

1 Opinion by DuBay.

2 NATURE OF THE DECISION

3 This is an appeal of a denied request to rezone a 171 acre
4 tract by overlaying a Quarry Mining Combining District (QM)
5 Zone on the existing Farm-Forestry 20 District (FF-20). The
6 change of zone would permit operation of a rock quarry.

7 FACTS

8 The property was formerly owned and developed as a quarry
9 by the US Corps of Engineers as a source of rock for the Fall
10 Creek Dam and associated facilities. The Corps excavated a 35
11 acre pit quarry, removed the soil on 70 percent of the
12 remaining 136 acres, and sold the property to private interests
13 in 1976. New quarrying operations were started, but they were
14 opposed by the county as a violation of the county's zoning
15 ordinance adopted in 1975. The owners applied for a
16 conditional use permit which was denied. Operations were
17 started without the permit, and litigation ensued, culminating
18 in the Court of Appeals' decision holding there was no right to
19 continue operation of the quarry as a pre-existing
20 non-conforming use. Lane County v. Bessett, 46 Or App 319, 612
21 P2d 297 (1980).

22 The owner applied for the zone change in June 1981. The
23 hearings official issued an order approving the application on
24 November 19, 1981. The decision specifically noted the appeal
25 deadline would be the close of business November 30, 1981.
26 After intervenor's attorney filed a request for reconsideration

1 with the hearings officer, the officer withdrew the decision,
2 held another hearing and issued a second decision on February
3 19, 1982, approving the application. Intervenor appealed that
4 decision to the county commissioners who held another hearing.
5 They sustained the appeal, denying the application for rezoning
6 on the grounds the use of the property as a quarry would not be
7 in compliance with Statewide Planning Goal 5. This appeal
8 followed.

9 FIRST ASSIGNMENT OF ERROR

10 Petitioner contends the board of commissioners had no
11 jurisdiction to consider intervenor's appeal because of the
12 first decision of the hearings officer, dated November 19,
13 1981, was not appealed within the period allowed by county
14 ordinance. The ordinance makes decisions of hearings officer's
15 final unless appealed to the board of county commissioners.
16 Lane Code (LC) §10.315-57(3). Appeals to the board of
17 commissioners must be filed within 10 days of the hearings
18 officer's written decision. LC §14.025. The code also
19 requires appeals to be made on county forms or be substantially
20 similar to such forms and to be filed with the Planning
21 Division. LC §14.025. No appeal of the November 19, 1981
22 decision was filed. The letter from intervenor's attorney
23 specifically stated it was a request for a reconsideration
24 only.

25 The request for reconsideration was prompted by the
26 inclusion in the hearings officer's November 19 decision of the

1 following:

2 "Decision: REZONING GRANTED AS APPLIED FOR TO ADD QM
3 SUFFIX.

4 "I shall automatically reconsider this decision based
5 upon the request of any party delivered to me in
6 writing during the appeal period. Such request for
7 reconsideration shall automatically stay the affect of
8 my order and I will then either reissue a new order or
9 in writing indicate that the original order will
10 stand. That written decision shall reinstitute a new
11 10 day appeal period to appeal from the reissued order
or the original order as reissued. Any request for
reconsideration should be made upon the record at the
two hearing dates above and not include any new
factual information. Such requests may also include
the allegations that the findings and conclusions
herein are not supported by the record as made at the
hearing." Record, Volume 1 at 308 (emphasis
supplied).

12 We construe the above as an invitation to submit requests
13 for reconsideration and indicates the hearings officer desired
14 to give the parties an opportunity to comment on the order. By
15 its terms, the order would become final if no request for
16 reconsideration were received but would not necessarily serve
17 as the final order if requests for reconsideration were
18 delivered to the hearings officer. We construe the order as a
19 proposal, capable of becoming final if no requests for further
20 consideration were received. This procedure was not
21 specifically described by the Lane Code, but the code gives
22 hearings officer's considerable latitude in decision making as
23 §10.035(10) of the Lane Code states:

24 "Procedures Directory. The procedures and the limits
25 set forth in Chapter 14 to be followed by the Board,
26 the Hearings Official or the Director are directory
and not mandatory, and the failure to follow or
complete the action in the manner provided shall not

1 invalidate the decision."

