BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

OREGON DEPARTMENT OF
TRANSPORTATION,
Petitioner,

vs.

CITY OF MOSIER,
Respondent.

LUBA No. 2001-103

FINAL OPINION
AND ORDER

Appeal from City of Mosier.

Kathryn A. Lincoln, Assistant Attorney General, Salem, filed the petition for review and argued on behalf of petitioner. With her on the brief were Hardy Myers, Attorney General, and Peter D. Shepherd, Deputy Attorney General.

Daniel Kearns, Portland, filed the response brief and argued on behalf of respondent. With him on the brief was Reeve Kearns, PC.

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

AFFIRMED 11/19/2001

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

Petitioner appeals a city decision concluding that a nonconforming use has been discontinued.

FACTS

The challenged decision is the city's decision on remand from *ODOT v. City of Mosier*, 36 Or LUBA 666 (1999) (*ODOT I*). There, we summarized the relevant facts as follows:

> "[The Oregon Department of Transportation (ODOT or petitioner)] owns 70 acres of land that it acquired by eminent domain in 1954 for a 'quarry site, stock pile site, and for the construction and maintenance of a haul road, to be used in connection with the proper construction and maintenance of highways of the state highway system.' * * * Two acres of the subject property lie within the Mosier city limits, along its western edge. Approximately 12 acres of the subject property lie outside the Mosier city limits but within the city's urban growth boundary (UGB). Pursuant to a joint management agreement, Wasco County administers these 12 acres by applying the city's comprehensive plan designations and the 'substantive' portions of the city's zoning code to development applications 'affecting' the urban growth area. * * * The remaining 56 acres of the subject property are outside the Mosier city limits and outside the city's UGB. Wasco County has authority over this portion of the subject property.
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> "The only road access to the property is a haul road that runs north through the two-acre portion of the property within the city limits and connects with a public highway in the city. The haul road is also the only access for [an] adjacent quarry [owned by Hood River Sand, Gravel and Redi-Mix, Inc. (HRSG & R),] which is located solely within Wasco County.
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> "The city originally zoned the two-acre portion of the subject property within the city limits as agricultural, under which quarrying was a permitted use. * * *
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> "By 1978, any quarrying operations on the two-acre portion within the city had ceased; however, petitioner and others continued to use the haul road crossing over the two acres after 1978 in order to access the main part of the quarry, the use of which is described below. * * * In 1996, the city adopted legislation to prohibit quarry operations in its industrial zone, thereby effectively prohibiting all quarry activities within the city limits, except those that are legal nonconforming uses.

> "In 1996, in anticipation of a substantial increase in activity in the part of the quarry located within the county, and thus an increase in truck traffic over the haul road, ODOT began discussions with the city and Wasco County regarding plans to renew extraction activities. Petitioner entered into mediation with the city, during which time petitioner agreed not to extract or process any aggregate, and limited its use of the quarry and the haul road to hauling stockpiled material.
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> "During the course of the mediation, the city challenged petitioner's authority to conduct quarry-related activities within that portion of the property located within city limits, as it was apparent that petitioner had completely ceased gravel extraction from that area. The city also questioned whether the haul road could continue to be used. Petitioner claimed that its use of the Mosier pit over the last 40 years constituted a valid nonconforming use; and therefore, the use of its entire 70 acres for quarrying activities and activities related to quarrying (crushing, asphalt batching, stockpiling, hauling, and storage and disposal of highway demolition debris) [was] permitted. The mediation was terminated.
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> "After the mediation process faltered, the city initiated the subject action to determine the nature and extent of nonconforming rights, if any, petitioner has over property within the city limits. Over petitioner's objections, the city council held a quasi-judicial hearing on the matter. * * * After receiving testimony, the city decided that petitioner had failed to show that [mining and related activities, including hauling] had continued within city limits [after 1978]. * * * The city decided that, because petitioner failed to show that the accessory use of the haul road could occur without being connected to the main use, if the main nonconforming use had discontinued, the accessory uses were discontinued as well.
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> "Because the nonconforming use had discontinued within the city, the city concluded that any new mining and quarry-related activities occurring within the city limits and attributable to ODOT, including use of the haul road for quarry-related activities in the county portion of the property, constitute a violation of its ordinances and therefore are subject to enforcement proceedings." 36 Or LUBA at 668-70 (citations and footnote omitted).

