BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

ROGUE AGGREGATES, INC. and
LTM, INCORPORATED,
*Petitioners,*
vs.

JACKSON COUNTY,
*Respondent,*

and

ROCK 'N' READY MIX CONCRETE, LLC,
*Intervenor-Respondent.*

LUBA Nos. 2007-158, 2007-178, 2007-179, 2007-180 and 2007-181

FINAL OPINION
AND ORDER

Appeal from Jackson County.

Todd Sadlo, Portland, filed the petition for review and argued on behalf of petitioners.

No appearance by Jackson County.

Roger A. Alfred, Portland, filed the response brief and argued on behalf of intervenor-respondent. With him on the brief were Corinne S. Celko and Perkins Coie LLP.

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

AFFIRMED 07/08/2008

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**

Petitioners appeal an order and four ordinances that grant comprehensive plan amendments, zone changes, and permit approvals to expand an existing aggregate mining operation on a tract totaling 345 acres.

**FACTS**

The subject property is a 345-acre tract located on both sides of Bear Creek. Petitioners operate a competing aggregate mine also located on Bear Creek, approximately 4,000 feet downstream from the subject property. In 1997, intervenor-respondent (intervenor) acquired the subject property and continued the existing aggregate operation, which mainly involved excavation of Pit #1. Pit #1 is located on tax lot 1101 on the west bank of Bear Creek. Pit #1 is separated from the creek by a berm, and is identified as a significant aggregate resource site on the county's Statewide Planning Goal 5 (Natural Resources, Scenic and Historic Areas, and Open Spaces) inventory. At various times, the Department of Geology and Mineral Industry (DOGAMI) has investigated alleged state permit violations regarding Pit #1.

In time, Pit #1 was exhausted, and in March 2005 intervenor filed applications with the county to facilitate mining of other areas of the subject property.[1] Among other things, the applications proposed excavation of Pit #2 on tax lot 1900, located on the east side of Bear Creek.

[1] Specifically, intervenor applied for (1) a comprehensive plan amendment to add additional portions of the subject property to the county's Goal 5 inventory of significant aggregate resource sites, (2) a comprehensive plan amendment adopting an updated analysis of economic, social, environmental and energy (ESEE) consequences, (3) a comprehensive plan map amendment for certain portions of the subject property from Agricultural to Aggregate Resource, (4) a zoning map amendment for the same portions from Exclusive Farm Use to Aggregate Removal, and (5) a greenway permit, site plan approval, and floodplain development permit to authorize aggregate operations in the floodplain and floodway of Bear Creek.

In early December 2005, a flood washed out petitioners' culverted road crossing of Bear Creek on their property downstream from the subject property. A month later, on December 31, 2005, the berm separating Pit #1 from Bear Creek was breached by a different flood event. Intervenor engaged in a "flood fight" and successfully closed the breach, restoring the berm and preventing "capture" of Pit #1. Several state and federal agencies investigated the breaching event. During that investigation, the agencies also investigated bridge piers that intervenor had placed on the creek banks with the intent of constructing a new bridge over Bear Creek.

On July 27, 2006, after conducting several hearings, the planning commission recommended approval of the applications. The county board of commissioners held additional hearings, at which opponents raised concerns regarding outstanding state agency permit violations. The board closed the record and began deliberations on October 25, 2006. The board chose, however, to re-open the record to allow intervenor to submit new information regarding compliance with the ongoing state and federal enforcement actions. The board issued notice of a hearing to be held February 28, 2007, for receipt of the requested information, limited to information regarding whether violations of DOGAMI and U.S. Army Corps of Engineers (Corps) regulations had been resolved, and provided seven days for other participants to respond to the new information. At the hearing, intervenor submitted information from DOGAMI and the Corps that all pending violations had been resolved. Intervenor also provided an e-mail from the Department of State Lands (DSL) stating that the agency had been unable to finalize a consent order related to the bridge piers prior to the February 28, 2007 deadline.

At the February 28, 2007 hearing, opponents submitted approximately 700 pages of documents describing the permitting history of the subject property, including allegations of violations of county code and conditions of approval attached to prior county permits. On March 7, 2007, petitioners submitted an additional 1,000 pages of information with similar

allegations. However, the board ultimately rejected the 1,700 pages of response submittals as not relating to compliance with state and federal enforcement actions. At a subsequent hearing, the commissioners noticed and re-opened the record to accept a letter from DSL stating that intervenor is in compliance with the consent order and to allow rebuttal to that letter. On June 13, 2007, the board deliberated and voted to approve the applications. This appeal followed.

