BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

DEL RIO VINEYARDS LLC,
Petitioner,

vs.

JACKSON COUNTY,
Respondent,

and

ROGUE AGGREGATES INC.,
Intervenor-Respondent.

LUBA No. 2013-084

FINAL OPINION
AND ORDER

Appeal from Jackson County.

Daniel B. O'Connor, Medford, filed the petition for review and argued on behalf of petitioner. With him on the brief was Huycke, O'Connor, Jarvis, Dreyer, Davis & Glatte, LLP.

Joel C. Benton, County Counsel, Medford, filed a response brief and argued on behalf of respondent.

Mark S. Bartholomew, Medford, filed a response brief and argued on behalf of intervenor-respondent. With him on the brief was Hornecker, Cowling, Hassen & Heysell, LLP.

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

AFFIRMED 02/04/2014

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

Petitioner appeals a decision by the county approving an application for an asphalt batch plant.

FACTS

Petitioner's property is located near intervenor's property. Intervenor operates an aggregate mine on approximately 46 acres of a 79-acre property that is zoned Aggregate Resource (AR).[1] Jackson County Land Development Ordinance (LDO) 4.4.3 and LDO Table 4.4-1 provide that an aggregate batch plant on property zoned AR is subject to the county's procedure for "Type I Land Use Authorizations, Permits, and Zoning Information Sheet" at LDO 3.1.2, and is subject to the standards at LDO 4.4.8(A).[2] LDO 4.4.8(A) is set out in the appendix. The planning director determined that the application satisfies LDO 4.4.8(A).

The property is also located within the county's Deer and Elk Habitat Area of Special Concern (ASC) 90-1 (Deer and Elk Habitat ASC). As we discuss in more detail below, the parties dispute whether intervenor's property is also subject to the regulations in the county's Scenic Resources Area of Special Concern (Scenic Resources ASC) 90-9. LDO Chapter 7 contains development regulations for property located within various county-identified

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[1] In our previous order denying intervenor's motion to dismiss, we set out the facts that led to the present appeal. *Del Rio Vineyards v. Jackson County*, __ Or LUBA __ (Order, LUBA No. 2013-084, November 27, 2013). We repeat and enhance those facts here.

[2] LDO 3.1.2 provides:

> "Type I uses are authorized by right, requiring only non-discretionary staff review to demonstrate compliance with the standards of [the LDO]. * * * Type I authorizations are limited to situations that do not require interpretation or the exercise of policy or legal judgment. Type I authorizations are not land use decisions as defined by ORS 215.402."

resource areas, including the Deer and Elk Habitat ASC and the Scenic Resources ASC. LDO 4.4.3(E) provides that "[u]ses [set forth in Table 4.4-1] are also subject to applicable standards in Chapter 7 * * *."

The challenged decision identifies the property as being within the Deer and Elk Habitat ASC, but does not identify any criteria contained in LDO Chapter 7 as applicable to the proposed batch plant or adopt any findings regarding LDO Chapter 7. After the planning director approved the application, this appeal followed.

FIRST AND SECOND ASSIGNMENTS OF ERROR

In its first assignment of error, petitioner argues that the county's decision improperly construes the applicable law by failing to determine whether the application satisfies the LDO Chapter 7 provisions that contain development standards for certain ASCs.[3]

A. Deer and Elk Habitat ASC

As noted, the challenged decision identifies the property as being within the Deer and Elk Habitat ASC. LDO 7.1.1(C)(5) contains development standards that apply to certain development within the Deer and Elk Habitat ASC, and provides in relevant part:

> "General Development Standards
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> "The following standards apply to all *discretionary land use permits* subject to review under this Section, unless a condition of approval when the parcel was created required compliance with prior habitat protection standards. The land use decision will

[3] LDO 7.1 provides that "[t]he purpose of these overlays is to protect site-specific environmental and cultural resources and through the application of additional development regulations and requirements. Use of this land will be governed by the underlying zoning regulations as well as the special regulations set forth in this Section. * * *"

include findings that the proposed use will have minimal adverse impact on winter deer and elk habitat based on:

> "a) Consistency with maintenance of long-term habitat values of browse and forage, cover, sight obstruction;
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> "b) Consideration of the cumulative effects of the proposed action and other development in the area on habitat carrying capacity; and
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> "c) Location of dwellings and other development within 300 feet of an existing public or private road, or driveway that provides access to an existing dwelling as shown on the County 2001 aerials or other competent evidence. When it can be demonstrated that habitat values and carrying capacity are afforded equal or greater protection through a different development pattern an alternative location may be allowed through the discretionary review process described in subsection (6), below[.]" (Emphasis added.)

