BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

JACK BRYANT,
Petitioner,

vs.

UMATILLA COUNTY,
Respondent,

and

HATLEY CONSTRUCTION, INC.,
Intervenor-Respondent.

LUBA No. 2003-108

FINAL OPINION
AND ORDER

Appeal from Umatilla County

James M. Habberstad, The Dalles, filed the petition for review. With him on the brief was the Law Office of James M. Habberstad.

No appearance by Umatilla County.

Roger A. Alfred, Portland, filed a response brief on behalf of intervenor-respondent. With him on the brief was Frank M. Flynn, Portland, and Perkins Coie, LLP.

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

AFFIRMED 11/26/2003

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

Opinion by Bassham.

NATURE OF THE DECISION

Petitioner appeals a decision that (1) amends the county comprehensive plan to add an aggregate site to the county's inventory of resource sites, and (2) grants a conditional use permit to mine the site.

FACTS

The subject property is a 15-acre portion of a 143.57-acre parcel zoned exclusive farm use (EFU). On June 2, 2003, intervenor-respondent (intervenor) applied to the county requesting a conditional use permit to significantly expand mining activity on the existing rock quarry on the site. The county determined that a plan amendment was necessary to authorize the expanded mining, and on June 4, 2003, the county mailed notice of the proposed plan amendment to the Department of Land Conservation and Development (DLCD). The DLCD notice identifies the date of the first evidentiary hearing as June 26, 2003 and the date of the final hearing as June 30, 2003.

DLCD submitted a letter to the county on June 24, 2003, providing comments on the proposed amendment. The planning commission held the initial evidentiary hearing on June 26, 2003, and recommended approval of the plan amendment and permit. The county board of commissioners held a hearing on June 30, 2003, and voted to approve the plan amendment and permit. This appeal followed.

STANDING

Intervenor moves to dismiss this appeal, arguing that petitioner has not established that he has standing to appeal the challenged decision to LUBA under the reasoning in *Utsey v. Coos County*, 176 Or App 524, 32 P3d 933 (2001) (a party seeking judicial review of a LUBA decision pursuant to ORS 197.850(1) must demonstrate that the Court of Appeals' decision will have a "practical effect" on the party).

Intervenor does not dispute that petitioner "appeared" before the county for purposes of ORS 197.830(2) and thus satisfies the statutory standing requirements to appeal to LUBA. We have held on several occasions that the "practical effect" limitation on judicial review described in *Utsey* does not apply to LUBA's review of a land use or limited land use decision. *See Central Klamath County CAT v. Klamath County*¸ 41 Or LUBA 524, 527 (2002) (summarizing cases). Intervenor offers no reason to reach a contrary conclusion that we have not already addressed, and rejected, in *Central Klamath County CAT* and the cases cited therein. Intervenor's motion to dismiss is denied.

FIRST ASSIGNMENT OF ERROR

Petitioner argues that the county failed to provide 45 days notice to DLCD prior to the first evidentiary hearing, as required by ORS 197.610(1).[1] Petitioner cites *Oregon City*

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[1] ORS 197.610 provides, in relevant part:

> "(1) A proposal to amend a local government acknowledged comprehensive plan or land use regulation or to adopt a new land use regulation shall be forwarded to the Director of [DLCD] at least 45 days before the first evidentiary hearing on adoption. The proposal forwarded shall contain the text and any supplemental information that the local government believes is necessary to inform the director as to the effect of the proposal. The notice shall include the date set for the first evidentiary hearing. The director shall notify persons who have requested notice that the proposal is pending.
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> "(2) * * * [A] local government may submit an amendment or new regulation with less than 45 days' notice if the local government determines that there are emergency circumstances requiring expedited review. In both cases:
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> "(a) The amendment or new regulation shall be submitted after adoption as provided in ORS 197.615 (1) and (2); and
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> "(b) Notwithstanding the requirements of ORS 197.830 (2), the director or any other person may appeal the decision to the board under ORS 197.830 to 197.845.
>
> "(3) When [DLCD] participates in a local government proceeding, at least 15 days before the final hearing on the proposed amendment to the comprehensive plan or land use regulation or the new land use regulation, the department shall notify the local government of:
>
> "(a) Any concerns the department has concerning the proposal; and

Leasing, Inc. v. Columbia County, 121 Or App 173, 854 P2d 495 (1993) and *Donnell v. Union County*, 39 Or LUBA 419 (2001), for the proposition that failure to provide the full 45 days notice to DLCD as required by ORS 197.610(1) mandates remand.

Petitioner fails to acknowledge more recent LUBA cases that revisit the Board's understanding of *Oregon City Leasing, Inc.* and the consequences that flow from a local government's failure to fully satisfy the notice requirements of ORS 197.610(1). *No Tram to OHSU v. City of Portland*, 44 Or LUBA 647, 653-56 (2003); *OCAPA v. City of Mosier*, 44 Or LUBA 452, 468-72 (2003); *Stallkamp v. City of King City*, 43 Or LUBA 333, 351-52 (2002), *aff'd* 186 Or App 742, 66 P3d 1029 (2003). Under these cases, inadequate provision of notice to DLCD under ORS 197.610(1) requires remand only if that failure (1) prejudiced petitioner's substantial rights or (2) was likely to prejudice the substantial rights of other persons who may be relying on DLCD's notice to participate in the post-acknowledgment plan amendment.

