

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

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BLATCHFORD BROTHERS, an )  
Oregon partnership, )  
 )  
Petitioner, )  
 )  
v. )  
 )  
BAKER COUNTY and )  
DONALD VAN BRUNT, )  
 )  
Respondent. )

LUBA NO. 81-115  
FINAL OPINION  
AND ORDER

Appeal from Baker County.

Martin J. Leuenberger, Baker, filed a petition for review and argued the cause for petitioners.

Alan J. Schmeits, Baker, filed a brief and argued the cause for respondent-applicant Donald Van Brunt.

Bagg, Referee; Reynolds, Chief Referee; Cox, Referee; participated in the decision.

Remanded. 2/09/82

You are entitled to judicial review of this Order. Judicial review is governed by the provisions of Oregon Laws 1979, ch 772, sec 6(a).

1 BAGG,

2 NATURE OF THE PROCEEDING

3 Petitioners appeal the grant of a conditional use permit  
4 allowing mining operations on a 9.26 acre parcel in an  
5 exclusive farm use zone (A-1 zone) in Baker County.

6 FACTS

7 On June 3, 1981, the applicant, Donald W. Van Brunt,  
8 applied to Baker County for conditional use approval to  
9 establish a mining and ore processing plant on a parcel of land  
10 owned by Harry Smit in an exclusive farm use zone in Baker  
11 County. The application requested permission to remove  
12 material from the ground and to construct a mill for processing  
13 mined ore. The Baker County Planning Commission considered the  
14 matter on June 25, 1981. The Planning Commission approved the  
15 permit indicating in the approval that it believed the site to  
16 have been previously determined to be non-productive  
17 agricultural land. This previous determination was made  
18 pursuant to a 1979 application by another individual for  
19 division of the property.

20 An appeal was taken to the Baker County Court. Petitioner  
21 argued before the county court that the proposed use would  
22 create additional dust, might contaminate their wells, and  
23 could subject them to possible flooding. The Baker County  
24 Court rejected the appeal and approved the conditional use  
25 application on August 28, 1981. Below are the findings  
26 applicable to the property:

1           "(2) The property is a prior gravel pit in the  
A-1 zone.

2           "(3) The Planning Commission did on December  
3 27th, 1980, grant a conditional use as a land  
partition meeting the criteria of ORS 215.213(1).

4           "(4) That mining use is a renewal of the former  
5 use of the land and therefore, Goal #3 is not violated.

6           "(5) That Goal #5 is not violated by the  
extraction of gravel from this land.

7           "(6) That Goal #6 is not violated as all water  
8 or air contamination and dust abatement standards as  
9 established by the Department of Environmental Quality  
must be met before conditional use is granted.

10           "(7) That Goal #9 is upheld as the economic  
11 benefit to the local economy through employment  
opportunities is [sic] improved."

12 FIRST ASSIGNMENT OF ERROR

13           "The Order of the Baker County Court violates Sec.  
14 15.020 of the Baker County Zoning Ordinance and the  
provisions of ORS 215.416."

15           Petitioner quotes a portion of Baker County Zoning  
16 Ordinance Section 15.020 providing that an application for a  
17 conditional use may be initiated "by a property owner, his  
18 agent or authorized representative \* \* \* \*" The ordinance also  
19 requires that a site plan accompany the application.<sup>1</sup>

20           Petitioner states that the application was filed by Mr. Van  
21 Brunt and another application (filed on the same date) by a Mr.  
22 Haller. Petitioner states the record does not show that the  
23 owner of the property, Mr. Smit, authorized either Mr. Haller  
24 or Mr. Van Brunt to file an application affecting Mr. Smit's  
25 property, and there is no application from Mr. Smit himself.  
26           Petitioner concludes that because of the manner in which the

1 application was filed, the applicant has no standing to request  
2 a conditional use. Petitioner also claims that ORS 215.416(1),  
3 requiring that applications be made in the manner provided by  
4 local ordinance, is also, therefore, violated.

