

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

3  
4 STEPHEN DONNELL,  
5 *Petitioner,*

6  
7 vs.

8  
9 UNION COUNTY,  
10 *Respondent,*

11  
12 and

13  
14 DON SHAW,  
15 *Intervenor-Respondent.*

16  
17 LUBA Nos. 2000-144 and 2000-156

18  
19 FINAL OPINION  
20 AND ORDER

21  
22 Appeal from Union County.

23  
24 Stephen Donnell, La Grande, filed the petition for review and argued on his own  
25 behalf.

26  
27 No appearance by Union County.

28  
29 Don Shaw, La Grande, represented himself.

30  
31 HOLSTUN, Board Member; BRIGGS Board Chair; BASSHAM, Board Member,  
32 participated in the decision.

33  
34 REMANDED

02/08/2001

35  
36 You are entitled to judicial review of this Order. Judicial review is governed by the  
37 provisions of ORS 197.850.

**NATURE OF THE DECISION**

Petitioner appeals a comprehensive plan amendment and a conditional use permit, authorizing an aggregate mining operation on a 13-acre parcel in the county’s A-4 Timber Grazing Zone.

**MOTION TO INTERVENE**

Donald Shaw, the applicant below, moves to intervene on the side of respondent. There is no opposition to the motion, and it is allowed.<sup>1</sup>

**FACTS**

The comprehensive plan amendment adds the 13-acre subject property to the comprehensive plan inventory of basalt aggregate sites. The conditional use permit authorizes the applicant to mine and remove up to 15,000 cubic yards of riprap and base rock per year between March 16 and November 30.<sup>2</sup>

The county planning commission considered both the conditional use and plan amendment applications at a public hearing on May 22, 2000. The notice that preceded that hearing was sent to property owners within 500 feet of the subject property. That notice listed the criteria that were applicable to the comprehensive plan amendment as well as the criteria that were applicable to the conditional use permit. Record 220.

The planning commission recommended approval of the comprehensive plan amendment and forwarded that recommendation to the county board of commissioners on May 23, 2000. Record 184-86. On June 17, 2000, the board of commissioners provided

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<sup>1</sup>Neither the county nor intervenor filed a brief in response to the petition for review.

<sup>2</sup>The conditional use permit limits site activity to Monday through Friday between the hours of six in the morning and six in the evening. Other conditions of approval (1) require dust abatement, (2) impose a 30-mile per hour speed limit on trucks using Owsley Canyon Road, (3) close Owsley Canyon Road to trucks exceeding specified weights during “spring breakup” to protect the road surface and (4) require that the applicant participate in future road improvements to Owsley Canyon Road. Record 6.

1 notice to property owners within 750 feet of the subject property of a June 28, 2000 public  
2 hearing on the proposed comprehensive plan amendment. The board of commissioners  
3 approved the comprehensive plan amendment on August 16, 2000.

4 On July 11, 2000, the planning commission denied the requested conditional use  
5 permit. Record 78-80. The applicant appealed that decision to the board of commissioners,  
6 and on July 24, 2000, the board of commissioners provided notice of a hearing to be held on  
7 August 2, 2000.<sup>3</sup> On September 5, 2000, the board of commissioners reversed the planning  
8 commission and granted the requested conditional use permit.

9 Petitioner seeks remand of both decisions.

#### 10 **FIRST ASSIGNMENT OF ERROR**

11 Under his first assignment of error, petitioner alleges the board of commissioners  
12 committed two errors by proceeding with its June 28, 2000 hearing on the requested  
13 comprehensive plan amendment. Petitioner argues the county failed to provide two required  
14 notices of hearing.

##### 15 **A. Written Notice to Adjoining Property Owners**

16 Union County Zoning, Partition and Subdivision Ordinance (UCZPSO) 23.04(2)  
17 requires that property owners within 750 feet of property for which a comprehensive plan  
18 map amendment is requested must be mailed individual notice of hearing. The notice that  
19 preceded the May 22, 2000 planning commission hearing was only given to property owners  
20 within 500 feet of the property.

21 In our view, the county's error in providing notice of the May 22, 2000 planning  
22 commission hearing to property owners located within 500 feet of the subject property, rather  
23 than to property owners located within 750 feet of the subject property as required by  
24 UCZPSO 23.04(2), is procedural error. Procedural errors provide no basis for remand unless

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<sup>3</sup>The notice of hearing was provided to owners of properties located within 750 feet of the subject property.  
Record 67-70.