**FIRST ASSIGNMENT OF ERROR**

Petitioners challenge the county's rejection of the evidence opponents submitted on February 28, 2007 and March 7, 2007.[2]

According to petitioners, during the initial open record period before the county commissioners, they argued that Jackson County Land Development Ordinance (LDO) 1.8.2 and related provisions effectively prohibit the county from approving a land use application where the property is in violation of the LDO or where local, state or federal land use

---

[2] In its findings, the board of commissioners explained:

> "On April 11, 2007, the Board of Commissioners held a public hearing to accept evidence and testimony into the record specifically related to compliance with DOGAMI, the [Corps], and [DSL] violations. Prior to this hearing, two violations had been identified from DOGAMI and the [Corps]. Evidence in the form of exhibits was submitted clearing these two violations. Evidence was also submitted identifying a violation from [DSL]. A decision on the merits of the application was postponed pending additional evidence and testimony that the Applicant was in substantial compliance with the [DSL] consent order.
>
> "Exhibits were discussed relative to their compliance with the Board's specific criteria for submission of evidence regarding clearance of the two violations from DOGAMI and the [Corps]. The Board of Commissions decided, by motion and vote, to accept Exhibits #68, 69, 70, 76 and 77 into the record to be considered by the Board for this application. The Board rejected Exhibits #71, 72, 73, 74, 75 and 81 as evidence to be considered by the Board. These exhibits did not meet the specific criteria determined by the Board regarding the clearance of violations from DOGAMI and the [Corps].
>
> "On May 30, 2007, the Board of Commissioners held a public hearing to accept evidence and testimony into the record specifically related to demonstration of substantial compliance with the [DSL] consent order. Exhibit 82 was specifically rejected because it did not meet the criteria determined by the Board with regards to the substantial compliance with the [DSL] consent order and would not be used as evidence used by the Board to reach a decision on this application. All other numbered exhibits were accepted as part of the record as evidence to determine compliance with the criteria for this application." Record 84.

enforcement actions have been initiated.[3] LDO 13.3 (291) defines "violation" in relevant part as "the failure of any person or entity to act as required by a specific County development approval (e.g., conditions of approval) or other State or County permit." Petitioners contend that the 1,700 pages of evidence rejected by the county document past and ongoing violations of county regulations and conditions of approval imposed in prior county permits, and the rejected evidence is directly relevant to compliance with LDO 1.8.2(A) or (B).

Petitioners argue that the county committed procedural error in re-opening the record to allow the applicant to submit additional evidence regarding compliance with LDO 1.8.2 as it relates to state and federal enforcement actions, but refusing to re-open the record to allow opponents to submit evidence regarding violation of *county* land use regulations and permit approvals.

Intervenor responds that before the initial closing of the record the only evidence submitted regarding violations of *county* regulations or permit conditions was the staff report to the commissioners, which stated that "[n]umerous code violations associated with the aggregate operations * * * have been cleared," according to the county code compliance officer. Record 17. Intervenor argues that staff correctly reported to the commissioners at the October 25, 2006 meeting that the only outstanding violations involved the DOGAMI, Corps, and DSL issues. Consequently, intervenor argues, the commissioners correctly chose

---

[3] LDO 1.8.2 is entitled "General Enforcement Provisions and Penalties," and provides, in part:

> "A. When a violation of this Ordinance is documented to exist on a property, the County will deny any and all development permits, unless such application addresses the remedy for the violation, or the violation has otherwise been corrected.
>
> "B. The County will not approve any application for a land use permit when a local, state, or federal land use enforcement action has been initiated on property, or other reliable evidence of such pending action exists. Such violations must be corrected prior to application for a land use or development permit on the property, unless the violation can be remedied as part of the development action."

to limit the scope of issues to be addressed to those outstanding issues. Intervenor notes that the motion to re-open the record specifically limited the scope of re-opening to new evidence "as it relates to the DOGAMI and DSL (and Corps as amended) confirmation and resolution of existing violations * * *." Record 2406. The notices of public hearing provided for the February 28, 2007 and May 30, 2007 hearings were expressly limited to receipt of testimony regarding the DOGAMI, DSL and Corps enforcement actions. Record 671, 2441. Intervenor argues that it is permissible to re-open the evidentiary record to solicit testimony regarding a limited, specified issue, and to reject testimony that is not related to that issue.

We agree with intervenor that it is permissible to re-open the evidentiary record to solicit testimony on a limited, discrete issue, and therefore it is also permissible to reject any new evidence submitted that is not reasonably related to that discrete issue. ORS 197.763(7) provides that when the local government re-opens the record to admit new evidence, arguments or testimony, "any person may raise new issues which relate to the new evidence, arguments, testimony or criteria for decision-making which apply to the matter at issue." However, nothing in ORS 197.763 or elsewhere cited to our attention requires that when a local government chooses to re-open the record, it must allow new evidence, arguments or testimony on any and all issues, or allow new issues to be raised that are unrelated to the "matter at issue." *See Sorte v. City of Newport*, 26 Or LUBA 236, 244 (1993) (ORS 197.763(7) does not preclude local governments from re-opening the evidentiary record for a limited purpose).

