

BEFORE THE LAND USE BOARD OF APPEALS
OF THE STATE OF OREGON

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28
29
30
31
32
33
34
35
36
37
38
39
40
41
42
43
44
45

JOHN WILLIAMS,)
)
Petitioner,)
)
and)
)
HAZEL STEVENS and VIOLA-FISCHER'S)
MILL CPO,)
)
Intervenors-Petitioner,)
)
vs.)
)
CLACKAMAS COUNTY,)
)
Respondent,)
)
and)
)
PARKER-NORTHWEST PAVING CO.,)
ESTACADA ROCK PRODUCTS, INC.,)
PORTER W. YETT CO., MT. HOOD ROCK)
PRODUCTS, TIGARD SAND & GRAVEL)
CO., INC., and OREGON CONCRETE &)
AGGREGATE PRODUCERS ASSOCIATION,)
INC.,)
)
Intervenors-Respondent.)
_____)
JOHN TORGESON and SANDE TORGESON,)
)
Petitioners,)
)
and)
)
HAZEL STEVENS and VIOLA-FISCHER'S)
MILL CPO,)
)
Intervenors-Petitioner,)
No. 93-058)
)

LUBA No. 93-046

FINAL OPINION
AND ORDER

LUBA

1 vs.)
2)
3 CLACKAMAS COUNTY,)
4)
5 Respondent,)
6)
7 and)

1 PARKER-NORTHWEST PAVING CO.,)
2 ESTACADA ROCK PRODUCTS, INC.,)
3 PORTER W. YETT CO., MT. HOOD ROCK)
4 PRODUCTS, TIGARD SAND & GRAVEL)
5 CO., INC., and OREGON CONCRETE &)
6 AGGREGATE PRODUCERS ASSOCIATION,)
7 INC.,)
8)
9 Intervenor-Respondent.)

10

11

12 Appeal from Clackamas County.

13

14 Edward J. Sullivan and Daniel H. Kearns, Portland,
15 filed a petition for review. With them on the brief was
16 Preston Gates & Ellis. Edward J. Sullivan argued on behalf
17 of petitioner Williams.

18

19 John Torgeson and Sande Torgeson, Canby, filed a
20 petition for review and argued on their own behalf.

21

22 Hazel Stevens, Eagle Creek, filed a petition for
23 review.

24

25 Jacqueline A. Tommas, Estacada, filed a petition for
26 review and argued on behalf of intervenor-petitioner Viola-
27 Fischer's Mill CPO.

28

29 Michael E. Judd, Chief Assistant County Counsel, Oregon
30 City, filed a response brief and argued on behalf of
31 respondent.

32

33 Frank M. Parisi and Peter Livingston, Portland, filed a
34 response brief. With them on the brief was Lane Powell
35 Spears Lubersky. Peter Livingston argued on behalf of
36 intervenors-respondent Parker-Northwest Paving Co., Estacada
37 Rock Products, Inc., and Oregon Concrete & Aggregate
38 Producers Association, Inc.

39

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

42

43 AFFIRMED (LUBA No. 93-046) 08/11/94

44 DISMISSED (LUBA No. 93-058)

45

1 You are entitled to judicial review of this Order.
2 Judicial review is governed by the provisions of ORS
3 197.850.

1 Opinion by Kellington.

2 **NATURE OF THE DECISION**

3 The challenged decision amends Clackamas County
4 Comprehensive Plan (plan) and Zoning and Development
5 Ordinance (ZDO) provisions related to mineral and aggregate
6 resources.

7 **MOTIONS TO INTERVENE**

8 Hazel Stevens and Viola-Fischer's Mill CPO (Community
9 Planning Organization) move to intervene on the side of
10 petitioners in this appeal proceeding. There is no
11 opposition to the motions, and they are allowed.

12 Parker-Northwest Paving Co., Estacada Rock Products,
13 Inc., Porter W. Yett Co., Mt. Hood Rock Products, Tigard
14 Sand & Gravel Co., Inc., and Oregon Concrete & Aggregate
15 Producers Association, Inc. move to intervene on the side of
16 respondent in this appeal proceeding. There is no
17 opposition to the motions, and they are allowed.

18 **FACTS**

19 The following facts are taken from page 2 of the
20 county's motion to dismiss:

21 "Clackamas County received its periodic review
22 notice in November, 1987. The County submitted
23 its proposed final periodic review order to the
24 Department of Land Conservation and Development
25 [(DLCD)] in December, 1989. That proposed order
26 included only a brief reference to mineral and
27 aggregate resources. DLCD * * * directed that
28 further work be done. The County proceeded to
29 revise its Plan and ZDO in this and numerous other
30 areas. In March, 1992, the County provided DLCD
31 with a specific work program for mineral and

1 aggregate resources. [DLCD] approved the work
2 program, giving the County until April, 1993 to
3 complete periodic review. Pursuant to the work
4 program, the County held public hearings and
5 adopted the challenged Plan and ZDO amendments in
6 February, 1993. In the County Planning Director's
7 March 24, 1994, update letter, this action was
8 reported to DLCD, along with further plans for
9 implementation of Goal 5." (Exhibit citations
10 omitted.)

