BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

MISSION BOTTOM ASSOCIATION, INC., RON SACCHI, TAMRA SACCHI, SPRING LAKE FARMS, MARIE ZIELINSKI, ADELE EGAN, EGAN GARDENS, LOIS EGAN, ELLEN EGAN, MISSION CHERRY FARM, PAUL WITTEMAN, FRANCES WITTEMAN, CHAPIN FARMS, JACK CHAPIN, MARY CHAPIN, RON M. CHAPIN, BRUCE R. CHAPIN, VELAN E. CHAPIN, and MARION COUNTY FARM BUREAU,	)
Petitioners,	)
and	)
DAVID L. MASSEE,	)
Intervenor-Petitioner,	)
vs.	)
MARION COUNTY,	)
Respondent,	)
and	)
MORSE BROS., INC.,	)
Intervenor-Respondent.	)

LUBA No. 94-196

FINAL OPINION AND ORDER

Appeal from Marion County.

Edward J. Sullivan, Portland, filed a petition for review and argued on behalf of petitioners. With him on the brief was Preston Gates and Ellis.

Robert L. Winkler, Salem, filed a petition for review on behalf of intervenor-petitioner. With him on the brief was Parks, Bauer, Sime & Winkler.

Jane Ellen Stonecipher, County Counsel, Salem, and Paul R. Hribernick, Portland, filed a response brief. With them on the brief was Black Helterline. Jane Ellen Stonecipher argued on behalf of respondent. Paul R. Hribernick argued on behalf of intervenor-respondent.

Joseph H. Hobson, Jr., Keizer, filed an amicus brief on behalf of Oregon Farm Bureau Federation. With him on the brief was Lien, Hobson & Johnson.

Peter Livingston, Portland, filed an amicus brief on behalf of Oregon Concrete and Aggregate Producers Association, Inc. With him on the brief was Lane Powell Spears Lubersky.

Jane Ard, Assistant Attorney General, Salem, filed an amicus brief on behalf of the Department of Land Conservation and Development and Department of Fish and Wildlife. With her on the brief was Theodore R. Kulongoski, Attorney General; Thomas A. Balmer, Deputy Attorney General; and Virginia L. Linder, Solicitor General.

GUSTAFSON, Referee; SHERTON, Chief Referee, participated in the decision.

REMANDED 06/09/95

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

Opinion by Gustafson.

NATURE OF THE DECISION

Petitioners appeal a Marion County Board of Commissioners' decision amending the Marion County Comprehensive Plan (plan) to add a site to its "Significant Mineral and Aggregate Sites Inventory," applying the mineral and aggregate overlay zone to a 490-acre site, and approving a floodplain permit for an aggregate extraction and processing operation on the site.

MOTIONS TO INTERVENE

David. L. Massee moves to intervene on the side of petitioner. There is no objection to the motion, and it is allowed.

Morse Bros., Inc., the applicant below, moves to intervene on the side of respondent. There is no objection to the motion, and it is allowed.

FACTS

In September, 1992, intervenor-respondent Morse Bros., Inc. (intervenor) applied to Marion County (county) for (1) a comprehensive plan amendment to add a 490-acre mineral and aggregate site to the plan's significant mineral and aggregate sites inventory; and (2) a zone change to apply the mineral and aggregate overlay zone to the site. The subject 490-acre site includes 115 acres which are part of an area for which the county approved a conditional use permit (CUP) in 1979. The 1979 CUP allows extraction and

processing of aggregate and operation of an asphalt batch plant. No change in scope or use was requested for the existing CUP.

The subject property is located approximately 1.5 miles north of the Salem/Keizer urban growth boundary and approximately 9 miles from the Salem city center. The entire property is zoned Exclusive Farm Use (EFU), as are the surrounding properties. With the exception of the existing CUP operation, the area is devoted to farm uses. There is a planted vineyard within two miles of the subject property.

At the time intervenor's application was filed, Marion County implemented Statewide Planning Goal 5 (Open Spaces, Scenic and Historic Areas, and Natural Resources) and plan requirements relating to protection of mineral and aggregate resources through Marion County Rural Zoning Ordinance (MCRZO) Chapter 180.[1] MCRZO Chapter 180 includes a process to amend the Marion County plan to add sites warranting protection under that chapter to the plan's "Significant Mineral and Aggregate Sites Inventory." MCRZO Chapter 180 also implements the comprehensive plan through amendments to the zoning map to apply a mineral and aggregate overlay

[1]Since this application was filed, MCRZO Chapter 180 has been repealed. No party contests the applicability of MCRZO Chapter 180 to this case.

zone.[2] The plan describes the MCRZO Chapter 180 process as follows:

> "When a District A [overlay zone] is established, including identification of one or more specific locations for excavation and processing equipment, the owners or operators may develop and operate the site in conformance with the standards and conditions in the A District. When the plan amendment/zone change is finalized the owner or operator has land use approval from the County and no further land use approvals are needed provided the development and operation are consistent with the zoning requirements." Plan, Mineral and Aggregate Resources Section, Exhibit A, p. 7; Respondents Brief, Addendum p. 40.