Petitioner argues that the county's decision improperly construes LDO 7.1.1(C)(5) by failing to determine whether the proposed batch plant will have "minimal adverse impact on winter deer and elk habitat[.]"

Intervenor responds that the LDO 7.1.1(C)(5) development standards do not apply to the proposed batch plant because the development standards apply only to "discretionary land use permits subject to review under this Section [LDO 7.1.1]," and the county's approval of a batch plant on the property is not a "discretionary land use permit" that is subject to review under LDO 7.1.1. That is so, intervenor argues, because the only criteria that apply to the batch plant application are in LDO 4.4.8(A) and those criteria are not discretionary. Consistent with this position, intervenor points out, is the fact that LDO 3.1.2 classifies the review of an application for a batch plant as a "Type I" review. *See* n 2. Intervenor also points to provisions governing other county-identified ASCs, such as ASC 90-3, the Jenny Creek Sucker Habitat ASC, contained in

LDO 7.1.1(E). LDO 7.1.1(E) specifically makes "[a]ll land use actions * * * subject to review to ensure that only minimal adverse impact results for any proposed action" on lands identified in ASC 90-3. According to intervenor, LDO 7.1.1(E) demonstrates that the county knows how to subject a county decision to additional development regulations when it wants to, and that the county intended in the Deer and Elk Habitat ASC that only "discretionary land use permits" subject to review under LDO 7.1.1 be subject to the additional development standards.

As we noted in our November 27, 2013 order, the LDO does not define the term "discretionary land use permit." For purposes of this opinion, we assume that the phrase "discretionary land use permit" does not include Type I land use authorizations as defined in LDO 3.1.2. *See* n 2. While the ASC standards at LDC 7.1.1(C)(5) appear to require the exercise of discretion, those standards do not apply independently to all uses in an ASC overlay zone, but only apply to "discretionary land use permits," *i.e.* permits subject to other code provisions that do require the exercise of discretion. Petitioner does not take the position that the AR zone standards contained in LDO 4.4.8(A) that apply to the batch plant constitute standards that require the exercise of discretion. The only other potential source of applicable standards that petitioner identifies is the Scenic Resources ASC standards. However, for the reasons set out below, we conclude that the Scenic Resources ASC standards do not apply. Because petitioner has not identified any discretionary approval standards that apply to the application for a batch plant in the AR zone, petitioner has not demonstrated that LDO 7.1.1(C)(5) applies.

B. Scenic Resources ASC

LDO 7.1.1(J)(3)(a) requires in relevant part that "[w]ithin the scenic resource areas of special concern, any land use action subject to review by the Department will include findings demonstrating that the proposal will have no significant impact on identified scenic views, sites, stream and roadway corridors either by nature of its design, mitigation measures proposed, or conditions of approval[.]" However, LDO 7.1.1(J)(2) provides exemptions from the additional standards for certain uses, including, as relevant here "[o]ther land uses or activities permitted in the underlying zone, subject to state and federal regulations[.]"

As noted, the parties dispute whether intervenor's property is also subject to the county's Scenic Resources ASC development standards. Petitioner maintains that the property is visible from a scenic resource roadway corridor and therefore all development on the property is subject to the LDO 7.1.1(J) provisions that apply to scenic resources. The county disputes that development on the property is subject to LDO 7.1.1(J). According to the county, the only mapped and designated scenic resource area near intervenor's property is a portion of Interstate 5 that is designated as a scenic resource roadway corridor. Because intervenor's property is not located within or adjacent to that designated corridor, the county argues, intervenor's property is therefore not subject to the additional regulations in LDO 7.1.1(J).

