

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

3 TERRITORIAL NEIGHBORS, composed    )  
of HAROLD BATES, ANDREW ELDRIDGE,   )  
4 ACE LaFAVERE, EARL BARNES, ROBERT   )  
BARNES, JEFFREY DOYLE, JAMES R.     )  
5 HERRIOTT II, and CONSER QUARRY,     )  
INC.,                                    )

6                               Petitioners,                                )

7                               vs.    )

LUBA No. 87-083

8 LANE COUNTY,                                )

FINAL OPINION  
AND ORDER

9                               Respondent,                                )

10                              and    )

11 LEONARD MOUG,                                )

12                              Participant-Respondent.                        )

13                              Appeal from Lane County.

14                              Howard E. Speer, Eugene, filed the petition for review and  
15 argued on behalf of petitioner. With him on the brief was  
Speer, Jones & Poppe.

16                              Stephen L. Vorhes, Eugene, filed a response brief and  
17 argued on behalf of Respondent County.

18                              Joseph J. Leahy, Springfield, filed a response brief and  
19 argued on behalf of Participant-Respondent Leonard Moug. With  
him on the brief was Harms, Harold, Leahy & Pace.

20                              SHERTON, Referee, BAGG, Chief Referee; HOLSTUN, Referee,  
participated in the decision.

21                              REVERSED

04/27/88

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

1 Opinion by Sherton.

2 NATURE OF THE DECISION

3 Petitioners appeal Lane County Board of Commissioners Order  
4 No. 87-9-2-3 electing not to hear an appeal of the county  
5 hearings official's decision to approve a special use permit  
6 for an aggregate quarry in an exclusive farm use zone.

7 FACTS

8 The subject property is a rectangular area of approximately  
9 160 acres, designated Agricultural by the Lane County Rural  
10 Comprehensive Plan (RCP) and zoned Exclusive Farm Use (E-40).  
11 The southern portion consists of about 70 acres of pastureland,  
12 including a dwelling and farm buildings, and the northern  
13 portion consists of 90 acres of forested land. An existing  
14 quarry is located in the central portion of the property, near  
15 its eastern boundary.

16 The property is joined to Territorial Highway by a long,  
17 narrow flag strip extending from the southeast corner of the  
18 rectangle. Primary access to the proposed quarry is by a  
19 private road from Territorial Highway, over the narrow flag  
20 strip, and along the eastern perimeter of the rectangle.

21 The subject property is bordered to the north, east and  
22 south by land zoned E-40 and to the west by land zoned  
23 Nonimpacted Forest Lands (F-1). To the south of the flag strip  
24 is a series of smaller, residentially developed lots zoned  
25 Rural Residential (RR-5).

26 On June 9, 1986, participant-respondent Leonard Moug

1 (participant) filed an application for a special use permit for  
2 aggregate extraction and processing. The county hearings  
3 official held a hearing, at which most or all of petitioners  
4 appeared, on December 4, 1986. At issue was (1) whether the  
5 subject site was on the county's inventory of mineral and  
6 aggregate resources sites; and (2) application of RCP policies  
7 to the approval of special use permits for inventoried sites.

8 At the close of the hearing, upon agreement by participant  
9 to waive the 120-day final action requirement of  
10 ORS 215.428(1),<sup>1</sup> the hearings official ruled that the  
11 proceeding would be held in abeyance until a response was  
12 obtained from the board of commissioners concerning how the  
13 county handles such mineral and aggregate extraction sites.

14 While the proceeding was held in abeyance, the county  
15 initiated a proceeding to amend some of the RCP Mineral and  
16 Aggregate Resources policies. This proceeding culminated in  
17 the adoption of Ordinance PA 934, amending the RCP policies, on  
18 June 24, 1987.

19 On July 7, 1987, the hearings official held another hearing  
20 on the special use permit application. The record was held  
21 open until July 16, 1987, in part for a site visit by the  
22 hearings official. The hearings official's August 10, 1987  
23 decision approving the special use permit was appealed by  
24 petitioners to the board of commissioners. After the board of  
25 commissioners elected not to hear their appeal, this appeal  
26 followed.

1 STANDING

2 Participant challenges the standing of petitioner Conser  
3 Quarry, Inc. (Conser). Participant asserts that Conser was not  
4 entitled to notice of the decision as a matter of right, and is  
5 not adversely affected or aggrieved by operation of the subject  
6 quarry other than by "the potential loss, if any, of some  
7 undefined market share." Participant's Brief at 1.

8 The petition for review<sup>2</sup> states that Conser appeared and  
9 gave testimony orally and in writing at the hearings, and  
10 appealed an adverse decision by the county hearings official to  
11 the board of commissioners. The petition asserts Conser is  
12 aggrieved and adversely affected by the decision because  
13 operation of the quarry as approved "will be contrary to  
14 Petitioners' interests and will adversely affect the use and  
15 occupancy of their respective properties." Petition for Review  
16 at 2. The petition also states that Conser operates a quarry  
17 in the vicinity of the proposed quarry.

