BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

ROGUE ADVOCATES
and CHRISTINE HUDSON,
Petitioners,

vs.

JACKSON COUNTY,
Respondent,

and

PAUL MEYER and KRISTEN MEYER,
Intervenors-Respondents.

LUBA No. 2014-015

FINAL OPINION
AND ORDER

Appeal from Jackson County.

Maura C. Fahey, Portland, filed the petition for review and argued on behalf of petitioners. With her on the brief were Courtney Johnson and Crag Law Center.

No appearance by Jackson County.

Daniel O'Connor, Medford, represented intervenors-respondents.

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

REMANDED 08/26/2014

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

Opinion by Holstun.

NATURE OF THE DECISION

Petitioner appeals a planning department decision approving a floodplain development permit for an asphalt batch plant within the 100-year floodplain.

INTRODUCTION

The property is a 10.98-acre parcel zoned Rural Residential-5 (RR-5). Significant portions of the property are located within the floodway and the 100-year floodplain of Bear Creek. Intervenors were the applicants for the disputed floodplain development permit. Mountain View Estates is a mobile home park located across Bear Creek in the vicinity of the subject property. Members of petitioner Rogue Advocates live in the Mountain View Estates and petitioner Hudson is "the manager and owner of the Mountain View Estates property." Petition for Review 5. A central dispute between the parties and intervenors is whether intervenors' existing asphalt batch plant qualifies as a legal nonconforming use.

The decision that is the subject of this appeal follows an earlier hearings officer's decision regarding the nonconforming use status of intervenors' asphalt batch plant. That earlier hearings officer decision was remanded by LUBA in *Rogue Advocates v. Jackson County*, ___ Or LUBA ___ (LUBA Nos. 2013-102 and 2013-103 (*Rogue I*). The manner in which the floodplain permit decision that is the subject of this appeal played out locally at the same time the hearings officer's nonconforming use decision was under review by LUBA in *Rogue I* has a bearing on LUBA's jurisdiction in this matter, as well as the merits of this appeal. We therefore discuss those events briefly below before

turning to the jurisdictional question and the merits, omitting events that are not significant in this appeal and simplifying where possible.

A. The Hearings Officer's Nonconforming Use Verification

Prior to 1988, batch plants were operated on the subject property by intervenors' predecessors. At the time the first batch plant was established on the property, the property was not subject to zoning or other land use regulations. Neither the zoning that was first applied to the property, nor the RR-5 zoning that currently applies to the property, allow batch plants. The Jackson County Land Development Ordinance (LDO) allows such preexisting uses to continue as nonconforming uses, even if the LDO would now preclude establishment of such uses. In 1988, another of intervenors' predecessor's (Best Concrete) began operating a concrete batch plant on the property.[1] Best Concrete operated that concrete batch plant until approximately 2001 when intervenors replaced the concrete batch plant with an asphalt batch plant. Intervenors have operated an asphalt batch plant on the property ever since.

On September 26, 2012, intervenors sought verification from the county that their asphalt batch plant (as it existed in 2012) is a legal nonconforming use and concurrently applied for floodplain development permits. On March

[1] As we noted in our decision in *Rogue I*, it was not clear from the record whether the batch plants that operated on the subject property prior to 1988 were asphalt batch plants or concrete batch plants. *Rogue I*, slip op 4, n 1. Regardless, under ORS 215.130(11), "a county may not require an applicant for verification [of a nonconforming use] to prove the existence, continuity, nature and extent of a use for a period exceeding 20 years immediately preceeding the date of the application [for verification of a nonconforming use]." The batch plant that was operating on the property 20 years prior to the September 12, 2012 application was the Best Concrete concrete batch plant.

25, 2013, planning staff determined that the asphalt batch plant does qualify as a nonconforming use and approved the requested floodplain development permits. Petitioners appealed that planning staff decision to the county hearings officer. On September 26, 2013, the hearings officer found that the asphalt batch plant use qualifies as a nonconforming use and that conversion of the prior concrete batch plant to an asphalt batch plant in 2001 did not require county approval as an alteration of the nonconforming concrete batch plant use.[2] However, the hearings officer also found that a shop structure and certain other structures on the property that were apparently constructed after 2001 and which were present in 2012 were unauthorized expansions of the nonconforming use.[3] Because the application did not seek county approval of those unauthorized expansions, the hearings officer denied the requested nonconforming use verification and vacated the floodplain development permits that had been approved by planning staff.

