BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

KENNETH STERN, JOEL PERKINS,
and CHUCK DEBRETT,
Petitioners,

and

HOLGER T. SOMMER,
Intervenor-Petitioner,

vs.

JOSEPHINE COUNTY,
Respondent.

LUBA No. 2008-171

FINAL OPINION
AND ORDER

Appeal from Josephine County.

Kenneth O. Stern, Cave Junction, filed a joint petition for review and argued on his own behalf. With him on the brief was Holger T. Sommer. Joel Perkins and Chuck Debrett, Cave Junction, represented themselves.

Holger T. Sommer, Merlin, filed a joint petition for review and argued on his own behalf. With him on the brief was Kenneth O. Stern.

No appearance by Josephine County.

James R. Dole, Grants Pass, filed an amicus brief on behalf of Barlow Sand & Gravel, Inc., and Copeland Sand & Gravel, Inc.

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

BASSHAM, Board Chair, did not participate in the decision.

AFFIRMED 03/25/2009

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

Opinion by Ryan.

NATURE OF THE DECISION

Petitioners and intervenor-petitioner (petitioners) appeal a decision by the county amending the county's comprehensive plan inventory of significant aggregate resources to add a 33.86 acre site.

AMICUS BRIEF

In an order dated January 30, 2009, we granted a motion by Barlow Sand & Gravel, Inc. and Copeland Sand & Gravel, Inc. to appear as amici in this appeal, because we determined that amici had an interest in participating in the appeal and the Board's review of the relevant issues would be significantly aided by their participation. __ Or LUBA __ (LUBA No. 2008-171, Order, January 30, 2009). Petitioners object to participation by amici. Petitioners offer no reason for us to revisit our decision allowing amici to participate, and we decline to revisit that decision.

FACTS

The subject property is an approximately 66-acre parcel zoned Exclusive Farm Use. Kelly Creek borders the subject property on the north and the east fork of the Illinois River borders the subject property to the west. The property is composed of Class I, II, and IV soils. The applicant sought to amend the county's comprehensive plan to add a 33.86-acre portion of the subject property to the county's Inventory of Significant Aggregate Sites, and also sought a conditional use permit to mine the subject property. The applicant later withdrew the conditional use permit application. Record 390. The planning commission recommended to the board of commissioners that the application be denied. The board of commissioners held hearings on the proposed amendment and voted to approve the comprehensive plan amendment. This appeal followed.

FIRST ASSIGNMENT OF ERROR

In their first assignment of error, petitioners allege that the county erred in processing and approving the comprehensive plan amendment without (1) requiring the applicant to apply for a conditional use permit, (2) applying conditional use permit criteria, or (3) determining whether the proposal complies with the standards set out in ORS 215.296. Petitioners argue that OAR 660-023-0180(6)(a) requires the county to find as part of its approval of the comprehensive plan amendment that the proposed mine satisfies county conditional use permit criteria.[1] Petitioners cite *Beaver State Sand & Gravel v. Douglas County*, 187 Or App 241, 65 P3d 1123 (2003) in support of their argument.

In response to the argument that OAR 660-023-0180(6) applies to the application, the county found that based on OAR 660-023-0180(9), the state administrative rule provisions do not apply directly to the application. OAR 660-023-0180(9) provides:

> "Local governments shall amend the comprehensive plan and land use regulations to include procedures and requirements consistent with this rule for the consideration of PAPAs [post-acknowledgment plan amendments] concerning aggregate resources. *Until such local regulations are adopted, the procedures and requirements of this rule shall be directly applied to local government consideration of a PAPA concerning mining authorization*,* * *." (Emphasis added).

The county explained that in 2006, the Oregon Department of Land Conservation and Development (DLCD) acknowledged the county's ordinance governing aggregate mining as

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[1] OAR 660-023-0180(6) provides in relevant part:

> "For an aggregate site on farmland that is determined to be significant under section (4) of this rule, the requirements of section (5) of this rule are not applicable, except for subsection (5)(f), and the requirements of OAR 660-023-0040 though 660-023-0050 are not applicable. Instead, local governments shall decide whether mining is permitted by applying subsections (a) through (d) of this section:
>
> "(a) The proposed aggregate mine shall satisfy discretionary conditional use permit approval standards adopted by the local government pursuant to applicable requirements of ORS 215.213(2) or 215.283(2), and the requirements of ORS 215.296 and 215.402 through 215.416;
>
> "* * * * *"

part of periodic review. Record 140, 143-44. That ordinance is Ordinance 2006-002. As relevant here, Ordinance 2006-002 amended Josephine County Comprehensive Plan (JCCP) Goal 7 (Natural Resources) (Goal 7) to implement OAR 660-023-0180. The county found that under OAR 660-023-0180(9), DLCD's administrative rules governing aggregate mining do not apply directly to the application. Rather, the county applied the provisions of JCCP Goal 7 that were adopted to implement OAR 660-023-0180.

