 831 P2d 678 (1992), in which the court explained what has come to be known as the law of the case doctrine. A petitioner may not raise an issue in a subsequent stage of a proceeding if that issue was previously decided adversely to them, or if they could have but failed to raise the issue below. Petitioner did not argue in *Currie I* that the county's findings were inadequate because they did not address the potential for incompatibility with nonexistent but permissible uses on adjacent land. Because petitioner failed to do so, they may not raise that issue now.

The second subassignment of error is denied.

**2. "Existing Adjacent Permitted Uses"**

Petitioner's first subassignment of error is that findings under LUDO 3.39.050 are inadequate and the decision is not supported by substantial evidence

because the county failed to explain the characteristics of the adjacent uses and the nature of the existing uses. Petition for Review 10. In petitioner's view, because the county failed to describe the characteristics of adjacent uses, it could not conclude that the proposed quarry use is compatible with adjacent uses as required by LUDO 3.39.050(1). We agree with petitioner.

As we explain below in our resolution of the fourth subassignment of error, an analysis of the characteristics of surrounding farm and forest uses is necessary in order to comply with the farm impacts test. LUDO 3.39.050(1) also requires that the county determine that the conditional use is compatible with existing *adjacent* uses more broadly. We agree with petitioner that the planning commission's findings are insufficient and not supported by substantial evidence, and sustain this assignment of error.

In *Currie I*, petitioner argued that the county failed to identify existing adjacent uses to be evaluated for compatibility with the proposed aggregate use. Intervenor directed us to maps and an aerial photo in the record that identified adjacent property and ownership, and to an aerial satellite map showing structures. *Currie I*, 79 Or LUBA at 601. We concluded that the record did not include the date of the aerial photograph or explain what uses existed on adjacent properties. Thus, the county failed to adequately identify the existing adjacent uses to be evaluated for compatibility. We remanded the planning commission decision in *Currie I* because it was not supported by substantial evidence. *Id.* at 601-02, 609.

Petitioner contends that the only evidence of adjacent uses in the record on remand are maps, either undated or dated 2014, that name nearby property owners. Petition for Review 10. Intervenor responds that the maps show lot lines and zoning, that testimony in the record establishes that conditions are unchanged since 2014, and that, in addition to the material identified by petitioner, photographs of adjacent uses are provided in intervenor's noise impact study. Response Brief 7-9; Record 240-46, 314. The planning commission found that

> "all adjacent permitted uses have been identified by location, ownership, and character of use. Specifically, [intervenor] explained both in the Hearing Memorandum and presentation before the Planning Commission which adjacent uses are residential, commercial, commercial-tourism and farm and forest." Record 37.

We agree with intervenor that the adjacent uses have been adequately identified.

Petitioner also argues, however, that the findings do not explain the characteristics or nature of *adjacent* existing uses. We agreed with petitioner in *Currie I* that understanding the identity and nature of existing uses is part of establishing compatibility between uses (and for determining the appropriate measuring points for distance when evaluating impacts). During the proceedings on remand, intervenor explained that the only *adjacent* residential use is the Black residence and the only *adjacent* farm use is the cattle ranch. Record 64-65. The broad description of the residential use in the findings is sufficient in this case. Intervenor submitted expert reports including

> "a Noise Impact Study by Acoustical Engineer Arthur M. Noxon, an Environmental Report by Environmental Health Specialist,

> Ronald Baker, and a letter from Bill Cannaday of the Oregon Department of Fish and Wildlife." Record 38.

The planning commission concluded that the noise study was based "on extensive onsite testing by a trained and experienced professional[.]" Record 38. The planning commission found that the environmental report was based on onsite observations of the subject property and knowledge of the area. *Id.* The planning commission found the expert reports intervenor presented persuasive. *Id.* For example, with respect to the impact of noise on residential uses, the planning commission concluded that the noise study was a worst case analysis, that residential uses would not be adversely impacted, and that the quarry was therefore a compatible use. *Id.* at 39. The cited evidence supported this conclusion as to residential uses.

However, we agree with petitioner that the planning commission's decision that the proposed use is compatible with the adjacent cattle ranching activity is not supported by substantial evidence in the whole record.

The planning commission findings explain "that the grazing use takes place on an expanse of pasturelands[.]" Record 41. The planning commission explained in its discussion of farm and forest impacts that "[t]here is also a high ridge separating the cattle ranch from the quarry site" and that the natural features of distance and the ridge

> "will prevent any water quality impact, as water will not travel from the quarry up and over the ridge to the cattle ranch. It is also likely, due to the limited impacts of the quarry as described by Acoustical Engineer Noxon and Environmental Health Specialist Baker, and

> the natural buffer (which is higher in elevation and at least 500 feet from the subject property at its closest point) that there will be no noise or air quality impacts whatsoever. In terms of air quality and noise impacts, we find that the more sensitive residential uses, which are closer to the proposed use and do not have the same high-ridge buffer, are an appropriate proxy for the potential impacts on the cattle grazing use. We agree with [intervenor] and Staff's analysis that the proposed use will be compatible with the cattle ranch in terms of water quality, air quality and noise." Record 41-42.