In *ODOT I*, we concluded that the city erred in (1) separating the mining uses into discrete activities that could be individually discontinued; (2) failing to consider whether mining uses on the portions of the property located within the UGB and the unincorporated county had continued; (3) using the city's zoning ordinance provisions to determine whether a nonconforming use existed on the portions of the property subject to county jurisdiction;

and (4) failing to consider the uses of the property by petitioner's invitees and permittees. We then remanded the decision for further proceedings.

On remand, the city held hearings and accepted evidence pertaining to the nonconforming uses located on the entire property. It suspended its proceedings for a time to allow petitioner to file a nonconforming use verification application with the county to determine the nonconforming use status of the portion of the property within the UGB. After the county determined that petitioner had a nonconforming use for mining and related activities for the portion of the property located within the UGB, the city resumed its proceedings.[1] The city accepted the record of proceedings before the county in addition to the evidence presented during all city proceedings. After considering the evidence, the city concluded that under Mosier Zoning Ordinance (MZO) 6.1, the city's nonconforming use criteria, petitioner had failed to establish that the use of the haul road on the city portion of the subject property had continued without interruption for one year or more.[2] The city cited to evidence that the mining and related activities on the property ceased for more than a one-year period and, as a result, concluded that the nonconforming uses located within city limits were discontinued, pursuant to MZO 6.1. This appeal followed.

MOTION TO STRIKE

Petitioner moves to strike an appendix to the city's response brief that contains a copy of a letter ruling from a Wasco County Circuit Court judge (letter ruling) pertaining to a

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[1]Although the county only found that petitioner has a legal nonconforming use on the portion of the property located within the UGB and outside the city, it apparently considered evidence of mining without reference to whether that mining occurred on unincorporated areas of the property inside the UGB or outside the UGB.

[2]MZO 6.1 provides, in relevant part:

> "(1) A nonconforming use or structure may be continued but may not be altered or expanded. * * *
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> "(2) If a nonconforming use is discontinued for a period of one year, further use of the property shall conform to this ordinance."

pending enforcement action by the city against HRSG & R. Petitioner contends that the letter ruling is not in the record, nor is it subject to official notice pursuant to OEC 202.[3]

The city responds that a letter ruling falls within the category of "decisional law" and, therefore, it is subject to official notice. The city also argues that the letter ruling is relevant to respond to an argument made in petitioner's third assignment of error pertaining to the question of the city's authority to determine the nonconforming use status of the haul road. The city argues that ODOT may not object to LUBA's consideration of the letter ruling, because ODOT relies on evidence from the same circuit court proceedings to support its substantial evidence arguments set out in the second assignment of error.

We may take official notice of judicially cognizable law, including decisional law. *North Park Annex v. City of Independence*, 35 Or LUBA 827, 828 (1998). We conclude that the letter ruling by the Wasco County Circuit Court judge is decisional law. For that reason, we deny petitioner's motion to strike.[4]

FIRST ASSIGNMENT OF ERROR

In *ODOT I*, we concluded that the city must consider the use of the entire property, not just the portion of the property located within city limits, to determine whether a nonconforming use exists. 36 Or LUBA at 673.[5] We also stated that if the city chose to make

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[3]OEC 202 provides, in relevant part:

"Law judicially noticed [includes]:

"(1) The decisional * * * law of Oregon * * *."

[4]However, the letter ruling is not particularly helpful in this case. The letter ruling does not address the probity or weight of the evidence contained in the court documents, nor does the letter ruling draw legal conclusions regarding HRSG & R's right to continue the use of the haul road. The letter does provide the court's determination regarding the jurisdiction of the county to decide the nonconforming status of the road. And, for the reasons given in our discussion of the third assignment of error, the court's determination does not affect our analysis of petitioner's arguments.

[5]In *ODOT I*, we said:

its own determination regarding the existence of the nonconforming uses on the property, that determination must be the result of the application of county nonconforming use provisions to the portion of the property located within the unincorporated county. We indicated that the city could rely on a county determination of the existence of a nonconforming use for the portion of the property located within the urban growth boundary and in the unincorporated county, or the city could make its own determination. We noted, however, that there was some question as to whether the county's nonconforming use regulations applied to property located within the urban growth area, or whether the city's regulations applied. A nonconforming use determination in the urban growth area by either the city or the county would require a decision regarding applicable regulations. 36 Or LUBA at 677.

