

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

3
4 COLUMBIA RIVERKEEPER,
5 1000 FRIENDS OF OREGON,
6 and MIKE SEELY,
7 *Petitioners,*

8
9 vs.

10
11 COLUMBIA COUNTY,
12 *Respondent,*

13
14 and

15
16 NEXT RENEWABLE FUELS OREGON, LLC,
17 *Intervenor-Respondent.*

18
19 LUBA Nos. 2024-045/046

20
21 FINAL OPINION
22 AND ORDER

23
24 Appeal from Columbia County.

25
26 Eric Wriston filed the petition for review and reply brief and argued on
27 behalf of petitioners. Also on the brief was Maura Fahey and Crag Law Center.

28
29 Spencer Q. Parsons filed a joint response brief on behalf of respondent.
30 Also on the brief was Garrett H. Stephenson, Keenan Ordon-Bakalian, and
31 Schwabe, Williamson & Wyatt, P.C.

32
33 Garrett H. Stephenson filed a joint response brief and argued on behalf of
34 intervenor-respondent. Also on the brief was Spencer Q. Parsons, Keenan Ordon-
35 Bakalian, and Schwabe, Williamson & Wyatt, P.C.

36
37 ZAMUDIO, Board Chair; RUDD, Board Member, participated in the
38 decision.

1 RYAN, Board Member, did not participate in the decision.

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AFFIRMED

11/26/2024

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

NATURE OF THE DECISION

Petitioners appeal a board of county commissioners decision approving a conditional use permit for a rail facility in an agricultural zone and a modified site design review for a renewable diesel production facility in a rural industrial zone at the Port Westward Industrial Park.

MOTIONS TO INTERVENE

NEXT Renewable Fuels Oregon, LLC (intervenor) moves to intervene on the side of the county in both consolidated appeals. No party opposes these motions and they are allowed.

BACKGROUND

In 2022, the county approved site design review for intervenor’s renewable diesel production facility at the Port Westward Industrial Park (the diesel facility) on land zoned Rural Industrial Planned Development (RIPD). Also, in 2022, the county approved a conditional use permit (CUP) for a rail facility to connect the diesel facility to the Portland & Western Railroad (P&W) line (2022 CUP). Intervenor proposed to develop one section of the rail facility within the RIPD zone and one section of rail line on land within the Primary Agriculture (PA-80) zone. Petitioners appealed the 2022 CUP in *1000 Friends of Oregon v. Columbia County*, LUBA No 2022-039 (Oct 27, 2022) (*Next I*). For the reasons we describe below, we reversed the county’s decision in *Next I*. In these appeals, petitioners

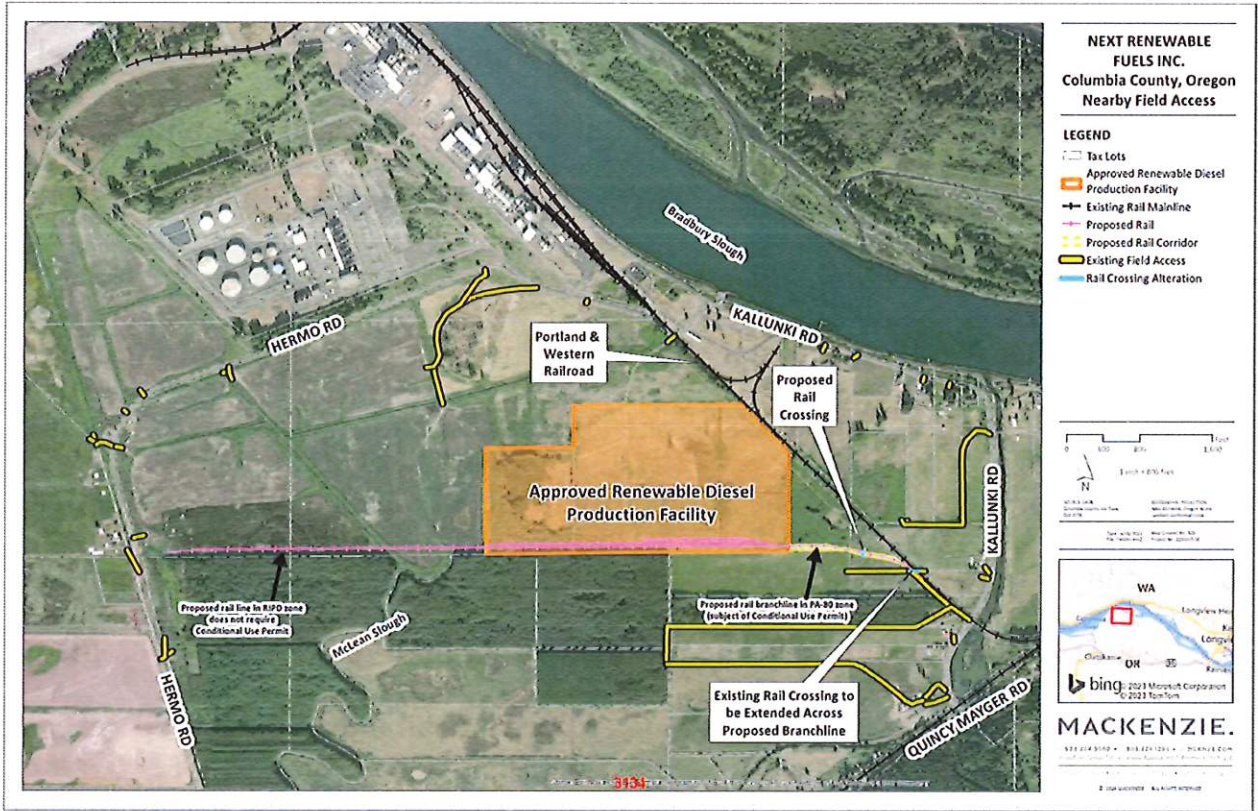
1 challenge aspects of the county’s 2024 approval of the rail facility in both the
2 PA-80 and RIPD zones.

3 Statewide Planning Goal 3 (Agricultural Lands) is “[t]o preserve and
4 maintain agricultural lands.” State law restricts the uses that are allowed on
5 agricultural land to farm uses and specified nonfarm uses. ORS 215.203(1),
6 (2)(a). ORS 215.283 sets out nonfarm uses that may be established on agricultural
7 land. ORS 215.283(3) provides that a local government may approve
8 transportation facilities and improvements on land in agricultural zones, subject
9 to either adoption of an exception to Goal 3 or application of the farm impacts
10 test at ORS 215.296 for those uses identified by the Land Conservation and
11 Development Commission (LCDC) at OAR 660-012-0065.

12 In the 2022 CUP, the county concluded that the proposed rail facility was
13 a “branchline,” which is a transportation facility that the county may allow on
14 agricultural land under OAR 660-012-0065(3)(j). The term “branchline” is
15 undefined for purposes of OAR 660-012-0065(3)(j). In *Next I*, we reversed the
16 county’s approval because we concluded that the county had misconstrued the
17 term “branchline.” We concluded that the plain meaning of “branchline” is “a
18 section of the track and roadbed of a railway that is distinct, elongated, narrow,
19 and rather uniform in width that is used for trains to travel a certain route.” *Next I*
20 (slip op at 13). We agreed with petitioners that the proposed rail facility was not
21 a “branchline” because it “include[d] multiple parallel tracks and include[d]
22 siding tracks for train car storage and maintenance.” *Id.* at 23. In reversing the

1 2022 CUP, we observed that “[i]ntervenor may be able to obtain approval if it
2 alters the design and function of the rail facility or seeks an exception to Goal 3.
3 Either approach would require more than insignificant changes to the application,
4 if not a new application.” *Id.* at 24.

