

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

3  
4 TIDEWATER CONTRACTORS, INC.,  
5 *Petitioner,*

6  
7 vs.

8  
9 CURRY COUNTY,  
10 *Respondent,*

JUN28'12 PM12:41 LUBA

11 and

12  
13 OREGON COAST ALLIANCE  
14 and CITY OF GOLD BEACH,  
15 *Intervenors-Respondents.*

16  
17 LUBA No. 2012-014

18  
19 FINAL OPINION  
20 AND ORDER

21  
22 Appeal from Curry County.

23  
24 Bill Kloos, Eugene, filed the petition for review and argued on behalf of petitioner.

25  
26 No appearance by Curry County.

27  
28 Sean Malone, Eugene, filed the response brief and argued on behalf of intervenors-  
29 respondents.

30  
31 RYAN, Board Member; BASSHAM, Board Chair; HOLSTUN, Board Member,  
32 participated in the decision.

33  
34 REMANDED

06/28/2012

35  
36 You are entitled to judicial review of this Order. Judicial review is governed by the  
37 provisions of ORS 197.850.  
38

**NATURE OF THE DECISION**

Petitioner appeals a decision by the county denying an application for a conditional use permit to mine gravel.

**MOTION TO INTERVENE**

Oregon Coast Alliance and the City of Gold Beach move to intervene on the side of respondent in the appeal. There is no opposition to the motion and it is granted.

**REPLY BRIEF**

Petitioner moves for permission to file a reply brief to respond to new matters raised in the response brief. There is no opposition to the motion and the reply brief is allowed.

**FACTS**

The subject property is a 152-acre parcel adjacent to the Rogue River and approximately 3 miles east of Highway 101. A county road, Jerry's Flat Road, divides the 152-acre property roughly in half. The portion of the property to the east of Jerry's Flat Road is zoned industrial and is the site of a former plywood mill, with two log ponds located on it that contain hazardous materials. The City of Gold Beach's water treatment plant intake pipe is located 625 feet north of the subject property's northern boundary and 3,500 feet away from the proposed mine site, on the same side of the Rogue River as the subject property. The Nesika Beach Ophir Water District water intake is located approximately 3,000 feet north of the subject property's northern boundary and over one mile from the proposed mine site, on the opposite side of the Rogue River. The groundwater depth on the property is approximately seven feet. Record 572.

In 2009, the county approved a conditional use permit to mine sand and gravel on an approximately 43-acre portion of the 152-acre property that is zoned Forestry-Grazing (F-G) and located along the southwest corner of the property, with Jerry's Flat Road as the eastern boundary and a secondary channel of the Rogue River as the western boundary. The permit

1 approved mining sand and gravel based on petitioner's operating and reclamation plan that  
2 proposed to mine by side-cutting into the sloping ground, starting at the south end of the site  
3 and moving northward in phases, in a direction away from the secondary channel of the  
4 Rogue River. In *Oregon Shores Conservation Coalition v. Curry County*, 61 Or LUBA 8  
5 (2010) (*Tidewater I*), we affirmed the county's decision.

6 Thereafter, DOGAMI issued an operating permit to mine the site. Petitioner  
7 subsequently mined the site using a method that was not consistent with the DOGAMI permit  
8 and the approved operating and reclamation plan, and without securing a required stormwater  
9 permit from DEQ. Record 636-37. Petitioner then applied to the county for a conditional use  
10 permit to mine sand and gravel on the same site, using a "trenching with backfill" mining  
11 method in which trenches 500 to 1,000 feet long and 50 to 75 feet wide are excavated and  
12 backfilled with overburden. The trench depths are proposed to range from five to fifteen feet.  
13 Record 688.

14 The planning commission approved the application with conditions, and opponents  
15 appealed the decision to the board of county commissioners. The board of commissioners  
16 denied the application, and this appeal followed.

17 **FIRST ASSIGNMENT OF ERROR**

18 Mining is a conditional use in the F-G zone. Curry County Zoning Ordinance  
19 (CCZO) 3.052(24). Pursuant to CCZO 7.010, the county is authorized to impose conditions  
20 in order to protect the best interests of the surrounding property and neighborhood.<sup>1</sup> CCZO

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<sup>1</sup> CCZO 7.010 is entitled "Authorization to Grant or Deny Conditional Uses" and provides:

"Uses designated in this ordinance as conditional uses may be permitted, enlarged or altered in accordance with the requirements of Sections 7.020 through 7.050. In permitting a conditional use the county may impose conditions in addition to the provisions set for uses within each zone in order to protect the best interests of the surrounding property, the neighborhood, or the county as a whole. A change in use, the size of the site area of use, or a structure that is classified as conditional and in existence prior to the effective date of this ordinance shall conform to all provisions of this ordinance pertaining to conditional uses."