Following two years of hearings before the planning commission and board of commissioners, the county approved a comprehensive plan amendment, adding the 490-acre area to its plan mineral and aggregate sites inventory, and applied the mineral and aggregate overlay zone to the entire 490 acres. However, the approval allows aggregate extraction from only 186 acres outside of the 115 acres that are subject to the 1979 CUP. The approved extraction area consists of 132 acres to the north and 37 acres to the southeast of the CUP area, both of which must be reclaimed as "open water areas" following extraction, and 17 acres east of the CUP area, which are required to be reclaimed for wildlife habitat purposes. The remainder of the site was

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[2]The overlay zone includes two districts, "A" and "B". While intervenor requested application of both districts, only District A was applied through the challenged decision and is relevant to this appeal.

not approved for aggregate extraction. The approval also requires 88 acres of the CUP site to be reclaimed for farm use at the end of the operational life of the extraction site. The approval is also conditioned upon certain road improvements and wildlife habitat protection requirements. In addition, the county granted a floodplain permit for the site.

JURISDICTIONAL MOTION

At the beginning of oral argument, petitioners moved that the Board either take official notice of or review a transcript of a 1993 Oregon House Appropriations A Committee hearing during which a representative of the Oregon Concrete and Aggregate Producers Association made comments critical of this Board. The application which is the subject of this appeal was apparently pending before Marion County at the time these comments were made. Petitioners argue the comments "could only have been made to influence the outcome of pending aggregate cases before the Board." Motion (05/11/95) 2. Petitioners also argue that, since they are statutorily entitled to an impartial decision maker, in order to have jurisdiction over this appeal the Board must assure petitioners that "this attempt to intimidate the Board will not influence the outcome of this appeal." Id.

This Board has a statutory and ethical obligation to decide all appeals before it in a fair and impartial manner. Statements made outside the appeals process are irrelevant

to this Board's evaluation of any appeal before it. As with all cases before it, this Board's consideration of this appeal is based on an impartial and thorough evaluation of the facts and law as authorized and required by ORS 197.835.

WAIVER

Respondents contend that several issues raised in petitioners' first through fourth assignments of error were not raised during the evidentiary proceedings before the county and, therefore, under ORS 197.763(1) and ORS 197.835(2) cannot be raised in this appeal.[3]

Petitioners argue that under ORS 197.835(2)(a) they may raise issues in this appeal, regardless of whether they were raised below, because the notice of the first evidentiary hearing before the county planning commission failed to list all standards applicable to the proposal, as required by

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[3]ORS 197.763(1) states:

> "An issue which may be the basis for an appeal to the board shall be raised not later than the close of the record at or following the final evidentiary hearing on the proposal before the local government. Such issues shall be raised with sufficient specificity so as to afford the governing body, planning commission, hearings body or hearings officer, and the parties an adequate opportunity to respond to each issue."

ORS 197.835(2) states, in part:

> "Issues shall be limited to those raised by any participant before the local hearings body as provided by ORS 197.763. A petitioner may raise new issues to the board if:
>
> "(a) The local government failed to follow the requirements of ORS 197.763[.]
>
> "* * * * *"

ORS 197.763(3)(b), and the oral announcement at the beginning of the first hearing failed to satisfy the requirements of ORS 197.763(5)(a).[4]

Respondents reply the county's failure to provide notice of statutory requirements which petitioners now argue are applicable is not a violation of ORS 197.763 because that statute specifically restricts the notice obligation to local plan and ordinance criteria. With regard to local plan and ordinance criteria not listed in the notice or announced at the hearing, respondents explain that none of those provisions are relevant to the issues petitioners raise on appeal. Accordingly, respondents argue any county failure to list such provisions should not provide a basis to allow petitioners to raise issues for the first time on appeal.

In Wuester v. Clackamas County, 25 Or LUBA 425 (1993), we determined the language of ORS 197.763 and 197.835(2)

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[4]ORS 197.763(3)(b) requires the county's notice of hearing to:

> "List the applicable criteria from the ordinance and the plan that apply to the application at issue[.]"

