BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

MORSE BROS., INC.,
Petitioner,

vs.

LINN COUNTY,
Respondent.

LUBA No. 2001-183

FINAL OPINION
AND ORDER

Appeal from Linn County.

Frank M. Parisi, Portland, and Todd Sadlo, Portland, filed the petition for review. Frank M. Parisi argued on behalf of petitioner. With them on the brief was Parisi and Parisi, PC.

Brad Anderson, Assistant County Counsel, Albany, filed the response brief.

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

REMANDED 08/16/2002

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 decision denying a post-acknowledgement plan amendment to allow mining on 74.50 acres of a 206-acre parcel zoned Exclusive Farm Use (EFU).

FACTS

The property that is the subject of this appeal lies east of Interstate 5 and north of the Calapooia River, approximately three and one-half miles northwest of the City of Brownsville. The property contains an estimated 11 million tons of high quality aggregate. The property is currently used for agricultural purposes, primarily grass seed production and livestock grazing. The property is bordered by EFU-zoned properties on the north, west and south. The Powell Hills Rural Residential Exception Area (Powell Hills) lies to the east. Powell Hills is developed with acreage homesites; approximately 48 dwellings are within 3,000 feet of the subject property. Powell Hills is at an elevation of 490 feet above mean sea level (MSL); the subject parcel is at an elevation of 435 feet above MSL.

Petitioner owns and operates an existing aggregate quarry on EFU-zoned property located immediately to the south of the subject property. Petitioner seeks to expand its quarry operations onto the subject parcel. Petitioner proposes to excavate in two phases. In the first phase, the western half of the 74.50-acre site would be mined, beginning at the southern property line. In the second phase, the eastern half of the site would be mined from west to east, to a distance 300 feet from Powell Hills. The proposed development permit would authorize the mining, crushing, processing, stockpiling and hauling of aggregate within the proposed mining area. Petitioner proposes to operate year-round, Monday through Saturday, from 6 a.m. to 10 p.m., with extended hours to be allowed as needed. Drilling and blasting would occur eight to ten times a year. Petitioner estimates that the quarry life will be approximately 60 years. The existing quarry floor is at approximately 300 feet MSL. Upon

excavation, the elevation of the subject property will drop approximately 135 feet and will generally match the elevation of the existing quarry.

Petitioner applied for a post-acknowledgement plan amendment (PAPA) to add the subject property to the county's significant aggregate inventory and to permit the mining as proposed. The county, applying local code provisions it adopted to conform with OAR chapter 660, division 23, approved the amendment to include the site on its aggregate inventory, but denied the application to permit mining. This appeal followed.

INTRODUCTION

The required process for reviewing aggregate mining applications is set out in OAR 660-023-0180(4).[1] We quote from our recent opinion in *Mollala River Reserve Inc. v.*

---

[1] OAR 660-023-0180(4) provides in pertinent part:

> "For significant mineral and aggregate sites, local governments shall decide whether mining is permitted. For a PAPA application involving a significant aggregate site, the process for this decision is set out in subsections (a) through (g) of this section. For a PAPA involving a significant aggregate site, a local government must complete the process within 180 days after receipt of a complete application that is consistent with section (6) of this rule, or by the earliest date after 180 days allowed by local charter. The 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 subsection (b) of this section 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.
>
> "(b) The local government shall determine existing or approved land uses within the impact area that will be adversely affected by proposed mining operations and shall specify the predicted conflicts. For purposes of this section, 'approved land uses' are dwellings allowed by a residential zone on existing platted lots and other uses for which conditional or final approvals have been granted by the local government. For determination of conflicts from proposed mining of a significant aggregate site, the local government shall limit its consideration to the following:
>
> "(A) Conflicts due to noise, dust, or other discharges with regard to those existing and approved uses and associated activities (*e.g.*, houses and schools) that are sensitive to such discharges;

Clackamas County, __ Or LUBA __ (LUBA No. 2001-199, June 6, 2002), describing that process:

