

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

3  
4 HOOD RIVER SAND, GRAVEL & READY-                                   )  
5 MIX, INC., and HOWARD W. HOUSTON,                                   )  
6    )  
7                                   Petitioners,                                    )  
8    )  
9                                   and    )  
10    )  
11 MARK J. MAZESKI, and DIANA CROSBY                                    )           LUBA  
12 No. 92-039  
13 MAZESKI,    )  
14    )                                   FINAL OPINION  
15                                   Intervenors-Petitioner,                                    )           AND  
16 ORDER  
17    )  
18                                   vs.    )  
19    )  
20 CITY OF MOSIER,    )  
21    )  
22                                   Respondent.    )  
23  
24

25           Appeal from City of Mosier.

26  
27           Steven L. Pfeiffer and Michael R. Campbell, Portland,  
28 filed a petition for review on behalf of petitioners. With  
29 them on the brief was Stoel, Rives, Boley, Jones & Grey.  
30 Michael R. Campbell argued on behalf of petitioners.

31  
32           Mark J. Mazeski and Diana Crosby Mazeski, Mosier, filed  
33 a petition for review, and Mark J. Mazeski argued on his own  
34 behalf.

35  
36           No appearance by respondent.

37  
38           HOLSTUN, Referee; SHERTON, Chief Referee; KELLINGTON,  
39 Referee, participated in the decision.

40  
41                                   REMANDED    01/04/93  
42

43           You are entitled to judicial review of this Order.  
44 Judicial review is governed by the provisions of ORS  
45 197.850.

1 Opinion by Holstun.

2 **NATURE OF THE DECISION**

3 Petitioners appeal a city decision determining that an  
4 existing quarry operation qualifies as a nonconforming use.

5 **FACTS**

6 From the record it appears that Dwaine Blanchard has  
7 conducted a rock quarry operation on his property located in  
8 the City of Mosier for a number of years, as a conditional  
9 use under the zoning designation previously applied to the  
10 subject property. Record 2. At the February 12, 1992 City  
11 of Mosier City Council meeting, Mr. Blanchard requested that  
12 the city council write a letter confirming the rock quarry  
13 on his property qualifies as a nonconforming use, entitled  
14 to continue operation at its present level as long as  
15 extractable rock remains. The minutes of that meeting show  
16 the city council passed a motion to write such a letter.

17 The record includes a letter dated February 12, 1992  
18 from the mayor to Mr. Blanchard, which provides, in its  
19 entirety, as follows:

20 "This letter is to verify that the rock quarry  
21 referenced above is a pre-existing operation.  
22 Please see copy of letter from Daniel R. Meader,  
23 Planning Consultant, Tenneson Engineering  
24 Corporation, dated November 20, 1989 (copy  
25 attached)." Record 4.

26 The November 20, 1989 letter to Mr. Blanchard referred  
27 to in the mayor's February 12, 1992 letter provides, in  
28 part, as follows:

1 "As you are aware, the City is processing a  
2 proposed Comprehensive Plan Map and Zoning Map  
3 amendment along with a text change to the Mosier  
4 City Zoning Ordinance which would eliminate the  
5 present agricultural zone inside the city limits.  
6 One of the Conditional Uses in the agricultural  
7 zone is rock quarry operations.

8 "Your ownership \* \* \* is the only property which  
9 would be impacted by this amendment. As it is an  
10 ongoing quarry operation, it would be considered a  
11 non-conforming use and would be allowed to  
12 continue [in] operation. It could not be expanded  
13 beyond the existing level but could continue as  
14 long as the resource material is usable." Record  
15 5.

16 **DECISION**

17 The minutes of the city council meeting and the mayor's  
18 letter to Mr. Blanchard are sufficient to satisfy the  
19 requirements of ORS 197.015(10)(a)(A) and OAR 661-10-010(3)  
20 and 661-10-015(1) that the challenged decision be reduced to  
21 writing and be a final decision. Astoria Thunderbird v.  
22 City of Astoria, 13 Or LUBA 297, 299 (1985); see Weeks v.  
23 City of Tillamook, 113 Or App 285, 287-88, 832 P2d 1246  
24 (1992). The challenged decision determines that a  
25 particular existing rock quarry is entitled to continue as  
26 an existing nonconforming use under applicable city zoning  
27 provisions.<sup>1</sup> Such decisions are land use decisions subject

---

<sup>1</sup>Mosier Zoning Ordinance (MZO) Section 1.3(28) defines "Non-Conforming Structure or Use" as "[a] lawfully existing structure [or] use at the time this [Zoning] Ordinance or any amendment thereto becomes effective, which does not conform to the requirements of the zone in which [it is] located." Although the challenged decision does not cite or discuss MZO Section 6.1, that provision provides as follows:

1 to our review jurisdiction. Forman v. Clatsop County, 297  
2 Or 129, 132, 681 P2d 786 (1984); Dack v. City of Canby, 17  
3 Or LUBA 265, 270-71 (1988).