ORS 197.763(5) states in relevant part:

> "At the commencement of a hearing under a comprehensive plan or land use regulation, a statement shall be made to those in attendance that:
>
> "(a) Lists the applicable substantive criteria[.]
>
> "* * * * *"

mandates that failure to provide notice of any applicable local plan or ordinance criterion during the initial evidentiary hearing constitutes a violation of ORS 197.763 which relieves parties of the requirement that issues raised before this Board were raised below. We did not determine in Wuester that failure to provide notice of statutory criteria alone would relieve parties of the "raise it or waive it" requirements. However, in this case, as in Wuester, petitioners cite several local ordinance provisions addressed as criteria in the challenged decision that were not listed in the county's notice of evidentiary hearing or announced at the commencement of the initial hearing.

Respondents urge us to overturn Wuester, and to limit petitioners' right to raise new issues to those concerning criteria of which no notice was provided. Respondents contend Wuester is contrary to the purpose of the statutory "raise it or waive it" provisions, as determined by the Court of Appeals in Boldt v. Clackamas County, 107 Or App 619, 813 P2d 1078 (1991). The Court determined in Boldt that the "raise it or waive it" provisions require issues to be raised with specificity in order to provide fair notice to all parties to the local government proceeding. Id. at 623. According to respondents, "unfair surprise" results when petitioners are not required to provide any "warning" of notice defects, then "merely have to find one criterion that was not announced in the written or oral notices given

by the County, and then they may raise all issues." Respondents' Brief 12.

The Court of Appeals' decision in Boldt does not control in this situation. That case dealt only with the question of the degree of specificity required in raising issues when the required notice of applicable criteria had been provided. It did not address the situation presented in Weuster and in this case, where the written and oral notices of the applicable plan and ordinance provisions were deficient under ORS 197.763(3)(b) and (5)(a).

Respondents are correct that, under this Board's opinion in Wuester, the county's failure to list even one relevant plan or ordinance criterion, regardless of whether that particular criterion is now at issue, allows petitioners to raise any new issue(s) on appeal. While this may appear to respondents to lead to unfair surprise and unnecessary delay, it is required by the language of ORS 197.763 and 197.835(2). Neither of those statutes restricts the ability of a party to raise new issues when the local government's written or oral notice of applicable criteria is defective. As we stated in Wuester:

> "The main problem with respondent's argument that the legal consequence of failing to list ZDO 404.05(A) as a criterion is limited to allowing new issues to be raised with regard to that criterion is that there is nothing in the words of ORS 197.835(2) or related statutory provisions to support such a limited construction of the right to raise new issues under ORS 197.835(2). The legislature could have provided in ORS 197.835(2) that failure to

> follow a requirement of ORS 197.763 would not obviate the need for a petitioner at LUBA to first raise an issue locally, unless the local government's failure to follow the requirement of ORS 197.763 somehow affected a petitioner's ability to raise that issue. The legislature did not do so, and this Board may not insert a limitation into the statue that the legislature has omitted. [ORS] 174.010." (Footnotes omitted.) Wuester, supra, 25 Or LUBA at 429-30.

The language of ORS 197.763 and 197.835(2) has not changed since Wuester was issued, nor have we been cited to legislative history that would indicate a legislative intent other than what is expressed in the statutory language. This Board has no authority to read into a statute language that is not there or to restrict the scope of a statute. To the extent restrictions on parties' ability to raise new issues when the notice required under ORS 197.763 is deficient would facilitate efficiency in the review of land use decisions, it is the legislature, and not this Board, that has the authority to impose those restrictions.

The county's failure to provide notice of certain local criteria means petitioners may raise issues before this Board regardless of whether those issues were raised during the local proceedings. ORS 197.835(2)(a). Respondents' waiver arguments are rejected, and in addressing the assignments of error below, we do not consider those arguments further.

FIRST ASSIGNMENT OF ERROR

Petitioners challenge the decision's compliance with

numerous requirements of ORS chapter 215.

A. ORS 215.203 and 215.283

ORS 215.203(1) states:

> "Zoning ordinances may be adopted to zone designated areas of land within the county as exclusive farm use zones. Land within such zones shall be used exclusively for farm use except as otherwise provided in ORS 215.213, 215.283 or 215.284. Farm use zones shall be established only when such zoning is consistent with the comprehensive plan."