> "* * * Once an aggregate site is determined to be significant, the local government must determine whether to allow mining on the site. That determination is governed by OAR 660-023-0180(4). * * *
>
> "Under OAR 660-023-0180(4)(a), the local government must first identify an impact area for the proposed mining activity. The local government must then identify approved land uses within the impact area that will be affected by the mining and specify any predicted conflicts. OAR 660-023-0180(4)(b). If possible, the local government must minimize any predicted conflicts through reasonable and practicable measures and allow the mining. OAR 660-023-0180(4)(c). If it is not possible to minimize the predicted conflicts, that does not necessarily mean that the request to mine must be denied. In the event that one or more conflicts cannot be minimized, the local government must then determine the economic, social, environmental, and energy (ESEE)

> "* * * * *
>
> "(c) The local government shall determine reasonable and practicable measures that would minimize the conflicts identified under subsection (b) of this section. * * * If reasonable and practicable measures are identified to minimize all identified conflicts, mining shall be allowed at the site and subsection (d) of this section is not applicable. If identified conflicts cannot be minimized, subsection (d) of this section applies.
>
> "(d) The local government shall determine any significant conflicts identified under the requirements of subsection (c) of this section that cannot be minimized. Based on these conflicts only, local governments shall determine the ESEE [economic, social, environmental and energy] consequences of either allowing, limiting, or not allowing mining at the site. Local governments shall reach this decision by weighing the ESEE consequences, with consideration of the following:
>
> "(A) The degree of adverse effect on existing land uses within the impact area;
>
> "(B) Reasonable and practicable measures that could be taken to reduce the identified adverse effects; and
>
> "(C) The probable duration of the mining operation and the proposed post-mining use of the site."

For the purposes of compliance with OAR 660-023-0180(4)(c), OAR 660-023-0180(1)(f) defines "minimize a conflict" as

> "reduc[ing] an identified conflict to a level that is no longer significant. For those types of conflicts addressed by local, state, or federal standards (such as the Department of Environmental Quality [(DEQ)] standards for noise and dust levels) to 'minimize a conflict' means to ensure conformance to the applicable standard."

> consequences of 'allowing, limiting, or not allowing mining at the site.' After weighing the ESEE consequences, the local government must determine whether to allow, limit, or not allow mining at the proposed site." Slip op 3-5 (footnote omitted).

In this case, the county considered evidence from opponents that the proposed mining would cause noise and dust impacts on Powell Hills that could not be minimized. After considering the ESEE consequences of allowing mining despite those impacts, the county concluded that mining should not be allowed. In its appeal, petitioner challenges both the standards the county applied and the evidence the county considered to reach its conclusion that the impacts of the proposed mining are such that they cannot be minimized in the manner described in OAR 660-023-0180(1)(f) and OAR 660-023-0180(4)(c). *See* n 1.

FIRST, SECOND, THIRD AND NINTH ASSIGNMENTS OF ERROR

In the first and third assignments of error, petitioner argues that the county misconstrued applicable law and made a decision that is unsupported by substantial evidence by basing its denial in part on impacts the proposed mining activity might have on domestic wells located within the established impact area. In the second assignment of error, petitioner contends that the county's findings are inadequate with respect to determining impacts to groundwater. In the ninth assignment of error, petitioner argues that the county erred in considering potential visual impacts on Powell Hills property owners as a result of the proposed mining.

The county concedes that it misconstrued the applicable law by basing its denial in part on the mining activities' potential impacts on domestic wells. In addition, the county concedes that visual impacts may not be considered under OAR 660-023-0180(4) because there are no inventoried or identified scenic views or sites in the area surrounding the subject property. Therefore, the first, second, third and ninth assignments of error are sustained.

