BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

JACK L. LINDSEY
and DELMER C. BRINK,
Petitioners,

and

HOLGER T. SOMMER
and CECIL E. WALDRON,
Intervenor-Petitioners,

vs.

JOSEPHINE COUNTY,
Respondent,

and

COPELAND SAND and GRAVEL, INC.,
Intervenor-Respondent.

LUBA No. 2005-112

FINAL OPINION
AND ORDER

Appeal from Josephine County.

Jack L. Lindsey, Grants Pass, filed a joint petition for review and argued on his own behalf. With him on the brief was Holger T. Sommer.

Delmer C. Brink, Grants Pass, represented himself.

Holger T. Sommer, Merlin, filed a joint petition for review and argued on his own behalf. With him on the brief was Jack. L. Lindsey.

Cecil E. Waldron, Grants Pass, represented himself.

No appearance by Josephine County.

James R. Dole, Grants Pass, filed the response brief and argued on behalf of intervenor-respondent. With him on the brief was Cauble, Dole and Sorenson.

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

REMANDED 02/27/2006

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

Opinion by Holstun.

NATURE OF THE DECISION

Petitioners and intervenor-petitioners (petitioners) appeal a county decision approving a comprehensive plan amendment, zone change, and site plan review to allow aggregate mining.

FACTS

Intervenor-respondent (applicant) owns a 45.81-acre parcel on the Rogue River outside of Grants Pass approximately one-half mile upstream from its confluence with the Applegate River. The applicant sought a post acknowledgement plan amendment (PAPA) from Agricultural to Aggregate Resource to redesignate 14.3 acres of the parcel as a significant aggregate site, a corresponding comprehensive plan text amendment, a concurrent zone change from Exclusive Farm (EF) to Aggregate Resource (AR), and site plan review approval. The planning commission recommended approval over the objections of petitioners, and the board of county commissioners approved the applications. This appeal followed.

MOTION TO STRIKE

Petitioners attach an affidavit to their petition for review in support of their argument that the application in this matter was submitted on July 12, 2005. Because that affidavit (1) asserts relevant facts, (2) is not included in the record, and (3) is not accompanied by a motion to consider extra-record evidence under OAR 661-010-0045, the applicant moves to strike the memorandum. The applicant's motion is granted.

FIRST ASSIGNMENT OF ERROR

The final decision in this case was adopted on June 29, 2005. The critical administrative rule for approving PAPAs involving significant aggregate resources is OAR 660-023-0180. Amendments to OAR 660-023-0180 became effective a little over a year earlier, on June 25, 2004. The county applied the version of the rule that existed prior to the

June 25, 2004 amendments. Petitioners argue that the county misconstrued the applicable law by not applying the new rule. The parties assume that the fixed goalpost rule of ORS 215.427(3) determines whether the new rule applies and that the date the application was submitted is dispositive under that statute.[1] We do not question the parties' assumptions. According to petitioners, because the application was not submitted until July 12, 2004, the new rule applies. The county responds that the application was submitted on June 4, 2004, and therefore the old rule applies.[2]

Petitioners base their argument on the fact that the various application sheets submitted by the applicant are not dated and are not date stamped by the county. Petitioners also argue that the county's receipt of the applicant's check for the application fees is dated July 12, 2004. The applicant responds that a memorandum from a county planner explains that due to staff shortages the application was not initially processed until July, but that it had been submitted on June 4, 2004.[3] The memorandum includes a copy of the June 4, 2004

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[1] ORS 215.427(3)(a) provides:

> "If the application [for a permit, limited land use decision or zone change] was complete when first submitted or the applicant submits the requested additional information within 180 days of the date the application was first submitted and the county has a comprehensive plan and land use regulations acknowledged under ORS 197.251, *approval or denial of the application shall be based upon the standards and criteria that were applicable at the time the application was first submitted*." (Emphasis added).