The position taken in the county's brief, that the scenic resource provisions apply only to development within or immediately adjacent to the portion of Interstate 5 designated as a scenic roadway corridor, seems highly

questionable.[4] However, we need not resolve that point, because even if petitioner is correct that LDO 7.1.1(J) applies to development on property that is visible from the designated portion of Interstate 5, we agree with intervenor that LDO 7.1.1(J)(2)(f) exempts the proposed batch plant from the special findings requirement in LDO 7.1.1(J)(3). The proposed batch plant is a "land use or activit[y] permitted in the underlying zone," and is therefore not subject to the LDO 7.1.1(J) standards. We disagree with petitioner's reading of that exemption as exempting only state and federally regulated land uses and activities permitted in the underlying zoning district, such as utility facilities and transmission towers. The better reading of the phrase "subject to state and federal regulations" that appears after the comma in LDO 7.1.1(J)(2)(f) is that uses permitted in the underlying zone are exempt from the Scenic Resources ASC requirements but remain subject to all state and federal regulations that apply to the permitted use.

The first assignment of error is denied.

SECOND ASSIGNMENT OF ERROR

In its second assignment of error, petitioner argues that the county erred in failing to treat the application as a "permit" (as defined in ORS 215.402(4)) and process the application according to the procedures contained in ORS

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[4] We note that the 1994 ordinance that rezoned 48 acres of the 68-acre subject property to AR that is included in the record at Record 42-54 describes the subject property as "visible from Interstate 5, and in this area, the freeway is designated as a scenic highway." Record 46.

We also note that LDO 4.4.8(A)(10), a provision that no party cites or discusses, requires that "processing activities" be screened from the view of county-identified scenic resources. The decision adopts findings not challenged that "the existing 1997 [site plan review approval for the mining operation] addressed the screening requirement. The location of the proposed permanent asphalt batch plant is consistent with the existing use approval. Staff accepts the Applicant's findings." Record 6; *See* Appendix at slip op 12.

215.416(11) and LDO 3.1.3 for "Type 2 Land Use Permits."[5] Petitioner argues:

> "As set forth above, [p]etitioner contends that the Decision required interpretation or the exercise of policy or legal judgment on the part of [the county]. *The procedural consequence is that the Decision is a 'permit' as that term is defined in by ORS 215.402(4*)." Petition for Review 11 (emphasis added).

Petitioner's theory that the decision is a permit decision rests on the premise that LDO 7.1.1(C)(5) and LDO 7.1.1(J) apply. However, the premise of petitioner's argument emphasized above is faulty, because we have already determined above that those provisions do not apply for the reasons explained above. We do not understand petitioner to argue that there is anything ambiguous in LDO 4.4.8(A) concerning whether the proposed use is identified as a permitted use or the nature of the use. Accordingly, the county was not required to process the application according to the procedures set out in ORS 215.416(11).

The second assignment of error is denied.

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[5] LDO 3.1.3 provides:

"**3.1.3 Type 2 Land Use Permits**

"Type 2 uses are subject to administrative review. These decisions are discretionary and therefore require a notice of decision and opportunity for hearing.

"A) Procedures

"Applications for a Type 2 Land Use Permit will follow the applicable review procedure set forth in Section 2.7 as identified in Table 2.7-1.

"B) Approval Criteria

"A site development plan may be required pursuant to Section 3.2.4. If a site development plan is required, it shall comply with Section 3.2 and all other applicable provisions of this Ordinance." (Emphasis in original).

THIRD ASSIGNMENT OF ERROR

LDO 1.8.2(A) provides:

> "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."[6]

In its third assignment of error, petitioner argues that the county erred in approving the application because two existing violations on the property are "documented to exist." First, petitioner points out that the decision itself recognizes that the mining operation on the subject property has been expanded outside of the AR zone onto adjacent property zoned Woodland Resource in violation of the LDO without county land use approval of the expansion. Record 7. Intervenor responds that the county properly approved the application and imposed condition of approval 2 that requires that intervenor "shall cease all facets of the aggregate operation on the adjacent, WR zoned properties **prior to the operation of the proposed processing facility**."