FOURTH, FIFTH, SIXTH AND SEVENTH ASSIGNMENTS OF ERROR

In the fourth assignment of error, petitioner challenges the county's determination that OAR 340-035-0035(1)(b)(B), rather than OAR 340-035-0035(1)(b)(A), provides the applicable noise standard for determining compliance with OAR 660-023-0180(4)(a).[2] In the fifth assignment of error, petitioner argues that the county's findings with respect to OAR

---

[2] OAR 340-035-0035 "Noise Control Regulations for Industry and Commerce" provides, in relevant part:

> "(1) Standards and Regulations:
>
> "* * * * *
>
> "(b) New Noise Sources:
>
> "(A) New Sources Located on Previously Used Sites. No person owning or controlling a new industrial or commercial noise source located on a previously used industrial or commercial site shall cause or permit the operation of that noise source if the statistical noise levels generated by that new source and measured at an appropriate measurement point, specified in subsection (3)(b) of this rule, exceed the levels specified in Table 8, except as otherwise provided in these rules.
>
> "(B) New Sources Located on Previously Unused Site:
>
> "(i) No person owning or controlling a new industrial or commercial noise source located on a previously unused industrial or commercial site shall cause or permit the operation of that noise source if the noise levels generated or indirectly caused by that noise source increase the ambient statistical noise levels, L_{10} or L_{50}, by more than 10 dBA in any one hour, or exceed the levels specified in Table 8, as measured at an appropriate measurement point, as specified in subsection (3)(b) of this rule.
>
> "(ii) The ambient statistical noise level of a new industrial or commercial noise source on a previously unused industrial or commercial site shall include all noises generated or indirectly caused by or attributable to that source including all of its related activities. Sources exempted from the requirements of section (1) of this rule, which are identified in subsections (5)(b) - (f), (j), and (k) of this rule, shall not be excluded from this ambient measurement."

Table 8 of OAR chapter 340, division 35, establishes noise ceilings, in decibels, for noise generated by commercial and industrial activities. For example, during daylight hours, the noise generated by the proposed mining activity cannot equal or exceed 75 decibels more than once in a given hour.

340-035-0035(1)(b)(B) are not adequate. In the sixth assignment of error, petitioner contends that the county's findings with respect to noise are not supported by substantial evidence. Finally, in the seventh assignment of error, petitioner argues that the county erred by failing to provide petitioner an opportunity to present evidence that demonstrates that petitioner satisfies OAR 340-035-0035(1)(b)(B).

A. The Applicable Noise Standard

Petitioner contends that it provided the only evidence regarding which noise standard applies to the expansion of a quarry onto adjacent property. According to petitioner, its noise expert testified that DEQ uses the standard set out in OAR 340-035-0035(1)(b)(A), "New Sources Located on Previously Used Sites," to establish the maximum noise levels for mining on the subject property.[3]

The county responds that it applied the correct noise standard. According to the county, a plain reading of OAR 340-035-0035(1)(b) indicates that OAR 340-035-0035(1)(b)(B) provides the relevant standard because the proposed quarry falls within the definition of "previously unused industrial or commercial site" found in OAR 340-035-0015(47).[4] The county contends that the subject property has not been used for industrial or

---

[3] Petitioner relies on the following excerpt from its noise report to support its contention that OAR 340-035-0035(1)(b)(A) provides the relevant compliance standard:

> "* * * With regard to the issue of how to classify an expansion onto nearby land, [DEQ] has taken the position that when an operation expands onto contiguous property, it will be regulated by the rules for 'previously used sites,' rather than be subjected to the more restrictive ambient degradation standard for 'previously unused sites.' Therefore, according to * * * DEQ noise regulations, the noise generated by the proposed * * * quarry expansion operations will be regulated by the section for 'new sources located on previously used sites.'" Record 417.

[4] OAR 340-035-0015(47) defines a "previously unused industrial or commercial site" as:

> "[P]roperty which has not been used by any industrial or commercial noise source during the 20 years immediately preceding commencement of construction of a new industrial or commercial source on that property. Agricultural activities * * * generating infrequent noise emissions shall not be considered as industrial or commercial operations for the purposes of this definition."

commercial purposes during the 20-year period prior to petitioner's application, which would qualify it for the "previously unused" standard found in OAR 340-035-0035(1)(b)(B). According to the county, it is uncontroverted that the subject property has been used for agricultural production for more than 20 years.