B. Petitioners' LUBA Appeal of the Hearings Officer's Nonconforming Use Verification and Floodplain Development Permit Decisions

On October 17, 2013, petitioners appealed both of the hearings officer's decisions to LUBA. Six months later, in an April 22, 2014 decision, LUBA remanded the hearings officer's nonconforming use verification decision and affirmed the hearings officer's decision to vacate the planning department's

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[2] Under ORS 215.130(9)(a) and (b), alterations of nonconforming uses and structures may be permitted, so long as the alteration will not result in "greater adverse impact to the neighborhood.

[3] LDO 11.2.1(B) authorizes expansions of nonconforming uses if certain standards are met. The structures the hearings officer found to be unauthorized expansions had not been approved under LDO 11.2.1(B).

approval of the floodplain development permit. In remanding the hearings officer's nonconforming use verification decision, LUBA agreed with the hearings officer in part. Among other things, the hearings officer found the disputed batch plant: (1) was "lawfully established," (2) satisfies the state and local requirements for continued, uninterrupted existence, and (3) that the batch plant did not have to be approved as an "[e]xpansion of nonconforming aggregate and mining operations." Slip op at 22-24. LUBA rejected petitioner Rogue Advocates' challenges to these three aspects of the hearings officer's decision. But LUBA found that the conversion of the concrete batch plant to an asphalt batch plant in 2001 required approval as an alteration of the nonconforming concrete batch plant and that the hearings officer erred in concluding that the conversion did not require approval as an alteration. Slip op at 18. We remanded so that the hearings officer could verify the nonconforming use "without considering as part of the verified use any unapproved alterations that occurred in 2001 or at other relevant times since 1992." Slip op at 22.

C. The Second Floodplain Permit Decision

On October 15, 2013 (two days before petitioner appealed the hearings officer's decisions to LUBA), the county issued code enforcement citations regarding the asphalt batch plant. On October 18, 2013 (one day after petitioner appealed the hearings officer's decisions to LUBA), the county and intervenors entered a stipulation. Record 66-69. Pursuant to that stipulation, intervenors agreed to do two things: (1) stop using and remove the structures that have not been found to be part of the lawful nonconforming batch plant use, and (2) apply for floodplain permits for the structures that have been found to qualify as part of the legally established nonconforming use.

While the appeals of the hearings officer's decisions were pending before LUBA between October 2013 and April 2014, intervenors submitted an application for floodplain development permit approval on October 25, 2013. On January 23, 2014, the planning department approved the October 25, 2013 application following the county's Type I procedures, which allow the county to approve certain permit applications without public hearings, notice or any right for persons other than the applicant to participate. On February 13, 2014, a little more than two months before LUBA's decision in *Rogue I*, petitioners appealed the planning department's approval of the October 25, 2013 application for floodplain development permit approval to LUBA. That floodplain development permit is the subject of this appeal.

JURISDICTION

Intervenors move to dismiss this appeal. Intervenors contend the challenged floodplain development permit was properly approved following the county's Type I review procedure. LDO 3.1 is entitled "Land Use Permits/Decisions." LDO 3.1.2 provides as follows:

> "**Type 1 Land Use Authorizations, Permits and Zoning Information Sheet[.]** Type 1 uses are authorized by right, requiring only non-discretionary staff review to demonstrate compliance with the standards of this Ordinance. A Zoning Information Sheet may be issued to document findings or to track progress toward compliance. *Type 1 authorizations are limited to situations that do not require interpretation or the exercise of policy or legal judgment.* Type 1 authorizations are not land use decisions * * *." (Italics added.)

Intervenors contend that because the challenged decision did "not require interpretation or the exercise of policy or legal judgment," the county correctly followed its Type I procedure and the challenged decision qualifies for the

exception to LUBA's jurisdiction over land use decisions that is set out at ORS 197.015(10)(b)(A).

The challenged decision is a final decision that applies the LDO, which is a land use regulation, so the challenged decision qualifies as a "land use decision," as that term is defined at ORS 197.015(10)(a).[4] Intervenors' jurisdictional challenge relies on ORS 197.015(10)(b)(A), which excludes from LUBA's review jurisdiction any decision "[t]hat is made under land use standards that do not require interpretation or the exercise of policy or legal judgment."