5 Respondent Van Brunt (hereinafter "respondent") claims that  
6 Mr. Smit's conduct gives the applicant apparent or implied  
7 authority to file the conditional use application as an agent  
8 of the owner. Respondent notes that Mr. Smit was present at a  
9 hearing before the county court and voiced no objection to the  
10 proposed conditional use permit. The record also shows that  
11 Mr. Smit proposed to sell the gravel pit to Mr. Van Brunt.  
12 Respondent also states that this issue has not been raised  
13 prior to appeal before this Board.

14 We believe the petitioners had an obligation to raise the  
15 manner of the filing of the conditional use application in the  
16 proceeding before the county. This problem, if it is a  
17 problem, is procedural and could easily have been corrected by  
18 the county during the course of its proceedings. We have  
19 repeatedly held that where a procedural error may be cured  
20 during the local proceedings, we will not entertain allegations  
21 of the same error on appeal. Twin Rocks v. Pockaway, 2 Or LUBA  
22 36 (1980); Dobaj v. Beaverton, 1 Or LUBA 237 (1980).

23 The first assignment of error is denied.

24 SECOND ASSIGNMENT OF ERROR

25 "The Order of the Baker County Court violates the  
26 applicable statutes and case law in that the  
state-wide goals were not complied with."

1           Petitioner here alleges a violation of Goal 3, the  
2 agricultural lands goal. Petitioner alleges that Baker County  
3 does not have an acknowledged plan and must make all land use  
4 decisions in conformity with applicable statewide planning  
5 goals. Petitioner notes that the Baker County Court made a  
6 determination that Goal 3 did not apply because of the 1979  
7 partitioning application concerning the same property.  
8 However, the record includes minutes of the 1979 planning  
9 commission meeting at which the partitioning was discussed, and  
10 the minutes do not reflect that the planning commission  
11 addressed the applicability of Goal 3. Petitioner notes that  
12 the Baker County Court, when considering the instant case, only  
13 concluded that Goal 3 was not violated because the mining use  
14 was simply a "renewal" of the former use of the property.<sup>2</sup>

15           Respondent states that the minutes of the 1979 action  
16 regarding the property "reflect that the criteria of the Oregon  
17 statutes were complied with." Respondent says that the prior  
18 consideration of the property at which the land was found to be  
19 unproductive was not appealed, and we can only, therefore,  
20 conclude that the county's decision that the property was not  
21 productive is correct. Respondent states that there is no  
22 evidence in the record that the gravel pit could be considered  
23 agriculturally productive. Respondent cites testimony to show  
24 the land served as a garbage dump.

25           Apparently, the county views its finding nos. 3 and 4 to  
26 adequately consider Goal 3. Finding No. 3 simply recites that

1 the planning commission granted the conditional use for the  
2 property under ORS 215.213(1), and Finding No. 4 simply says  
3 that mining is a renewal of a former use and "therefore, Goal 3  
4 is not violated." We fail to see how these two findings  
5 adequately show compliance with Goal 3 or even an adequate  
6 consideration of Goal 3. The minutes of the December 28, 1979  
7 planning commission meeting where a conditional use for a land  
8 partition in the A-1 zone on this property was considered make  
9 no findings with respect to Goal 3.<sup>3</sup> Also, there is no  
10 incorporation of any earlier analysis of Goal 3. The reference  
11 to a "renewal" of an old use is hardly a clear incorporation of  
12 a prior Goal 3 analysis. It is not clear to us what the  
13 county's views are with respect to Goal 3 and this property,  
14 and without such findings or reference to an earlier set of  
15 findings clearly adopted by the county, the county has failed  
16 to demonstrate compliance with Goal 3. We have stated many  
17 times we are unable to perform our review function without  
18 adequate findings explaining what it is the county believed to  
19 exist. Dupont v. Jefferson Co., 1 Or LUBA 136 (1980); Albany  
20 v. Linn Co., 2 Or LUBA 8 (1980). Failure to make findings  
21 showing compliance with the goals is itself a violation of the  
22 goals. Twin Rocks, supra.