In *No Tram to OHSU*, we held that provision of notice to DLCD only 26 days prior to the first evidentiary hearing did not provide a basis for reversal or remand. 44 Or LUBA at 658. In *Donnell v. Union County*, 40 Or LUBA 455, 459-60 n 2 (2001), we questioned, but did not resolve, whether notice provided 19 days before the first evidentiary hearing necessarily required remand. In the present case, the county provided notice 22 days prior to the first evidentiary hearing. Petitioner participated during the proceedings below, and does not allege any prejudice to his substantial rights. Despite the relatively short notice, DLCD was able to respond to the notice and provide substantive comments prior to the first evidentiary hearing. Record 50-51. The DLCD letter does not suggest that the short notice prevented DLCD, or other parties that might rely on DLCD for notice, from participating in

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> "(b) Advisory recommendations on actions the department considers necessary to address the concerns, including, but not limited to, suggested corrections to achieve compliance with the goals."

the county's proceedings. Petitioner does not allege or attempt to demonstrate otherwise. Accordingly, the county's failure to provide a full 45 days notice to DLCD as required by ORS 197.610(1) does not provide a basis for reversal or remand in this case.

The first assignment of error is denied.

SECOND ASSIGNMENT OF ERROR

Petitioner argues that the county's determination of the quantity and quality of the aggregate resource on the site, and its determination that the resource is "significant," is not supported by substantial evidence. Specifically, petitioner disputes that intervenor demonstrated, based on a "representative set of samples of aggregate material," that the aggregate resource meets Oregon Department of Transportation (ODOT) specifications, as required by OAR 660-023-0180(3)(a).[2]

Intervenor submitted to the county a letter indicating that the quarry contains more than 100,000 tons of material that meet ODOT specifications. In addition, intervenor submitted a laboratory report dated June 30, 1995 verifying that the aggregate resource meets ODOT specifications for degradation and abrasion. Record 45. The county relied on the letter and report to find that the resource is "significant" under OAR 660-023-0180(3)(a).

Petitioner contends that there is no evidence that the laboratory report or other testing was based on a "representative" set of samples from the 15-acre quarry. In addition, petitioner argues that the report tested only for degradation and abrasion, and did not

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[2] OAR 660-023-0180(3) provides, in relevant part:

> "An aggregate resource site shall be considered significant if adequate information regarding the quantity, quality, and location of the resource demonstrates that the site meets any one of the criteria in subsections (a) through (c) of this section, except as provided in subsection (d) of this section:
>
> "(a) A representative set of samples of aggregate material in the deposit on the site meets Oregon Department of Transportation (ODOT) specifications for base rock for air degradation, abrasion, and sodium sulfate soundness, and the estimated amount of material is more than 2,000,000 tons in the Willamette Valley, or 100,000 tons outside the Willamette Valley[.]"

determine whether the sample met ODOT specifications for sodium sulfate soundness, as OAR 660-023-0180(3)(a) requires.

While petitioner is correct that the laboratory report and other evidence relied upon by the county do not specify that the samples tested were "representative," there is also no suggestion in the record to the contrary. We note that, as far as we can tell, neither petitioner nor any other person raised an issue below regarding whether the tested samples were "representative." There is undisputed evidence that the existing quarry on the site has been used for many years, including use by the City of Pilot Rock, and that there is at least 100,000 tons of aggregate on the site. Absent some reason to believe that the sample tested was unrepresentative or that the rock quality at the quarry is not uniform, we do not believe that the county's findings under OAR 660-023-0180(3)(a) lack evidentiary support.

Petitioner is also correct that the laboratory report did not determine whether the sample met ODOT specifications for sodium sulfate soundness. However, intervenor responds that ODOT has developed specifications with respect to base aggregate for degradation and abrasion, but not for sodium sulfate soundness. Intervenor submits that it is impossible to satisfy ODOT specifications that do not exist, and that the rule must be understood as requiring testing under ODOT specifications that ODOT has, in fact, promulgated.

Petitioner does not dispute intervenor's contention that ODOT in fact has not developed specifications with respect to base aggregate for sodium sulfate soundness. We agree with intervenor that OAR 660-023-0180(3)(a) does not require a demonstration that the aggregate resource meets ODOT specifications that, in fact, do not exist.

The second assignment of error is denied.

THIRD ASSIGNMENT OF ERROR

Petitioner argues that the conditional use permit approval must be reversed because it ultimately depends on the validity of the comprehensive plan amendment. For the reasons

stated in the first and second assignments of error, petitioner contends that the comprehensive plan amendment must be remanded. Therefore, petitioner argues, the conditional use permit must also be remanded.

Our rejection of petitioner's arguments under the first and second assignments of error also disposes of this assignment of error.

The third assignment of error is denied.

The county's decision is affirmed.