ORS 215.283 addresses uses permitted in exclusive farm uses zones. As relevant here, ORS 215.283(2) states:

> "The following nonfarm uses may be established, subject to the approval of the governing body or its designate in any area zoned for exclusive farm use subject to ORS 215.296:
>
> "* * * * *
>
> "(b) Operations conducted for:
>
> "* * * * *
>
> "(B) Mining, crushing or stockpiling of aggregate and other mineral and other subsurface resources subject to ORS 215.298;
>
> "(C) Processing, as defined by ORS 517.750, of aggregate into asphalt or portland cement; and
>
> "(D) Processing of other mineral resources and other subsurface resources.
>
> "* * * * *"

Petitioners contend ORS 215.203(1) and 215.283 mandate that approvals of nonfarm uses in EFU zones must be evaluated through a conditional use

process and that, unless a nonfarm use is evaluated as a conditional use, ORS 215.203(1) prohibits nonfarm use of the property. According to petitioners, the county's use of the MCRZO Chapter 180 overlay zone process to approve an aggregate extraction and processing operation is impermissible under ORS 215.203(1) and 215.283 because it is not a conditional use process.

Petitioners also argue ORS 215.203 prohibits any nonfarm use of this property because intervenor did not request a "permit" under ORS 215.283. Petitioners apparently argue that under the rationale of Schrock Farms, Inc. v. Linn County, 117 Or App 390, 844 P2d 253 (1992), ORS 215.283 requires an independent permit review of some sort.

In Schrock Farms, the Court of Appeals concluded the ORS 215.283 list of nonfarm uses allowed in an EFU zone restricts the uses allowed on EFU-zoned land, regardless of whether an exception to Statewide Planning Goal 3 (Agricultural Lands) is adopted. In other words, approval of a Goal 3 exception does not authorize a nonfarm use of EFU-zoned land that is not listed in ORS 215.283. Schrock Farms does not suggest that an additional ORS 215.283 "permit" or other permit approval of some kind is required for a use listed in that statute. Nor does it support an interpretation that ORS 215.203(1) mandates that ORS 215.283 be applied only through a conditional use process.

ORS 215.203(1) generally establishes that EFU zones must be used exclusively for farm uses, with the express exception of uses listed in one of three other statutes, including ORS 215.283. Uses listed in ORS 215.283 are allowed in EFU zones, so long as they are approved by the local governing body, subject to compliance with ORS 215.296. Neither ORS 215.203(1) nor ORS 215.283 mandates the manner in which the local governing body gives that approval. Nor do either of these statutes require an additional permit independent of the requirements of the local government process.

Petitioners also argue that MCRZO Chapter 180 allows uses beyond those allowed under ORS 215.283(2)(b), and otherwise does not contain required statutory limits on the ability to allow mining uses on EFU-zoned land. MCRZO Chapter 180 is not, however, subject to independent review in this case. If petitioners wished to challenge that ordinance, they should have done so at the time it was adopted; not through a collateral attack upon its implementation in this case. At issue here is whether the implementation of MCRZO Chapter 180 in this case complies with applicable statutory requirements. The request at issue is for a use listed in ORS 215.283(2)(b). Regardless of whether MCRZO Chapter 180 might allegedly be defective in other respects, here the challenged decision does not allow

a use beyond that which is allowed under ORS 215.283(2)(b).[5]

This subassignment of error is denied.

B. ORS 215.253

Petitioners next contend the county's decision either fails to address or violates ORS 215.253. ORS 215.253(1) provides, in relevant part:

> "No * * * county * * * may exercise any of its powers to enact local laws or ordinances or impose restrictions or regulations affecting any farm use land situated within an exclusive farm use zone established under ORS 215.203 * * * in a manner that would unreasonably restrict or regulate farm structures or that would unreasonably restrict or regulate accepted farming practices because of noise, dust, odor or other materials carried in the air or other conditions arising therefrom if such conditions do not extend into an adopted urban growth boundary in such manner as to interfere with the lands within the urban growth boundary. 'Accepted farming practice' as used in this subsection shall have the meaning set out in ORS 215.203."

Respondents argue this statute applies only to legislative enactments, not to quasi-judicial land use approvals. They further argue that, to the extent the statute applies, the county adopted extensive findings explaining why its decision, and the conditions imposed by that decision, do not result in an unreasonable restriction

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[5]Petitioners suggest in a footnote that, as applied here, MCRZO Chapter 180 violates ORS 215.283(2)(b) because it allows for the sale of the aggregate resources after they are extracted. Petitioners do not cite to any specific proposal by the intervenor-respondent for the "sale" of its aggregate beyond what is customary in the industry. We decline to interpret ORS 215.283 to preclude a mineral and aggregate operator from deriving economic value from , i.e. selling, the products of its operation.

of accepted farming practices.

In addition to prohibiting specified legislative local government enactments, ORS 215.253(1) expressly states that local governments may not "impose restrictions or regulations" which would have the same effect on farm use land. Imposition of restrictions and regulations is not limited to a legislative context; restrictions and regulations on farm use can also result from quasi-judicial land use approvals. Thus, we reject respondents' argument that ORS 215.253 is, by its terms, limited to legislative decisions.

