

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

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KALMIOPSIS AUDUBON SOCIETY,)
a nonprofit corporation; and)
CATHERINE KROGER, and DAVID)
WERKSCHUL,)
Petitioners,)
v.)
CURRY COUNTY,)
Respondent,)
and)
RIVER'S END RANCH, INC. and)
TIDEWATER CONTRACTORS, INC.,)
Respondent-Intervenors)

LUBA NO. 81-067

FINAL OPINION
AND ORDER*

Appeal from Curry County.

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

Richard Mickelson, Gold Beach, filed a brief on behalf of Respondent Curry County.

Respondent-Intervenor withdrew from the case.

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

Remanded. 10/15/81

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).

*In order to comply with Oregon Laws 1979, ch 772, sec 6(3), LCDC's comments regarding this opinion have been incorporated in their entirety by attachment hereto.

1 COX, Referee

2 NATURE OF PROCEEDING

3 Petitioners appeal Curry County Order No. 4037. The order
4 grants a conditional use permit to Respondent-Intervenors'
5 River's End Ranch, Inc. and Tidewater Contractors, Inc. for a
6 "cement and asphalt plant site." Petitioners allege that the
7 decision can be interpreted as permitting the removal of gravel
8 from a Rogue River gravel bar. Respondent Curry County argues
9 that the gravel removal permit of Respondent-Intervenors
10 River's End Ranch, Inc. and Tidewater Contractors, Inc.
11 (hereinafter R.E.R) was not at issue in Order No. 4037.

12 STANDING

13 Petitioners' standing to object to the conditional use
14 permit as it relates to the placement of an asphalt plant, a
15 cement plant, and a rock crusher on the subject site is not
16 contested. Curry County alleges, however, that petitioners do
17 not have standing regarding a permit to remove gravel from the
18 Rogue River. We find petitioners have standing to contest not
19 only the conditional use permit approval to place the various
20 plants and equipment on the site but also to contest any other
21 activity which arguably is allowed by Curry County's order.
22 The order's scope is unclear on its face but it can be
23 interpreted to include a permit for removal of gravel. Since
24 respondent does not challenge standing to attack the placement
25 of the asphalt plant, etc., we find petitioners have standing
26 to attack the permit for gravel removal. The issues are the

1 same and are related subjects of an apparently single county
2 decision.

3 ALLEGATIONS OF ERROR

4 Petitioners assert that the order is in violation of
5 Statewide Planning Goals 2, 3, 4, 5, 7, 8, 16 and 17. As
6 regards those goals, petitioners not only allege that the
7 county failed to make appropriate findings and thereby
8 improperly applied the Statewide Goals but also that there is
9 no substantial evidence in the record to support the findings
10 which were made. In addition, petitioners assert that Curry
11 County is without authority to grant the subject conditional
12 use permit because the permit is governed by an LCDC
13 enforcement order which prohibits Curry County's approval of
14 R.E.R.'s request to construct the cement and asphalt plants.

15 FACTS

16 In January, 1981, R.E.R. submitted a conditional use permit
17 application in an attempt to secure approval from the Curry
18 County Planning Commission for the establishment of "a cement
19 and asphalt plant site" on property known as Wedderburn Ranch.
20 The entire Wedderburn Ranch consists of approximately 1200
21 acres. The conditional use permit application states that the
22 site in question consists of approximately 10 acres. The
23 subject property is currently zoned by Curry County as forest
24 and grazing (F-G). The application indicates that the type of
25 equipment to be used on the proposed 10 acre site is a portable
26 asphalt plant, a portable concrete plant and a portable rock

1 crusher.

2 The county's final order reduced the size for the proposed
3 site to "plus or minus five acres." The site is adjacent to an
4 existing rock quarry and concrete plant site. The county in
5 its order found that the current use of the subject property is
6 as open pasture land. The land contains SCS Class II soil. In
7 its order the county found that the proposed industrial site
8 has agricultural soil capability. In addition to pasture, a
9 SCS District Conservationist reported that the site is
10 potentially suitable for growing grasses and legumes including
11 lily bulbs. In addition, although there has been no historic
12 use of the five acre site for forestry, the property is
13 potentially suitable for the growing of sitka spruce, douglas
14 fir, western hemlock and red alder.

15 There is no specific legal description for the proposed
16 "plus or minus five acre" site. The only legal description in
17 the record is that of the entire Wedderburn Ranch, which
18 contains some 1200 acres. The site is near the Rogue River and
19 is considered part of the Rogue River estuary. In February of
20 1981, R.E.R. procured a fill and removal permit from the
21 Division of State Lands (hereinafter DSL) for extraction of
22 100,000 cubic yards of sand and gravel from the Rogue River
23 gravel bar which is either adjacent to or part of the site,
24 depending on the definition of "the site," used. The permit
25 authorizes the removal of the 100,000 cubic yards of sand and
26 gravel from an area described in the permit as being a portion

1 of the Wedderburn Ranch and encompassed by the Rogue River.

