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. 2016-050

FINAL OPINION
AND ORDER

Appeal from Jackson County.

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

No appearance by Jackson County.

H. M. Zamudio, Medford, filed the response brief and argued on behalf of intervenors-respondents. With her on the brief was Huycke O'Connor Jarvis LLP.

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

REVERSED 08/29/2016

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

Opinion by Holstun.

NATURE OF THE DECISION

Petitioners appeal a planning staff decision that was rendered without prior notice or a hearing. That decision determines that a proposed aggregate processing use is permitted in the county's Rural Residential (RR-5) zone.

FACTS

This matter has been before LUBA in various forms four times before this appeal. *Meyer v. Jackson County*, __ Or LUBA __ (LUBA No. 2015-072, January 11, 2016); *Rogue Advocates v. Jackson County*, 71 Or LUBA 148 (2015); *Rogue Advocates v. Jackson County*, 70 Or LUBA 163 (2014); *Rogue Advocates v. Jackson County*, 69 Or LUBA 271 (2014).

The RR-5-zoned property includes almost eleven acres and is located west of Interstate Highway 5 and east of the Bear Creek Greenway Trail. The property is located approximately 250 feet from Mountain View Estates, which is a mobile home retirement community.

Permanent asphalt batch plants are not an allowed use in the RR-5 zone. Jackson County Land Development Ordinance (LDO) 13.2.2(C)(2). In our most recent decision in *Meyer v. Jackson County*, LUBA affirmed a county hearings officer's decision that an asphalt batch plant located on intervenors' property constituted an unlawful alteration of a prior nonconforming concrete batch plant use. After our decision in *Meyer*, intervenors sought county approval to continue all batch plant related activities on their property, except

for the batch plant itself, and intervenors relocated the asphalt batch plant to a different property. Intervenors' application sought county approval for the following:

> "* * * (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. * * *" Record 52.

The county decision approving intervenors' application states "[n]o aggregate or surface mining is proposed and none is authorized through this review. Record 1.

Petitioners seek LUBA review of the county's decision, and for the reasons explained below we reverse the decision.

MOTIONS

Petitioners move for permission to file a reply brief to respond to intervenors' challenge to petitioner Hudson's standing and intervenors' jurisdictional challenge. The motions are granted.

STANDING

Intervenors concede that petitioner Rogue Advocates appeared below and therefore has standing to bring this appeal under ORS 197.830(2)(b). But intervenors argue that petitioner Hudson lacks standing and should be dismissed as a party in this appeal.

A single petition for review was filed by petitioners, and there is no dispute that petitioner Rogue Advocates has standing in this appeal. Given our

disposition of the first assignment of error, the county's decision must be reversed, and that result would not be affected regardless of how the standing challenge is resolved. Given that circumstance, we decline to rule on intervenors' challenge to petitioner Hudson's standing.

JURISDICTION

Intervenors argue that as relevant in this appeal LUBA's jurisdiction is limited to "land use decision[s]." ORS 197.825(1). Intervenors contend that in making the challenged decision the planner was required to exercise very little discretion and the decision therefore falls within the exception to the ORS 197.015(10) definition of "[l]and use decision" provided by ORS 197.015(10)(b)(A) for decisions that are "made under land use standards that do not require interpretation or the exercise of policy or legal judgment[.]"

As our discussion below demonstrates, the relevant LDO language clearly required interpretation by the planner and the planner was required to exercise policy or legal judgment. The decision that is before us in this appeal is a land use decision, because it concerns the application of land use regulations, and it does not qualify for the exclusion set out at ORS 197.015(10)(b)(A) or any of the other exclusions at ORS 197.015(10)(b). LUBA has jurisdiction to review the challenged decision.

FIRST ASSIGNMENT OF ERROR

In their first assignment of error, petitioners allege the county planning staff misconstrued the LDO in concluding that intervenors' proposed use is allowed as a "Mineral and aggregate" use.

A. The Proposed Use Does Not Fit Within the Mineral and Aggregate Use Category and the County Improperly Authorized Accessory Uses Without the Required Primary Use

We have combined petitioners' first and second subassignments of error for discussion. Those subassignments of error are based on several LDO sections that we set out and discuss below.

1. LDO Table 6.2-1

The LDO includes a Table that lists all uses that are allowed in the county's base zoning districts. LDO Table 6.2-1. That table lists uses by "Category" and then, within each Category, the table lists one or more "Specific Use[s]." One of the listed Category of uses is "Mineral and aggregate." The Specific Use listed for "Mineral and aggregate" is "Aggregate or surface mining, stockpiling or processing (e.g. batch plants)".[1] The Table then sets out each base zoning district and identifies whether the use is "not

[1] The reference to "batch plants" is somewhat confusing, because prior appeals have proceeded with the understanding that batch plants are not allowed in the RR-5 zone. LDO 13.2.2(C)(2) appears to resolve the confusion, because it provides that "[p]ermanent concrete and asphalt batch plants are classified as Industrial/Manufacturing uses" and are excluded from the "Mineral and aggregate" use category. The batch plant that was the subject of the prior appeals apparently was a permanent batch plant.

allowed" (by a dash), or is a Type 1, 2, 3, or 4 use in that base zoning district. For "Aggregate or surface mining stockpiling or processing * * *," Table 6.2-1 identifies the use as a Type 1 use.[2] The planning staff decision appears to conclude that the proposal set out earlier in this opinion, qualifies as "[a]ggregate or surface mining, stockpiling or processing * * *:

> "**Key Issue**: Table 6.2-1 establishes aggregate or surface mining, stockpiling or processing (e.g. batch plants) as Type 1 permitted uses in the Rural Residential zone.
>
> "The subject property is zoned Rural Residential. No aggregate or surface mining is proposed and none is authorized through this review. Stockpiling of aggregate material and processing limited to washing, screening, handling and conveying. As no onsite batching is proposed or authorized, the processed material will be hauled to a separate location for batching." Record 1.