In this case, the county made its own independent determination that the county's regulations applied to property within the urban growth area. The county applied its

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> "Fifty-six acres of the subject property are located within Wasco County's unincorporated area and thus are subject to Wasco County's jurisdiction. The city may consider whether ODOT has a nonconforming use right to use the portion of the access road that crosses city property in conjunction with that part of ODOT's operation that is located in the county. However, in doing so, the city may not—as it apparently did in this case—limit its analysis to ODOT's activities on the two-acre, city portion of ODOT's property. The city must consider whether ODOT has a nonconforming use right on the county portion of its property that includes a right to use the haul road, including the portion of the haul road that crosses the two acres located in the city.
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> "In considering whether ODOT has nonconforming use rights on the county portion of its property that include road access across the city portion of its property, the city has two ways in which it may proceed. First, the city could require that ODOT seek and obtain a determination from the county concerning the scope and nature of any nonconforming use rights ODOT may have with regard to the portion of its operation located within the county. We see no reason why the city could not then defer to such a county nonconforming use determination, including any county determination concerning a right of access to the county portion of ODOT's property that might cross the city portion of ODOT's property. Alternatively, the city can make its own decision concerning the scope and nature of any nonconforming use rights ODOT may have with regard to the portion of its operation located within the county. In making such a determination, the city must apply the same statutory nonconforming use criteria the county would apply, ORS 215.130(5) through (10) rather than Mosier Zoning Ordinance (MZO) 6.1. ORS 215.130(5) through (10) establish the county's rights and obligation regarding the regulation of nonconforming uses." 36 Or LUBA at 673-74 (footnote omitted).

nonconforming use regulations and ORS 215.130 and concluded that a nonconforming use existed to extract and process gravel to maintain the Mitchell Point to Highway 197 intersection at The Dalles segment of I-84 and for certain city and county roads. Neither the city nor ODOT appealed the county's nonconforming use determination. After the county concluded its proceedings, the city resumed its review of ODOT's evidence. The city presumed that a legal nonconforming use exists within the urban growth area but nonetheless concluded that the use of the haul road and the quarry area within the city limits had been discontinued, because ODOT failed to show that the use of the haul road had not been interrupted for any period of 12 consecutive months between 1978 and 1998.

ODOT argues that the county's decision is determinative in this case. According to ODOT, once the nonconforming use had been established on one portion of the property, it necessarily follows that such a right exists to use the haul road to access that nonconforming use, including that portion of the haul road that is located within city limits. In ODOT's view, the city cannot disregard the county's decision, and independently determine that the nonconforming use of the road is lost.

The city responds that it accepts the county's determination that a nonconforming use exists within the county portion of the UGB, according to the county's regulations, and based on the county's view of the evidence. The city notes, however, that the county decision recognizes that there have been gaps in time where there has been no activity at the quarry, most notably during the entirety of 1987, and from 1992 through 1998. While those gaps did not affect the county's determination that a nonconforming use exists on the county portion under county law, the city contends that its ordinance does not permit such extended intervals of interruption. MZO 6.1(2) provides that if a nonconforming use is discontinued for more than one year, further use of the property must conform to the city's ordinance. *See* n 2. Applying MZO 6.1(2) to the portion of the nonconforming use within the city, the city contends that it properly concluded that the nonconforming use of the quarry property

located within the city, including the haul road, had been discontinued for more than one year.

We agree with the city. Our decision in *ODOT I* required that the city consider the uses occurring on the entire parcel, and it required that the city apply its ordinance provisions to that portion of the property located within the city limits. The city did so. Our decision in *ODOT I* did not hold, as ODOT appears to argue, that the answer to the question of whether ODOT retains a lawful nonconforming use on the portions of the property outside city limits necessarily answers the question of whether ODOT also retains the right to use the portion of the haul road within the city limits. The principle error requiring remand in *ODOT I* was the city's failure to consider evidence of activities on the portion of the property outside city limits, for purposes of determining whether use of the haul road had been discontinued under city law. On remand, the city properly considered evidence of activities on portions outside city limits, and assumed that such activities correlated with use of the haul road within the city limits. Nonetheless, the city concluded that periods of no activity on the portion outside city limits, while not legally determinative under county and state law, indicated that use of the area within city limits had been discontinued under the more restrictive city standard.[6] The legal conclusions that petitioner (1) *retains* a legal nonconforming use outside city limits and (2) has discontinued and therefore *lost* its legal nonconforming use within city limits are not, as the city explains, inconsistent. They are the result of applying MZO 6.1 to the part of the property that is inside city limits and applying ORS 215.130 to the part of the property that is outside city limits. Although the evidence in both cases may support the same factual conclusions, the different legal standards explain the differing ultimate legal conclusions regarding petitioner's right to continue the nonconforming use inside and outside city limits.

