

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)
7 Petitioner,) LUBA No. 92-193
8)
9 vs.) FINAL OPINION
10) AND ORDER
11 COLUMBIA COUNTY,)
12)
13 Respondent.)

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15
16 Appeal from Columbia County.

17
18 Steven W. Abel, Portland, filed the petition for review
19 and argued on behalf of petitioner. With him on the brief
20 was Schwabe, Williamson & Wyatt.

21
22 Michael J. Lilly, Portland, and John K. Knight, County
23 Counsel, St. Helens, filed the response brief. Michael J.
24 Lilly argued on behalf of respondent. With them on the
25 brief was Lane, Powell, Spears & Lubersky.

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

29
30 AFFIRMED 03/29/93

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 a county ordinance amending the
4 Columbia County Surface Mining Ordinance.

5 **FACTS**

6 The county first adopted an ordinance regulating
7 surface mining operations in June, 1972. That ordinance is
8 known as the Columbia County Surface Mining Land Reclamation
9 Ordinance (hereafter 1972 Mining Ordinance). In 1990, the
10 county adopted an ordinance purporting to amend the 1972
11 Mining Ordinance.¹ That ordinance is known as the Columbia
12 County Surface Mining Ordinance (hereafter 1990 Mining
13 Ordinance).

14 Section 5.2 of the 1990 Mining Ordinance (entitled
15 "Permit and Certificate Fees") requires that an application
16 for a new operating permit be accompanied by an application
17 fee established by order of the board of county
18 commissioners, not to exceed \$535. Section 5.2 also
19 requires holders of operating permits to pay an annual
20 renewal fee established by order of the board of
21 commissioners, not to exceed \$385.²

22 On September 30, 1992, the board of commissioners

¹Whether the 1990 Mining Ordinance repeals, rather than amends, the 1972 Mining Ordinance, is the subject of the fourth assignment of error, infra.

²Section 5.2 of the 1990 Mining Ordinance also allows the county to charge a fee of \$100 for certain inspections of mining sites. However, this aspect of Section 5.2 is not affected by the challenged ordinance.

1 adopted the challenged ordinance amending Section 5.2 of the
2 1990 Mining Ordinance. Amended Section 5.2 (entitled
3 "Permit, Certificate, Inspection and Regulatory Fees") sets
4 the application fee and renewal fee at \$500 and \$300,
5 respectively. Amended Section 5.2 also requires holders of
6 operating permits to pay a "regulatory fee * * * in the
7 amount of two cents (\$0.02) per ton for all minerals removed
8 from each surface mining site." The regulatory fees
9 collected are required to be deposited into an account
10 dedicated to paying the expenses incurred by the county in
11 regulating surface mining.

12 **JURISDICTION**

13 Respondent concedes that "much of the 1990 [Mining]
14 Ordinance is a land use regulation." Respondent's Brief 2.
15 However, respondent argues that certain portions of the 1990
16 Mining Ordinance, including the fee provisions of
17 Section 5.2, do not implement the county comprehensive plan
18 and, therefore, are not land use regulations. Therefore,
19 according to respondent, an ordinance amending these
20 portions of the 1990 Mining Ordinance does not amend a land
21 use regulation. Respondent further contends the challenged
22 ordinance amending Section 5.2 of the 1990 Mining Ordinance
23 is not itself a land use regulation.

24 This Board has exclusive jurisdiction to review "land
25 use decisions." ORS 197.825(1). ORS 197.015(10)(a)(A)
26 defines "land use decision" to include:

1 "A final decision or determination made by a local
2 government * * * that concerns the * * * amendment
3 * * * of:

4 "* * * * *

5 "(iii) A land use regulation; * * *

6 "* * * * *."

7 ORS 197.015(11) defines "land use regulation" as:

8 "[A]ny local government zoning ordinance, land
9 division ordinance * * * or similar general
10 ordinance establishing standards for implementing
11 a comprehensive plan."

12 As pointed out by petitioner, the 1990 Mining Ordinance
13 establishes standards for surface mining operations and
14 reclamation of surface-mined land that implement county
15 comprehensive plan policies on surface mining. It may also
16 be true, as alleged by respondent, that discrete portions of
17 the 1990 Mining Ordinance, when read in isolation, do not
18 establish standards for implementing the comprehensive plan.
19 However, the above quoted definition of land use regulation
20 refers to entire local government ordinances, not isolated
21 provisions within such ordinances. We conclude the 1990
22 Mining Ordinance, construed as a whole, is a land use
23 regulation. Accordingly, the challenged ordinance amending
24 the 1990 Mining Ordinance is a land use decision and is
25 subject to this Board's review.