2 Intervenor's attorney relied on the hearings officer's
3 invitation to request reconsideration.¹ Based on these
4 circumstances, and taking into account the liberal provisions
5 of the Lane Code with respect to the hearings procedure, we
6 find the tentative nature of the hearings officer's decision to
7 be permissible.

8 The question remains, however, whether the request for
9 reconsideration was delivered within the time specified by the
10 hearings officer. Petitioner claims the request was not filed
11 before the close of business on November 30, 1981, and was
12 therefore not effective to prevent the order from becoming
13 final. Although the request was not delivered before the close
14 of business on November 30, business hours do not necessarily
15 set absolute limits for filing legal documents. Where the
16 controlling statute or ordinance requires a document to be
17 filed by a certain date or within a specified period of time,
18 both the courts and this Board have recognized the validity of
19 filings after the close of business on the prescribed day.
20 City of Hillsboro v. Housing Development Corp., 61 Or App 484,
21 657 P2d 726 (1983); Constant v. City of Lake Oswego, ___ Or
22 LUBA ___ (1984) (LUBA No. 83-120, slip op. dated February 28,
23 1984).

24 The record shows the hearings officer expressly authorized
25 intervenor's attorney to deliver the document after business
26 hours by slipping it under the door of the hearings officer.

1 We do not view this informal arrangement to accept delivery
2 after business hours, made before the expiration of the appeal
3 period, to be an abuse of the hearings officer's discretion.
4 Delivery of the document in accordance with the arrangement
5 constituted delivery in accordance with the terms of the
6 order.² This assignment of error is denied.

7 SECOND ASSSIGNMENT OF ERROR

8 The county commissioners' review of the hearings officer's
9 February 19, 1982 decision focused exclusively on Goal 5.³
10 Petitioner claims the county misinterprets Goal 5, stating
11 three arguments supporting this assignment of error.

12 Summarized, they are:

- 13 (1) The order equated the program development concept
14 of Goal 5 and the conflict resolution process
15 described in OAR 660-16-010 with the procedure
16 used in granting conditional use permits, i.e.,
17 to allow the proposed use only if compatible with
18 existing uses.
- 19 (2) The order defeats the purpose of Goal 5 to
20 conserve open space and protect natural resources
21 by prohibiting the use of a resource protected by
22 the Goal from conflicting uses.
- 23 (3) The commissioners erroneously rejected the
24 hearings officer's program to balance the
25 consequences of the conflicting uses by imposing
26 a site review requirement and special covenants
to run with the land.

27 The county commissioners held a de novo hearing on the Goal
28 5 ramifications of the proposed rock mining use and received
29 evidence of the number and location of residences in the area
30 and how the mining operation would negatively affect them. The
31 residential use was found to be a "conflicting use" as

1 described in the goal, and impacts of the mining on residents
2 were found to consist of safety hazards, noise, dust and
3 possible damage from blasting, including damage to water wells
4 in the area. Consideration was given to the economic effect on
5 the resource site if the rezoning ordinance were not allowed.
6 No express conclusions were made on this point, but the
7 findings noted there was no proof by the applicant of economic
8 losses during the applicant's seven years of ownership.

9 Lastly, the county considered the adequacy of the
10 restrictions placed on mining operations by the hearings
11 officer's order as a program to achieve the goal. The
12 restrictions were implemented by the use of covenants to run
13 with the land. The county found the covenants were not
14 adequate to "protect adjacent residences and therefore do not
15 meet the requirement of OAR 660-16-000 to develop a plan to
16 meet Goal 5."

