

BEFORE THE LAND USE BOARD OF APPEALS

JUN 30 2 36 PM '81

OF THE STATE OF OREGON

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FRIENDS OF BENTON COUNTY, )  
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Petitioner, )  
 )  
v. )  
 )  
BENTON COUNTY AND )  
MORSE BROS., INC. )  
 )  
Respondents. )

LUBA NO. 81-024  
FINAL OPINION  
AND ORDER

Appeal from Benton County.

Richard C. Stein, Salem, filed the petition for review and argued the cause for petitioner. With him on the brief were Ramsay, Stein, Feibleman & Meyers.

Richard T. Ligon, Corvallis, filed a brief and argued the cause for Respondent Benton County.

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

Remanded. 6/30/81

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 NATURE OF THE DECISION

3 Petitioner seeks a reversal of the grant of a conditional  
4 use permit to Morse Bros., Inc., to expand a gravel extraction  
5 operation in Benton County.

6 STANDING

7 Standing is an issue in this case. Petitioners allege one  
8 of its members, Mr. Kenagy, appeared in the proceeding before  
9 the County Commissioners. He owns a house and property "on the  
10 opposite bank of the Willamette River from the proposed gravel  
11 pit, and approximately two (2) miles downstream." Petitioners  
12 claim the house is set back 70 feet from the bank and 140 feet  
13 from the low water mark, and petitioners further claim that a  
14 letter in the record from the Army Corps of Engineers shows the  
15 river channel could relocate, under certain conditions, and  
16 expose new lands to erosion. Petitioner claims an old river  
17 channel points at his property and his house. "Consequently,  
18 his [Mr. Kenagy's] home and property could be placed in  
19 jeopardy \* \* \* and \* \* \* he is aggrieved and/or adversely  
20 affected by this decision."

21 Respondent argues that Mr. Kenagy was not adversely  
22 affected by the decision. Respondent notes the Kenagy property  
23 is over two miles away from the Morse Bros.'s plant, and the  
24 alleged aggrievement "is at best speculative in nature."  
25 Respondent points to the stringent conditions imposed by the  
26 Board of Commissioners in their approval of the Morse Bros.,

1 Inc. expansion and asserts that "adequate flood protection on  
2 adjoining properties is assured." Respondent concludes that  
3 Mr. Kenagy has not demonstrated that he has a "real stake" in  
4 this controversy.

5 We agree that the likelihood of damage resulting to Mr.  
6 Kenagy's property appears to be remote. The letter from the  
7 Corps of Engineers, it seems to us, does not clearly indicate  
8 that Mr. Kenagy's property is at all threatened. However, the  
9 possibility of flooding is not so far removed from probability  
10 that we can say the likelihood of a flood is too remote to be  
11 considered in evaluating the alleged injury.<sup>1</sup> We cannot say,  
12 therefore, that the facts alleged by Mr. Kenagy are so  
13 speculative that they are not worthy of our consideration.

14 The test for standing rests not so much on the likelihood  
15 of the injury in an absolute sense but the likelihood of the  
16 injury should the facts plead be true. 1000 Friends of Oregon  
17 v. Benton Co. \_\_\_\_ Or LUBA \_\_\_\_ (LUBA No. 80-134, 1981);  
18 Parsons v. Josephine Co., \_\_\_\_ Or LUBA \_\_\_\_ (LUBA No. 80-159,  
19 1981). Petitioner has claimed that the Willamette River  
20 channel could relocate, could accelerate channel alterations,  
21 could expose new lands to erosion and place his home and  
22 property in jeopardy thereby. If these facts are true, the  
23 petitioner has alleged a sufficient injury, and he does have a  
24 "real stake" in the outcome of the case.

25 Petitioners have standing to bring this appeal.

26

1 FACTS

2 The Morse Bros, Inc. property consists of 151 acres east of  
3 the City of Corvallis along the east bank of the Willamette  
4 River. The soil type is generally SCS Class II agricultural  
5 soil. The Benton County Comprehensive Plan has designated this  
6 property for exclusive farm use. The area to be mined will  
7 include approximately 101 acres, and the property is within an  
8 area of general agricultural activity.