The planner recognizes that intervenors propose no mining on the property. The planner recognizes that intervenors propose stockpiling and processing of aggregate material, but seems in the above finding to view that processing to be: "limited to washing, screening handling and conveying[.]" That view does not appear to be consistent with what is actually proposed. However, earlier, the planner described the proposal as "crushing, screening and recycling of aggregate materials; placement and use of three storage

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[2] Type 1 uses are described as "a use type [that] is allowed by-right in the respective zoning district, subject to review and approval of a plot plan showing compliance with all other applicable regulations of this Ordinance, including the Development Standards set forth in Chapter 9. Some uses may also require approval of a site development plan pursuant to Section 3.2 (e.g., new commercial or industrial uses on vacant parcels)." LDO 6.2.1(A).

container structures; fuel storage, placement and use of an employee office; scales and scale shack; stockpiling of aggregate material; placement storage and operation of essential equipment," which is consistent with the activities intervenors described in their application, as set out earlier in this opinion. Record 1.

For purposes of this appeal, the critical features of the proposed use that the planner found qualifies as "aggregate or surface mining, stockpiling, or processing * * *" are: (1) there will be no mining of aggregate or mineral resources, and (2) the material that will be crushed and screened is recycled asphalt pavement rather than mined aggregate. Apparently a prior operation on the property hauled recycled asphalt pavement (RAP) to the property for crushing and reuse. Intervenors dispute that their operation necessarily will be limited to crushing RAP for reuse, suggesting that other material may be brought to the site for crushing, screening and stockpiling. But there seems to be no question that the proposal, as approved, could be limited to crushing of RAP for reuse.

2. LDO 13.2.2(C)(1) and 13.3(6)(a)

LDO 13.2.2(C)(1) provides the following description of the "Mineral and aggregate" use category:

"*Characteristics; Accessory Uses*

> "Includes activities that primarily involve extraction of mineral and aggregate materials from below the subsoil of a site. On-site accessory uses and activities may include surface stockpiling of mined materials, processing and crushing, truck scales and office

> or caretaker's buildings necessary to conduct, or ensure the security of, on-site mining operations." (Italics in original; underscoring emphasis added.)

LDO 13.3(6)(a) provides that "[a]ggregate resources: are *naturally occurring* concentrations of stone, rock, sand gravel, decomposed granite, limestone, pumice, cinders, and other naturally occurring solid materials commonly used in road building or other construction." (Underscoring in original; italics emphasis added.)

From the above LDO sections, petitioners argue that both the "Mineral and aggregate" use category authorized in the RR-5 zone, and the Specific Use authorized in the RR-5 zone ("aggregate or surface mining, stockpiling or processing") authorize mining of naturally occurring material as the primary use and "processing" of that material as an accessory use. Petitioners contend the planner committed two errors in authorizing the proposed use because (1) the proposed use will not include any mining of "aggregate resources" as defined in LDO 13.3.6(a) and instead apparently will be using RAP as its source of material for processing (with the possibility that the site might also be used to crush and screen aggregate that has been mined elsewhere) and (2) the activities described in the application and approved by the county all are described by LDO 13.2.2(C)(1) as "accessory uses and activities," rather than

primary uses. Petitioners contend LDO 6.4.2(D) prohibits establishing accessory uses unless a primary or principal use is established first.[3]

We agree with petitioners. The express language of the LDO does not allow processing aggregate material in the absence of aggregate mining on the site, or processing of material that is not "naturally occurring material" such as RAP. The county's conclusion to the contrary misconstrues the applicable law.[4] Because the proposed activities are not permitted by the LDO, the county's decision must be reversed. OAR 661-010-0073(1)(c).[5]

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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."

[4] Petitioners mistakenly argue that our standard of review of the county planner's decision is set out at ORS 197.829(1), which sets out a deferential standard of review that applies only to the county governing body. *Siporen v. City of Medford*, 349 Or 247, 258, 243 P3d 776 (2010); *Gage v. City of Portland*, 319 Or 308, 312, 877 P2d 1187 (1994); *Tonquin Holdings, LLC v Clackamas County*, 247 Or App 719, 723, 270 P3d 397 (2012). Our standard of review of the county planner's decision in this case is set out at ORS 197.835(9)(a)(D), which requires that we determine whether the county planner "[i]mproperly construed the applicable law[.]."

[5] OAR 661-010-0073(1)(c) provides that LUBA is to reverse a decision if it "violates a provision of applicable law and is prohibited as a matter of law."

CONCLUSION

Petitioners allege additional errors in the county's decision under the third subassignment of error under the first assignment of error and under the second and third assignments of error. Because our resolution of the first and second subassignments of error under the first assignment of error requires that we reverse the county's decision, we need not and do not reach the additional subassigment and assignments of error that at most would provide additional reasons to reverse or remand the decision.[6]

The county's decision is reversed.

[6] Petitioners contend that processing RAP constitutes a "Manufacturing and Production" use that is not permitted in the RR-5 zone. Intervenors dispute that contention. We need not and do not consider the question. All that we are required to decide in this appeal is whether the proposal qualifies as a "Mineral and aggregate" use. We conclude that it does not. Whether the proposal might be approvable under some other allowed use Category is for the county to consider in the first instance.