BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

TED BLOOMER, CONCERNED DURKEE CITIZENS, and BAKER CITIZENS FOR SAFE INDUSTRY, Petitioners, vs. BAKER COUNTY, Respondent, and ASH GROVE CEMENT WEST, INC., Intervenor-Respondent.	LUBA No. 89-143 FINAL OPINION AND ORDER

Appeal from Baker County.

Michael D. Axline and Jeffrey K. Steve, Eugene, filed the petition for review and argued on behalf of petitioners.

No appearance by respondent.

Steven L. Pfeiffer, Portland, filed the response brief and argued on behalf of intervenor-respondent. With him on the brief was Stoel, Rives, Boley, Jones & Grey.

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

REMANDED 07/11/90

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

Opinion by Kellington.

NATURE OF THE DECISION

Petitioners appeal an order of the Baker County Board of Commissioners (board of commissioners) affirming a decision of the county planning commission that intervenor-respondent (intervenor) is not required to obtain a conditional use permit to burn tire derived fuel at its cement manufacturing plant.

MOTION TO INTERVENE

Ash Grove Cement West, Inc. moves to intervene on the side of respondent. There is no objection to the motion, and it is allowed.

FACTS

Intervenor owns a cement manufacturing plant located on 72 acres of industrially zoned land, approximately 3 miles south of the City of Durkee. Intervenor's cement manufacturing plant has been in operation since 1979. The cement manufacturing operation utilizes a cement kiln. Intervenor's Department of Environmental Quality (DEQ) Air Contaminant Discharge Permit includes a list of authorized fuels for the kiln.

Intervenor applied to the DEQ to modify its Air Contaminant Discharge Permit. Intervenor proposes to add tire derived fuel (TDF) to the list of fuels which it may burn in its cement kiln. As a prerequisite to issuance of this permit, DEQ requires the county to issue a land use

compatibility statement that the proposal to burn TDF in the kiln is consistent with county land use regulations. OAR 660-31-026(2)(b)(B).

Petitioners took the position in letters to DEQ and the county that under the Baker County Zoning Ordinance (BCZO), a conditional use permit is required before intervenor may burn TDF in its cement kiln, and before the county could properly issue a land use compatibility statement to the DEQ.

The planning department recommended to the planning commission that no land use compatibility statement should be issued unless intervenor obtained a conditional use permit to burn TDF in the kiln. The planning commission held a public hearing to consider whether a conditional use permit is required for intervenor to burn TDF in the cement kiln. The planning commission concluded intervenor is not required to obtain a conditional use permit to burn TDF in its kiln, and approved issuance of the DEQ compatibility statement.

Petitioners appealed the planning commission's decision to the board of commissioners, which affirmed the decision of the planning commission. This appeal followed.

FIRST ASSIGNMENT OF ERROR

> "Respondents erred in holding that Ash Grove's proposal to burn tires at its Durkee, Oregon cement plant does not constitute a change in use requiring a conditional use permit pursuant to Section 601(C) of the Baker County Zoning

Ordinance (BCZO) and ORS 215.130(5)."

Manufacturing uses are permitted outright in the county's industrial zone, under BCZO 314(A)(1). However, notwithstanding BCZO 314(A)(1), BCZO 314(B)(2) requires county conditional use approval for the following "uses" within the industrial zone:

> "Any process, storage, or manufacturing which emits odors, fumes, gases, or treated liquids."

The parties agree, reading BCZO 314(A)(1) and 314(B)(2) together, that within the Baker County industrial zone manufacturing, processing, storage as well as other specified uses are permitted "outright," so long as they do not emit "odors, fumes, gases, or treated liquids." Manufacturing, processing and storage uses in the industrial zone that do emit "odors, fumes, gases, or treated liquids" require conditional use approval.