9 The top soil is approximately four to six feet deep. Morse  
10 Bros., Inc. will mine the gravel after removing the top soil.  
11 Morse Bros., Inc. intends to develop the site for recreational  
12 use after the mining as it is not feasible to reclaim the area  
13 for agriculture. The soil taken to expose the aggregate  
14 resource will be removed to other sites for agricultural  
15 purposes.

16 A hearing on the matter was held before the County  
17 Commissioners on January 13, 1981; and subsequent to the  
18 hearing, the Commissioners personally viewed the property. On  
19 January 30, 1981 the Commissioners' order reversing the earlier  
20 Planning Commission denial of the conditional use was entered.

21 The operator, Morse Bros., Inc., has capital improvements  
22 on the site including a concrete plant, a semi-mobile limestone  
23 plant, an asphalt plant, a crusher and a conveyor belt system.  
24 The property is near the Corvallis urban area and enjoys good  
25 highway access. Of the total acreage owned by Morse Bros.  
26 Inc., 50 acres is currently being mined for gravel, and, as

1 mentioned above, the proposed conditional use is for an  
2 expansion of that operation.

3 ASSIGNMENT OF ERROR NO. 1

4 Assignment of error no. 1 alleges that the "findings of  
5 fact of the Benton County Commissioners are inadequate to  
6 support their conclusions, being incomplete and conclusory."  
7 In the first part of petitioner's argument, petitioner quotes  
8 Section 4.I.b8 as follows:

9 "4.I.b8. Because productive soils overlay  
10 valuable subsurface aggregate material deposits on  
11 terraces of the Willamette River, prime agricultural  
12 soils should not be removed to allow new extraction  
13 sites unless annual river bar channel sources of  
14 aggregate material are depleted or unavailable. If  
annual river bar channel sources of gravel are not  
available, and terrace deposits are needed, aggregate  
material extraction needs, should be balanced against  
the need to maintain agricultural land on a  
case-by-case basis." (Emphasis added)

15 Petitioner argues that no findings were made that the river bar  
16 channel aggregate sources were "depleted or unavailable."

17 Respondent answers by saying that evidence was submitted  
18 showing river channel rock sources had been restricted by the  
19 State Department of Fish and Game in order to protect salmon  
20 runs. The county's findings on the matter note that Morse  
21 Bros., Inc. mines in the river channel, and the county's  
22 findings do recite that "[p]roduction from that site has been  
23 restricted by the State of Oregon in order to protect fish  
24 spawning areas." Record 4. There is no other finding bearing  
25 on the matter of whether aggregate sources are "depleted or  
26 unavailable," save a conclusion that restates the above

1 finding. However, the record includes testimony to the effect  
2 that the river aggregate does not replenish as fast as it is  
3 mined.

4 The Board views the finding quoted above and the record to  
5 be insufficient to meet the plan requirement that there be a  
6 showing that "annual river bar channel sources of aggregate  
7 material are depleted or unavailable." It is only after that  
8 showing is made that the county plan allows the county to  
9 consider aggregate mining on agricultural land. As we  
10 understand the county plan, once there has been a showing that  
11 river channels are depleted or unavailable, the county may then  
12 consider mining on agricultural land utilizing a balancing test  
13 for the need for aggregate against the need for agricultural  
14 land on a "case-by-case basis." The record simply does not  
15 show that river bar channel sources are depleted or  
16 unavailable, only that they are "restricted." We take  
17 restricted to mean something more akin to a limitation than to  
18 unavailability.

19 Petitioner next argues that the Benton County Conditional  
20 Use Ordinance requires a showing that gravel operation on prime  
21 agricultural soil will not have an adverse effect on the  
22 county's agricultural economy. Petitioner claims this  
23 provision was violated because the county made no finding "that  
24 this gravel operation on prime agricultural soil would not have  
25 an adverse impact on the county's agricultural economy."

