BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

KENT STOCKWELL, DEANNA STOCKWELL,
HECTOR MacPHERSON and FRIENDS
OF BENTON COUNTY,
Petitioners,

vs.

BENTON COUNTY,
Respondent,

and

MORSE BROS., INC.,
Intervenor-Respondent.

LUBA No. 2000-033

FINAL OPINION
AND ORDER

Appeal from Benton County.

Charles Swindells, Portland, filed the petition for review and argued on behalf of petitioners.

No appearance by Benton County.

Frank M. Parisi and Timothy S. Sadlo, Portland, filed the response brief. Timothy S. Sadlo argued on behalf of intervenor-respondent. With them on the brief was Parisi & Parisi, P.C.

BRIGGS, Board Member; BASSHAM, Board Chair; HOLSTUN, Board Member, participated in the decision.

AFFIRMED 09/07/2000

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

Opinion by Briggs.

NATURE OF THE DECISION

Petitioners challenge a county decision approving a plan amendment and zone change to permit surface mining.

MOTION TO INTERVENE

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

MOTION TO STRIKE

On August 7, 2000, two days before oral argument, petitioners filed a memorandum of additional authorities that petitioners stated they would rely on during oral argument. At oral argument and in a motion filed after oral argument, intervenor moved to strike the memorandum. Intervenor argues that the memorandum should not be considered for two reasons. First, intervenor argues that if petitioners intended that the memorandum serve as a reply brief, the form and the content fail to comply with our rules for reply briefs. Second, intervenor argues that the memorandum serves as a supplemental petition for review and, as such, should not be allowed because none of the cases cited were decided between the time the petition for review was filed and oral argument. Intervenor argues that this situation is similar to the situation in *Sanders v. Yamhill County*, 34 Or LUBA 69, *aff'd* 154 Or App 448, 963 P2d 755 (1998), where LUBA declined to receive a document that the petitioners argued merely summarized arguments contained in their petition for review. There, we concluded that the document produced for oral argument reformulated complex arguments contained within a lengthy petition for review, and it was unfair to the respondents to be called upon to address matters raised in the document without adequate opportunity to review it. *Id.* at 74-75.

Unlike the Oregon Rules of Appellate Procedure, our rules do not specifically provide for memoranda of additional authorities. However, as a general principle, we do not

believe that lack of specific authority for providing LUBA and opposing counsel with additional citations of relevant authority in advance of oral argument means such memoranda of additional authorities necessarily are prohibited. Here, petitioners' memorandum cites four cases they claim support certain aspects of three assignments of error. Each case cited has a two to three-line summary following the citation. The memorandum does not contain additional arguments, or replies to issues raised in the response brief. Therefore, intervenor's characterization of the memorandum as either a *de facto* reply brief or an expansion of the petition for review is not accurate. The document is what it purports to be—a listing of additional cases that petitioners claim support arguments made in their brief. Intervenor has not argued that it had inadequate time to review the cases to verify the summaries, or prepare an adequate response.

Intervenor's motion to strike is denied.

FACTS

The 263-acre subject property includes seven parcels in Benton County, plus a portion of an eighth parcel that straddles the Benton County-Linn County line. The parcels are located on Stahlbush Island, between the main and east channels of the Willamette River. The property is comprised entirely of Class II agricultural soils and is currently in farm use. An aggregate layer approximately 20-21 feet deep lies below the agricultural topsoil. The property is entirely within the Willamette River flood plain and is subject to frequent flooding. The site is hydraulically connected to the river by way of the East Channel and groundwater located approximately 8-12 feet below the surface.

Intervenor filed an application to amend the Benton County Comprehensive Plan to include the subject parcel in its inventory of significant mineral and aggregate resource sites and to apply a Surface Mining Overlay zoning designation to the property. Intervenor proposes to extract aggregate from 213 of the 263 acres over a 20-year period. The application proposed that extraction activity will occur in stages. Upon completion of the

extraction activity, 46 acres will be reclaimed for farm use. The remaining portion will be reclaimed as a 160-acre lake.

The board of county commissioners approved intervenor's application, subject to conditions. The conditions included a requirement that the measures imposed to ensure minimal impacts to the Willamette River be reviewed during the course of extraction activities to ensure their effectiveness.

This appeal followed.