26 **FIRST ASSIGNMENT OF ERROR**

27 The county's comprehensive plan and land use
28 regulations were acknowledged by the Land Conservation and

1 Development Commission (LCDC) pursuant to ORS 197.251 in
2 1985. LCDC Acknowledgment Order 85-ACK-135. Petitioner
3 contends the county erroneously failed to follow the
4 procedural requirements of ORS 197.610(1) and 197.615(1) for
5 postacknowledgment comprehensive plan and land use
6 regulation amendments in adopting the challenged ordinance.
7 ORS 197.610(1) and 197.615(1) require the county to give
8 notice of proposed and adopted postacknowledgment amendments
9 to the director of the Department of Land Conservation and
10 Development (DLCD).

11 Whether the requirements of ORS 197.610(1) and
12 197.615(1) were applicable to the county proceeding leading
13 to the adoption of the challenged ordinance is unclear.³
14 However, the requirements imposed by these statutory
15 provisions are procedural in nature. We are authorized to
16 reverse or remand the challenged decision for failure to
17 follow applicable procedures only if the error caused
18 prejudice to petitioner's substantial rights.
19 ORS 197.835(7)(a)(B). We have stated the substantial rights
20 of petitioner referred to by ORS 197.835(7)(a)(B) are "the

³The procedural requirements of ORS 197.610(1) and 197.615(1) apply to the amendment of acknowledged land use regulations and the adoption of new land use regulations. It is not entirely clear that the 1990 Mining Ordinance is itself an acknowledged land use regulation, as it was adopted after the initial acknowledgment of the county plan and land use regulations in 1985, and it is uncertain whether the county followed postacknowledgment amendment procedures when it adopted the 1990 Mining Ordinance. Whether the ordinance challenged in this appeal is itself a land use regulation is also uncertain.

1 rights to an adequate opportunity to prepare and submit
2 [its] case and a full and fair hearing." Torgeson v. City
3 of Canby, 19 Or LUBA 511, 520 (1990); Muller v. Polk County,
4 16 Or LUBA 771, 775 (1988).

5 Here, petitioner participated in the public hearing
6 before the board of commissioners on the proposed amendment
7 to the 1990 Mining Ordinance. Record 41. Petitioner argues
8 only that the county's failure to comply with ORS 197.610(1)
9 may have prevented DLCD from participating in the county
10 proceedings. Petitioner does not argue that its ability to
11 prepare and submit its case was impeded by the county's
12 failure to notify DLCD, or that it did not receive a full
13 and fair hearing before the board of commissioners.

14 The first assignment of error is denied.

15 **SECOND AND THIRD ASSIGNMENTS OF ERROR**

16 In these assignments of error, petitioner argues the
17 county erred by failing to adopt findings demonstrating that
18 the challenged ordinance complies with the Statewide
19 Planning Goals and the Columbia County Comprehensive Plan.
20 Krueger v. Josephine County, 17 Or LUBA 418, 425-26 (1989)
21 (county failure to adopt findings demonstrating compliance
22 of quasi-judicial zone change with goals requires remand).
23 However, petitioner does not argue the challenged decision
24 fails to comply with any particular goal or plan provision.

25 There is no dispute that the challenged ordinance is a
26 legislative, rather than a quasi-judicial, decision. No

1 statute or appellate court case requires that all
2 legislative land use decisions be supported by findings.
3 Riverbend Landfill Company v. Yamhill County, ___ Or LUBA
4 ___ (LUBA No. 92-114, February 6, 1993), slip op 8; Von
5 Lubken v. Hood River County, 22 Or LUBA 307, 313 (1991).
6 Where petitioners allege that a challenged legislative
7 decision violates particular standards, for this Board to
8 perform its review function, it is necessary either that the
9 legislative land use decision be supported by findings of
10 compliance with the relevant legal standards or that
11 respondents explain in their briefs how the challenged
12 legislative decision complies with the applicable legal
13 standards. Id., 22 Or LUBA at 314; Jentzch v. City of
14 Sherwood, 20 Or LUBA 575, 582 n 11 (1991). However, absent
15 such allegations that a legislative decision violates
16 particular legal standards, a local government's failure to
17 adopt findings in support of that legislative decision
18 addressing the goals and county comprehensive plan is not,
19 of itself, a basis for reversal or remand of the decision.