18 Absent limitation by the local government of who may appear  
19 before it as an interested person, it is sufficient to  
20 establish that a person is "aggrieved" by the local  
21 government's decision, under ORS 197.830(3)(c)(B), if (1) the  
22 person was allowed to appear and assert a position on the  
23 merits; and (2) the local government made a decision contrary  
24 to that position. Jefferson Landfill Comm. v. Marion Co., 297  
25 Or 280, 284-286, 686 P2d 310 (1984).

26 The petition for review alleges that Conser testified

1 before the hearings official and board of commissioners. It  
2 also alleges that a decision adverse to Conser was made by the  
3 hearings official and was appealed by Conser to the board of  
4 commissioners, which declined to hear Conser's appeal. These  
5 statements are sufficient to allege entitlement to standing as  
6 an aggrieved party. See Citizens for Better Transit v. Metro  
7 Service District, \_\_\_ Or LUBA \_\_\_ (LUBA No. 86-022; June 16,  
8 1987); Apalategui v. Washington County, 14 Or LUBA 261, 263  
9 (1986).

10 The challenge to petitioner Conser's standing is denied.

11 FIRST ASSIGNMENT OF ERROR

12 "Lane County's decision is contrary to and not  
13 consistent with the acknowledged Rural Comprehensive  
14 Plan for Lane County \* \* \* ."

14 Petitioners assert the county's decision violates specific  
15 RCP policies, which we discuss separately below.

16 A. RCP Mineral and Aggregate Resources Policies

17 "[The county] did not follow the procedures of  
18 Goal 5 which pertained to Mineral and Aggregate  
19 Resources which required denial of the  
application when it was considered on December 4,  
1986."

20 Petitioners argue that under ORS 215.428(3), the county's  
21 decision to approve the subject special use permit was required  
22 to be "based on the standards and criteria that were applicable  
23 at the time the application was first submitted." According to  
24 petitioners, the RCP Mineral and Aggregate Resource (M&A)  
25 policies in effect when the subject application was filed  
26 provide that approval of mineral extraction operations at a

1 site listed in "Appendix F" of the RCP "Mineral and Aggregate  
2 Working Paper"<sup>3</sup> requires a plan amendment. Thus, extraction  
3 operations at such sites could not be approved through the  
4 special use permit process when the subject application was  
5 submitted. Petitioners assert the county's decision recognizes  
6 that the subject site is listed in "Appendix F." Record 23.  
7 Petitioners contend the hearings official should have denied  
8 the application for failure to comply with these plan policies.

9 The county argues that the essence of this subassignment is  
10 a claim that the county committed a procedural error by holding  
11 the proceeding in abeyance after the December 4, 1986 hearing,  
12 or by not making its decision prior to August 10, 1987. The  
13 county asserts that petitioners have not identified any  
14 prejudice to their substantial rights from the procedures  
15 followed. The county and participant contend that petitioners  
16 waived the statutory and code time limits for final action on  
17 the application by not objecting to the hearings official's  
18 decision to hold the matter in abeyance.

19 We do not agree with the county's characterization of this  
20 assignment as an allegation of procedural error. The essence  
21 of this subassignment is petitioners' charge that the RCP  
22 policies in effect at the time the permit application was  
23 initially filed are the criteria applicable to approval of the  
24 permit, and that approval of the challenged permit violates  
25 those policies. Thus, petitioners claim the county "improperly  
26 construed the applicable law." ORS 197.835(8)(a)(D). Reversal

1 or remand on this basis does not require us to find that  
2 petitioners' substantial rights were prejudiced by the error.

3 1. Application of ORS 215.428(3)

4 The county asserts that, notwithstanding the language of  
5 ORS 215.428(3), the M&A policies in effect at the time of the  
6 Hearings Official's August 10, 1987 decision are the criteria  
7 applicable to our review of the challenged special use permit.  
8 The county bases this claim on two arguments.

9 First, the county argues that the provisions of ORS 215.428  
10 give rights only to permit applicants. According to the  
11 county, only if the applicant obtained a writ of mandamus from  
12 circuit court, would the county be required to apply the  
13 criteria in effect at the time the application was filed.  
14 Second, the county argues that both our decision in Gearhard v.  
15 Klamath County, 7 Or LUBA 27 (1982), and Lane County Code  
16 (code) 14.700(1)(a), establish that it is the RCP provisions  
17 currently in effect which are applicable to our review of the  
18 county's decision.

19 ORS 215.428(3) provides:

20 "If the application [for a permit or zone change] was  
21 complete when first submitted or the applicant submits  
22 the requested additional information within 180 days  
23 of the date the application was first submitted and  
24 the county has a comprehensive plan and land use  
regulations acknowledged under ORS 197.251, approval  
or denial of the application shall be based on the  
standards and criteria that were applicable at the  
time the application was first submitted."