5 After *Next I*, intervenor submitted a new CUP application for the portion
6 of the rail facility in the PA-80 zone and an application for a modified site plan
7 review for the portion of the rail facility in the RIPD zone. The reconfigured rail
8 facility “will provide rail car transportation and storage capacity for 18,000 linear
9 feet of track.” Record 100. The rail line within the PA-80 zone is a single track
10 that is approximately 1,250 feet long. Where the rail line in the PA-80 zone ends,
11 the line splits into six parallel tracks. Intervenor modified the design of the rail
12 facility by shifting a large portion of the rail facility, including side-stacked
13 parallel track sections, into the RIPD zone, as depicted below. In addition to
14 moving tracks that were previously in the PA-80 zone into the RIPD zone, the
15 application relocates infrastructure into the RIPD zone, including stormwater
16 drainage detention ponds and a vegetated buffer. Record 284-85, 1670-72.



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2 Record 3134.

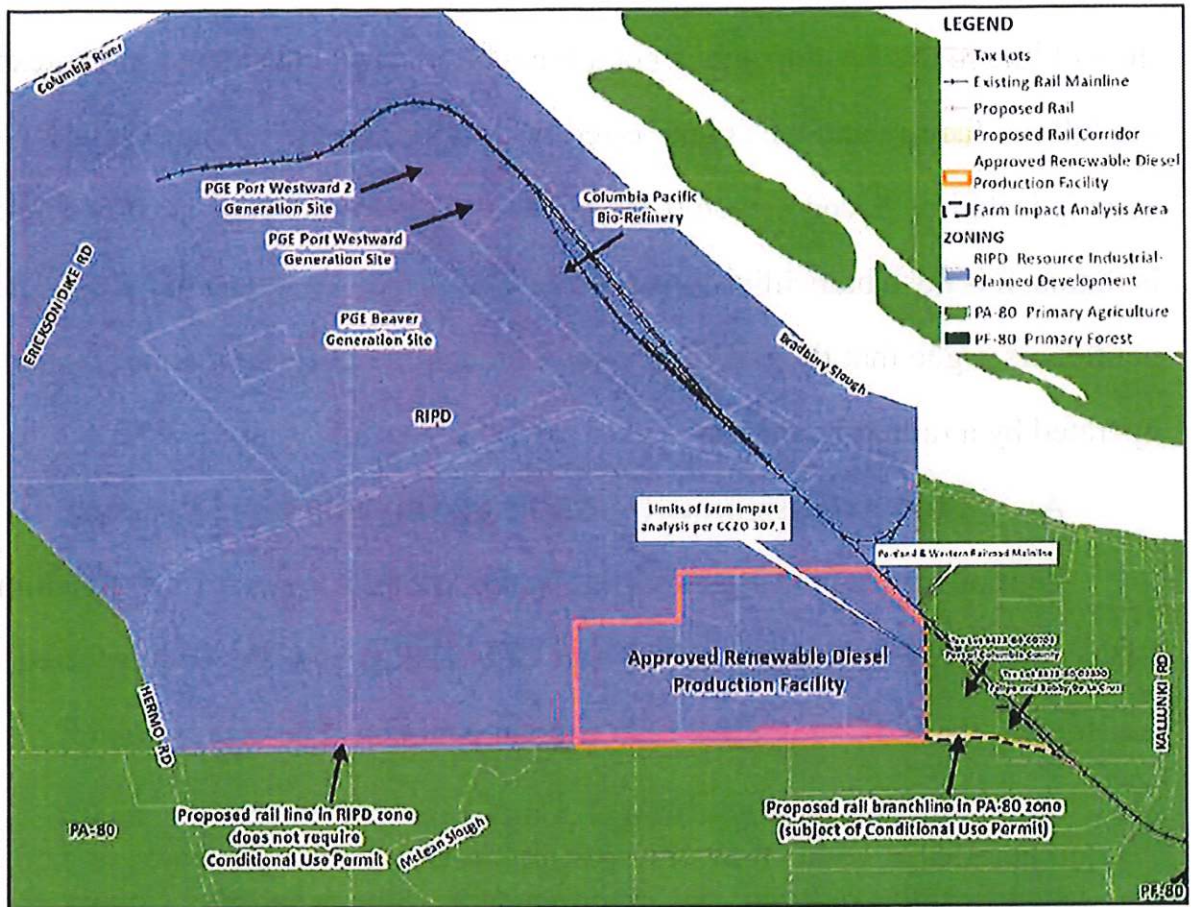


Figure 2: Area Zoning and Limits of Farm Impacts Analysis

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2 Record 101.

3 The board of commissioners reviewed the applications and, after a public
 4 hearing, approved the applications. The approval authorizes up to 318 rail cars to
 5 serve the facility per week, in trains of up to 100 cars in length. Rail cars may be
 6 stored in the RIPD zone rail facility for up to 14 days. Record 48-49. These
 7 appeals followed.

8 **FIRST ASSIGNMENT OF ERROR**

9 Petitioners argue that the county again misconstrued the term “branchline”
 10 for three reasons under three subassignments of error. First, petitioners argue that

1 the rail line in the PA-80 zone is not a branchline when considered in context of
2 the full rail facility and the county erred by considering the rail line in the PA-80
3 zone in isolation. Second, even if the rail line in the PA-80 zone is considered in
4 isolation, it is not a branchline under the definition that we set out in *Next I*. Third,
5 petitioners argue that the rail line is not a branchline because it is not owned or
6 operated by a railroad company.

7 **A. First Subassignment – Whole Facility and Zone Crossing**

8 Petitioners argue that the rail line in the PA-80 zone is not a “branchline”
9 when considered in context of the full rail facility and the county erred by
10 considering the rail line in the PA-80 zone in isolation. The county found:

11 “[A] reduction in length from 1.5 miles to 1250 linear feet, and a
12 reduction in width from five parallel tracks to a single track, is a
13 significantly reduced rail improvement from what the County
14 approved in 2022. Unlike the prior design, the Branchline in this
15 Application plainly has no switching function, no storage function,
16 and no loading function. It is solely intended to convey a single train
17 at a time between [P&W’s] existing rail services at Port Westward
18 to the [diesel facility]. All train switching, unloading/loading,
19 parking, storage, assembly and disassembly is proposed to occur
20 within the RIPD zone. In that zone, rail services are allowed as
21 accessory to permitted or approved uses and are not subject to the
22 restrictions of Goal 3, [Statewide Planning] Goal 14
23 [(Urbanization)], or required to meet the requirements of OAR 660-
24 012-0065.

25 “* * * * *

26 “[T]he Board concludes that the Application satisfies LUBA’s
27 ‘plain meaning’ construction of the term ‘branchline’ as ‘a section
28 of the track and roadbed of a railway that is distinct, elongated,

1 narrow, and rather uniform in width that is used for trains to travel
2 a certain route.’ There is no question that the proposed 1250 sq. ft.
3 track is distinct. It is also elongated and narrow, because the width
4 of its gravel base, at 24 feet, is only 1.92 percent of its length. The
5 Board also finds that it is uniform in width. * * *

6 “[T]o the extent that LUBA adopted [the Oregon Department of
7 Transportation’s] definition of ‘branchline,’ the Board concludes
8 that the Application is for ‘a section of track running between a main
9 line and another destination.’ Based on the evidence in the record,
10 there is no question that the Application is for a section of track and
11 that track is located between the [P&W’s] mainline and another
12 destination (in this instance, the [diesel facility]).” Record 60-61.

