

1 BEFORE THE LAND USE BOARD OF APPEALS

2 OF THE STATE OF OREGON

3
4 OREGON CITY LEASING, INC.,)
5 dba LONE STAR NORTHWEST,)
6) LUBA No. 92-193
7 Petitioner,)
8) FINAL OPINION
9 vs.) AND ORDER
10)
11 COLUMBIA COUNTY,)
12)
13 Respondent.)

14
15
16 On remand from the Court of Appeals.

17
18 Steven W. Abel and Mildred J. Carmack, Portland, filed
19 a brief on behalf of petitioner. With them on the brief was
20 Schwabe, Williamson & Wyatt. Steven W. Abel argued on
21 behalf of petitioner.

22
23 Michael J. Lilly, Portland, filed a response brief and
24 argued on behalf of respondent. With him on the brief was
25 Lane, Powell, Spears & Lubersky.

26
27 SHERTON, Referee; KELLINGTON, Chief Referee; HOLSTUN,
28 Referee, participated in the decision.

29
30 REMANDED 11/16/93

31
32 You are entitled to judicial review of this Order.
33 Judicial review is governed by the provisions of ORS
34 197.850.

1 Opinion by Sherton.

2 **NATURE OF THE DECISION**

3 Petitioner appeals county adoption of an ordinance
4 amending the Columbia County Surface Mining Ordinance.

5 **INTRODUCTION**

6 This case is before us on remand from the court of
7 appeals. In Oregon City Leasing, Inc. v. Columbia County,
8 ___ Or LUBA ___ (LUBA No. 92-193, March 29, 1993) (Oregon
9 City Leasing I), slip op 2-3, we described the relevant
10 facts as follows:

11 "The county first adopted an ordinance regulating
12 surface mining operations in June, 1972. That
13 ordinance is known as the Columbia County Surface
14 Mining Land Reclamation Ordinance (hereafter 1972
15 Mining Ordinance). In 1990, the county adopted an
16 ordinance purporting to amend the 1972 Mining
17 Ordinance. That ordinance is known as the
18 Columbia County Surface Mining Ordinance
19 (hereafter 1990 Mining Ordinance). [Whether the
20 1990 Mining Ordinance repeals, rather than amends,
21 the 1972 Mining Ordinance, is an issue in this
22 case.]

23 "Section 5.2 of the 1990 Mining Ordinance
24 (entitled 'Permit and Certificate Fees') requires
25 that an application for a new operating permit be
26 accompanied by an application fee established by
27 order of the board of county commissioners, not to
28 exceed \$535. Section 5.2 also requires holders of
29 operating permits to pay an annual renewal fee
30 established by order of the board of
31 commissioners, not to exceed \$385.

32 "On September 30, 1992, the board of commissioners
33 adopted the challenged ordinance amending
34 Section 5.2 of the 1990 Mining Ordinance. Amended
35 Section 5.2 (entitled 'Permit, Certificate,
36 Inspection and Regulatory Fees') sets the
37 application fee and renewal fee at \$500 and \$300,

1 respectively. Amended Section 5.2 also requires
2 holders of operating permits to pay a 'regulatory
3 fee * * * in the amount of two cents (\$0.02) per
4 ton for all minerals removed from each surface
5 mining site.' The regulatory fees collected are
6 required to be deposited into an account dedicated
7 to paying the expenses incurred by the county in
8 regulating surface mining." (Footnotes omitted.)

9 In Oregon City Leasing I, slip op at 4, we determined
10 we have jurisdiction to review the challenged decision
11 because "the 1990 Mining Ordinance, construed as a whole, is
12 a land use regulation," as that term is defined in
13 ORS 197.015(11) and, therefore, "an ordinance amending the
14 1990 Mining Ordinance is a land use decision and is subject
15 to this Board's review." We also found that whether the
16 requirements of ORS 197.610(1) and 197.615(1) for amendments
17 to acknowledged comprehensive plans and land use regulations
18 are applicable to the adoption of the challenged ordinance
19 was unclear, because it was uncertain whether the 1990
20 Mining Ordinance is an acknowledged land use regulation.
21 Oregon City Leasing I, slip op at 5. However, we concluded
22 it was unnecessary to determine whether ORS 197.610(1) and
23 197.615(1) applied, because the requirements of these
24 provisions that notice be given to the Department of Land
25 Conservation and Development (DLCD) are procedural in
26 nature, and petitioner did not demonstrate its substantial
27 rights were prejudiced by any failure to comply with

1 ORS 197.610(1) and 197.615(1).¹ Id.

2 We then considered petitioner's argument that the
3 county lost its exemption from complying with state statutes
4 and regulations governing surface mining under
5 ORS 517.780(1), because it repealed its grandfathered 1972
6 Mining Ordinance when it adopted its 1990 Mining Ordinance.²
7 According to petitioner, without this exemption from state
8 regulations, the fees imposed by the challenged ordinance
9 improperly exceed those allowed under ORS 517.780(4) and
10 517.800. However, we agreed with the county that because
11 the ordinance adopting the 1990 Mining Ordinance stated it
12 "amended" the 1972 Mining Ordinance, the 1972 Mining
13 Ordinance was not repealed. Oregon City Leasing I, slip op
14 at 8-9.

15 Petitioner appealed our decision to the court of
16 appeals. The court of appeals reversed and remanded our
17 decision. Oregon City Leasing, Inc. v. Columbia County, 121

¹Under ORS 197.835(7)(a)(B), failure to follow applicable procedural requirements is a basis for reversal or remand of the challenged decision only if petitioner's substantial rights were prejudiced by the error.

