BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

ROGUE ADVOCATES
and CHRISTINE HUDSON,
Petitioners,

vs.

JACKSON COUNTY,
Respondent,

and

PAUL MEYER and KRISTEN MEYER,
Intervenors-Respondents.

LUBA No. 2017-100

FINAL OPINION
AND ORDER

Appeal from Jackson County.

Maura C. Fahey, Portland, filed the petition for review and argued on behalf of petitioners. With her on the brief was Crag Law Center.

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

Daniel O'Connor, Medford, represented intervenors-respondents.

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

REMANDED 02/13/2018

You are entitled to judicial review of this Order. Judicial review is

1 governed by the provisions of ORS 197.850.

Opinion by Bassham.

NATURE OF THE DECISION

Petitioners appeal the county's decision approving a Floodplain Development Permit Application for certain non-residential structures accessory to a nonconforming asphalt batch plant use previously located on the subject property.

REPLY BRIEF

Petitioners move to file a reply brief to respond to the respondent's argument that petitioners lack standing to challenge the county's decision and that LUBA lacks jurisdiction to hear the appeal. There is no opposition to the reply brief, and it is allowed.

FACTS

The subject property is a 10.98-acre parcel zoned Rural Residential-5 (RR-5), located in Jackson County. The regulations governing the RR-5 zone are located in Jackson County Land Development Ordinance (LDO) Chapter 6, in particular Table 6.2, which lists all uses allowed or conditionally allowed in each county zone.

A substantial portion of the property is located within the floodway of Bear Creek, and the remainder of the property is located within the creek's 100-year floodplain. The entire property is located within the Special Flood Hazard Area (SFHA) of Bear Creek, and development within the SFHA is subject to standards in LDO Chapter 7.2 (Floodplain Overlay).

On August 7, 2017, intervenors-respondents (intervenors) applied to the county for a floodplain development permit under LDO 7.2. Record 10-16. The application seeks retroactive approval of existing structures located within the floodway, consisting of an office building and two storage buildings. The buildings were previously used as part of intervenors' asphalt paving business, Mountain View Paving, Inc., which as explained below is a use that no longer operates on the subject property. As explained below, intervenors' 2017 application for a floodplain development permit took the position that the office building and two storage buildings had been approved in an earlier county decision. Record 10.

Intervenors' development activities on the subject property have a significant history, review of which is necessary to understand the issues in this appeal. Six previous appeals of land use decisions concerning the batch plant and accessory structures on the subject property have come before LUBA: *Rogue Advocates v. Jackson County*, Or LUBA __ (LUBA No. 2016-069, December 20, 2016) (*Rogue V*); *Rogue Advocates v. Jackson County*, 74 Or LUBA 214 (2016) (*Rogue IV*); *Meyer v. Jackson County*, 73 Or LUBA 1 (2016) (*Meyer*); *Rogue Advocates v. Jackson County*, 71 Or LUBA 148 (2015) (*Rogue III*); *Rogue Advocates v. Jackson County*, 70 Or LUBA 163 (2014) (*Rogue II*); and *Rogue Advocates v. Jackson County*, 69 Or LUBA 271 (2014) (*Rogue I*). We set forth below the procedural history relevant to the disposition of the present appeal.

A. *Rogue I*

Intervenors' predecessors-in-interest operated a concrete batch plant on the subject property as an unverified nonconforming use in the RR-5 zone, which generally does not allow batch plants or similar industrial and commercial uses. In 2001, intervenors acquired the subject property and installed an asphalt batch plant, and thereafter constructed without county approval several accessory structures, including the office building and storage buildings at issue in this appeal. In 2012, following initiation of a county code enforcement proceeding, intervenors sought verification from the county that the asphalt batch plant (as it existed in 2012) is a legal nonconforming use, and concurrently applied for floodplain development permits for the existing batch plant operation, including the structures at issue in this appeal. The hearings officer verified most of the then-existing asphalt batch plant operation as a lawful nonconforming use, but concluded that some structures, including the office building and storage containers on the property, were unauthorized expansions of the nonconforming use.[1] The hearings officer vacated the staff approval of the floodplain development permit for the structures, because the permit was predicated on the structures being part of a lawful nonconforming use.