2 The permit states in pertinent part:

3 "(2) This permit does not authorize any work
4 that is not in compliance with local zoning or other
5 local, state, or federal regulations pertaining to the
6 operations authorized by this permit. The permit
7 holder is responsible for obtaining the necessary
8 approvals and permits before proceeding under this
9 permit."

10 It is not clear from the contested Curry County order whether
11 it is intended to be the local approval contemplated by the DSL
12 permit. Respondent Curry County argues that the actual permit
13 to remove gravel was granted by DSL and since that permit was
14 not appealed to LUBA within the 30 days required under Oregon
15 Laws 1979, Chapter 772, the issue of gravel removal is not
16 before this Board.

17 A review of order 4037 does not indicate exactly its
18 scope. Statements in Order 4037 do include references to a
19 gravel extraction operation. For example, on page 6 of the
20 order Item F states:

21 "The riverwash bed (gravel bar) proposed to be used in
22 this proposal is a renewal [sic] resource at this
23 location. The utilization of such renewable resources
24 is encouraged and planned for in the County's
25 Comprehensive Plan and L.C.D.C. goals."

26 In addition, Item F on order page 6 states:

27 "Under the Rogue River Estuary Plan gravel removal is
28 recognized as a valid and viable activity to be
29 maintained."

30 In addition, on page 7 of the Curry County order under the
31 heading "Applicable Zoning Provisions" it is stated:

32

1 "Section 2.0220(15) establishes cement and asphalt
2 plants as conditionally acceptable in the
3 Forest-Grazing (F-G) zone. Section 6.0040 (9) (a) &
4 (b) sets standards for mining, quarrying, or other
5 extraction activities." (Emphasis added)

6 Further, on page 18 of the contested order there is an entry
7 regarding the applicability of Statewide Goal 16 - Estuarine
8 Resources. The order states:

9 "1. The proposed gravel removal site is located in
10 the Rogue River Estuary and specifically in the
11 conservation management unit defined in the City
12 of Gold Beach Comprehensive Plan. * * *

13 "2. The principal proposed industrial activity that
14 is located on the estuary shoreline is for gravel
15 removal which is an allowed use in an estuary
16 conservation management unit. (Ref. LCDC Goal
17 16).

18 "3. Since this application is for the expansion of an
19 existing gravel removal operation * * *

20 "4. The proposed gravel removal operation in this
21 part of the estuary will not have an adverse
22 impact on the fish and wildlife * * * *"

23 The record indicates that many of the above quoted statements
24 are lifted from R.E.R.'s conditional use permit application.

25 The property in question is within the jurisdiction of
26 Curry County and is subject to a July 11, 1980 Land
27 Conservation and Development Commission enforcement order
28 against Curry County. In pertinent part, the July 11, 1980
29 enforcement order prohibited Curry County from approving any
30 land use actions "including but not limited to plan and zone
31 changes, subdivision, major and minor partition approvals, and
32 issuance of conditional use, building or other similar permits,
33 * * *" on specified lands.

1 DECISION

2 Petitioners first assert that the scope of Curry County
3 Order 4037 is imprecise in that it fails to delimit the site on
4 which the proposed project will be located and is not clear as
5 to exactly what activities are approved by the order.

6 Petitioners reason that ambiguity in the scope of the order
7 results in an inability to know exactly which site specific
8 goals are applicable and what uses may be allowed on the
9 property.

10 Respondent Curry County counters that Order No. 4037
11 clearly delineates the site of the proposed use as being plus
12 or minus five acres located on North Bank Rogue River Road and
13 behind (northwest of) the existing Pacific Ready-Mix, Inc.
14 rock quarry and concrete plant. Citing a staff report and a
15 map designated as Exhibit A, respondent argues that there is
16 sufficient specificity in the site description to eliminate any
17 ambiguity as to the exact property governed by the Order.

18 Statewide Goal 2 indicates that land use plans adopted by
19 local governments shall be the basis for specific
20 implementation measures. The goal requires that there will be
21 an adequate factual base for all decisions and actions related
22 to the use of land.¹ Since the statewide goals must be
23 applied to individual land use decisions prior to
24 acknowledgment of the county's comprehensive plan, Goal 2's
25 requirement of specificity is applicable to land use decisions
26 made prior to plan acknowledgment. If it were otherwise, at

1 the time of acknowledgment, the relationship of prior decisions
2 to the proposed comprehensive plan would not be fully
3 ascertainable.