20 The second and third assignments of error are denied.

21 **FOURTH ASSIGNMENT OF ERROR**

22 State legislation regulating surface mining and the
23 reclamation of surface-mined lands was adopted in 1971 and
24 is codified at ORS 517.750 to 517.900. Or Laws 1971,
25 ch 719. ORS 517.780(1) provides the following exemption or
26 "grandfather clause" for county surface mining ordinances

1 that were in effect on July 1, 1972:

2 "The provisions of ORS 517.700 to 517.951 and the
3 rules and regulations adopted thereunder [by the
4 Department of Geology and Mineral Industries]
5 shall not supersede any zoning laws or ordinances
6 in effect on July 1, 1972; however, if such zoning
7 laws or ordinances are repealed on or after
8 July 1, 1972, the provisions of ORS 517.700 to
9 517.951 and the rules and regulations adopted
10 thereunder shall be controlling. * * *" (Emphasis
11 added.)

12 Petitioner contends the 1990 Mining Ordinance
13 effectively repealed the 1972 Mining Ordinance and,
14 therefore, the ORS 517.780(1) exemption no longer applies.
15 According to petitioner, if the ORS 517.780(1) exemption no
16 longer applies, the county may not impose fees on surface
17 mining greater than those allowed under ORS 517.780(4) and
18 517.800. Petitioner argues the "regulatory fee" imposed by
19 the challenged ordinance improperly allows the total fees
20 imposed on surface mining operations to exceed what is
21 allowed by ORS 517.800.

22 Petitioner points out that the 1990 Mining Ordinance is
23 a near total rewrite of the 1972 Mining Ordinance.
24 Petitioner concedes the 1971 legislation that enacted
25 ORS 517.780(1) was originally drafted to provide that if a
26 local government surface mining ordinance was amended or
27 repealed after July 1, 1972, the exemption would be lost,
28 and was later changed to provide that the exemption is lost
29 only if the ordinance is repealed. However, petitioner
30 argues this change was made to allow only de minimis changes

1 to a local ordinance, not a total rewrite such as the
2 county's 1990 Mining Ordinance.

3 Ordinance No. 90-11, which adopted the 1990 Mining
4 Ordinance, is captioned "In the Matter of Amending the
5 Columbia County Surface Mining Land Reclamation Ordinance of
6 June 28, 1972." (Emphasis added.) Sections 2 and 3 of
7 Ordinance No. 90-11 state the 1990 Mining Ordinance is
8 adopted pursuant to Section 8.070 (Amendments) of the 1972
9 Mining Ordinance, and for the purpose of amending the 1972
10 Mining Ordinance "to provide for more effective regulation
11 of surface mining and reclamation of surface-mined lands in
12 Columbia County." Section 1.4(6) of the 1990 Mining
13 Ordinance defines "amended ordinance" to mean "the Columbia
14 County Surface Mining Land Reclamation Ordinance, which was
15 enacted on June 28, 1972, as amended by Ordinance
16 No. 90-11." (Emphasis added.)

17 The above described references in the county's 1990
18 enactment clearly establish that in adopting the 1990 Mining
19 Ordinance, the county amended, rather than repealed, the
20 1972 Mining Ordinance. ORS 517.780(1) provides that the
21 county's exemption from ORS 517.700 to 517.951 expires only
22 if the county surface mining ordinance in effect on July 1,
23 1972 is repealed. The legislative history cited by the
24 parties indicates the legislature specifically chose to
25 delete a provision under which amendment of a county mining
26 ordinance would have resulted in loss of the ORS 517.780(1)

1 exemption. We have no basis to conclude that anything less
2 than an express repeal of the 1972 Mining Ordinance will
3 result in loss of the county's exemption under
4 ORS 517.780(1). Therefore, the ordinance challenged in this
5 appeal is not subject to the fee limitations established by
6 ORS 517.780(4) and 517.800.

7 The fourth assignment of error is denied.

8 The county's decision is affirmed.