17 The approach used by the county was therefore one of
18 balancing the need for the resource against the effects of the
19 use on nearby residences. Using this approach, the county
20 found the negative impacts on the residences to weight the
21 balance in favor of protecting the existing residential use.

22 Goal 5 has a basic purpose: "To conserve open spaces and
23 protect natural and scenic resources." It lists 12 types of
24 protected resources, including mineral and aggregate resources,
25 and requires the resources to be inventoried. If there are no
26 conflicting uses identified, the goal requires the resource to

1 be managed to preserve its original character. If there are
2 conflicting uses, the goal mandates (1) an analysis of the
3 economic, social, environmental and energy consequences (the
4 ESEE analysis) and (2) the development of programs to achieve
5 the goal.⁴

6 Goal 5, considering the initial sentence requiring
7 conservation and preservation of resources, seems to establish
8 a preference for protection of the listed types of resources
9 over other uses. Although the goal speaks of identifying and
10 analyzing the ESEE consequences of conflicting uses, it is
11 unclear whether "conflicting uses" refers to conflicts between
12 the various types of protected resources listed in the goal or
13 to conflicts between the protected resources and other uses.
14 The goal is also silent on the issue presented here, where
15 exploitation of a protected resource conflicts with other
16 offsite uses.⁵ The question presented by this appeal is
17 whether a protected resource must be fully protected, despite
18 conflicts with non-resource uses, or may "programs developed to
19 achieve the goal" include substantial restrictions on the
20 resource when other uses (here, neighboring residences) are
21 considered more important?

22 LCDC has promulgated rules addressing these questions. The
23 rules tell us conflicting uses are uses which negatively impact
24 the Goal 5 site. OAR 660-16-005. The conflicting uses,
25 however, may themselves be impacted by the Goal 5 resource
26 site, and such impacts must be considered in the ESEE

1 analysis. OAR 660-16-005(2). Where there are conflicting
2 uses, a jurisdiction is expected to resolve conflicts in three
3 ways. OAR 660-16-010. Summarized, they are:

- 4 (1) Protect the resource site if the resource is so
5 important relative to the conflicting uses "that
6 the resource site should be protected and all
7 conflicting uses prohibited on the site possibly
8 within the impact area...."
- 9 (2) Allow conflicting uses fully notwithstanding the
10 impacts on the resource site "when the
11 conflicting use for a particular site is of
12 sufficient importance, relative to the resource
13 site."
- 14 (3) Allow the conflicting use "but in a limited way
15 so as to protect the resource site to some
16 desired extent."⁶

17 The county, upon completion of its analysis of the ESEE
18 consequences, opted for allowing the conflicting uses (the
19 residences) fully, the second listed option in OAR 660-16-010.
20 In so doing, the county seems to interpret the rules to permit
21 substantial restrictions, possibly to the point of prohibition,
22 of a Goal 5 resource when an ESEE analysis shows the resource
23 would cause unacceptable impacts on existing conflicting uses
24 on other lands.⁷ However, since restriction of a protected
25 resource appears to run counter to the basic purpose of Goal 5,
26 a decision of that kind must be supported by facts and reasons
in the ESEE analysis clearly justifying the restriction.

27 An LCDC rule provides:

28 "Both impacts on the resource site and on the
29 conflicting use must be considered in analyzing the
30 ESEE consequences. The applicability and requirements
31 of other Statewide Planning Goals must be considered,
32 where appropriate at this stage of the process. A

1 determination of the ESEE consequences of identified
2 conflicting uses is adequate if it enables a
3 jurisdiction to provide reasons to explain why
4 decisions are made for specific sites." OAR
5 660-16-005.

