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

ORDER

**FACTS**

Intervenor operates an existing aggregate mine on property that is zoned Aggregate Resource/Aggregate Removal (AR) that is also located in the county's Deer and Elk Habitat Area of Special Concern (Habitat Overlay) and the county's Scenic Resources Area of Special Concern (Scenic Overlay). The challenged decision is a decision by the county planning director approving intervenor's application to place an aggregate batch plant on the property.

The planning director approved intervenor's application to place an aggregate batch plant on the property as a "Type I Land Use Authorization," according to Jackson County Land Development Ordinance (LDO) 3.1.2. LDO 3.1.2 describes "Type I Land Use Authorizations, Permits, and Zoning Information Sheet" and provides in relevant part:

> "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."[1]

LDO 4.4.3 and Table 4.4-1 set forth the uses allowed in the AR zone. Table 4.4-1 provides in relevant part that "[p]rocessing of aggregate from a new or expansion site * * * at an AR zoned site" is subject to "Type I * * * approval procedures," and is subject to the standards at LDO 4.4.8(A). The planning director determined that the application satisfies LDO 4.4.8(A).

LDO 4.4.3(E) additionally provides that "[u]ses are also subject to applicable standards of [LDO] Chapter[] 7 * * *." LDO Chapter 7 contains development regulations for property located within various county overlay zones, including the Habitat Overlay and the Scenic Overlay. 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. * * *" The challenged decision identifies the property as being within the Habitat Overlay, but does not identify any criteria contained in LDO Chapter 7 as applicable to the proposed

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[1] ORS 215.402 does not contain a definition for "land use decision," but does contain a definition for "permit:"

> "'Permit' means discretionary approval of a proposed development of land under ORS 215.010 to 215.311, 215.317, 215.327 and 215.402 to 215.438 and 215.700 to 215.780 or county legislation or regulation adopted pursuant thereto. 'Permit' does not include:
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> "(a) A limited land use decision as defined in ORS 197.015;
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> "(b) A decision which determines the appropriate zoning classification for a particular use by applying criteria or performance standards defining the uses permitted within the zone, and the determination applies only to land within an urban growth boundary;
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> "(c) A decision which determines final engineering design, construction, operation, maintenance, repair or preservation of a transportation facility which is otherwise authorized by and consistent with the comprehensive plan and land use regulations; or
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> "(d) An action under ORS 197.360(1)."

batch plant, or adopt any findings regarding LDO Chapter 7. Record 2-10.

**JURISDICTION**

Petitioner filed its petition for review, and prior to the deadline for filing the response brief, intervenor moved to dismiss the appeal. Intervenor contends the challenged decision falls within the ORS 197.015(10)(b)(A) exclusion from the statutory definition of land use decision for a decision "[t]hat is made under land use standards that do not require interpretation or the exercise of policy or legal judgment."[2] According to intervenor, applying the land use standards set out at LDO 4.4.8(A) to the proposal for a batch plant does not require "interpretation or the exercise of policy or legal judgment."

Petitioner argues that the requirement in LDO 4.4.3(E) that "[u]ses in the AR zone are also subject to the applicable standards of LDO Chapter 7" requires the proposal for a batch plant to be reviewed for compliance with the applicable standards of LDO Chapter 7. Specifically, petitioner argues that LDO 7.1.1(C)(5) and LDO 7.1.1(J)(3) apply to the proposal and that applying both of those provisions requires interpretation and/or the exercise of policy or legal judgment.[3] Petitioner also argues that to the extent the county determined

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[2] LUBA has exclusive jurisdiction to review land use decisions and limited land use decisions. ORS 197.825(1). As defined by ORS 197.015(10)(a), a "[l]and use decision" includes "[a] final decision or determination made by a local government * * * that concerns the adoption, application or amendment of" "[a] land use regulation."

[3] LDO 7.1.1(C)(5) provides:

> "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 include findings that the proposed use will have minimal adverse impact on winter deer and elk habitat based on:
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> "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 there are no "applicable standards of Chapter 7" to apply, that determination required interpretation and the exercise of policy or legal judgment and for that reason the challenged decision does not fall within the ORS 197.015(10)(b)(A) exclusion. Petition for Review 6.

Intervenor argues that no provision of LDO Chapter 7 applies to the proposed batch plant, and provides several textual arguments to support its contention. First, intervenor argues that LDO 7.1.1(J)(2)(f) exempts the proposed batch plant from the requirements of LDO 7.1.1(J)(3)(a) and (b).[4] Second, interevenor argues that the standards of LDO

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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;

"d) Dwellings other than the initial dwelling on a lot or parcel will comply with one (1) of the following, as applicable:

"i) A maximum overall density (within the tract) of one (1) dwelling unit per 160 acres in Especially Sensitive Winter Range units, or one (1) dwelling unit per 40 acres in Sensitive Winter Range units; or

"ii) Clustering of new structures within a 200-foot radius of the existing dwelling to achieve the same development effect as would be achieved under i), above." (Emphasis added.)

LDO 7.1.1(J)(3) provides:

"*Special Findings Required*

"a) Within 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; and

"b) Land use activities that have no significant visual impact will not attract undue attention, and must visually harmonize with existing scenic resources. This can be accomplished through project designs that repeat the form, line, colors, or textures typical of the subject landscape, and designing the land use activity to blend into the existing landscape." (Emphasis added.)

