

LAND USE
BOARD OF APPEALS

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

JAN 28 10 23 AM '81

SCAPPOOSE DRAINAGE DISTRICT;)
a public corporation; and)
FRED BERNET,)
Petitioners,)
vs.)
COLUMBIA COUNTY,)
Respondent,)
and)
CASCADE AGGREGATES, INC., an)
Oregon corporation,)
Intervenor-Respondent)

LUBA NO. 80-152

FINAL OPINION
AND ORDER

Appeal from Columbia County.

Terry D. Morgan, Portland, filed a brief and argued the cause for Petitioners. With him on the brief were Morgan & Shonkwiler, P.C.

Jill Thompson, St. Helens, filed a brief and argued the cause for Respondent Columbia County.

John D. Mosser, Portland, filed a brief and argued the cause for Respondent Intervenor. With him on the brief were Wood, Tatum, Mosser, Brooke & Holden.

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

REMANDED

1/28/81

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, Referee.

2 STATEMENT OF THE CASE

3 This case is an appeal of a grant of a conditional use
4 permit for aggregate mining in Columbia County.

5 STANDING

6 Standing is not an issue in this case; petitioners have
7 standing to bring the appeal.

8 FACTS

9 Petitioner Scappoose Drainage District is a special
10 district organized under ORS Chapter 547

11 "for the purpose of having such lands reclaimed and
12 protected by drainage or otherwise from the effects of
13 water, for sanitary or agricultural purposes, or when
14 the same may be conducive to the public health,
convenience and welfare or of public utility or
benefit." ORS 547.005

15 The district boundaries include portions of land owned by
16 Cascade Aggregates, Inc., the applicant in this matter.

17 In August, 1980, the Columbia County Planning Commission
18 considered a conditional use permit for Cascade Aggregates,
19 Inc. Cascade Aggregates, Inc. had requested a conditional use
20 for extension of its aggregate mining activities onto 290 acres
21 of agricultural land in Columbia County. The Planning
22 Commission granted the permit for only 32 acres of land west of
23 Honeyman Road, subject to conditions including the construction
24 of a berm and the planting of fast growing shrubs. The
25 Planning Commission tabled the remainder of the conditional use
26 application for a two year period to allow further study of

1 suspected water seepage problems. The land subject to the
2 water seepage is land controlled by the Drainage District.

3 Part of the originally requested 290 acres lies within a
4 flood plain. It is not clear to us how much, if any of the 32
5 acre parcel approved for aggregate mining is subject to
6 flooding. The area was not included in the flood plain
7 district under section 1200 of the county zoning ordinance.
8 Fears were expressed at both the Planning Commission hearing on
9 the conditional use permit and at the Board of Commission
10 hearing that the proposed mining use would pose a flood hazard
11 for the district. However, testimony was given at the Planning
12 Commission hearing from an engineer who said that mining up to
13 Honeyman Road would cause minor seepage problems, if any at
14 all. Record 28. In short, the record shows a dispute to exist
15 as to whether or not the proposed activity would create
16 drainage or flooding hazards. Neither the Planning Commission
17 nor the Board of Commissioners made findings on the matter of
18 possible seepage or flooding.

19 The area is not within any established urban growth
20 boundary and is presently used for cattle pasture.

21 The grant of the conditional use permit was not appealed.
22 The conditional use permit was given a very limited review by
23 the Columbia County Board of Commissioners because of the
24 existence of Ordinance 80-8 adopted in June, 1980. Ordinance
25 80-8 was adopted pursuant to an LCDC enforcement order
26 requiring the county to take steps to protect agricultural

1 lands within Columbia County. Ordinance 80-8 requires review
2 of any use contemplated on agricultural land to insure
3 compliance with Goal 3. Section 3 of the Ordinance allows land
4 use actions on Goal 3 lands where the county "or its authorized
5 representative" finds:

6 "A. that the land is committed to a nonfarm use
7 as provided in Section 5; or

8 "B. that the land is needed for a nonfarm use as
provided in Section 6; or

9 "C. that, if a dwelling is proposed, the
10 dwelling meets the criteria provided in Section 7; or

11 "D. that, if a division of land is proposed, the
division meets the criteria provided in Section 8; or

12 "E. that any other land use action would be a
13 use allowed under ORS 215.203 to ORS 215.213."