1 7.040(1) contains standards governing conditional uses generally, and CCZO 7.040(9)  
2 contains additional standards that apply specifically to “[m]ining, quarrying, or other  
3 extractive activities.<sup>2</sup> In particular, CCZO 7.040(9)(a) provides that “[p]lans and

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<sup>2</sup> CCZO 7.040(9) provides in relevant part:

“In addition to the standards of the zone in which the conditional use is located and the other standards in this ordinance, conditional uses must meet the following standards:

“\* \* \* \* \*

“9. Mining, quarrying, or other extractive activity.

“a) Plans and specifications submitted to the Commission for approval must contain sufficient information to allow the Commission to review and set siting standards related to the following standards:

“(1) Impact of the proposed use on surrounding land uses in terms of Department of Environmental Quality standards for noise, dust, or other environmental factors;

“(2) The impact of the proposed use on water quality, water flow, or fish habitat on affected rivers or streams;

“(3) The impact of the proposed use on overall land stability, vegetation, wildlife habitat and land or soil erosion;

“(4) The adequacy of protection for people residing or working in the area from the proposed mining activity through fencing of the site;

“(5) The rehabilitation of the land upon termination of the mining activity. The proposed rehabilitation must at least meet the requirements of state surface mining or gravel removal permits.

“b) If the proposed extractive activity involves the removal of rock, gravel, or sediment from a river or stream, the proposal shall be reviewed by the Oregon Department of Fish and Wildlife and it may provide a written statement to the county regarding the possible impact on fish habitat associated with the affected river or stream.

“c) The County will define an area around the specific removal site which includes all lands within 250 feet of the site, based on the site map for a state mining or gravel permit. The applicant shall provide findings which identify the existing uses on those lands included within this area. The Commission shall evaluate the applicant's findings with regard to the potentially conflicting uses identified in the area based on the factors below:

“1) If the mining activity can be sited on an alternate site; and

1 specifications submitted to the Commission for approval must contain sufficient information  
2 to allow the Commission to review and set siting standards related to considerations set forth  
3 in that subsection, including impacts on water quality, flow and fish habitat, and impacts on  
4 land or soil erosion. *See* n 2.

5 The board of commissioners denied the application because it concluded that  
6 petitioner had not submitted sufficient information as required by CCZO 7.040(9)(a)(2) and  
7 (3) to allow the board of commissioners to assess the impacts of the proposed mining on  
8 water quality and fish habitat of the Rogue River and on the shape and flow of the river and  
9 its secondary channel. The board of commissioners expressed concern about whether the  
10 proposed trench mining would increase the chance that contaminated groundwater from the  
11 two log ponds on the subject property would reach the Rogue River and could impact the  
12 water intake facilities for the City of Gold Beach, located 3,500 feet away from the proposed  
13 mine site, and the Nesika Beach Ophir Water District, located more than one mile from the  
14 proposed mine site. Finally, the board expressed concern about whether the proposed mining  
15 could change the shape and flow of the Rogue River and the secondary channel adjacent to  
16 the mining site.<sup>3</sup> The board of commissioners found:

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“2) where conflicting uses are identified the economic, social environmental and energy consequences of the conflicting uses shall be determined and methods developed to resolve the conflict.

“d) A rock crusher, washer or sorter shall not be located closer than 500 feet to any residential or commercial use. Surface mining equipment and necessary access roads shall be constructed, maintained, and operated in such a manner as to eliminate, as far as is practicable, noise, vibration, or dust which are injurious or substantially annoying to persons living in the vicinity.

“e) No uses are permitted relating to offshore oil, gas or marine mineral exploration or development.” (Emphasis in original.)

