

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

3  
4           CITY OF BARLOW,                                    )  
5                                                                    )  
6                    Petitioner,                            )           LUBA No. 93-110  
7                                                                    )  
8            vs.                                                    )           FINAL OPINION  
9                                                                    )           AND ORDER  
10           CLACKAMAS COUNTY,                            )  
11                                                                    )  
12                    Respondent.                            )

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14  
15           Appeal from Clackamas County.

16  
17           Alan L. Gallagher, Canby, filed the petition for review  
18 and argued on behalf of petitioner.

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20           Michael E. Judd, Chief Assistant County Counsel, Oregon  
21 City, filed the response brief and argued on behalf of  
22 respondent.

23  
24           KELLINGTON, Chief Referee, and SHERTON, Referee,  
25 participated in the decision.

26  
27                   AFFIRMED                                   01/07/94

28  
29           You are entitled to judicial review of this Order.  
30 Judicial review is governed by the provisions of ORS  
31 197.850.

1 Opinion by Kellington.

2 **NATURE OF THE DECISION**

3 Petitioner appeals an order approving a conditional use  
4 permit for the extraction of aggregate.

5 **FACTS**

6 The subject property is a three acre portion of a 27.86  
7 acre parcel zoned General Agricultural District (GAD).<sup>1</sup>  
8 The challenged decision states the following additional  
9 facts:

10 "[The 27.86 acres are] part of a much larger farm  
11 property owned and operated by the applicant. The  
12 property is generally level and is developed as a  
13 commercial farm. The proposed three acre mining  
14 site is within the southeast corner of Tax Lot  
15 1600. It is the site of a previously approved  
16 conditional use authorizing the mining and  
17 processing of aggregate to create a three acre  
18 irrigation pond to serve the agricultural  
19 operations on the balance of the applicant's  
20 lands. \* \* \* That conditional use permit expired  
21 in March, 1989, with approximately one acre of the  
22 site mined, with an additional acre or so affected  
23 by the surface mining. The site is located within  
24 the 500 year flood plains of the Molalla River and  
25 the Pudding River." Record 2.

26 After a public hearing, the hearings officer approved  
27 the conditional use permit, and this appeal followed.

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<sup>1</sup>The challenged decision notes there is some dispute concerning whether the subject property is zoned Exclusive Farm Use or GAD and determines the property is zoned GAD. However, as the challenged decision states, it makes little difference here, as the relevant approval standards applicable to the proposed use are substantially identical.

1 **MOTION FOR EVIDENTIARY HEARING**

2 Pursuant to OAR 661-10-045,<sup>2</sup> petitioner moves for an  
3 evidentiary hearing to allow this Board to review evidence  
4 not included in the record submitted by the county in this  
5 appeal proceeding. Specifically, petitioner requests an  
6 evidentiary hearing to enable our review of a letter from  
7 the Ground Water Coordinator, Drinking Water Program, Oregon  
8 Health Division, and a bankruptcy notice concerning one of  
9 the proposed aggregate operators.

10 ORS 197.830(13)(b) and OAR 661-10-045(1) recognize that  
11 there are several possible bases for an evidentiary hearing.  
12 Those bases include the existence of disputed allegations of  
13 fact concerning standing, procedural irregularities and  
14 constitutional issues. In addition, the statute and rule

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<sup>2</sup>OAR 661-10-045(1) and (2) provides:

"(1) Grounds for Hearing: The Board may, upon written motion, conduct an evidentiary hearing in the case of disputed allegations in the parties' briefs concerning unconstitutionality of the decision, standing, ex parte contacts or other procedural irregularities not shown in the record and which, if proved, would warrant reversal or remand of the decision. An evidentiary hearing may also be held upon motion or at the direction of the Board to consider disputes regarding the content of the record or requests for stays, attorney fees and actual damages under ORS 197.845.

"(2) Motions for Hearings: A motion for an evidentiary hearing shall contain a statement explaining with particularity what facts the moving party will present at the hearing and how those facts will affect the outcome of the review proceeding. Whenever possible such facts shall be presented by affidavit with the motion."  
(Emphasis supplied.)