However, in applying MCRZO Chapter 180, the county made extensive findings that the proposed use will not unreasonably restrict accepted farming practices. Petitioners do not directly challenge the adequacy of those findings. Petitioners do, however, argue that several of the conditions the county imposed have the effect of unreasonably restricting farm use, both on the site and in the surrounding area, in violation of ORS 215.253.

Petitioners challenge three conditions of approval. First, petitioners argue Condition 1, which generally requires the use to comply with the development standards and requirements of MCRZO Chapter 180, will "transform" two "noise sensitive" farm uses, i.e. commercial mink and poultry operations, into conditional uses. Second, petitioners argue Condition 2, which requires intervenor to

submit a site plan for the entire site, including areas reserved for farm use, could unreasonably restrict the location of some farm structures. Third, petitioners argue Condition 8, which requires preservation of turtle habitat on the site, could unreasonably limit farm structures and accepted farming practices. In essence, petitioners' challenge to each of these conditions is that it could potentially or indirectly "unreasonably" restrict or regulate farm structures or practices because, by their nature, mineral and aggregate uses could effectively restrict farm uses.

ORS 215.253 must be read in context with ORS 215.203(1) and ORS 215.283(2)(b) which specifically permit mineral and aggregate operations on EFU-zoned land. Read in context with those statutes, mineral and aggregate operations cannot be held to per se unreasonably restrict or regulate farm structures or practices. Nor does a condition imposed on a mineral and aggregate operation violate ORS 215.253(1) simply because it has the potential of impacting some farm uses.

Petitioners argue compliance with the development standards of MCRZO Chapter 180 could restrict location of mink or poultry operations because those are noise sensitive farm uses. Petitioners do not contend those operations are currently located on the subject property or in the surrounding area; only that this condition could limit their

future location. Likewise, petitioners argue the site plan could result in an unreasonable restriction on the location of farm structures and practices, not that it does have such an effect. Finally, petitioners argue the preservation of turtle habitat could unreasonably restrict the future location of other farm structures or practices.

All of the impacts identified by petitioners are conjectural. Moreover, with regard to the turtle habitat, "uses" required for the turtle habitat preservation fall within the definition of "current employment" of land for farm use under ORS 215.203(2)(b). Thus, turtle habitat uses are themselves farm uses. ORS 215.253 does not prohibit preservation of a farm use on the basis that it could potentially restrict another farm use or structure.

To the extent any of the challenged conditions could potentially restrict some farm uses or structures, Condition 11 ensures that the land will ultimately be preserved for farm use. Condition 11 recognizes that farming, wetland and wildlife habitat are the designated uses of the subject property, and requires that, upon completion of the aggregate extraction, deed restrictions must be recorded to ensure that the land is preserved for those uses. Thus, any impact will be temporary. A potential, temporary impact on farm structures or practices caused by an allowed use in the EFU zone is not an unreasonable restriction or regulation under ORS 215.253. None of the challenged conditions would

"unreasonably" restrict or regulate farm structures or practices in violation of ORS 215.253.

This subassignment of error is denied.

C. ORS 215.296

Petitioners next argue the county did not find that the proposed used complies with the requirements of ORS 215.296.[6] Petitioners' argument appears to be that compliance with ORS 215.296 is not independently evaluated in the County's decision; and that application of ORS 215.296 through the application of MCRZO Chapter 180 is inadequate since that chapter refers to compliance with ORS 215.296 as only a factor to be considered, rather than an independent criterion. Respondents answer that the requirements of ORS 215.296(1) and (2) are satisfied by

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[6]ORS 215.296, which establishes standards for approval of certain uses in EFU zones, states, in relevant part:

> "(1) A use allowed under ORS 215.213(2) or 215.283(2) may be approved only where the local governing body or is designee finds that the use will not:
>
> > "(a) Force a significant change in accepted farm or forest practices on surrounding lands devoted to farm or forest use; or
> >
> > "(b) Significantly increase the cost of accepted farm or forest practices on surrounding lands devoted to farm or forest use.
>
> "(2) An applicant for a use allowed under ORS 215.213(2) or 215.283(2) may demonstrate that the standards for approval set forth in subsection (1) of this section will be satisfied through the imposition of conditions. Any conditions so imposed shall be clear and objective.
>
> "* * * * *"

detailed findings in the challenged decision at Record 21-27, 41 and 68.