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[1] LDO 11.2.1(B) authorizes expansions of nonconforming uses if certain standards are met. The structures the hearings officer found to be unauthorized expansions had not been approved under LDO 11.2.1(B).

Petitioners appealed the hearings officer's decisions to LUBA. Upon review, we affirmed the hearings officer's decision to vacate the planning department's approval of the floodplain permit, but remanded the nonconforming use verification, concluding that replacing the original concrete batch plant with an asphalt batch plant with accessory structures was an alteration of a nonconforming use, which required county approval. *See* n 1. *Rogue I*, 69 Or LUBA 271.

B. *Rogue II*

In 2013, during the pendency of the *Rogue I* appeal, the county and intervenors entered a stipulation that required intervenors to apply for floodplain permits for those structures that the hearings officer found to qualify as part of the legally established nonconforming use. Intervenors submitted two floodplain development permit applications, which the county approved in 2013 and 2014. Petitioners appealed the planning department's approval of the 2013 floodplain development permit application. Intervenors moved to dismiss the appeal, arguing that the floodplain development permit is subject to standards that do not require interpretation or the exercise of legal or policy judgment, and therefore fall within the so-called "ministerial" exception to LUBA's jurisdiction, at ORS 197.015(10)(b)(A).[2]

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[2] ORS 197.015(10)(a)(A) defines "land use decision" in relevant part to include:

In *Rogue II,* we rejected intervenors' jurisdictional challenge, concluding that because the permit decision relied upon the 2012 hearings officer's decision to establish the legality of the structures at issue, the decision to approve the floodplain permit applications while the 2012 hearings officer's decision was pending on appeal to LUBA required interpretation or the exercise of policy or legal judgment, and therefore the appeal of the floodplain permit application did not fall within the ORS 197.015(10)(b)(A) exclusion. 70 Or LUBA at 167-68.

On the merits, we agreed with petitioners that the county did not have the authority to grant floodplain permits for the existing asphalt batch plant

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> "A final decision or determination made by a local government or special district that concerns the adoption, amendment or application of:
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> "(i) The goals;
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> "(ii) A comprehensive plan provision;
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> "(iii) A land use regulation; or
>
> "(iv) A new land use regulation[.]"

ORS 197.015(10)(b) excludes from that definition a decision of a local government:

> "(A) That is made under land use standards that do not require interpretation or the exercise of policy or legal judgment; [or]
>
> "(B) That approves or denies a building permit issued under clear and objective land use standards[.]"

structures, until the scope and nature of the legal nonconforming batch plant had been determined by the county, consistent with our remand decision in *Rogue I*. *Id.* at 169. Finally, we affirmed petitioners' second assignment of error, finding the county erred in approving the floodplain development permit under its "Type I" procedure, which as discussed below is an administrative approval process that is expressly limited under the LDO to county permits that do not require "interpretation or the exercise of policy or legal judgment." LDO 3.1.2.

C. *Meyer*

Following our decision remanding the challenged decision in *Rogue III*, 71 Or LUBA 148, LUBA affirmed a county hearings officer's decision that the asphalt batch plant located on intervenors' property since 2012 constituted an unlawful alteration of a prior nonconforming concrete batch plant use. *Meyer*, 73 Or LUBA 1.

D. *Rogue IV*

After we issued our decision in *Meyer*, intervenors relocated the asphalt batch plant itself to a different property, but sought and obtained county approval to continue all other activities related to the asphalt paving business on the subject property. *Rogue IV*, 74 Or LUBA 214. Intervenors' application sought county approval of:

> " * * * (a) the crushing, screening and recycling of aggregate materials; (b) three small storage containers/structures; (c) an elevated fuel storage structure; (d) a small employee office; (e)

scales; (f) stockpiles; and (g) equipment essential to the operation. * * *" *Id.* at 215).

On appeal, LUBA reversed the county's approval, concluding that the proposed uses were accessory to the asphalt batch plant use, and under the LDO accessory uses require establishment of a lawful primary use on the property.[3]

E. *Rogue V*

Following *Rogue IV*, the parties stipulated to a dismissal of petitioners' appeal of the county's approval of a floodplain development permit for intervenors' activities on the property in *Rogue Advocates v. Jackson County*, __ Or LUBA __ (LUBA No. 2016-069, Dec 20, 2016) (*Rogue V*).

