

1 BEFORE THE LAND USE BOARD OF APPEALS
2 OF THE STATE OF OREGON

3
4 GENE F. WYNN,
5 *Petitioner,*

6
7 vs.

8
9 POLK COUNTY,
10 *Respondent,*

11
12 and

13
14 J. C. COMPTON COMPANY,
15 *Intervenor-Respondent.*

16
17 LUBA Nos. 2004-038, 2004-039 and 2004-040

18
19 FINAL OPINION
20 AND ORDER

21
22 Appeal from Polk County.

23
24 Gene F. Wynn, Independence, filed the petition for review and argued on his own behalf.

25
26 David Doyle, County Counsel, Dallas, and Wallace W. Lien, Salem, filed a joint response
27 brief on behalf of respondent and intervenor-respondent. Wallace W. Lien argued on behalf of
28 intervenor-respondent.

29
30 BASSHAM, Board Member; HOLSTUN, Board Chair, participated in the decision.

31
32 AFFIRMED

05/25/2004

33
34 You are entitled to judicial review of this Order. Judicial review is governed by the
35 provisions of ORS 197.850.

NATURE OF THE DECISION

Petitioner appeals three county decisions that facilitate expansion of an existing aggregate mine on land zoned for exclusive farm use (EFU).

MOTION TO INTERVENE

J.C. Compton Company (intervenor), the applicant below, moves to intervene on the side of respondent. There is no opposition, and the motion is allowed.

FACTS

The subject property is a 16.5-acre area adjacent to an existing 130-acre aggregate mine, known as the Krauger Pit. The existing pit is on the county's comprehensive plan inventory of significant aggregate sites. The pit and the proposed expansion area are adjacent to the Willamette River. Intervenor filed applications with the county (1) to add the expansion area to the comprehensive plan inventory of significant aggregate sites; (2) to apply the Mineral and Aggregate Overlay zone to the expansion area; and (3) for approval of a non-structural floodplain development permit, necessary to mine the expansion area.

The Oregon Department of Fish and Wildlife (ODFW) required intervenor to construct a fish channel that would connect the existing pit with a natural slough via the expansion area, in order to help fish that now become trapped in the mining pits during flood events to escape back to the river. Intervenor proposed, and ODFW approved, a 20-foot deep fish channel that will be 240 feet wide where it connects to the expansion area, tapering down at a 4-to-1 slope to the slough, where it will be 120 feet wide.

The county hearings officer recommended approval of the requested plan and zoning amendments, and approved the floodplain development permit. After conducting hearings on the three applications, the county board of commissioners approved all three applications. These appeals followed.

1 **FIRST ASSIGNMENT OF ERROR**

2 The county’s decision states that the proposed fish channel is “accessory” to mining of the
3 expansion area. Record 50. In the first assignment of error, petitioner disputes that the fish channel
4 is an accessory use, and argues that excavation of the proposed fish channel is itself a mining activity
5 that is not allowed in the EFU zone.

6 Intervenor responds that no issue was raised below that the fish channel is not an accessory
7 use, or that it is properly viewed as a mining use not allowed in the EFU zone, and therefore those
8 issues are waived. ORS 197.763(1). In any case, intervenor argues, the county properly
9 concluded that the fish channel is accessory to the primary use, mining of the expansion area.
10 Intervenor further notes that even if the fish channel is properly viewed as aggregate mining activity,
11 as petitioner alleges, aggregate mining is an allowed use in the EFU zone. ORS 215.213(2)(d)(B);
12 ORS 215.283(2)(b)(B).

13 Petitioner has not identified any testimony or evidence in the record that raises the issues
14 presented in the first assignment of error. Accordingly, those issues are beyond our review.
15 ORS 197.835(3).

16 **SECOND ASSIGNMENT OF ERROR**

17 Petitioner contends that the county erred in declining to consider and approve the
18 reclamation plan, which includes the fish channel, as part of these proceedings. According to
19 petitioner, while the county accepted testimony with respect to the fish channel, the county failed to
20 consider that testimony, because it did not consider the reclamation plan, and hence the fish channel,
21 to be part of the plan and zoning amendment applications before it. Instead, petitioner argues, the
22 county determined that it would consider the reclamation plan only as part of a future site plan
23 review.¹

¹ Petitioner cites to the following passage in the county’s decision:

The applicant has submitted a reclamation plan in this application. The applicant indicated that the reclamation plan has been prepared with input from DOGAMI [Department of Geology

1 Intervenor responds that no issue was raised below with respect to whether the county must
2 consider and approve the reclamation plan as part of the plan and zone amendment proceedings, as
3 opposed to during subsequent site plan review. In any case, intervenor argues, the county's
4 decision to consider the reclamation plan as part of site plan review is entirely consistent with the
5 county's land use regulations, which require consideration and approval of the reclamation plan as
6 part of site plan review.² Finally, intervenor argues that to the extent petitioner alleges that the

and Mineral Industries]. The applicant indicated that as the mining progresses mined areas would be graded to final slopes and seeded with native species. After reclamation the extraction area would be used as a water impoundment for wildlife habitat and recreation. Polk County is not considering the reclamation plan as part of this application. Polk County will consider the reclamation plan as part of the Site Plan Review. The reclamation plan must also be approved by DOGAMI as part of that agency's permitting process." Record 51.