23 Assignment of error no. 2 is sustained.

24 THIRD ASSIGNMENT OF ERROR

25 "The Baker County Court erred in not establishing  
26 criteria, making adequate findings or revealing their  
findings."

1 In this assignment of error, petitioner notes that the  
2 Baker County Court made reference to Goals 3, 5, 6 and 9, but  
3 the references are "cursory and conclusory, [sic] with no  
4 reference to any particular findings or criteria upon which the  
5 decision is based." Petitioner claims that ORS 215.416(5) and  
6 (6) require a clear articulation of standards for conditional  
7 use approval and a set of findings showing compliance with  
8 those standards.<sup>4</sup>

9 Petitioner goes on to quote section 4.020 of the Baker  
10 County Ordinance which allows conditional uses for mining  
11 operations in the A-1 zone, and then cites section 15.010 of  
12 the ordinance giving the county power to allow conditional uses  
13 subject to whatever conditions the county may require.<sup>5</sup> The  
14 petitioner states there are no criteria in the ordinance for  
15 allowance of a conditional use, and since there are no  
16 criteria, any action taken granting a conditional use is  
17 invalid.

18 Also, petitioner points to transcript of the proceedings  
19 showing petitioner's concern about noise, dust and probable  
20 contamination of their water supplies. No findings were made  
21 on these issues, and petitioner believes the county was obliged  
22 to address petitioner's concerns. In short, the petitioner  
23 believes that the entirety of the findings and order of the  
24 county court is insufficient.

25 Respondent suggests that petitioner is wrong as to what  
26 criteria apply to conditional use applications. Respondent

1 advises the Baker County ordinance, as with ORS 215.213,  
2 provides much stricter requirements for a conditional use for  
3 single family residential dwellings than for other uses,  
4 including mining activities. Respondent asserts the statutes  
5 to which petitioner refers concern the overall adoption and  
6 revision of comprehensive plans, not individual applications  
7 for a conditional use. We understand respondent to be  
8 referring to ORS 215.416(5) and (6). Respondent says that the  
9 findings made by the county showing consideration of goals 5, 6  
10 and 9 are adequate considering the nature of the application  
11 and history of the property.

12 We believe petitioner is correct in its assertion that the  
13 county's findings are inadequate. The findings, quoted at page  
14 3 of this opinion, are only conclusions and do not explain the  
15 standards used or the facts found to be true. ORS 215.416(6)  
16 requires the county to explain the criteria thought to be  
17 relevant and state the facts relied on in reaching each and  
18 every individual conditional use application decision. These  
19 requirements simply were not met in this case.<sup>6</sup> Conclusion  
20 as to conformity with standards are themselves not sufficient.  
21 Dickson v. Wash. Co., 3 Or LUBA 123 (1981); 1000 Friends v.  
22 Clackamas County, 3 Or LUBA 203 (1981).

23 As to petitioner's concerns about noise, dust and possible  
24 water pollution, the findings in the case simply conclude that  
25 goals were met with no findings addressing petitioner's  
26 concerns. Our review of the record shows that petitioners

1 clearly articulated these issues. Where petitioners articulate  
2 a genuine concern, the county has an obligation to respond.

3 Lee v. Portland, 3 Or LUBA 31 (1981).

4 The third assignment of error is sustained.

5 This case is remanded to Baker County with instructions to  
6 proceed in a manner not inconsistent with this opinion.

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FOOTNOTES

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Although petitioner quotes section 15.020, the county ordinance emphasizes that portion requiring a site plan accompany the application, petitioner makes no argument in the text of his first assignment of error regarding the site plan. His emphasis is on the filing of the application by someone other than the owner or authorized agent.

As petitioner and respondent have not discussed the matter of the failure to file a site plan along with the application, we make no comment as to that matter.

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2  
The county findings make no reference to any possible claim that the applicant might be allowed to mine the property as some sort of pre-existing "non-conforming" use under provisions of the Baker County ordinance or state law.

