BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

PIONEER ASPHALT, INC.,
Petitioner,

vs.

UMATILLA COUNTY,
Respondent,

and

CENTRAL WASHINGTON ASPHALT INC.,
CENTRAL INVESTMENT PROPERTIES LLC,
PAMP MAIERS, and A & B ASPHALT INC.,
Intervenors-Respondents.

LUBA No. 2014-076

FINAL OPINION
AND ORDER

Appeal from Umatilla County.

Peter D. Mohr, Portland, filed the petition for review and argued on behalf of petitioner. With him on the brief was Jordan Ramis PC.

No appearance by Umatilla County.

Wendie L. Kellington, Lake Oswego, filed the response brief and argued on behalf of intervenors-respondents.

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

AFFIRMED 01/28/2015

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 county decision approving a comprehensive plan text amendment and zoning map amendment.

MOTION TO AMEND APPENDICES

Petitioner moves for permission to amend the appendix to its petition for review to add a verbatim transcript of a portion of the June 11, 2014 board of commissioners hearing. Intervenors filed a response to the motion; petitioner filed a reply to the response; and intervenors filed a reply to the reply.

OAR 661-010-0030(5) provides that the petition for review "may include appendices containing verbatim transcripts of relevant portions of media recordings that are part of the record." OAR 661-010-0030(6) allows the filing of an amended petition for review with the permission of the Board in certain circumstances. The motion is granted.

FACTS

Intervenors applied for a comprehensive plan text amendment to add 33.26 acres of property zoned Exclusive Farm Use (EFU) to the comprehensive plan's Rock Material Resources Inventory (Inventory), and a zoning map amendment to apply the Aggregate Resources Overlay (ARO) to the subject property.[1] Petitioner is a different quarry operator in the county.

An asphalt batch plant is located on an adjacent 9.83 acres of property that are already included on the Inventory. Intervenors intend to process aggregate from the subject property at the batch plant after the property is added to the Inventory. The existence and operation of the asphalt batch plant

[1] The subject 33.26-acre property is sometimes referred to as the Spence Pit.

is the main issue in petitioner's assignments of error and we discuss the batch plant in greater detail below.

After public hearings on the applications, the board of county commissioners approved the applications, and this appeal followed.

INTRODUCTION

All of petitioner's assignments of error challenge findings the county adopted regarding the asphalt batch plant that is located on the 9.83 acre property that is adjacent to the subject property.[2] Petitioner does not argue that any Umatilla County Development Code (UCDC) criteria that apply to the comprehensive plan text amendment and zoning map amendment applications require the county to determine whether the asphalt batch plant, which is not located on the subject property, is operating in conformance with the UCDC, or require any consideration at all of the batch plant. The county's decision identifies the only applicable approval criterion that requires consideration of the asphalt batch plant in processing the current application, which is OAR 660-023-0180(5)(g), a Department of Land Conservation and Development administrative rule. We first set out the rule before we resolve petitioner's assignments of error.

A. OAR 660-023-0180(5)(g)

Most of OAR 660-023-0180(5), sets out how a local government must go about determining whether mining will be allowed on a site that has been determined to be significant under OAR 660-023-0180(3). OAR 660-023-

[2] The minutes of the board of commissioners' June 11, 2014 hearing refer to a mandamus proceeding that was filed in circuit court that relates to the asphalt batch plant. Record 121. The parties have not apprised us of the status of that proceeding.

0180(5)(a) through (f). OAR 660-023-0180(5)(g) addresses a particular circumstance, whether a "currently approved aggregate processing operation" can "process material from a new or expansion [significant mineral and aggregate] site without requiring a reauthorization of the existing processing station." As relevant here, OAR 660-023-0180(5) provides:

> "For significant mineral and aggregate sites, local governments shall decide whether mining is permitted. For a PAPA application involving an aggregate site determined to be significant under section (3) of this rule, the process for this decision is set out in subsections (a) through (g) of this section. * * *"
>
> "* * * * *
>
> "(g) Local governments shall allow *a currently approved aggregate processing operation at an existing site* to process material from a new or expansion site without requiring a reauthorization of the existing processing operation unless limits on such processing were established at the time it was approved by the local government." (Emphasis added.)

