

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

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SHADYBROOK ENVIRONMENTAL)
PROTECTION ASSOCIATION.)
(SEPA), ET AL,)
)
Petitioners,)
)
v.)
)
WASHINGTON COUNTY, OREGON,)
KARBAN ROCK, INC., an)
Oregon Corporation, and)
JEAN JENKINS,)
)
Respondents.)

LUBA NO. 81-023

FINAL OPINION
AND ORDER

Appeal from Washington County.

Edward J. Sullivan, Portland, filed a brief and argued the cause for Petitioners. With him on the brief were O'Donnell, Sullivan & Ramis.

Alan S. Bachman, Hillsboro, filed a brief and argued the cause for Respondent Washington County.

DeMar L. Batchelor, Hillsboro, filed a brief and argued the cause for Respondents Karban Rock, Inc. and Jean Jenkins. With him on the brief were Schwenn, Bradley, Batchelor & Brisbee.

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

Remanded.

11/04/81

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 COX, Referee.

2 NATURE OF PROCEEDING

3 Petitioners contest the February 10, 1981 conditional use
4 permit granted to Karban Rock, Inc. and Jean Jenkins for a
5 quarrying and rock crushing operation on a 20 acre site located
6 in Washington County. The site is presently zoned Agricultural
7 and Forestry District 10 acre minimum (AF-10).

8 ALLEGATIONS OF ERROR

9 Petitioners assert that the Washington County Order
10 granting the conditional use permit is violative of ORS 215.416
11 because the findings adopted in support of the decision are
12 inadequate and not supported by substantial evidence. Included
13 in this allegation of error is petitioners' argument that the
14 county failed to address the applicable statewide goals and
15 make findings thereon supported by substantial evidence.
16 Petitioners also assert that the county's order fails to
17 properly address the applicable code provisions of the
18 Washington County Zoning Code and fails to properly address the
19 Washington County Comprehensive framework plan.

20 FACTS

21 Karban Rock, Inc. and Jean Jenkins (hereinafter applicant)
22 requested a conditional use permit to allow the placement of a
23 rock quarry and crushing operation on a twenty-acre site
24 located approximately five miles north of the City of North
25 Plains in Washington County. The Washington County
26 Comprehensive Plan places the site within a rural intermediate

1 area. Applicant's environmental impact report describes the
2 site as timbered hillside. On the southern boundary of the
3 site is the old Shadybrook landfill. The record indicates the
4 landfill is full, no longer being used and is being reclaimed
5 by natural vegetation and timber growth. There appears to be
6 spontaneous combustion still going on in the area of the
7 landfill as is evidenced by periodic venting of smoke. Also on
8 the southern boundary of the site is the Washington County
9 shooting range. Surrounding uses include private residences
10 and agricultural operations such as tree farms. Shadybrook
11 Lumber Company lies 1 1/2 miles south of the site.

12 The applicant asserts that approximately 8 to 15 acres of
13 the 20 acre site may yield rock for a period from 5 to 8
14 years. The exact site, while being described as timbered
15 hillside, seems to consist of open land with a stand of trees
16 around its perimeter. The open portion of the subject 20 acres
17 is to be used for the quarry operations. The open area is said
18 to contain extensive rock outcropping and is covered by a
19 shallow overburden of soil. The county's conditions include a
20 requirement that the trees not be removed or altered in the
21 quarry operation.

22 Petitioners' appeal of Washington County Planning
23 Commission approval of the conditional use permit was heard by
24 the Washington County Board of Commissioners on January 13,
25 1981. On February 10, 1981, the county orally affirmed the
26 decision of the planning commission. Petitioner filed for

1 rehearing on February 11, and on February 17, the Board of
2 Commissioners denied the petition for rehearing. Washington
3 County's decision affirming the planning commission's approval
4 for the conditional use permit was reduced to writing on
5 February 18, 1981. The county's order adopted as its own the
6 findings of the planning commission as expressed in the
7 planning staff report and the findings and conclusions
8 requested from the applicant.

9 OVERVIEW

10 Petitioner first attacks the county's findings as being
11 inadequate under the requirements set forth in ORS 215.416(3),
12 (5) and (6).¹ In addition, petitioner argues the findings
13 are not supported by substantial evidence in the whole record.
14 Respondent Washington County's findings are not presented in an
15 organized, logical format. The county's order states, in
16 pertinent part,

17 "it appearing to the Board that the findings of the
18 Planning Department staff, Board of County
19 Commissioners and applicant's attorney should be
adopted as the basis for the aforesaid Board's
decision, * * * *"

20 In reviewing such an order, it is very difficult for this Board
21 to understand exactly what the Board of County Commissioners
22 believed were the facts in this case. For example, as regards
23 the type of soil which makes up the subject site, the adopted
24 findings in the staff report state "soil and census material is
25 included in the case file." There is no reference in the
26 record as to what the county believes to be the soil on this

1 property. In addition, under the issue of demonstration of
2 public need and site suitability, the findings state "see
3 applicant's statement, case file and Planning Commission
4 packet."