6 The ESEE analysis by the county is inadequate to meet this
7 standard. Although impacts on the protected resource site from
8 the conflicting use - i.e., residential use in the neighborhood
9 - are required to be considered, the findings are almost
10 exclusively confined to impacts of mining on the adjacent
11 residential use. The only mention of impacts on the resource
12 site are findings related to economic matters, but the findings
13 address only the possibility of economic loss to the owner
14 during a period in which mining hardly occurred. There are no
15 findings, such as one might expect in such an analysis, of any
16 increased costs incident to mining near residential areas, and
17 the effects of such increases, if any, on the costs of the
18 roads and other aggregate uses in the county. The energy
19 consequences, both on the resource site and the residential
20 use, are also missing from the analysis. We find no discussion
21 of whether use of this resource site would be more or less
22 energy efficient than the alternatives.

23 Goal 5 requires a complete analysis of each of the
24 economic, social, environmental and energy consequences by
25 consideration of the impacts on the resource site as well as
26 impacts on the conflicting uses. Only after such analysis may
the county properly conclude the conflicting uses are of
sufficient importance relative to the resource site to justify

1 protection. We therefore sustain this assignment of error.

2 THIRD ASSIGNMENT OF ERROR

3 Petitioner claims the refusal to rezone the property,
4 together with the county's prior refusal to allow a conditional
5 use permit for a rock quarry and refusal to recognize the
6 pre-existing non-conforming use status of the quarry operation,
7 constitute a regulatory taking of property rights in violation
8 of the state and federal constitutions.⁸ Further, petitioner
9 claims compensation for the taking, rather than invalidation of
10 the land use controls limiting use of the property, is the
11 appropriate remedy in these circumstances.

12 Although zoning regulations may be so restrictive they
13 constitute a deprivation or a taking of property in violation
14 of either state or federal constitutional law, the burden on
15 one asserting such a violation is indeed heavy. Where the
16 regulation does not designate land for public use or
17 acquisition, the courts of this state have uniformly held a
18 land owner has suffered no deprivation or taking if there
19 remains some substantial beneficial use of the property under
20 the regulations. See e.g., Fifth Avenue Corp. v. Washington
21 Co., 282 Or 591, 581 P2d 50 (1978); Oregon Investment Co. v.
22 Schrunk, 242 Or 63, 71, 408 P2d 89 (1965); Morris v. City of
23 Salem et al, 179 Or 666, 673, 174 P2d 192 (1946); Kroner v.
24 City of Portland et al, 116 Or 141, 151-152, 240 P2d 536
25 (1925); Suess Builders v. City of Beaverton, 56 Or App 573, 642
26 P2d 361 (1982); Joyce v. City of Portland, 24 Or App 689, 692,

1 546 P2d 1100 (1976); Multnomah County v. Howell, 9 Or App 374,
2 383, 496 P2d 235 (1972), Sup. Ct. rev den (1973).

3 Petitioner claims this burden has been met, citing evidence
4 regarding the effects of prior operations on the site's
5 capacity for uses other than quarrying. One expert reported
6 the quarry pit itself and approximately 70 percent of the
7 remainder of the property cannot support agricultural crops or
8 forest production. Petitioner contends the property is
9 substantially valueless for the customary agricultural or
10 forestry uses permitted in the FF-20 Zone, leaving the property
11 usable only as a source of rock. The actions of the county,
12 according to petitioner's argument, effectively bar use of the
13 property for rock removal.

14 The county, on the other hand, argues there are other
15 permitted and conditional uses in the FF-20 Zone to which the
16 property may be put, including the operation as a rock quarry
17 as a conditional use. The record does not show that all uses
18 allowed in the zone are foreclosed on this property. Indeed,
19 petitioner contends only that customary farm or forestry
20 practices are not possible. Petitioner has neither pointed to
21 evidence in the record showing no substantial beneficial use is
22 possible for the property nor supplemented the record on this
23 issue by using the evidentiary hearing procedures available
24 when constitutional issues are raised.⁹ On this record we
25 cannot, therefore, conclude there is no substantial beneficial
26 use for the property under the existing zoning ordinance. This

1 assignment of error is denied.