F. The Present Appeal

As noted, in August 2017, intervenors submitted a new application for a floodplain development permit for the office building and two storage structures that were included in intervenors' prior unsuccessful land use applications, and that had previously been deemed accessory to the nonconforming asphalt batch plant use. Intervenors stated in their 2017 floodplain development permit application that:

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[3] LDO 6.4.2(D) provides:

> "No accessory use will be established, and no accessory structure will be allowed on a parcel, until all required permits and approvals for the principal use or activity have been obtained and the principal structure is under construction, or the principal use has been established."

> "[Intervenors] obtained land use approval for a small office (Jackson County File No. 439-16-00001-SIT) ('the Approval'). Pursuant to the Approval, Applicants are required to submit for a floodplain development permit for a 264[-]square foot office structure and two (2) 160-foot storage containers (collectively, 'the structures'), which is the purpose of this land use application ('the Application')." Record 10.

However, the "Approval" referenced by intervenors as File 439-16-00001-SIT is the decision that was reversed in *Rogue IV* nearly a year earlier, on August 29, 2016, as described above.

Nonetheless, county planning staff processed the 2017 floodplain development application pursuant to the county's Type I procedures, which do not require notice of the application or decision, or provide an opportunity to request a hearing. Under the LDO, Type I review procedures are limited to uses that are "allowed by-right." LDO 6.2.1(A). On September 28, 2017, a county planner issued the 2017 floodplain development permit. This appeal followed.

MOTION TO DISMISS

The county moves to dismiss this appeal.[4] Although the county does not cite the statute, we understand the county to argue that the 2017 floodplain development permit decision is excluded from LUBA's jurisdiction under ORS

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[4] Intervenors did not file a response brief in this appeal, and have informed LUBA and the parties by letter that they withdrew the application at issue in this appeal, and acknowledged that it will have no further force or effect. However, as far as we are informed, the 2017 floodplain development permit is still valid, and no party argues that this appeal is moot.

197.015(10)(b)(A). The county argues, similar to the argument we rejected in *Rogue II*, that the 2017 floodplain development permit decision was issued subject to standards that do not require interpretation or the exercise of legal or policy judgment. Specifically, the county argues that the standards at LDO 7.2 that govern approval of a floodplain development permit consist entirely of technical construction standards that do not require interpretation or the exercise of legal or policy judgment. According to the county, approving a floodplain development permit does not require the county to evaluate the *use* to which the structures will be put, only whether proposed structures comply with the floodplain construction standards. We understand the county to contend that it is irrelevant for purposes of issuing a floodplain development permit whether the applicant intends to use the structures for a commercial, industrial, or residential use, or whether the intended use is a lawful use permitted in the applicable underlying zone.

Relatedly, and in response to petitioners' first assignment of error, which argues that the county committed procedural error in processing the application under its Type I procedures, the county responds that the county correctly applied its Type I procedures to approve the floodplain development permit, because the applicable floodplain development permit standards do not require interpretation or the exercise of legal or policy judgment.

The challenged decision applies several land use regulations, at LDO 7.2, and thus is a "land use decision" as defined at ORS 197.015(10)(a), unless

one or more of the exclusions at ORS 197.015(10)(b) apply. As noted, the county appears to argue that the exclusion at ORS 197.015(10)(b)(A) applies, and that in turn depends on whether the standards that the county applied or should have applied in making the decision require interpretation or the exercise of legal or policy judgment. The county appears to be correct that most of the standards in LDO 7.2 are fairly technical standards concerning placement and construction of structures to prevent damage or alter floodways. However, it is not accurate to say that the floodplain overlay standards in LDO 7.2 require no evaluation of the nature and use of a proposed structure.

For example, LDO 7.2.4 requires the applicant to submit a site plan indicating, among other things, the "nature, location, dimensions of existing and proposed structures." LDO 7.2.4(A)(1). LDO 7.2.13 includes different standards for residential structures, commercial, industrial and nonresidential structures, and accessory structures. LDO 7.2.13(B), (C) and (G). At a minimum, then, LDO 7.2 requires the applicant to state whether proposed structures are primary or accessory structures (and whether residential, commercial or industrial), and the county must necessarily evaluate that information, if only for the county to determine which LDO 7.2 standards apply.