Petitioner does not dispute that the 9.83-acre site on which the asphalt batch plant operates is an "existing site," because it was "included on an inventory of significant aggregate sites" in the county's comprehensive plan on September 1, 1996.[3] There also appears to be no dispute that the subject property is an "expansion site" within the meaning of OAR 660-023-0180(5)(g).[4] The only

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[3] OAR 660-023-0180(1)(c) defines "existing site" as "an aggregate site that meets the requirements of subsection (3)(a) of this rule and was lawfully operating, or was included on an inventory of significant aggregate sites in an acknowledged plan, on September 1, 1996."

[4] "Expansion site" is not defined, but OAR 660-023-0180(1)(d) defines "expansion area" as "an aggregate mining area contiguous to an existing site."

dispute appears to be whether the asphalt batch plant is a "currently approved aggregate processing operation," within the meaning of the rule.

B. The County's Previous Decisions Regarding the Asphalt Batch Plant

In 1987, the county approved a conditional use permit (C-479) for Humbert Asphalting to operate an asphalt plant on a 30-acre property (hereafter the 1987 Permit). Record 653; Intervenors' App. 9. That 30 acres includes the 9.83 acres on which the batch plant is located, as well as some of the 33.26 acres that are included in the applications to add the subject property to the Inventory. The county issued a zoning permit for the asphalt batch plant the same year that shows the actual and proposed locations of the batch plant. Record 485; Intervenors' Response Brief App. 20.

In 1992, the county approved a modification to the 1987 Permit to change the operator from Humbert Asphalting to Humbert Excavating (hereafter the 1992 Permit). Record 486-87; Intervenors' Response Brief App. 10. The 1992 Permit imposed the same conditions of approval that were imposed in the 1987 Permit, and required that the applicant be issued a county zoning permit prior to operation of the batch plant.[5] Record 487.

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[5] The conditions of approval are:

> "1. The applicant will be required to locate the batch plant at least 500 feet from the nearest residential residence.
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> "2. The applicant contact the County Road Department concerning the road access and the condition of the interior roads.
>
> "3. The applicant show proof that they have complied with all air, noise and [dust] control as required by the state and

The decision also required yearly review to determine "if all conditions of approval have been met." Record 487. The record includes letters from the planning department to the operator of the mine for 1993, 1996, 1998, 1999, 2000, 2002, and 2006 after the county conducted its yearly review. All of the letters state that the county decided to renew the conditional use permit for an additional year. Beginning in 1998, the annual review letters also confirm that the operator "[is] in good standing with the conditions placed on [the] permit[.]" Record 519, 514, 507, 500, 493. The 2006 letter additionally stated

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federal regulations with regard to the existing gravel extraction operation.

"4. The applicant submit a revised plot plan showing the exact location of the batch plant in relation to the existing residences and including any recommendation of the Road Department on haul roads. (The plot plan shall identify all equipment and other development on the property.)

"5. The applicant places a culvert under the road access to the quarry site, according to the County Road Department's specifications and pave the access road into the quarry site to eliminate the depositing of mud on the county road.

"6. A yearly review to be conducted to determine if all conditions of approval have been met. A $25.00 renewal fee shall be required at the time of yearly review, for each year the operation exists.

"* * * * *

"All conditions listed above, excepting condition #6, shall be completed prior to issuance of a Zoning Permit. A zoning permit must be obtained prior to operation of the batch plant." Record 486-87.

that further yearly approvals of the aggregate operation would not be required, unless complaints were received.

In 2009, the county issued a zoning permit for placement of an office trailer on the property that is the subject of the 1992 Permit. Intervenors' Response Brief App. 20, page 2.