1 such errors result in prejudice to petitioner’s substantial rights. ORS 197.835(9)(a)(B);  
2 *Mason v. Linn County*, 13 Or LUBA 1, 4 (1984), *aff’d in part rev’d and rem’d on other*  
3 *grounds sub nom Mason v. Mountain River Estates*, 73 Or App 334, 698 P2d 529 (1985). As  
4 petitioner recognizes in his petition for review, the notice error was corrected in the June 17,  
5 2000 notice that preceded the board of commissioners’ June 28, 2000 public hearing on the  
6 requested plan amendment, and it was the board of commissioners that adopted the final  
7 decision in this matter, not the planning commission. Petitioner makes no attempt to explain  
8 why the June 17, 2000 notice was insufficient to ensure that any error in the notice that  
9 preceded the May 22, 2000 planning commission hearing resulted in no prejudice to  
10 petitioner’s substantial rights. In fact, petitioner was given written notice of the May 22,  
11 2000 planning commission hearing. Record 223. Petitioner also appeared before the  
12 planning commission and opposed the application. Record 191-92.

13 The planning commission’s error in failing to provide written notice of its May 22,  
14 2000 hearing to all owners of property located within 750 feet of the subject property  
15 resulted in no prejudice to petitioner and, therefore, provides no basis for reversal or remand  
16 of the challenged decision.<sup>4</sup>

17 **B. ORS 197.610(1) Notice to DLCD**

18 ORS 197.610(1) requires that when the county amends its acknowledged  
19 comprehensive plan, it must forward that proposed amendment to the Director of the  
20 Department of Land Conservation and Development (DLCD) “at least 45 days before the  
21 first evidentiary hearing on adoption.” ORS 197.610(2) provides that less than 45 days  
22 notice may be provided in emergency circumstances. In this case, the county provided only  
23 19 days prior notice of its initial evidentiary hearing on May 22, 2000, and did not identify

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<sup>4</sup>We also note that petitioner alleges that notice to property owners within 750 feet of the subject property is required by ORS 215.416(11)(c)(A)(iii). However, the 750-foot notice required by ORS 215.416(11)(c)(A)(iii) only applies to permit decisions that are rendered without providing a prior hearing. The challenged decision is not such a permit decision.

1 any emergency circumstances that justified giving less than the required 45 days prior notice.  
2 Record 225.

3 Where the ORS 197.610(1) requirement for 45-day prior notice to DLCD applies, a  
4 local government's failure to comply with the statute is substantive error rather than  
5 procedural error. *Oregon City Leasing, Inc. v. Columbia County*, 121 Or App 173, 177, 854  
6 P2d 495 (1993). ORS 197.610(1) applies to the disputed comprehensive plan amendment.  
7 As far as we can tell from the record, the county failed to provide the 45-day notice required  
8 by ORS 197.610(1) and provides no explanation for why only 19 days prior notice was  
9 given. Accordingly, we agree with petitioner that the county violated ORS 197.610(1) and  
10 the disputed plan amendment must be remanded.

11 The first assignment of error is sustained in part.

## 12 **SECOND ASSIGNMENT OF ERROR**

13 Petitioner's second assignment of error attacks the adequacy of the planning staff  
14 report that was prepared and modified during the local proceedings. However, the issue in  
15 this appeal is the adequacy of the board of commissioners' final decisions on the conditional  
16 use permit and comprehensive plan amendment. Petitioner's arguments under the second  
17 assignment of error are either erroneously directed at the planning staff report or are  
18 inadequately stated and developed to provide a basis for reversal or remand.

19 The second assignment of error is denied.

## 20 **THIRD ASSIGNMENT OF ERROR**

21 Most of petitioner's arguments under the third assignment of error are directed at  
22 statements by the planning director, which petitioner argues are erroneous. For the same  
23 reason that alleged errors in the staff report provide no basis for reversal or remand of the  
24 board of commissioners' decisions in this matter, allegedly erroneous statements by the  
25 planning director can provide no basis for reversal or remand.

1           However, petitioner does include arguments under the third assignment of error that  
2 the board of commissioners failed to adopt adequate findings to demonstrate compliance  
3 with conditional use approval criteria set out at UCZPSO 21.07(3)(C)(2). UCZPSO  
4 21.07(3)(C)(2) imposes the following environmental limitations on mineral and aggregate  
5 extraction:

6           “Contamination or impairment of the groundwater table, streams, rivers, or  
7 tributary bodies thereto shall not be permitted as a result of the extraction  
8 and/or processing activity. All operations which include some form of  
9 washing process must make application with the Oregon Department of  
10 Environmental Quality and comply with applicable laws, rules and  
11 regulations.”