To discern the meaning of an administrative rule, we look first to its text and context. *PGE v. Bureau of Labor and Industries*, 317 Or 606, 610-11, 859 P2d 1143 (1993); *Dept. of Land Conservation v. Lincoln County*, 144 Or App 9, 14, 925 P2d 135 (1996). Here, we agree with the county that the text of OAR 340-035-0035(1)(b)(B), fairly read, states that it applies to those sites like the subject property that have not been used for either industrial or commercial purposes within the 20-year period immediately preceding the commencement of the industrial use.[5]

B. Findings and Evidence Pertaining to the Applicable Noise Standard

As stated earlier, petitioner argues that the county's findings that OAR 340-035-0035(1)(b)(B) provided the relevant compliance standard are inadequate and not supported by substantial evidence. Petitioner also argues that the evidence it supplied during the proceedings demonstrates that, with proper mitigation, the proposed mining activity will comply with either or both standards set out at OAR 340-035-0035(1)(b). Petitioner contends that there is no quantified factual evidence in the record to undermine or contradict petitioner's evidence regarding noise.

The county responds that petitioner's evidence showed that, without mitigation, the proposed mining activity could exceed the maximum noise threshold established by OAR 340-035-0035(1)(b)(A) and Table 8. The county argues that OAR 340-035-0035(1)(b)(B)

[5] It may be, as petitioner suggests, that the application of the ambient noise threshold of OAR 340-035-0035(1)(b)(B) to the subject property will not affect petitioner's ability to comply with that standard, because the ambient noise will include the noise that is generated by the existing mining activities. If so, petitioner argues that the pertinent compliance standards under either OAR 340-035-0035(1)(b)(A) or (B) are the noise ceilings set out in Table 8. However, the possibility that the result may be the same under either scenario does not mean that the county applied the wrong standard.

establishes an additional threshold, the ambient noise threshold, which requires that the mining activity not exceed certain ambient statistical noise levels by more than 10 decibels in any one hour. The county argues that petitioner has not demonstrated that it has met that standard, especially when the ambient noise threshold standard requires consideration of certain noise generators that are not included in the maximum noise level calculations established for Table 8. Therefore, the county argues, petitioner's failure to provide evidence that demonstrates compliance with OAR 340-035-0035(1)(b)(B) justifies its finding that petitioner failed to meet that standard.

Notwithstanding these arguments, the county concedes in its response to the seventh assignment of error that it erred in failing to provide petitioner an opportunity to present evidence to show that the proposed mining activity will comply with OAR 340-035-0035(1)(b)(B). The county announced that OAR 340-035-0035(1)(b)(B) was the applicable noise standard in its decision, two months after the record closed for new evidence. In these circumstances, the county believes that the appropriate remedy is to remand the challenged decision to the county, so that petitioner and others can present evidence regarding the relevant noise standard.

Because the county has conceded that it should allow petitioner an opportunity to present evidence with respect to OAR 340-035-0035(1)(b)(B), we need not consider petitioner's challenge to the adequacy of, and the evidentiary support for, the county's findings of compliance with OAR 340-035-0035(1)(b)(B).

The fourth assignment of error is denied. We do not resolve the fifth and sixth assignments of error. The seventh assignment of error is conceded by the county and is therefore sustained.

EIGHTH ASSIGNMENT OF ERROR

Petitioner argues that the county's findings with respect to dust impacts misconstrue the applicable law, are inadequate and are not supported by substantial evidence.[6] Petitioners argue that the county's findings fail to consider OAR 660-023-0180(1)(f) (codified at LCC 939.030(M)). *See* n 1 (setting out OAR 660-023-0180(1)(f)).