First, we agree with the county that based on OAR 660-023-0180(9) and DLCD's acknowledgement of JCCP Goal 7, OAR 660-023-0180 no longer applies directly to the application. More importantly, however, even if the rules did somehow apply directly, petitioners misread OAR 660-023-0180(6)(a). That provision states that proposed mining of an aggregate site *that has already been placed on the county's inventory* must satisfy conditional use criteria and the requirements of ORS 215.296 and ORS 215.402 through 215.416. That provision does not require satisfaction of conditional use criteria or a demonstration of compliance with ORS 215.296 as part of the determination of whether an aggregate site is significant and therefore should be added to the county's inventory of aggregate resources. Stated differently, OAR 660-023-0180(6)(a) simply does not prohibit proceeding in a two-step manner, with the decision whether to place a site on the county's inventory being made in the first step, and the conditional use approval decision being made in the second step.

Additionally, petitioners' reliance of *Beaver State Sand & Gravel* is inapposite. In *Beaver State*, the Court of Appeals affirmed LUBA's conclusion that even if a parcel was listed on the county's list of "non-significant" aggregate sites, the site would not be eligible for a conditional use permit to mine unless it was included on the county's "significant" site inventory. 187 Or App at 252-53. *Beaver State* did not hold that consideration of conditional use permit criteria is necessary when considering whether to add a site to the county's inventory of significant aggregate sites.

Absent any argument from petitioners that any provision of JCCP Goal 7 requires a simultaneous processing of a conditional use permit or a demonstration of compliance with conditional use criteria when considering an application for a comprehensive plan amendment to add a site to the county's inventory, petitioners' argument offers no basis for reversal or remand.

Petitioners also argue that JCCP Goal 7 is inconsistent with OAR 660-023-0180. Petition for Review 7. In support of their argument, petitioners cite Josephine County Rural Land Development Code (RLDC) 46.030(C), which governs applications for plan amendments.[2] We understand petitioners to argue that because subsection 5 of that section refers to "OAR 660-023, as amended * * *," the administrative rules apply directly to the application. We do not see that a general reference in RLDC 46.030(5)(C) to OAR 660-023 *et seq* creates an inconsistency between Ordinance 2006-002 and OAR 660-023-0180(9), particularly where DLCD has acknowledged Ordinance 2006-002 as consistent with the statewide planning goals.

The first assignment of error is denied.

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[2] RLDC 46.030 provides in relevant part for applications for plan amendments:

> "(C) At a minimum the application shall:
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> " * * * * *
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> "5. In the event the proposed change relates to an inventory, data base, plan or ordinance, the application shall include the scientific and technical data, reports or other evidence prepared by an expert in that field necessary to support the change. It shall be the function of the review body to determine, based upon substantial evidence in the record, whether the particular training and experience of a witness qualifies the witness to testify as an expert. Specifically:
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> " * * * * *
>
> "b. In the case of a change to a Goal 5 inventory, the application shall be accompanied by evidence demonstrating compliance with OAR 660-23, as amended, which may include one or more Economic, Social, Environmental and Energy (ESEE) analyses. * * *"

SECOND AND THIRD ASSIGNMENTS OF ERROR

Under JCCP Goal 7, Section 1.E(3)(b), an aggregate site "is not significant if more than 35 percent of the proposed mining area consists of soil classified as Class I, Class II, or of a combination of Class I and Class II or Unique soil on Natural Resource and Conservation Service (NRCS) maps on June 11, 2004." This is commonly referred to as the "35% rule." The 35% rule seeks to protect prime farmland from degradation through mining. In their second and third assignments of error, petitioners argue that the county incorrectly excluded areas from the "proposed mining area" that should have been included, and included areas that should not have been included, so that when petitioners' included and excluded areas are considered, the proposed mining area consists of more than 35% Class I and II soils.

A map included in the application materials and attached at Appendix A to this opinion identifies various areas of the property. The legend for that map sets out the acreage and Class I or II soil percentage of the Total Permit Area, and the subareas that make up the Total Permit Area, as follows:

IV Ranch Areas	**Total Area**	**Class I, II**	**Percentage**
Extraction Area	18.57	5.12	28%
Bar Shaping and Riparian Enhancement Area	15.29	-	0%
Riparian Enhancement Area	5.07	-	0%
Farmland Reclamation Area	0.86	0.86	100%
Wetlands/Ponds	3.12	3.12	100%
Office	1.52	-	0%
Stockpile and EQ Storage	3.74	-	0%
Prime Farmland Conservation and Stockpiles	4.66	4.66	100%
Total Permit Area	52.82	13.76	26%

In their second assignment of error, petitioners argue that the "proposed mining area," within the meaning of JCCP Goal 7, Section 1.E(3)(b), should include all of the portion of the subject property identified on the map as the "Permit Area" totaling 52.82 acres, except the 15.29 acre Bar Shaping and Riparian Enhancement Area. Petitioners argue:

> "Removing the 15.29 acres from the 'Permit Area' of 52.83 [sic 52.82] acres reduces it to 37.54 acres. As the 'Bar Shaping and Riparian Enhancement' area has no 'Prime Farmland Soils' the remaining Permit Area acreage increases the percentage of 'Prime Farmland Soils' to the point that they exceed the '35% Rule.' * * *" Petition for Review 12.