[2] According to petitioners, whether the new rule applies is material because the new rule requires an estimated 500,000 tons of aggregate material to constitute a significant aggregate site while the old rule only requires 100,000 tons. The estimated amount of aggregate for the proposal is "in excess of 460,000 tons." Record 252. Depending on how much more than 460,000 tons of aggregate material is present on the proposed site, it might not qualify as a significant site under the new rule.

[3] The memorandum states in pertinent part:

> "The reason I did not review the application immediately was because one of our planners * * * had left in May, and the new planners had not been hired yet. The burden of counter duty and applications was largely on [another employee] and myself. Consequently, we had a very large backlog of applications, and I was unable to get to this one until weeks after it had been submitted. When I finally was able to look at the application more closely 4-6 weeks later, I realized that a check had been included. I immediately wrote out the receipts, which reflect the date of discovery – July 12, 2004, not the date of application." Record 35.

cover letter from the applicant's attorney that was submitted with the application.[4] We agree with the applicant that the memorandum and cover letter adequately establish that the applications were submitted on June 4, 2004, before the amendments to OAR 660-023-0180 became effective.

The first assignment of error is denied.

SECOND ASSIGNMENT OF ERROR

A. Membership of Review Committee

At the public hearing before the board of county commissioners, a motion was passed to add more conditions of approval to the planning commission's recommendation for approval. The minutes demonstrate that condition 23 should provide for:

> "an administrative process of review by the Planning Director, the Planning Commission Chair, and the Lower Applegate [Citizens Advisory Committee (CAC)] chair with the Applicant to ensure [that] all conditions of approval of this application are met * * *." Record 19.

When the county reduced its decision to writing, condition of approval 23 stated:

> "Each six months after substantial commencement of mining of the subject property, the Planning Director shall convene a conference among the following persons for the purposes of review and discussion of operations of the site: the planning director or designee, the applicant." Record 13.

We agree with petitioners that the final decision does not accurately reflect the decision made by the board of county commissioners. The applicant concedes that condition 23 erroneously omits the planning commission chair and CAC chair. The applicant also agrees that remand is appropriate so that condition 23 can be amended to state the correct membership of the review body.

This subassignment of error is sustained.

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[4] We do not agree with petitioners that merely because the signature line for the applicant's attorney is blank that the letter cannot be considered. We have no reason to believe the date on the letter is not accurate.

B. Name of Aggregate Site

Petitioners argue that the county erred by allowing the applicant to change the name of the aggregate site and to treat the site as a *new* site rather than an *expansion* of an existing site.[5] Initially, the proposed aggregate site was referred to as the Ash Bar Expansion Site. Later, the site was referred to as the Middleton Bar Aggregate Site.[6] Petitioners argue that the county conspired with the applicant to allow the name change, but it is not clear why petitioners believe this constitutes a basis to reverse or remand the decision. In any event, we do not agree with petitioners that the county and the applicant engaged in any conspiracy to change the name. As the applicant explains, the site was originally called the Ash Bar Expansion Site because it is adjacent to a site already on the county's significant aggregate inventory known as Ash Bar, which has been fully permitted and in operation for many years. During the hearing process, the applicant requested that the proposal be referred to as the Middleton Bar Site simply to distinguish it from Ash Bar. We agree with the applicant that the name change, in and of itself, provides no basis for reversal or remand. Whether the proposal is accurately described as a new aggregate site or an expansion of an existing operation could have some impact on the analysis required for approval of the request. We consider whether petitioners have established that this is such a case later in this opinion.

This subassignment of error is denied.

C. Bias

Petitioners also appear to argue that the error in naming the membership review committee and allowing the name change demonstrates that the county was biased in favor of the applicants. To establish that a decision maker is biased, a petitioner must demonstrate

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[5] We address petitioners' arguments regarding the difference between new and existing aggregate sites in the third assignment of error.