13 The county further found that “[t]he evidence in the record is unambiguous [that]
14 the portion of the tracks that remain on the PA-80 zoned parcels are not designed
15 to receive, store, sort, and unload trains.” Record 61 (footnote omitted).

16 Petitioners emphasize that, in *Next I*, we concluded that the proposed rail
17 facility was not a branchline because it included multiple parallel tracks and
18 siding tracks for train car storage and maintenance. Petition for Review 12; *Next*
19 *I* (slip op at 23). Petitioners argue that intervenor cannot avoid that same result
20 by merely shifting the parallel tracks and loading, storage, and maintenance
21 activities into the RIPD zone. Petitioners argue that the county was required to
22 consider the entire facility and not the one portion of track that remains on
23 agricultural land.

24 Respondent and intervenor (together, respondents) respond, and we agree,
25 that nothing in the term “branchline” requires that the county consider the
26 proposed facility in the RIPD zone as part of the proposed facility in the PA-80

1 zone. Any branchline will ultimately connect with another type of rail facility and
2 thus be “functionally interdependent.” Petition for Review 13. So long as the
3 section of rail in the agricultural zone classifies as a branchline, then it may be
4 permitted under OAR 660-012-065(3)(j). Intervenor now proposes a single track
5 that will be used to convey a single train from P&W’s rail to the rail and diesel
6 facility in the RIPD zone. We agree with the county that the proposed
7 configuration satisfies our prior construction of “branchline” in *Next I*.

8 Petitioners argue that intervenor will need to store train cars on the rail in
9 the PA-80 zone due to the anticipated lengths of trains. Petitioners argue that
10 “[t]rains coming into the facility will be as long as 7,000 feet” and “[i]t does not
11 appear that any single line of track within the RIPD zone can accommodate that
12 length.” Petition for Review 13-14 (citing Record 1514, footnote omitted).

13 Petitioners explain that

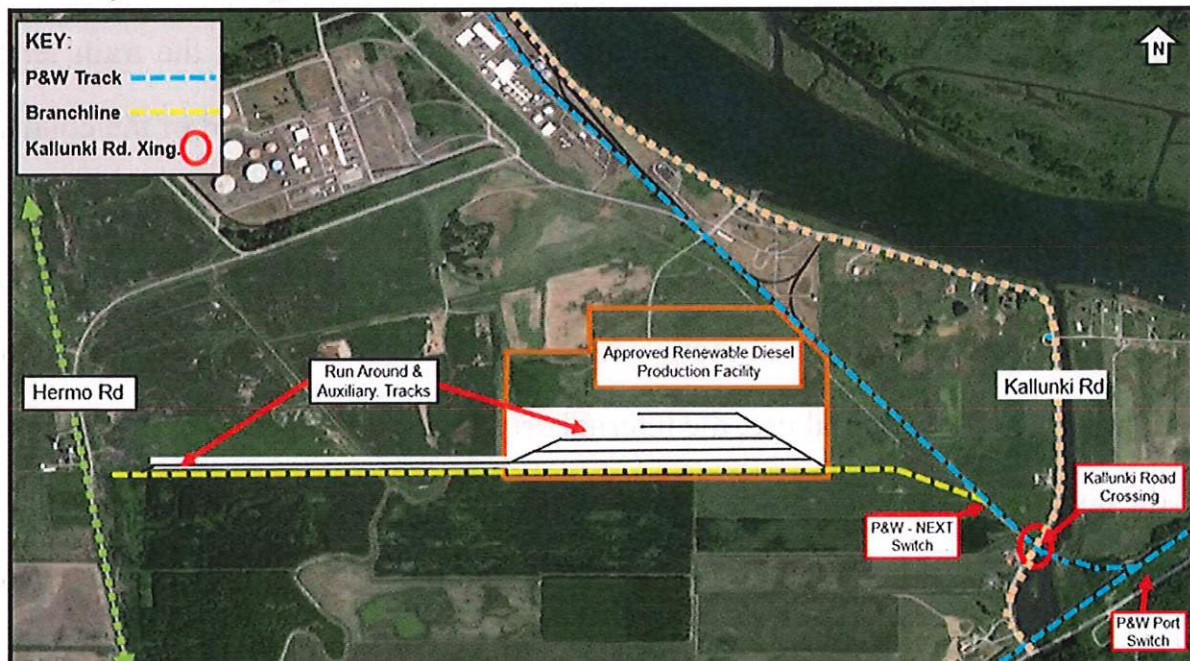
14 “[t]he total length of the lines in the RIPD zone is not identified in
15 the application. However, comparing the new design to the previous
16 facility, whose longest line was 7,500 feet long over the whole
17 facility in both the RIPD and PA-80 zones, it is apparent that there
18 is no single line of track in the RIPD zone that can accommodate a
19 7,000-foot train.” Petition for Review 14 n 4 (citing Record 126-27,
20 1670-71).

21 Respondents respond that “[a]ll train switching, unloading/loading,
22 parking, storage, assembly, and disassembly—originally proposed in *Next I* to
23 also be located in the PA-80 zone—would be entirely within the RIPD zone.”
24 Joint Response Brief 8 (citing Record 60, 95-126, 3211). Intervenor submitted a

1 memorandum prepared by Crosstown Consulting Associates, LLC, which
2 evaluated railroad operations and offered recommendations to minimize the
3 potential impact on farming practices within the impact area (Crosstown Memo).
4 Record 1510-16. The Crosstown Memo explained:

5 “There are three double-ended auxiliary tracks, including an
6 extended length run-around track and two spur tracks planned for
7 installation north of the branchline within the [diesel] facility to
8 accommodate the loading and unloading processes as well as the in-
9 plant switching and short-term storage of railcars associated with
10 plant operations.

11 “Once inbound trains are delivered by the P&W Railroad,
12 [intervenor’s] employees or contractors will perform the necessary
13 switching and car placement within the facility using * * * a
14 specialized utility vehicle equipped with a coupler and train airbrake
15 system designed to move railcars.” Record 1513.



16 Figure 2: Area of NEXT Facility and branchline with labels added (Track placements are approximate.)

17 Record 1513.

1 The county found:

2 “Unlike the prior design, the Branchline in this Application plainly
3 has no switching function, no storage function, and no loading
4 function. It is solely intended to convey a single train at a time
5 between [P&W’s] existing rail services at Port Westward to the
6 [diesel facility]. All train switching, unloading/loading, parking,
7 storage, assembly and disassembly is proposed to occur within the
8 RIPD zone. In that zone, rail services are allowed as accessory to
9 permitted or approved uses and are not subject to the restrictions of
10 Goal 3, Goal 14, or required to meet the requirements of OAR 660-
11 012-0065.” Record 60.

12 As we understand it, the proposed and approved use requires trains to
13 traverse the rail section in the PA-80 zone. Trains will be disassembled and
14 sidestacked, that is separated into sections of rail cars and stored on the parallel
15 tracks, within the RIPD zone. We agree that the county has not approved train
16 storage in the PA-80 zone. Thus, petitioners’ argument about the train length
17 compared to estimated track length provides no basis for remand of the county’s
18 decision.

