



1 Opinion by Livingston.

2 **NATURE OF THE DECISION**

3 Petitioner appeals a decision of the county board of  
4 commissioners requiring an existing gravel and hard rock  
5 extraction operation to meet current zoning code operating  
6 standards as a condition to approval of a new asphalt plant  
7 on a portion of the subject property.

8 **FACTS**

9 Petitioner has a gravel and hard rock extraction  
10 operation on a 70-acre parcel designated and zoned Special  
11 Agriculture (SA). The subject property is located on the  
12 north side of a two-lane county road. There are woodlots to  
13 the north and west. Several dwellings to the west front on  
14 the county road. The property to the south is zoned  
15 Exclusive Farm Use (EFU) and is devoted to farming. Mill  
16 Creek forms the southern boundary between the subject  
17 property and a residential area within the Turner city  
18 limits.

19 Petitioner proposes to operate the proposed asphalt  
20 plant within the pit created by previous rock extraction.  
21 Asphalt would be made using rock produced on the site and  
22 asphalt oil delivered to the site.

23 After public hearings on August 17, 1994 and September  
24 21, 1994, a county hearings officer approved the addition of  
25 the proposed asphalt batch plant to the existing gravel and  
26 hard rock extraction operation. However, the hearings

1 officer decided the entire operation must meet most of the  
2 requirements of Marion County Zoning Ordinance (MCZO)  
3 120.460, which establishes standards for mineral and  
4 aggregate operations approved after July 1, 1992.

5 Petitioner objects to the application of MCZO 120.460  
6 to the existing aggregate mining and crushing operation.  
7 Petitioner appealed the hearings officer's decision to the  
8 county board of commissioners. On February 10, 1995, the  
9 commissioners affirmed the hearings officer's decision.  
10 This appeal to LUBA followed.

11 **FIRST ASSIGNMENT OF ERROR**

12 Petitioner contends the county's decision misconstrues  
13 MCZO 114.010, 120.460 and 120.470 when it concludes the  
14 county can impose conditions on the existing gravel and hard  
15 rock extraction operation as part of the conditional use  
16 approval of the proposed asphalt batch plant.<sup>1</sup>

17 MCZO 120.470 states:

18 "Any existing mineral and aggregate related use  
19 operating under a conditional use permit shall

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<sup>1</sup>MCZO 114.010 states:

"NONCONFORMING USE OF LAND. The lawful use of land existing on the effective date of this ordinance, although such use does not conform to the regulations specified for the zone in which such land is situated, may be continued, provided that no such use shall be enlarged or increased, or be extended to occupy a greater area than that occupied by such use at the time of the passage of this ordinance, and if any such use ceases, as hereinafter provided, subsequent use of such land shall be in conformity with the regulations specified in this ordinance for the zone in which such land is situated."

1 continue to comply with the conditions of  
2 approval, and the standards in Section 120.400 to  
3 120.460 as they existed on July 1, 1992, unless  
4 the conditions or standards are removed or  
5 modified as part of obtaining a new conditional  
6 use permit.<sup>[2]</sup> The standards in Section 120.460 do  
7 not apply to such uses."<sup>3</sup>

8 The county interprets MCZO 120.470 to allow the  
9 imposition of additional conditions when an existing  
10 conditional use is expanded. The county finds that the  
11 application for the asphalt batch plant conditional use  
12 would expand a conditional use, rather than installing a new  
13 use alongside an existing use as petitioner contends. The  
14 county then concludes that the "operation as a whole must be  
15 examined." Record 20. Petitioner disagrees with the  
16 county's characterization of its proposal and the county's  
17 interpretation of MCZO 120.470. According to petitioner,  
18 the last sentence in MCZO 120.470 expressly prohibits the  
19 imposition of conditions on an expanding, existing  
20 conditional use. Petitioner acknowledges that it is  
21 appropriate to impose conditions on approval of the proposed  
22 asphalt batch plant as a new, though related, use, but  
23 maintains that new conditions must not be applied to the  
24 existing gravel and hard rock extraction operation.

25 The challenged decision concludes:

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<sup>2</sup>Both petitioner and the county assume the existing gravel and hard rock extraction operation is a permitted conditional use.

<sup>3</sup>The current version of MCZO 120.460, adopted in 1992, states detailed regulations for mineral and aggregate resource operations.

1 "When MCZO 114.010 and 120.470 are read with MCZO  
2 120.460, the provisions require the hearings  
3 officer to apply the MCZO 120.460 standards to any  
4 new use unless specifically excepted, but do not  
5 require the hearings officer to apply those  
6 standards to a preexisting conditional use unless  
7 the hearings officer chooses to do so." Record  
8 27.

9 In petitioner's words, the proper interpretation of  
10 MCZO 120.470 would be one that

11 "required the pre-1992 standards to be met until  
12 the property ceases to be used for the purposes to  
13 which those standards could apply, at which point,  
14 if a different conditional use was proposed, (for  
15 example, a solid waste disposal site \* \* \*) then  
16 new conditions appropriate to that use could be  
17 imposed." Petition for Review 6.