25 The plain meaning of this subsection is that, if a permit  
26 application is complete when filed (or made complete within 180

1 days), and a county's plan and regulations are acknowledged,  
2 the county must apply the standards and criteria of the plan  
3 and regulations that were in effect at the time the application  
4 was initially filed. Neither the county nor participant claims  
5 that the subject application was not complete when first  
6 submitted or was not made complete within 180 days. There is  
7 also no claim that the county's comprehensive plan and land use  
8 regulations were not acknowledged at any time critical to  
9 application of this statutory provision.<sup>4</sup> Therefore, the  
10 county was required to apply the M&A policies that were in  
11 effect on June 9, 1986 to its approval of the subject permit,  
12 and those policies are "applicable law" in our review of the  
13 county's decision.<sup>5</sup>

14 We find nothing in the statute to support the county's  
15 argument that only the applicant may demand, through a writ of  
16 mandamus proceeding, that the standards and criteria in effect  
17 at the time the application was filed be applied. Other  
18 subsections of ORS 215.428 establish a requirement that a  
19 county take final action on a permit application within 120  
20 days of when the application is deemed complete. If the county  
21 does not take final action on the application by that deadline,  
22 ORS 215.428(7) provides that the applicant may apply to the  
23 circuit court for a writ of mandamus to compel the county to  
24 issue an approval. The statute requires the writ to be issued  
25 unless approval would violate a substantive provision of the  
26 plan or land use regulations.<sup>6</sup>

1        There is nothing in ORS 215.428, or other sections of the  
2 statute, which makes the operative language of subsection (3)  
3 dependent upon the initiation of a writ of mandamus proceeding  
4 by the applicant pursuant to subsection (7). The provisions of  
5 subsection (7) provide a remedy to applicants for county  
6 failure to make a final decision within the 120 day time  
7 limit. They do not purport to provide any remedy for county  
8 application of incorrect standards and criteria under  
9 subsection (3). Remedy for such error is available through  
10 appeal of the county's final decision to this board on the  
11 basis that the county misconstrued the applicable law. This  
12 remedy is available to any person who meets the standing  
13 requirements of ORS 197.830(3).

14            2. Application of M&A Policy 10

15        Petitioners argue that the county's decision does not  
16 comply with the M&A Policies 5, 7 and 10 in effect when the  
17 application was initially filed. However, only M&A Policy 10  
18 imposes requirements on decisions to allow mineral or aggregate  
19 extraction at certain sites. That policy provides as follows:

20        "Sites for which not enough information is presently  
21 available to determine quality, quantity and conflicts  
22 with other uses which include those sites listed on  
23 Appendix 'F' of the 'Mineral and Aggregate Working  
24 Paper,' shall be considered 'Significant' in terms of  
25 OAR 660-16-000 through 660-16-025, but requiring that  
26 the Goal 5 evaluation process be delayed (the '1B'  
option). At such a time as it is clear that these  
sites will be needed within the County's advance  
framework, they shall be evaluated per the Goal 5 rule  
including conflict analysis and implementation of  
protective measures. Such evaluation will take the  
form of a Plan amendment or revision studies. \* \* \* "

1       The county and participant do not contend that the subject  
2 site is not a site listed on "Appendix F." Indeed, the  
3 county's decision specifically recognizes that the subject site  
4 is listed on "Appendix F." Record 23. Further, neither the  
5 county nor participant contends that, under the above-quoted  
6 policy, aggregate extraction could be allowed at sites listed  
7 on "Appendix F" through a special use permit, without a plan  
8 amendment. The county recognizes the RCP, prior to the June  
9 24, 1987 amendment of M&A Policy 10, required a plan amendment  
10 to allow aggregate extraction at such sites. The county's  
11 findings say the amendment:

12       \* \* \* removed the requirement of a Plan amendment to  
13 authorize the operation of noninventoried aggregate  
14 sites or sites for which insufficient information  
exists in regard to their significance." (emphasis  
added) Record 24.

15       The county itself interprets the M&A Policy 10 in effect  
16 when the subject application was filed as requiring a plan  
17 amendment to approve aggregate extraction at the subject site.  
18 This interpretation is reasonable and correct. See McCoy v.  
19 Linn County, \_\_\_ Or App \_\_\_, \_\_\_ P2d \_\_\_ (April 6, 1988);  
20 Gordon v. Clackamas County, 73 Or App 16, 20-21, 698 P2d 49  
21 (1985). The county's decision approves aggregate extraction at  
22 the subject site without a plan amendment and, therefore,  
23 violates this policy.

24       This subassignment of error is sustained. Because approval  
25 of the special use permit violated a provision of applicable  
26 law and was prohibited as a matter of law, the county's

1 decision must be reversed. OAR 661-10-070(1)(b)(A)(iii).