19 Petitioners argue that we should extend the so-called “zone-crossing
20 doctrine” to this appeal. In sum, where a property is to be developed with a
21 commercial or industrial use, the internal driveway on that property that connects
22 the commercial or industrial buildings to the nearest public right of way is viewed
23 as part of the commercial or industrial use. *In-N-Out Burger v. Washington*
24 *County*, LUBA No 2022-083 (Oct 27, 2023) (slip op at 6-13); *Wilson v.*
25 *Washington County*, 63 Or LUBA 314, 316-19 (2011); *Roth v. Jackson County*,

1 38 Or LUBA 894, 905 (2000); *Bowman Park v. City of Albany*, 11 Or LUBA
2 197, 203 (1984).

3 “In *Wilson*, we held that an access road/driveway to a winery is an
4 accessory use to the winery and upheld the county’s denial of a
5 permit for the winery on an EFU-zoned parcel where the zoning of
6 the access road did not allow wineries. In *Roth*, we held that an
7 access road/driveway to a winery is an accessory use to the winery
8 and that the county erred in approving the winery where the
9 residential zoning of the access road/driveway did not allow
10 wineries. In *Bowman Park*, we held that an access road/driveway to
11 an industrial use was an accessory use to the industrial use, and that
12 the city erred in approving the industrial use where the residential
13 zoning of the access road/driveway did not permit industrial uses.”
14 *Del Rio Vineyards, LLC v. Jackson County*, 73 Or LUBA 301, 309
15 (2016).

16 Petitioners argue that the county may not approve a branchline on
17 agricultural land to connect to a rail facility that cannot be permitted in the PA-
18 80 zone. Petitioners acknowledge, and respondents emphasize, that we rejected
19 a similar argument in *Next I*, where we reasoned that

20 “OAR 660-012-0065(3) allows a variety of transportation
21 improvements within an agricultural zone that may be related to or
22 serve uses that are not allowed or conditionally allowed by ORS
23 215.283. For example, OAR 660-012-0065(3)(m) allows
24 replacement of docks and OAR 660-012-0065(3)(n) allows
25 expansions or alterations of public use airports. Ports and public use
26 airports are not uses that are allowed or conditionally allowed by
27 ORS 215.283.

28 “In enacting ORS 215.283(3)(b), the legislature empowered LCDC
29 to allow certain transportation improvements on agricultural land
30 subject to the farm impacts test at ORS 215.296. *See Stop the Dump*
31 *Coalition v. Yamhill County*, 364 Or 432, 435 P3d 698 (2019)

1 (explaining ORS 215.296). As the Court of Appeals has explained,
2 the uses allowed under OAR 660-012-0065(3) ‘necessarily
3 represent LCDC’s balancing of [Statewide Planning Goal 12
4 [(Transportation)] transportation needs against goals 3, 4, 11, and
5 14.’ *Schaefer v. Oregon Aviation Board*, 312 Or App 316, 341, 495
6 P3d 1267, *adh’d to as modified on recons*, 313 Or App 725, 492 P3d
7 782, *rev den*, 369 Or 69 (2021).” (Slip op at 15-16.)

8 For that same reason, the zone-crossing doctrine does not apply or aid
9 petitioners in this appeal.

10 The first subassignment of error is denied.

11 **B. Second Subassignment – Design and Function**

12 Petitioners argue that, even if the portion of the rail line in the PA-80 zone
13 is considered separately from the rail facility in the RIPD zone, the design and
14 function of the rail in the PA-80 zone disqualify it as a branchline. In particular,
15 petitioners argue that the 1,250-foot length of the track in the PA-80 zone is not
16 distinct, elongated, narrow, nor designed for trains to travel a certain route.
17 Petitioners argue that 7,000-foot trains will utilize the track and, because the total
18 train length is longer than the 1,250-foot track section, that section of track is not
19 elongated or designed for trains to travel a certain route. Petitioners also argue
20 that “the track is surrounded by a gravel laydown area that appears to be around
21 60-feet wide,” by which we understand petitioners to argue that that portion of
22 track is not “narrow.” Petition for Review 17. Finally, petitioners argue that the
23 track is not a branchline because it does not stem from a railroad mainline and
24 instead stems from another branchline.

1 Respondents initially respond that the “design and function” issue is
2 waived. ORS 197.835(3) provides that LUBA “may only review issues raised by
3 any participant before the local hearings body as provided by ORS 197.195,
4 197.622 or 197.797, whichever is applicable.” ORS 197.797(1), in turn, provides:

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

12 The “raise it or waive it” principle does not limit the parties on appeal to the exact
13 same arguments made below, but it does require that the issue be raised below
14 with sufficient specificity to prevent “unfair surprise” on appeal. *Boldt v.*
15 *Clackamas County*, 21 Or LUBA 40, 46, *aff’d*, 107 Or App 619, 813 P2d 1078
16 (1991); *Friends of Yamhill County v. Yamhill County*, LUBA No 2021-074 (Apr
17 8, 2022), *aff’d*, 321 Or App 505 (2022) (nonprecedential memorandum opinion),
18 *rev den*, 370 Or 740 (2023) (slip op at 5-6). A particular issue must be identified
19 in a manner detailed enough to give the local government and the parties fair
20 notice and an adequate opportunity to respond. *Boldt*, 21 Or LUBA at 46. When
21 attempting to differentiate between “issues” and “arguments,” there is no “easy
22 or universally applicable formula.” *Reagan v. City of Oregon City*, 39 Or LUBA
23 672, 690 (2001).

1 A petitioner is required to demonstrate in the petition for review “that the
2 issue raised in the assignment of error was preserved during the proceedings
3 below. Where an assignment raises an issue that is not identified as preserved
4 during the proceedings below, the petition shall state why preservation is not
5 required.” OAR 661-010-0030(4)(d). In their preservation statement under the
6 first assignment of error in the petition for review, petitioners assert as follows:

7 “Petitioners submitted testimony regarding the mischaracterization
8 of the rail facility as a ‘branchline’ under OAR 660-012-0065(3)(j)
9 in written testimony submitted before the County.” Petition for
10 Review 8 (citing Record 2260-62, 2287).

11 Respondents argue that the issue that petitioners raised below was that the
12 county must consider the rail facility as a whole in construing the term
13 “branchline.” Respondents argue that petitioners never raised the distinct issue of
14 the design and function of the section of rail in the PA-80 zone, and that issue is
15 qualitatively different because it turns on different evidence—the shape, length,
16 and function of the track in the PA-80 zone alone and distinct from the rail facility
17 in the RIPD zone.

18 Petitioners reply that they raised the design and function issue at Record
19 2262. We agree that petitioners raised the issue of the length of the track in the
20 PA-80 Zone when they asserted that 1,250 linear feet “is less than the length of a
21 single train that will serve NEXT’s facility” and “it is merely a connection
22 segment from the main rail line to NEXT’s facility rail yard or terminal.” Record
23 2262. Record 2262 does not raise any issue about the width of the laydown area

1 or that the track is not a branchline because it does not stem directly from a
2 railroad mainline.