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[6] LDO 1.8.1 provides:

> "Violations
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> "It is a violation of County Law for any person or other entity to violate this Ordinance. Specifically, it is a violation to:
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> "A) Intentionally make false statements of material fact on any application.
>
> "B) Use land, construct, occupy, or place improvements, sell or transfer land by an instrument of conveyance, or conduct any activity on land, in any manner not in accordance with the standards set forth in this Ordinance, or with any special permit or order of the Development Services Department, Hearings Officer, Planning Commission, or Board of Commissioners issued hereunder.
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> "C) Conduct, without a permit, any activity for which a permit is required by this Ordinance."

Record 8 (emphasis in original). Accordingly, the second part of LDO 1.8.2(A) allows the application to be approved because that "violation has * * * been corrected." We agree with intervenor that the county could approve the application pursuant to LDO 1.8.2(A) and rely on condition 2, thus remedying the violation of conducting the activity without a permit. *See* n 7.

Second, petitioner alleges that evidence in the record "document[s]" the existence of an additional violation of what petitioner alleges is a condition of approval imposed when the subject property was rezoned to AR in 1994 that limits the extraction area to "5 acres at one time, with ongoing incremental reclamation." Record 52. According to petitioner, evidence in the record at Record 14 shows that currently 46 acres are "disturbed by mining" in violation of the 5-acre extraction area limit and the ongoing reclamation requirement. Petition for Review 14.

We reject the argument for a few reasons. First, the 5 acre minimum and ongoing incremental reclamation requirement was proposed as a condition in the staff report, but as far as we are aware, that condition was not specifically adopted as a condition by the board of commissioners in its ordinance. Record 42-43, 52. If there is another limit on the size of the extraction area or a requirement for ongoing incremental reclamation other than the proposed condition that was not adopted, petitioner does not cite to it.[7] Second, even if the condition of approval was adopted, petitioner does not allege that gravel is currently being *extracted from* more than 5 acres in violation of the condition of approval, only that more than 5 acres is currently "disturbed." Finally, to the

[7] The Department of Geology and Mineral Industries (DOGAMI)-approved reclamation plan is at Record 55-63. The DOGAMI reclamation plan requires reclamation to begin within 120 days after mining is completed. Further, the area in the red dashed lines in the picture at Record 14 is not required to be reclaimed. Record 55.

extent petitioner argues that the portion of the condition of approval that requires "ongoing incremental reclamation" is violated, for the same reason the evidence cited by petitioner that shows a 46-acre "disturbed area" also does not support that argument.

The third assignment of error is denied.

The county's decision is affirmed.

4.4.8 Mineral, Aggregate, Oil and Gas Use Regulations

A) Aggregate Mining and Processing

Prior to commencement of new or expanded operations for mining, crushing, stockpiling or processing of aggregate or other mineral resources, evidence shall be submitted showing that the operation will comply with the following operating standards, in addition to any requirements and conditions that were placed on the site at the time it was designated AR, or that were otherwise required through the Goal 5 process, or approved through a mining permit issued by the County.

In AR zones, if the Board Ordinance designating the site AR required a higher level of review than shown in Table 4.4-1, the review and noticing requirements of the Board Ordinance will be used.

1) All necessary County and state permits have been obtained, and a current Department of Geology and Mineral Industries (DOGAMI) operating permit has been issued. Equipment testing necessary to obtain permits is allowed.

2) All facets of the operation will be conducted in a manner that complies with applicable DEQ air quality, water quality and noise standards, and in conformance with the requirements of the DOGAMI permit for the site.

3) A site reclamation plan, approved by DOGAMI, has been submitted for inclusion in the Planning Division's records. Such plan must return the land to natural condition, or return it to a state compatible with land uses allowed in the zoning district or otherwise identified through the Goal 5 review process.

4) A written statement from the County Road Department and/or ODOT has been submitted verifying that the public roads that will be used by haul trucks have adequate capacity and are, or will be, improved to a standard that will accommodate the maximum potential level of use created by the operation. The property owner or operator is responsible

for making all necessary road improvements, or must pay a fair share for such improvements if agreed to by the County Road Department or ODOT.