1 provide that an evidentiary hearing may only be allowed  
2 where it is shown that such allegations, if proved, might  
3 result in reversal or remand of the challenged decision.  
4 Torgeson v. City of Canby, 19 Or LUBA 511 (1990).  
5 Petitioner has not established that if its request for  
6 evidentiary hearing were granted, it would introduce  
7 evidence that could result in the reversal or remand of the  
8 challenged decision. Accordingly, the motion for  
9 evidentiary hearing is denied.

10 **ASSIGNMENTS OF ERROR**

11 Petitioner challenges certain findings in and  
12 evidentiary support for the challenged decision.

13 **A. Cumulative Impacts**

14 Petitioner argues the county failed to determine the  
15 cumulative impacts of the proposal on the city. The county  
16 argues that petitioner does not cite an applicable standard  
17 requiring a determination of the cumulative impacts of the  
18 proposal, and that there is no such standard.

19 In the absence of a citation to some legal standard  
20 requiring a determination of the cumulative impacts of the  
21 proposal, the county's failure to make such a determination  
22 provides no basis for reversal or remand of the challenged  
23 decision.

24 **B. ESEE Analysis**

25 Petitioner argues the county failed to analyze the  
26 economic, social, environmental and energy (ESEE)

1 consequences of the proposed aggregate operation.

2 The county argues that its comprehensive plan and land  
3 use regulations are acknowledged by the Land Conservation  
4 and Development Commission and the challenged decision is  
5 not a comprehensive plan or land use regulation amendment.  
6 The county contends that under these circumstances,  
7 Statewide Planning Goal 5 (Open Spaces, Scenic and Historic  
8 Areas, and Natural Resources) does not apply to the  
9 proposal. The county also contends petitioner cites no  
10 applicable standard, and that there is no applicable  
11 standard, requiring an ESEE analysis as a prerequisite to  
12 approval of a conditional use permit in the GAD zoning  
13 district.

14 We agree with the county. We are aware of no standard  
15 requiring an ESEE analysis for a conditional use permit for  
16 an aggregate operation in the GAD zoning district.  
17 Therefore, that the county failed to conduct an ESEE  
18 analysis provides no basis for reversal or remand of the  
19 challenged decision.

20 **C. Applicant's Intent**

21 Petitioner argues the applicant's real intent is to  
22 convert the entire 70 acre parcel into a giant aggregate  
23 operation. Petitioner contends the applicant has no  
24 intention of limiting its aggregate operations to the  
25 approved three acre site, and that the applicant's prior  
26 history indicates it will not comply with established

1 standards.

2 We agree with the county that it is not required to  
3 deny the conditional use permit application on the basis of  
4 the applicant's intent and prior history. The challenged  
5 decision provides limited and conditional approval. In the  
6 event the applicant fails to comply with the limitations and  
7 conditions of the challenged decision, there are enforcement  
8 mechanisms available which the county, and potentially  
9 private parties, may bring to bear. This argument provides  
10 no basis for reversal or remand of the challenged decision.

11 **D. Delegation**

12 Petitioner argues:

13 "[I]n approving a conditional use permit, [the  
14 county] must state that an applicable approval  
15 standard 'will be met,' e.g. Lousignont v. Union  
16 County, 16 Or LUBA 272 (1987); Vizina v. Douglas  
17 County, 16 Or LUBA 936 (1988), and not merely  
18 defer to a state agency enforcement program and  
19 the applicant to insure that the use will meet the  
20 standard. Herein, the hearings officer has partly  
21 substituted conditions for findings and partly  
22 recited, in mere conclusory form, that standards  
23 will be met, but without reviewing the whole  
24 record, including the history and intent of the  
25 applicant, and the history of county  
26 non-enforcement of existing standards upon this  
27 applicant." Petition for Review 24.

28 Petitioner contends there are wetlands on some portion  
29 of the 70 acre property, and perhaps on the subject three  
30 acre site. Petitioner argues the hearings officer failed to  
31 determine whether are wetlands at the site, but rather "made  
32 it a condition of approval that some other agency make those

1 determinations." Petition for Review 24.