4 The portions of the record cited by the respondent are at
5 best marginally descriptive. Exhibit A is a hand-drawn,
6 multi-colored map entitled "Preliminary Site Plan for a
7 Proposed Concrete and Asphalt Plant" drawn to a scale of one
8 inch equals 100 feet. The map does not contain tax lot lines
9 but does indicate section separations showing the property to
10 be in Section 30, Township 36 South. There are various uses
11 indicated on the map however, the exact description or location
12 of those uses is not set forth with any specificity. The map
13 includes a designation entitled "Site of Existing Concrete
14 Plant, Pacific Ready-Mix, Inc." In addition, across what is
15 entitled the "Old Oregon Coast Highway" and some distance from
16 the above mentioned Pacific Ready-Mix site is a large gray area
17 entitled "Gravel Removal Area." This gravel removal area abuts
18 the main channel of the Rogue River.

19 Petitioners' argument is that the property is located in a
20 sensitive area (Rogue River Estuary) and without more
21 specificity a slight error in location of the use could have
22 great impact on the estuarine resources which surround the
23 site. Furthermore, respondents do not respond to petitioners'
24 allegation regarding the lack of specificity in the order
25 relating to the removal of gravel. As was pointed out in the
26 facts section of this order, the county found and the applicant

1 seems to have intended that a portion of this order related to
2 the necessary approval for the removal of gravel under the DSL
3 permit.

4 This Board is unable to determine exactly the perimeters of
5 the "plus or minus five acre" site being proposed for this
6 use. In addition, the order is confusing as to whether or not
7 it is intended to allow for the extraction of 100,000 cubic
8 yards of sand and gravel. Therefore, we find that Goal 2 has
9 been violated as petitioners contend. The order lacks the
10 specificity required of decisions and actions. The lack of
11 specificity prohibits the determination of whether an adequate
12 factual base for the decision exists and would hinder future
13 incorporation of the decision into the county's comprehensive
14 plan.

15 EXCEPTION TO GOALS 3 and 4

16 Petitioners argue that because of the soil class on the
17 property, both Statewide Goals 3 and 4 are applicable and the
18 county failed to properly consider those goals. Even though
19 the county recognized the property as being agriculture land,
20 it did not take a Goal 2 exception to Goal 3. Instead, the
21 county found that the proposed use not only complies with ORS
22 215.213(2) but that the site is committed to industrial and
23 hence non-resource use. Specifically the county found that:

24 "[a]n exception to Statewide Goal 3 Agricultural Lands
25 is not required due to the following reasons:

26 "(1) The subject site is already committed to
Non-farm/Non-forest uses. The site has been

1 committed to industrial use for the past several
2 years.²

3 "(2) The subject site is composed of SCS Class IIw-IVw
4 soils and Statewide Goal 3 Agricultural Lands
5 defines SCS Class I through IV soils as
6 Agricultural Soils subject to regulation under
7 Goal 3. Goal 3 defines 'Farm Use' to be as set
8 forth in ORS. 215.203 and includes the non-farm
9 uses authorized by ORS. 215.213. The subject
10 proposal is a conditionally permitted activity or
11 use under provisions of ORS. 215.213, and
12 therefore, conditionally permitted under Goal 3,
13 and a Goal 3 exception is not required.

14 "(3) The subject property falls under the requirements
15 of L.C.D.C. Goal 3 and the proposed use is
16 consistent with Goal 3 should the property
17 ultimately be zoned under the provisions of ORS
18 215 when the county comprehensive plan is finally
19 acknowledged.

20 "(4) The subject proposal is a conditionally permitted
21 activity or use in the Curry County
22 Forest-Grazing (F-G) zone.

23 "(5) The subject site is located within the City of
24 Gold Beach Urban Growth Boundary.

25 "(6) The subject site is designated as 'Industrial
26 Land' in the Gold Beach UGB.

27 "(7) L.C.D.C. Field Representative Glen Hale has
28 determined that the proposed use is an accessory
29 use of the land for purposes of considering the
30 application under the LCDC Enforcement Order."
31 (Record 27-28)

32 Respondent Curry County does not respond to the petitioners'
33 allegations regarding Goals 3 and 4.³

34 Petitioners first argue that the county has not complied
35 with ORS 215.213(2). ORS 215.213(2) states:

36 "The following nonfarm uses may be established,
37 subject to the approval of the governing body or its
38 designate, in any area zoned for exclusive farm use:

39 * * *

1 "(b) Operations conducted for the mining and
2 processing of geothermal resources as defined ORS
3 522.005 or exploration, mining and processing of
4 aggregate and other mineral resources or other
5 subsurface resources." (Emphasis added)

6 The record indicates that the property in question has not
7 been zoned EFU. In addition, ORS 215.213(2) requires that the
8 approval of the governing body be based upon certain
9 standards. The standards relied upon by the county have not
10 been set forth with any particularity in this proceeding. It
11 could be that the county is relying upon provisions in its
12 zoning ordinance governing the issuance of conditional use
13 permits as the pertinent standards. The county's order,
14 however, does not indicate what those standards consist of and
15 the record does not seem to contain a copy of the ordinance.
16 (See ORS 215.416). A better understanding of the county's
17 position may have resulted had the county appeared on this
18 issue.