FIRST ASSIGNMENT OF ERROR

OAR 660-023-0180(4) provides, in relevant part:

> "For significant mineral and aggregate sites, local governments shall decide whether mining is permitted. For a [post-acknowledgement plan amendment] involving a significant aggregate site * * * [t]he process for reaching decisions about aggregate mining is as follows:
>
> "(a) The local government shall determine an impact area for the purpose of identifying conflicts with proposed mining and processing activities. The impact area shall be large enough to include uses listed in [OAR 660-023-0180(4)(b)] and *shall be limited to 1,500 feet from the boundaries of the mining area,* except where factual information indicates significant potential conflicts beyond this distance. For a proposed expansion of an existing aggregate site, the impact area shall be measured from the perimeter of the proposed expansion area rather than the boundaries of the existing aggregate site and shall not include the existing aggregate site."[1] (Emphasis added.)

Petitioners argue that the rule is ambiguous because it is not clear whether the Land Conservation and Development Commission (LCDC) intended that the impact area for a new aggregate site include the area proposed to be mined in addition to land within a 1,500-foot ring around the boundaries of the mining area, or only the area within the 1,500-foot ring, but

[1]OAR 660-023-0180(4)(b) requires that a local government limit its consideration of significant potential conflicts to six categories of uses, including conflicts between discharges from mining activities and existing and approved uses that are sensitive to such discharges, conflicts between access and transport over certain local roads, safety conflicts with existing public airports, conflicts with other Goal 5 resources identified and listed on an inventory contained within a comprehensive plan and conflicts with agricultural practices.

not including the area proposed to be mined. Petitioners contend that the text and context of the rule most strongly support a reading that requires the impact area to include the area proposed to be mined. *PGE v. Bureau of Labor and Industries*, 317 Or 606, 611, 859 P2d 1143 (1993) (text and context of legislation are the first level of analysis to discern legislative intent). Consequently, petitioners argue, because the county's decision fails to address the impact mining would have on the current agricultural uses on the subject property, the challenged decision must be remanded to permit the county to apply the correct standard.

Intervenor argues that OAR 660-023-0180(4)(a) is not ambiguous, in that it is inevitable that, at least for a time, mining on the subject parcel will interfere with other uses that previously existed on the property. Intervenor contends that, even if the text of the rule could support petitioners' reasoning, the context clearly demonstrates that only those conflicts located on farm and forest lands *surrounding* the subject parcel need be considered under the OAR 660-023-0180(4)(a) analysis. Intervenor points to OAR 660-023-0180(4)(c), which requires that conflicts between mining and agricultural practices be measured by the standard set forth in ORS 215.296(1), as support for its argument that only those agricultural practices on *surrounding* farm and forest lands must be considered in an analysis of the impact of the proposed mining on agricultural lands.[2]

ORS 215.296(1) requires that nonfarm uses be allowed only when the local government finds that the nonfarm uses will not force a significant change in or significantly increase the cost of farm and forest practices on "surrounding lands devoted to farm or forest use." Intervenor contends that, even if other OAR 660-023-0180(4)(b) uses located on the

---

[2]OAR 660-023-0180(4)(c) provides, in relevant part:

> "The local government shall determine reasonable and practicable measures that would minimize the conflicts identified under [OAR 660-023-0180(4)(b)]. To determine whether proposed measures would minimize conflicts to agricultural practices, the requirements of ORS 215.296 shall be followed rather than the requirements of this section. * * *"

subject property must be included in the OAR 660-023-0180(4)(a) analysis, it is clear that for conflicts between mining and agricultural practices, only agricultural practices on surrounding farm and forest lands, not agricultural practices on the subject property, must be considered.

The reference in OAR 660-023-0180(4)(c) to ORS 215.296 does not definitively answer the question of whether the impact area described in OAR 660-023-0180(4)(a) is limited to the 1,500-foot ring around the mining area, or if it is intended to include the mining site itself. However, we agree with intervenor that the text and context of the rule make it relatively clear that the rule does not require analysis of impacts to agricultural practices on the mining site itself.[3]

The first assignment of error is denied.