As the legend indicates, if the Total Permit Area is considered the "proposed mining area," the percentage of prime farmland soils in the Total Permit Area is approximately 30%. Thus, as we understand petitioners' argument, their assertion that the prime farmland soils exceed the 35% rule is only of legal consequence if their assertion that the county incorrectly included the Bar Shaping and Riparian Enhancement Area in the "proposed mining area" is correct. We address that argument first.

Petitioners argue that the county erred in including the 15.29-acre Bar Shaping and Riparian Enhancement Area as part of the proposed mining area, because evidence in the record shows that the U.S. Army Corps of Engineers (ACOE), the regulatory authority for mining in areas below the ordinary high water line, would deny an application for a permit to mine the river bar. Petitioners argue that it was unreasonable for the county to assume that permits to mine that area can be obtained from ACOE because the east fork of the Illinois River and its tributaries are Coho salmon rearing and migration areas.

The staff report includes the following explanation of the location of the proposed mining area:

> ""* * * The proposal is to mine rock from one area that is internally divided into two sub-areas. The application describes the two sub-areas as the 'Extraction Area' and the 'Bar Shaping Area/Riparian Enhancement.' These two areas are distinguished because they are regulated by different agencies. The Extraction Area is regulated by [the Oregon Department of Geology and Mineral Industries] DOGAMI because it is above the ordinary high water line

> of the river. The Bar Shaping Area is below the ordinary high water line and is regulated by the [Oregon Department of State Lands] DSL and the U.S. Army Corps of Engineers. While the mining area is unbroken on the ground it is broken by regulatory authority. For the purpose of placing the area on the county's significant inventory, who has jurisdiction between state and federal agencies is not pertinent. It does mean, though, that the two areas will likely be permitted and mined at different times even though the county's conditional use permit will cover both activities." Record 140.

First, we disagree with petitioners that the cited portions of the record show that the ACOE would deny a permit to mine the bar. Petitioners cite an e-mail message from a DOGAMI employee in which he expresses his opinion that it is unreasonable to assume that DSL or ACOE would issue mining permits for the bar. Record 61. DOGAMI does not have jurisdiction over the bar areas, however, and that employee's opinion is not determinative. Petitioners also cite an e-mail message from an ACOE employee. Record 32. That e-mail message explains to petitioners the steps that the ACOE takes when it receives an application to mine in locations below the ordinary high water line, including consultation with the National Marine Fisheries Service and other regulatory agencies. That e-mail does not, as petitioners suggest, demonstrate that ACOE would not issue a permit to mine the bar.

More importantly, we disagree with petitioners' premise that when considering an application for a plan amendment to add an aggregate site to the county's inventory, the county is required as a threshold matter to determine that all parts of the proposed mining site will ultimately receive all required local, state and federal permits that will be necessary to mine the site. As long as aggregate is present in the requisite quantity and mining is not conclusively prohibited on the property by federal, state or local law, nothing in the language of JCCP Goal 7 supports a reading of that section to require the county to determine the likelihood of a successful permitting process occurring when determining whether a site is "significant" and thus deserving of inclusion on the county's inventory. We think it was reasonable for the county to consider the Bar Shaping and Riparian Enhancement Area as part of the "proposed mining area" for purposes of the 35% rule.

As explained above, the legend on the map attached as Appendix A indicates that the percentage of soils in the Total Permit Area does not exceed 35%. For the reasons explained above, we reject petitioners' argument that the county wrongly included the Bar Shaping and Riparian Enhancement Area in the "proposed mining area." It follows that even if we agreed with petitioners that, for example, the county wrongly excluded the areas to be used for stockpiles from the "proposed mining area," and those stockpile areas together with the Bar Shaping and Riparian Enhancement Area and the Extraction Area are considered the "proposed mining area," the percentage of Class I and II soils in that acreage would equal approximately 22%, well below the threshold set in the 35% rule. Therefore, petitioners' second assignment of error provides no basis for reversal or remand of the decision.

Petitioners' third assignment of error is a variation of their argument under the second assignment of error that the county both included areas that should have been excluded and excluded areas that should have been included in determining that the 35% rule was satisfied. In their third assignment of error, petitioners argue that the county improperly included 9.54 acres of the 18.57 acre "Extraction Area" in the proposed mining area because, according to petitioners, that 9.54 acre portion will not be permitted to be mined. That area contains a grove of trees.

Petitioners argue that a conceptual design plan prepared by DOGAMI shows that DOGAMI would limit mining in the tree area. Record 36-37. For the same reasons explained above regarding the Bar Shaping and Riparian Enhancement Area, we do not see that it was error for the county to consider the treed area as part of the "proposed mining area." Additionally, the conceptual design plan that petitioners rely on is just that – conceptual, and not based on a specific application to mine. And that design plan shows a design for alcoves for fish habitat that are the product of mining the area, indicating that some mining of the area would occur.

The second and third assignments of error are denied.

The county's decision is affirmed.

Appendix A