14 A procedure is provided in an attachment to the ordinance
15 (Exhibit B) to enable the county to make these necessary
16 findings.¹ If the use proposed is a farm related use
17 permitted outright under ORS 215.213, the Planning Director
18 makes a recommendation to the Board of Commissioners, and his
19 recommendation must include findings that show the use is
20 permitted under ORS 215.213, is on land of sufficient size, the
21 land use action meets all applicable statewide planning goals,
22 and satisfies the provisions of the ordinance and any other
23 applicable ordinance or regulation. Ordinance 80-8 Exhibit B,
24 Section 2(A)(1).

25 A more complicated set of requirements must be met if the
26 application is for a use other than a farm related use

1 permitted outright under ORS 215.213. Where such a use is
2 contemplated, a Board of Commissioners hearing is required
3 where testimony may be received for or against the
4 application. The Board is required to make findings that
5 demonstrate whether the proposed action

6 "(a) is in accordance with the Comprehensive Plan, if
7 adopted;

8 "(b) is consistent with the applicable statewide
9 goals, or is consistent with the Comprehensive Plan if
10 both adopted and acknowledged;

11 "(c) meets the requirements of this ordinance and any
12 other applicable ordinance or regulation." Ordinance
13 80-8, Exhibit B, Sec (2)B(2) (Record, Exhibit 1, page
14 13).

15 Aggregate mining is a farm use which may be approved under
16 the provisions of ORS 215.213(2)(b). It is not an outright
17 permitted use, but it is a use requiring "approval of the
18 governing body." As such, it is the Board's view that it falls
19 under the provisions of Ordinance 80-8, Exhibit B (2)B(2).

20 The county's order concerning the conditional use permit
21 and made for the apparent purpose of complying with Ordinance
22 80-8 states that the "[P]roposed use is permitted under ORS ch
23 215." The order goes on to recite the existence of the
24 conditional use approval by the Planning Commission, and the
25 ordinance lists the conditions of that approval. There are no
26 other "findings" in the order.

27 ASSIGNMENT OF ERROR NO. 1

28 The first assignment of error alleges that the county's
29 order "is not supported by adequate findings of fact, reasons

1 and conclusions of law as required under Goal 2, ORS 215.203 to
2 215.263, Columbia County Ordinance No. 80-8 and ORS 215.402 to
3 215.422." Petitioner's allegation is that the provision of
4 Ordinance 80-8, including those quoted above for the approval
5 of conditional uses, require that the county consider all
6 standards applicable to the development. Petitioner asserts
7 that even where the Planning Commission, as in this case, "has
8 previously rendered a decision and the appeal period has passed
9 for contesting that decision, the Board of Commissioners must
10 consider all of the relevant criteria before approving the
11 application." Petitioner alleges that those "relevant criteria
12 include goals 2, 3 and 7, the policy provisions of ORS 215.203
13 to ORS 215.263, and ORS 215.416 governing conditional use
14 approvals. The needed findings were not made, and petitioner
15 concludes that the decision does not comply with the ordinance.

16 The county and the Intervenor-Respondent Cascade
17 Aggregates, Inc. reply by asserting that the only finding
18 required under Ordinance 80-8 is a finding that the conditional
19 use would be allowed under ORS 215.203 to ORS 215.213. The
20 respondents cite 80-8, sec 3 for this proposition. Sec 3,
21 quoted supra, does provide, inter alia, that the county
22 commission may approve land use actions on agricultural land
23 where such uses are allowed under ORS 215.203 to 215.213.
24 However, sec 1(D) of the ordinance refers the reader to the
25 procedures in Exhibit B. Those procedures include a hearing
26 and call for more detailed findings than the single finding

1 suggested in section 3, that the "land use action would be a
2 use allowed under ORS 215.203 to ORS 215.213." Ordinance 80-8,
3 sec 3(E).

