

1 BEFORE THE LAND USE BOARD OF APPEALS

2 OF THE STATE OF OREGON

3
4 DEBRA O'ROURKE, PAUL DALGLEISH
5 and DUANE JORGENSEN,
6 *Petitioners,*

7
8 vs.

9
10 UNION COUNTY,
11 *Respondent,*

12
13 and

14
15 R.D. MAC, INC.,
16 *Intervenor-Respondent.*

17
18 LUBA No. 2007-077

19
20 FINAL OPINION
21 AND ORDER

22
23 Appeal from Union County.

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25 Jonel K. Ricker, La Grande, filed the petition for review and argued on behalf of
26 petitioners. With him on the brief was Jonel Ricker, PC.

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28 No appearance by Union County.

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30 Paul R. Hribernick, Portland, filed the response brief. With him on the brief were
31 Noah W. Winchester and Black Helterline LLP. Noah W. Winchester argued on behalf of
32 intervenor-respondent.

33
34 BASSHAM, Board Member; HOLSTUN, Board Chair; RYAN, Board Member,
35 participated in the decision.

36
37 REMANDED

07/25/2007

38
39 You are entitled to judicial review of this Order. Judicial review is governed by the
40 provisions of ORS 197.850.

NATURE OF THE DECISION

Petitioners appeal a county decision approving a conditional use permit to operate a temporary large-capacity asphalt batch plant.

FACTS

The subject property is a 128-acre tract zoned A-1 Exclusive Farm Use. The site is identified as a significant resource site on the county’s comprehensive plan inventory of aggregate sites. In 2000, the county granted intervenor-respondent (intervenor) a conditional use permit authorizing aggregate mining on the site, including a rock crusher and a small asphalt batch plant that has no restrictions on hours of operation.

In preparation for bidding on a large state highway paving project, intervenor filed a conditional use permit application with the county seeking permission to operate a temporary, large capacity asphalt batch plant on the subject property. The proposed new plant has double the capacity of the existing plant. Attached to the application is Exhibit C, a handwritten document that describes the proposed use as follows:

“Portable Asphalt Plant

“Operator unknown until project bid awarded.

“Days per week—6 Monday through Sat.

“Hours—6 a.m.-6 p.m.

“Water dust control

“Number of trucks depends on project.” Record 85.

At the planning commission hearing, petitioners, who are residential neighbors, appeared in opposition. Petitioners argued that they are adversely impacted by the fumes from the existing asphalt plant and the trucks hauling asphalt off-site, and that allowing the much larger asphalt plant would cause even worse impacts. At the beginning of the planning commission hearing, intervenor made an oral request to modify the application so that the

1 new asphalt plant could operate at nighttime, explaining that it is possible that the Oregon
2 Department of Transportation (ODOT) will do the paving at night. After discussion, the
3 planning commission voted to approve the asphalt plant, imposing Condition No. 2 that
4 limits the hours of operation to the originally proposed 6 a.m. to 6 p.m. daytime period.

5 Following the planning commission decision, intervenor learned that ODOT indeed
6 planned to conduct paving at night on the project. Intervenor chose to appeal the planning
7 commission decision to the county board of commissioners (BOC), rather than file a new
8 application. In the appeal, intervenor requested that Condition No. 2 be modified to permit
9 operation of the new plant 24 hours a day.

10 Petitioners received notice of the appeal, and appeared at the BOC hearing in
11 opposition. The BOC conducted a de novo evidentiary hearing and, after deliberations,
12 voted unanimously to approve a “new operating hour limit of 6 p.m. to 6 a.m.” Record 12.
13 On March 26, 2007, the county planning director issued the BOC’s written decision, which
14 amended Condition No. 2 to state:

15 “The new proposed temporary asphalt plant can operate without time
16 limitations, unless the existing smaller asphalt plant is operating then the new
17 proposed temporary asphalt plant must not be operating.” Record 1.

18 This appeal followed.

19 **FIRST ASSIGNMENT OF ERROR**

20 Petitioners argue that the BOC committed a procedural error in considering and
21 approving the request to modify the hours of operation to include night-time hours.
22 According to petitioners, the request to include night-time hours of operation was never
23 properly before the planning commission or the BOC, because the original application
24 proposed daytime hours of operation, and that application was never formally modified.
25 Citing *Larson v. Wallowa County*, 23 Or LUBA 527, 547 rev’d and rem’d on other grounds,
26 116 Or App 96, 840 P2d 1350 (1992), petitioners contend that if a governing body delegates
27 decision making authority to its planning commission, reserving unto itself only the authority

1 to decide appeals, the governing body cannot decide new issues or amendments to the
2 application without the planning commission hearing the issue first.