12 According to petitioner the board of commissioners’ decision includes no findings that  
13 specifically address UCZPSO 21.07(3)(C)(2). Petitioner argues that issues were raised  
14 during the local proceedings concerning “water problems,” “[f]looding down stream of site,”  
15 “[a]nticipated well problems,” “[c]ontamination of Class II streams below pit site and  
16 adjacent to Owsley Canyon Road if [it] is allowed to return to gravel surface,” and  
17 “[d]isposal of waste water from dust control, crushed rock processing and pit [runoff] during  
18 spring thaw.” Petition for Review 17.

19           The board of commissioners’ only apparent attempt to address UCZPSO  
20 21.07(3)(C)(2) in the conditional use decision is the following:

21           “The Commissioners are adopting approval conditions designed to mitigate  
22 environmental conflicts.” Record 5.

23 These findings are clearly inadequate to respond to the issues petitioner cites, and because  
24 neither the county nor the applicant have appeared in this appeal, no one disputes that the  
25 cited issues were raised. The conditions the board of commissioners included in its  
26 conditional use approval have nothing to do with the cited concerns. Record 6.<sup>5</sup> We agree

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<sup>5</sup>We describe those conditions at n 2, *supra*.

1 with petitioner that the board of commissioners' decision is inadequate to demonstrate that  
2 the proposal complies with UCZPSO 21.07(3)(C)(2).

3 The third assignment of error is sustained in part.

#### 4 **FOURTH AND NINTH ASSIGNMENTS OF ERROR**

5 Under the Transportation Planning Rule (TPR), the county is required to take certain  
6 steps if a proposed comprehensive plan amendment will "significantly affect a transportation  
7 facility." OAR 660-012-0060(1). The circumstances in which a comprehensive plan  
8 amendment is deemed to "significantly affect a transportation facility" under the TPR are set  
9 out at OAR 660-012-0060(2). These TPR requirements have been adopted as part of the  
10 UCZPSO.<sup>6</sup>

11 In his fourth assignment of error, petitioner presents the following argument:

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<sup>6</sup>UCZPSO 23.05(3)(D) imposes the following requirement for comprehensive plan amendments:

"Determine whether the amendment significantly affects a transportation facility. The amendment shall assure that land uses are consistent with the function, capacity, and level of service of the facility identified in the Transportation System Plan. This shall be accomplished by one of the following:

- "• Limiting allowed land uses to be consistent with the planned function of the transportation facility;
- "• Amending the Transportation System Plan to ensure that existing, improved, or new transportation facilities are adequate to support the proposed land uses consistent with the requirement of the Transportation Planning Rule; or
- "• Altering land use designations, densities, or design requirements to reduce demand for automobile travel and meet travel needs through other modes."

"A plan or land use regulation amendment significantly affects a transportation facility if it:

- "• Changes the functional classification of an existing or planned transportation facility;
- "• Changes standards implementing a functional classification system;
- "• Allows types or levels of land use that would result in levels of travel or access that are inconsistent with the functional classification of a transportation facility; or
- "• Would reduce the level of service of the facility below the minimum acceptable level identified in the Transportation System Plan."

1           “At [Record 114] first and second paragraph[s] about [UCZPSO] 23.05(3)(D),  
2           the Planning Director advised petitioner that he had to request that an  
3           applicable part of the planning ordinance be considered by the County  
4           Commission.” It is not the responsibility of petitioner to insure an applicable  
5           section of the [UCZPSO] will be considered. \* \* \*” Petition for Review 18.

6           Again, petitioner’s challenge is directed at a statement by the planning director rather  
7           than the board of commissioners’ decision. Even if the planning director’s statement does  
8           reflect an erroneous view of the county’s burden in this matter, the challenged decision in  
9           fact addresses UCZPSO 23.05(3)(D). The board of commissioners’ findings conclude that  
10          the proposed “amendment does not significantly affect a transportation system” and provide  
11          a number of reasons for reaching that conclusion.<sup>7</sup> Record 17-18. Petitioner makes no  
12          attempt to challenge the adequacy of those findings, and for that reason we reject the fourth  
13          assignment of error.