19 Petitioners next argue that the site is not irrevocably
20 committed to nonfarm/nonforest use. Respondents reasoning for
21 reaching the conclusion that the property is committed to
22 nonfarm/nonforest uses is set forth in footnote 2 of this
23 opinion. The county's findings regarding the commitment of
24 this property are inconsistent with prior findings made by the
25 county and do not accord with the record. For instance,
26 "commitment" finding no. 3 states that the subject site has
27 been in industrial use for many years. (See footnote 2). In
28 its order under findings 9A (3), (4) and (5), however, the

1, county states:

2

3 "(3) The proposed industrial site has agricultural
4 soil capability and has been historically in
5 agricultural use as pasture land.

6 "(4) SCS District Conservationist, Beverly Short,
7 inspected the site and she reported that the
8 Bayside soils present at the site are potentially
9 suitable for growing grasses and legumes
10 including lily bulbs; however,

11 "(5) Soil limitations encountered, surrounding
12 topography, and the size of te unit, all tend to
13 render the site uneconomical to install the
14 required drainage and irrigation facilities
15 needed to produce high quality forage, row crops,
16 or small grains."

17 The findings go on to indicate that even though the county
18 claims the parcel is too small to farm as a unit the five-acre
19 pasture could support about 6,000 pounds of live animal weight
20 for one year with rotations and intensive management.⁴ In
21 addition, the county indicates that the subject site can
22 potentially produce approximately \$4,500 per acre, once every
23 60 years, in timber products. Using this figure the county
24 indicates that at a maximum the total plus or minus five acre
25 site can potentially produce \$20,000-\$25,000 once every sixty
26 years or about \$375 per year in present dollars if used for
27 timber purposes.

28 The inconsistency of the findings leaves this Board
29 wondering what, in fact, the county truly believes regarding
30 this property. As above quoted, the county finds that the
31 subject site is capable of forest and farm uses but then turns

1 around and describes the property first as being physically
2 built upon and then later says that the proposal is for
3 expansion of an existing use. The county also indicates there
4 has been extensive physical alteration of the site from river
5 gravel and quarry residual being deposited on the property.
6 Such a position, of course, does not comport with the findings
7 regarding the potential for raising crops and timber on the
8 property.

9 The test for commitment is set forth in 1000 Friends of
10 Oregon v. Clackamas County, ____ Or LUBA ____ (80-060, 1981).
11 In that case we held that Goal 2 requires the findings to not
12 only be supported by substantial evidence but also compel a
13 reasonable person to conclude as the county did that the
14 property is committed. Given the inconsistency in the county's
15 findings, a reasonable person would not be compelled to
16 conclude that commitment to nonresource use exists. Therefore,
17 we find that the Respondent Curry County has failed to comply
18 with Goals 3 and 4.⁵

19 STATEWIDE GOAL 16

20 Probably the most significant of the petitioners'
21 allegations of error that we will treat in this opinion deals
22 with Statewide Goal 16, Estuarine Resources. The goal's
23 purpose is to recognize and protect the unique environmental,
24 economic and social values of each estuary and associated wet
25 lands; and to protect, maintain, where appropriate develop, and
26 where appropriate restore the long-term environmental, economic

1 and social values, diversity and benefits of Oregon's
2 estuaries. The goal requires that comprehensive management
3 programs to achieve these objectives be developed for all
4 estuaries by appropriate local, state and federal agencies.

5 The goal calls for classification of Oregon's estuaries in
6 order to specify the most intensive level of development or
7 alteration which may be allowed to occur within each estuary.
8 The goal sets forth inventory requirements to provide necessary
9 information for designating estuary uses and policies. The
10 goal then sets forth a plan, based upon the inventories, to
11 classify the estuarine areas into management units. The
12 management unit classifications include: "Natural,
13 Conservation, and Development."⁶

14 In the "natural" management unit little or no actual
15 construction in or modification of the estuary is allowed.
16 Permissible uses in "conservation" units are those allowed in a
17 management unit as well as dredging of existing facilities,
18 minor navigational improvements, mining and mineral extraction
19 as well as others. In the "development" unit more intense
20 development or alteration will be allowed.

