

1 BAGG Board Member.

2 NATURE OF THE DECISION

3 Petitioner appeals the issuance of a conditional use permit
4 for a gravel mining operation in Jackson County. This permit
5 modified a 1980 conditional use permit (CUP) by changing some
6 and deleting other conditions attached to the earlier permit.

7 FACTS

8 The C.U.P. was issued in 1975 to permit a gravel mining
9 enterprise in rural Jackson County. In order to reach the site
10 and permit transport of gravel to markets, trucks had to travel
11 along a state access road and through a tunnel under Interstate
12 5. The roadway and the tunnel are under the jurisdiction of
13 the Department of Transportation, State Highway Division.

14 Seven conditions were attached to the original issuance.
15 One of those conditions required review of the permit in
16 October, 1975 to insure compliance with all other conditions.
17 There were subsequent reviews held in October, 1977 and in
18 October, 1980. An order resulted from the October, 1980
19 review, and that order modified the conditions attached to the
20 permit. The conditions in the 1980 issuance included
21 installation of automatic traffic signals near the tunnel by
22 April, 1981 and an increase in lighting in the tunnel so as to
23 eliminate shadows and increase visibility during daylight
24 hours. Also, the operator was required to post a schedule of
25 school bus arrivals and departures at the entrance to the
26 tunnel. A compliance review was set for October of 1981. At

1 the 1981 compliance review, the Jackson County hearings council
2 heard the matter and directed that the review hearing be set
3 over until January of 1982.

4 Evidence at the hearing showed traffic signals had not been
5 installed but no rock had been hauled over the problem roadway
6 or through the tunnel since March of 1981. Apparently the
7 respondent was not operating as of the date the condition was
8 to be fulfilled, April, 1981, and no operations had been
9 conducted since that time. There was no mention made of the
10 lighting required in the tunnel, but the respondent apparently
11 did install signs setting forth school bus schedules. The
12 schedules, however, were in error. Respondent had relied upon
13 erroneous information from the school district.

14 At the January hearing, the hearings council passed a,
15 motion continuing the matter until the Highway Division could
16 make a study of traffic using the tunnel and issue
17 recommendations to the county. The hearing was resumed in July
18 of 1982 and in August of 1982, the hearings council entered an
19 order approving continuation of the use. That order was
20 appealed to the county commissioners. The county
21 commissioners' order resulted in an appeal to this Board.

22 Petitioner appeals here because of his fear that dropping
23 the conditions controlling access and lighting in the tunnel
24 will adversely affect safety.

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1 ASSIGNMENTS OF ERROR

2 A. Statewide Goals

3 In petitioner's "Summary of Arguments," he alleges
4 violations of Statewide Goals 1, 2 and 12. Petitioner alleges
5 Goal 1 is violated because the county commissioners ignored or
6 took lightly "compelling evidence" given by the petitioner
7 that, presumably, shows the conditional use permit to be
8 inappropriate or unsafe. Petitioner also claims a citizen
9 advisory committee recommendation was ignored or not considered
10 by the county.

11 Petitioner alleges Goal 2 was violated because the county
12 commissioners did not have an adequate factual base for their
13 decision. Petitioner claims the decision was based on "broad,
14 unsubstantiated statements." Petitioner adds the record does
15 not show "compelling factual evidence that the Ken Robertson
16 Crushing Company complied with the CUP in question."

17 Petitioner alleges a violation of Statewide Goal 12 because
18 the county commissioners failed to adequately address the
19 "Safety and Transportation needs of the 12 property owners, who
20 must use the access road and the 175' long box-culvert under
21 the I-5 Freeway." Petition for Review at 2.

22 We do not find a violation of Statewide Goal 1. The
23 issuance of this permit followed a contested case procedure in
24 which petitioner and other interested parties were offered an
25 opportunity to present and rebut evidence. Findings of fact
26 and conclusions were issued, and the procedure was fair and

1 open. Goal 1 is a planning goal, a goal designed to guide
2 local governments in establishing a citizen involvement program
3 that assures citizen participation at all levels of the
4 planning process. Goal 1 does not control individual land use
5 actions, and Goal 1 in no case requires that one person or
6 group of persons be given priority over another. None of the
7 facts as alleged by petitioner, or that we are able to uncover
8 in the record, suggests that petitioner was denied the
9 opportunity to participate in this process as controlled by the
10 county ordinance.