14          We also reject petitioner’s ninth assignment of error. In his arguments under that  
15          assignment of error, petitioner argues the proposal will have effects on Owsley Canyon Road  
16          that he believes will be significant. However, whether a comprehensive plan amendment  
17          will “significantly affect a transportation facility,” within the meaning of UCZPSO  
18          23.05(3)(D) is determined by whether the proposal will have one of the four results specified  
19          in UCZPSO 23.05(3)(D). *See* n 6. The findings set out at footnote 7 appear to have been  
20          adopted to explain why the proposal will not have any of the four specified results.  
21          Petitioner does not challenge those findings.

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<sup>7</sup>The board of commissioners’ findings are as follows:

“This amendment does not significantly affect a transportation system – Owsley Canyon Road and Blackhawk Trail Lane – because both routes are local roads. The proposed operation would not change the functional classification of these routes to collectors. The Union County Transportation System Plan \* \* \* defines a local road as carrying the lowest traffic volumes and they primarily provide access to individual properties. While collector roads balance mobility and access. The proposed amendment will not significantly affect the level of service (LOS) on Owsley Canyon Road because the paved portion is already deteriorated beyond repair. [The County Director of Public Works] testified this road section is nothing but patches and will be returned to gravel in about five years.” Record 17-18.

1 The fourth and ninth assignments of error are denied.

2 **FIFTH ASSIGNMENT OF ERROR**

3 UCZPSO 23.05 sets out the criteria that must be satisfied to amend the  
4 comprehensive plan. As relevant, UCZPSO 23.05 states: “A decision on a Land Use Plan  
5 text or map amendment by the Planning Commission and Board of Commissioners shall be  
6 based on the applicant’s ability to meet all of the following [four specified approval  
7 criteria].” The challenged decision that approves the requested comprehensive plan  
8 amendment includes the following finding, which describes UCZPSO 23.05(3):

9 “UCZPSO Section 23.05(3) requires applicants to satisfy the following [four  
10 approval criteria.]” Record 16.

11 Petitioner argues the quoted description of UCZPSO 23.05(3) demonstrates the  
12 county understood UCZPSO 23.05(3) to impose a lesser standard than it in fact imposes. We  
13 do not agree that the quoted language, which simply describes the requirements of UCZPSO  
14 23.05(3) in slightly different language than is used in the regulation itself, demonstrates any  
15 misunderstanding on the county’s part regarding what is required by UCZPSO 23.05(3).

16 The fifth assignment of error is denied.<sup>8</sup>

17 **SIXTH ASSIGNMENT OF ERROR**

18 The board of commissioners’ conditional use approval includes a finding of fact that  
19 Owsley Canyon Road has a 60-foot wide right of way.<sup>9</sup> Petitioner argues that the finding is  
20 erroneous and that the narrow right of way presents safety issues that the board of  
21 commissioners failed to address. According to petitioners this failure violates UCZPSO  
22 1.02.<sup>10</sup>

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<sup>8</sup>Petitioner includes other arguments under the fifth assignment of error. Those arguments are undeveloped and provide no basis for reversal or remand.

<sup>9</sup>According to a letter in the record signed by the planning director, the right of way is 40 feet wide in some places and 60 feet wide in other places. Record 72-73.

<sup>10</sup>UCZPSO 1.02 is the purpose statement of the UCZPSO and provides:

1 UCZPSO 1.02 is not among the approval criteria identified in the notices of hearing  
2 and is not among the approval criteria identified in either the conditional use approval  
3 decision or the comprehensive plan amendment. Petitioner makes no attempt to explain why  
4 he believes UCZPSO 1.02 is an applicable approval criterion for either of the challenged  
5 decisions, and we do not see that it is.

6 The sixth assignment of error is denied.

7 **SEVENTH AND EIGHTH ASSIGNMENTS OF ERROR**

8 Two of the criteria for a comprehensive plan amendment are UCZPSO 23.05(3)(A)  
9 and (B), which require that the county find:

10 "A. Community attitudes and/or physical, social, economic, or  
11 environmental changes have occurred in the area or related areas since  
12 plan adoption and that a public need supports the change, or that the  
13 original plan was incorrect.

14 "B. Alternative sites for the proposed uses will be considered which are  
15 comparable with the other areas which might be available for the uses  
16 proposed."<sup>11</sup>

17 In addressing UCZPSO 23.05(3)(A) and (B), the board of commissioners adopted the  
18 following findings:

19 "\* \* \* The applicant has satisfied the requirements in UCZPSO Section  
20 23.05(3) because written and oral testimony demonstrated community  
21 attitudes have changed and a public need supports the change. Richard  
22 Comstock, County Public Works Director, supported a riprap site in the  
23 subject area and identified a public need for riprap rock. Alternative sites  
24 such as those up Fox Hill Road were investigated and found not suitable for  
25 riprap material." Record 17.