C. The County's 2014 Decision

During the proceedings below, petitioner argued that operation of the asphalt batch plant on the 9.83 acre property adjacent to the subject property violates provisions of the UCDC that apply to conditional use permits. Record 119-120. Petitioner argued that the 1992 Permit has expired because, according to petitioner, (1) a zoning permit was not obtained prior to operation of the batch plant; and (2) the conditions of approval of the 1992 Permit have not been satisfied.[6]

In the decision, the county found:

> "The opponents also claimed that the * * * asphalt plant * * * at some points in history did not comply with conditions of approval [of the 1992 Permit] (when an opponent operated the site) and that the County should invalidate [the 1992 Permit]. However, the County does not understand how such a claim is relevant to whether the 9.83 acres is an existing site. The 9.83 acres is an existing site because it is on the [Inventory]. The status of [the 1992 Permit] makes no difference to that issue. The only

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[6] Petitioner argues that operation of the batch plant violates UCDC 152.613(A), which currently provides:

> "A conditional use permit or land use decision shall expire after two years (except for a land use decision for a dwelling in the EFU Zone per § 152.059 (K)) from the date the final findings are signed, unless all applicable conditions have been met and a zoning permit is obtained."

relevance of [the 1992 Permit] to this matter is through OAR 660-023-0180(5)(g) * * *

"No one disputes that the processing activities (the asphalt batch plant) occurring under [the 1992 Permit] are 'currently approved.' *The opponents argued that [the 1992 Permit] should be revoked for various alleged reasons. However, those allegations do not change the fact the processing (asphalt plant) on the 9.83 acres are 'currently approved' per [the 1992 Permit] * * * and the Board so finds.*

"As a precaution only and without waiving that the county believes the issue to be irrelevant to this application other than the fact that [the 1992 Permit] expresses a 'current approval,' the county finds as follows:

" * * * * *

"2. [The 1987 Permit] was issued in 1987 and a slight modification was issued in 1992 [the 1992 Permit]. Both of these decisions were issued more than 10 years ago. They may not be challenged now per ORS 197.830(6).

" * * * * *

"4. At least one zoning permit specifically referring to and for [the 1992 Permit] was issued by the county. The Board finds that this zoning permit is, as provided in [the UCDC]: 'An official finding that a planned use of a property, as indicated by an application, complies with the requirements of this chapter or * * * conditional use permit.' That zoning permit is a final decision and not subject to collateral attack." Record 77-78 (Emphasis added).

D. The meaning of "currently approved"

The rule does not define "currently approved." Neither of the parties offer a definition for the phrase. Based on the above quoted findings, the county appears to have interpreted "currently approved" to mean that the permit authorizing the asphalt batch plant remains effective. Record 77.

Petitioner appears to agree with that interpretation, but disputes that the record includes substantial evidence to support a finding that any permit for the asphalt batch plant remains effective. For purposes of resolving petitioner's evidentiary challenge in this opinion, we will apply the county's understanding of what "currently approved" means.

SECOND AND FOURTH ASSIGNMENTS OF ERROR

In petitioner's second and fourth assignments of error, we understand petitioner to argue that the county's conclusion that the asphalt batch plant is "currently approved" for purposes of OAR 660-023-0180(5)(g) is not supported by substantial evidence in the record. ORS 197.835(9)(a)(C).

Intervenors respond initially that the issues raised in petitioner's second and fourth assignments of error are waived. Intervenors point to the minutes of the April 2014 planning commission hearing, which describe petitioner's attorney as claiming to be "neutral on the Goal 5 considerations and whether or not they are approved[.]" Record 172, 173. For that reason, intervenors argue, petitioner may not raise a challenge to the county's finding that the asphalt batch plant is "currently approved" for the first time before LUBA. ORS 197.763(1).

At oral argument, petitioner responded by citing to the minutes of the March and April 2014 planning commission hearings (at Record 1045 and 163) to demonstrate that the issue regarding whether the asphalt batch plant is "currently approved" within the meaning of OAR 660-023-0180(5)(g) was raised. We have reviewed the citations provided by petitioner and we agree with petitioner that an issue was raised below regarding whether the permit that authorized the batch plant remains effective, or in other words, is "currently approved."