11 **PETITIONERS TORGESON'S STANDING TO APPEAL**

12 Petitioners Torgeson did not appear during the local
13 proceedings leading to the adoption of the challenged
14 decision. Therefore, the county argues, petitioners
15 Torgeson lack standing to appeal the challenged decision.
16 ORS 197.830(2)(b).

17 The challenged decision is a legislative,
18 postacknowledgment plan and land use regulation amendment.
19 Therefore, there was no right to individual notice of a
20 public hearing or right to request a public hearing such
21 that the county's failure to provide such individual written
22 notice would excuse petitioners Torgeson's failure to appear
23 below. Flowers v. Klamath County, 98 Or App 384, 389,
24 780 P2d 227, rev den 308 Or 74 (1989). Under the statutes
25 in effect in 1989,¹ plan and land use regulation amendments
26 submitted to DLCD as part of periodic review were adopted
27 through the postacknowledgment amendment process under ORS
28 197.610 to 197.625. Petitioners Torgeson may be excused

¹We explain below why the 1989 statutory provisions apply.

1 from failing to appear during the local proceedings if
2 either (1) they requested, in writing, notice of the
3 challenged decision under ORS 197.615(2)(a) and such notice
4 was not mailed to them more than 21 days before they filed
5 their notice of intent to appeal (ORS 197.830(8)); (2) the
6 notice of the proposed amendment given under ORS 197.610 did
7 not reasonably describe the nature of the local government's
8 final decision (ORS 197.620(2)); or (3) the published notice
9 of the county's public hearing did not reasonably describe
10 the challenged decision (ORS 197.830(3)).

11 The Torgesons did not request, in writing, notice of
12 the challenged decision. The Torgesons do not argue that
13 the notice provided by the DLCD director under ORS 197.610
14 was inadequate. Further, the county notice of public
15 hearing did adequately describe the challenged decision.
16 Therefore, no exception applies to excuse petitioners
17 Torgeson from failing to appear during the local
18 proceedings. Petitioners Torgeson lack standing, and their
19 appeal is dismissed.

20 **MOTION TO DISMISS**

21 The county moves to dismiss this appeal, arguing the
22 issues on appeal are subject to review by DLCD as part of
23 periodic review and, therefore, are excluded from LUBA's
24 scope of review.

25 **A. Background**

26 An assortment of statutes affect this Board's authority

1 over matters subject to periodic review. We explain the
2 relevant law below.

3 In 1989, the statutory provisions excluding matters
4 subject to DLCD's periodic review authority from LUBA's
5 jurisdiction stated in a relatively straightforward manner
6 that LUBA's jurisdiction "does not include those matters
7 over which [DLCD] has review authority under * * *
8 ORS 197.640 to 197.650."² At that time, ORS 197.640 to
9 197.647 were the statutory provisions governing DLCD's
10 periodic review of local plans and land use regulations.³
11 However, in 1991, ORS 197.640 to 197.647 were repealed and
12 replaced by a new periodic review process, codified at ORS
13 197.628 to 197.646.⁴ Or Laws 1991, ch 612, §§ 2-7. Oregon
14 Laws 1991, chapter 612, section 8 allowed local governments
15 that had previously submitted a proposed periodic review
16 order to DLCD to "complete periodic review under the
17 existing process or the periodic review process set forth in

²In 1989, LUBA also had authority to defer its review of a decision subject to periodic review until periodic review was completed. ORS 197.840(1)(a)(B)(1989).

³ORS 197.649 authorized LCDC to establish fees for notices given pursuant to the postacknowledgment amendment and periodic review statutes. ORS 197.650 governed the appeal of all types of LCDC orders to the court of appeals.

⁴The legislature added the new periodic review provisions to ORS Chapter 197. However, individual section numbers within ORS Chapter 197 were not assigned by the legislature, but rather by the compiler.

1 this act."⁵ There is no dispute that in this case, the
2 county submitted a proposed periodic review order pursuant
3 to the 1989 process prior to the enactment of the 1991
4 legislation, and is still engaged in periodic review.