Here, compliance with LDO 1.8.2(A) and (B) was at issue in the initial proceedings, but there was apparently little or no dispute raised during those initial proceedings regarding whether the existing aggregate operation was in violation of local regulations or local conditions of approval. The only evidence submitted on that point indicated that all violations "had been cleared." The primary dispute was whether the existing operation was in compliance with state or federal regulations or permits. Petitioners apparently believed

that the applications would be denied based on the on-going state and federal enforcement actions, and therefore did not seek out or submit the evidence regarding alleged violations of local regulations and permit conditions that they later attempted to submit when the record was re-opened.[4] Petitioners complain that they could not anticipate that the county would re-open the record to allow intervenor to submit evidence that the state and federal enforcement actions had been resolved. Under these circumstances, we understand petitioners to argue, the county is required to re-open the record with respect to compliance with all elements of LDO 1.8.2(A) and (B), not the just the state and federal enforcement actions.

Petitioners cite *Gutoski v. Lane County*, 155 Or App 369, 372-73, 963 P2d 145 (1998), for the proposition that the county may be required to re-open the record to allow participants to present new evidence where, after the conclusion of the initial evidentiary hearing, the local government significantly changes an existing interpretation of an approval criterion or adopts a new interpretation that is beyond the range of interpretations that the parties could have reasonably anticipated at the time of their evidentiary presentations. The difficulty with that argument is that petitioners do not identify any new or unanticipated "interpretation" of an approval criterion that the county made. All elements of LDO 1.8.2(A) (local violations) and (B) (local, state and federal enforcement actions) were potentially at issue during the initial evidentiary proceedings. If petitioners wished to dispute the staff report testimony that all local violations had been resolved, the time to do that was during the initial evidentiary proceedings. While petitioners may not have anticipated that the county would re-open the record to accept additional testimony regarding the state and federal enforcement actions for purposes of LDO 1.8.2(B), we do not see that circumstance triggers

[4] Petitioners explain that "intervenor was still embroiled in state and federal enforcement actions at the time the record was closed. It was obvious to petitioners that intervenor had not met the standard [LDO 1.8.2], and that the record would not sustain an approval." Petition for Review 23.

an obligation under *Gutoski* to re-open the record to accept additional testimony regarding local violations or local enforcement actions under LDO 1.8.2(A) and (B).

Petitioners make no argument under ORS 197.763(7) that the rejected evidence is related or responsive to the new evidence intervenor submitted when the record was re-opened. Nor do petitioners argue that anything in the new evidence intervenor submitted affects the question of compliance with the local elements of LDO 1.8.2(A) and (B), such that would trigger the obligation to allow petitioners to "raise new issues" regarding compliance with those local elements. As far as petitioners have established, the various elements of LDO 1.8.2(A) and (B) (local violations, and local, state and federal enforcement actions) are independent considerations, and evidence submitted regarding resolution of a state or federal enforcement action does not necessarily affect or raise new issues regarding compliance with local regulations or resolution of local enforcement proceedings.

Finally, on an unrelated issue, petitioners note that intervenor's attorney wrote a letter to county counsel dated April 19, 2007, discussing procedural options for subsequent hearings on the applications. Record 665-67.[5] Petitioners argue that the county erred in allowing intervenor to "argue privately to the board" without notice to petitioners or allowing petitioners an opportunity to rebut the contents of the letter. We do not understand the argument. The letter was sent to county counsel, not the board of county commissioners. Assuming it was entered into the record on May 15, 2007, as petitioners assert, and hence nominally "placed before" the county commissioners, petitioners do not explain why they could not have requested the right to rebut it at the May 30, 2007 public hearing, if they wished. Petitioners have not established that the county committed procedural error with respect to the April 19, 2007 letter or that any error prejudiced petitioners' substantial rights.

[5] The letter recommends to the county counsel that the county re-open the record to accept the DSL compliance letter at an evidentiary hearing limited to that purpose, with provision for rebuttal, rather than make submission of the DSL compliance letter a condition of approval, without re-opening the record.

The first assignment of error is denied.

**SECOND THROUGH SEVENTH ASSIGNMENTS OF ERROR**

Under these assignments of error, petitioners argue that even without the rejected new evidence regarding alleged local code and permit violations, during the initial open record period petitioners sufficiently raised the issue of on-going violations of local regulations and county permits to require the county to address that issue, under LDO 1.7.6 and 1.8.2(A). Petitioners contend that the county misconstrued the applicable law and adopted inadequate findings regarding violations of local regulations and previously imposed county permits.