BCZO 601(A)(2) provides that the BCZO conditional use standards apply to a proposed action which "modif[ies] an existing [conditional] use." In addition, BCZO 601(C) provides the following requirement applicable to preexisting or nonconforming uses:

> "The lawful use of any building, structure or land at the time of the enactment or amendment of any Zoning Ordinance or regulation may be continued as a non-conforming use. Reasonable alteration of any such use may be permitted to continue the use. Alteration of any such use shall be permitted when necessary to comply with any lawful requirement for alteration in the use. A change of ownership or occupancy shall be permitted. In dealing with

> non-conforming and pre-existing conditions, any change in the use, in the lot area, or alteration of the structure, shall conform to the requirements for a Conditional Use. * * *"[1]

Intervenor states its use involves manufacturing processes which have continuously released emissions into the air since the inception of the cement plant in 1979. Intervenor states it was not until 1983 that the county adopted a zoning ordinance which made its manufacturing processes emitting gases and fumes conditional uses in the industrial zone. Intervenor contends the totality of its operations comprise a preexisting nonconforming use which is characterized by ongoing processes emitting gases and fumes. Intervenor argues nothing about the existing plant is proposed to change as a result of the proposal, except that an additional type of fuel will be allowed to be burned in the existing kiln. According to intervenor, the proposal to burn TDF in the existing cement kiln is neither a modification nor an alteration of its preexisting nonconforming use, and a conditional use permit is not required.

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[1]Additionally, ORS 215.130(5) provides:

> "The lawful use of any building, structure or land at the time of the enactment or amendment of any zoning ordinance or regulation may be continued. Alteration of any such use may be permitted to reasonably continue the use. Alteration of any such use shall be permitted when necessary to comply with any lawful requirement for alteration in the use. A change of ownership or occupancy shall be permitted."

BCZO 314(B)(2) requires a conditional use permit for all processing, storage and manufacturing uses contemplated in the industrial zone which will emit "odors, fumes, gases or treated liquids." It is undisputed that the proposal to burn TDF in the cement kiln will emit fumes and gases. It is also undisputed that the existing cement kiln emits fumes and gases when utilizing fuels other than TDF. The question here is whether burning TDF is an alteration or a modification of intervenor's nonconforming use within the meaning of BCZO 601(A) and (C). If introduction of the burning of TDF alters or modifies the existing use, BCZO 601(A)(2) and 601(C) require conditional use approval. If introduction of TDF does not amount to alteration or modification of the existing use, continuation of the existing nonconforming use is protected by ORS 215.130(5) and BCZO 601(C), and a conditional use permit is not required.

We are required to read the BCZO as a whole giving effect to each of its parts. Kenton Neighborhood Assoc. v. City of Portland, ___ Or LUBA ___ (LUBA No. 88-119, June 7, 1989), slip op 16; Forest Highlands Neighborhood Assoc. v. Portland, 11 Or LUBA 189, 193 (1984). Additionally, while a local government's interpretation of its ordinances is entitled to some weight, it is ultimately the responsibility of this Board to determine the correct interpretation of local ordinances. McCoy v. Linn County, 90 Or App 271, 275-

276, 752 P2d 323 (1988).

BCZO 108(B)(9)(b) defines a "use" as:

> "The purpose for which land or a structure is designed or intended or for which either is occupied or maintained. The term shall include accessory uses subordinate to the main use."

The BCZO does not define the terms "process" or "processing." However, the Webster's Third New World Dictionary (1981) defines the terms "process" and "processing" as follows:

> "* * * to subject to a particular method, system, or technique of preparation, handling or other treatment designed to effect a particular result: put through a special process * * *"

Burning TDF in the cement kiln is a particular method to effect a particular result, viz, heating of the cement kiln. Additionally, operating the cement kiln is an integral part of making cement, which is the purpose for which the land is used. Accordingly, we believe that the proposed burning of TDF in the kiln is a component of the underlying manufacturing "use" of the property.

It is reasonably clear that in the county's industrial zone, a conditional use permit is required under BCZO 314(B)(2) where a change to an existing manufacturing or processing use which does not emit gases, fumes, odors or treated liquids and, therefore, does not require a conditional use permit, will result in emissions of such substances. Here, however, the existing use does emit gases and fumes, but does not presently require a conditional use

permit because the existing activities constitute a nonconforming use. In this situation, we believe it is most consistent with the overall intent of the BCZO to control emissions of gases, fumes, odors and treated liquids, and to control alterations of nonconforming uses, to interpret the BCZO to provide that any change in a nonconforming use which results in emissions of gases, fumes, odors and treated liquids having a greater adverse impact than previous emissions of such substances, constitutes a modification or an alteration of such nonconforming use which requires a conditional use permit pursuant to BCZO 601(A)(2) and 601(C).[2] Therefore, in order to determine whether a conditional use permit is required, the county must determine whether the emissions of gases, fumes, odors, and treated liquids from the proposed use of TDF will have greater adverse impacts than those emissions previously generated by the existing nonconforming use.