2 B. Amended Mineral and Aggregate Resources Policies

3 "[The county] did not follow the standards  
4 established in amended Policy 10 of Goal 5  
5 pertaining to mineral and aggregate resources  
6 which allows a special use only in cases of a  
7 short-term, limited or intermittent basis."

8 Petitioners argue that RCP M&A Policy 10, as amended June  
9 24, 1987, allows issuance of a special use permit at an  
10 "Appendix F" site only for extraction operations on a  
11 short-term, limited or intermittent basis. Petitioners contend  
12 the county's decision does not limit extraction at the site as  
13 required by the amended policy because it allows an operation  
14 extracting 20,000 cubic yards per year to continue  
15 indefinitely, subject only to review during the course of the  
16 county's periodic review of the RCP.

17 The county and participant contend the county's decision is  
18 consistent with amended M&A Policy 10 because the 20,000 cubic  
19 yards which participant is allowed to extract annually is a  
20 "limited" amount. They claim this amount is less than 20% of  
21 the average annual extraction at petitioner Conser's quarry.  
22 Record 131. The county and participant argue that the permit  
23 is for a "short-term" use in that a condition of approval  
24 requires the permit to be "reexamined" and either extended,  
25 modified or revoked prior to issuance of the county's proposed  
26 local periodic review order. According to the county, since  
27 acknowledgment occurred on September 13, 1984, under  
28 ORS 197.640, periodic review "should occur very soon."

1 Respondent's Brief at 10.

2 We held, under the previous subassignment of error, that it  
3 is the RCP M&A policies which were in effect when the subject  
4 application was filed that are applicable to the county's  
5 decision. The county's decision was not required to comply  
6 with the amended M&A Policy 10. Therefore, this subassignment  
7 does not allege a basis for reversal or remand of the county's  
8 decision, and is denied.

9 However, on the chance that we are in error with regard to  
10 whether it is the original or amended RCP M&A Policy 10 which  
11 applies to the decision, we will consider whether the decision  
12 violates amended M&A Policy 10, as argued by petitioners.

13 RCP M&A Policy 10, as amended June 24, 1987, provides in  
14 relevant part:

15 " \* \* \* All sites listed in Appendix 'F', including  
16 sites used pursuant to Special Use Permits issued  
17 after the effective date of this Policy, shall be  
18 examined pursuant to the Goal 5 rule (OAR 660-16-000  
19 through 660-16-025), for inclusion in the County's  
20 resource inventory no later than the time of  
21 completion of the next Periodic Review of the Lane  
County Rural Comprehensive Plan. Until then, the  
alternative procedures of Special Use Permits may be  
used to authorize mineral and aggregate extraction and  
accessory activities on a short-term, limited or  
intermittent basis as provided in Lane Code  
Chapter 16. \* \* \* "

22 The county's decision limits the total annual volume of  
23 aggregate extracted from the subject site to 20,000 cubic  
24 yards. Record 25. The decision appears to constitute  
25 authorization for extraction on a "limited" basis, as allowed  
26 by amended M&A Policy 10, particularly in light of the evidence

1 in the record that the annual extraction of aggregate from  
2 petitioner Conser's quarry is 110,000 cubic yards. Record  
3 131. Petitioners offer no argument to the contrary. We  
4 therefore conclude that the approved special use permit is  
5 consistent with amended M&A Policy 10.<sup>7</sup>

6 Therefore, if amended RCP M&A Policy 10 were applicable to  
7 the county's decision, this subassignment of error would be  
8 denied.

9 C. Water Resources Policies

10 "[The county] did not follow the procedure of  
11 Goal 5 which pertains to water resources by  
12 requiring the applicant to perform the necessary  
13 tests and studies required by the Plan and Lane  
14 Code Section 13.050(13)(c) & (d)."

15 Petitioners state that their groundwater source is located  
16 in the Spencer Formation, which is designated as a quantity or  
17 quality limited aquifer by the RCP. See Record 24. Therefore,  
18 petitioners argue that RCP Water Resources Policies 3 and 4  
19 require that the county apply the provisions of code 13.050(13)  
20 in evaluating groundwater resources in this special use permit  
21 process.

22 According to petitioners, the applicant should have  
23 demonstrated, through submission of the test data described in  
24 code 13.050(13)(c) and (d), that the proposed activity will not  
25 adversely affect petitioners' water supply. Petitioners also  
26 contend that the hearings official's findings, relying on his  
own observation that the proposed quarry is at a higher  
elevation than petitioners' wells, and stating that no evidence

1 was submitted that there would be an adverse effect on  
2 petitioners' wells, are not sufficient and do not comply with  
3 these RCP policies.