26 Petition for Review 5. (Emphasis in original.)

1 The ordinance provision is as follows:

2 "3. Operations conducted for the exploration,  
3 mining and processing of geothermal resources as  
4 defined by ORS 522.010(4), aggregate and other mineral  
5 resources or other sub-surface resources, providing  
6 that such operations will be shown not to have an  
7 adverse impact on the agricultural economy of the  
8 County and; [sic] complete reclamation plans are  
9 provided showing how the affected area will be  
10 returned to agricultural use, if feasible, after  
11 depletion of the resources." Sec IV.04(3).

12 Respondent answers by noting the county's finding showing  
13 that land in active farming has actually increased in the years  
14 between 1970 and 1978. The county notes that the expansion of  
15 the aggregate operation into an additional 100 acres "is an  
16 extremely small land area in relation to the total acreage  
17 under cultivation in Benton County." Respondent's Brief at 9.

18 The county's finding does not address exactly Section  
19 IV.04(3) as quoted above, but the county's findings taken as a  
20 whole suggest that the additional 100 acres of farmland put to  
21 aggregate use will not damage the agricultural economy in the  
22 area. The finding is as follows:

23 "9. Although both agricultural land and aggregate  
24 resource land are limited in their availability,  
25 both are essential to the continued growth,  
26 productivity and well being of the citizens of  
27 Corvallis and Benton County. The availability of  
28 high quality aggregate resource land (such as the  
29 proposed conditional use permit site), is much  
30 more limited than the availability of  
31 agricultural land because of the necessity of  
32 having aggregate resource land located near  
33 population centers. According to the Extension  
34 Economics Information Office, Oregon State  
35 University, the acreage of corn, small grains,  
36 hay, field seed, vegetables, berries, fruits and  
37 peppermint grown in Benton County increased from

1 50,395 acres in 1970 to 61,219 acera [sic] in  
2 1978, an increase of 21 percent (Exhibit 'F').  
3 During the same period of time, in excess of  
4 3,667 tons (encompassing in excess of 44 acres)  
of sand and gravel was excavated in Benton County  
(Tables 8 and 9, Short Paper 27; Morse Brothers,  
Inc., records)."

5 This finding is marginally sufficient to let a reasonable  
6 person conclude that removal of 10 acres from agricultural  
7 production will not harm the agricultural economy. We do not  
8 find a serious violation of Section 14.04(7) to exist given the  
9 findings in this case.

10 The petitioner next cites Section IV.05(2) of the county  
11 zoning ordinance regarding "alternate criteria for conditional  
12 uses" and argues the county's findings on the alternate  
13 criteria are inadequate.

14 "2. Alternate criteria for conditional uses  
15 .04(1) - .04(6) certain uses:

16 "a. There is a demonstrated need that the use  
17 will provide the area residents or the general public  
benefits which outweigh the need for, or benefits of,  
the existing or potential farm use; and

18 "b. There is no other feasible location for the  
19 proposed use that would meet all of the criteria in  
.05; and

20 "c. It will not cause adverse long term  
21 environmental, economic, social and energy  
consequences for the area, the region or the state."

22 The county responds that its findings do show, firstly, a  
23 demonstrated need for the aggregate resource. The county's  
24 findings discuss a long range shortage of gravel in Benton  
25 County concluding that "existing sites will be depleted in 25  
26 years or less." The county's findings also show that the

1 particular site in question is favorably located near Corvallis  
2 and is buffered from other potentially incompatible uses  
3 thereby minimizing any environmental impact. The county then  
4 points to its finding no. 16 which cites the Morse Bros. Inc.  
5 report in which the need for aggregate resources is discussed.  
6 The report is detailed, and it lists a number of reasons why  
7 the rock from the proposed site is superior to other rock. The  
8 report also says the rock is desirable for economic reasons  
9 owing to the quarry site.