21 The goal then sets forth fairly restrictive and stringent
22 implementation requirements which include:

23 "Unless fully addressed during the development and
24 adoption of comprehensive plans, actions which would
25 potentially alter the integrity of the estuarine
26 ecosystem shall be preceded by a clear presentation of
the impacts of the proposed alteration, and a
demonstration of the public's need and gain which
warrant such modification or loss."

1 All parties agree that the subject site is within the Rogue
2 River estuary. The county found that the estuary was
3 classified as a "conservation management unit." The basis for
4 its determination was that the property had been so designated
5 in the City of Gold Beach Comprehensive Plan. The county then
6 reasoned since the comprehensive plan of Gold Beach designated
7 this property as a conservation management unit, the gravel
8 removal is allowed. Based on that reasoning, the county
9 granted the CUP for the asphalt and cement plants. The
10 county's determination is faulty for two reasons. First: it is
11 the responsibility of the county to determine whether or not
12 this is a conservation management unit. Gold Beach's
13 Comprehensive Plan has not been acknowledged to be in
14 compliance with the goals and there is no finding in the record
15 indicating any attempt by the county to determine on its own
16 which type of management unit suits this property.⁷

17 Second, while gravel extraction appears to be allowed in a
18 conservation management unit, the proposed asphalt plant,
19 cement plant or rock crusher may not be. The county's findings
20 only relate to the removal of gravel. It is not clear that the
21 conservation management unit designation will allow the plants and
22 crusher. The county failed to address this possible restriction.

23 We do not address petitioners' other assignments of error
24 which include concerns about Goals 5, 7, 8 and 17.⁸ Based on
25 the foregoing, we remand Curry County Order 4037 for further
26 proceedings not inconsistent with this opinion.

FOOTNOTES

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Goal 2, Part I states:

"PART I - PLANNING: To establish a land use planning process and policy framework as a basis for all decisions and actions related to use of land and to assure an adequate factual base for such decisions and actions.

"City, county, state and federal agency and special district plans and actions related to land use shall be consistent with the comprehensive plans of cities and counties and regional plans adopted under ORS 197.705 through 197.795.

"All land use plans shall include identification of issues and problems, inventories and other factual information for each applicable state-wide planning goal, evaluation of alternative courses of action and ultimate policy choices, taking into consideration social, economic, energy and environmental needs. The required information shall be contained in the plan document or in supporting documents. The plans, supporting documents and implementation of ordinances shall be filed in a public office or other place easily accessible to the public. The plans shall be the basis for specific implementation measures. These measures shall be consistent with and adequate to carry out the plans. Each plan and related implementation measure shall be coordinated with the plans of affected governmental units.

"All land use plans and implementation ordinances shall be adopted by the governing body after public hearing and shall be reviewed and, as needed, revised on a periodic cycle to take into account changing public policies and circumstances, in accord with a schedule set forth in the plan. Opportunities shall be provided for review and comment by citizens and affected governmental units during preparation, review and revision of plans and implementation ordinances.

2 Additional findings regarding the exceptions process
3 state:

3 "Curry County did not take an exception via the LCDC
4 Goal 2 process for the subject land use action on the
5 basis of the following findings:

- 5 "1. The LCDC policy is that land use actions are
6 excluded from the exceptions procedure if
7 findings can be made that the land is:
 - 7 "a) physically developed or built upon
 - 8 "b) irrevocably committed to nonfarm or
9 nonforest uses in urban and rural areas.
- 9 "2. Curry County contends that the subject site is
10 excluded from the exceptions process by meeting
11 both of the above criteria with the following
12 supplementary findings.
- 12 "3. The subject site has been in industrial use for
13 many years as a cement plant, rock crusher, and
14 quarry site; and that the land use action
15 approved allows expansion of the present site.
- 14 "4. The expansion of the existing site will involve
15 the siting of an additional cement plant an
16 asphalt plant and crushing facilities at the same
17 site (see exhibit).
- 17 "5. The specific lands upon which these facilities
18 will be sited has been physically built upon,
19 used for outdoor storage, truck parking and
20 quarrying and has not been in agricultural use at
21 least for the past 10 years.
- 20 "6. The extent to which the natural soil has been
21 altered by the present industrial use of the land
22 makes it impossible to restore the site to its
23 former agricultural productivity.
- 22 "7. The presently vacant areas to the west and north
23 of the facilities are partially filled with river
24 gravel and quarry residual to allow their use
25 [sic] open storage and parking.
- 25 "8. The extent of physical alteration of these areas
26 irrevocably commits them to nonfarm use.

1 "9. The only area that remains essentially unaltered
2 is the hillside to the north that is intended for
a water storage tank site.