Beyond that minimum evaluation, however, we agree with petitioners that, at least under the circumstances of this case, the LDO requires the county to evaluate the intended use of the three structures at issue, and determine

whether that use is consistent with other applicable LDO provisions. LDO 7.2 does not exist in isolation from other provisions of the LDO. As petitioners argue, LDO 7.2.2 (Applicability) states that "[n]othing in Section 7.2 is intended to allow uses or structures that are otherwise prohibited by the zoning ordinance or Specialty Codes." Clearly, LDO 7.2 is not intended to function in a manner that would allow the county to approve a floodplain development permit for a use that is otherwise not allowed under the LDO. The county cannot possibly ensure compliance with LDO 7.2.2 unless it conducts some inquiry into the land use served by proposed structures in a floodplain hazard area, at least to ensure that the use is not prohibited under the LDO.

The context of LDO 7.2 supports that view. LDO 7.2.2(C) describes various circumstances in which an application for a floodplain development permit will be processed under the county's Type I or II procedures. The county planner who issued the challenged floodplain development permit presumably concluded that the circumstances presented qualified the application for processing under the county's Type I procedures instead of Type II procedures (which provide for notice and opportunity to request a hearing). However, LDO 7.2.2(C) is not the only LDO provision governing which county procedures are applied to which applications. As petitioners argue, LDO 3.1.2 provides that uses that can be approved under Type I

procedures are those that are "authorized by right."[5] Thus, the county's determination to process a floodplain development permit application under Type I procedures inherently includes an obligation to confirm that the use or structure proposed is "authorized by right" on the subject property.

In the present case, intervenors took the position in their application that the county had previously authorized the existing structures, in a decision concluding that the structures are accessory to a lawful nonconforming asphalt paving operation. Record 10. If that position was accurate at the time the floodplain permit was issued, it would seem to provide a straightforward basis for the county to conclude that the uses served by the structures are "authorized by right," and thus to confirm that the Type I process is the appropriate county procedure to apply to intervenors' floodplain development permit application, similar to the situation in *Rogue II*. However, intervenors' position was not accurate. As noted, the county authorization to which intervenors referred was the county decision at issue in *Rogue IV*, which LUBA had reversed nearly a

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[5] LDO 3.1.2 provides:

> "**Type 1 Land Use Authorizations, Permits and Zoning Information Sheet[.]** Type 1 uses are authorized by right, requiring only non-discretionary staff review to demonstrate compliance with the standards of this Ordinance. A Zoning Information Sheet may be issued to document findings or to track progress toward compliance. Type 1 authorizations are limited to situations that do not require interpretation or the exercise of policy or legal judgment. Type 1 authorizations are not land use decisions as defined by ORS 215.402 [*sic*]. (Bold in original).

year prior to intervenors' August 2017 application. As far as we are informed, there is no extant county decision of any kind that would provide a basis to conclude that the existing structures are "authorized by right" or otherwise allowed in the RR-5 zone. No party argues that the existing office or storage structures are authorized by right in the RR-5 zone, which generally prohibits industrial and commercial uses.

In more typical circumstances, the county may well be correct that county decisions on floodplain development permits are not "land use decisions" as defined at ORS 197.015(10)(a), because they fall within the exclusion at ORS 197.015(10)(b)(A). But if so, that is because in issuing such decisions the county has concluded (implicitly or explicitly) without the necessity of interpretation or the exercise of legal or policy judgment that the uses or structures authorized by the permit are "authorized by right" or otherwise allowed on the subject property under the applicable LDO provisions or pursuant to valid, final county decisions. Such a conclusion could be based on reference to the list of uses permitted in the applicable zone (*e.g.* LDO Table 6.2-1), or reliance upon a previously issued valid, final county decision (*e.g.*, a zoning classification decision, land use permit, or nonconforming use verification). However, in the present case the county planner who approved intervenors' application for a floodplain development permit apparently had no such basis. The county planner either (1) ignored the question entirely or (2) implicitly concluded, perhaps based on intervenors' inaccurate citation to the

decision at issue in *Rogue IV*, that the office and storage structures serve allowed or authorized uses in the RR-5 zone. In the present circumstances, the question must be squarely addressed, if not in a separate land use decision then in the decision to approve a floodplain development permit. Further, in the present circumstances, answering the question of whether the existing structures serve uses that are allowed or authorized in the RR-5 zone is one that clearly requires the exercise of legal judgment.