2 FOURTH ASSIGNMENT OF ERROR

3 Petitioner here alleges the county deprived it of
4 constitutional due process protections.¹⁰ Due process
5 deprivation is claimed to have occurred in part by:

6 A. Taking more than two years after the filing of
7 the rezone application to arrive at a final local
8 government decision, in the face of continuous
9 objections to the delays by petitioner's attorney.

10 B. Twice reopening the record for new evidentiary
11 hearings at the request of the opponents,
12 contrary to the Lane Code and Oregon case law
13 over petitioner's objections.

14 Petitioner first faults the two year processing period as a
15 denial of due process of law. At the time the application for
16 rezoning was filed there was no statute or ordinance requiring
17 the county to complete processing of the application within a
18 certain period.¹¹ It is true this Board is subject to the
19 statutory policy expressed in ORS 197.805 that "time is of the
20 essence in reaching final decisions in matters involving land
21 use." The statutory policy prefaces ORS 197.805 to 197.850.
22 These sections provide for the establishment of LUBA, its
23 jurisdiction, and various procedural matters in the appeal of
24 local government land use decisions. However, these sections
25 of the statute do not concern local government procedures.

26 Petitioner has not set forth how the two year period
interfered with any constitutional rights. We are not
unsympathetic to claims that government procedures may at times
run longer than is apparently necessary. However, where

1 general allegations of constitutionality are asserted without a
2 developed theory or explanation of how the facts of the case
3 have overstepped constitutional limits, this Board will not
4 develop a case for petitioner. Constant v. Lake Oswego, 5 Or
5 LUBA 311 (1982). We view petitioner's argument to be of that
6 posture and deny this subassignment of error.

7 Petitioner next claims deprivation of due process when the
8 hearings officer and the county commissioners each reopened the
9 record for the purpose of holding further hearings and the
10 taking of testimony. As noted above, the county ordinance
11 gives both hearings officers and county commissioners great
12 latitude in procedural matters. Lane Code §10.035(10). In
13 addition, the code specifically permits the county
14 commissioners to hold de novo hearings in appeals from
15 decisions of hearings officers. Code §14.025(7) states:

16 "Unless otherwise provided by the Board of County
17 Commissioners, review of the decision shall be
18 confined to the record of the proceeding before the
19 hearings official...." (emphasis supplied).

20 We believe the hearings officer and the county commissioners
21 acted within the scope of their discretion authorized by these
22 code provisions.

23 Finally, petitioner challenges the procedures as being both
24 unfair and having the appearance of unfairness by:

- 25 A. Allowing a former Lane County counsel to continue
26 representing opponents over petitioner's
objections, when she had represented Lane County
at an earlier stage of land use proceedings
involving the same property.

1 B. Admitting into evidence in the third evidentiary
2 hearing considerable irrelevant and prejudicial
3 items of evidence over Mobile Crushing's
4 objection and never ruling on those objections in
5 any correct or identifiable fashion.

6 Petitioner frames this challenge to the county's order in
7 terms of deprivation of a fair opportunity for a hearing,
8 rather than a deprivation of due process or violation of a
9 particular procedure. For example, petitioner does not ask us
10 to find the rulings on admissibility constitute reversible
11 procedural error, but that we find the overall process was
12 unfair. The petition does not disclose any details of the
13 evidence introduced, the objections made, or the prejudicial
14 effects of the admissions of the evidence or other explanation
15 why the admission of the evidence was in error. We are
16 therefore not in a position to consider the rulings on
17 admissibility of evidence even if requested.

18 On the matter of the representation by the former county
19 counsel, petitioner seems to acknowledge the county has no
20 authority to resolve alleged violations of the Oregon State Bar
21 Code of Professional Responsibility, but alleges the county's
22 recognition of the former assistant county counsel as
23 intervenor's attorney is an indicator of an unfair process. We
24 do not view the county's failure to take action interfering
25 with intervenor's choice of counsel to indicate the county
26 commissioners were not impartial or were biased against
27 petitioner.