3 "In conclusion, Curry County finds that the subject
4 site is presently committed to industrial use by
5 virtue of the existing industrial facility and that
6 the proposed expansion of that facility will be onto
vacant lands that are irrevocably committed to nonfarm
use by their extensive alteration by fill and physical
disruption."

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8 3

Respondent Curry County appeared and submitted

9 "this abbreviated brief to correct factual
10 deficiencies in the Petition for Review. Respondent
11 will rely upon counsel for Respondent-Intervenors to
submit arguments on Petitioners third, fifth, and
sixth assignments of error."

12 Curry County did respond to petitioners' first, second and
13 fourth assignments of error. The respondent-intervenor
14 notified the Board the day prior to oral argument that it was
not intending to present a brief and that it would not appear
at oral argument. The respondent-intervenor informed this
Board that it was withdrawing from the case.

15
16 4

The county seems to completely ignore the fact that the
17 proposed plus or minus five acre site is presently part of the
18 1200 acre Wedderburn parcel.

19 5

20 We note that the county believes this property is within the
unacknowledged Gold Beach UGB. Without the findings and record
21 which support the Gold Beach UGB determination, we will not
accept such a factor as an alternative means of addressing Goal
22 3's applicability. See Friends of Benton County v. Benton
County, _____ Or LUBA _____ (LUBA No. 81-054, 1981) decided this
23 date.

24 6

Goal 16 defines the management units as follows:

1 "(1) Natural - In all estuaries, areas shall be
2 designated to assure the protection of
3 significant fish and wildlife habitats, of
4 continued biological productivity within the
5 estuary, and of scientific, research, and
6 educational needs. These shall be managed to
7 preserve the natural resources in recognition of
8 dynamic, natural, geological and evolutionary
9 processes. Such areas shall include, at a
10 minimum, all major tracts of salt marsh,
11 tidflats, and seagrass and algae beds.

 "Permissible uses in natural areas shall be
undeveloped low-intensity water dependent
recreation; research and educational observation;
navigational aides, such as beacons and buoys;
protection of habitat, nutrient, fish, wildlife
and aesthetic resources; and passive restoration
measures; and where consistent with the resource
capabilities of the area and the purposes of this
management unit, aquaculture, communication
facilities, and active restoration measures.

12 "(2) Conservation -- in all estuaries, except those in
13 the overall Oregon Estuary Classification which
14 are classed for preservation, areas shall be
15 designated for long-term uses of renewable
16 resources that do not require major alteration of
17 the estuary, except for the purpose of
18 restoration. These areas shall be managed to
19 conserve the natural resources and benefits.

 These shall include areas needed for maintenance
and enhancement of biological productivity,
recreational and aesthetic uses, and
aquaculture. They shall include tracts of
significant habitat smaller or of less biological
importance than those in (1) above, and oyster
and clam beds. Partially altered areas or
estuarine areas adjacent to existing development
of moderate intensity shall also be included in
this classification unless otherwise needed for
preservation or development consistent with the
overall Oregon Estuary Classification.

 "Permissible uses in conservation areas shall be
those allowed in (1) above; active restoration
measures; aquaculture; and communication
facilities. Where consistent with resource
capabilities of the area and the purposes of this
management unit, high-intensity water-dependent
recreation; maintenance dredging of existing
facilities; minor navigational improvements;
mining and mineral extraction; water-dependent

1 users requiring occupation of water surface area
2 by means other than fill; and bridge crossings,
shall be appropriate.

3 "(3) Development -- In estuaries classified in the
4 overall Oregon Estuary Classification for more
5 intense development or alteration, areas shall be
6 designated to provide for navigation and other
7 identified needs for public, commercial,
8 industrial water-dependent uses, consistent with
9 the level of development or alteration allowed by
10 the overall Oregon Estuary Classification. Such
11 areas shall include deep-water areas adjacent or
12 in proximity to the shoreline, navigation
13 channels, subtidal areas for in-water disposal of
14 dredged material and areas of minimal biological
15 significance needed for uses requiring alteration
of the estuary.

"Permissible uses in areas managed for
water-dependent activities shall be navigation
and water-dependent commercial and industrial
uses. Where consistent with the resource
capabilities and the purposes of this management
unit, water-related and non-dependent,
non-related uses not requiring fill; mining and
mineral extraction; and activities identified in
(1) and (2) above, shall also be appropriate."

15

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16 If the county wishes to rely on Gold Beach's
17 determination, it should make findings adopting that
18 decision and include Gold Beach's findings and record in
the record before us.