10 Given the detail in the findings, we can agree that the  
11 rock from the proposed site is of high quality and very  
12 desirable for practical and economic reasons. We can even  
13 conclude that there will be a demand for the rock in the market  
14 place. However, the report and the findings do not clearly  
15 show that there is a "demonstrated need," for the rock as  
16 required by Sec IV.05(2)(a). As we read the quoted portion of  
17 the conditional use ordinance, "demonstrated need" means  
18 something more immediate than a need in the long term future.  
19 The shortage of rock will be upon the county in 25 years.  
20 There is nothing in the findings that we can see which supports a  
21 present "need" for the rock other than a possible market  
22 preference. We do not believe this preference equals  
23 demonstrated need. See Still v. Marion Co., 42 Or App 115  
24 (1979).

25 We must conclude that the county's findings are not  
26 sufficient to show that a demonstrated need exists for gravel

1 from this particular site.

2 Assignment of error no. 1 is sustained in part.

3 ASSIGNMENT OF ERROR NO. 2

4 Assignment of error no. 2 alleges that "[t]here is not  
5 substantial evidence to support any purported finding of  
6 demonstrated need for gravel over agricultural land."

7 Because we have concluded that the findings do not  
8 themselves support a "demonstrated need," we need not address  
9 this assignment of error.

10 ASSIGNMENT OF ERROR NO. 3

11 Assignment of error no. 3 alleges that "[t]he Benton County  
12 Commissioners misconstrued the applicable law under LCDC Goal 3  
13 and ORS 215.243 by using a simple balancing test in determining  
14 the need for gravel versus the need for agricultural land."

15 The petitioner's main attack here is on a county finding  
16 that suggests the need for aggregate land is equal to the need  
17 for agricultural land. The finding in question is as follows:

18 "1. This conditional use request reveals a  
19 unique dilemma created by nature. The Willamette  
20 River has deposited high quality aggregate in the  
21 valley bottom. It also has left excellent  
22 agricultural soils on top of the aggregate. There is  
a need for both the aggregate and for the agricultural  
soil. Accordingly the Board approaches this issue  
using a balancing test considering all of the factors  
which have been presented."

23 Petitioner argues the legislature has made it clear that the  
24 need for agricultural land is greater because the need for  
25 aggregate is only recognized as a "conditional" use in  
26 exclusive farm use zones. See ORS 215.213(2). Petitioner

1 says that there should be a presumption in favor of  
2 agricultural land vis-a-vis aggregate extraction. Petitioner  
3 also claims that under the implementation section of LCDC Goal  
4 3, nonfarm uses permitted in ORS 215.243 "should be minimized  
5 to allow for maximum agricultural productivity." LCDC Goal 3.

6 The designation of the conditional use and zoning ordinance  
7 is, according to respondent, "proof of public need for such a  
8 use." Christensen v. Eugene Planning Comm., 24 Or App 131, \_\_\_  
9 P2d \_\_\_ (1976). The county's own comprehensive plan, as noted  
10 above, establishes a balancing test between the need to  
11 maintain agricultural land and the extraction of aggregate  
12 materials.

13 We recognize the legislative policy in favor of the  
14 exploitation of the aggregate resources in the state. The high  
15 value placed on aggregate resources is evidenced in ORS  
16 517.760.<sup>2</sup> It is not clear to us that agricultural uses are  
17 considered by the legislature to be paramount in all cases, and  
18 resolution of this issue is really not important to the outcome  
19 of this case. In this case, the county's ordinances control  
20 the balancing test and give agricultural uses preference. The  
21 "demonstrated need" requirement in the conditional use  
22 ordinance places a great burden on anyone wishing to make use  
23 of this conditional use. Also, Section IV.04(3), supra,  
24 clearly requires a showing that the agricultural economy not be  
25 damaged as a result of allowing an aggregate extraction  
26 permit. We think these standards are quite sufficient when

1 utilized in conjunction with the county's plan to provide an  
2 adequate set of scales to balance agricultural needs against  
3 aggregate needs. Our difficulty with the county's decision is  
4 that it appears that the county has not followed its plan and  
5 its conditional use ordinance in concluding that a demonstrated  
6 need for aggregate exists.