28 Neither do we accept petitioner's argument, without greater

1 specificity than shown here, that adverse rulings on the
2 admissibility of evidence, when compared with favorable rulings
3 of the opponents evidence, are sufficient to demonstrate the
4 tribunal was not impartial. In this regard we note the county
5 ordinance allows admissibility of any evidence "of the quality
6 that reasonable persons rely upon in the conduct of their
7 everyday affairs." LC §14.025(8). We therefore deny this
8 assignment of error.

9 The decision is remanded to the county for further
10 proceedings. [The county must, at a minimum, provide a complete
11 analysis of the impacts of the identified conflicting uses on
12 the Goal 5 protected resource and the economic, social,
13 environmental, and energy consequences of those impacts. The
14 findings must clearly set forth facts and explanations showing
15 why the conflicting uses are of sufficient importance relative
16 to the resource site to justify protecting the conflicting uses
17 rather than allow utilization of the Goal 5 protected resource.]

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FOOTNOTES

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"In accordance with my understanding of Exhibit B to your order adopting findings of fact in the rezoning matter, I am submitting this letter requesting reconsideration of that order. It is my understanding that I may seek reconsideration of that order directly through you, rather than filing an appeal to the Lane County Board of Commissioners with the Planning Division. It is also my understanding that, should you choose not to alter your order, a new appeal period shall commence during which an appeal may be made to the board of commissioners." Letter from Scott M. Galenbeck to Hearings Officer Larry Thompson, dated November 30, 1981, Record, Volume 1 at page 286.

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11 2

We also note the hearings official received another letter prior to close of business on November 30. The letter objected to the November 19 order and gave reasons for the objection. The hearings official considered the letter to be a request for reconsideration. The hearings officer based the decision to reconsider partly on that letter as well as the letter from intervenor's attorney. Record, Volume 1 at page 69.

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16 3

The first paragraph of the supplemental findings to the denial order states in part:

"After our De Novo [sic] Goal 5 hearing we determined the application should be denied. Our decision to deny the application stands or falls on that analysis and decision." Record, Volume 5, Supplemental Findings to Order No. 83-8-24-9, dated August 24, 1983.

21 4

These two steps are referred to as the conflict resolution provisions of the goal.

"660-04-010(1) There are three methods for resolving conflicts between goal provisions and conflicting land uses:

"(a) The exceptions process;

1 "(b) Use of conflict resolution provisions
2 contained within the specific goals; and

3 "(c) The balancing of competing uses and goals
4 during the comprehensive planning process."

5

6 It is apparent from reading the LCDC rules on Goal 5 that
7 they were formulated to assist governmental units in the
8 preparation of comprehensive plans. There are obvious
9 difficulties in the application of the rules through individual
10 land use decisions, an office different from the plan
11 preparation process.

12

13 We assume the LCDC rules are permissible interpretations of
14 Goal 5. Petitioner has not challenged the rule's validity.

15

16 Whether the county has effectively prohibited use of the
17 resource is not clear. Under the existing zone classification
18 some limited aggregate removal operations are allowed as a
19 conditional use. Petitioner contends the previous refusal of
20 the county to grant a conditional use permit shows a permit
21 cannot be obtained. Yet the county's order encourages an
22 application for a conditional use permit.

23

24 Article 1, §18 Oregon Constitution, and Fifth Amendment,
25 United States Constitution.

26

27 It is not surprising the record is lacking evidence on this
28 issue as the county hearings were not for the purpose of
29 establishing what beneficial uses were possible on the
30 property.

31

32 Petitioner also alleges denial of opportunity for a fair
33 hearing. We construe this challenge to be based on a denial of
34 due process.

35

36 In 1983 the state adopted new legislation limiting the time

1 for final action on permits and zone changes. 1983 Or Laws, ch
2 827, §23, 27, codified as ORS 215.428 for counties and ORS
3 227.178 for cities. The new law requires a final order within
4 120 days from the time an application is complete.
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