19

8

20 We do not address petitioner's allegation regarding
21 the July 11, 1980 LCDC enforcement order. The violation
22 determination is left up to LCDC. ORS 197.320. That
23 determination appears to depend on the scope of Order 4037
24 and whether the approved uses are "accessory to an
25 existing use." See Curry County Enforcement Order, July
26 11, 1980, Section 4d.

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

LAND USE
BOARD OF APPEALS

Oct 6 11 29 AM '81

KALMIOPSIS AUDUBON SOCIETY, ET AL,)
)
Petitioners,)
)
v.)
)
CURRY COUNTY,)
)
Respondent.)

LUBA NO. 81-067
LCDC Determination

The Land Conservation and Development Commission hereby approves the recommendation of the Land Use Board of Appeals in LUBA 81-067 with the following modifications:

EXCEPTIONS TO GOALS 3 AND 4

The Commission does not concur with the proposed opinion of the Land Use Board of Appeals relating to exception requirements for Goals 3 and 4. LUBA's opinion at page 10, line 22 to page 13, line 18 is not consistent with Commission policy or ORS 215.213(2).

Commission policy relevant to this case is as follows:

"An exception to the Agricultural Lands Goal is not required if the proposed land use decision involves one of the farm or nonfarm uses permitted in an EFU zone under ORS 215.203-.213. An exception to the Forest Lands Goal is not required if the proposed land use decision is consistent with forest uses as defined in Goal 4 (Exceptions Process Policy, Part II, March 10, 1978; amended May 3, 1979).

ORS 215.213(2) includes:

"(b) Operations conducted for the...exploration, mining and processing of aggregate and other mineral resources or other subsurface resources."

"Processing" is not defined in the statute. The County has interpreted ORS 215.213(2)(b) to include the proposed mining operation, including the asphalt and concrete plants. Had the County legally applied ORS 215.213(2) (i.e., set out the standards that it relied on to reach its decision), the proposed mining operation may have been found consistent with ORS 215.213(2) and Goal 3 and not require an exception.

LUBA has not correctly applied Commission policy. LUBA apparently agrees with petitioner's argument that the County has not complied with ORS 215.213(2) because the subject property was not in an EFU zone (page 10, line 22 to page 11, line 5). EFU zoning is not a necessary condition for complying with 215.213(2). If the property is determined to be agricultural land subject to Goal 3, then ORS 215.203-.213 apply regardless of whether the land is currently in an EFU zone.

The other findings made by the County should be considered irrelevant to the decision and not subject to review by LUBA. As a result, page 11, line 17 to page 13, line 18 of LUBA's opinion are not needed and should be deleted.

Assuming Goal 4 is applicable, as argued by the petitioner, the challenged decision likely would be consistent with Goal 4 and not require an exception for the same reasons set forth above. Farm and nonfarm uses allowed by

ORS 215.203-.213 may also be allowed under Goal 4 as nonforest uses if a finding of compatibility with forest uses is made at the time of the decision (Lake County staff report, pages 14-15, August 20, 1980). However, there is not sufficient information in LUBA's opinion to determine whether Goal 4 is applicable and, if so, whether the mining and processing uses would be compatible with surrounding forest uses.

GOAL 2

The Commission concurs with LUBA's proposed opinion dealing with Goal 2.

GOAL 16

LUBA correctly concludes that the County's approval of the mining operation was in violation of Goal 16 for two reasons: (1) the County erred in relying on Gold Beach's unacknowledged comprehensive plan to determine that the subject site was in a conservation management unit, instead of making its own findings as to the proper management unit designation; and (2) the County erred in allowing the asphalt and concrete plants and rock crusher on the basis that gravel removal was allowed in the management unit, without determining whether the plants and crusher themselves would be allowed (page 15, lines 9-22).

However, LUBA should have also reviewed the adequacy of the County's findings to conclude whether, in fact, gravel removal was allowed in the conservation management unit. Goal 16 sets forth two findings that must be made before

gravel extraction is allowed: the extraction is consistent with the resource capabilities of the area and is consistent with the purposes of the management unit.

LUBA states, "gravel extraction appears to be allowed in a conservation management unit" and refers to the County's findings, which only address removal of gravel (page 15, lines 17-20). LUBA makes no mention of the relevant Goal 16 consistency conditions, what the County's findings are, or whether the findings are adequate to meet the Goal 16 conditions. The two consistency conditions of Goal 16 must be addressed when determining whether the County's approval of gravel extraction complies with Goal 16.