7 Assignment of error no. 3 is denied insofar as it finds a  
8 violation of LCDC Goal 3 and ORS 215.243.

9 ASSIGNMENT OF ERROR NO. 4

10 Assignment of error no. 4 alleges "[t]he Benton County  
11 Commissioners erred in hearing this case before establishing  
12 criteria of the review of mineral extraction applications as  
13 required by the Benton County 'Comprehensive Plan.'

14 Section 4.1.b5 of the county comprehensive plan provides

15 "Benton County shall establish performance  
16 standards or specific criteria for the review of  
17 mineral extraction applications. These should include  
18 the following: proper maintenance of air and water  
19 quality, fish and wildlife habitat, erosion control,  
20 visual quality, noise standards and access  
21 requirements, the efficient use of the  
22 resource, reclamation of the site once the resource  
23 has been exhausted, and determination of the  
24 subsequent use of the site. If a mineral extraction  
25 conditional use permit is applied for, the applicant  
26 shall provide to the County staff a copy of the DOGAMI  
application which includes pertinent information  
regarding extraction, reclamation and subsequent use  
of the extraction site." Section 4.1.b5

23 Petitioner claims these standards were not established, and the  
24 action by the Benton County Commissioners is, therefore,  
25 impermissible.

26 Respondent says the quoted portion of the plan is simply a

1 future goal that respondent wishes to achieve. The plan does  
2 not require, claims respondent, the standards to be developed  
3 before mining operations may be considered. Respondent says  
4 that adequate standards regarding aggregate production exist in  
5 the county zoning ordinance at Section IV.05.

6 We agree with the respondent. The standards that the  
7 county is to adopt under its quoted plan provision are  
8 "performance standards." The county plan lays out in detail  
9 what performance standards should include, and we read the  
10 county's findings and the many conditions imposed on the  
11 applicant to address each of those performance standards. We  
12 do not believe all activity need come to a halt while the  
13 county writes an ordinance which simply combines the  
14 performance standards in the plan with the conditional use  
15 requirements in the ordinance.

16 Assignment of error no. 4 is denied.

17 ASSIGNMENT OF ERROR NO. 5

18 Assignment of error no. 5 alleges that [t]he Benton County  
19 Commissioners failed to follow the applicable procedure in that  
20 they took an impermissible view of the subject property."

21 Apparently, the commissioners viewed the property after the  
22 hearing had been closed. Petitioner says that it is not clear  
23 whether the view was used to supplement the evidence in the  
24 case, but in any event, no prior notice was given and no  
25 opportunity was given to rebut any information gained.

26 Respondent says that the commissioners did not acquire any

1 new evidence. Respondent says the purpose of the view was  
2 simply to familiarize the commissioners with the location and  
3 the proposed operation.

4 We recognize that no statement appears in the record or the  
5 findings as to what the commissioners found in their view of  
6 the property. We have every reason to believe that nothing  
7 impermissible occurred to the detriment of the petitioner.  
8 However, we do believe a requirement exists in the law that any  
9 view of property be disclosed on the record so that any  
10 evidence presented is subject to effective rebuttal by other  
11 parties in the case. This requirement is part of due process  
12 of law to which any participant in a quasi-judicial land use  
13 case is entitled. Fasano v. Washington County, 264 Or 574, 507  
14 P2d 23 (1973). We believe the commissioners are certainly  
15 entitled to take a view of the property, and a view may indeed  
16 be necessary in order to assist the commissioners in  
17 understanding the evidence presented. However, that view must  
18 be disclosed in sufficient detail to allow petitioners a  
19 meaningful opportunity to comment on and rebut, if needed, any  
20 evidence or impression gained by the view before the decision  
21 is made... Concerned Property Owners v. Klamath County, (LUBA  
22 No. 81-026) (Proposed Opinion, June 9, 1981).