<sup>3</sup> The board of commissioners found:

“The Board is concerned that the proposed mining activity may accelerate release of toxic chemicals into the groundwater and thus, contaminate both the groundwater and the Rogue River. The Board finds the evidence in the record from DEQ that the former mill ponds on the subject property are hydrologically linked to the river and that the ponds contain toxic

1 “The Board acknowledges that [petitioner] did submit evidence in relation to  
2 [these] criteria, but finds that it was not sufficient to meet its burden.  
3 [Petitioner] needs to submit a hydrologic study of the area regarding  
4 groundwater flows and levels. \* \* \*

5 “Without a hydrologic study, the Board does not have sufficient information  
6 to review whether the proposed trench mining will increase the likelihood that  
7 contaminated groundwater from the mill site will reach the river and  
8 accelerate the movement of groundwater and contaminants. The Board cannot  
9 accurately evaluate the potential impact of the proposed trench mining  
10 methods on the water quality of the groundwater, or the water intakes for Gold  
11 Beach and Nesika Beach Ophir Water District. The Board cannot set siting  
12 standards to mitigate the potential impacts without more information.  
13 Therefore, the applicant has not met its burden with respect to these criteria.

14 “ \* \* \* \* \*

15 “In summary, the Board finds that the proposed mining use has the potential  
16 for serious and far reaching consequences on constituents’ health, the  
17 environment and nearby land owners. Given these potential drastic  
18 consequences, [petitioner] has not yet submitted sufficient evidence into the  
19 record to meet the information requirements in CCZO \* \* \* 7.040(9)(a)(2) –  
20 (3). [Petitioner] must obtain and submit more information about the impacts  
21 of the proposed use on water quality, water flow, fish habitat, land stability  
22 and land and soil erosion to allow the Board to review the proposed use and  
23 set siting standards that reduce possible adverse impacts.” Record 9-11.

24 Before turning to petitioner’s assignment of error, we note a potential problem with  
25 the way CCZO 7.040(9)(a) is worded and that potentially problematic wording is reflected in  
26 places in the board of county commissioners’ decision, including the last sentence quoted  
27 above. ORS 215.416(8)(a) requires that the county’s decision on petitioner’s permit  
28 application be based on “standards and criteria,” which must be set out in the county’s land  
29 use regulations.<sup>4</sup> ORS 215.427(3) further constrains county review of permit applications

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contamination from the former mill to be conclusive. [Petitioner] concedes that the  
groundwater flows towards the river and that the mill ponds are contaminated \* \* \*.” Record  
8-9.

<sup>4</sup> ORS 215.416(8)(a) provides:

“Approval or denial of a permit application shall be based on standards and criteria which  
shall be set forth in the zoning ordinance or other appropriate ordinance or regulation of the  
county and which shall relate approval or denial of a permit application to the zoning

1 and generally requires that the county apply only the “standards and criteria” that were in  
2 effect when the permit application was first submitted.<sup>5</sup> CCZO 7.040(9)(a) authorizes the  
3 planning commission use the information that is required by CCZO 7.040(9)(a) to “set siting  
4 standards related to the” considerations set out in CCZO 7.040(9)(a)(1) through (5). If the  
5 “siting standards” that CCZO 7.040(9)(a) seems to authorize the planning commission to  
6 develop and impose *after* a complete application is submitted constitute “standards and  
7 criteria,” within the meaning of ORS 215.416(8)(a) and 215.427(3), CCZO 7.040(9)(a)  
8 almost certainly would run afoul of both the ORS 215.416(8)(a) requirement that “standards  
9 and criteria” be set out in the county’s land use regulations and the ORS 215.427(3)  
10 requirement that a complete application be judged by standards and criteria that were in effect  
11 when the complete application was submitted. But it is reasonably clear from the county’s  
12 decision and the parties’ arguments that the county did not interpret CCZO 7.040(9)(a) to  
13 authorize the county to adopt “standards and criteria” based on the information required by  
14 CCZO 7.040(9)(a). Rather, we understand the county to have interpreted CCZO 7.040(9)(a)  
15 to require that an applicant submit sufficient information to allow the planning commission to  
16 determine whether conditions of approval are needed to mitigate impacts, based on the  
17 considerations set out at CCZO 7.040(9)(a)(1) through (5) and to impose such conditions of  
18 approval if they are needed. While the practical effect of “standards and criteria” that must  
19 be set out in advance and *conditions of approval*, which are commonly developed during the  
20 permit review process, can be similar, they are not the same thing. So long as CCZO

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ordinance and comprehensive plan for the area in which the proposed use of land would occur  
and to the zoning ordinance and comprehensive plan for the county as a whole.”

<sup>5</sup> ORS 215.427(3)(a) provides, in part:

“If the application was complete when first submitted or the applicant submits additional  
information, as described in subsection (2) of this section, within 180 days of the date the  
application was first submitted and the county has a comprehensive plan and land use  
regulations acknowledged under ORS 197.251, approval or denial of the application shall be  
based upon the standards and criteria that were applicable at the time the application was first  
submitted.”