4 The county replies that the subject property is located in  
5 an area of "intrusive rock," which is not designated as a  
6 quantity or quality limited aquifer. See Record 24. The  
7 county also argues RCP Water Resources Policies 3 and 4 do not  
8 require the aquifer testing described in code 13.050(13)(c) to  
9 be carried out prior to approval of a special use permit. The  
10 county argues the requirements of code 13.050(13)(c) apply only  
11 to partition and subdivision applications in designated  
12 quantity or quality limited aquifers. Finally, the county and  
13 participant argue that the well monitoring program imposed by  
14 condition is adequate to ensure compliance with RCP Water  
15 Resources policies and to address the concerns raised by  
16 petitioners.

17 RCP Water Resources Policy 3 states that "adequacy of water  
18 supply \* \* \* shall be a major concern in reviewing major land  
19 use changes." "Major land use change" includes any application  
20 reviewed by the hearings official. Water Resources Policy 4  
21 states that "the primary means of evaluating groundwater  
22 resources for land use planning purposes" in limited aquifers  
23 shall be through the land division review process of code  
24 chapter 13. Policy 4 designates the Spencer Formation, but not  
25 "intrusive rock," as a limited aquifer.<sup>8</sup>

26 Code 13.050(13) establishes requirements for the approval

1 of preliminary plans of land divisions with regard to water  
2 supply. The county's interpretation of Water Resources  
3 Policy 4 not to require application of code 13.050(13) to  
4 approval of a special use permit is reasonable and correct.  
5 See Alluis v. Marion County, 64 Or App 478, 481, 668 P2d 1242  
6 (1983); Mc Coy v. Linn County, supra; Gordon v. Clackamas  
7 County, supra. Neither Policy 4 nor code chapter 13 calls for  
8 the application of code 13.050(13) outside of land division  
9 proceedings.<sup>9</sup>

10 All Water Resources Policy 3 requires is that adequacy of  
11 water supply be a "major concern" in reviewing the application  
12 for the subject special use permit. The county's findings  
13 address the geological characteristics of the area, whether  
14 there is a hydrogeologic connection between the quarry  
15 formation and the formation underlying the residences to the  
16 east, and the potential effects of quarry blasting on  
17 groundwater. Record 24-25, 29. The county's decision imposes  
18 a requirement that a well-monitoring plan for the area be  
19 prepared by a licensed hydrogeologist and reviewed by the  
20 hearings official. Record 26-27. Petitioners have not  
21 explained why these provisions are not adequate to demonstrate  
22 that water supply was a "major concern" to the county.

23 This subassignment of error is denied.

24 The first assignment of error is sustained, in part.

25 //

26 //

1 SECOND ASSIGNMENT OF ERROR

2 "Lane County failed to follow procedures applicable to  
3 the matter before it in a manner which prejudiced the  
substantial rights of the Petitioners \* \* \* "

4 Petitioners make specific allegations of procedural errors  
5 which we address as separate subassignments of error below.

6 A. July 16, 1987 Site View

7 "[By] [c]onducting tests during the site view  
8 without notice to the petitioners that such would  
9 be done and without permitting the petitioners  
the opportunity to take part in the tests or to  
object"

10 "By issuing a decision based upon evidence which  
11 was not in the record contrary to L.C.  
14.200(3)(d) and LC [sic] 14.200(10)(c)"<sup>10</sup>

12 Petitioners argue they were prejudiced by not being  
13 notified of the hearings official's intent to perform tests  
14 during his July 16, 1987 site view "because many of his  
15 findings appear to be based upon the results of those tests."  
16 Petition for Review at 28. Petitioners contend that at the  
17 close of the July 7 hearing, the hearings official announced he  
18 would make another site view, but that no testimony would be  
19 taken and he merely wanted to observe the property, how dust  
20 was produced along the road and the location of the neighbors  
21 in relation to the quarry. Petitioners contend the tests  
22 should not have been conducted without petitioners'  
23 representative present.

24 Petitioners also complain that no record was made of any of  
25 the activities which took place during the site view, the only  
26 record of what took place being contained in the hearings

1 official's decision. Petitioners contend this procedure  
2 violated the requirements (1) of code 14.200(3)(d) that no  
3 factual information outside of the record be considered; and  
4 (2) of code 14.200(5)(c) that the circumstances of the site  
5 view be put into the record.

6 The county and participant respond that the hearings  
7 official adequately advised parties of his intentions with  
8 regard to the site visit at the close of the July 7, 1987  
9 hearing and offered the opportunity for notification of the  
10 site view. The county argues that the decision contains a full  
11 and complete description of the observations made by the  
12 hearings official. The county contends that petitioners do not  
13 explain how the alleged procedural errors prejudiced their  
14 substantial rights.

15 The county also argues that petitioners had the opportunity  
16 to raise these procedural errors below and failed to do so.  
17 The county notes that the appeal filed by petitioners' attorney  
18 checked off, as a basis for appeal, that the hearings official  
19 "failed to follow the procedure applicable to the matter," but  
20 petitioners' required explanatory statement did not allege the  
21 procedural errors raised in this subassignment. Record 17-20.