3 Petitioners reply that the design and function of the track in the PA-80 zone
4 is essential to the county's conclusion that that section of track qualifies as a
5 branchline and that that issue falls under the larger issue of whether the use is
6 allowed under OAR 660-012-0065(3)(j). Petitioners point to the county's
7 findings at Record 58 to 61, but do not point to any particular findings. We have
8 reviewed those findings. The county found, in part:

9 "[T]he Board concludes that the Application satisfies LUBA's
10 'plain meaning' construction of the term 'branchline' as 'a section
11 of the track and roadbed of a railway that is distinct, elongated,
12 narrow, and rather uniform in width that is used for trains to travel
13 a certain route.' There is no question that the proposed 1250 sq. ft.
14 track is distinct. It is also elongated and narrow, because the width
15 of its gravel base, at 24 feet, is only 1.92 percent of its length. The
16 Board also finds that it is uniform in width. * * *

17 "[T]o the extent that LUBA adopted [the Oregon Department of
18 Transportation's] definition of 'branchline,' the Board concludes
19 that the Application is for 'a section of track running between a main
20 line and another destination.' Based on the evidence in the record,
21 there is no question that the Application is for a section of track and
22 that track is located between the [P&W] mainline and another
23 destination (in this instance, the [diesel facility])." Record 60-61.

24 We agree with respondents that, had petitioners raised the issues of the
25 width of the laydown area and the lack of direct connection to a mainline, then
26 intervenor and the county could have responded to those issues in the local

1 proceeding. It constitutes unfair surprise to raise them for the first time on appeal.
2 Thus, those issues are waived.

3 With respect to length of the track and a single train exceeding the length
4 of the track in the PA-80 zone, we agree with respondents that nothing in the
5 plain meaning or context of the term “branchline” requires that the rail section
6 meet or exceed any particular length of track. The county did not err in
7 concluding that the proposed configuration satisfies our prior construction of
8 “branchline” in *Next I*. To the extent that the evidence shows that longer trains
9 may need to be separated into sections of cars and stored on the parallel tracks in
10 the RIPD zone in order to clear the PA-80 zone track, that does not compel a
11 conclusion that the portion of the track in the PA-80 zone is not a section of track
12 that is used for trains to travel a certain route. As the county found, “this single,
13 1,250-foot track is among the various offshoots of [P&W’s] main line(s), and is
14 designed to have a business of its own (i.e. rail service to the [diesel facility]),
15 and the [diesel facility] is not reached by the principle route.” Record 60.

16 The fact that the trains travel only a short distance between P&W’s line
17 and the diesel facility is not determinative of whether the section of track qualifies
18 as a branchline. The county did not err in concluding that the rail line in the PA-
19 80 zone qualifies as a branchline as it is designed and approved to function.

20 The second subassignment of error is denied.

1 **C. Third Subassignment – Railroad Ownership and Operation**

2 Petitioners argue that the proposed track is not a branchline because it will
3 not be owned or operated by a railroad company. Respondents initially respond
4 that the issue was not raised before the county and, thus, it is waived. ORS
5 197.797(1). We agree.

6 In their preservation statement under the first assignment of error in the
7 petition for review, petitioners assert as follows:

8 “One of the three main arguments raised in this assignment of error
9 is that the rail facility cannot be permitted under OAR 660-012-
10 0065(3)(j) because it is not a part of a ‘railroad,’ and thus it is not a
11 ‘branchline’ within the meaning of the regulation. Petitioners did not
12 raise this exact argument below. However, this argument is a part of
13 the larger issue and argument that Petitioners did sufficiently raise,
14 which is that the facility cannot be allowed under OAR 660-012-
15 0065(3)(j). Record 2260-62, 2287. The ‘railroad’ argument is thus
16 preserved since it is only a ‘particular argument’ corresponding to a
17 broader issue that was raised below. *See e.g., Gould v. Deschutes*
18 *County*, 54 Or LUBA 205, 244-45 (2007) (holding specific
19 argument regarding interpretation of provision was preserved where
20 general issue of compliance with that provision was raised);
21 *Department of Land Conservation and Development v. Tillamook*
22 *County*, 34 Or LUBA 586, 591 (1998) (‘The statutory restrictions to
23 raising issues on appeal do not apply to new arguments on appeal
24 regarding issues that were raised below.’). Regardless, the County
25 and [intervenor] clearly had ‘adequate opportunity to respond’ to
26 this particular argument as the entire decision revolved around
27 whether the facility is a ‘railroad branchline.’ ORS 197.797(1);
28 Record 59 (the County finding that the facility ‘falls within the
29 category of “railroad mainlines and branchlines”’), Record 93
30 (memo from Mackenzie adopted by the County as findings entitled
31 ‘Conditional Use Permit for a Railroad Branchline’), Record 100-
32 101, 103, 814.” Petition for Review 8-9.

1 We agree with respondents that petitioners did not raise during the local
2 proceeding the issue of whether a “railroad * * * branchline[]” must be owned
3 and operated by a railroad company in order to qualify as a transportation
4 improvement allowed on agricultural land under OAR 660-012-0065(3)(j). As
5 we explained in *Friends of Yamhill County v. Yamhill County*, “[a] particular
6 issue must be identified in a manner detailed enough to give the governing body
7 and the parties fair notice and an adequate opportunity to respond.” LUBA No
8 2021-074 (citing *Boldt v. Clackamas County*, 107 Or App 619, 623 (1991);
9 *Vanspeybroeck v. Tillamook County*, 221 Or App 677, 691 n 5, 191 P3d 712
10 (2008)) (slip op at 6). *Friends of Yamhill County* is instructive and concerned a
11 transportation improvement on agricultural land allowed under OAR 660-012-
12 0065(3)(o), which allows on agricultural land transportation facilities “that serve
13 local travel needs” and which provides, in part:

14 “The travel capacity and performance standards of facilities and
15 improvements serving local travel needs shall be limited to that
16 necessary to support rural land uses identified in the acknowledged
17 comprehensive plan or to provide adequate emergency access.”
18 OAR 660-012-0065(3)(o).

19 The intervenors in *Friends of Yamhill County* argued that, regarding OAR 660-
20 012-0065(3)(o), the issue preserved by petitioner was that the intervenors’
21 proposed new public road development was not needed to serve local travel needs
22 because the subject parcels could already be accessed by way of a private
23 easement. We agreed with the intervenors that the private easement issue did not

1 provide fair notice of the issue the petitioner raised on appeal, which was that the
2 intervenors could not establish that the proposed road would “serve local travel
3 needs” unless and until the intervenors obtained county land use approval to
4 develop a dwelling on the parcels that would be served by the road. OAR 660-
5 012-0065(3)(o).

6 Similarly, here, petitioners raised the issue that the county should construe
7 the term “branchline” by reference to the entire proposed rail development.
8 However, petitioners did not raise the issue that a rail facility that is not owned
9 and operated by a railroad company cannot qualify as a branchline under OAR
10 660-012-0065(3)(j). Thus, petitioners did not provide respondents fair notice of
11 that issue that would have allowed respondents a reasonable opportunity to
12 respond during the local proceeding. Thus, that issue is waived. ORS 197.797(1).

13 The third subassignment of error is denied.

14 The first assignment of error is denied.

15 **SECOND ASSIGNMENT OF ERROR**

16 Petitioners argue that the county’s findings for the CUP regarding the
17 impacts of the proposed rail facility to farm practices are inadequate to
18 demonstrate compliance with the farm impacts test under ORS 215.296 and are
19 not supported by substantial evidence.