**A. LDO 1.8.2 and 1.7.6**

As noted, LDO 1.8.2(A) provides what "[w]hen a violation of this Ordinance is documented to exist on a property, the County will deny any and all development permits, unless such application addresses the remedy for the violation, or the violation has otherwise been corrected." *See* n 3. Similarly, LDO 1.7.6 provides in relevant part that "when a violation of this Ordinance exists on a property, the County will not approve any application for building or land use permits on that property unless such application addresses the remedy for the violation."[6]

Petitioners contend that, given the abundant evidence that the existing aggregate operation violated state and federal regulations and permits, the county had an affirmative obligation to inquire into whether the existing operation also violated conditions imposed in

[6] LDO 1.7.6 is entitled "Violations Continue," and provides:

> "Any documented violation of previous land development ordinances related to permissible activities or structures on land that also violate this Ordinance will continue to be a violation subject to all penalties and enforcement under this Ordinance. * * * Except as provided for in Chapter 10, when a violation of this Ordinance exists on a property, the County will not approve any application for building or land use permits on that property unless such application addresses the remedy for the violation. Where a violation of any other local ordinance, state, or federal law has been documented on property to the satisfaction of the County, such violation must be corrected prior to application for a land use or development permit on that property, unless the violation can be remedied as part of the development application."

two county decisions issued in 1995 and 1998. However, petitioners argue, the county failed to conduct that inquiry, and simply accepted the staff testimony that all local violations "have been cleared."

Petitioners also argue there is substantial evidence in the record that the existing aggregate operation is inconsistent with the 1995 and 1998 county decisions, Ordinance No. 95-01 and Order No. 1998-1-SPRA. According to petitioners, Ordinance No. 95-01 rezoned tax lot 1900 for aggregate uses, including portions of the property west of Bear Creek. However, petitioners argue that Ordinance No. 95-01 prohibited "extraction" west of Bear Creek, and the stated purpose of rezoning that portion of the property to Aggregate was to accommodate a maintenance shop. Petitioners contend that the record includes photographic evidence that intervenor has used the portion west of Bear Creek for aggregate processing activities inconsistent with Ordinance No. 95-01, including settling ponds and a concrete disposal area that was one of the state permit violations DOGAMI identified.

In addition, petitioners argue that Ordinance No. 95-01 required site plan review prior to commencement of aggregate extraction. Petitioners contend that Order No. 1998-1-SPRA granted site plan review only for tax lot 1101, the site of Pit #1, and tax lot 2604, and that no site plan review was ever granted for the processing activities on tax lot 1900 west of Bear Creek.

Intervenor responds, initially, that petitioners failed to raise any issues below regarding inconsistency with Ordinance No. 95-01 or Order No. 1998-1-SPRA, and therefore those issues are waived. ORS 197.763(1).[7] While those issues may have been raised in the

[7] ORS 197.763(1) provides:

> "An issue which may be the basis for an appeal to [LUBA] shall be raised not later than the close of the record at or following the final evidentiary hearing on the proposal before the local government. Such issues shall be raised and accompanied by statements or evidence sufficient to afford the governing body, planning commission, hearings body or hearings officer, and the parties an adequate opportunity to respond to each issue."

1,700 pages of documents the county rejected following the close of the initial open record period, intervenor argues that those documents were properly rejected and are not in the record.

On the merits, intervenor argues that there is no "documented" or other substantial evidence in the record of a violation of an LDO provision or permit condition, for purposes of LDO 1.7.6 or 1.8.2(A). According to intervenor, mere allegations of a code violation are insufficient. Instead, intervenor contends, there must be a notice of code violation, a cease and desist order, a code enforcement action, or a similar county document evidencing some code violation in order to trigger obligations under LDO 1.7.6 or 1.8.2(A). Intervenor argues that the evidence petitioners cite to—photographs submitted by the applicant—fall far short of demonstrating any violation of or inconsistency with Ordinance No. 95-01 or Order No. 1998-1-SPRA, much less a "documented" violation. Further, intervenor contends that while Ordinance No. 95-01 prohibited "excavation" on the west side of the creek, it did not prohibit other activities associated with mining that do not involve excavation, or require site plan approval for such activities. Intervenor disputes petitioners' view that Ordinance No. 95-01 limited use of the property west of the creek to a single maintenance shed.

We agree with intervenor that petitioners have failed to demonstrate that the record includes evidence of "documented" violations of county regulations or land use permits. Even if the photographs submitted by intervenor could constitute substantial evidence of a "documented" violation for purposes of LDO 1.7.6 or 1.8.2(A), the board of commissioners accepted staff testimony that all local code violations had been resolved. Petitioners cite to no evidence in the record that any local code violations have not been resolved. The staff testimony is substantial evidence, and the county was entitled to rely on that testimony.