22 Petitioners reply that they should not be precluded from  
23 raising these procedural issues on appeal, even though they did  
24 not raise them below, because (1) petitioners other than Conser  
25 were not represented by counsel during the proceedings before  
26 the hearings official; and (2) to raise these issues in their

1 appeal to the board of commissioners would have been a "useless  
2 act" in that these issues are not relevant to the code's  
3 criteria for elective board review of appeals of hearings  
4 official's decisions.

5 We will not review an allegation of procedural error where  
6 the parties alleging such error had the opportunity to raise  
7 the procedural matter below, and thus enable the local  
8 government to cure the error without the necessity of an appeal  
9 to this Board. Dobaj v. City of Beaverton, 1 Or LUBA 237, 241  
10 (1980); Lane County School Dist. 71 v. Lane County, 15 Or LUBA  
11 150, 154 (1986).

12 Petitioners had the opportunity to raise the alleged  
13 procedural errors concerning the July 16 site view in their  
14 appeal of the hearings official's decision. To do so would not  
15 have been a "useless act." Under code 14.535, the county  
16 planning director forwards copies of such appeals to the  
17 hearings official. The hearings official has "full discretion  
18 to affirm, modify or reverse his or her initial decision and to  
19 supplement findings as necessary." It is only after the  
20 hearings official decides not to reconsider the decision that  
21 the board of commissioners determines whether to hear the  
22 appeal. Code 14.600(2).

23 Code 14.515(3)(d) requires an appeal to include "an  
24 explanation with detailed support" specifying the bases for the  
25 appeal. Thus, if petitioners had raised these procedural  
26 issues in their appeal, the hearings official would have had

1 the opportunity to reconsider his decision and conduct further  
2 proceedings to remedy the error. Also, even if the hearings  
3 official had not done so, it might have led him or the planning  
4 director to recommend review by the board of commissioners, a  
5 sufficient basis for board review under code 14.600(4)(b)(iv).

6 This subassignment or error is denied.

7 B. Continuation of December 4, 1986 Hearing

8 "By failing to notify all parties concerning the  
9 request for a policy interpretation to the Board  
10 of County Commissioners or that an amendment to  
11 the Lane County Rural Comprehensive Plan was  
being requested and that the matter would be held  
in abeyance contrary to the provisions of L.C.  
14.300(7)"

12 "By continuing the hearing and the decision from  
13 December 4, 1986 to July 7, 1987 without  
14 authority and contrary to the provisions of ORS  
215.428 and L.C. 14.200(9)(g)"

15 Petitioners argue that the hearings official erred by  
16 continuing the hearing from December 4, 1986 to July 7, 1987.  
17 Petitioners argue that code 14.200(9)(g) only authorizes the  
18 continuance of a hearing for a period not to exceed 31 days.  
19 Also, ORS 215.428(1) requires the county to take final action  
20 on a permit within 120 days of when the application is deemed  
21 complete. According to petitioners, the hearings official  
22 should have denied the application within the 120-day time  
23 limit, or made a request for interpretation of county policy to  
24 the board of commissioners, under code 14.300(7). Because he  
25 did neither, holding the matter in abeyance until the county  
26 amended the RCP, participant was given an unfair advantage and

1 petitioners were prejudiced.

2 The county replies that the statutory and code provisions  
3 cited by petitioners do not prevent continuances. The county  
4 and participant argue that at no time did petitioners object to  
5 the continuance below. The county also argues that the only  
6 mechanism for enforcing the 120-day statutory time limit is for  
7 the applicant to seek a writ of mandamus to compel the local  
8 government to issue the permit under ORS 215.428(7). According  
9 to the county, petitioners do not explain why the continuance  
10 was prejudicial to their rights or is a basis for reversal by  
11 LUBA.

12 Petitioners had the opportunity to raise alleged procedural  
13 errors regarding the continuance of the hearing in that  
14 appeal. For the reasons stated under the previous  
15 subassignment of error, this subassignment is denied.

16 C. Zoning Code Violations

17 "By granting the application in spite of the fact  
18 that the applicant openly violated the zoning  
19 laws by operating the quarry between December 4,  
20 1986 and July 7, 1987, which should have been  
grounds for revoking the application had the  
violations occurred after it had been granted  
contrary to the provisions of L.C. 14.700(2)&(3)."

21 Petitioners argue that code 14.700(2) and (3) provide that  
22 a special use permit will be revoked if the holder does not  
23 comply with conditions imposed in the approval process.  
24 Petitioners assert the record shows that participant has  
25 conducted quarry operations without the required county permit  
26 and has threatened violence against individuals who opposed his

1 permit application. According to petitioners:

2 " \* \* \* it is inconceivable that all of the conditions  
3 imposed \* \* \* will make any difference to the behavior  
4 of the applicant \* \* \* the Hearings Officer should  
5 have considered all of that behavior and denied the  
6 application as though it were a revocation hearing  
7 after the application had been granted." Petition for  
8 Review at 32.