Without an explanation of the manner in which the grazing operation is run—for example, whether it is seasonal or includes accessory activities such as breeding or calving—and the nature of the periodic logging, the findings are inadequate and there is not substantial evidence in the record supporting a conclusion that the quarry use is compatible with the adjacent farm operation.

The first subassignment of error is sustained.

**B. Third Subassignment of Error**

Petitioner submitted into evidence a document entitled "Noise Study – Elk Haven Rock Quarry," prepared by Albert Duble, acoustical consultant, dated December 20, 2000. Record 173. Petitioner argues in her third subassignment of error that the planning commission findings fail to establish why the planning commission preferred and adopted the noise report of intervenor's expert. Petition for Review 11. Petitioner also argues that the noise testing locations used by intervenor's expert were inadequate. We agree with intervenor that the planning commission's findings are sufficient and supported by substantial evidence, and deny this subassignment of error.

The planning commission determined:

> "The remonstrators' arguments and testimony with respect to potential compatibility issues, including water quality impacts, air quality impacts, and wildlife, are not based on expert evidence, onsite testing, or observation of the subject property. For instance, the written submission of Ms. Currie includes speculation. We give this testimony little evidentiary weight, but acknowledge the remonstrator's testimony and other submittals as argument. Those arguments, however, are not sufficient to persuade us that the proposed use will pose compatibility issues on any of the issues on remand, in light of the evidence submitted by [intervenor]." Record 39.

Although it did not specifically mention evidence of noise impacts, the planning commission adopted general findings that petitioner's evidence was insufficient. More detailed findings are not required in this instance.

In *Tallman v. Clatsop County*, 47 Or LUBA 240 (2004), the petitioner argued that the county's findings failed to explain its decision to disregard petitioner's evidence related to soil type. We held:

> "The hearings officer found that the soil survey presented the 'most persuasive' evidence of soil type, and that 'no compelling evidence to contradict' the soil survey was presented. * * * Where there is conflicting evidence, the local government may choose which evidence to accept, but it must state the facts it relies upon and explain why those facts lead to the conclusion that the applicable standard is satisfied. *LeRoux v. Malheur County*, 30 Or LUBA 268, 271 (1995). While admittedly brief, the findings quoted at n 1 recite the facts the county relies upon and explains why those facts lead to the conclusion that the predominant soil type on the subject property is 71C. At least where this Board is able to determine that a reasonable decision maker would rely on the evidence the decision maker chose to rely on, findings specifically addressing conflicting evidence are unnecessary. *Port Dock Four, Inc. v. City of Newport*, 36 Or LUBA 68, 76, *aff'd*[,] 161 Or App 199, 984 P2d 958 (1999); *Angel v. City of Portland*, 22 Or LUBA 649, 656-57, *aff'd*[,] 113 Or

App 169, 831 P2d 77 (1992); *Douglas v. Multnomah County*, 18 Or LUBA 607, 619 (1990). Therefore, the hearings officer's failure to address petitioners' evidence in her findings does not necessarily mean those findings are inadequate." *Tallman*, 47 Or LUBA at 245-46.

In this case, the planning commission made compatibility findings in reliance on a noise study provided by intervenor. The noise study concludes that the only noise sensitive properties lie south of the proposed quarry site. Record 244. Thus, the noise study did not determine that the cattle ranch to the west was a noise sensitive use. The study also explains:

> "Because the original quarry site has lain unused for over 20 years, [the Department of Environmental Quality] considers a new quarry in the same area to be a 'new industrial use on previously unused site' and accordingly, the most conservative of the State's noise standards, ambient degradation section, will apply in addition to the regular noise control regulations." Record 245.

The planning commission found that intervenor's noise study evaluated potential noise impacts to the Black residence, the only adjacent residential use and the closest residential use. Record 39. The planning commission found:

> "In terms of noise, Mr. Noxon tested for noise impacts using a 'worst case scenario' situation. The signal was set off in the quarry site itself, and one of the measuring sites for ambient noise was set up to show the potential noise impacts for the Black residence. Noxon at p. 5. Noise impacts at that location were within acceptable levels, even at the worst case scenario." Record 39.