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3  
We don't know to what the county court refers when it mentions December 27, 1980, but we believe it to be this 1979 planning commission meeting as there is no other information on the property bearing a 1979 or 1980 date in the file.

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4  
We read petitioner's assignment of error to be an attack as stated in the title of the assignment of error and not a claim that Goals 3, 5, 6 and 9 have been violated.

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5  
The conditional use ordinance was changed after the processing of this application. The changes are not important to this appeal.

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6  
We express no opinion as to whether adoption of the statewide goals, or some of them, would be sufficient criteria under ORS 215.416(5).

FEB 9 8 18 AM '82

BEFORE THE LAND CONSERVATION AND DEVELOPMENT COMMISSION  
OF THE STATE OF OREGON

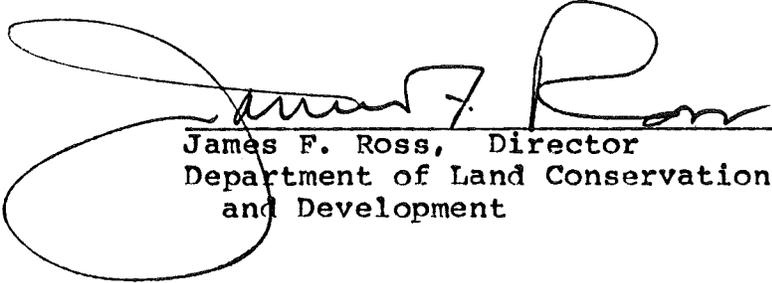
BLATCHFORD BROTHERS,  
an Oregon partnership,  
  
Petitioner,  
  
v.  
  
BAKER COUNTY AND  
DONALD VAN BRUNT,  
  
Respondent.

LUBA No. 81-115  
  
LCDC DETERMINATION

The Land Conservation and Development Commission hereby  
approves the recommendation of the Land Use Board of Appeals in  
LUBA case No. 81-115.

Dated this 8<sup>th</sup> day of February, 1982.

For the Commission:

  
James F. Ross, Director  
Department of Land Conservation  
and Development

Department of Justice  
100 State Office Building  
Salem, Oregon 97310  
Phone 378-4400

BEFORE THE LAND USE BOARD OF APPEALS  
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LUBA NO. 81-115  
PROPOSED OPINION  
AND ORDER

9           Appeal from Baker County.

10          Martin J. Leuenberger, Baker, filed a petition for review  
and argued the cause for petitioners.

11          Alan J. Schmeits, Baker, filed a brief and argued the cause  
12 for respondent-applicant Donald Van Brunt.

13          Bagg, Referee; Reynolds, Chief Referee; Cox, Referee;  
participated in the decision.

14           Remanded.

1/18/82

15           You are entitled to judicial review of this Order.  
16 Judicial review is governed by the provisions of Oregon Laws  
1979, ch 772, sec 6(a).



## STATE OF OREGON

## INTEROFFICE MEMO

TO: MEMBERS OF THE LAND CONSERVATION  
AND DEVELOPMENT COMMISSION

DATE: 1/18/82

FROM: THE LAND USE BOARD OF APPEALS

SUBJECT: BLATCHFORD V. BAKER CO.  
LUBA NO. 81-115

Enclosed for your review is the Board's proposed opinion and final order in the above captioned appeal.

This case is about a conditional use approval to allow mining and ore processing within an EFU zone in Baker County. The case is really a findings case, because the Baker County Court made very few findings concerning the property and the effect of the proposed use on the property. We found the findings that did exist to be conclusional. Specifically, the second assignment of error alleges a violation of Goal 3. We agree with the petitioners in finding a violation of Goal 3.

The third assignment of error mentions the goal, but it is really an assignment about the adequacy of the county's findings generally and not a specific allegation of goal violation.

In short, the policy discussion in this case is found in assignment of error no 2 beginning on page 4 and ending on page 6.

The Board is of the opinion that oral argument would not assist the commission in its understanding or review of the statewide goal issues involved in this appeal. Therefore, the Board recommends that oral argument before the commission not be allowed.



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