ORS 215.283(2) provides that uses listed in that subsection are allowed in EFU zones subject to compliance with ORS 215.296. As we recently reiterated in Zippel v. Josephine County, 27 Or LUBA 11, 37, aff'd 128 Or App 458, rev den 320 Or 272 (1994), the requirements of ORS 215.296 apply directly to uses in EFU zones. See Kenagy v. Benton County, 115 Or App 131, 134, 838 P2d 1076, rev den 315 Or 271 (1992); Kenagy v. Benton County, 112 Or App 17, 20 n2, 826 P2d 1047 (1992); Forster v. Polk County, 115 Or App 475, 478, 839 P2d 241 (1992). The requirements of ORS 215.296 apply directly to the challenged decision.

Respondents essentially argue that the findings addressing MCZO Chapter 180 are sufficient to demonstrate compliance with ORS 215.296. It appears that MCZO Chapter 180 is intended to implement ORS 215.296 and, to some extent, the county's findings do address the substance of the ORS 215.296 requirements. However, the requirements of MCZO Chapter 180 do not mirror the statutory requirements of ORS 215.296 and the findings do not specifically address the statute. Without any reference to ORS 215.296 in the findings, we cannot determine whether each of the requirements of that statute is addressed. In order to establish that the proposed use satisfies the requirements of ORS 215.296, the county must adopt findings

addressing the proposal's compliance with that statute.

Because the county did not adequately evaluate the proposal for compliance with ORS 215.296, we do not reach petitioners' fourteen subassignments of error challenging the evidentiary support for the county's findings regarding compliance with that statute or the county's interpretation of that statute.

This subassignment of error is sustained.

D. ORS 215.301

Finally, petitioners contend the approval violates ORS 215.301, which they argue prohibits an asphalt batch plant on the subject property. ORS 215.301 prohibits siting a batch plant within two miles of a planted vineyard. The statute specifically does not apply to batch plants approved prior to October 3, 1989 or to renewal of an existing batch plant approval.[7]

There is no dispute that there is a planted vineyard within two miles of the existing batch plant intervenor

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[7]ORS 215.301 states as follows:

> "(1) Notwithstanding the provisions of ORS 215.213, 215.283 and 215.284, no application shall be approved to allow batching and blending of mineral and aggregate into asphalt cement within two miles of a planted vineyard.
>
> "(2) Nothing in this chapter shall be construed to apply to operations for batching and blending of mineral and aggregate under a local land use approval on October 3, 1989, or a subsequent renewal of an existing approval.
>
> "* * * * *"

operates on the subject property. That batch plant was approved as a conditional use prior to October 3, 1989. Intervenor did not, through this application, request any alteration of the existing conditional use.

Petitioners argue the challenged decision does not approve either a renewal of the existing conditional use or the same use approved through the earlier conditional use permit, either of which would exempt the decision from the ORS 215.301(1) prohibition. Rather, petitioners suggest the challenged decision expands the scope or operation of the existing conditional use and is, therefore, prohibited by ORS 215.301(1).

Petitioners are correct to the extent the challenged decision does not either renew approval of or re-approve the existing conditional use batch plant. However, those facts are irrelevant to the applicability of ORS 215.301(1) to this case. Nothing in the challenged decision impacts the continued operation of the existing conditional use. The challenged decision adds an overlay zone to the CUP site, but does not expand or alter either the operation or area subject to the conditional use permit. The batch plant could continue to operate regardless of the challenged decision. The only direct impact of the overlay zone on the area of the conditional use is a condition which requires that when all operations at the site are completed, 88 acres of the 115 acre CUP site must be reclaimed for farm use.

This condition assures future farm use of the site. It does not impact the nature, validity or scope of the existing CUP.

The prohibition of ORS 215.301(1) does not apply to this case.[8] The existing batch plant was approved as a conditional use prior to October 3, 1989 and, therefore, under ORS 215.301(2) the prohibition of ORS 215.301(1) against locating batch plants within two miles of a planted vineyard is inapplicable.

This subassignment of error is denied.

The first assignment of error is sustained, in part.

SECOND ASSIGNMENT OF ERROR

Petitioners challenge the floodplain permit approved by the challenged decision. Petitioners argue both that the county had no jurisdiction to issue the permit and that it failed to provide notice of and an opportunity to be heard regarding the permit, to petitioners' substantial prejudice.