4 However, The county interpreted the hearing held pursuant
5 to Ordinance 80-8, Exhibit B, to be for the sole purpose of
6 determining whether, in fact, the use requested was a use
7 allowed in EFU zones under state law. Respondents note that
8 the petitioners made no objection to the county's
9 interpretation of its ordinance, and the record reveals that
10 this interpretation was stated by the Planning Director and one
11 of the Commissioners at the Board of Commissioners hearings.
12 (Record 7). Under this view, any findings on land use goals or
13 other criteria were the proper subject of the conditional use
14 permit hearing and not the hearing under Ordinance 80-8. As
15 the conditional use permit was not appealed, any findings or
16 the lack of them under that permit are beyond the review of the
17 Land Use Board of Appeals.

18 We do not agree with the respondents' view. The LCDC
19 enforcement proceeding required the county to take steps to
20 protect agricultural lands. The enforcement order did not by
21 its terms require that the county conduct a broad review of
22 every land use act proposed on agricultural land. However,
23 Exhibit B to Ordinance 80-8, the procedural section of the
24 ordinance, by its terms insists that "the Board [County Board
25 of Commissioners] shall make findings of fact and conclusions
26 of law whether the proposed land use action * * * is consistent

1 with the applicable statewide goals * * * meets the
2 requirements of this ordinance and any other applicable
3 ordinance or regulation." The county could not ignore these
4 provisions of its ordinance.²

5 Once adopted, a municipal body must follow its own
6 ordinances where applicable. 5 McQuillin, Municipal
7 Corporations, sec 15.14 (3d Ed 1969); Cannady v. Roseburg, LUBA
8 No. 80-107 (1980). The county and the intervenor cited us to
9 no authority that would suggest to us that the county may
10 ignore the provisions of Ordinance 80-8 and make a single
11 finding that the use is allowed under ORS ch 215. We conclude
12 the county was required to make findings demonstrating
13 compliance with all applicable laws, rules and ordinances.

14 One such rule is LCDC's Goal 2. Goal 2 requires, inter
15 alia, "evaluation of alternative courses of action and ultimate
16 policy choices, taking into consideration social, economic,
17 energy and environmental needs." We believe Goal 2 requires an
18 evaluation of this proposed use of agricultural land as an
19 "alternative" course of action. A use which, in order to be
20 allowed, must receive conditional approval certainly is an
21 "alternative" within the power of the county to grant or deny.
22 Here, there were at least two alternative courses of action for
23 this property; continued use for a farm purpose (here, pasture)
24 or for mineral extraction. There was evidence that use of the
25 property for mineral extraction would have adverse effects on
26 adjacent property. The county was required under Goal 2 to

1 evaluate this evidence. This evaluation must appear in the
2 county's findings, required by its ordinance, explaining why
3 use of the property for mineral extraction was a preferred
4 alternative.

5 ASSIGNMENTS OF ERROR NOS. 2 AND 3

6 The second assignment of error alleges a violation of Goal
7 3 and ORS 215.203 to 215.263. The third assignment of error
8 alleges a violation of Goal 7.

9 Because of our holding that the county's findings are
10 inadequate to support its decision under its own ordinance and
11 LCDC Goal 2, we will not review the decision for compliance
12 with Goal 3, ORS 215.203 to 215.263 and Goal 7. We would be
13 forced to review the decision without the benefit of the
14 county's views on these standards. Without adequate findings,
15 we are simply unable to test the decision against applicable
16 goals and the statutes. 1000 Friends v. Marion Co., 1 Or
17 LUBA ____ (1980); Ashland v. Bear Creek Valley Sanitary
18 Authority, ____ Or LUBA ____ (LUBA No. 80-094 (1980)).³

19 This case is remanded to Columbia County for proceedings
20 consistent with this opinion.

1 FOOTNOTES

2 1

3 Procedure: This ordinance shall be administered as
4 described in Exhibit B which is attached hereto and by this
5 reference made a part hereof. Ordinance 80-8 (1)(D).