For the foregoing reasons, we disagree with the county that the county's approval of a floodplain development permit falls within the exclusion at ORS 197.015(10)(b)(A). Accordingly, it is a land use decision subject to LUBA's jurisdiction. The county's motion to dismiss is denied.

FIRST ASSIGNMENT OF ERROR

Petitioners' first assignment of error alleges the county erred in following its Type I procedure in granting the disputed 2017 floodplain development permit, rather than its Type II procedure, which provides for notice and opportunity to request a hearing. We have already concluded that the county's decision on intervenors' application for a floodplain development permit required the county to determine whether the uses served by the proposed structures—according to intervenors, uses accessory to a verified nonconforming use—are authorized uses under the LDO on the subject property. Answering that question under the circumstances of this case requires the exercise of legal judgment. Because LDO 3.1.2, quoted earlier in

this opinion, expressly limits application of the Type I procedure to "situations that do not require interpretation or the exercise of policy or legal judgment," it follows that the county erred in processing the application under its Type I procedures.[6] *See* n 5.

The county's procedural error warrants remand only if it "prejudiced the substantial rights of the petitioner." ORS 197.835(9)(a)(B). Had the county followed the Type II procedure that petitioners contend the county should have followed, petitioners argue that at least petitioner Christine Hudson would have been entitled to notice of the application and a right to participate. Petition for Review 1-2. Petitioners' substantial rights that are protected by ORS 197.835(9)(a)(B) include "an adequate opportunity to prepare and submit their case and a full and fair hearing." *Muller v. Polk County*, 16 Or LUBA 771, 775

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[6] It is important to note that our conclusion that the applicable LDO standards required interpretation or the exercise of legal or policy judgment for purposes of ORS 197.015(10)(b)(A) means only that the county's decision is not excluded from the definition of "land use decision" and hence LUBA's review. That conclusion does not compel the conclusion that the county's decision is *also* a statutory "permit" as defined at ORS 215.402(4) and thus the type of decision that there is a *statutory* obligation to provide notice and an opportunity to request a hearing under ORS 215.416. *See Tirumali v. City of Portland*, 41 Or LUBA 231, 239-42 (2002) (a building permit issued under ambiguous land standards is a "land use decision" as defined at ORS 197.015(10)(a) because it is issued under standards that require interpretation, but the building permit is not necessarily a "permit" as defined at ORS 227.160(2), the cognate to ORS 215.402(4)). In the present case, our conclusion that the county erred in processing the floodplain development permit application under its Type I procedures is based on the language of the LDO.

(1988). The county's decision to follow its Type I procedure prejudiced petitioners' substantial rights.

The county's first assignment of error is sustained.

SECOND ASSIGNMENT OF ERROR

Petitioners' second assignment of error argues that if the office and storage structures continue to serve intervenors' nonconforming asphalt paving business, much of which is unverified or no longer located on the subject property, then there is no possible basis to conclude that these structures are allowed or authorized on the subject property.

Because the county's decision must be remanded for new proceedings at which the county must address whether the existing office and storage structures are allowed or authorized on the subject property, we need and do not resolve petitioners' second assignment of error.

The county's decision is remanded.

Certificate of Mailing

I hereby certify that I served the foregoing Final Opinion and Order for LUBA No. 2017-100 on February 13, 2018, 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:

Daniel O'Connor
Huycke O'Connor Jarvis LLP
823 Alder Creek Drive
Medford, OR 97504

Joel C. Benton
Jackson County Counsel
10 S Oakdale Room 214
Medford, OR 97501

Maura C. Fahey
Crag Law Center
917 SW Oak Street, Suite 417
Portland, OR 97205

Dated this 13th day of February, 2018.

Kelly Burgess
Paralegal

Kristi Seyfried
Executive Support Specialist