3 Intervenor responds that *Larson* is distinguishable, because in that case the planning
4 commission recommended denial of a zone change and did not reach a final decision on a
5 related subdivision application. The governing body, on appeal, approved the zone change
6 and went on to approve the subdivision application, even though the planning commission
7 had made no decision on that application. LUBA concluded that the governing body had
8 delegated initial decision making authority to the planning commission, and had exceeded its
9 code authority to approve the subdivision application in the first instance. In the present
10 case, intervenor argues, the planning commission issued a final decision on the application,
11 and the county’s code permits the applicant or other parties to appeal conditions of approval
12 to the BOC, which has full authority to “affirm, reverse or modify, in whole or in part, the
13 orders, requirement, decision, determination, interpretation, or ruling appealed.” Union
14 County Zoning, Partition and Subdivision Ordinance (UCZPSO) 34.01(2)(C).¹

15 We agree with intervenor that petitioners have not established that the BOC exceeded
16 its authority in modifying Condition 2 to reflect different operating hours than those
17 proposed in the initial application. Nothing cited to us in the county code prohibits an
18 applicant from modifying an application once filed, requires that the applicant file a new

¹ UCZPSO 34.01(2) governs appeal procedures, and provides in relevant part that

“A. The appeal shall be in writing upon the forms provided * * *. The appeal must set forth specifically the decision or condition being appealed.”

“* * * * *

“C. While hearing the appeal, the Planning Commission or Board of Commissioners shall consider the record and accept new evidence and testimony (a de novo hearing). * * * The Planning Commission or Board of Commissioners may affirm, reverse or modify, in whole or in part, the orders, requirement, decision, determination, interpretation, or ruling appealed. The Planning Commission or Board of Commissioners shall transmit a copy of their decision to the appellant and all participating parties. Substantially new testimony may result, at the option of the Board of Commissioners, in referral to the Planning Commission.”

1 application when proposing a modification, or even requires that proposed modification be
2 submitted in writing. The county potentially could have committed prejudicial procedural
3 error if it had considered and approved a requested modification without providing other
4 participants an opportunity to present testimony and evidence on the proposed modification.
5 However, petitioners do not contend that they lacked such an opportunity and as far as we
6 can tell petitioners were afforded a full opportunity to present testimony and evidence on that
7 issue, both before the planning commission and the BOC.

8 Further, nothing cited to us in the county code or elsewhere prohibits the BOC from
9 hearing an appeal of a condition of approval, even though the appealed condition reflects the
10 hours of operation that were initially proposed in the application. Had petitioners instead of
11 intervenor appealed the planning commission decision to the BOC, arguing that Condition 2
12 is impermissible for some reason, there is no doubt that the BOC would have the authority
13 under UCZPSO 34.01(2)(C) to affirm, reverse or modify the decision in whole or part, and
14 that would include authority to modify Condition 2, even though intervenor proposed no
15 modifications. Petitioners do not explain why the BOC has less authority to modify
16 Condition 2 simply because the applicant, rather than an opponent, appealed the condition..
17 The planning commission effectively denied intervenor's request to modify the hours of
18 operation initially proposed, and petitioners have not demonstrated that the BOC committed
19 procedural error in considering intervenor's appeal of that denial.

20 The first assignment of error is denied.

21 **SECOND ASSIGNMENT OF ERROR**

22 Petitioners argue that the BOC decision is internally inconsistent with respect to the
23 hours of operation approved, and further that the modified Condition 2 as reflected in the
24 final written decision is inconsistent with the actual terms voted upon and approved by the
25 BOC. Finally, petitioners argue that the county's findings of compliance with applicable
26 approval criteria are inadequate.

1 **A. Internal Inconsistency**

2 The BOC’s final decision was issued on March 26, 2007, in the form of a letter
3 signed by the county planning director, with attached findings. The letter states, in relevant
4 part:

5 “The Union County Board of Commissioners meeting in regular session,
6 March 21, 2007, made a final decision on your appeal of the Planning
7 Commission’s February 26, 2007 approval condition No. 2. After reviewing
8 written and oral testimony the Board changed the approval condition to the
9 following:

10 “2. The new proposed temporary asphalt plant can operate without time
11 limitations, unless the existing smaller asphalt plant is operating then
12 the new proposed temporary asphalt plant must not be operating.”

13 “The Board of Commissioners’ final decision is based on the attached
14 Findings of fact. * * *” Record 1.