11 As to alleged violations of Goal 2 or Goal 12, we are
12 unable to rule on such allegations at this time. We must wait
13 for adequate findings before we may determine whether or a
14 factual base exists for this decision and whether or not
15 statewide Goal 12 has been violated. We will not review for
16 goal violations where the findings are not adequate for us to
17 conduct such a review. Hoffman v. Dupont, 49 Or App 699, 621
18 P2d 63; rev den, 290 Or 651 (1981). See discussion, infra.

19 B. Other Issues

20 The main point of petitioner's brief is an attack on the
21 county's findings and the evidence in the record supporting the
22 findings.² The petitioner's complaints are about compliance
23 with the following conditions of the 1980 conditional use
24 permit.

25 "The applicant shall be responsible for the
26 installation of traffic signals which are both
automated and manually operated to be located on each

1 side of the Interstate Five underpass, and positioned
2 to allow approaching traffic ample time to stop.
3 These signals shall be operable by both vehicles and
4 predestrians. The signal shall be installed by April
5 20, 1981, and shall be maintained in working condition
6 by the applicant." Record at 52.

7 * * *

8 "The applicant shall be responsible for the increase
9 in intensity of lighting in the underpass; the
10 intensity shall be bright enough to eliminate shadows,
11 increase visibility during daylight hours. This shall
12 be completed by April 20, 1981; or if lighting is not
13 available by that time, the applicant shall submit the
14 hearings council proof that the lighting has been
15 ordered." Record at 52.

16 * * *

17 "The schedule of arrivals and departures of school
18 buses shall be obtained from School District 35 and
19 shall be posted in a conspicuous place that is readily
20 visible to drivers of haul trucks, to emphasize extra
21 caution at these times. These schedules shall also be
22 posted in each of the vehicles. The applicant shall
23 identify these schedules with the appropriate school
24 district, and shall advise the drivers of school bus
25 schedule changes." Record at 52.

26 The county findings relevant to petitioner's complaints are
as follows:

"2.1 Traffic signals had not been installed as
required by condition one of the 1980 order because
the applicant had ceased operating prior to the date
at which time the signals were to be installed, and
because the State Highway Division prohibits the
installation of such signs.

"2.2 School bus schedule signs were installed as
required by condition five; however, the posted
schedule was wrong because the school district had
provided inaccurate information to the applicant
concerning this schedule.

"2.3 The principal issue was the lighting of the
tunnel addressed by condition two of the 1980 order.
Tunnel lighting was first required when this

1 application was originally approved in 1975. The 1980
2 order required an increase in the intensity of the
3 lighting sufficient to eliminate shadows and increase
4 visibility during daylight hours. As a result of the
5 1980 order, the applicant doubled the lighting that
6 was installed as required by the 1975 order.

7 "This existing lighting is considered adequate
8 considering that:

9 "A) Signs will be installed requiring that all
10 vehicles stop before proceeding through the
11 tunnel.

12 "B) The State Highway Division, which conducted
13 a traffic safety study of the state access road
14 and tunnel, did not find that increased lighting
15 was necessary.

16 "C) Both the department staff and the Hearings
17 Council concluded the existing lighting was
18 adequate.

19 "2.4 Curtis Miller, the owner of a tract of land
20 easterly of and adjacent to that portion of the state
21 access road between Foothills Boulevard and
22 Interstate-5, complained that the actual drivable
23 portion of the access road was beyond the state
24 right-of-way and on his property. The encroachment of
25 the drivable portion of a state access road onto
26 private property is not a legitimate responsibility of
Jackson County or within the jurisdiction of Jackson
County."