6 Ordinance 80-8, sec 3 includes a provision that would allow
7 delegation of the authority to approve "land use actions" on
8 agricultural land. However, the procedure in Exhibit B for
9 conducting certain required hearings and making the necessary
10 findings very clearly requires action by the Board of
11 Commissioners. In this case, the county has acted through its
12 Board of Commissioners under the procedures outlined in Exhibit
13 B of Ordinance 80-8 and has not attempted the delegation of
14 authority that may be permitted under Ordinance 80-8, sec 3.

15 2

16 We note here that the county's conditional use ordinance
17 requires that any mining operation comply with standards
18 included in the "Columbia County Surface Mining Land
19 Reclamation Ordinance." Columbia County Zoning Ordinance
20 Section 1602-13. The surface mining ordinance requires at
21 section 8.030 that the Board of Commissioners determine whether
22 a mining operator is in compliance with the regulations of that
23 ordinance. The county apparently believes the conditional use
24 permit fulfills this requirement, but the ordinance requires
25 the Board to make that determination. We believe this
26 requirement to be one of the "other applicable ordinance"
regulations referenced in Ordinance 80-8 Exhibit B, and:
therefore, a requirement that must be articulated in writing.
The county has not shown us a provision in its ordinance that
delegates this review under the mining ordinance to the
Planning Commission. Nowhere in the record do we find a review
of the conditional use permit for compliance with the Columbia
County Surface Mining and Reclamation Ordinance.

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28 Petitioner would require the county to make findings
29 showing compliance with the policies articulated in ORS
30 215.243. We do not believe specific findings on those
31 "policies" are required. Adequate findings on the matter of
32 goal compliance and other substantive criteria may be reviewed
33 in the light of the policies in ORS 215.243. Generally,
34 legislative policies do not demand findings showing compliance
35 with the terms of the policy statement, but only provide a
36 conceptual framework for testing findings made under other
substantive legal criteria. Anderson v. Peden, 284 Or 313, 587
P2d 59 (1978); 1A Sands Sutherland, Statutory Construction, sec
20.12 (3d Ed 1972).

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OF THE STATE OF OREGON

CASCADE AGGREGATES, INC.,)
an Oregon corporation,)
Petitioner,)
v.)
COLUMBIA COUNTY,)
Respondent,)
and)
CASCADE AGGREGATES, INC., an)
Oregon corporation,)
Intervenor-Respondent)

LUBA NO. 80-152
FINAL OPINION
AND ORDER OF DISMISSAL

* * * * *

Submitted on remand from the Oregon Court of Appeals.

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

Dismissed.

6/03/82

1 BAGG, Referee.

2 The Court of Appeals remanded the above captioned appeal to
3 LUBA on April 29, 1982. The parties, however, have filed a
4 stipulated motion for dismissal, a copy of which is attached
5 hereto. Based upon the stipulated motion, this appeal is
6 dismissed. No costs are awarded to either party, and
7 petitioners' \$150 deposit for cost shall be returned.

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

JUN 3 10 00 AM '82

CASCADE AGGREGATES, INC.,
an Oregon corporation,

Petitioner,

v.

SCAPPOOSE DRAINAGE DISTRICT,
a public corporation, FRED
BERNET and COLUMBIA COUNTY,

Respondents.

LUBA No. 80-152

STIPULATED MOTION
FOR DISMISSAL

Petitioner and Respondents jointly move the Board for an Order of Dismissal in the above captioned proceedings, following remand from the Court of Appeals, for the reason that all disputes between the parties have been settled. The parties further stipulate that no costs should be awarded in the proceeding and that the deposit for costs be returned to the Petitioner.

MORGAN & SHONKWILER, P. C.

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Of Attorneys for Respondents

John D. Mosser
John D. Mosser
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Jill Thompson
Jill Thompson
Columbia County Counsel