15 The first nine findings attached to the March 26, 2007 letter are identical to those adopted by
16 the planning commission, including Finding No. 7, which states in both the BOC and
17 planning commission decision that “[t]he asphalt plant will operate 6 days per week
18 (Monday through Saturday) from 6:00 a.m. to 6:00 p.m.” Record 2, Record 59.

19 Petitioners first argue that modified Condition 2 is inconsistent with Finding No. 7.
20 While that certainly is true, it is reasonably clear that the Finding No. 7 does not accurately
21 reflect the BOC action on the appeal, and that the county inadvertently failed to modify
22 Finding No. 7 to reflect the BOC action, when incorporating the planning commission
23 findings into the BOC decision. We do not see that the internal inconsistency between
24 Condition No. 2 and Finding No. 7 warrants reversal or remand.

25 **B. 24/7 Hours of Operation.**

26 Petitioners argue next that Condition 2 does not accurately reflect the actual BOC
27 vote and action on the appeal.

28 Prior to the BOC action, Condition 2 stated:

1 “2. The temporary asphalt plant will operate 6 days per week (Monday
2 through Saturday) from 6:00 a.m. to 6:00 p.m.” Record 60.

3 The minutes of the March 21, 2007 BOC reflect the following BOC action:

4 “Commissioner Hibbert moved to approve the appeal with a new operating
5 hour limit of 6 p.m. to 6 a.m. Commissioner McClure seconded. Motion
6 carried unanimously. The findings adopted by the Planning Commission will
7 be used to support the decision with the operating hours changed in condition
8 two to 6 p.m. to 6 a.m. A finding will also be added to note that public safety
9 is improved by operating at night.” Record 12-13.

10 According to petitioners, the actual BOC vote and action on the appeal was to
11 approve night time operation (6:00 p.m. to 6:00 a.m.) *instead of* daytime operation (6:00 a.m.
12 to 6:00 p.m.). Moreover, petitioners note, the minutes do not reflect that the BOC voted to
13 expand the number of days of operation from six to seven. Therefore, petitioners argue, the
14 county planning director erred in issuing a written decision on behalf of the BOC that
15 modifies Condition 2 to permit operation 24 hours a day, seven days a week, contrary to the
16 actual BOC decision.

17 Intervenor responds that, while the minutes could be clearer on this point, it was
18 understood by all participants that the requested modification was to allow the new plant to
19 operate 24 hours a day, seven days a week. *See* Record 58 (appeal form stating “hours of
20 operation requesting to be 24 hours”); Record 11 (planning director stating at the BOC
21 hearing that “[t]he applicant is seeking permission to run the new plant 24 hours, 7 days per
22 week”). Intervenor argues that the BOC approved that requested modification. To the extent
23 there is any inconsistency between the minutes of the March 21, 2007 BOC hearing and the
24 text of the BOC’s final written decision, intervenor argues that the written decision must
25 control.

26 As far as the record reflects, the BOC did not meet following the March 21, 2007
27 hearing to approve the final written decision issued under the planning director’s signature
28 on March 26, 2007. While nothing we are aware of would prohibit the BOC from delegating
29 authority to issue the final written decision to the planning director, the apparent failure of

1 the BOC to review and approve the county's written decision prior to its issuance creates the
2 possibility that the written decision may not accurately reflect the actual BOC vote or the
3 BOC's views on exactly what the decision authorizes. If the BOC reviewed and approved
4 the final written decision prior to issuance, we could be certain that any inconsistency
5 between the earlier oral decision and the final written decision it is intended to embody
6 would be immaterial, as that BOC review and approval would supersede any earlier oral
7 decision. For that reason, where planning staff prepares a final written decision based on an
8 oral decision, the far better practice is to have the final decision maker review and approve
9 the final written decision prior to its issuance.

10 It is not clear in the present case whether modified Condition 2 as reflected in the
11 final written decision signed by the planning director is materially inconsistent with the
12 BOC's oral decision, or whether any material inconsistency would warrant reversal or
13 remand. However, we need not resolve those questions. For the reasons stated below,
14 remand is necessary for the county to adopt more adequate findings addressing compliance
15 with applicable approval criteria. Because remand will require that the BOC adopt a new or
16 modified decision, that decision will supersede the one challenged in this appeal, rendering
17 moot any issue regarding potential inconsistency between the March 21, 2007 oral decision
18 and the March 26, 2007 written decision. Accordingly, we do not resolve this sub-
19 assignment of error.

20 **C. Inadequate Findings**

21 UCZPSO 21.07(3)(C) provides for the following conditional use standards for
22 mineral, aggregate resource extraction and/or processing:

- 23 “(1) Mining equipment and access roads shall be constructed, maintained,
24 and operated in such a manner as to eliminate, as far as practicable,
25 noise, vibration, dust which are injurious or substantially annoying to
26 persons living in the vicinity or to crops or livestock being in the
27 vicinity.