**B. LDO 1.5.1**

LDO 1.5.1 provides, in part:

> "Whenever the provisions of any other statute, ordinance, or regulation impose other standards which are more restrictive than those set forth in this Ordinance, then the provisions of such statute, ordinance, or regulation will govern. However, standards imposed by other permitting agencies will be implemented and enforced by those agencies."

Petitioners argued to the county that the Corps may have been mistaken in concluding that it had no jurisdiction over the placement of the bridge piers over Bear Creek, and that the county has an obligation under LDO 1.7.6, 1.8.2 and 1.5.1 to independently enforce state or federal laws that are more restrictive than county laws. In response, the county focused on the last sentence of LDO 1.5.1, and concluded that that provision must be interpreted in context with LDO 1.7.6 and 1.8.2 to allow the county to rely on other permitting agencies' determinations regarding enforcement of their regulations.[8]

Petitioners challenge that finding, arguing that it is "incumbent on the county, under [LDO] 1.5.1, to identify the local land use restrictions applying to the site and establish whether those are more restrictive, before defaulting to state and federal authority. The county did not do so." Petition for Review 33 (emphasis original). We understand petitioners to argue that LDO 1.5.1 operates only when other permitting agencies' regulations are more restrictive than the county's, and the county never evaluated whether its

---

[8] The board of commissioners' decision states, in relevant part:

> "As concluded by the Board during the May 30, 2007 hearing, any and all present cited enforcement actions and/or violations by the applicant have been resolved to the degree necessary to ensure consistency with LDO Section 1.7 and 1.8 * * *
>
> "Furthermore, the Board of Commissioners concludes that LDO Sections 1.7 and 1.8 must be interpreted in a manner that leaves the last sentence of LDO Section 1.5.1 with meaning. Section 1.5.1 provides that 'standards imposed by other permitting agencies will be implemented and enforced by those agencies' * * * The Board of Commissioners concludes that they have responded to violation issues of 'other permitting agencies' by withholding issuance of new development permits consistent with LDO Sections 1.7 and 1.8, but have provided an opportunity to submit evidence in response to the violation issues. The evidence now demonstrates that the Application is in compliance with the standards imposed by such other permitting agencies, and thus, the Board of Commissioners are bound to recognize the procedures to implement and enforce those agencies' standards consistent with LDO Section 1.5.1." Record 80-81.

regulations or prior land use approvals were more or less restrictive than state and federal agency regulations.

Petitioners do not identify any land use regulation or county permit requirement that is "more restrictive" than state or federal regulations, within the meaning of LDO 1.5.1. We disagree with petitioners that the county has an affirmative obligation under LDO 1.5.1 to conduct a comprehensive comparison of local, state and federal regulations and determine if any state or federal requirements are "more restrictive" than local requirements. Further, we understand the county to have interpreted the last sentence of LDO 1.5.1 to provide that where state and federal permitting agencies have chosen to enforce their own regulations in a particular case, as here, the county is under no obligation to second-guess those enforcement decisions and attempt to independently impose other permitting agencies' regulations. Petitioners have not demonstrated that that interpretation is inconsistent with the text or context of the relevant code provisions or otherwise reversible under the standard of review we apply to a governing body's code interpretations. ORS 197.829(1).

The second through seventh assignments of error are denied.

**EIGHTH, NINTH AND TENTH ASSIGNMENTS OF ERROR**

As relevant to these assignments of error, the challenged decisions allow (1) construction of a bridge across Bear Creek within its floodway, (2) placement of fill within the 100-year floodplain, and (3) aggregate removal within the 100-year floodplain. The county approved those activities under LDO 7.1.2(F), which sets out standards for development within the floodplain and floodway.

LDO 7.1.2(C)(1) adopts by reference a report prepared by the Federal Emergency Management Agency (FEMA) entitled "The Flood Insurance Study for Jackson County" dated April 1, 1982, or as later amended, along with its accompanying maps. LDO 7.1.2(C)(1) further provides that the FEMA study "will be the means for establishing the location of the 100-year floodplain." LDO 7.1.2(C)(2) provides that the floodway is

established as shown on the FEMA maps, but that an applicant may offer evidence establishing the location of the floodway where one has not been established.

Intervenor's consultants determined that the FEMA maps were outdated with respect to the locations of the floodplain and floodway on the subject property and did not accurately reflect the current locations. The consultants testified that "it would be prudent" to request revision of the FEMA maps, but such revision was not necessary in order to process intervenor's applications. The county agreed, but imposed a condition requiring that intervenor file a subsequent application with FEMA to update the relevant maps. The county also adopted findings that the proposed development within the floodplain and floodway complied with the standards in LDO 7.1.2(F).