[4] LDO 7.1.1(J)(2) provides:

"*Exemptions*

"The following uses within ASC 90-9 will be permitted without review by Jackson County, *unless otherwise provided by other regulations*:

"a) Conservation and maintenance of scenic resources;

7.1.1(C)(5) only apply to "discretionary land use permits" and that because the county allows the proposed batch plant as a permitted use in the AR zone, the county's review of the proposal is not a review of a "discretionary land use permit" as that term is used in LDO 7.1.1(C)(5). However, although both petitioner and intervenor focus considerable pages of argument in their pleadings on the issue of whether any of the provisions of LDO Chapter 7 apply to the proposed batch plant, the question that we are required to resolve at this stage of the proceeding, in response to intervenor's motion to dismiss, is whether the county's decision approving the batch plant required the county to interpret the LDO or exercise policy or legal judgment in making the decision. Resolving the issue of whether any of the provisions of LDO Chapter 7 apply to the proposed batch plant is premature at this stage of the proceeding, when no response brief has been filed.

We conclude that the county was required to interpret the LDO and exercise legal judgment in making the decision, and therefore the decision is not subject to the exclusion in ORS 197.015(10)(b)(A). If the property was not located in any county overlay zone, we might agree that a county decision that is required to apply only the standards contained in LDO 4.4.8 does not require interpretation or the exercise of policy or legal judgment. However, no party disputes that the property is located within two of the county's zones that are regulated by LDO Chapter 7. Because of that location, LDO 4.4.3(E) requires that the

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"b) Fish and wildlife habitat management;

"c) Historic resource protection measures;

"d) Natural areas protection measures;

"e) Passive recreation activities;

"*f) Other land uses or activities permitted in the underlying zone, subject to state and federal regulations*; or

"g) Forest practices on commercial forest land within the scope of OAR Chapter 729, Division 24, are not subject to the Area of Special Concern, although the regulations continued herein may be used as guidelines for such practices." (Emphasis added.)

county review the standards in LDO Chapter 7 to determine if any are applicable. If that review of standards to determine which are applicable requires interpretation or the exercise of policy or legal judgment, then the decision based on that review does not fall within the exception to LUBA's jurisdiction at ORS 197.015(10)(b)(A), regardless of the outcome of that review. *See St. Johns v. Yachats Planning Commission*, 138 Or App 43, 47, 906 P2d 304 (1995) (the city's determination of which ordinance applied to proposed development requires interpretation and exercise of legal judgment, is not determinable under clear and objective standards and is thus a land use decision subject to LUBA's exclusive jurisdiction).

In the present case, the parties dispute whether certain LDO Chapter 7 standards apply to the proposed use, or whether the proposed use is exempt from all LDO Chapter 7 standards. Regardless of how that dispute is ultimately resolved, we agree with petitioners that determining whether and which LDO Chapter 7 standards apply to the proposed use requires interpretation. By way of example only, determining whether LDO 7.1.1(J)(2)(f) exempts the proposed batch plant from the LDO 7.1.1(J)(3) requirement that "any land use action subject to review by the Department" must include the findings specified in that section requires interpretation and the exercise of legal judgment to determine whether the exemption is available or unavailable due to the existence of "other regulations." As another example, determining whether the standards of LDO 7.1.1(C)(5) apply to the proposal depends on the meaning of "discretionary land use permit" as it is used in that provision, because "discretionary land use permit" is not a term that is specifically defined in the LDO, although the LDO defines the term "land use permit."[5] Accordingly, the challenged decision

[5] LDO 13.3(138) defines "Land Use Permit" as:

> "A development authorization issued in compliance with the provisions of this Ordinance, including permits issued by the County certifying a proposed development meets local or State land use standards and criteria. Permits may be time limited and include conditions that apply to future development or use of the land, regardless of ownership changes. Advisory statements issued in compliance with ORS 197.180 (e.g., land use compatibility statements) or

is a "land use decision" that does not fall within the ORS 197.015(10)(b)(A) exclusion for decisions that do not require "interpretation or the exercise of policy or legal judgment."

Intervenor's motion to dismiss is denied.

**BRIEFING SCHEDULE**

The next event in the proceeding is the filing of the respondents' briefs. The respondents' briefs shall be due 21 days from the date of this order.

Dated this 27th day of November, 2013.

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Melissa M. Ryan
Board Member

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at the request of a citizen (e.g., zoning information sheet) are not land use permits. See DEVELOPMENT PERMIT, PERMIT (*See ORS 215.402*)." (Emphasis in original.)

LDO 13.3(178) defines "Permit" as:

"Any approval granted as the result of a Type 1 ministerial review as described in Section 3.1.2 and any approval granted as the result of a Type 2, Type 3 or Type 4 discretionary review as described in Sections 3.1.3, 3.1.4 and 3.1.5, respectively. Only Type 2, Type 3 and Type 4 approvals are land use decisions within the meaning of ORS 215.402. This distinction governs regardless of the terms used elsewhere in this Ordinance to describe any given approval. (*See ORS 215.402*)." (Emphasis in original.)