23 Assignment of error no. 5 is sustained.

24 This matter is remanded to Benton County for proceedings  
25 not inconsistent with this opinion.

26

1 COX, Referee, Concurring.

2 I have the same problem with the holding regarding a  
3 showing of "need" in this case that I discuss in my concurring  
4 opinion in DLCD v. Tillamook County, \_\_\_ Or LUBA \_\_\_ (LUBA No.  
5 81-004, 1981). "Need" is an amorphous term whose definition is  
6 not set forth by Benton County. Maybe a better standard would  
7 be based on supply and demand for aggregate projected a  
8 specific number of years into the future.

1 FOOTNOTES

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3 1

4 The letter from the Corps of Engineers mentions "no  
5 detrimental effect on the stability of the river channel will  
6 occur if a 200-foot-wide buffer strip is left between the  
7 mining operation and the Willamette River and East Channel."  
8 Record 46. The county approval of the conditional use requires  
9 compliance with Corps of Engineer rules, but the 200 foot wide  
10 buffer strip is not mandated and it has not been suggested that  
11 such a buffer is part of the corps' body of "rules."

12  
13 2

14 ORS 517.760 states:

15 "(1) The Legislative Assembly finds and declares  
16 that:

17 "(a) The extraction of minerals by surface  
18 mining operations is a basic and essential activity  
19 making an important contribution to the economic  
20 well-being of the state and nation.

21 "(b) Proper reclamation of surface-mined lands  
22 is necessary to prevent undesirable land and water  
23 conditions that would be detrimental to the general  
24 welfare, health, safety and property rights of the  
25 citizens of this state.

26 "(c) Surface mining takes place in diverse areas  
27 where the geologic, topographic, climatic, biological  
28 and social conditions are significantly different and  
29 that reclamation operations and the specifications  
30 therefor must vary accordingly.

31 "(d) It is not practical to extract minerals  
32 required by our society without disturbing the surface  
33 of the earth and producing waste materials and that  
34 the very character of many types of surface mining  
35 operations precludes complete restoration of the  
36 affected lands to their original condition.

37 "(e) Reclamation of surface-mined lands as  
38 provided by ORS 517.750 to 519.900 and subsection (4)  
39 of 517.990 will allow the mining of valuable minerals  
40 in a manner designed for the protection and subsequent  
41 beneficial use of the mined and reclaimed lands.

1           "(2) The Legislative Assembly, therefore,  
2 declares that the purposes of ORS 517.750 to 517.900  
and subsection (4) of 517.990 are:

3           "(a) To provide that the usefulness, productivity  
4 and scenic values of all lands and water resources  
5 affected by surface mining operations within this state  
6 shall receive the greatest practical degree of  
protection and reclamation necessary for their  
intended subsequent use.

7           "(b) To provide for cooperation between private  
8 and governmental entities in carrying out the purposes  
of ORS 517.750 to 517.900 and subsection (4) of  
517.990."





## STATE OF OREGON

## INTEROFFICE MEMO

TO: MEMBERS OF THE LAND CONSERVATION AND DEVELOPMENT COMMISSION      DATE: 6/9/81

FROM: THE LAND USE BOARD OF APPEALS

SUBJECT: FRIENDS OF BENTON COUNTY V. BENTON LUBA NO. 81-024

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

This case is about a request to expand an aggregate mining operation onto 100 acres of farmland near the Willamette River. The petitioner has made an allegation that the expansion is a violation of Goal 3 simply because the county utilizes a balancing test to weigh the need for aggregate against the need for farmland. We find against the county because it failed to establish a "demonstrated need" for aggregate materials at this time. We did not find that the balancing test was per se a violation of Goal 3 particularly as Goal 3 recognizes aggregate mining as a conditional use. Our review of the county ordinances suggests that the county has set up adequate safeguards for agricultural lands. Our difficulty with the case is simply that we felt the county did not meet its own requirements.

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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