The challenged order does not identify the impacts of the emissions produced by the kiln at the time the cement plant became a nonconforming use, or compare them to the

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[2]This interpretation of the BCZO is consistent with ORS 215.130(5), which provides that proposed alterations of nonconforming uses which are not necessitated by law, are subject to county regulation. ORS 215.130(9) defines alteration of a nonconforming use as follows:

> "(a) A change in the use of no greater adverse impact to the neighborhood; and
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> "(b) A change in the structure or physical improvements of no greater adverse impact to the neighborhood."

impacts of the emissions which would be produced by the proposed burning of TDF.[3] See City of Corvallis v. Benton County, 16 Or LUBA 488 (1988) (determination of the scope of a nonconforming use, in order to determine whether a development proposal constitutes an alteration of such nonconforming use, requires comparison of the use which existed on the site when restrictive zoning was applied, with the use which will result from the proposal).

Under these circumstances, we conclude the county erred in determining the proposal to burn TDF in the cement kiln does not require conditional use approval, without determining that the emissions from the proposed use of TDF will not have greater adverse impacts than the existing nonconforming use.

The first assignment of error is sustained.

SECOND ASSIGNMENT OF ERROR

> "Respondents erred in not remanding the proceedings back to the Baker County Planning Commission as required by Section 1104(E) of the Baker County Zoning Ordinance to consider new information not presented."

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[3]The challenged order does not identify whether the cement manufacturing use established before the effective date of the otherwise applicable zoning ordinances has, by its nature, fluctuating emissions levels and whether the emissions associated with the proposal to burn TDF are within those fluctuations. See Polk County v, Martin, 292 Or 69, 76, 636 P2d 952 (1981) (the nature and extent of prior use determines the scope of permissible continued nonconforming use activity after the effective date of restrictive zoning ordinances.) It is possible that the scope of the existing nonconforming use encompasses fluctuations and, therefore, includes a range of emissions impacts.

BCZO 1104(E) states:

> "The County Court shall remand back to the Planning Commission for rehearing any appeal in which new information is revealed which was not a part of the original record and which might have influenced the decision."

Petitioners argue they submitted new information regarding toxicity of emissions resulting from burning TDF in the cement kiln to the county court because they were not allowed to present that evidence to the planning commission. Petitioners contend the county court erroneously rejected this evidence concerning emissions, and erroneously refused to remand the appeal below to the planning commission under BCZO 1104(E).

Intervenor argues that the county court had no responsibility to consider the evidence petitioners offered at the hearing before the county court or to remand the proceedings to the planning commission, because the offered emissions evidence was available to petitioners at the time of the planning commission's review.

We agree with intervenor that BCZO 1104(E) requires remand to the planning commission from the county court only if evidence is presented to the county court which could not have been presented to the planning commission. We disagree with intervenor's argument, however, that the evidence presented to the county court must have been unavailable to petitioners at the time of the planning commission hearing.

We determined in our order on record objections that

the disputed evidence was specifically rejected by the county court. Bloomer v. Baker County, ___ Or LUBA ____ (LUBA No. 89-143, Order on Record Objections, March 9, 1990), slip op 13. It is also reasonably clear that the planning commission was uncertain whether it had the power to consider or accept the disputed evidence, and that the planning commission refused to consider the emissions evidence.[4] Where petitioners are not allowed to present disputed evidence to the planning commission, and the disputed evidence is relevant and is offered to the county court in an appeal of a planning commission decision, BCZO 1104(E) requires that the proceeding be remanded to the planning commission. We determined under the first assignment of error that evidence regarding the emissions of gas, fumes, odors and treated liquids produced by burning TDF in the cement kiln, is relevant to determining whether a conditional use permit is required to burn TDF in the cement kiln. Accordingly, we conclude that under under BCZO 1104(E), the county court should have remanded the appeal below to the planning commission to consider petitioners' evidence concerning such emissions.

The second assignment of error is sustained.

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[4]The minutes of the planning commission hearings show that the planning commission acknowledged that opponents of the proposal were told by the planning department that no evidence of emissions would be allowed to be presented to the planning commission. The planning commission did nothing to change that position.

The county's decision is remanded.