LUBA notes the lack of specificity in the record regarding the exact site of the proposed mining operation. This deficit also calls into question whether Goal 17 rather than Goal 16 is applicable to the asphalt and concrete plants and rock crusher. If the structures are actually in the estuary and subject to Goal 16 (below the mean higher high water level), are they standing in water part of the year? Are they actually above the estuary and subject to Goal 17? Or are they sited and operated below the mean higher high water level in low water periods and moved to higher ground (since they are portable) during high water periods? Had the County developed an adequate record of its decision, LUBA and the Commission would have had a better understanding of the proposed use, its impacts on the resources, and the applicable Statewide Planning Goals.

In addition, on page 14, line 16, add the word "natural" to the end of the line. On page 15 at line 2, change the second "estuary" to "property."

LCDC ENFORCEMENT ORDER

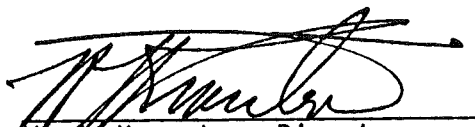
Petitioners allege that the granting of the conditional use permit by Curry County is a violation of the LCDC Enforcement Order of July 11, 1981.

Respondent argues that an appeal to LUBA is not the appropriate remedy for a review of an alleged violation of the LCDC Enforcement Order. LUBA declined to make any recommendation on this allegation, leaving any determination to LCDC (see Footnote 8 of opinion).

Based on a review of ORS 197.320(5), the best remedy to review allegations of violations of an LCDC Enforcement Order is through the Circuit Court.

ORS 197.320(5) provides that the Commission may institute actions or proceedings in the Circuit Court to enforce compliance with the provisions of any order issued under ORS 197.320 or to restrain violations thereof. The Department believes that allegations of violations may be brought to the Commission's attention. However, the Commission should refer enforcement of this Order, if it so desires, to the Courts, pursuant to ORS 197.320(5).

Dated this 5th day of October, 1981.


W. J. Kvarsten, Director
Department of Land
Conservation and Development

WJK:RS:af
6653A

CERTIFICATE OF MAILING

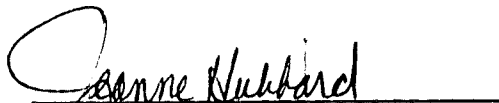
I hereby certify that I served the foregoing Final Opinion and Order for LUBA No. 81-067, on October 15, 1981, by mailing to said parties or their attorney a true copy thereof contained in a sealed envelope with postage prepaid addressed to said parties or their attorney as follows:

Terry Morgan
Morgan & Shonkwiler, P.C.
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Portland, OR 97213

Richard Mickelson
District Attorney
PO Box 746
Gold Beach, OR 97444

Timothy V. Ramis
O'Donnell, Sullivan & Ramis
1727 NW Hoyt Street
Portland, OR 97209

Dated this 15th day of October, 1981.



Jeanne Hubbard
Secretary to the Board

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

3 KALMIOPSIS AUDUBON SOCIETY,)
4 a nonprofit corporation; and)
5 CATHERINE KROGER, and DAVID)
6 WERKSCHUL,)

7 Petitioners,)

8 v.)

9 CURRY COUNTY,)

10 Respondent,)

11 and)

12 RIVER'S END RANCH, INC. and)
13 TIDEWATER CONTRACTORS, INC.,)

14 Respondent-Intervenors))

LUBA NO. 81-067

PROPOSED OPINION
AND ORDER

15 Appeal from Curry County.

16 Terry Morgan, Portland, filed a brief and argued the cause
17 for petitioners. With him on the brief were Morgan &
18 Shonkwiler, P.C.

19 Richard Mickelson, Gold Beach, filed a brief on behalf of
20 Respondent Curry County.

21 Respondent-Intervenor withdrew from the case.

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

24 Remanded.

9/03/81

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



STATE OF OREGON

INTEROFFICE MEMO

TO: MEMBERS OF THE LAND CONSERVATION AND DEVELOPMENT COMMISSION DATE: 9/4/81

FROM: THE LAND USE BOARD OF APPEALS

SUBJECT: KALMIOPSIS V. CURRY COUNTY
LUBA NO. 81-067

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

This case involves the allowance by Curry County of a surface mining operation (gravel extraction, asphalt and cement plants, and rock crusher) in the Rogue River estuary. We remand the decision.

We first rule the order lacks sufficient specificity to satisfy Goal 2. We then find that Goals 3 and 4 are not properly addressed. Finally, we address Goal 16, Estuarine Resources. We find the county improperly relied on the unacknowledged Gold Beach Comprehensive Plan and urban growth boundary designation of the site area as a "conservation unit." In addition, we question whether a portable asphalt plant, portable cement plant, and a portable rock crusher, are allowed in a "conservation unit" area even if the site were properly designated.

Finally, we note in footnote 8 that petitioners allege a violation of your July 11, 1980 enforcement order against Curry County. We do not rule on that allegation, deferring to you to decide on how to treat the alleged violation.

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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