With respect to the nearby RV Park, the planning commission held:

> "Noise impacts from the quarry were measured at the entrance to the park and at the northern end of the park. Noxon at p. 5. Noise impacts at those locations were within acceptable levels, even at the

worst case scenario." Record 39.

Intervenor's noise study is specific to intervenor's proposed quarry and dated October 25, 2019. Record 244. Petitioner's noise study is dated December 20, 2000. Record 173. It is reasonable for the planning commission to rely upon a project-specific expert noise report and disregard an almost 20-year-old report analyzing a prior proposal.

Petitioner also argues that, unlike the report submitted by petitioner, intervenor's report is insufficient because it does not consider noise from trucks entering the highway. Petitioner did not raise that issue below and may not raise it for the first time on appeal.

The third subassignment of error is denied.

**C. Fifth Subassignment of Error**

In her fifth subassignment of error, petitioner argues that the county erred in finding that access to the quarry is compatible with adjacent uses. Petitioner argues that she preserved this assignment of error because she placed into the record an ODOT "Change of Use" access permit that ODOT issued to intervenor on March 12, 2019. Petition for Review 18.

First, we agree with intervenor that petitioner has not preserved the issue raised in this subassignment of error. Our scope of review on appeal is limited to issues "raised by any participant before the local hearings body." ORS 197.835(3). Issues must be raised with sufficient specificity to allow the decision-maker to respond to the issue. ORS 197.763(1). Placing a document into the

record without explaining either verbally or in written testimony its alleged relevance to the approval criteria lacks the requisite specificity to raise an issue. Petitioner does not point to any place in the record where she raised the issue raised in this subassignment of error.

We also agree with intervenor that, to the extent petitioner argues that intervenor lacks a valid highway access permit, that issue is not properly before us. In *Currie I*, petitioner "challenge[d] the county's compatibility determination with respect to traffic/access, air quality/dust, water quality, and wildlife impacts." *Currie I*, 79 Or LUBA at 602. With respect to traffic/access, petitioner argued that the proposed quarry's driveway access was an unpermitted residential access point and that quarry use required an ODOT permit. We concluded that petitioner's argument did not provide a basis for reversal or remand. Petitioner did not identify any applicable land use regulation that required intervenor establish ODOT access approval. We agree with intervenor that petitioner may not challenge compatibility of the ODOT access permit in this proceeding.

The fifth subassignment of error is denied.

**D. Fourth Subassignment of Error**

ORS 215.296(1) and its county implementation at LUDO 3.3.150 provide that a governing body may only approve a mining use on farmland if it finds that the mining use will not "force a significant change in accepted farm or forest practices on surrounding lands devoted to farm or forest use," or "significantly increase the cost of accepted farm or forest practices on surrounding lands

devoted to farm or forest use."[2] Petitioner's fourth subassignment of error is that the county's findings on farm and forest impacts are not supported by substantial evidence. We sustain this assignment of error.

In *Currie I*, petitioner argued that the county "decision does not enumerate what farm and forest practices are currently in use on the neighboring ranch and surrounding lands devoted to farm and forest use." *Currie I*, 79 Or LUBA at 607. We observed that the county made general conclusions that any potential impacts related to noise, air quality and water quality would be mitigated "by the limited

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[2] ORS 215.296(1) states:

> "A use allowed under ORS 215.213(2) or (11) or 215.283(2) or (4) may be approved only where the local governing body or its designee finds that the use will not:
>
> "(a) Force a significant change in accepted farm or forest practices on surrounding lands devoted to farm or forest use; or
>
> "(b) Significantly increase the cost of accepted farm or forest practices on surrounding lands devoted to farm or forest use."

LUDO 3.3.150 states:

> "The Approving Authority shall consider the following additional criteria which must be met prior to the approval of a conditional use:
>
> "The use would not:
>
> "a. Force a significant change in accepted farm or forest practices on surrounding lands devoted to farm or forest use; or
>
> "b. Significantly increase the cost of accepted farm or forest practices on surrounding lands devoted to farm or forest use."

scope of the project, project condition, natural setting and regulatory oversight." *Id.* at 608. However, we held that the county failed to

> "identify any evidence supporting its conclusion that only northerly directed blasting would ever occur or that the direction of blasting controls noise and dust to an extent that the aggregate mining use is compatible with surrounding uses. * * * The county does not discuss how long initial blasting will occur, how long each blasting session will last, how loud blasting will be or how far particulates may be transmitted. The county does not address drilling onsite. The county does not cite evidence of why a 100-foot setback is, along with the dust palliative and water treatment, sufficient to protect air quality/control dust." *Id.* at 604.

ORS 215.416(9) provides:

> "Approval or denial of a permit or expedited land division shall be based upon and accompanied by a brief statement that explains the criteria and standards considered relevant to the decision, states the facts relied upon in rendering the decision and explains the justification for the decision based on the criteria, standards and facts set forth."