[6] Ash Bar lies next to Middleton Bar on the subject 45.81 acre parcel. An aggregate mining operation has existed on Ash Bar for many years.

that the decision maker could not render an impartial decision based on the law and evidence before it. *Halvorson Mason Corp. v. City of Depoe Bay*, 39 Or LUBA 702, 710-11 (2001). We have already determined that the county did not err in allowing the name change of the aggregate site, and we do not see that the oversight in naming the membership review committee establishes that the county was biased.

This subassignment of error is denied.

The second assignment of error is sustained, in part.

THIRD ASSIGNMENT OF ERROR

A. Noise

Petitioners argue that because the county treated the application as an expansion of the Ash Bar Mine site instead of the new Middleton Bar site, that Department of Environmental Quality (DEQ) regulations regarding noise are not met. According to petitioners, because the applicant's noise experts treated the application as an expansion of an existing mine rather than a new mine that the noise study does not demonstrate that DEQ noise regulations are met. Petitioners argue several times that, because the noise study allegedly mischaracterizes the proposal as an expansion of an existing mine, the noise study applied the "existing" noise source standard rather than the "new" noise source standard. While petitioners apparently believe the proposal would be treated by DEQ as an expansion of an "Existing Noise Source" or as a "New Noise Source," depending on whether the applicant and the county characterize the proposal as an expansion or not, petitioners do not explain why that is the case.[7] Moreover, while it appears that DEQ does regulate New Noise Sources on new sites more stringently than it regulates New Noise Sources or expanded

[7] Although petitioner does not develop a reviewable argument, we note that there is a letter in the record from DEQ that states that so long as an existing mine is expanded onto "contiguous" property it is viewed as an expansion of an existing site rather than a new noise source. Record 415. The existing Ash Bar mining operation is located on tax lot 500. The proposed Middleton Bar mining operation is located on tax lot 600. Tax lots 500 and 600 are contiguous.

Existing Noise Sources that are located on Previously Used Sites, OAR 340-035-0035(1)(b)(B), petitioners do not discuss those regulations or explain why they believe the proposal would violate those New Noise Source standards, if they apply.

This subassignment of error is denied.

B. Air Quality

The applicant submitted an air quality report to demonstrate that the proposed mining activity would not violate any air quality regulations. In the appendices to the air quality report, there are three divider pages. Those three divider pages themselves include no substantive information; they merely separate the various appendices. The divider pages, although devoid of any information, do contain notations at the bottom the pages with the name of a different mine. Petitioners argue that this discrepancy somehow undermines the air quality report. Petitioners, however, do not explain why. There is no dispute that the information in the appendices following the divider pages concerns the proposed mining operation that is the subject of the application. It is clear that the county did not rely on any information from the divider pages to approve the application, because there is no information on the divider pages. If there was error here, it was harmless error.

This subassignment of error is denied.[8]

The third assignment of error is denied.

FOURTH ASSIGNMENT OF ERROR

The applicant submitted a transportation impact study (TIS) as part of its application. The TIS concludes that traffic impacts from the site will be adequately mitigated and minimized, and the county relied on the TIS to find traffic impacts would be minimized. Petitioners challenge the TIS, apparently on the basis that it is not supported by substantial

[8] Petitioners also offer a one-sentence argument challenging the biological assessment for the same reason. This argument is denied for the same reasons.

evidence.[9] Petitioners' main argument appears to be that the TIS was conducted in 2003, a number of fatal accidents have occurred on Redwood Highway since 2003, and the county did not adequately consider those recent accidents in finding that traffic impacts will be minimized.