A. Jurisdiction

Petitioners first argue the board of county

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[8]Petitioners argue that under our decision in Morse Bros. v. Clackamas County, 18 Or LUBA 188 (1989), the continuation of the existing conditional use batch plant becomes part of the challenged decision as part of the "application of a newly adopted zone and regulatory scheme under MCRZO Chapter 180." Petition for Review 21. Morse Bros., however, did not involve the continuation of an existing conditional use. Rather, it involved the expansion of a nonconforming use. Petitioners do not argue the existing conditional use batch plant is nonconforming. Addition of a mining operation adjacent to a pre-existing approved conditional use does not void that pre-existing conditional use or render it part of the challenged decision. Our previous decision in Morse Bros. is inapposite.

commissioners did not have the initial authority to grant a floodplain permit. Citing Larson v. Wallowa County, 23 Or LUBA 527, rev'd 116 Or App 96 (1992), petitioners argue that, as the county's delegated authority, the planning commission was required to make the initial county decision on a floodplain permit application. However, as respondent explains, MCRZO 110.765 specifically grants the governing body the authority to make an initial determination on a land use application. Petitioners cite no code or statutory provision which limits that authority. The board of commissioners had jurisdiction to initially consider and approve the floodplain permit.

B. Notice and Hearing Opportunity

Petitioners next argue that no notice was provided of the application for a floodplain permit. According to petitioners, the first notice that such a permit was being considered was in the county's written decision of approval.

Respondents argue that the requirement for a floodplain permit is incorporated into the MCRZO Chapter 180 process, and that, because notice of the application of MCRZO Chapter 180 was provided, sufficient notice was provided that a floodplain permit was also being considered.

If MCRZO Chapter 180 contemplates the applicability of floodplain permit requirements when a mineral and aggregate overlay zone is applied, that intent is not clearly reflected in that chapter. Further, respondents have not

provided a reference to that chapter establishing that notice of a review under MCRZO Chapter 180 necessarily provides notice that a floodplain permit is being considered. Consequently, general notice of the applicability of MCRZO Chapter 180 did not provide petitioners adequate notice that the county was considering a floodplain permit application.

Respondents also argue that even if the notice of the hearing was defective, this procedural error did not prejudice petitioners' substantial rights. See Mazeski v. Wasco County, 26 Or LUBA 226 (1993) (when a party alleges procedural error as a basis for remand, it must also show how that error was prejudicial). Respondents argue petitioners have not been prejudiced because "the County was inundated with an endless array of arguments, evidence and posterboard rebuttal by the petitioners related to floodplain issues," which included more than 100 pages of evidence on those issues. Respondents' Brief 39. Petitioners acknowledge floodplain issues were addressed during the public hearings, but explain that those issues were addressed in the context of compliance with Statewide Planning Goal 5.

The floodplain issues relevant to Goal 5 compliance are not necessarily equivalent to the requirements for approval of a county floodplain permit. Even though the county may have been "inundated" with evidence regarding floodplain

issues, petitioners were prejudiced because they were not given notice that the county's floodplain permit requirements were at issue and, therefore, did not have adequate opportunity to specifically address floodplain issues as they relate to the county's floodplain permit requirements.

The second assignment of error is sustained.

THIRD ASSIGNMENT OF ERROR

Petitioners challenge a condition of the County's approval requiring certain road improvements.[9] According to petitioners, Condition 7 requires conditional use approval under one or more of ORS 215.283(1)(l),(m) or (n); (2)(p)(q) or (r); or (3). Petitioners also argue that they were entitled to additional notice and hearing before the "uses" allowed by the condition could be approved.

As discussed supra, in the analysis of the First Assignment of Error, ORS 215.283 does not mandate a

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[9]The challenged condition states:

> "Public Road requirements. Requirements 1, 3 and 4 in the memorandum of October 28, 1992, from the County Director of Public Works are conditions of approval. These conditions include: 1) constructing a left turn refuge and deceleration lane for right turn traffic at the Wheatland Road access; 2) contributing to the installation of costs if the county decides to install a flashing light at the intersection of Brooklake and Wheatland Roads before 1998; and 3) removal of loose gravel from the intersection of Wheatland and Brooklake Roads as directed by Public Works. In addition, the applicant shall agree to implement a program approved by the Director of Public Works ensuring that the Wheatland Road. [sic] bike lane from the entrance to Brooklake Road is maintained to facilitate bike use." Record 92.

conditional use process. While ORS 215.283(2) and (3) list some road improvements for which county approval is required, none of the requirements of Condition 7 require improvements under any of the provisions of ORS 215.283(2) or (3) cited by petitioner. At most, the improvements are of the nature listed in ORS 215.283(1)(L).[10] As stated in ORS 215.283(1), those uses "may be established in any area zoned for exclusive farm use." They do not require conditional use, or any other type of, county approval.

Petitioners' argument is untenable. There is nothing in ORS Chapter 215 or the county's ordinance to warrant requiring a conditional use process before the county can impose conditions for minor road improvements in conjunction with intervenor's mineral and aggregate mining operation. Petitioners have not established that the condition of approval requiring road improvements requires a conditional use review, or that petitioners were entitled to any additional notice and hearing prior to the county's "approval" of those improvements through the imposition of Condition 7.