Petitioner's first attack on the findings alleges the
original condition requiring installation of traffic signals
and lighting was made after careful consideration by county
staff and the hearings council. On the other hand, petitioner
claims the decision to remove the condition was based simply on
a Highway Division statement no such aids were needed. That
conclusion was based on nothing more than traffic count and
field review, according to petitioner. Petitioner asks whether

1 the State Highway Division's refusal to allow signalization
2 somehow makes the condition on the roadway and in the tunnel
3 less dangerous. Petitioner cites evidence to suggest the
4 tunnel lighting that exists does not meet the criteria in
5 condition number 2 in the 1980 order and that the lights now in
6 the tunnel are not sufficient. Petitioner concludes that the
7 original need for the signal and the lighting is still not
8 satisfied.

9 Petitioner next reminds us that the conditional use permit
10 requires a finding there will be "minimal impact on the
11 livability and appropriate development of abutting properties"
12 anytime a conditional use permit is issued. See footnote 3,
13 supra. We understand petitioner to argue that the use is
14 incompatible because of safety of persons within the tunnel.

15 Lastly, petitioner questions the county's conclusions on
16 encroachment on the state access road. The petitioner believes
17 that the county must address the matter of encroachment on the
18 drivable portion of the state access roadway. See Finding 2.6
19 at page 7, supra.

20 In evaluating petitioner's complaints, it is our view that
21 any revision of a conditional use permit is subject to the same
22 standards and criteria as the original application. That is,
23 though we do not believe an applicant must reapprove the
24 appropriateness of his conditional use permit each time the
25 matter is before the hearings council, any changes allowed
26 should consider the standards required for the original

1 permit. See footnote 3, supra. In this case, modifications
2 consisted of lifting a number of conditions. These changes
3 should have been tested for compliance with Section 260.040 of
4 the county ordinance and applicable statewide land use planning
5 goals.

6 Respondent defends the county's abandonment of traffic
7 signalization and tunnel lighting conditions on the ground the
8 county had no authority to impose the condition in the first
9 instance. Respondent argues the record shows the State Highway
10 Division conducted an appropriate study that determined no
11 signals were needed. Also, Highway Division recommendations as
12 to brush removal, shoulder widening and placement of traffic
13 signs were sufficient to insure safety, argues respondent.
14 Even if the county had the power to impose conditions on this
15 state road, respondent claims the conditions recommended by the
16 Highway Division and recognized by the county in its new permit
17 are sufficient to insure public safety.

18 As to the matter of encroachment on the roadway or
19 questions as to who owns portions of the state right-of-way or
20 the roadway, respondent notes the location of the roadway is
21 not entirely clear. However, it is clear that the county took
22 the precaution of requiring that the roadway be widened. The
23 commissioners have assured, thereby, that when the use
24 continues, the question of roadway location will be fully
25 addressed, argues respondent.

26 It is our view that the county ordinance requires the

1 county to insure that conditional uses will be conducted
2 safely.³ If the county finds the use may not be conducted
3 safely, the county may withhold approval of the permit. See
4 260.040, footnote 4, supra. Where safety of a conditional use
5 may depend upon circumstances outside the county's direct
6 control, the county may nonetheless withhold approval of a
7 permit until those circumstances are resolved. 4 Anderson,
8 American Law of Zoning, Section 23.36 (2d Ed, 1977).

9 In this case, it is not clear to us what the county thinks
10 about the need for the signals and the lighting. We do not
11 know whether the county believes signals to be so necessary to
12 public safety that the permit may not be safely given without
13 the signals and the lights. It may be that the county intended
14 the petitioner to install signals only if he were legally able
15 to do so. We simply do not know. The county must make finding
16 about whether the signals and the lighting were necessary for
17 public safety. If the county believes the public safety could
18 be assured through some other means, the county should say
19 so.⁴

20 With respect to the issue of encroachment on driveable
21 portions of the access way, the county says in the findings
22 that it has no responsibility for this issue. However, the
23 county adopted a condition imposed by the hearings council
24 during 1982 proceedings and applicable now that the roadway is
25 to be widened by a minimum of two feet. This condition
26 apparently is the result of a recommendation of the State

1 Highway Division. Here the county seems to be adopting or
2 recognizing an act of the Highway Division. This apparent
3 adoption of a state recommendation is not consistent with its
4 view that the county has no power to impose conditions that
5 depend upon acts of a state agency. The county needs to
6 explain how it views the right-of-way work to be relevant to
7 the criteria in Ordinance Section 260.040.