1 7.040(9)(a) is interpreted to authorize the county to develop and impose conditions of  
2 approval to mitigate the impacts of the proposal, rather to authorize the county to develop and  
3 impose “standards and criteria” based on information that is submitted in a permit  
4 application, CCZO 7.040(9)(a) does not run afoul of ORS 215.416(8)(a) and 215.427(3).

5 Turning to petitioner’s first assignment of error, petitioner argues that the county  
6 erred in denying the application on the basis that petitioner failed to provide sufficient  
7 information under CCZO 7.040(9)(a) because CCZO 7.040(9)(a) does not set out “standards  
8 and criteria \* \* \* which relate approval or denial of a permit application to the zoning  
9 ordinance and comprehensive plan,” within the meaning of ORS 215.416(8)(a) and  
10 215.427(3)(a). *See* n 4. Petitioner points out that the CCZO and the Curry County  
11 Comprehensive Plan (CCCP) set out a number of approval “standards and criteria” that  
12 petitioner concedes the county could rely on to deny the application if the county determines  
13 that there is not sufficient evidence that a proposal meets those standards. Petition for  
14 Review 7, n 2. But, petitioner argues, the “sufficient information” requirement of CCZO  
15 7.040(9)(a) is *purely* an information requirement and is unconnected to any of the CCZO or  
16 CCCP approval “standards and criteria.” According to petitioner, the county may not deny  
17 its application on the basis that inadequate information was submitted under CCZO  
18 7.040(9)(a).

19 Intervenor’s respond that CCZO 7.040(9)(a) is not purely an information requirement.  
20 Intervenor’s contend that CCZO 7.040(9)(a) requires an applicant to provide enough  
21 information about the potential impacts of the mining proposal to allow the county, if it  
22 chooses, to identify mitigation measures that must be implemented to mitigate adverse  
23 impacts on water quality, fish habitat and the other concerns implicated by CCZO  
24 7.040(9)(a). According to intervenor’s, the board of commissioner’s decision implicitly  
25 interprets CCZO 7.040(9)(a) to allow the county to determine if mitigating conditions or



1 measures are necessary and to craft mitigating conditions or measures. We agree with  
2 intervenors.

3 We reject petitioner's attempt to characterize CCZO 7.040(9)(a) as something other  
4 than "standards and criteria," which can be applied to approve or deny an application for  
5 permit approval. CCZO 7.040(9)(a) has two relevant and related requirements. First, it  
6 requires an applicant to submit sufficient information to allow the county to determine  
7 whether mitigation conditions of approval are needed to address the impacts set out at CCZO  
8 7.040(9)(a)(1) through (5). Second, it requires that the county determine if conditions of  
9 approval are needed and develop and impose those conditions if they are needed. Under the  
10 Court of Appeals reasoning in *Davenport v. City of Tigard*, 121 Or App 135, 141, 854 P2d  
11 483 (1993), the statutory term "standards and criteria" is sufficiently malleable to encompass  
12 a two-step requirement like CCZO 7.040(9)(a). To the extent petitioner suggests the  
13 information it submitted to comply with CCZO 7.040(9)(a) is necessarily sufficient because  
14 the application was deemed complete, we reject the suggestion. See *Caster v. City of*  
15 *Silverton*, 54 Or LUBA 441, 451 (2007) (a local government's acceptance of a permit  
16 application as complete does not necessarily mean the permit applicant has carried his or her  
17 evidentiary burden with regard to all approval standards and criteria).

18 The first assignment of error is denied.

19 **SECOND ASSIGNMENT OF ERROR**

20 CCZO 2.140(5)(a) provides:

21 "The burden of proof is upon the proponent. The more drastic the change or  
22 the greater the impact of the proposal in an area, the greater is the burden on  
23 the proponent."

24 In its findings, the county board of commissioners cited CCZO 2.140(5)(a) as part of its  
25 conclusion that petitioner had failed to provide "sufficient information" as required under  
26 CCZO 7.040(9)(a).

1 In its second assignment of error, petitioner argues that CCZO 2.140(5)(a) is an  
2 approval standard and, as such, it violates ORS 215.416(8)(a), because an applicant will not  
3 know at the time an application is submitted what the burden of proof will be to meet the  
4 approval standards. According to petitioner, the greater burden of proof was not known or  
5 applied to petitioner until the board of commissioners commenced reviewing the application  
6 and the evidence in support of the application, and determined that the applicant proposed a  
7 sufficiently “drastic” change to warrant a greater burden of proof than would otherwise apply.