5 LUBA's authority to review matters subject to periodic
6 review was affected by the statutory metamorphosis of the
7 periodic review process. As stated above, in 1989 LUBA
8 lacked authority over matters subject to periodic review
9 under ORS 197.640 to 197.647. ORS 197.825(2)(1989).
10 However, notwithstanding that the 1989 periodic review
11 process codified at ORS 197.640 to 197.647 was repealed by
12 the legislature in 1991, the reference in ORS 197.825(2)(c),
13 to matters over which DLCD has review authority under "ORS
14 197.640 to 197.650" being excluded from LUBA's jurisdiction,
15 was not changed by the legislature. Because the periodic
16 review provisions formerly codified at ORS 197.640 to
17 197.647 were replaced with new periodic review provisions
18 codified at ORS 197.628 to 197.644, it is unclear whether
19 matters subject to periodic review under the 1991 periodic
20 review process are excluded from LUBA's jurisdiction.⁶ In

⁵Under ORS 197.640(5)(1989), a local government initiated the local periodic review proceedings by submitted to DLCD a proposed periodic review order at least 90 days before the final local hearing on that proposed periodic review order.

⁶One of the new periodic review provisions enacted in 1991 provides that LCDC has exclusive jurisdiction to review "the evaluation, work program and completed work program tasks as set forth [in the new periodic review statutes.]" ORS 197.644(2)(1991).

1 addition, LUBA's authority to defer its review while a
2 decision is subject to periodic review was repealed by the
3 legislature in 1991. Or Laws 1991, ch 612, § 19. This
4 contributes to the lack of clarity concerning the
5 legislature's intention regarding LUBA's review of local
6 government decisions subject to periodic review.

7 In an apparent attempt to make the codified text of
8 ORS 197.825(2)(c)(1991) consistent with the 1991 repeal of
9 ORS 197.640 to 197.647, the compiler of the ORS changed the
10 codified text to read that LUBA's jurisdiction:

11 "Does not include matters over which [DLCD] has
12 review authority under ORS * * * 197.649 and
13 197.650." (Emphasis supplied.)

14 However, this only made matters more confusing. As noted
15 above, ORS 197.649 relates to LCDC notice fees and ORS
16 197.650 relates to appeals of LCDC orders to the court of
17 appeals.

18 **B. Analysis**

19 The county and intervenors-respondent contend LUBA
20 lacks jurisdiction over the challenged decision because it
21 involves issues subject to periodic review. Petitioners
22 argue LUBA has jurisdiction over the challenged decision,
23 regardless of the fact that issues raised in this appeal may
24 also be subject to periodic review. Both sides present
25 legally plausible arguments concerning the Board's
26 jurisdiction over matters subject to periodic review under
27 the above described statutory provisions.

1 This Board is bound by the statutes as the legislature
2 adopted them, not as they are changed by the compiler. In
3 addition, because the issue here concerns our jurisdiction,
4 the applicable statutory provisions are those in effect in
5 March, 1993, when the notices of intent to appeal were filed
6 in this case. See Warren v. City of Aurora, 23 Or LUBA 507,
7 509 (1992).

8 The statutes in effect at the time the notices of
9 intent to appeal were filed with this Board are the 1991
10 statutory provisions. Under the 1991 statutory provisions,
11 Clackamas County had the power to elect to proceed under the
12 1989 periodic review process.⁷ There is no dispute that
13 Clackamas County made such an election. Therefore, while it
14 is not clear, we conclude the Board's review is governed by
15 the statutes in effect in 1989, including the 1989 statutory
16 provisions concerning the Board's jurisdiction.

17 In 1989, matters subject to periodic review were
18 excluded from this Board's jurisdiction. Under
19 ORS 197.640(3)(1989), matters subject to periodic review
20 included a determination of whether:

21 "[p]reviously acknowledged provisions of the
22 comprehensive plan or land use regulations do not
23 comply with the [Statewide Planning Goals
24 (goals),] because of goals subsequently adopted or

⁷The 1991 statutory provisions authorizing local governments to elect to use the 1989 periodic review process "sunsetting" on December 31, 1993, after the notice of intent to appeal initiating this appeal proceeding was filed. Or Laws 1993, ch 435.

1 statewide land use policies adopted as rules
2 interpreting goals."

3 This has been interpreted to mean that where a plan or land
4 use regulation amendment is subject to periodic review, DLCD
5 has review authority over matters concerning the amendment's
6 compliance with the statewide planning goals.⁸ 1000 Friends
7 of Oregon v. City of Troutdale, 23 Or LUBA 219 (1992).

8 All of intervenor-petitioner Viola-Fischer's Mill CPO's
9 assignments of error; all of intervenor-petitioner Stevens'
10 assignments of error, except for subassignment (A) of the
11 first assignment; and all of petitioner Williams'
12 assignments of error, except for the fifth assignment,
13 contend the challenged decision fails to comply with the
14 goals or unamended portions of the county's comprehensive
15 plan related to goal compliance issues. Therefore, we do
16 not consider those issues. However, because we have
17 jurisdiction to review petitioner Williams' fifth assignment
18 of error and subassignment (A) of intervenor-petitioner
19 Steven's first assignment of error, the motion to dismiss is
20 denied.