2 The county argues the hearings officer responded to the  
3 possibility presented by petitioner of a wetland at the  
4 three acre site. The county contends the decision  
5 acknowledges that it is unclear whether there are wetlands  
6 at the site. The county points out the decision requires  
7 study on this issue and that if wetlands are discovered on  
8 the site, county approval is required before any development  
9 may occur within a wetland, as follows:

10 "The applicant shall submit a wetlands delineation  
11 for the [Clackamas County Development and  
12 Transportation Department] and Division of State  
13 Lands review and approval. Development is  
14 prohibited within an identified wetland, except as  
15 may be approved pursuant to [Clackamas County  
16 Zoning and Development Ordinance (ZDO) 1011.04].  
17 Any development within 100 feet of an identified  
18 wetland shall be only pursuant to site specific  
19 design review, to assure compliance with the  
20 standards of Sections 1002 and 1011 of the ZDO."  
21 Record 13.

22 The problem with petitioner's argument is that it fails  
23 to identify, or explain the content of, any local standard  
24 requiring a wetlands analysis, or prohibiting development at  
25 or near a wetland. Further, under the above condition, no  
26 development in a wetland is allowed unless a further,  
27 specific approval is given under the ZDO. Therefore,  
28 petitioner's argument concerning the possibility that there  
29 are wetlands at or near the proposed three acre site  
30 provides no basis for reversal or remand of the challenged  
31 decision.

1 Further, to the extent there may be other standards the  
2 application of which petitioner believes to have been  
3 improperly deferred to a state agency program for  
4 enforcement, those standards are not identified by  
5 petitioner. It is not the function of this Board to guess  
6 what those standards may be, rather it is petitioner's  
7 responsibility to develop an argument upon which relief may  
8 be granted. Deschutes Development Corp. v. Deschutes  
9 County, 5 Or LUBA 218, 220 (1982). Petitioner's failure to  
10 do so means this argument provides no basis for reversal or  
11 remand of the challenged decision.

12 **E. Evidentiary Support**

13 As we understand it, petitioner's remaining challenges  
14 concern the evidentiary support for the county's decision.  
15 Petitioner argues the county improperly balanced evidence  
16 and asserts the hearings officer should have given more  
17 weight to petitioner's evidence.<sup>3</sup>

18 The responsibility for weighing evidence and  
19 determining what evidence to believe, lies with the county.  
20 1000 Friends of Oregon v. Marion County, 116 Or App 584,  
21 588, 842 P2d 441 (1992). It is inappropriate for this Board  
22 to reweigh evidence. Rather, our review is limited to

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<sup>3</sup> Petitioner also argues the county failed to consider the evidence in the record of cumulative impacts and the applicant's intent. However, we explain above that there is no cited legal standard which would make such evidence relevant. Therefore, the hearings officer did not err by failing to consider such evidence.

1 determining whether the record contains evidence that a  
2 reasonable person could rely upon to reach the conclusions  
3 that the county did here, considering the whole record.  
4 Younger v. City of Portland, 305 Or 346, 752 P2d 262 (1988).  
5 We have reviewed the evidence in the record cited by the  
6 parties and conclude a reasonable person could reach the  
7 conclusions the county did based on that evidence. That  
8 petitioner may disagree with the county's conclusions  
9 provides no basis for this Board to reverse or remand the  
10 challenged decision. McGowan v. City of Eugene, 24 Or LUBA  
11 540, 546 (1993). Finally, the county decision maker was not  
12 required to specifically discuss in the challenged decision  
13 all of the evidence in the record or to explain his reasons  
14 for choosing to rely upon particular evidence over other  
15 evidence. Angel v. City of Portland, 22 Or App 649, 656-57,  
16 aff'd 113 Or App 169 (1992). In sum, we see no error in the  
17 manner in which the county may have reviewed or "balanced"  
18 the evidence submitted by the parties during the proceedings  
19 below.

20 Petitioner's assignments of error are denied.

21 The county's decision is affirmed.