Petitioners does not dispute that the FEMA maps are inaccurate or outdated, but argues that because the FEMA maps are adopted by reference into the LDO and are the sole means provided under the code for determining the location of the floodplain and floodway, the county is required to base its decision on the existing maps. As a consequence, petitioners argue, the only way the county can approve the requested development is if intervenor first applies to FEMA for a map correction before submitting applications for development with the floodplain and floodway.

Intervenor responds that the FEMA maps are relevant only for determining the *location* of the floodplain and floodway, and there is no dispute in the present case that the proposed bridge development is within the floodway, and the proposed fill and aggregate removal is within the floodplain, and all three are therefore subject to the standards in LDO 7.1.2(F). According to intervenor, the county found, and petitioners do not dispute, that the proposed development complies with those standards. Intervenor contends that because the applicable standards are the same, under these circumstances there is no need to seek a revision to the FEMA maps prior to approving the proposed development.

We understand intervenor to argue that whether the floodplain and floodway are located using the existing FEMA maps or more recent data, the bridge is located within the floodway and the proposed fill and aggregate removal sites are located within the floodplain, and therefore the approval standards that apply are exactly the same. Petitioners do not contend that the FEMA maps adopted by the county serve any function in the present case other than to determine whether the LDO 7.1.2(F) standards apply to proposed development. Because the county applied those standards, we agree with intervenor that petitioners have not established that the county was required to deny the proposed development pending revision of the FEMA maps. Petitioners do not argue that the county's findings regarding compliance with LDO 7.1.2(F) standards are inadequate or unsupported by substantial evidence. Accordingly, the arguments under these assignments of error do not provide a basis for reversal or remand.

The eighth, ninth and tenth assignments of error are denied.

**ELEVENTH ASSIGNMENT OF ERROR**

LDO 3.7.3(C)(2) provides that minor map amendments "will not prevent implementation of any area of special concern or restrictions specified for that area in Chapter 7." The Bear Creek Greenway is an area of special concern (ASC), an identified Goal 5 resource, that extends down both banks of the creek. The county found that the purpose of the Bear Creek Greenway ASC is to facilitate a trail extension, and that the map amendment is consistent with that purpose, because the proposed development is not within the greenway setback, and intervenor agreed to grant a permanent easement along the bank for a greenway trail over an existing haul road, when Pit #2 is exhausted.

LDO 7.1.1(B) describes the Bear Creek Greenway ASC overlay, and provides that the county "will, to the extent of its legal authority, provide for the implementation" of Bear Creek management plans during the development review process, "through implementation of use restrictions set out in that code section and in some cases by attaching special

conditions to development approvals." Petitioners argue that the county failed to provide for the implementation of the Bear Creek Greenway ASC "to the extent of its legal authority," because the county could have chosen to require more than a future greenway easement. Petitioners contend that the county could have, for example, prohibited all activities related to mining within the greenway setback, including further use of the haul road, to preserve the existing riparian area.

Intervenor responds that the county adopted findings explaining how it chose to balance conflicts between the two Goal 5 resources, aggregate and greenway, pursuant to an analysis of the economic, social, environmental and energy (ESEE) consequences. Record 84. Further, the county adopted findings that the minor plan amendment is consistent with the greenway ASC, its management plan, and the purpose of the greenway to facilitate a greenway trail. Record 53-55. Intervenor argues that petitioners do not challenge these findings or explain why they are inadequate. With respect to LDO 7.1.1(B), intervenor argues that that provision does not require the county to prohibit all uses within the greenway setback, particularly when balancing conflicts between Goal 5 resources.

We agree with intervenor that petitioners have not demonstrated that the county erred in failing to impose additional restrictions or conditions in order to protect the greenway. The county found, and petitioners do not dispute, that the purpose of the greenway is to facilitate a future trail system that, as yet, does not exist. Petitioners do not explain why additional conditions, such as prohibiting use of the haul road within the greenway setback, are necessary to serve that purpose, or why the condition requiring an easement for a future trail is inadequate to serve that purpose. Further, to the extent LDO 7.1.1(B) can be read to require the county to consider additional measures, we agree with intervenor that the county has a superior obligation under the Goal 5 process to balance conflicts between competing Goal 5 resources.

The eleventh assignment of error is denied.