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"The purpose of this ordinance is to promote public health, safety and general welfare of the citizens of Union County, encourage appropriate and orderly growth and development, implement the Union County Land Use Plan, and require that age, gender, or physical disability shall not be an adverse consideration in making a land use decision."

<sup>11</sup>The UCZPSO 23.05(3)(B) standard is awkwardly worded, and the challenged decision includes no interpretation of that criterion.

1           **A.     Community Attitudes**

2           Petitioner argues that while the board of commissioners’ finding suggests community  
3 attitudes have changed and now support the proposal, “over 50 people from all over Union  
4 County have expressed opposition to the aggregate removal as long as rock crushing and  
5 hauling down Owsley Canyon Road is allowed.” Petition for Review 21. We understand  
6 petitioner to allege the challenged finding is not supported by substantial evidence.

7           The challenged comprehensive plan amendment decision identifies no evidence in  
8 support of the finding that community attitudes have changed. Neither the county nor the  
9 applicant have filed briefs in this appeal, and no party calls our attention to any evidence  
10 supporting the challenged finding. Accordingly, we conclude the challenged finding that  
11 community attitudes have changed is not supported by substantial evidence.

12           **B.     Public Need and Alternative Sites**

13           The only evidence cited in the board of commissioners’ findings that there is a public  
14 need for the proposal is testimony by the county public works director. In his testimony  
15 before the planning commission, the public works director testified that he “would support  
16 basically any pit in the county because there aren’t a lot of them and the [rock] is needed.”  
17 Record 125.

18           The public works director’s testimony is slim evidence of a public need supporting  
19 the requested plan change, and that testimony does not address alternative sites for the  
20 proposed use. The board of commissioners’ findings reject “[a]lternative sites such as those  
21 up Fox Hill Road [as] not suitable for riprap material.” Record 17. However, the findings do  
22 not explain why the rejected alternative sites are unsuitable.<sup>12</sup> Petitioner identifies evidence  
23 of two rock quarries that have produced riprap in the past, and disputes the board of  
24 commissioners’ findings concerning public need and lack of alternative sites.

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<sup>12</sup>Neither do the findings cite any evidence in the record that might locate the alternative sites that were evaluated or explain why they are not suitable.

1           Where we conclude that a reasonable person could reach the decision made by the  
2 local government, in view of all the evidence in the record, we defer to the local  
3 government's choice between conflicting evidence. *Younger v. City of Portland*, 305 Or 346,  
4 360, 752 P2d 262 (1988); *Bottum v. Union County*, 26 Or LUBA 407, 412 (1994); *Douglas*  
5 *v. Multnomah County*, 18 Or LUBA 607, 617 (1990). In this case we are unable to conclude  
6 that the board of commissioners reasonably reached the conclusions it did concerning public  
7 need and lack of alternative sites. This is due in large part to the general failure of the  
8 findings themselves to identify any evidence that supports the findings of compliance with  
9 UCZPSO 23.05(3)(A) and (B) and the absence of any briefs in this appeal supporting the  
10 county's decision and identifying such evidence.<sup>13</sup> It may be that there is evidence in the  
11 two-volume record that would constitute substantial evidence in support of the board of  
12 commissioners' findings of compliance with UCZPSO 23.05(3)(A) and (B). However,  
13 without some assistance locating such evidence, either in the findings or in a brief supporting  
14 the county's decision, we will not independently search the record for such evidence. *See*  
15 *Eckis v. Linn County*, 110 Or App 309, 313, 821 P2d 1127 (1991) (LUBA is not required to  
16 search the record looking for evidence with which the parties are presumably already  
17 familiar).

18           The seventh and eighth assignments of error are sustained.

19 **CONCLUSION**

20           Because we sustain the seventh and eight assignments of error and sustain the first  
21 assignment of error in part, the challenged plan amendment is remanded.

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<sup>13</sup>It is also due in part to the somewhat overlapping questions posed by the public need and alternative sites questions. To the extent the county considered other *existing* aggregate sites as alternative sites, such considerations are closely tied to the public need question. To the extent the county considered other *potential* aggregate sites, that consideration would be essentially independent of the public need question. We are uncertain how the county approached the alternative sites inquiry required by UCZPSO 23.05(3)(B).

1            Because we sustain the third assignment of error in part, the decision granting  
2 conditional use approval is remanded.