5) On-site roads and private roads from the operating area to a public road have been designed and constructed to accommodate the vehicles and equipment that will use them, and meet the following standards:

a) All access roads within 100 feet of a paved public road are paved, unless the operator demonstrates that other methods of dust control will be implemented.

b) All unpaved roads that will provide access to the site or that are within the operating area will be maintained in a dust-free condition at all points within 250 feet of a dwelling or other identified conflicting use.

6) If the operation will include blasting, the operator has developed a procedure to ensure that a notice will be mailed or delivered to the owners and occupants of all residences within one-half (2) mile of the site at least three (3) working days before the blast. The notice must provide information concerning the date and time that blasting will occur, and must designate a responsible contact person for inquiries or complaints. Failure to notify neighbors and the County before blasting is a violation of this Ordinance for which a citation may be issued. Notice will be deemed sufficient if the operator can show that the notices were mailed or delivered, even if one (1) or more of the households within the notice area did not receive the notice.

7) The operation is insured for a minimum of $500,000 against liability and tort arising from surface mining, processing, or incidental activities conducted by virtue of any law, ordinance, or condition. Insurance shall be kept in full force and effect during the period of such activities. Evidence of a prepaid policy of such insurance which is in effect for a period of one (1) year shall be deposited with the County

prior to commencing any operations. The owner or operator shall annually provide the County with evidence that the policy has been renewed.

8) The operation will observe the following minimum setbacks except where the operation is lawfully preexisting and encroachment within the prescribed setbacks has already occurred:

a) No extraction or removal of aggregate/minerals will occur within 25 feet of the right-of-way of public roads or easements of private roads.

b) Processing equipment, batch plants, and manufacturing and fabricating plants will not be operated within 50 feet of another property or a public road right-of-way, or within 200 feet of a residence or residential zoning district, unless written consent of the property owner(s) has been obtained.

9) If the aggregate removal and surface mining operation will take place within the Floodplain Overlay the requirements of Section 7.1.2 have been met.

10) Mining and processing activities, including excavated areas, stockpiles, equipment and internal roads, will be screened from the view of dwellings, scenic resources protected under ASC 90-9, and any other conflicting use identified through the Goal 5 process or Type 3 review. Screening may be natural or may consist of earthen berms or vegetation which is added to the site. If vegetation is added, it shall consist of alternating rows of conifer trees planted six (6) feet on center and a height of six (6) feet at the commencement of the operation. An exemption to the screening requirements may be granted when the operator demonstrates any of the following:

a) Supplied screening cannot obscure the operation due to local topography.

b) There is insufficient overburden to create berms, and planted vegetation will not survive due to soil, water, or climatic conditions.

c) The operation is temporary and will be removed, or the site will be reclaimed within 18 months of commencement.

d) The owner of the property containing the use from which the operation must be screened, has signed and recorded a restrictive deed declaration acknowledging and accepting that the operation will be visible and that the operator will not be required to provide screening.

11) Existing trees and other natural vegetation adjacent to any public park, residential zoning district, or parcel on which a dwelling is situated will be preserved for a minimum width of 25 feet along the boundary of the property on which the operation is located.

12) Operations will observe the following hours of operation:

a) Mining, processing, and hauling from the site are restricted to the hours of 6 a.m. to 7 p.m. Monday through Saturday. The hours of operation do not apply to hauling for public works projects.

b) Neither mining, processing, nor hauling from the site will take place on Sundays or the following legal holidays: New Year=s Day, Memorial Day, July 4, Labor Day, Thanksgiving Day, and Christmas Day.

c) An exemption to the hours of operation may be requested. Notice of the proposed change in operating hours must be provided to all property owners within 1,000 feet radius of the aggregate removal or surface mining operation, to residences within one-half (2) mile of the site, and to owners of property adjacent to private site access roads. If no request for a public hearing is made within 12 calendar days of mailing

said notice, the operating hours can be changed as requested by the operator. If a request is made for a public hearing, adjustment of standard operating hours shall be determined by the Hearings Officer, subject to findings that the proposal is consistent with the best interests of public health, safety, and welfare and that the operation will not conflict with other land uses.