A. Second Assignment of Error

In its second assignment of error, we understand petitioner to argue that the county's decision that the 1992 Permit supports the county's conclusion that the batch plant is "currently approved" is not supported by substantial evidence in the record. First, petitioner argues, testimony and evidence in the record supports a conclusion that no asphalt plant was installed and operated on the property until 2010. Petitioner cites to testimony in the record at the planning commission hearing from Brad Humbert, a former employee of Humbert Excavating in 1992 and possibly an employee of a current business competitor of some of the intervenors, that takes the position that Mr. Humbert was not aware of an asphalt batch plant operating on the site between 1992 and 2010. Record 121-22. Based on that alleged failure to install and operate a batch plant until 2010, petitioner argues, the record supports only the conclusion that the 1992 Permit has expired by operation of UCDC 152.613(A). *See* n 6. Second, petitioner points to the absence of a zoning permit for the batch plant in the record to demonstrate that a requirement of the 1992 Permit was never satisfied. For those reasons, we understand petitioner to argue, the 1992 Permit has expired and is not "currently approved" within the meaning of OAR 660-023-0180(5)(g).

Intervenors respond that the county reasonably relied on (1) the 1992 Permit; and (2) the annual review letters from the county to the operator that confirm that the conditions are met and renew the 1992 Permit, to conclude that the batch plant is "currently approved" within the meaning of OAR 660-023-0180(5)(g). In response to the absence of a zoning permit for the batch plant in the record, intervenors point to the zoning permit issued in conjunction with the 1987 Permit that shows the "actual" and "proposed" location of the batch

plant. Record 485. Finally, in response to petitioner's argument that the 1992 Permit has expired, intervenors respond that the UCDC provisions that petitioner cites and relies on are not self-executing, and the county has taken no steps to have the county determine that the 1992 Permit has expired.

We agree with intervenors that the evidence in the record supports the county's conclusion that the 1992 Permit and the annual renewals that confirm the conditions are met and renew the permit are substantial evidence in the record that the batch plant is "currently approved" within the meaning of OAR 660-023-0180(5)(g), as the county and we interpret it here, to mean that the 1992 Permit authorizing the batch plant remains effective.

In addition, the board of commissioners implicitly interpreted UCDC 152.613(A) not to be self-executing. *See* n 6. In other words, until there has been an adjudication to establish that "all applicable conditions have [not] been met," in the language of UCDC 152.613(A), it will not be known whether the 1992 Permit has "expired." That interpretation is consistent with UCDC 152.613(F), which specifies procedural requirements for voiding a conditional use permit:

> "The County may void a conditional use permit or land use decision under the following circumstances:
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> "(1) The property owner/applicant no longer complies with the conditions of approval imposed as part of the original decision, the County provided the property owner/applicant at least 30 days written notice and opportunity to correct or cure the compliance issue and the property owner/applicant failed to correct or cure the compliance issue within said notice period; or
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> "(2) The use approved pursuant to the conditional use permit or land use decision has been continuously discontinued for a

> period of one (1) year or more, unless a longer period is provided in state law.
>
> "(3) If the County intends to void a conditional use permit or land use decision under subsection (l) or (2) above, it shall do so pursuant to a public process set forth in § 152.769 and § 152.771. The County bears the burden of proving the elements set forth in subsections (1) and (2) above."

Petitioner does not argue that the county has voided the 1992 Permit under the procedures set forth in UCDC 152.613(F) or some other adopted procedure. Unless and until it does so, we agree with the county that the 1992 Permit has not "expire[d]," within the meaning of UCDC 152.613(A).

The second assignment of error is denied.

B. Fourth Assignment of Error

As quoted above, the county adopted findings that a 2009 zoning permit, which references the 1992 Permit, for placement of an office trailer on the subject property meets the definition of "zoning permit" in UCDC 152.003. As noted, the 1992 Permit required the applicant to obtain a zoning permit prior to operation of the batch plant. *See* n *5*. In its fourth assignment of error, petitioner argues that to the extent the county's finding relies on the 2009 zoning permit as evidence that a zoning permit was issued prior to operation of the batch plant is met, the county misconstrued the UCDC, because the 2009 zoning permit concerned only an office trailer, not the asphalt batch plant.

Petitioner's fourth assignment of error provides no basis for reversal or remand of the decision. Even if the county has not issued any zoning permit for the asphalt batch plant, for the reasons we explain above petitioner has not demonstrated that that circumstance has any bearing on whether the 1992 permit remains effective, or that the asphalt batch plant is "currently approved"

for purposes of OAR 660-023-0180(5)(g). In other words, if the county erred in finding that the 2009 zoning permit qualifies as the zoning permit required by the 1992 Permit prior to operation of the asphalt batch plant, that finding would appear to be harmless error.