20 Adequate findings must “(1) identify the relevant approval standards, (2)
21 set out the facts which are believed and relied upon, and (3) explain how those
22 facts lead to the decision on compliance with the approval standards.” *Heiller v.*

1 *Josephine County*, 23 Or LUBA 551, 556 (1992). Substantial evidence is
2 evidence that a reasonable person would rely upon to make a decision,
3 considering the whole record. *Dodd v. Hood River County*, 317 Or 172, 179, 855
4 P2d 608 (1993); *Younger v. City of Portland*, 305 Or 346, 351-52, 752 P2d 262
5 (1988).

6 As explained above, transportation facilities and improvements allowed by
7 OAR 660-012-0065 on land in agricultural zones are subject to the farm impacts
8 test at ORS 215.296. Under ORS 215.296(1), a use

9 “may be approved only where the local governing body or its
10 designee finds that the use will not:

11 “(a) Force a significant change in accepted farm or forest practices
12 on surrounding lands devoted to farm or forest use; or

13 “(b) Significantly increase the cost of accepted farm or forest
14 practices on surrounding lands devoted to farm or forest use.”

15 The Columbia County Zoning Ordinance (CCZO) effectively mirrors that statute.
16 *See also Stop the Dump Coalition*, 364 Or 432 (explaining ORS 215.296). The
17 farm impacts test is applied to specific farm practices on individual farms. *Id.* at
18 459. The applicant carries the burden of proving that ORS 215.296(1) has been
19 met. *Id.* at 445, 456.

20 **A. Farm Impacts on “Surrounding Lands”**

21 Petitioners argue that the county failed to identify all of the farm practices
22 on surrounding areas likely to be impacted by its decision. The county relied on
23 intervenor’s identification of “surrounding lands devoted to farm or forest use”

1 and describing an “impact area” of approximately 14 acres and characterizing the
2 farm practices on those lands, including hay and row crop production. Record 63.
3 The county acknowledged that petitioner Riverkeeper objected that intervenor’s
4 identified impact area was insufficient, however, Riverkeeper did not identify
5 any additional surrounding lands devoted to farm use.

6 Similarly, on appeal, petitioners reiterate their argument that the county
7 analyzed too small an area when considering farm impacts. However, again,
8 petitioners do not identify any additional surrounding lands devoted to farm use
9 that the county failed to consider. While intervenor, as the applicant, bears the
10 burden of satisfying the farm impacts test, a bald assertion that the surrounding
11 area considered was inadequate, without identifying any other additional lands
12 devoted to farm use, provides no basis for remand under the farm impacts test. In
13 other words, while intervenor bore the burden of proof and persuasion before the
14 county, petitioners bear the burden of establishing error on appeal.

15 **B. Seely Farm Practices**

16 Petitioners argue that the county’s findings fail to adequately address
17 concerns raised by petitioner Seely regarding potential impacts to his mint
18 farming practices as a result of delays from train traffic associated with the
19 proposed rail facility. Seely grows and harvests mint on lands surrounding the
20 subject site and processes the mint crop in a distillery on private property to the
21 southwest of the proposed facility. Record 64. Seely asserted that the existing
22 railroad crossing at Kallunki Road will suffer increased delays due to increased

1 rail traffic and asserted that “delays of hours or even minutes” would have a
2 negative impact on their farming practices. Record 63-65, 2287-88.¹ Seely also
3 argued that the proposed branchline would interfere with road access to farmland
4 north of the proposed rail development, but did not identify any particular fields
5 or access points that would be impacted. Record 65.

6 The county found that the project will not force a significant change in, or
7 significantly increase the costs of, any accepted farm practices on land
8 surrounding the proposed branchline. The county found that, with the imposition
9 of conditions, the branchline will not significantly impact mint farm access or
10 mint harvest activities, and will not significantly increase the costs of those
11 activities. Record 65. The county found:

12 “Substantial evidence in the record indicates that access to fields
13 directly north of the Facility will not be significantly changed as a
14 result of the Branchline, because the Branchline does not prohibit
15 access to any Seely fields via Kallunki Road or Hermo Road. During
16 the first open record period, [intervenor’s] land use planning
17 consultant provided a memorandum responding to concerns about
18 the potential for interference in access, which reemphasized the
19 access map originally submitted with the Application and
20 demonstrated that the approved Facility (which is not the subject of
21 this Decision) does not cut off any existing farm accesses. The
22 Board also notes that Condition 14 of Final Order 12-2022 (DR 21-
23 03 and V 21-05) requires [intervenor] to pave Hermo Road and the

¹ Seely asserted: “My business would be negatively impacted by traffic and train delays. Delays of hours or even minutes - any delay whatsoever - will have a negative impact on our farming. When mint is ready for harvest, we move quickly.” Record 2287.

1 entrance to the Port Westward industrial site:

2 “14. The applicant shall complete the following road
3 improvements: The complete reconstruction of
4 approximately 1.65 miles of Hermo Road between Quincy-
5 Mayger Road and the entrance to the Port Westward
6 Industrial site. These improvements shall include two 12-foot
7 travel lanes, rock shoulders, safety slopes, and roadside
8 ditches. The improvement shall also consist of paving the
9 entire length of Hermo Road to final grade between Quincy-
10 Mayger Road to Kallunki Road and bringing the entire road
11 up to current County road standards. This work includes final
12 design, permitting, and construction.” Record 66 (footnote
13 omitted).

14 The county observed that Seely did not identify any farm fields that they
15 could not access or which would require crossing the existing rail lines at
16 Kallunki Road. Record 70. The county found that the Seely’s farm field access
17 “may be *improved* with the paving of Hermo Road.” Record 67 (emphasis in
18 original). The county further found that trains entering and leaving intervenor’s
19 facility will require less than 10 minutes to clear the tracks, based on the
20 assessment in the Crosstown Memo. Record 1510-16. The Crosstown Memo
21 proposed the following nine mitigation measures that the county incorporated
22 into the conditions of approval to minimize any potential farm impacts caused by
23 rail crossing delays:

24 (1) “Provide P&W crews and NEXT employees conducting rail
25 operations with a standard operating procedure (SOP) for the proper
26 handling of inbound and outbound trains with an emphasis on safety
27 and the importance of keeping crossing occupancy times to a
28 minimum.”

29 (2) “Establish and maintain consistent communications between

1 P&W and NEXT that include timely (24 hour) advance notice
2 concerning inbound and outbound train movements, with estimated
3 times of arrival and departure at the facility and train consist details
4 via email or fax (i.e. number and types of cars, commodities and
5 load/empty status).”

6 (3) “In advance of a train’s arrival, NEXT should ensure all
7 necessary tracks are clear to receive inbound traffic and all
8 associated track switches within the facility are properly lined to
9 allow continuous inbound movement during the delivery.”

10 (4) “To expedite outbound train departures, NEXT employees
11 should ensure outbound cars are assembled and ready for pickup
12 with loading and unloading mechanisms disconnected and all NEXT
13 employees safely in the clear with the P&W crew ensuring all
14 affected switches and derails are properly aligned to facilitate a
15 continuous outbound departure from the facility without stopping on
16 the crossings.”

17 (5) “Provide NEXT employees involved in the rail operations with
18 a portable radio to allow communication with P&W crews servicing
19 the facility.”