**TWELTH ASSIGNMENT OF ERROR**

Petitioners contend that the county erred in failing to consider petitioners' aggregate operation 4,000 feet downstream of the subject property to be a "conflicting use," for purposes of the county's Goal 5 analysis. Citing *Hegele v. Crook County*, 190 Or App 376, 78 P3d 1254 (2003), petitioners argue that because they oppose and will continue to oppose by any means the proposed expansion of mining on the subject property, the county is required to consider petitioners' mining operation as a "conflicting use."

Intervenor responds that pursuant to LDO 7.1.4(A) the county considered an impact area extending 1,500 feet from the boundaries of the mining area.[9] According to intervenor, the presumption is that the 1,500-foot impact area is sufficient, unless the county identifies "significant potential conflicts" beyond that distance. *Id.* In the present case, intervenor argues that the county rejected petitioners' arguments that the proposed mining impacts petitioners' downstream operation or constitutes a significant potential conflict with that operation, and accepted intervenor's contrary evidence.[10] The county adopted extensive findings explaining why it declined to expand the impact area beyond 1,500 feet. Record 81-82. Intervenor argues that petitioners do not challenge those findings and have not established that the county erred in limiting its analysis to the 1,500-foot impact area.

---

[9] LDO 7.1.4(A) provides:

> "The Aggregate Conflicting Use Impact Area consists of the area surrounding properties zoned Aggregate Removal (AR) where there is the potential that new uses or development could adversely affect or interfere with mining and processing operations. The size of the impact area is determined by the Board of Commissioners as part of the Goal 5 procedure leading to the amendment of the Comprehensive Plan and Zoning map rezoning the AR property. The impact area generally extends 1,500 feet from the boundaries of the mining area, but may extend a greater distance where significant potential conflicts have been identified."

[10] In particular, petitioners argued that Pit #1 contributed sediment to the flood in early December 2005 that washed out petitioners' culverted road crossing of Bear Creek. The county rejected that argument, noting that the flood that breached the berm protecting Pit #1 did not occur until December 31, 2005, and accepting intervenor's experts' testimony that there was no connection between aggregate operations on the subject property and the loss of petitioners' culvert.

Intervenor is correct that petitioners have not acknowledged much less challenged the county's relevant findings, in which the county rejects petitioners' arguments and evidence that the existing mining has impacted their operation and accepted intervenor's evidence that the proposed mining will not adversely affect downstream properties, including petitioners' operation. Petitioners' only challenge is based on *Hegele*, in which the Court of Appeals held that for purposes of OAR Chapter 660, Division 016, the original Goal 5 rule that also applies in the present case, the scope of the conflicting use analysis is limited to impacts of surrounding uses on the Goal 5 resource itself, not impacts of resource extraction on surrounding uses. However, the Court held that the county may consider "social, legal, or other pressures that can result in negative impacts *on* the Goal 5 resource," including but not limited to nuisance or trespass actions from surrounding property owners. 190 Or App at 386.[11]

Intervenor argues that *Hegele* does not require the county to treat a business competitor's threats to continue opposing a proposed Goal 5 mining resource as a "conflicting use" or, more precisely, as evidence of "significant potential conflicts" sufficient

---

[11] The Court stated:

> "[W]e agree with LUBA that the rule is worded to encompass a broad range of negative impacts; it is not limited to impacts that would actually curtail the use of the Goal 5 resource or would alter the legal rights and liabilities of persons in their ownership or use of the resource site. * * * The inquiry requires case-by-case assessment, and local governments are free to consider any and all negative impacts on a Goal 5 resource site that *could* arise *if* an allowable use were to exist in the zoning district along with the Goal 5 site.
>
> "Such impacts therefore could include, among others, legal, social, or economic ones. That understanding is reflected expressly in OAR 660-016-0005(2), which provides that, once the conflicting uses have been identified, and negative impacts are to be balanced, the local government must consider the 'economic, social, environmental and energy' impacts of the Goal 5 resource and the competing uses alike. Legal consequences potentially qualify as economic and social ones, and curtailing use of a resource site through a nuisance or trespass action therefore readily falls within the range of contemplated impacts. But so do a wide variety of other impacts, such as social pressures that could come to bear within the zoning district in an effort to restrict, confine, or limit activity on the Goal 5 resource site. In other words, when the negative impacts *of* the Goal 5 resource likely will create social, legal, or other pressures that can result in negative impacts *on* the Goal 5 resource." *Id*. at 384-85 (emphasis in original, footnote omitted).

to expand the impact analysis area beyond the presumptive 1,500 foot boundary. We agree with intervenor that petitioners read too much into *Hegele*. As we understand *Hegele*, the scope of conflicting uses can include impacts *on* the resource extraction site, such as lawsuits and organized social opposition, that derive from the impacts *of* the resource extraction operation on surrounding permitted uses. In *Hegele*, the residential neighbors to a proposed aggregate mine opposed the mine based on impacts to residential uses from operation of the mine, such as noise, dust, traffic, etc. Here, the county found that intervenor's aggregate operation will have no adverse impact on downstream properties, including petitioners' aggregate operation located 4,000 feet downstream. Petitioners argue that that finding is not supported by substantial evidence, but we agree with intervenor that a reasonable person could conclude, based on the whole record, that the proposed aggregate operation will have no adverse physical impacts on petitioners' downstream aggregate operation. We do not think the Court in *Hegele* intended that the scope of the conflicting use analysis could include mere opposition by a business rival based solely on economic competition.