21 **FIFTH ASSIGNMENT OF ERROR (WILLIAMS)**

22 "The county acted inconsistent[ly] with * * *
23 state statutes governing land use and mining by
24 improperly defining the term 'mining' to exclude

⁸Through Goal 2 (Land Use Planning), DLCD has authority to assure as part of the periodic review process that plan and land use regulation amendments are consistent with other, portions of the plan and land use regulations.

1 certain activities."⁹

2 The portion of the challenged decision creating the
3 Mineral and Aggregate Resources Zoning District, proposed
4 ZDO 708.02(A), excludes certain activities from the county
5 definition of "mining," as follows:

6 "Mining does not include excavation or grading
7 conducted in the process of farming, forestry or
8 cemetery operations or other onsite construction
9 when no more than 5000 cubic yards of such
10 materials are removed from the property for
11 compensation. Mining also does not include
12 removal of more than 5000 cubic yards of such
13 minerals from the property for compensation when
14 the construction activities are authorized by a
15 building permit."

16 In other words, mining that occurs in the process of
17 farming, forestry or cemetery operations or "other onsite
18 construction," on land zoned Mineral and Aggregate
19 Resources, where no more than 5,000 cubic yards are removed
20 for compensation, is not considered mining.

21 Petitioner Williams contends excluding these activities
22 from the county definition of mining is inconsistent with
23 ORS 215.298, which provides:

24 "(1) For purposes of ORS * * * 215.283(2)
25 [regarding mining on land zoned for exclusive

⁹One of petitioner's contentions is the challenged decision is inconsistent with ORS 517.750 to 517.900. However, our review does not include the alleged violation of ORS 517.750 to 517.900 because these statutes must be addressed as part of the Goal 5 (Open Spaces, Scenic and Historic Areas and Natural Resources) compliance process. OAR 660-16-030(1). Therefore, the determination of whether the challenged decision is consistent with ORS 517.750 to 517.900 is a matter subject to DLCD's periodic review.

1 farm use] a land use permit is required for
2 mining more than 1,000 cubic yards of
3 material or excavation preparatory to mining
4 of a surface area of more than one acre. A
5 county may set standards for a lower volume
6 or smaller surface area than set forth in
7 this section.

8 "(2) A permit for mining of aggregate shall be
9 issued only for a site included on an
10 acknowledged comprehensive plan.

11 "(3) For purposes of ORS * * * 215.283(2) and this
12 section 'mining' includes all or any part of
13 the process of mining by the removal of
14 overburden and the extraction of natural
15 mineral deposits thereby exposed by any
16 method including open-pit mining operations,
17 auger mining operations, processing, surface
18 impacts of underground mining, production of
19 surface mining refuse and the construction of
20 adjacent off-site borrow pits except those
21 constructed for use as access roads.
22 'Mining' does not include excavations of
23 sand, gravel, clay, rock or other similar
24 materials conducted by a landowner or tenant
25 on the landowner or tenant's property for the
26 primary purpose of reconstruction or
27 maintenance of access roads and excavation or
28 grading operations conducted in the process
29 of farming or cemetery operations, onsite
30 road construction or other onsite
31 construction or nonsurface impacts of
32 underground mines."

33 ORS 215.298 relates only to mining activities on land
34 zoned for exclusive farm use. As we understand it, the
35 challenged exclusion from the definition of "mining" applies
36 only to activities on land within the challenged Mineral and
37 Aggregate Resources zoning district. Petitioner does not
38 argue that this zoning district is an exclusive farm use
39 zone, and we do not see that it is. Therefore, the

1 definitions in ORS 215.298 do not apply, and provide no
2 basis for reversal or remand of the challenged decision.

3 Petitioner Williams' fifth assignment of error is
4 denied.

5 **FIRST ASSIGNMENT OF ERROR (INTERVENOR-PETITIONER**
6 **STEVENS)**

7 As we understand it, under subassignment (A),
8 intervenor-petitioner Stevens alleges the county failed to
9 provide adequate written notice of the local proceedings
10 leading to the adoption of the challenged decision, as well
11 as of the challenged decision itself. Intervenor-petitioner
12 Stevens' arguments in this regard are based on ZDO
13 requirements for notice of county "administrative actions."
14 However, as stated above, the challenged decision is not a
15 county administrative decision, but rather a legislative
16 decision. Therefore, this assignment of error provides no
17 basis for reversal or remand of the challenged decision.

18 Intervenor-petitioner Stevens' subassignment (A) of the
19 first assignment of error, is denied.

20 The county's decision is affirmed.

21