28 “* * * * *

1 “(3) All extraction and/or processing activities which will produce noise,
2 air, dust, odors, and other pollutants shall acquire an air contaminant
3 discharge permit from the Oregon Department of Environmental
4 Quality and/or comply with the applicable laws, rules and
5 regulations.”

6 Petitioners argue that the county’s decision fails to address UCZPSO 21.07(3)(C)(1).
7 Petitioners argue that there are no findings addressing how mining equipment and access
8 roads will be operated in a manner as to eliminate, as far as practicable, noise, vibration, and
9 dust that are injurious or substantially annoying to persons living in the vicinity.
10 Specifically, petitioners argue that the county failed to address the increased truck traffic
11 during nighttime hours and dust and asphalt fumes emitted by such trucks, and their effect on
12 residential neighbors, some of whom have serious respiratory problems. In addition,
13 petitioners argue that there are no findings addressing possible water quality impacts from
14 contamination of the water used on the internal access roads to reduce dust.

15 According to petitioners, the only finding even remotely related to the standards in
16 UCZPSO 21.07(3) is Finding 9, which states, in its entirety:

17 “The applicant has satisfied UCZPSO Section 21.01 as shown in Exhibit ‘C’
18 submitted with the application and oral testimony.” Record 2.

19 UCZPSO 21.01 is entitled “Authorization to Grant or Deny Conditional Uses” and provides
20 in relevant part that uses designated in Article 21 “shall be permitted or enlarged or altered
21 upon approval by the Planning Commission in accordance with the standards and procedures
22 specified in this article.” Exhibit C is the handwritten document at Record 85, and quoted in
23 its entirety in the summary of facts above.

24 It is not clear why Finding No. 9 cites to UCZPSO Section 21.01, which does not
25 appear to include any approval standards but instead refers to other standards elsewhere in
26 Article 21. Intervenor does not dispute that UCZPSO 21.07(3) provides the approval
27 standards governing the requested conditional use permit. Intervenor argues, however, that
28 UCZPSO 21.07(3)(C)(3) is the only approval standard that applies to the proposed new

1 asphalt plant. There is no dispute, intervenor argues, that the new asphalt plant will operate
2 subject to a Department of Environmental Quality permit, and thus the plant complies with
3 UCZPSO 21.07(3)(C)(3). According to intervenor, UCZPSO 21.07(3)(C)(1) applies only to
4 “mining equipment and access roads.” Because intervenor already possesses a conditional
5 use permit to operate the existing mining equipment and existing access roads, and the
6 application does not propose any alterations to those approved equipment or roads,
7 intervenor argues that UCZPSO 21.07(3)(C)(1) is not an approval criterion for the new
8 asphalt plant, and the county did not err in failing to address it.

9 The notice of the planning commission hearing identifies UCZPSO 21.07 as one of
10 the applicable land use regulations. Record 79. However, neither the planning commission
11 nor the BOC decision includes any findings addressing *any* standard in UCZPSO 21.07,
12 unless Finding No. 9 is intended to address that code section. To the extent it is so intended,
13 we agree with petitioners that the finding is inadequate. Finding No. 9 refers to Exhibit C
14 that was submitted with the application and unspecified “oral testimony.” Nothing in that
15 finding explains why UCZPSO 21.07(3)(C)(1) or (3) is complied with or takes the position
16 that those code provisions do not apply. Exhibit C, quoted above, includes no information
17 that would support a finding of compliance with UCZPSO 21.07(3)(C)(1).

18 Finally, intervenor argues that because it not proposing to alter the existing mining
19 equipment and access roads, which are already authorized under the 1999 conditional use
20 permit, UCZPSO 21.07(3)(C)(1) simply does not apply. However, the decision at issue in
21 this appeal authorizes intervenor to *add* a temporary large capacity batch plant. That
22 additional large capacity batch plant could increase truck traffic, as compared to the existing
23 batch plant. Therefore, even if we assume the *existing* mining, batch plant and roads have
24 been “constructed, maintained, and operated in such a manner as to eliminate, as far as
25 practicable, noise, vibration, dust which are injurious or substantially annoying to persons
26 living in the vicinity or to crops or livestock being in the vicinity,” as required by

1 UCZPSO 21.07(3)(C)(1), it does not necessarily follow that the expanded operation will
2 continue to satisfy UCZPSO 21.07(3)(C)(1).

3 The second assignment of error is sustained, in part.

4 The county's decision is remanded.