In sum, petitioners have not demonstrated that the county erred in concluding that the proposed aggregate operation is not a "significant potential conflict" with respect to petitioners' operation, and thus did not err in declining to expand the impact area to include petitioners' property.

The twelfth assignment of error is denied.

**THIRTEENTH AND FOURTEENTH ASSIGNMENTS OF ERROR**

Under the thirteenth assignment of error, petitioners contend the county erred in failing to require intervenor to submit a site development plan, as required by LDO 3.1.5 for a "Type 4 Permit."[12] According to petitioners, intervenor submitted and the county approved

[12] LDO 3.1.5 provides:

> "**Type 4 Land Use Permits** (*See Section 3.7 for Comprehensive Plan and Zoning Map Amendments*).

a general master plan instead of a site development plan, and the county contemplates that intervenor will submit specific site development plans for future phases of the operation, subject only to administrative Type I review.

Intervenor responds that petitioners fail to acknowledge that the county rejected petitioners' arguments regarding LDO 3.1.5, interpreting that code provision in context to not require that the county approve a site development plan when approving an application for comprehensive plan and zoning map amendments to Aggregate Resource.[13] According to intervenors, the parenthetical in the heading to LDO 3.1.5 indicates that comprehensive plan amendments are subject to LDO 3.7 standards. LDO 3.7.2(c) states that comprehensive plan amendments "will follow the Type 4 review procedure set forth in Section 3.1.5." We understand intervenor to argue and the county to have found that while the comprehensive plan amendment application must follow the Type 4 review *procedure* described in Section 3.1.5, *i.e.*, review by the planning commission and board of commissioners, a comprehensive plan amendment application is not a Type 4 *permit* subject to the requirement to file a site development plan under the criteria in LDO 3.2.4. Intervenor argues that further support for that interpretation is found in LDO 4.4.8, the code section governing uses in the Aggregate

---

> "A Type 4 permit requires review by the Planning Commission and the Board of Commissioners, as applicable, to ensure the property integration of uses that may be suitable only in specific locations. Approval of a Type 4 Permit to allow a specific use requires review and approval of a site development plan pursuant to Section 3.2.4 as part of the Type 4 permit review."

[13] The board of commissioners adopted the following finding:

> "* * * Opponents advance the position that the Applicants seek a Type 4 ***Permit*** that requires compliance with Type 4 site development plan review criteria. This is not the case. The Applicant requests a Comprehensive Plan Map amendment and map amendments are subject to a Type 4 process, but one that is subject to independent criteria found in LDO Section 3.7. Aggregate Site Plan reviews are Type 1 permit actions on AR zoned lands that are subject to aggregate-specific site development criteria and standards. Opponents' interpretation on the applicability of the Type 4 ***Permit*** criteria and corresponding site-development criteria is not supported by the context and language of the code which is clearly directed at non-aggregate site development * * *." Record 118 (emphasis in original).

Removal zone, which indicates that aggregate site plan reviews are administrative Type I permits subject to standards set out in LDO 4.4.8.

Intervenor is correct that petitioners do not challenge the commissioners' interpretation of LDO 3.1.5. While the relevant county code provisions are anything but clear on this point, petitioners have not demonstrated that the commissioners' code interpretation is reversible under the somewhat deferential standard of review we must apply to that interpretation, under ORS 197.829(1). Accordingly, we must affirm it.

Under the fourteenth assignment of error, petitioners challenge the adequacy of the county's findings under LDO 3.1.4(B)(1)(a), which requires a finding that the proposed use "will cause no significant adverse impact on existing or approved adjacent uses * * *." Petitioners contend that the record demonstrates that the proposed mining will adversely impact petitioners' downstream operation, and that the county erred in failing to adopt findings under LDO 3.1.4(B)(1) addressing those impacts. Intervenor responds in part that LDO 3.1.4(B)(1) requires evaluation only of impacts on "existing or approved adjacent uses," and petitioners' mining operation is not adjacent to the subject property. We agree with intervenor that petitioners' arguments under the fourteenth assignment of error do not provide a basis for reversal or remand.

The thirteenth and fourteenth assignments of error are denied.

The county's decision is affirmed.