

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

FEB 24 3 06 PM '81

3 G. K. HIGGINSON, )  
4                   Petitioner, )  
5           vs.            ) )  
6 YAMHILL COUNTY and )  
7 WILLIAM T. CAPPERAULD, )  
8                   Respondents. )

LUBA No. 80-151  
FINAL OPINION  
AND ORDER

9  
10 Appeal from Yamhill County.

11 K.D. Brand, McMinnville, filed the Petition for Review and  
12 argued the cause for Petitioner. With him on the brief were  
13 Craig, Brand and Lake.

14 Daryl S. Garrettson, McMinnville, filed the brief and  
15 argued the cause for Respondent Yamhill County.

16 William T. Capperauld, Dundee, filed the brief and argued  
17 the cause on his own behalf.

18 REYNOLDS, Chief Referee; COX, Referee; BAGG, Referee;  
19 participated in this decision.

20 AFFIRMED

21 2/24/81

22 You are entitled to judicial review of this Order.  
23 Judicial review is governed by the provisions of Oregon Laws  
24 1979, ch 772, sec 6(a).  
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1 that on petitioner's property. This quarry has over 46,000  
2 yards of processed rock presently stockpiled and available for  
3 sale and consists of 107 acres of which only 15 have been  
4 affected by its present operation. Given these facts, we do  
5 not believe that Goal 5 required Yamhill County to designate  
6 petitioner's property for quarry purposes.<sup>2</sup>

7 Even if Goal 5 did require Yamhill County to "manage"  
8 petitioner's property "so as to preserve" the mineral resources  
9 on the property for future use,<sup>3</sup> we believe the present plan  
10 designation and zoning ordinance are a reasonable means of  
11 achieving that goal. The ordinance which implements the  
12 Agriculture/Forestry Large Holding designation for petitioner  
13 and surrounding properties specifies a 20 acre minimum lot  
14 size. Petitioner's concern that people may move into the area,  
15 build houses, and thereby create uses which would conflict with  
16 the potential future operation of petitioner's property as a  
17 quarry are rather speculative given the 20 acre minimum lot  
18 size designation for the area. In any event, we do not believe  
19 petitioner has proven as a matter of law that the county's  
20 designation is not a reasonable means of managing petitioner's  
21 property so as to preserve the mineral resources contained on  
22 the property for future use. Accordingly, for either of the  
23 foregoing reasons we believe Yamhill County did not violate  
24 Goal 5 in denying petitioner's request.<sup>4</sup>

25 Petitioner's second assignment of error is that a county  
26 commissioner failed to disqualify himself from voting on

1 REYNOLDS, Chief Referee.

2 INTRODUCTION

3 Petitioner, a property owner in Yamhill County, appeals the  
4 county's denial of his request for a plan amendment to change  
5 the plan map designation for his property from  
6 "Agricultural/Forestry Large Holding" to "Quarry," and his  
7 request for an amendment to the Yamhill County's zoning  
8 ordinance to change the official zoning map from "A-F-20" to  
9 "M-R."

10 Petitioner owns approximately 30 acres in Yamhill County  
11 which is wooded and utilized for grazing. A quarry of  
12 approximately 3/4 acre in size has been operated on and off on  
13 petitioner's property since at least 1955 and perhaps as far  
14 back as 1900. The quarry pit contains high grade basaltic  
15 rock. When Yamhill County adopted its comprehensive plan in  
16 1974, petitioner's quarry was not designated on the plan map or  
17 the zoning map as a quarry site. The comprehensive plan  
18 designation for this property has been acknowledged by LCDC as  
19 in accordance with the statewide goals.

20 Petitioner sets forth two assignments of error. His first  
21 assignment of error is that the county violated Goal 5 because  
22 the present plan and zone designation for his property and the  
23 surrounding property fails to protect his quarry site for  
24 future generations.<sup>1</sup> Petitioner's second assignment of error  
25 is that one of the county commissioners failed to disqualify  
26 himself on the vote when he had a clear conflict of interest.