4 In order to determine whether Mr. Blanchard's existing  
5 quarry operation falls within the MZO's definition of  
6 nonconforming use, the city must determine whether the  
7 existing quarry operation lawfully existed at the time the  
8 city's zoning ordinance was amended. See n 1, supra.  
9 Furthermore, MZO Section 6.1 requires that the city make  
10 additional determinations regarding the continued use of the

---

"(1) A nonconforming use or structure may be continued but may not be altered or expanded. The expansion of a nonconforming use to a portion of a structure which was arranged or designed for the nonconforming use at the time of passage of this Ordinance is not an enlargement or expansion of a nonconforming use. A nonconforming structure which conforms with respect to use may be altered or expanded if the alteration or expansion does not cause the structure to deviate further from the standards of this Ordinance.

"(2) If a nonconforming use is discontinued for a period of one year, further use of the property shall conform to this Ordinance.

"(3) If a nonconforming use is replaced by another use, the new use shall conform to this Ordinance.

"(4) If a nonconforming structure or a structure containing a nonconforming use is destroyed by any cause to an extent exceeding 80 percent of its fair market value as indicated by the records of the county assessor, a future structure or use on the site shall conform to this Ordinance.

"\* \* \* \* \* [.]"

1 property.<sup>2</sup> Id. These determinations involve the exercise  
2 of sufficient legal and factual judgment and discretion to  
3 make the challenged decision a "permit," as that term is  
4 defined by ORS 227.160(2).<sup>3</sup> See Citizens Concerned v. City  
5 of Sherwood, 21 Or LUBA 515, 520 (1991); Pienovi v. City of  
6 Canby, 16 Or LUBA 604, 606 (1988).

7 In rendering a decision on a permit, the city is  
8 required to hold at least one public hearing or provide  
9 notice of the decision and an opportunity for appeal. ORS  
10 227.175(3), (5), and (10). Here the city failed to do so,  
11 and this failure requires that the decision be remanded.  
12 Citizens Concerned v. City of Sherwood, \_\_\_ Or LUBA \_\_\_  
13 (LUBA Nos. 90-091 and 90-093 December 5, 1991), slip op 11.

14 As petitioners correctly note, the city also failed to  
15 adopt findings in support of its decision.<sup>4</sup> The city did  
16 not adopt findings identifying the applicable MZO

---

<sup>2</sup>For example, the city is required under MZO 6.1(2) to determine whether the challenged use has been discontinued for a year.

<sup>3</sup>ORS 227.160(2) defines "permit" as follows:

"'Permit' means discretionary approval of a proposed development of land, under ORS 227.215 or city legislation or regulation. \* \* \*"

<sup>4</sup>ORS 227.173(2) provides as follows:

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

1 provisions, explaining how it interprets those standards and  
2 explaining why the city believes Mr. Blanchard's quarry  
3 complies with the applicable MZO provisions governing  
4 continuation of nonconforming uses. The city's failure to  
5 adopt such findings also requires that we remand the  
6 challenged decision. Astoria Thunderbird v. City of  
7 Astoria, supra.

8 Because we must remand the city's decision so that the  
9 city may comply with statutory notice and hearing  
10 requirements and adopt statutorily required findings, we do  
11 not consider whether Mr. Blanchard's existing quarry is  
12 entitled to continue as a nonconforming use under the  
13 applicable MZO standards governing nonconforming uses. That  
14 determination is for the city to make in the first instance.  
15 Citizens Concerned v. City of Sherwood, \_\_\_ Or LUBA \_\_\_  
16 (LUBA Nos. 90-091 and 90-093, December 5, 1991), slip op 11.

17 However, we do note that intervenors-petitioner offer a  
18 variety of arguments that Mr. Blanchard's quarry operation  
19 is not entitled to continue as a nonconforming use, based on  
20 ORS 215.130 and appellate court cases interpreting that  
21 statute. While ORS 215.130, appellate court cases  
22 construing that statute, and the arguments intervenors-  
23 petitioner make based on that statute may have some bearing  
24 on the city's discretion in interpreting and applying the  
25 somewhat similar standards contained in the MZO governing  
26 nonconforming uses, ORS 215.130 applies to counties, not

1 cities. Therefore, ORS 215.130 and appellate court cases  
2 interpreting and applying that statute, while perhaps  
3 suggestive of how the city might interpret and apply its  
4 zoning ordinance, are not binding on the city. See Clark v.  
5 Jackson County, 313 Or 508, 836 P2d 710 (1992); Weeks v.  
6 City of Tillamook, \_\_\_ Or App \_\_\_, \_\_\_ P2d \_\_\_ (December 30,  
7 1992); DLCD v. Coos County, 115 Or App 145, \_\_\_ P2d \_\_\_  
8 (1992); DLCD v. Coos County, \_\_\_ Or LUBA \_\_\_ (LUBA No.  
9 91-193, December 16, 1992).

10 The city's decision is remanded.