The third assignment of error is denied.

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[10]ORS 215.283(1)(L) allows the following uses to be established in an EFU zone:

> "Reconstruction or modification of public roads and highways, not including the addition of travel lanes, where no removal or displacement of buildings would occur, or no new land parcels result."

FOURTH ASSIGNMENT OF ERROR

Petitioners next challenge the county's compliance with two unamended provisions of its comprehensive plan. Petitioners contend the county's decision fails to address "the applicability and the application" of the plan Agricultural Goal and Agricultural Policy 3.[11] Petitioners contend that because the county decision maker failed to address those provisions, under Weeks v. City of Tillamook, 117 Or App 449, 844 P2d 91 (1992), the decision must be remanded for the county to address them.

The county's findings address compliance with its comprehensive plan at Record 74-80. The plan Agricultural Goal is specifically addressed at Record 74-75.[12]

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[11]The plan Agricultural Goal is "[t]o preserve and maintain agricultural lands for farm use consistent with the present and future need for agricultural products, forest and open space." Agricultural Policy 3 is to "[d]iscourage the development of non-farm uses on identified agricultural lands."

[12]The county's findings regarding compliance with the plan Agricultural Goal and policies are as follows:

> "The agricultural goal of the County is very similar in language and identical in purpose to statewide Goal 3. Accordingly, we incorporate by reference herein our findings under statewide Goal 3. In addition, we find that our approval will maintain agricultural lands in large areas with tracts to encourage large scale commercial agricultural production. We have specifically limited the size of the mineral and aggregate operation in order to preserve a substantial area that will continue with commercial agricultural production. In addition, we are requiring the reclamation of 88 acres of property that is presently not in agricultural production. We find and conclude that this will help maintain primary agricultural lands in the County and encourage large scale commercial agricultural production. We also find that we have allowed this mineral and aggregate expansion to occur on farmland in

Petitioners do not allege any specific deficiency in the County's findings regarding compliance with the cited agricultural goal and policy. The county's findings adequately address the plan agricultural goals and policies as they relate to this application.

The fourth assignment of error is denied.

FIFTH ASSIGNMENT OF ERROR

Finally, petitioners argue that (1) the county improperly construed the applicable law and made a decision not supported by substantial evidence by retaining the existing conditional use batch plant; (2) the county exceeded its jurisdiction by doing so; and (3) the county did not give adequate notice that it was approving an application for both a conditional use permit and a zone change.

Petitioners contend the County was required to either re-approve or incorporate into the subject application the existing conditional use batch plant at the subject site. To support this contention, petitioners suggest the county's decision approving the overlay zone somehow expands the scope of the existing conditional use batch plant.

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large part because we have found that there are no adverse impacts on adjoining farm uses from the proposed mining extraction activities. We find that the balance that we have reached between use of the land for agricultural purposes and mineral and aggregate purposes is consistent with the agricultural lands, goals and policies, and mineral and rock resources goals and policies in the Comprehensive Plan." Record 74-75.

Respondents deny this suggestion and we are cited to nothing in the record to support petitioners' suggestion.[13]

Petitioners also argue that because operation of a batch plant is not required to be a conditional use in the Mineral and Aggregate Overlay zone, but rather could be a permitted use in the overlay zone, it must be incorporated into the county's approval of the challenged decision. Nothing in the state statutes or county ordinances compel such a requirement.

Finally, petitioners argue the county either did (without adequate notice), or was required to but did not, process the existing asphalt batch plant as a new, expanded conditional use. Neither argument has merit. The county's findings establish that the operation of the existing conditional use batch plant was not at issue. Thus, there was no conditional use application for which notice and hearing were required. Secondly, petitioners' assertion that the conditional use has been expanded through the imposition of the overlay zone is not supported by any facts in the record. The County's findings reflect that the continuation of the conditional use batch plant is unaffected by the overlay zone. The continuation of the

[13]The only impact of the challenged decision on the conditional use batch plant is a condition that when all aggregate operations on intervenor's property are completed, 88 acres of the 115-acre CUP site must be reclaimed for farm use. We decline to find this condition on the future use of the property constitutes an expansion of the scope of the existing operation.

existing conditional use did not require a new conditional use permit under the County's process or any statutory requirement.[14]

The fifth assignment of error is denied.

The county's decision is remanded.

[14]Petitioners argue again that Morse Bros. v. Clackamas County, supra mandates that the continuation of the existing conditional use requires a new conditional use application. As discussed, supra, that case involved the expansion of a nonconforming use, not the continuation of an existing conditional use. That case is inapposite.