8 In support of its argument, petitioner cites *Davenport* and *State ex rel West Main*  
9 *Townhomes v. City of Medford*, 233 Or App 41, 225 P3d 56 (2009), *modified and adhered to*  
10 *on reconsideration* 234 Or App 343, 228 P3d 607 (2010). In *West Main Townhomes*, the  
11 Court of Appeals reversed a city determination that an applicant had failed to satisfy a  
12 standard that required an application to be consistent with a city plan that did not exist at the  
13 time the application was submitted, and concluded that the standard did not satisfy ORS  
14 227.173(1), the city analogue to ORS 215.416(8)(a). Petitioner argues that CCZO  
15 2.140(5)(a) is the same type of “standard” that the Court in *West Main Townhomes* found  
16 failed to satisfy ORS 227.173(1) because it requires an applicant to satisfy a burden of proof  
17 that is not established when the application is first submitted.

18 Petitioner is certainly correct that CCZO 2.140(5)(a) makes it somewhat uncertain  
19 precisely what petitioner’s ultimate burden of proof will be, until the county decision maker  
20 expresses its view concerning how drastic it believes the proposed change is and how great  
21 an impact the proposal will have. However, we disagree with petitioner that CCZO  
22 2.140(5)(a) is an approval standard that is subject to the requirement of ORS 215.416(8)(a).  
23 Rather, CCZO 2.140(5)(a) merely codifies the somewhat unremarkable proposition that  
24 where a proposal will have significant impacts on an area, the proponent of the proposal may  
25 be required to submit more detailed and reliable evidence held that the proposal will comply  
26 with applicable approval criteria than would otherwise be required in order for the county to

1 approve an application with few impacts. The concept of an increasing burden of proof  
2 where the degree of proposed change increases is not something that Curry County invented.  
3 CCZO 2.140(5)(a) is consistent with and likely was patterned after the following language in  
4 *Fasano v. Washington Co. Comm.*, 264 Or 574, 586, 507 P2d 23 (1973) regarding the burden  
5 of proof in a quasi-judicial application for rezoning:

6 “Because the action of the commission in this instance is an exercise of  
7 judicial authority, the burden of proof should be placed, as is usual in judicial  
8 proceedings, upon the one seeking change. The more drastic the change, the  
9 greater will be the burden of showing that it is in conformance with the  
10 comprehensive plan \* \* \*. As the degree of change increases, the burden of  
11 showing that the potential impact upon the area in question was carefully  
12 considered and weighed will also increase. \* \* \*.”

13 The county’s reference to CCZO 2.140(5)(a) as part of its conclusion that petitioner  
14 failed to provide “sufficient information” as required under CCZO 7.040(9) was not error and  
15 provides no basis for reversal or remand.

16 The second assignment of error is denied.

17 **THIRD ASSIGNMENT OF ERROR**

18 In its third assignment of error, petitioner argues that the county’s findings are  
19 inadequate to explain the county’s decision. The board of commissioners denied the  
20 application because it determined that there was not sufficient information for it to condition  
21 approval of the proposal based on impacts to the features enumerated in CCZO 7.040(9)(a).  
22 In the case of a denial, the grounds for denial must be sufficiently explained to inform the  
23 applicant what steps are necessary to gain approval or that it is unlikely that the application  
24 will be approved. *Commonwealth Properties v. Washington County*, 35 Or App 387, 400,  
25 582 P2d 1384 (1978); *Bridge Street Partners v. City of Lafayette*, 56 Or LUBA 387, 394  
26 (2008) (the findings must provide a coherent explanation for why the city believes the  
27 proposal does not comply with the criteria).

1 In its first subassignment of error, petitioner complains that the county inadequately  
2 identified the information that the county believes is needed under CCZO 7.040(9)(a).  
3 However, as petitioner recognizes, the county did identify specific insufficiencies:

4 “• ‘a hydrologic study determining the groundwater level or flows for the  
5 subject property’

6 “• ‘specific information studying whether or not the river does or does not  
7 flow upstream during the summer months’

8 “• ‘information about the intake of the Nesika Beach Ophir Water  
9 District’

10 “• ‘evidence about how the gravel extraction will affect the shape and  
11 flow of the Rogue River and the secondary channel’

12 “• ‘information about gravel accumulation rates or the impact the mining  
13 might have on the rivers morphology.’” Petition for Review 13-14.

