

1 BEFORE THE LAND USE BOARD OF APPEALS
2 OF THE STATE OF OREGON
3

4 MARK LATHAM EXCAVATION, INC,
5 *Petitioner,*
6

7 vs.
8

9 DESCHUTES COUNTY,
10 *Respondent,*
11

12 and
13

14 ERIC HOFFMAN, RONNA HOFFMAN,
15 OREGON PARKS AND RECREATION
16 DEPARTMENT, SANDERS NYE,
17 DANIELLE NYE and CASCADES ACADEMY OF
18 CENTRAL OREGON.
19 *Intervenors-Respondents.*
20

21 LUBA No. 2011-078
22

23 FINAL OPINION
24 AND ORDER
25

26 Appeal on remand from Court of Appeals.
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28 Bruce W. White, Bend, represented petitioner.
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30 Laurie E. Craghead, Assistant County Counsel, Bend, represented respondent.
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32 Paul D. Dewey, Bend, represented Eric Hoffman and Ronna Hoffman.
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34 Erin L. Donald, Assistant Attorney General, Salem, represented Oregon Parks and
35 Recreation Department.
36

37 Alison G. Hohengarten, Bend, represented Sanders Nye, Danielle Nye and Cascades
38 Academy of Central Oregon.
39

40 AFFIRMED

10/29/2012

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

1 Opinion by Holstun.

2 In *Hoffman v. Deschutes County*, 61 Or LUBA 173, *aff'd* 237 Or App 531, 240 P3d
3 79 (2010), *rev den* 349 Or 479, 246 P3d 744 (2010) (*Hoffman*) we remanded a county
4 decision that authorized Mark Latham Excavation, Inc. (Latham) to mine and remove both
5 pumice and Tumalo Tuff (tuff) from its property. Following that remand, the county adopted
6 a second decision, which is the subject of this appeal. In a January 17, 2012 decision LUBA
7 remanded the county's remand decision. *Mark Latham Excavation, Inc. v. Deschutes*
8 *County*, ___ Or LUBA ___ (LUBA No. 2011-078, January 17, 2012) (*Latham I*). LUBA's
9 decision was appealed to the Court of Appeals, and the Court of Appeals reversed and
10 remanded in part. *Mark Latham Excavation, Inc. v. Deschutes County*, 250 Or App 543, 281
11 P3d 644 (2012) (*Latham II*). The Court of Appeals' decision requires that we revisit our
12 prior decision.

13 As we noted in our most recent decision, the facts and the legal issues that have been
14 generated and resolved by these appeals have reached a staggering level of complexity. We
15 attempt to strictly limit what we say in this final opinion to the minimum required to respond
16 to the Court of Appeals' remand.

17 **FIRST AND SECOND ASSIGNMENTS OF ERROR**

18 Pursuant to Statewide Planning Goal 5 (Natural Resources, Scenic and Historic
19 Areas, and Open Spaces) the county has adopted a Program to Meet the Goal (PTMG) for the
20 subject property. That PTMG authorizes mining on the subject property with limitations to
21 minimize the impacts of that mining. Latham's first two assignments of error to LUBA in
22 this appeal concern an existing headwall that has already been exposed by past mining on the
23 subject property. The additional mining that Latham proposes would lengthen and enlarge
24 that headwall. The issue presented in the first two assignments of error is whether Latham's
25 proposed additional mining on the subject property, if limited to mining of pumice, requires

1 approval of an amendment to the existing PTMG for the subject property or whether mining
2 the headwall to remove pumice has already been approved in the existing PTMG.