8 This case is remanded to Jackson County for further
9 proceedings not inconsistent with this opinion.

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FOOTNOTES

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Goal 1 states as its purpose:

"To develop a citizen involvement program that insures the opportunity for citizens to be involved in all phases of the planning process."

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Respondent attacks the form of the petition for review on the ground that petitioner does not set out clearly and succinctly each assignment of error as required by LUBA Rule 7. Respondent argues that the assignments of error listed by petitioner do not relate directly to the body of the petition for review.

In sum, we believe the petition may be treated as an attack on the county's findings for failure to show compliance with applicable criteria. While we can agree with respondent's assertion that much of the petition includes argument asking this Board to substitute its judgment for that of the county, we believe the petitioner clearly alleges that the findings are not adequate and there is insufficient evidence to support the findings that are made.

We will treat the petition for review to be a challenge to the county's findings and the evidentiary support for the findings.

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18 3

In Jackson County, a conditional permit is subject to certain standards.

260.040 STANDARDS AND CRITERIA FOR ACTION ON APPLICATION:

"In order to grant a conditional use permit, the Hearings Council must make the following findings:

"1) That the permit would be in conformance with the Jackson County Comprehensive Plan for the area, the standards of the district of the Zoning Ordinance in which the proposed development would occur, and the comprehensive plan for the county as a whole; and,

"2) That the location, size, design, and operating

1 characteristics of the proposed use will have
2 minimal adverse impact on the liveability, value
3 or appropriate development of abutting properties
4 and the surrounding area when compared to the
5 types of development which are listed as
6 permitted uses in the district; and,

7 "3) That the location and design of the site and
8 structures for the proposal will be as attractive
9 as the nature of the use and its setting
10 warrants; and,

11 "4) That the proposal will preserve environmental
12 assets of particular interest to the community."

13 We take 260.040(2) to be a public safety standard. Under
14 Section 260.050 of the Jackson County Zoning and Land
15 Development Ordinance, conditions may be placed upon the
16 granted conditional use permit. The allowable conditions
17 include a broad list of means for controlling use of a site.

18 "260.050 PLACING CONDITIONS ON A PERMIT:

19 "In permitting a new conditional use or the alteration
20 of an existing conditional use, the Hearings Council
21 may impose, in addition to those standards and
22 requirements expressly specified by this ordinance,
23 additional conditions which may be imposed to avoid a
24 detrimental environmental impact and to otherwise
25 protect the best interests of the surrounding area or
26 the community as a whole. These conditions may
include but are not limited to the following:

"1) Limiting the manner in which the use is conducted
including restricting the time a certain activity
may take place and restraints to minimize such
environmental effects as noise, vibration, air
pollution, glare and odor.

"2) Establishing a special yard or other open space
or lot area or dimension.

"3) Limiting the height, size or location of a
building or other structure.

"4) Designating the size, number, location and nature
of vehicle access points.

"5) Increasing the amount of street dedication,
roadway width or improvements within the street

1 right-of-way.

- 2 "6) Designating the size, location, screening,
3 drainage, surfacing or other improvement of a
4 parking area/lot or truck loading area.
- 5 "7) Limiting or otherwise designating the number,
6 size, location, height, and lighting of signs.
- 7 "8) Limiting the location and intensity of outdoor
8 lighting and requiring its shielding.
- 9 "9) Requiring diking, screening, landscaping or
10 another facility to protect adjacent or nearby
11 property and designating standards for its
12 installation and maintenance.
- 13 "10) Designating the size, height, location and
14 materials for a fence.
- 15 "11) Protecting and preserving existing trees,
16 vegetation, water resources, wildlife habitat
17 such as winter deer and elk ranges, or other
18 significant natural resources or natural hazards.
- 19 "12) Making any other condition to permit the
20 development of the county in conformity with the
21 intent and purpose of the conditional
22 classification of uses.
- 23 "13) Requiring that public facilities are adequate to
24 serve the proposed use."