14 Nevertheless, petitioner argues “[a]t this point, the cumulative message of the findings  
15 provides Petitioner with little confidence that the Board [of Commissioners] would ever be  
16 satisfied that it had enough information to review the impacts and set siting standards.”  
17 Petition for Review 14.

18 If the county were to repeatedly enlarge the list of information that it believes is  
19 required under CCZO 7.040(9)(a) the county would obviously run afoul of its obligations  
20 under *Commonwealth Properties*. However, we have no reason at this time to suspect that if  
21 petitioner supplied the information that the county identified as missing above the county  
22 would still conclude that the supplied information is insufficient for purposes of CCZO  
23 7.040(9)(a). Presumably if petitioner submitted that information, the county would be able to  
24 determine if conditions of approval are warranted and develop and impose any such  
25 conditions. The first subassignment of error is denied.

26 In its second subassignment of error under the third assignment of error, petitioner  
27 argues that the county’s findings in support of denial are inadequate where the basis for  
28 denying the application was petitioner’s failure to provide “sufficient information” regarding

1 the impacts to the features listed in CCZO 7.040(9)(a)(2) and (3), and the findings fail to  
2 address the information submitted by petitioner regarding impacts to those features. The  
3 board of commissioners found that “[petitioner] did submit evidence in relation to [these]  
4 criteria, but finds it was not sufficient to meet its burden.” Record 9.

5 With respect to water quality, the board of commissioners expressed concern that  
6 because the contaminated log ponds are hydrologically linked to the Rogue River, any  
7 impacts to the groundwater table from the mining activity that is occurring to the south of the  
8 log ponds could cause contaminants to enter the groundwater and then migrate to the river.  
9 Petitioner points to the evidence that petitioner submitted with respect to water quality  
10 impacts that includes (1) expert reports and testimony from DOGAMI that with a  
11 requirement to install a groundwater monitoring well and the projected mine maximum depth  
12 of fifteen feet, impacts to groundwater were not expected (Record 328, 346, 222); and (2) a  
13 water quality report indicating that no toxins are currently migrating from the mill site to a  
14 drainage creek that flows from the mill site and crosses the southeastern corner of the  
15 property (Record 517).

16 With respect to water flow, land stability and soil erosion, the board of commissioners  
17 relied on testimony from a Watershed Management Extension Agent with the Oregon State  
18 University extension service that opines that allowing the mining could lower the elevation of  
19 the gravel bed and encourage the river to flow into the secondary channel of the river that is  
20 adjacent to the mining site, which could lead to further erosion and sediment build up in the  
21 Rogue River. Record 33-34. Petitioner first argues that the extension agent’s qualifications  
22 to opine about potential erosion and water flow issues are not established in the record.  
23 Petitioner next points to the evidence that petitioner submitted with respect to impacts to  
24 water flow, the river’s morphology, and erosion control, that includes (1) a 2008 engineering  
25 report and an updated 2011 engineering report that conclude that the proposed operating and  
26 reclamation plan avoids ponding of flood water, fish entrapment, concentration of flood

1 waters and velocity increases and increased flood elevation (Record 672-73, 688-690); (2)  
2 petitioner's application for a NPDES permit that sets out petitioner's erosion control plan,  
3 including grading, mulching and re-seeding (Record 305-311); and (3) a written statement  
4 from an ODFW fish biologist that petitioner's seeding practices are working as planned to  
5 control erosion (Record 658).

6 The board of commissioners' decision does not explain why the evidence petitioner  
7 submitted regarding impacts to water quality, water flow, land stability and erosion does not  
8 amount to "sufficient information" under CCZO 7.040(9)(a)(3) to allow the county to impose  
9 conditions of approval on the proposed mine. We agree with petitioner that where the county  
10 denied the application based on its conclusion that petitioner did not provide "sufficient  
11 information," the county's findings are inadequate to explain why the information that  
12 petitioner submitted was not "sufficient." The evidence cited by petitioner seems to directly  
13 address the concerns expressed by the board of county commissioners. In that circumstance,  
14 the county is obligated to explain in its decision why the information that was submitted is  
15 not "sufficient." *Montgomery v. City of Dunes City*, 60 Or LUBA 274, 289, *aff'd in part*,  
16 *rev'd in part* 236 Or App 194, 236 P3d 750 (2010).

17 The third assignment of error is sustained, in part.

18 The county's decision is remanded.

## Certificate of Mailing

I hereby certify that I served the foregoing Final Opinion and Order for LUBA No. 2012-014 on June 28, 2012, 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 28th day of June, 2012.

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