9 Petitioners appear to argue that a special use permit may  
10 be denied if a similar permit, previously issued, could be  
11 revoked. The county argues that petitioners fail to identify  
12 any statutory or code provision so providing.

13 It is petitioners' responsibility to identify a basis upon  
14 which we might grant relief. Deschutes Development v.  
15 Deschutes County, 5 Or LUBA 218, 220 (1982). Under this  
16 subassignment of error, petitioners do not identify any  
17 applicable legal standard allegedly violated by approval of the  
18 special use permit.<sup>11</sup> See City of Corvallis v. Benton  
19 County, \_\_\_ Or LUBA \_\_\_ (LUBA No. 87-115; March 21, 1988).

20 This subassignment of error is denied.

21 The second assignment of error is denied.

22 THIRD ASSIGNMENT OF ERROR

23 "Lane County's decision was not supported by  
24 substantial evidence in the whole record in connection  
25 with the following decisions and findings of the  
26 Hearings Officer:"

1. That there would be no adverse effect on property  
values;

2. That there would be no adverse effect as a result  
of the noise from the traffic on the haul road or  
in the operation of the crusher;

1 "3. That the concerns on the groundwater source of  
the petitioners' wells were not valid;

2 "4. That the trucks traveling on the haul road would  
3 not create a vibration or noise problem; and

4 "5. That dust would not fall on the residences  
5 adjoining the haul road from truck traffic as a  
result of the prevailing wind from the north."

6 Petitioners challenge the evidentiary support for the  
7 above-quoted findings in the county's decision concerning  
8 property values, groundwater, dust and noise/vibration.

9 The county replies that the assignment does not provide any  
10 basis for us to reverse or remand because petitioners have not  
11 identified the applicable criteria which require the challenged  
12 findings or explained why the challenged findings are essential  
13 to a determination of compliance with such criteria.

14 We are authorized to reverse or remand approval of the  
15 subject special use permit if the county made a decision not  
16 supported by substantial evidence in the whole record.  
17 ORS 197.835(8)(a)(C); Sellwood Harbor Condo Assoc. v. City of  
18 Portland, \_\_\_ Or LUBA \_\_\_ (LUBA No. 87-079 and 87-080; April 1,  
19 1988). If a challenged finding is not critical to the county's  
20 decision, whether or not it is supported by substantial  
21 evidence is of no consequence. Bonner v. City of Portland, 11  
22 Or LUBA 40, 52 (1984). Where petitioners attack certain  
23 findings as being unsupported by substantial evidence, the  
24 attack must include an explanation of why the challenged  
25 findings are critical to the decision. In the absence of such  
26 an explanation, we will not review the record for evidentiary

1 support, since a determination that the challenged finding was  
2 not supported would not by itself provide us with a sufficient  
3 basis for reversing or remanding the decision. Id. at 65.

4 In this case, petitioners do not identify the criteria to  
5 which the challenged findings apply or explain why the  
6 challenged findings are essential to county determination of  
7 compliance with such criteria.<sup>12</sup> Without such an explanation,  
8 we will not review the record for the evidentiary support for  
9 the challenged findings.

10 The third assignment of error is denied.

11 The county's decision is reversed.

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1 FOOTNOTES

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3 1

ORS 215.428(1) provides:

4 " \* \* \* the governing body of a county or its  
5 designate shall take final action on an application  
6 for a permit or zone change, including resolution of  
all appeals under ORS 215.422, within 120 days after  
the application is deemed complete."

7  
8 2

Petitioners filed, pursuant to OAR 661-10-030(4), a "Motion  
to Amend Petitioners' Petition and Brief" by substituting an  
amended "Summary of Facts" section and adding a copy of the  
appealed decision, as required by OAR 661-10-030(3)(h). The  
revisions to the "Summary of Facts" section simply add  
references to the record, as is required by OAR  
661-10-030(3)(e)(C). Respondent and participant do not object  
to the motion. We therefore grant the motion.

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13 3

Lane County Ordinance No. PA 883 provides that the working  
paper is to be "recognized as supportive technical information  
used in the preparation of this [Lane County Rural  
Comprehensive] Plan \* \* \* ."

16  
17 4

On March 29, 1988, the Oregon Supreme Court issued an  
opinion reversing and remanding the Land Conservation and  
Development Commission's order acknowledging Lane County's  
comprehensive plan and land use regulations. 1000 Friends of  
Oregon v. LCDC (Lane Co.), 305 Or 384, \_\_\_ P2d \_\_\_ (1988).  
However, this decision is not effective prior to May 3, 1988.  
ORAP 11.03(2)(b) and (3)(a).

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22 5

Our decision in Gearhard v. Klamath County, supra at 30-31,  
held that a county was required to apply code provisions which  
were adopted after a conditional use permit application was  
filed. The case also implied that we would apply the plan and  
ordinance provisions currently in effect in our review of a  
local government decision on a permit application. However,  
Gearhard was decided prior to the enactment of ORS 215.428 by  
Oregon Laws 1983, chapter 827, section 23, and can no longer be  
considered a correct statement of the law on this point.