20 (6) “Provide a utility vehicle or crew taxi to expedite the P&W
21 conductor’s ground duties when delivering and securing inbound
22 trains and while preparing, inspecting, and testing outbound train
23 prior to departure.”

24 (7) “Identify a contact person(s) and/or position(s) at the P&W and
25 NEXT for area law enforcement, emergency responders and area
26 farmers and or other interested parties to reach with concerns,
27 complaints or requests involving rail operations and include such
28 information for community access through a posting on a NEXT
29 website for the Port Westward facility.”

30 (8) “P&W could post a crew member at the Kallunki Rd. crossing
31 while servicing the [diesel] facility to flag motor vehicle traffic, and
32 communicate with the engineer should it become necessary to
33 separate the train to clear the crossing in the event of an unforeseen

1 delay (typically for blockages in excess of 10 minutes or in case of
2 emergency).”

3 (9) “During critical times while the mint harvest is underway, the
4 P&W can issue a ‘Form B Track Bulletin’ as provided for in the
5 General Code of Operating Rules at the farmer’s request, that would
6 place a railroad foreman in charge at the Kallunki Road crossing
7 during the dates and times of said bulletin to stop and hold trains
8 approaching the crossing from either direction as necessary to allow
9 harvest vehicles traveling between the field and nearby distillery to
10 do so without delay (See GCOR Rule 15.2).” Record 68-69.

11 Petitioners argued that those recommendations are unenforceable. The
12 county disagreed, observing that most of the measures are aimed at actions of
13 intervenor’s employees, whose activity is within intervenor’s control. The county
14 also observed that the corresponding conditions of approval can be enforced
15 through a county code enforcement action. Record 70. Finally, the county also
16 imposed a condition of approval requiring intervenor to “prepare a management
17 plan for the rail crossing providing clear timeframes for unobstructed use of the
18 rail crossing consistent with farm activity requirements and a means to resolve
19 conflicts.” Record 71 (footnote omitted). The county found that, with those
20 conditions of approval, any traffic delays would not significantly impact Seely’s
21 farm practices. Record 70-72.

22 Petitioners argue that the county’s conclusion that the maximum possible
23 delay would be 10 minutes is based on an unsupported assumption that trains will
24 cross at the maximum 10 miles per hour speed. Petitioners argue that there is no
25 evidence that trains would be traveling at that speed and the only evidence in the
26 record regarding train speed is Seely’s testimony that they have experienced long

1 delays at rail crossings. Record 2287 (“I have personally experienced long delays
2 from train traffic in the area, already.”). Petitioners also argue that the only
3 evidence in the record is that *any* delay could harm Seely’s mint harvest and
4 processing, and therefore the county had no evidentiary basis to disregard that
5 claim. *Id.*

6 Respondents respond that the county based its conclusion that up to 10
7 minute delays will not force a significant change in or significant increase to the
8 cost of Seely’s farm practices on the fact that Seely already experiences some rail
9 crossing delays due to the existing Port Westward rail traffic and, thus, “it is
10 reasonable to conclude that some existing crossing delays are already present and
11 that Seely Mint is currently capable of operating in and around Port Westward
12 when these crossing delays are minimal.” Record 71 n 20. The county found:

13 “Based on the existence of the Kallunki Road crossing as well as the
14 tracks serving developed areas of Port Westward the Board finds
15 that trains routinely access Port Westward. Mr. Seely indicated that
16 delays of various lengths would have a ‘negative impact’ on mint
17 harvest, including ‘delays of hours or even minutes—any delay
18 whatsoever’ and cited a particular concern of a delay lasting 45
19 minutes. The Board agrees that significant additional train crossing
20 delays (such as those significantly exceeding the 10 minutes
21 anticipated for full-size trains) could have a negative impact on
22 Seely Mint’s harvest operations if harvest trucks are delayed by such
23 a crossing. However, with the conditions of approval 6 and 19, both
24 of which require [intervenor] to take specific steps to limit the
25 impact of increased crossing times at the Kallunki Road crossing,
26 the Board finds that the potential for crossing delays specifically
27 caused by rail service to the [diesel facility] via the Branchline does
28 not rise to the level of forcing a ‘significant’ change or one that
29 would ‘significantly’ increase the costs of Mr. Seely’s mint farming.

1 This is because there is evidence that the additional train crossings
2 can be managed to reduce the potential crossing times so that they
3 will not have ‘an important influence or effect’ on the Seely farm.”
4 Record 70-71.

5 “While the Board does agree that significant delays in trips to and
6 from a field during harvest could adversely impact the mint, the
7 Board does not find credible Mr. Seely’s assertion that any crossing
8 delay (i.e. of a few seconds or just a few minutes) is likely to ‘have
9 an important influence or effect on the farm’ because Mr. Seely
10 identified one example of a 45-minute delay as being problematic.
11 Vehicle trips of any length, including harvest trips, can be delayed
12 for a limited time for any number reasons, such as traffic control
13 measures and even the speed of the vehicle used. Given the rail
14 services already present at Port Westward and Mr. Seely’s
15 testimony, the Board finds that it is reasonable to conclude that some
16 existing crossing delays are already present and that Seely Mint is
17 currently capable of operating in and around Port Westward when
18 these crossing delays are minimal.” Record 71 n 20.

19 With respect to the delay estimates, respondents respond, and we agree,
20 that a reasonable person could rely on the Crosstown Memo to support a finding
21 that delays would be at a maximum around 10 minutes. The Crosstown Memo
22 author is an expert “in railroad mechanical, operating, and engineering
23 disciplines” and petitioners do not point to any competing expert evidence.
24 Record 1517.

25 Petitioners reiterate their argument that the Crosstown Memo
26 recommendations, which the county adopted as conditions, are unenforceable
27 and there is no evidence that they will be effective. Respondents respond, and we
28 agree, that a reasonable person could rely on the Crosstown Memo regarding

1 efficacy of the conditions and the county adopted adequate findings explaining
2 that the conditions are enforceable.

3 **C. De La Cruz Parcels**

4 Petitioners argue that the county failed to analyze farm impacts to the De
5 La Cruz parcels that the rail line crosses. We understand petitioners to argue that
6 the county erred by failing to analyze and adopt findings addressing whether the
7 rail line crossing the De La Cruz parcels will force a significant change to the
8 farm practices on those parcels.

9 The findings state, in part:

10 “The Board notes that with the exception of the fields owned by
11 * * * [the De La Cruzes], there are no farm field access points that
12 will be disrupted. As the Del La Cruzes authorized submittal of the
13 Application, the Board does not understand them to object to the
14 Application and notes that the Application includes a new crossing
15 to allow them to access either side of their property.” Record 65.

16 Petitioners argue, and we agree, that the farm impacts test requires the
17 county to analyze whether the use will force a change in or significantly increase
18 the cost of accepted farm practices on surrounding lands devoted to farm use. The
19 fact that current owners or operators consent to the nonfarm use does not relieve
20 the county of that obligation. The purpose of the farm impacts test is to prevent
21 “reductions in the supply of operating, productive agricultural land over time.”
22 *Stop the Dump*, 364 Or at 455. ORS 215.296 is not concerned with what impacts
23 current owners are willing to accept without opposition; instead, it is concerned
24 with impacts to the land and accepted farm practices.