Petitioner contends that there is uncontroverted evidence in the record to show that its dust suppression measures will prevent dust from the proposed mine from exceeding DEQ thresholds for airborne particulates. According to petitioner, the opposing testimony only provided anecdotal evidence that at times the mine would produce fugitive dust. Petitioner argues that the findings are inadequate because they do not identify the properties that would be affected by the dust, or counter the evidence that the proposed dust suppression measures are sufficient to meet the applicable DEQ standard.

In its brief, the county responds:

> "* * * The county's findings regarding dust were not essential to the decision made by the county. To the extent that the county based its decision to deny petitioner's application based on dust conflicts within the impact area, county concedes that a remand is necessary. However, it is the county's position that dust conflicts [were] not the basis for the denial of petitioner's application. Petitioner's eighth assignment of error should be denied." Respondent's Brief 7.

The county's findings state, in relevant part:

> "[Powell Hills] abuts and overlooks the resource site. The Board [of county commissioners] received a significant amount of testimony from property owners in [Powell Hills] that the proposal would impact existing land uses beyond the proposed 1,500-foot impact area boundary. Identified conflicts include * * * fugitive dust * * *.
>
> "The hearings record contains sufficient testimony to conclude there would be significant conflicts between the proposed mining operation and the existing and proposed residential land uses in [Powell Hills] beyond the proposed 1,500-foot impact area boundary. The impact area is therefore expanded to the

[6] Linn County Code (LCC) 939.130(B) duplicates OAR 660-023-0180(4).

> east of the resource site to include land uses within [Powell Hills] that are within 3,000 feet of the site. * * *" Record 14.
>
> "* * * No conflicts with the haul road due to noise, dust or other discharges are identified.
>
> "* * * * *
>
> "Fifteen existing residences are located within 1,500 feet of the proposed mining area boundary. When the 3,000-foot impact area to the east is used to include impacted Powell Hills properties, 48 existing dwellings plus six vacant residential tax lots are within the impact area. The Board [of county commissioners] has heard considerable testimony from Powell Hills residents that the proposal would result in unacceptable noise, dust and visual impacts * * *.
>
> "* * * The Board [of county commissioners] has received testimony challenging the conclusion that any mitigation measures would adequately minimize noise and dust impacts on area residents." Record 15.
>
> "The hearing record contains substantial testimony and evidence that mining the site would create significant impacts on neighboring residential uses due to noise, dust, other potential discharges, visual impacts and potential impacts on residential water wells. The Board [of county commissioners] concludes that these impacts cannot be minimized by proposed measures to reduce conflicts with existing and future residential uses within the impact area." Record 17.
>
> "* * * Water treatment is used at [the existing quarry] and is proposed at the [proposed quarry] to minimize dust impacts on the nursery [that is located to the south of the existing quarry]. * * *" Record 17-18.

Fairly read, the findings state that the impact of dust on Powell Hills residents formed one of the bases for the county's conclusion that the proposed quarry operation will cause adverse impacts within 3,000 feet of the property's boundary with Powell Hills that cannot be mitigated. We agree with petitioner that the county misconstrued the applicable law by not addressing compliance with the applicable DEQ air quality standards, and that the county's findings with respect to dust are not responsive to OAR 660-023-0180(1)(f), (4)(a) and (4)(b)(A). *See* n 1. Because the county will have the opportunity to address the other assignments of error on remand, we believe the proper disposition of this assignment of error

is to sustain it, and allow the county to clarify its position on whether dust effects within the identified impact area are indeed a conflict that cannot be mitigated.[7]

The eighth assignment of error is sustained.

The county's decision is remanded.

[7] As part of this analysis, it may be appropriate for the county to revisit its determination that the dust impacts warrant the expansion of the conflict impact area from 1,500 to 3,000 feet. We agree with petitioner that to the extent the county believes dust impacts justify expanding the 1,500-foot impact area to 3,000 feet, its findings fail to adequately explain or justify that position.