SECOND ASSIGNMENT OF ERROR

Petitioners argue that during the proceedings below they raised the issue of whether the proposed mining activity complies with Benton County Code (BCC) 87.130(3), and that the county failed to adopt findings addressing compliance with this code section.[4] Petitioners concede that the county concluded that its local regulations are preempted by OAR 660-023-0180, but argue that this conclusion misconstrues the applicable law. Petitioners explain that aggregate mining is a conditional use on agricultural lands and, as such, is subject to ORS 215.296(10), which allows a local government to establish additional standards to ensure that

[3]Petitioners argue that, if the impact area does not include the mining site, then inventoried Goal 5 resources located on the subject property cannot be considered a potential source of conflict with mining activities. However, petitioners do not argue that such is the case here, and we do not address that circumstance.

[4]BCC 87.130(3) provides that with respect to proposed aggregate resource designations:

> "The Planning Commission shall determine the economic, social, environmental, and energy (ESEE) consequences of any conflicting uses on the [aggregate] resource site. If any conflicting use is subject to other Statewide Planning Goals, the ESEE consequences of both resource[use]s shall be determined."

mining will not interfere with agricultural activities, and to impose conditions of approval to address the additional standards.

In the proceedings before the local government, petitioners raised the issue of compliance with BCC 87.130(3); however, they did not raise the issue of whether ORS 215.296(10) allows the local government to require that the applicant for an aggregate mining overlay comply with local code provisions in light of the provisions of OAR 660-023-0250(2), which clearly limit the local government's ability to apply local code provisions to the establishment of an aggregate mine.[5] We agree with intervenor that the portion of the record cited by petitioners does not raise the issue petitioners present in their petition for review. In any case, ORS 215.296(10) allows a local government to impose additional standards for a *conditional use permit* for aggregate mining, but the challenged decision in this case is the designation of a significant resource site and the establishment of a surface mining overlay to allow mining outright. Therefore, the provisions of ORS 215.296(10) do not apply.

The second assignment of error is denied.

THIRD ASSIGNMENT OF ERROR

Petitioners argue that the county's findings are contradictory and fail to demonstrate that the county found that the proposed mining activity on the entire mining site is feasible. Petitioners contend that there is evidence in the record to show that mining on the subject property will increase groundwater flows from the Willamette River and will tend to exacerbate flood impacts on neighboring farm land. According to petitioners, the county's decision concludes that mining in the first 15-acre cell may feasible, but hydrogeologic studies and review of water movement as a result of the initial mining activity will be

[5]OAR 660-023-0250(2) provides, in relevant part:

> "The requirements of [OAR chapter 660, division 23] are applicable to [post-acknowledgment plan amendments] initiated on or after September 1, 1996. * * *"

necessary to determine if the proposed mining on the entire site is actually possible. Petitioners contend that these tentative conclusions are insufficient to demonstrate (1) that the proposed mining is feasible and (2) that further review need not comply with public notice and hearing requirements. In *Rhyne v. Multnomah County*, 23 Or LUBA 442, 447-48 (1992), we explained that a local government may find compliance with approval criteria by finding that the proposed means to achieve compliance is feasible, and imposing conditions of approval to ensure that the criteria are met. We also explained that, in the alternative, a local government may be able to defer finding compliance with the criteria, but only if it observes statutory notice and hearing requirements when it later makes the deferred finding of compliance.

The county's findings rely on the testimony of a reclamationist from the Department of Geology and Mineral Industries (DOGAMI), the public agency responsible for regulating mining activity and reclamation, and testimony from a specialist in river mechanics analysis to conclude that intervenor's proposal for mining and reclamation would not increase the potential for channel recapture or otherwise exacerbate impacts from floods on surrounding properties. As a precaution, DOGAMI recommended that mining be permitted only on a particular 15-acre portion of the subject property until further hydrogeologic studies could be completed. The county then adopted a condition of approval that requires the completion of a hydrologic engineering study prior to mining beyond the 15-acre area. The engineering study is required to establish particular practices to minimize recharge and flood impacts. The engineering study would be reviewed and approved by DOGAMI prior to expansion of mining activities beyond the specified 15 acres.

We believe that the county's findings adequately show that the proposed measures to minimize channel recapture and impacts from flooding are feasible. Moreover, the condition of approval that limits mining activities to a portion of the property until further

hydrogeologic studies are completed and more refined measures to minimize impacts are implemented is sufficient to ensure that the relevant criteria are satisfied.