[6]The county applied the nonconforming use provisions of ORS 215.130 and relied on the precedent established in appellate cases involving cyclical nonconforming uses to determine that the nonconforming mining uses have not been discontinued in this case.

The first assignment of error is denied.

SECOND ASSIGNMENT OF ERROR

ODOT argues that it provided substantial evidence to show that there have been continuous gravel extraction, processing, storage and hauling activities on the subject property since the use became nonconforming within city limits in 1978. ODOT cites to evidence from regional managers regarding the level of activity, reports to the Oregon Department of Geology and Mineral Industries (DOGAMI) pertaining to compliance with reclamation regulations, testimony and evidence from other jurisdictions regarding use of the quarry and haul road by those entities, and to photographic evidence of the expansion of the pit over time to show that the use of the quarry and haul road has never been substantially interrupted. ODOT also points to evidence showing HRSG & R's and its predecessors' use of the haul road to serve the HRSG & R quarry as evidence of continuous use of the haul road. ODOT argues that the evidence showing HRSG & R's use is relevant, because it shows that gravel trucks, inspector's vehicles and other vehicles have used the haul road for access. ODOT contends that the city's determination that the nonconforming uses of the property have been discontinued is unreasonable, given the overwhelming evidence of continuous, multi-faceted use by numerous parties.

ODOT also argues that, in making its decision, the city artificially separated the uses of the property into those uses that have been conducted outside of city limits and those uses that have occurred within city limits, in contravention of our direction in *ODOT I*. According to ODOT, it may now demonstrate continuous use of the haul road by showing evidence of use by HRSG & R to reach HRSG & R's property, because the nonconforming use at issue for the city is the nonconforming use of the haul road, not the nonconforming use of the ODOT quarry.

We disagree with ODOT that the city separated the use of the haul road from the main nonconforming use. The city properly considered the county's determination that the

nonconforming use of the entire property has been retained if the county's standards are applied. The city also considered the evidence showing the use of the subject property by entities other than ODOT. The segmentation that ODOT argues is impermissible is the result of the haul road's location within the city limits, and the city's application of its ordinance provisions to the part of ODOT's property that is located within the city, and is not the result of segmenting the haul road use from the uses on the remainder of the property.[7] The city determined that the haul road is an accessory use to the mining activities on the subject property. Therefore, ODOT is incorrect that evidence of use of the haul road by HRSG & R to reach HRSG & R's quarry is relevant to prove nonconforming uses on ODOT's property. *See ODOT I*, 36 Or LUBA at 678 n 4 ("the city does not have to consider the use of the haul road * * * that does not arise from the nonconforming use on the property").

We now turn to petitioner's substantial evidence challenge. As a review body, we are authorized to reverse or remand the challenged decision if it is "not supported by substantial evidence in the whole record." ORS 197.835(9)(a)(C). Substantial evidence is evidence a reasonable person would rely on in reaching a decision. *Carsey v. Deschutes County*, 21 Or LUBA 118, *aff'd* 108 Or App 339, 815 P2d 233 (1991). In reviewing the evidence, however, 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. *Younger v. City of Portland*, 305 Or 346, 358-60, 752 P2d 262 (1988).

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[7]The city's findings state, in relevant part:

> "We acknowledge that where ODOT's data shows <u>any surface mining activity</u> anywhere in the large Mosier Pit by ODOT or its lessees or permittees, *i.e.*, any extraction processing, hauling or removal from stockpile, we must assume that material was hauled out through the 2-acre portion of the Mosier Pit under City jurisdiction. These gaps, during which there was <u>no surface mining activity</u> anywhere in the Mosier Pit by ODOT or its lessees or permittees, occurred in 1987 and 1992 through 1998. * * *" Record 13 (emphasis in original; footnotes omitted).

The city points to evidence in the record indicating that there has been a substantial gap in the use of the quarry for any purpose during certain periods. That evidence includes testimony from ODOT employees showing that from 1992 through 1998 there have been times that ODOT intended to use gravel from the Mosier quarry but in actuality used gravel obtained from other sources. While we agree with ODOT that there is evidence to show continuous use, there is also evidence showing that the use of the property has been discontinued for periods of more than one year. Where there is conflicting believable evidence that the nonconforming use either has or has not been discontinued for continuous periods of one year, the city may select the evidence it chooses to believe.