As the applicant correctly notes, under OAR 660-023-0180(5)(b)(B), consideration of road conflicts is limited to local roads, and most of petitioners' concerns are directed at Redwood Highway, a state road. The county adopted the following findings addressing petitioners' concerns:

> "ODOT did, however, request that the county consider hazards in connection with truck traffic entering onto Redwood Highway [Highway 199]. We note that there have been recent incidences of serious traffic accidents on Redwood Highway. There is nothing in the record however that leads us to conclude that truck traffic from the Middleton Bar site will create a dangerous condition or will cause an increase in the risk of accidents which has been experienced. Rather, the hearing testimony was clear that the accidents did not appear to be the result of deficiencies in level of service on these state highways. Nothing exists in the record to show that there is anything unusually or unreasonably dangerous about trucks entering onto Highway 199 from Applegate Avenue. The TIS, confirmed by ODOT and county representatives appears to be adequate for the level of traffic proposed and it concludes that site distances and levels of service are more than adequate along the haul route. We find, as shown by the TIS, that there is sufficient site distance at the intersection of Applegate Avenue and Highway 199 for trucks entering onto or exiting the highway. But we will not ignore the recent evidence of accidents on Highway 199. In order to assure that adequate precautionary warning exist[s] for motorists traveling on Highway 199, we are requiring the applicant to install a lighted warning sign at the intersection of Highway 199 and Applegate Avenue. While we find the applicant's TIS to show that traffic impacts have, in fact, been adequately mitigated, we believe this additional measure is

[9] 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. *City of Portland v. Bureau of Labor and Ind.*, 298 Or 104, 119, 690 P2d 475 (1984); *Bay v. State Board of Education*, 233 Or 601, 605, 378 P2d 558 (1963); *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); *1000 Friends of Oregon v. Marion County*, 116 Or App 584, 588, 842 P2d 441 (1992).

> warranted as extra protection for the motoring public. We find, as shown by the TIS, and contrary to any other evidence or testimony, that adverse traffic impacts on Applegate Avenue between the site and Redwood Avenue have been sufficiently minimized." Record 7-8.

Petitioners appear to mistake the finding that there is "nothing in the record" that leads the county "to conclude that truck traffic from the Middleton Bar site will create a dangerous condition or will cause an increase in the risk of accidents" to mean that the county ignored the contrary evidence and testimony submitted by opponents. Petitioners, however, take the findings out of context. As the findings clearly demonstrate, the county did indeed consider opponents' evidence and testimony. The county merely was not persuaded by opponents that such evidence and testimony outweighed the evidence submitted by the applicant. A reasonable person could rely on the evidence in the record to reach the conclusion that traffic impacts will be adequately mitigated.[10]

The fourth assignment of error is denied.

FIFTH ASSIGNMENT OF ERROR

The Josephine County Rural Land Development Code (RLDC) requires that mining applicants attempt to enter into an Impact Area Agreement (IAA) with property owners in the impact area. The applicant entered such an agreement with some of the property owners in the impact area. Petitioners argue that the county improperly substituted the IAA for the required economic, social, environmental, and energy (ESEE) analysis required by OAR 660-023-0180(5), which provides in pertinent part:

> "(c) The local government shall determine reasonable and practicable measures that would minimize the conflicts identified under subsection (b) of this section. To determine whether proposed measures would minimize conflicts to agricultural practices, the requirements of ORS 215.296 shall be followed rather than the

[10] Petitioners also argue that traffic impacts are not mitigated because petitioner Lindsey's driveway on Applegate Avenue does not meet industry standard sight distances. Petitioners do not explain why petitioner Lindsey's unsafe driveway, which will not be used by the applicant, is a traffic impact that must be mitigated by the county or applicant, and we do not see that it is.

> requirements 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 government shall determine the ESEE consequences of either allowing, limiting, or not allowing mining at the site. Local governments shall reach this decision by weighing these ESEE consequences * * *." (Emphasis added.)

As the emphasized language illustrates, an ESEE analysis is only required if identified conflicts cannot be minimized. The county found that all identified conflicts could be minimized. Therefore, no ESEE analysis was required in this case. Even if an ESEE analysis had been required, the applicant provided one during the course of its application. The IAA was not submitted in lieu of an ESEE analysis but in addition to the ESEE analysis. Even if an ESEE were required, the additional submission of an IAA in no way undermines the ESEE analysis. Furthermore, petitioners do not even challenge the ESEE analysis that was submitted.

The fifth assignment of error is denied.

The county's decision is remanded.