The fourth assignment of error is denied.

THIRD ASSIGNMENT OF ERROR

In its third assignment of error, petitioner argues that the conditions of approval of the 1992 Permit are "limits on [aggregate] processing [that] were established at the time it was approved by the local government" within the meaning of OAR 660-023-0180(5)(g), and that because the conditions of approval were never satisfied, the batch plant exceeds those "limits."

Intervenors respond that petitioner failed to raise the issue that it raises in the third assignment of error below. Petitioner has not responded to intervenors' waiver argument. We agree with intervenors that petitioner may not raise for the first time at LUBA the issue of whether the conditions of approval of the 1992 Permit are "limits on [aggregate] processing [that] were established at the time it was approved by the local government" within the meaning of OAR 660-023-0180(5)(g). ORS 197.835(3).

Even if the issue was not waived, petitioner has not established that the conditions of approval of the 1992 Permit are "limits on [aggregate] processing" within the meaning of the rule. The phrase more likely refers to a fixed amount of aggregate allowed to be processed on the site or a time period for operation of the site, rather than general conditions of approval of the batch plant. Moreover, the evidence in the record from the annual review letters supports the county's conclusion that the conditions of approval of the 1992 Permit were satisfied sometime after the permit was issued.

The third assignment of error is denied.

FIFTH ASSIGNMENT OF ERROR

In its fifth assignment of error, petitioner argues that the county erred in adopting findings that the batch plant is a "currently approved aggregate processing operation at an expansion site" for purposes of OAR 660-023-00180(5)(g). As we understand it, the county adopted the findings quoted above in order to respond to petitioner's challenges to the batch plant.

It is possible to read some of the county's findings at Record 77-78 as making a final decision to reject petitioner's argument that the 1992 Permit has expired. However, it is reasonably clear the board of commissioners did not intend in the challenged decision to render a final decision on the merits concerning whether there might be grounds to find the 1992 Permit has expired under UCDC 152.613(A) in a proceeding under UCDC 152.613(F), or some other procedure for making such determinations. In light of the conclusion in the findings that the issue of whether the 1992 Permit "expired" is "irrelevant," the more likely understanding of the findings at Record 77-78 is that the county was merely trying to respond to issues petitioner raised during the proceedings below. The board of commissioners' finding that petitioner's UCDC 152.613(A) arguments were "irrelevant" made that discussion unnecessary, and therefore the findings are more properly characterized as non-binding dicta. Accordingly, it was not error for the county to adopt findings regarding a Goal 5 rule that applies to the applications, nor was it error for the county to adopt findings that respond to issues that petitioner raised, in the context of addressing the Goal 5 rule. *Blosser v. Yamhill County*, 18 Or LUBA 253, 264 (1989).

The fifth assignment of error is denied.

FIRST ASSIGNMENT OF ERROR

In its first assignment of error, petitioner argues that the county's decision misconstrues UCDC 152.593, governing nonconforming uses. According to petitioner, the county's decision to approve the applications allows a nonconforming use that has been abandoned (the asphalt batch plant) to be resumed in violation of UCDC 152.593.

Intervenors respond that the issue presented in the first assignment of error was not raised during the proceedings below and petitioner is precluded from raising it for the first time on appeal to LUBA. Petitioner has not responded to intervenors' waiver arguments. We agree with intervenors that the issue is waived.

However, even if the issue was not waived, the first assignment of error provides no basis for reversal or remand of the decision. First, petitioner does not explain why the provisions of the UCDC governing nonconforming uses are approval criteria for the applications, which seek a comprehensive plan text amendment and zoning map amendment for an entirely different property than the property on which the batch plant is located. Second, the provisions of the UCDC 152.593 that govern discontinuance of a nonconforming use simply do not apply to the batch plant. A "nonconforming structure or use" is defined in UCDC 152.003 as "[a] lawful existing * * * use at the time this chapter or any amendment thereto becomes effective, which does not conform to the requirements of the zone in which it is located." The batch plant is a use that received approval under the conditional use permit criteria that applied at the time it sought approval, and operates pursuant to that conditional use permit, the 1992 Permit.

The first assignment of error is denied.

The county's decision is affirmed.