3 The county took the position in its decision on remand that that the existing PTMG
4 does not authorize mining of the headwall, even if that mining is limited to mining and
5 removal of pumice, and the overburden of tuff is retained onsite for reclamation. The county
6 imposed Condition 20 which provides: “[f]urther mining of the headwall is prohibited unless
7 and until a Post Acknowledgment Plan Amendment is submitted and approved for that use.”
8 Remand Record 19. Under Condition 20, a Post Acknowledgment Plan Amendment would
9 be required to adopt a new “Economic, Social, Environmental and Energy” (ESEE) analysis
10 of the consequences of mining the headwall and to modify the PTMG for the subject property
11 to allow further headwall mining for pumice in accordance with that ESEE analysis.
12 Petitioner took the position in its first two assignments of error in *Latham I* that the existing
13 PTMG authorizes mining of the headwall, so long as that mining is limited to pumice.
14 Petitioner argued that because Condition 20 would preclude such limited mining for pumice
15 it was inconsistent with the existing PTMG and that the county erred by interpreting the
16 PTMG for the subject property to the contrary. In our January 17, 2012 decision, we agreed
17 with petitioner and sustained the first two assignments of error.

18 On appeal the Court of Appeals disagreed with our analysis and concluded that the
19 county’s interpretation of the PTMG to permit it to impose Condition 20 was within the
20 county’s interpretive discretion under ORS 197.829(1) and *Siporen v. City of Medford*, 349
21 Or 247, 259, 243 P3d 776 (2010). *Latham II*, 250 Or App at 553-59. Based on the Court of
22 Appeals’ decision in *Latham II*, LUBA erred in sustaining Latham’s first two assignments of
23 error.

24 Petitioner’s first and second assignments of error are denied.

1 **THIRD ASSIGNMENT OF ERROR**

2 Although our decision regarding the third assignment of error in *Latham I* can be read
3 to depend at least in part on our decision to sustain the first two assignments of error in
4 *Latham I*, our decision here to deny petitioner’s first two assignments of error does not
5 change our conclusion in *Latham I* that Latham’s third assignment of error provides no basis
6 for remand.

7 The gist of petitioner’s third assignment of error is that the prohibition in Condition
8 20 regarding “[f]urther mining of the headwall” without an additional ESEE analysis and
9 PTMG amendment results in an impermissible lack of clarity about what mining activities
10 might not constitute further mining of the headwall and therefore could go forward on the
11 property without an additional ESEE analysis or PTMG amendment. Even if we accept
12 petitioner’s premise that a lack of clarity in a land use decision could by itself constitute a
13 basis for remand, petitioner’s contention that the county’s decision in this case is not clear
14 enough is itself unclear, and is insufficiently developed to provide a basis for remand.
15 Petitioner must do more than simply speculate about possible ways petitioner and the county
16 might disagree in the future about application of condition 20.

17 The Court of Appeals’ decision in *Latham II* requires no change in our prior decision
18 in *Latham I* to deny the third assignment of error.

19 **EIGHTH ASSIGNMENT OF ERROR**

20 We denied the eighth assignment of error in *Latham I*. *Latham I*, slip op 16-18. The
21 Court of Appeals’ decision requires no change in our prior decision to deny the eighth
22 assignment of error.

23 **FOURTH, FIFTH, SIXTH, SEVENTH AND NINTH ASSIGNMENTS OF ERROR**

24 LUBA declined to reach these assignments of error in *Latham I*. In doing so, we
25 noted that these assignments of error “are exceedingly complicated and to a significant extent
26 present largely hypothetical issues that will likely, in most cases, ultimately be irrelevant or

1 moot.” *Latham I*, slip op at 18. The application that led to the decision at issue in *Latham I*
2 was an application for mining that would include the mining and removal of a large amount
3 of tuff, which would have resulted in further mining of the headwall. As this case now
4 stands, such mining will require a new ESEE analysis and amended PTMG that would affect
5 and potentially render moot the issues presented in these assignments of error. Even if
6 petitioner decides to abandon its application to mine and remove tuff, and instead proposes to
7 limit its future mining to mining of pumice without further mining of the headwall, so that no
8 amended ESEE analysis or PTMG amendment is required, a new or amended application
9 would be required. In that event, the county’s decision on that new or amended application
10 could easily affect resolution of the issues that are presented under these assignments or make
11 their resolution unnecessary. We therefore continue to decline to consider these assignments
12 of error.

13 The county’s decision is affirmed.