1 Respondents respond, initially, that the issue of impacts to the De La Cruz
2 parcels is waived because petitioners did not raise any issue before the county
3 regarding farm impacts to the De La Cruz parcels that the branchline crosses.
4 Joint Response Brief 22. That is, respondents argue that petitioners did not
5 identify during the local proceeding any specific farm impacts or practices on the
6 De La Cruz parcels that the county was required to address. On the merits,
7 respondents argue that the county did adopt findings characterizing the farm
8 practices on the De La Cruz parcels, which are farmed for hay, and concluded
9 that the branchline will not force a significant change in the farm practices
10 because intervenor will construct a crossing to allow access to all parts of the
11 parcels. Record 63, 65. The county found

12 “The Application explained that the central portion of the De La
13 Cruz parcel (within and north of the proposed railroad branchline
14 corridor) is used for hay/grassland; similarly, the single Port parcel
15 west of the De La Cruz parcel contains wetlands and is used for
16 hay/grassland as well. The Application Narrative explained that
17 ‘Farm practices for hay production and row crops include activities
18 such as tilling/soil preparation, planting, irrigation, spraying
19 fertilizer, managing weeds, mowing, and harvesting.’ * * * [T]he
20 surrounding lands for purposes of the farm impacts test include the
21 impact area identified in the Application, which includes farm
22 activities for growing hay and other row crops that are adjacent to
23 or abutting the Branchline, as well as portions of Seely Mint’s
24 operations.” Record 63.

25 We reject respondents’ waiver challenge. The application and the county’s
26 findings identify the farm practices on the De La Cruz property. The county’s
27 farm impacts analysis first appeared in the challenged decision. That is sufficient

1 for the issue of the adequacy of the county’s farm impacts analysis with respect
2 to those parcels to be reviewable on appeal. *See Riverview Abbey Mausoleum*
3 *Company v. City of Portland*, 79 Or LUBA 38, 42, *aff’d*, 297 Or App 192, 440
4 P3d 684 (2019) (a petitioner is not required to anticipate erroneous findings or
5 interpretations in a final decision in order to challenge them at LUBA); *Lucier v.*
6 *City of Medford*, 26 Or LUBA 213, 216 (1993) (stating the same).

7 On the merits, we agree with respondents that the county identified the
8 farm practices on the De La Cruz parcels and concluded that the branchline would
9 not cause any access issues that would force a significant change or significantly
10 increase the cost of farm practices on the De La Cruz parcels. The county did not
11 rely solely on the fact that the De La Cruzes did not object to the branchline
12 development.

13 The second assignment of error is denied.

14 **THIRD ASSIGNMENT OF ERROR**

15 As explained above, in order to change the configuration of the rail line in
16 the PA-80 zone, intervenor relocated much of the rail facilities into the RIPD
17 zone. In the RIPD zone, “[p]roduction, processing, assembling, packaging, or
18 treatment of materials; research and development laboratories; and storage and
19 distribution of services and facilities” may be permitted, subject to a review of
20 the factors in CCZO 683.1. CCZO 683.1.B requires that:

21 “The potential impact upon the area resulting from the proposed use
22 has been addressed and any adverse impact will be able to be
23 mitigated considering the following factors:

1 “.1 Physiological characteristics of the site (i.e., topography,
2 drainage, etc.) and the suitability of the site for the particular land
3 use and improvements;

4 “.2 Existing land uses and both private and public facilities and
5 services in the area;

6 “.3 The demonstrated need for the proposed use is best met at the
7 requested site considering all factors of the rural industrial element
8 of the Comprehensive Plan.”

9 The associated development around the rail facility includes a vegetated buffer
10 and stormwater drainage detention and conveyance. Record 3212-32 (maps and
11 drawings for revised rail corridor development in the RIPD zone).

12 The county found that CCZO 683.1 did not apply to the modification
13 because, according to the county, the scope of the rail use was not changed from
14 the 2022 approval. Record 290-91. In the alternative, the county found that the
15 new configuration satisfies CCZO 683.1. Record 291-313. Petitioners argue that
16 the county’s conclusion in the site design review modification approval that the
17 modified facility design complies with CCZO 683.1 misconstrues the law and is
18 not supported by adequate findings or substantial evidence.

19 Petitioners argue that the county failed to identify any of the physiological
20 characteristics of the new site for the reconfigured *rail* facility. Rather, petitioners
21 argue, the county analyzed the suitability of the site for the *diesel* facility, relying
22 heavily on its previous decision. Petitioners argue that the county thereby failed
23 to analyze the suitability of the site for the rail facility. Petitioners argue that, as
24 an example, the proposed site has a high water table and the county failed to

1 analyze whether the specific location of the modified rail facility and associated
2 infrastructure would be at risk of flooding and, if so, what impact that could have
3 on surrounding uses. Additionally, petitioners argue that the county failed to
4 analyze the stormwater impacts considering large, new stormwater detention
5 ponds added in the modification, which are all proposed below grade and could
6 impact groundwater and surface water. Record 1670-72. Petitioners argue that
7 because the modification includes new development in new locations, the county
8 improperly relied on the original findings and evidence that the site is suitable for
9 the use. *Id.*

10 Respondents respond, initially, that petitioners' statement of preservation
11 is overly broad and insufficient to establish that the issue raised in the third
12 assignment of error was preserved. Joint Response Brief 39-40; OAR 661-010-
13 0030(4)(d). In the petition for review, petitioners cite to Record 1663-69, 2252-
14 58, and 2287-88. We agree with petitioners that those citations are sufficiently
15 specific to demonstrate that the issue raised in the third assignment of error was
16 preserved during the proceedings below.

17 On the merits, respondents respond that the county adopted adequate
18 findings concerning the relocated rail facility, vegetative buffer, and stormwater
19 facilities. The supplemental findings quote county staff findings that the nearby
20 industrial uses are not sensitive to the expansion of industrial activities elsewhere
21 at Port Westward and nearby agricultural activities are unlikely to be negatively
22 impacted, due to regulatory protections in place. Record 294-308. The county

1 made findings regarding the vegetative buffer, quoting and relying on a January
2 24, 2024, technical memorandum. “Installation of the proposed tree buffer is a
3 County requirement for development of the project site. Routine maintenance of
4 the tree buffer will reduce the likelihood of debris and blockages in the adjacent
5 waterways.” Record 301. The county also referred to a second technical
6 memorandum addressing the same concern that the vegetated buffer may
7 adversely impact waterways adjacent to the site. *Id.*

8 Similarly, the county found that the proposal will not have adverse impacts
9 on surface or subsurface water, relying on intervenor’s submitted technical
10 memorandum. Record 298-304. The findings address stormwater management in
11 detail, summarizing the stormwater management plan and finding it and
12 intervenor’s technical memorandum “more credible” than concerns raised by
13 opponents. Record 299-310. The findings also note that the drainage system is
14 not altered by the relocation of the reconfigured rail facility, and the stormwater
15 management plan indicates that peak flow rates are actually anticipated to
16 decline. Record 302. The county concluded that the stormwater facilities are
17 adequately designed to treat all stormwater and prevent groundwater
18 contamination. *Id.* The findings conclude that “the proposed [diesel facility],
19 associated wetlands fills, and drainage plan will not have an adverse impact on
20 the ‘physiological characteristics of the site.’” Record 294. We agree with
21 respondents that those findings are adequate and supported by substantial
22 evidence.

- 1 The third assignment of error is denied.
- 2 The county's decision is affirmed.