The third assignment of error is denied.

FOURTH ASSIGNMENT OF ERROR

Petitioners argue that intervenor's plan for mining does not comply with BCC 53.215, in that topsoil will be removed from the property. The provisions of BCC 53.215 contain criteria for conditional use permits and require, in part, that a conditional use "not seriously interfere with uses on adjacent property, with the character of the area, or with the purpose of the zone[.]" BCC 53.215(1). According to petitioners, this case is similar to *MacHugh v. Benton County*, 37 Or LUBA 65 (1999), where the county denied a request for conditional use approval to remove the top six feet of soil from 30 acres of EFU-zoned land. The county found the proposed conditional use would seriously interfere with "the purpose of the zone" and, therefore, violate BCC 53.215(1).

Intervenor contends that BCC 53.215 does not apply to its application for a plan amendment. According to intervenor, those provisions only apply to conditional use permit applications. In addition, intervenor explains that it will not be selling topsoil removed from the mining area. It will stockpile the topsoil for reclamation. Intervenor points to a condition of approval that reclamation must occur sequentially, begin within 12 months after mining activities cease within a particular extraction cell, and result in at least 46 acres of the site being reclaimed for agricultural uses. Intervenor contends that this condition shows that the topsoil will not be removed from the property.

We agree with intervenor that petitioners have not adequately explained why a conditional use approval criterion applies to an application for a plan amendment to permit mining; nor have they demonstrated that the effect of the mining operations is to remove topsoil from the subject property.

The fourth assignment of error is denied.

FIFTH ASSIGNMENT OF ERROR

OAR 660-023-0180(4)(c) requires that the county adopt findings that demonstrate that the impacts from mining will not substantially increase the cost of or force a significant change in agricultural and forest practices within the mining impact area. One of the issues raised below was whether the proposed aggregate extraction would increase water impoundments and would therefore attract waterfowl, specifically Canadian Geese, to the vicinity.

According to petitioners, the county's findings that conclude that the proposed mining activity will not substantially increase the threat of goose depredation of crops are not supported by substantial evidence. Petitioners cite to a letter from a wildlife biologist for the U.S. Department of Agriculture (USDA) for the proposition that the problem of wildfowl depredation in the Willamette Valley is a serious concern, and that the creation of additional bodies of water could attract more migratory birds to the area. Petitioners contend that this testimony undermines the testimony relied upon by the county in its findings to such an extent that a reasonable decision maker could not conclude that an increase in goose population would not significantly increase the cost of agricultural activities on surrounding agricultural lands.

Intervenor responds that the testimony the county relied upon was from a farmer who has conducted agricultural activities for 15 years on property adjacent to intervenor's existing mining operation on Stahlbush Island. This farmer also conducts agricultural activities on other property in Willamette Valley that is not located near large bodies of water. According to the farmer's testimony, goose depredation is not substantially greater on the property next to the mining operation. Intervenor contends that the county's reliance on this local experience is even more justified, considering the farmer in question was formerly chair of the Oregon Board of Agriculture and recently won a US Presidential Award for sustainable agricultural practices. Intervenor argues that a reasonable decision maker could

rely on the testimony of someone with personal experience instead of generalized statements contained in a letter, especially when the author of the letter did not appear at the local hearings to explain his reasoning.

In reviewing the evidence that was relied upon by the local government to support its decision, we may not substitute our judgment for that of the local decision maker. Rather, we must consider all the evidence in the record to which we are directed and determine whether, based on that evidence, the local decision maker's conclusion is supported by substantial evidence. In evaluating the substantiality of evidence in the whole record, we are required to consider whether supporting evidence is refuted or undermined by other evidence in the record, but we cannot reweigh the evidence. *Younger v. City of Portland*, 305 Or 346, 358-60, 752 P2d 262 (1988); *1000 Friends of Oregon v. Marion County*, 116 Or App 584, 588, 842 P2d 441 (1992).

The testimony contained in a letter from a USDA employee does not so undermine the evidence the county relied upon that it renders that reliance unreasonable. A reasonable decision maker could rely upon the testimony of an individual with personal experience of intervenor's water impoundments, notwithstanding the general statements in the USDA letter about potential impacts caused by birds attracted to additional open water areas.

The fifth assignment of error is denied.

The county's decision is affirmed.