1 OPINION

2 Petitioner's basic argument under his first assignment of  
3 error is that because his property consists of a high quality  
4 mineral resource, the county was required to designate the  
5 property in the plan map and zone the property to protect this  
6 resource.

7 Goal 5 states in pertinent part:

8 "Where no conflicting uses for such resources  
9 [e.g., mineral and aggregate resources] have been  
10 identified, such resources shall be managed so as to  
11 preserve their original character."

12 According to this provision, Goal 5 requires that a parcel of  
13 property containing valuable mineral resources must be managed  
14 so as to preserve those mineral resources if no conflicting  
15 uses for that parcel have been identified. In the present  
16 case, however, Yamhill County has identified in its plan and  
17 zoning designations for this property two uses which could  
18 conflict with the county's designation and the operation of  
19 this site as a quarry. Those uses are agriculture and  
20 forestry. The 30 acre parcel is presently being used for  
21 grazing and contains trees on the property.

22 In addition, there was considerable evidence in the record  
23 as to quarry operations within a 5 and 10 mile radius of  
24 petitioner's property. There are 4 known quarry sites located  
25 in Yamhill County within a 5 mile radius and 15 to 20 within a  
26 10 mile radius. At least one quarry, the Laurelwood Quarry,  
contains basaltic rock of approximately the same quality as

1 petitioner's request for plan amendment and zone change when  
2 the commissioner had a conflict of interest in the matter.  
3 Petitioner contends that, as a result, he was denied a hearing  
4 before a fair and impartial tribunal as is required for  
5 quasi-judicial proceedings. See Fasano v. Board of County  
6 Commissioners of Washington County, 264 Or 574, 507 P2d 23  
7 (1973).

8 Commissioner MaCaulay, in 1971, sold his ready-mix  
9 concrete, sand and gravel business to Robert Malott and Harold  
10 Burch. As part of the sale, Commissioner MaCaulay agreed not  
11 to compete for 10 years with Malott and Burch doing business as  
12 Newberg Ready Mix Company. Malott and Burch are doing business  
13 at present as Newberg Ready Mix Company and Willamette Sand and  
14 Gravel Company and are the lessees of petitioner's property.  
15 Commissioner MaCaulay, at present, owns certain land in the  
16 City of Newberg which he leases to his sons for the operation  
17 of a sand and gravel plant. On June 3, 1980, Commissioner  
18 MaCaulay's sons filed an application for a conditional use  
19 permit to allow the construction and operation of a concrete  
20 batch plant. Commissioner MaCaulay signed this application in  
21 a place on the application designated for the signature of the  
22 owner of the property. It is based upon these facts that  
23 petitioner contends Commissioner MaCaulay should have  
24 disqualified himself from participating in the vote on  
25 petitioner's request.

26 We construe an error such as that allegedly committed by

1 Commissioner MaCaulay to be a procedural error as does  
2 petitioner. We have previously held that in order for one to  
3 raise a procedural error on appeal that error must have been  
4 asserted below at least in those circumstances where raising  
5 the error below would give the governing body the opportunity  
6 to cure the alleged error. Dobaj v. City of Beaverton, \_\_\_ Or  
7 LUBA \_\_\_, (LUBA No. 80-002, 1980). Petitioner was at all times  
8 aware of the facts pertaining to Commissioner MaCaulay's  
9 potential conflict of interest but failed to bring the matter  
10 before the governing body. Had petitioner done so,  
11 Commissioner MaCaulay could have then decided either not to  
12 participate or to perhaps explain why the facts did not give  
13 rise to a conflict of interest requiring his disqualification  
14 or why, in spite of the facts, he did not feel he had a  
15 conflict of interest.<sup>5</sup>

16 For the foregoing reasons, we conclude the decision of  
17 Yamhill County denying petitioner's request for a comprehensive  
18 plan amendment and zone change should be affirmed.