² Intervenor cites to Polk County Zoning Ordinance (PCZO) 174.060, 174.070, and 174.080, which govern proposals for mining in the Mineral and Aggregate Overlay zone and provide, in relevant part:

"174.060. DEVELOPMENT STANDARDS - EXTRACTION AREA. A development plan shall be submitted to the County Planning Department for any activity allowed in Section 174.050. The development plan shall provide the necessary documents, permits, and maps to demonstrate compliance with the following standards and requirements:

"(H) Site Reclamation. A reclamation plan shall be submitted concurrently with the development plan required in Section 174.070. The reclamation plan shall include a schedule showing the planned order and sequence of reclamation, shall assure that the site will be restored or rehabilitated for the land uses specified in the underlying zone consistent with the site specific Goal 5 program, and shall meet DOGAMI requirements."

"174.070. APPLICATION PROCESS. Final development plan approval is required prior to the beginning of any mineral and aggregate activity listed in Section 174.050 (A), and before any expansion of a pre-existing or nonconforming site. The applicant shall provide the following at the time of application:

"(A) A development plan demonstrating that the development standards required in Section 174.060 can be met, including:

(8) Site Reclamation[.]"

"174.080. SITE PLAN APPROVAL. The Planning Director shall review the completed application and shall grant or deny approval based on the ability of the proposal to conform with the ESEE analysis for the site and the development standards set forth in Section 174.060. The applicant may be required to make such modifications in the development plan as are

1 county refused to consider testimony regarding the fish channel, the county in fact adopted extensive
2 findings addressing all issues raised about the fish channel. Record 116-20.

3 Petitioner has not identified anything in the record that raises an issue below regarding
4 whether the county must approve the reclamation plan in the course of approving the requested plan
5 and zoning amendments, or otherwise demonstrated that that issue may be raised for the first time
6 before LUBA. The issue presented in this assignment of error is therefore waived.

7 The second assignment of error is denied.

8 **THIRD ASSIGNMENT OF ERROR**

9 Petitioner contends that the county erroneously believed that it could not impose an impact
10 area greater than 750 feet, and therefore the county improperly rejected testimony that a larger
11 impact area was warranted. Petitioner cites to the following passage from the county's
12 supplemental findings:

13 "The issue of width of the impact area has been raised. Allegations for why the
14 impact area width should be wider than that specified in this approval are hereby
15 rejected. The result of this approval is [a] continuation of the existing operation at
16 essentially the same level as before, and that existing operation has not generated
17 any adverse [e]ffects or impacts or complaints or any conflicts whatsoever. The
18 allegations about noise, dust, vibration and traffic are all misnomers as none will
19 increase over current levels. It must be remembered that this is a wet mining
20 operation so dust is not an issue with extraction. The impact area width and
21 location is driven by the necessary location of the fish passage, which dictates the
22 extraction area, and by the rules of PCZO Chapter 174 which establish the
23 minimum width. The purpose the impact area is to protect the aggregate resource
24 from conflicts or interference that may be caused by sensitive land uses that could
25 locate near the mining site. The requirement for an impact area of 750 [feet]
26 surrounding an extraction area is described in PCZO 174.020(B). This section
27 specifies that the width of the impact area shall be determined through the ESEE
28 analysis, but that the width must be at least 750 [feet], unless a reduced distance is
29 justified based on the ESEE analysis. *There is no provision for an impact area*
30 *greater than 750 [feet] as is suggested by the opponents,* and no suggestion in
31 the ESEE analysis that anything less is justified either. It is hereby found and

necessary to meet the requirements of the ESEE analysis and development standards.
Approval may only be granted to sites which are inventoried 3A or 3C under Statewide
Planning Goal 5 and the Comprehensive Plan."

1 concluded that the 750 [foot] impact area is appropriate under [PCZO] Chapter
2 174.” Record 116 (emphasis added).

3 According to petitioner, the emphasized clause in the above-quoted finding shows that the county
4 believed, erroneously, that there was no provision *under the PCZO* for an impact area greater than
5 750 feet. In fact, petitioner argues, PCZO 174.020 makes it clear that the impact area must be a
6 *minimum* of 750 feet, which indicates that a larger impact area may be appropriate.³ Petitioner
7 cites to testimony and evidence raising concerns regarding whether a 750 foot impact area is
8 sufficient in size to protect nearby sensitive uses.

9 The emphasized language is ambiguous, and it is possible, as petitioner contends, that the
10 county intended to state that there is no provision under the PCZO that would allow an impact area
11 larger than 750 feet. However, we agree with intervenor that read in context it is reasonably clear
12 that the county did not intend that meaning. The challenged finding accurately paraphrases
13 PCZO 174.020(B), which provides that the appropriate width of the impact area is determined
14 through the ESEE analysis. Intervenor argues that the county obviously intended to state that there
15 is no provision *in the ESEE analysis* for an impact area greater than 750 feet. Given the accurate
16 paraphrase of PCZO 174.020(B) that immediately precedes the challenged statement in the
17 county’s finding, we agree with intervenor that the county almost certainly did not intend the
18 erroneous meaning petitioner ascribes to that finding. Accordingly, petitioner’s arguments based on
19 that misunderstanding of the challenged finding do not provide a basis for reversal or remand.
20 Petitioner does not present a focused challenge to the ESEE analysis or otherwise explain why the
21 county erred in relying on the ESEE analysis to impose a 750-foot impact area.

³ PCZO 174.020(B) states:

“IMPACT AREA. The Mineral and Aggregate Impact Area shall be applied to properties or portions of properties adjacent to and immediately surrounding an Extraction Area. The width of the Impact Area shall be determined through the ESEE analysis prior to application of the MA Overlay Zone, based on the type of mineral or aggregate resource to be extracted as well as physical features of the area which may cause a larger or smaller area to be affected. The minimum width of the impact area shall be 750 feet from the Extraction Area boundary unless a reduced distance is justified, based on the ESEE analysis (see example in Appendix ‘A’).”

- 1 The third assignment of error is denied.
- 2 The county's decisions are affirmed.