25 The ordinance also provides for review to test compliance
26 with the conditions which are imposed:

"An approved conditional use shall comply with the
standards of the district in which it is located. The
hearings council may by their own motion modify,
alter, or revoke a conditional use permit for
non-compliance with conditions set forth in the order
granting the permit." Jackson County Zoning and Land
Development Ordinance, Section 260.060(1).

As we understand the operation of the ordinance, further
hearings council action on a permit can be triggered by
evidence of "non-compliance" with whatever conditions were
imposed on the permit. We presume a complaint as to whether or
not the holder of the conditional use has complied with its
terms will precipitate hearings council action and that action

1 may result in a change of conditions including revocation of
2 the permit.

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4 With respect to the matter of lighting in the tunnel, we
5 note the county points to the State Highway Division as
6 authority for the proposition that increased lighting was not
7 necessary. We understand the finding to suggest that the
8 Highway Division considered lighting, but a review of the
9 record shows the State Highway Division did not consider
10 lighting at all. See correspondence from State Highway
11 Division at pages 55, 99, 102 in the Record.
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STATE OF OREGON

INTEROFFICE MEMO

TO: MEMBERS OF THE LAND CONSERVATION AND DEVELOPMENT COMMISSION DATE: 4/5/83

FROM: THE LAND USE BOARD OF APPEALS

SUBJECT: MOSHER V. JACKSON COUNTY
LUBA No. 82-105

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

This case is about the reissuance of a conditional use permit in Jackson County. The permit is for a gravel operation, and this newest version of the conditional use permit removes certain conditions regarding traffic signalization, lighting in a tunnel under Interstate 5 and other highway safety matters originally placed upon the conditional use permit. Petitioner alleges violation of Statewide Goals 1, 2 and 12 on the ground that (1) his evidence was ignored, (2) the county lacks a factual base for its decision, and 3) the resulting decision renders the highway unsafe. Because of the way petitioner structures the petition for review, we spend most of our time talking about the adequacy of the findings and substantial evidence. We do not rule specifically on allegations about Goal 2 and Goal 12 because we hold the findings to be insufficient. However, we do comment that petitioner's challenge under Goal 1 is mistaken. We say that Goal 1 is a "planning goal" and does not require a local government to give priority to or necessarily agree with one person or a group of persons over another.

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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Materials

1 BEFORE THE LAND USE BOARD OF APPEALS

2 OF THE STATE OF OREGON

3 TOM MOSHER,)
)
 4 Petitioner,)
) LUBA No. 82-105
 5 vs.)
)
 6 JACKSON COUNTY and) PROPOSED OPINION
 KEN ROBERTSON, dba KEN) AND ORDER
 7 ROBERTSON CRUSHING,)
)
 8 Respondents.)

9 Appeal from Jackson County.

10 Tom Mosher, Grants Pass, filed the Petition for Review and
11 argued the cause on his own behalf.

12 Patricia E. Morgan and Richard W. Morgan, Grants Pass,
13 filed the Petition for Review on their own behalf as
14 intervenors.

15 John Eads, Jr., Medford, filed a brief and argued the cause
16 on behalf of Respondent Ken Robertson, dba Ken Robertson
17 Crushing.

18 Jackson County submitted a memorandum at request of the
19 Board.

20 BAGG, Board Member; COX, Board Member, participated in the
21 decision.

22 REMANDED 4/05/83

23 You are entitled to judicial review of this Order.
24 Judicial review is governed by the provisions of Oregon Laws
25 1979, ch 772, sec 6(a), as amended by Oregon Laws 1981, ch 748.
26