As we have already noted, the disputed *asphalt* batch plant in its present configuration is only a permissible use under the LDO if it qualifies as a nonconforming use. As intervenors correctly note, the challenged floodplain development permit did not itself attempt to find that each of the separate structures authorized by the floodplain development permit qualify as a nonconforming use. Instead, the January 23, 2014 floodplain development permit simply applied the floodplain permit standards to the structures that the stipulation identified. It is somewhat unclear whether the October 18, 2013 stipulation relies on an order issued by the code enforcement hearings officer to identify the structures that qualify as nonconforming uses, or whether it relies on the September 26, 2013 hearings officer's decision to identify the scope of the structures that have legal nonconforming use status, or both.[5] However, the

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[4] As defined by ORS 197.015(10)(a) "[a] final decision" "that concerns the * * * application of" "[a] land use regulation" is a land use decision.

[5] The code enforcement hearings officer and the hearings officer who issued the September 26, 2013 hearings officer's decision are not the same person.

January 23, 2014 floodplain development permit expressly cites the hearings officer's September 26, 2013 floodplain development permit and nonconforming use determinations (ZON2012-01172_FP and ZON2012-01173_NC) in identifying the scope and identify of the nonconforming use structures that were granted floodplain development permit approval. Record 1-2. While the hearings officer's decision essentially verifies the converted asphalt batch plant as it existed in 2012 as a legal nonconforming use, with certain exceptions, our decision in *Rogue I* concludes that the nonconforming use only includes the *concrete* batch plant, and any related structures, that were on the property in 1992, and that the conversion to an *asphalt* batch plant in 2001 can be approved only as an alteration of the lawful nonconforming *concrete* batch plant use. In addition, any structures that post-date that 2001 conversion either must be removed or approved as alterations of the lawful nonconforming concrete batch plant use.

For purposes of intervenors' jurisdictional challenge, the decision on appeal implicitly determined that the city could proceed to issue the requested floodplain permit for the 2012 configuration of the asphalt batch plant, notwithstanding that the hearings officer's decision that established the scope of that nonconforming use was on appeal to LUBA and therefore might be found to be erroneous. That implicit determination required "interpretation or the exercise of policy or legal judgment." Therefore the exception to our jurisdiction set out at ORS 197.015(10)(b)(A) does not apply.

Intervenors' motion to dismiss is denied.

PETITIONERS' ASSIGNMENTS OF ERROR

Neither the county nor intervenors have filed a brief to respond to petitioners' assignments of error. Petitioners' first assignment of error alleges

the floodplain development permit erroneously extends its approval to structures that may have been added in 2001 when the then-existing concrete batch plant was converted to an asphalt batch plant or thereafter. We understand petitioners to contend the county does not have authority to grant floodplain permits for the existing asphalt batch plant, until the scope and nature of the legal nonconforming batch plant has been determined by the county, consistent with our remand in *Rogue I*. We agree with petitioners. Once the county has identified the scope and nature of the nonconforming batch plant that existed on the property prior to its conversion to an asphalt batch plant in 2001, it will be in a position to grant floodplain development permits for the verified nonconforming use. If the intervenors desire a floodplain development permit for the current asphalt batch plant, they will first need to seek approval for any alterations to the nonconforming concrete batch plant that have occurred since 1992, particularly those alterations made in 2001 or thereafter that were made to convert that concrete batch plant to the current asphalt batch plant.

In their second assignment of error, petitioners also argue the county erred in following its Type I procedure in granting the disputed floodplain development permit. We have already concluded that the county's decision to proceed with issuing the floodplain development permit while the nature and extent of the nonconforming batch plant remained unresolved required "interpretation or the exercise of policy or legal judgment." Under LDO 3.1.2, quoted earlier in this opinion, the county's Type I procedure is limited to "situations that do not require interpretation or the exercise of policy or legal judgment." It follows that the county erred in following its Type I procedure. That procedural error warrants remand if it "prejudiced the substantial rights of

the petitioner." ORS 197.835(9)(a)(B). Had the county followed the Type II procedure that petitioners contend the county should have followed, petitioners would have been entitled to notice and a right to participate. Petitioners' substantial rights that are protected by ORS 197.835(9)(a)(B) include "an adequate opportunity to prepare and submit their case and a full and fair hearing." *Muller v. Polk County*, 16 Or LUBA 771, 775 (1988). The county's decision to follow its Type I procedure prejudiced petitioners' substantial rights.

The county's decision is remanded.[6]

[6] Because the county's decision must be remanded in any event, we need not and do not consider petitioners' third assignment of error.