The second assignment of error is denied.

THIRD ASSIGNMENT OF ERROR

The joint management agreement between the city and the county governs uses within the UGB. In pertinent part, the agreement provides:

> "Wasco County shall retain final decision making responsibility for all land use actions [including zone changes, conditional uses, variances, subdivisions, major partitions, minor partitions, and building permits] *affecting* the City of Mosier urban growth area * * *." Joint Management Agreement, Referred Application/Situations, Section C (emphasis added).

ODOT argues that the city's decision regarding the status of the haul road "affects" the use of the portion of the subject property that is located within the urban growth area, because the haul road is the only feasible access to the quarry. Because the challenged land use action affects property within the urban growth area, ODOT argues that the joint management agreement clearly provides that the county has sole decision making authority to determine the status of the haul road. ODOT argues that the city erred by attempting to exert jurisdiction over the nonconforming status of the haul road when the city clearly ceded its authority to decide such matters to the county.

The city responds that ODOT waived this issue by not raising it during the remand proceedings below. ORS 197.763(1). The city concedes that during the proceedings below,

questions arose regarding the standards to be applied to the portion of the property within the urban growth area. However, the city argues that no one raised the issue of whether the county's authority to render decisions within the urban growth area necessarily extends to property within the city.

The issue under this assignment of error is similar to one raised and implicitly resolved in *ODOT I*, 36 Or LUBA at 672. Even if the issue or some portion of it is properly before us, we agree with the city that the joint management agreement does not confer authority on the county to decide any matters concerning property within the city that may have an effect on property located within the urban growth area.

The third assignment of error is denied.

FOURTH ASSIGNMENT OF ERROR

The portions of the subject property that are located within the city are zoned Industrial and Residential (R-10). In the Industrial zone, aggregate resource extraction and processing sites are prohibited. MZO 3.5. The R-10 zone does not explicitly prohibit aggregate resource extraction; however, the zone does not list aggregate resource extraction and processing as either an allowed or conditional use. MZO 3.2. The city interpreted its ordinance to prohibit those uses that are accessory to aggregate resource extraction and processing, in addition to the aggregate extraction and processing themselves, in the city's industrial and residential zones.[8]

Petitioner argues that the city erred in interpreting its ordinance to prohibit "uses accessory to surface mining." According to petitioner, an access road, whatever it is used for,

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[8]The city's findings, in relevant part, state:

> "[R]ock hauling is a use accessory to surface mining. We also find that hauling is, itself, a use regulated by City zoning in the same way as mining because of its severe noise, dust and vibration impacts on surrounding properties. We conclude that surface and aggregate mining and their accessory uses, including hauling, are not allowed in the City's R-10 or [Industrial] zones. All of the Mosier Pit within the City, including the haul road, is zoned R-10 or [Industrial]." Record 14 (footnote omitted).

is an allowed use within all of the city's zones. Petitioner contends that the city's interpretation that a private haul road used primarily to haul gravel and sand is an accessory use to a surface mine and has impacts that are similar to surface mining uses, is clearly wrong. *Goose Hollow Foothills League v. City of Portland*, 117 Or App 211, 217, 843 P2d 992 (1992). Petitioner argues that the road merely provides access and is not itself a use that is regulated by the MZO.

The city responds that it reasonably interpreted its ordinance to regulate accessory nonconforming uses. In this case, one of the established accessory uses to the Mosier pit is the use of the haul road. According to the city, its conclusion that the use of the haul road has adverse impacts that justify its regulation in conjunction with the primary use of the property is neither inconsistent with the express language of the city's comprehensive plan or zoning ordinance, nor is it inconsistent with the purpose or underlying policies that provide the basis for the plan or zoning ordinance. Therefore, the city argues, it must be affirmed. ORS 197.829(1).

We agree with the city that its interpretation of its ordinance to prohibit uses that are either an accessory to a prohibited use, or are unrelated to permitted uses within a zone is not clearly wrong. *Huntzicker v. Washington County*, 141 Or App 257, 261, 917 P2d 1051 (1996). Therefore, we defer to it.

The fourth assignment of error is denied.

The city's decision is affirmed.