"Findings must (1) identify the relevant approval standards, (2) set out the facts which are believed and relied upon, and (3) explain how those facts lead to the decision on compliance with the approval standards." *Heiller v. Josephine County*, 23 Or LUBA 551, 556 (1992). LUBA will reverse or remand a local government decision where the findings are inadequate. ORS 197.835(9)(a)(C). We concluded in *Currie I* that the county had to identify and describe surrounding uses so that impacts could be meaningfully evaluated. *Currie I*, 79 Or LUBA at 609.

On remand, the planning commission concluded that the proposed use will not force a significant change in or increase the cost of the only identified farm or forest use, grazing. The planning commission found:

> "All surrounding properties zoned for farm and forest were identified by location and ownership. The only one ongoing farm or forest use on any of these properties was identified as the Strader cattle ranch. The Strader cattle ranch exists to the immediate west of the proposed quarry site and subject property. Applicant explained that the Strader ranch is used for cattle grazing. This statement is not contradicted by any other evidence in the record. Applicant further described using aerial and contour maps, that the grazing use takes place on an expanse of pasturelands, which at their closest point are approximately 500 feet from the subject property's boundary. There is also a high ridge separating the cattle ranch from the quarry site as shown in Exhibit 4R, Appendix 7.
>
> "These natural barriers will prevent any water quality impact, as water will not travel from the quarry up and over the ridge to the cattle ranch. It is also likely, due to the limited impacts of the quarry as described by Acoustical Engineer Noxon and Environmental Health Specialist Baker, and the natural buffer (which is higher in elevation and at least 500 feet from the subject property at its closest point) that there will be no noise or air quality impacts whatsoever. In terms of air quality and noise impacts, we find that the more sensitive residential uses, which are closer to the proposed use and do not have the same high-ridge buffer, are an appropriate proxy for the potential impacts on the cattle grazing use. We agree with [intervenor] and Staff's analysis that the proposed use will be compatible with the cattle ranch in terms of water quality, air quality, and noise. For the same reasons, the proposed use will not force a significant change in or increase in the cost of the cattle grazing farm use.
>
> "[intervenor]'s statement that no other farm or forest uses are ongoing on surrounding properties is also not contradicted by any evidence in the record. The remonstrators' speculation as to uses

> that may occur in the future on unspecified properties is not helpful to our farm and forest impacts analysis in light of the evidence and statements presented by [intervenor]." Record 41-42.

We understand the planning commission to have concluded that the only farm or forest operation in the area is grazing, that the grazing use is characterized by the use of a pasture, and that there will be no change in the pasturing operation because of the character of the quarry use and the terrain. We agree with petitioner that a broad description of the activity as grazing is insufficient for purposes of meeting the farm impacts test. The planning commission must verify that the activity is in fact limited to grazing, without other uses such as breeding.

Intervenor's application materials, referenced by the planning commission, also indicate that the rancher "occasionally cuts timber, but this use is not continuous and where the timber is cut depends on the maturity of the trees and the needs of the owner." Record 314. No explanation is provided of whether the timber cutting is part of the ranching use or, if not, why it is not considered a forest use. More importantly, intervenor's hearing memorandum, incorporated by the planning commission into its decision, included a declaration stating:

> "Other than the Strader ranch, there are no surrounding farm or forest uses on any of these surrounding properties. The remainder of the properties shown in Appendix 2 are being held as timber investments or are government-owned timber lands, but no timber projects are occurring at this time or anticipated in the near future. In other words, the properties are sitting largely in their natural state and are <u>not being used</u> for: any natural resource extraction, timber production, grazing, raising livestock or any other animals, or any other farm or forest use." Record 314 (emphasis in original).

The findings do not explain what constitutes holding property as an investment or the relevance of the fact that certain timberlands are government owned. Because the findings do not establish that logging on the Strader ranch, government ownership of forest lands, or maintaining forest land as a timber investment do not involve protected forest activity, the findings do not establish that the quarry will not force a significant change in forest practices or significantly increase their cost. The findings are inadequate and the record lacks substantial evidence to support the conclusion that the requisite standards are met because the record lacks evidence of the operational details of the farm and forest uses.

The fourth subassignment of error is sustained.

The first assignment of error is sustained, in part.

The county's decision is remanded.

# Certificate of Mailing

I hereby certify that I served the foregoing Final Opinion and Order for LUBA No. 2020-050 on August 12, 2020, by mailing to said parties or their attorney a true copy thereof contained in a sealed envelope with postage prepaid addressed to said parties or their attorney as follows:

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Dated this 12th day of August, 2020.

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