18 The county responds that the hearings officer's  
19 interpretation of its own ordinance, which was adopted by  
20 the county governing body, is not clearly wrong, and  
21 therefore it must be affirmed by LUBA under the highly  
22 deferential standard established by ORS 197.829 and Clark v.  
23 Jackson County, 313 Or 508, 836 P2d 710 (1992). We agree,  
24 while acknowledging that the county's interpretation of MCZO  
25 114.010, 120.460 and 120.470 leaves much to be desired.<sup>4</sup>

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<sup>4</sup>We do not endorse the distinction made between "new use" and "preexisting conditional use" in the above-quoted discussion of when MCZO 120.460 applies. The challenged decision finds the proposal would expand an existing conditional use. Under MCZO 114.010, the expanded use is required to satisfy the version of the MCZO that is current at the time of expansion. The decision cites no provision of the MCZO that would allow the county to impose additional conditions on a preexisting conditional use. MCZO 120.470 clearly does not.

1           The county apparently reasoned that the existing  
2 operation is nonconforming, in that it does not satisfy the  
3 post-1992 standards of MCZO 120.460. It then concluded that  
4 the general rule pertaining to nonconforming uses, which is  
5 stated in MCZO 114.010, prohibits the existing operation  
6 from being enlarged until it is brought into conformity with  
7 the post-1992 MCZO 120.460 standards.<sup>5</sup> This interpretation  
8 is consistent with the last sentence of MCZO 120.470, which  
9 can be understood to recognize the nonconforming status of  
10 mineral and aggregate operations in existence prior to the  
11 adoption of the post-1992 MCZO 120.460 standards.<sup>6</sup>

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If this error were on a point fundamental to the decision, it would provide a basis for remand. However, since the result is the same under a correct interpretation, the error is inconsequential.

<sup>5</sup>The finding in the challenged decision that the asphalt batch plant is an expansion of the existing mining operation, rather than a new, independent activity is critical to the application of MCZO 114.010. Petitioner does not assign error to that finding or state a legal or evidentiary challenge, although petitioner obviously disagrees with it.

<sup>6</sup>In its brief, petitioner quotes MCZO 114.110, which states:

"CONDITIONAL USES ARE NOT NONCONFORMING USES. Any use which is permitted as a conditional use as provided in this ordinance shall not be deemed a nonconforming use, but shall, without further action, be deemed a conforming use, qualified with such conditions as the Planning Commission or Hearings Officer has required."

Petitioner apparently takes issue with the county's decision for reasons related to MCZO 114.110. The challenged decision does not mention MCZO 114.110, and petitioner does not explain in its brief what significance MCZO 114.110 has for this case. Petitioner's argument with respect to MCZO 114.110 is too undeveloped for us to address it. It is not our function to supply petitioner with legal theories or to make petitioner's case for petitioner. See Deschutes Development v. Deschutes Cty., 5 Or LUBA 218 (1982).

1 The first assignment of error is denied.

2 **SECOND ASSIGNMENT OF ERROR**

3 Petitioner contends the conditions imposed by the  
4 challenged decision on the entire aggregate extraction  
5 operation as expanded to include the asphalt batch plant are  
6 not supported by adequate findings. Petitioner specifically  
7 objects to the findings in support of the conditions  
8 governing hours of operation.

9 In support of this assignment of error, petitioner  
10 relies on MCZO 119.060, which states:

11 "The Planning Commission or Hearings Officer may  
12 prescribe restrictions or limitations for the  
13 proposed conditional use but may not reduce any  
14 requirement or standard specified by this  
15 ordinance as a condition to the use. Any  
16 reduction or change of the requirements of the  
17 ordinance must be considered as varying the  
18 ordinance and must be requested and viewed as  
19 such. The Planning Commission or Hearings Officer  
20 shall impose conditions only after it has  
21 determined that such conditions are necessary for  
22 the public health, safety or general welfare, or  
23 to protect persons working or residing in the  
24 area, or the protection of property or  
25 improvements in the area. The Planning Commission  
26 or Hearings Officer may prescribe such conditions  
27 it [sic] deems necessary to fulfill the purpose  
28 and intent of this ordinance." (Emphasis added.)

29 In view of the first emphasized phrase, petitioner's  
30 reliance on the second emphasized phrase is misplaced.  
31 MCZO 120.460 specifies the current conditional use standards  
32 for mineral and aggregate operations. MCZO 120.460 begins  
33 with a statement that "[u]nless specifically deleted or  
34 modified as part of the conditional use approval the

1 following standards and requirements apply," and then lists  
2 standards governing dimensional requirements, screening and  
3 fencing, access, hours of operation, environmental  
4 standards, safety standards, site reclamation and  
5 performance agreements. The challenged decision imposes all  
6 of the MCZO 120.460 conditions, with the exception of those  
7 governing screening and fencing, to the entire operation.  
8 Because they are requirements or standards specified by the  
9 MCZO as conditions to approval of the expanded aggregate  
10 operation, MCZO 119.060 requires no further findings to  
11 justify them on public health, safety or general welfare  
12 grounds.

13 The second assignment of error is denied.

14 **THIRD ASSIGNMENT OF ERROR**

15 Petitioner contends the imposition of the MCZO 120.460  
16 conditions is not supported by substantial evidence in the  
17 record. However, once the county determines the addition of  
18 the asphalt batch plant is an expansion of the existing  
19 gravel and hard rock extraction operation, the imposition of  
20 some or all of the MCZO 120.460 conditions is justified  
21 under MCZO 119.060 and MCZO 120.460 itself. No further  
22 evidence is required.

23 The third assignment of error is denied.

24 The county's decision is affirmed.