²ORS 517.780(1) provides the following exemption or "grandfather clause" for county surface mining ordinances that were in effect on July 1, 1972:

"The provisions of ORS 517.700 to 517.951 and the rules and regulations adopted thereunder [by the Department of Geology and Mineral Industries] shall not supersede any zoning laws or ordinances in effect on July 1, 1972; however, if such zoning laws or ordinances are repealed on or after July 1, 1972, the provisions of ORS 517.700 to 517.951 and the rules and regulations adopted thereunder shall be controlling. * * *" (Emphasis added.)

1 Or App 73, ___ P2d ___ (1993) (Oregon City Leasing II). The
2 court of appeals decision does not disturb our determination
3 of jurisdiction. However, the court remanded the case for
4 further proceedings because it found we erred in determining
5 the 1990 Mining Ordinance amended, rather than repealed, the
6 1972 Mining Ordinance because it expressly stated it
7 "amended" the earlier ordinance. The court concluded that
8 if the 1990 Mining Ordinance "supersedes all material
9 particulars of the [1972 Mining Ordinance, the 1972 Mining
10 Ordinance] is 'repealed,' whether or not the county used the
11 word." Oregon City Leasing II, 121 Or App at 178.

12 The court also disagreed with our conclusion in Oregon
13 City Leasing I that failure to comply with ORS 197.610(1)
14 and 197.615(1), if compliance was required, was at most a
15 procedural error. The court concluded the requirements of
16 ORS 197.610(1) and 197.615(1) are substantive, because
17 "ORS 197.610 et seq contain procedures for assuring that
18 amendments to acknowledged local land use legislation * * *
19 comply with the statewide planning goals." Oregon City
20 Leasing II, 121 Or App at 177. Consequently, the court
21 remanded the appeal to us to "determine whether ORS 197.610
22 and 197.615 apply to the [challenged] ordinance, and what
23 disposition follows if the statutes were violated." Id.

24 **DECISION**

25 **A. Amendment or Repeal of 1972 Mining Ordinance**

26 The court of appeals stated the 1990 Mining Ordinance

1 repealed the 1972 Mining Ordinance if it "supersedes all
2 material particulars" of the 1972 Mining Ordinance. Oregon
3 City Leasing II, 121 Or App at 178.

4 A revegetation "site improvement standard" at
5 section 5.02(c) of the 1972 Mining Ordinance is retained,
6 with one insignificant wording change, as a reclamation
7 standard at section 6.12(12) of the 1990 Mining Ordinance.
8 Several "operation standards" concerning setback
9 requirements for excavation and stockpiling, variances
10 thereto, and requirements for access, screening and parking
11 at sections 6.010, 6.020, 6.040, 6.050 and 6.060 of the 1972
12 Mining Ordinance are retained, with no or only minor wording
13 changes, as "operating requirements" at sections 8.3 through
14 8.7 of the 1990 Mining Ordinance. See Respondent's
15 Supplemental Memorandum on Remand, App. A-4 to A-7.

16 The court of appeals did not explain what it means by
17 "material particulars." However, under any reasonable
18 definition of the term, the operating and reclamation
19 standards referred to above must be considered "material
20 particulars" of these mining ordinances. We therefore
21 conclude the 1990 Mining Ordinance did not repeal the 1972
22 Mining Ordinance, because it does not "supersede all
23 material particulars" of the earlier ordinance.
24 Consequently, the county did not lose the exemption from
25 state regulations provided by ORS 517.780(1), and the fees
26 established by the challenged ordinance are not subject to

1 the limitation established by ORS 517.780(4) and 517.800.

2 **B. ORS 197.610 and 197.615**

3 In Oregon City Leasing I, in resolving the county's
4 challenge to our jurisdiction, we determined the 1990 Mining
5 Ordinance is a "land use regulation," as defined in
6 ORS 197.015(11).³ Further, the parties agree the 1990
7 Mining Ordinance is an acknowledged land use regulation.
8 However, the county argues the challenged ordinance should
9 not be considered an amendment to an acknowledged land use
10 regulation for the purpose of applying the requirements of
11 ORS 197.610 and 197.615 to provide notice to DLCD. The
12 county argues that because the challenged ordinance deals
13 only with fees, there is nothing for DLCD to review and
14 providing notice to DLCD would be a useless act.

15 The statutes specifically provide for instances where a
16 local government determines the statewide planning goals do
17 not apply to a proposed amendment to an acknowledged
18 comprehensive plan or land use regulation. Under
19 ORS 197.610(2), in such an instance the local government is
20 not required to provide notice of the proposed amendment to
21 DLCD as required by ORS 197.610(1), but rather must submit

³In its supplemental memorandum on remand, the county appears to question whether the 1990 Mining Ordinance is a land use regulation. However, our determination on this issue in Oregon City Leasing I was not challenged before the court of appeals. Therefore, this issue was not preserved and cannot be reopened before this Board. McKay Creek Valley v. Washington County, 122 Or App 59, 64, ___ P2d ___ (1993); see Beck v. City of Tillamook, 313 Or 148, 831 P2d 674 (1992).

1 the adopted amendment to DLCD and provide notice of the
2 decision to parties, as required by ORS 197.615(1) and (2).
3 Thus, there is no statutory basis for concluding any
4 ordinance amending provisions of an acknowledged land use
5 regulation is not subject to the requirements of ORS 197.610
6 and 197.615.

7 We conclude the challenged ordinance is an amendment to
8 an acknowledged land use regulation and, therefore, is
9 subject to the requirements of ORS 197.610 and 197.615.
10 There is no dispute the county did not provide notice to
11 DLCD, as required by ORS 197.610 and 197.615. This means
12 the county improperly construed substantive provisions of
13 the applicable law and, under ORS 197.835(7)(a)(D), the
14 challenged decision must be remanded.

15 The county's decision is remanded.