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FOOTNOTES

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4 At the time of oral argument, petitioner advised the Board  
5 that the first assignment of error was intended to raise an  
6 alleged violation of the comprehensive plan and not Goal 5.  
7 The only reference in the first assignment of error, however,  
8 to the county's comprehensive plan is contained in the second  
9 to the last paragraph in the assignment of error in which  
10 petitioner states as follows:

11 "Most of all, the land is well suited for the  
12 proposed amendments because the county goal requires  
13 the protection of mineral and aggregate deposit within  
14 the county."

15 Respondent objected at the time of oral argument to having to  
16 respond at such a late date to what respondent believed was an  
17 entirely separate argument or assignment of error than  
18 contained in the Petition for Review.

19 We do not believe petitioner raised in his first assignment  
20 of error in the Petition for Review an allegation of violation  
21 of the Yamhill County Comprehensive Plan. Taking then,  
22 petitioner's statement at the time of oral argument as a  
23 request to amend the Petition for Review to include a new  
24 assignment of error, we believe petitioner's request was  
25 untimely and unduly prejudiced respondents' ability to  
26 adequately respond. Accordingly, we address only that  
27 contention made in the first assignment of error, that is, that  
28 the county failed to comply with statewide Goal 5 of the  
29 statewide planning goals.

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31 It may be that the county's view of the need to preserve  
32 this pit for use as a quarry may change when the county has  
33 completed its mineral resources inventory. The county  
34 estimated at oral argument that this task would be completed  
35 within a year.

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37 In addition, Goal 5 states "where conflicting uses have  
38 been identified in the economic, social, environmental and  
39 energy consequences of the conflicting uses shall be determined  
40 and programs developed to achieve the goal."

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In view of our conclusion that the county did not violate Goal 5, we do not address the matter of whether had Goal 5 been violated the county was required to amend its acknowledged comprehensive plan. Neither party to this appeal briefed the issue of the burden of proof which a proponent of an amendment to a comprehensive plan must meet in order to require the governing body to amend the comprehensive plan. In the absence of briefing by the parties and because it is not necessary to decide this case, we do not reach the issue of petitioner's burden of proof to require amendment of an acknowledged comprehensive plan.

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We note that ORS 244.130 requires that when a public official has a potential conflict of interest he must disclose the potential conflict. That statute also, however, provides expressly that no decision of a governing body shall be invalidated simply because a public official fails to disclose a potential conflict. Thus, even though Commissioner MaCaulay perhaps should have announced his potential economic interest in the outcome of the decision in this case, we do not believe it changes the basic duty of the petitioner to object to Commissioner MaCaulay's potential conflict of interest when the petitioner himself was aware of the existence of the potential conflict. We view the disclosure requirement in the statute to require giving notice to persons so that they might be able to inquire concerning the conflict and perhaps request that the official because of the potential conflict not participate in the decision. We do not believe that statute provides a petitioner who already has knowledge of the facts with any additional rights as far as being able to object for the first time on appeal to the official's participation in the decision making process.



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

HIGGINSON

Petitioner,

v.

YAMHILL COUNTY

Respondent.



LUBA 80-151  
LCDC DETERMINATION

The Land Conservation and Development Commission hereby adopts the proposed opinion and order of the Land Use Board of Appeals concerning allegations of Goal violations with the following modifications:

1. On page 3 at line 10 delete the word "only";
2. On page 3 at line 20 strike the entire sentence beginning with the word "Operation";
3. On page 4 at line 13 add a footnote after the word "use."

The footnote should read: In addition, Goal 5 states "where conflicting uses have been identified in the economic, social, environmental and energy consequences of the conflicting uses shall be determined and programs developed to achieve the goal."

DATED THIS 17<sup>th</sup> DAY OF February, 1981.

  
W. J. Kvarsten, Director  
for the Commission

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