1 The county has also cited code 14.700(1)(a). That section  
provides in relevant part:

2 "Limitations Upon Approved and Denied Applications.

3 "Applications approved or denied according to the  
4 provisions of this Chapter shall be subject to the  
following limitations:

5 "(1) Vesting of Approval.

6 "(a) An application subject to approval or  
7 denial under any of the provisions of this  
8 Chapter shall be subject to the provisions of  
this Chapter and other Chapters of Lane Code in  
9 effect at the time the most recent decision to  
approve or deny the application occurs."

10 We need not decide whether paragraph (a) provides that the  
11 code provisions in effect at the time of a county decision on a  
12 permit application are applicable to that decision (as argued  
13 by the county) or that the code provisions in effect at the  
14 time of a county decision on a permit application are  
15 applicable to the post-approval regulation of that permit (as  
16 argued by petitioners). In any case, the paragraph does not  
purport to prescribe the plan provisions that are applicable to  
17 county permit decisions, which is the issue under this  
18 subassignment. We note, however, that the county's  
19 interpretation of this paragraph would make this code provision  
20 in some instances contrary to the provisions of ORS 215.428(3).

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6 ORS 215.428(7) provides:

18 "If the governing body of the county or its designate  
19 does not take final action on an application for a  
20 permit or zone change within 120 days after the  
21 application is deemed complete, the applicant may  
22 apply in the circuit court of the county where the  
23 application was filed for a writ of mandamus to compel  
24 the governing body or its designate to issue the  
approval. The writ shall be issued unless the  
governing body shows that the approval would violate a  
substantive provision of the county's comprehensive  
plan or land use regulations as defined in ORS  
197.015."

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7 M&A Policy 10 allows aggregate extraction "on a

1 short-term, limited or intermittent basis" (emphasis  
2 added). Since the three quoted terms are listed by the  
3 policy in the disjunctive, it is sufficient for compliance  
4 with the policy that the use allowed is "limited." We  
5 need not also determine whether the approved use is  
6 "short-term."

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6 The full text of RCP Water Resources Policies 3 and 4  
is as follows:

7 "3. Adequacy of water supply, particularly those  
8 relying on groundwater sources, shall be a major  
9 concern in reviewing major land use changes. For  
10 the purpose of applying this policy, major land  
11 use change shall be any application reviewed by  
12 the Hearings Official or the Planning Commission.

13 "4. The primary means of evaluating groundwater  
14 resources for land use planning purposes shall be  
15 through the land division review process. The  
16 Little Butte Volcanics, Eugene Formation, Fisher  
17 Formation, Spencer Formation, Flourney Formation,  
18 Alluvium and Older Dunes geological units shall  
19 be designated as quality and/or quantity limited  
20 aquifers. As such the provisions of Chapter 13,  
21 Lane Code (Land Divisions) regarding areas so  
designated will apply."

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9

17 We also note that, even under petitioners' interpretation,  
18 the detailed aquifer testing requirements of code 13.050(13)(c)  
19 for areas designated by the county "as having problems in the  
20 quantity or quality of available water," as documented in the  
21 Lane Manual, would not apply to approval of the subject special  
use permit. The proposed use is located in an area of  
"intrusive rock," which is not designated as a quality and/or  
quantity limited aquifer by Water Resources Policy 4 and is not  
identified as such in the Lane Manual.

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23 The petition for review also contained a subassignment of  
24 error dealing with alleged ex parte contacts between the  
25 hearings official and the applicant or applicant's  
26 representatives during the July 16, 1987 site view.  
Petitioners filed a Motion for Evidentiary Hearing, seeking to  
introduce evidence of the alleged ex parte contacts. However,  
petitioners have informed us that this motion and subassignment

1 of error will be withdrawn if we find that the county's  
2 decision must be reversed on other grounds. Accordingly,  
3 because we have held under the first assignment of error that  
the county's decision must be reversed, we treat the motion and  
subassignment of error as being withdrawn.

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11

5 The cited code section 14.700(2) and (3) apply only to  
6 enforcement of a permit after it has been issued.

7 \_\_\_\_\_  
12

8 We note that the challenged findings concerning property  
9 values, groundwater, dust and noise/vibration are located in a  
10 section of the county's decision which appears to address  
11 amended RCP M&A Policy 10. Record 27-30. However, even if we  
12 could infer an argument by petitioners that the challenged  
13 findings are essential to a determination of compliance with  
amended M&A Policy 10, that would still not provide us with a  
potential basis for reversing or remanding the county's  
decision. Amended M&A Policy 10 is not applicable to the  
county's decision. Under the first assignment of error, supra,  
we concluded that it is the original, not the amended, M&A  
Policy 10 which is applicable to the county's decision.

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