5 It is clear that such statements do not indicate, as
6 required by ORS 215.416(6), what the county believes to be the
7 facts relied upon in rendering the decision. In situations
8 such as this, this Board is painfully aware of the ruling by
9 the Oregon Supreme Court in Sunnyside Neighborhood v. Clackamas
10 Co. Comm., 280 Or 3, 569 P2d 1063 (1977), wherein the court
11 held that there is no specific form required for findings in a
12 land use decision. Since there is no form required, we can
13 only review the deficiency of the findings against the criteria
14 which are applicable to the decision. If, as in the above
15 example, a demonstration of public need is not required by the
16 applicable criteria, then, of course, the alleged "finding" is
17 merely surplusage and would have no effect on this Board's
18 decision.

19 APPLICABLE CRITERIA AND STANDARDS

20 A reading of the decision in the light most favorable to
21 the county seems to indicate that the applicable criteria are
22 found in Chapters 1900, 2200, 184, and 120 of the county's
23 zoning ordinance; the county framework plan (comprehensive
24 plan); and the statewide goals. In reviewing the petitioners'
25 allegations of error concerning findings as applied to these
26 various criteria, we see that the county has failed to comply

1 with not only ORS 215.416 but also the requirements of the
2 statewide goals. As we have held in prior cases, it is the
3 responsibility of the local jurisdiction prior to
4 acknowledgement of its comprehensive plan by the Land
5 Conservation and Development Commission to apply the statewide
6 goals to any land use decision it makes. A review of this
7 record reveals that the county did not address some applicable
8 statewide goals and it improperly dealt with the ones it did
9 address. The following review of some of petitioners'
10 assertions is designed to indicate how the county's order is
11 defective in terms of the statewide goals. The county's
12 failure to properly address the applicable criteria results,
13 therefore, in a violation of ORS 215.416 requirements.

14 Statewide Goal 2

15 Statewide Goal 2 indicates that land use plans adopted by
16 local governments shall be the basis for specific
17 implementation measures. The goal requires that there be an
18 adequate factual base for all decisions and actions related to
19 the use of land. (See Kalmiopsis v. Curry County, _____ Or
20 LUBA _____ (LUBA No. 81-067, 1981) decided this date.) The
21 county's findings do not reveal what the county decision-making
22 body determined to be the specific characteristics of the
23 subject property. For example, the county has, as above
24 indicated, adopted by reference the planning staff "findings."
25 Staff "finding" IIIC refers to the soil characteristics of the
26 site by stating "soil and census material is included in the

1 case file." Nowhere in the county's order or its adopted-by-
2 reference "findings" is there any evidence to indicate the
3 county determined what class of soil exists on the property.
4 Without such a determination there is not an adequate factual
5 base to determine whether the property is resource land. The
6 mere inclusion of soil and census material in the case file
7 does not precisely state what the county found to be the facts
8 and fully explain why those facts led it to its final
9 decision. The county, by adopting staff finding III-C, seems
10 to merely be recognizing that information exists. We will not
11 venture to guess what it actually believes about the
12 information that may be in the case file. See Dickson v.
13 Washington County, ____ Or LUBA ____ (LUBA No. 81-021, 1981)
14 citing Sunnyside Neighborhood v. Clackamas Co. Comm., supra.
15 and Home Plate v. O.L.C.C., 20 Or App 188, 530 P2d 862 (1975).
16 Statewide Goals 3 and 4.

17 Fairly read, the county's overall order indicates it
18 believes that even if the site is agriculture or forest land,
19 its use as such will only be interrupted during the term of the
20 mining operation. After the mining activity is over, the land
21 will be reclaimed according to the county. Based on its
22 belief, the county concluded that no exception to Goals 3 or 4
23 was necessary. The county by adopting applicant's "Proposed
24 Conclusion No. 5," stated:

25 "The proposed mining activities on the site will not
26 require the removal of timber from the site or
preclude the site from potential agricultural uses;

1 consequently, the proposed use is compatible and
2 consistent with statewide planning goals 3 and 4. No
exception to said goals 3 and 4 is required or taken."

3 While the removal of the specific tract of land from Goals
4 3 and 4 resource use may be necessary to acquire another
5 desired resource, i.e. rock, the county's order does not reveal
6 consideration of the impact the mining activity will have on
7 adjacent land uses. Such consideration is necessary before the
8 conclusion that a Goal 2 exception is unnecessary can be
9 supported.

10 The county does not address whether the activities on the
11 subject site can be conducted without interfering with
12 agricultural land and activities on neighboring property. Such
13 consideration is mandated by Goal 3's definition of agriculture
14 land.² Without more detail and explanation of its
15 considerations, the county's conclusion that no exception to
16 Goal 3 is required or that the action is "compatible and
17 consistent" with Goal 3 is not supported.

18 The county does not even address in its "findings" any
19 facts to lead it to the conclusion the action is compatible and
20 consistent with Goal 4 and that no exception to Goal 4 is
21 required. The record indicates the site is "logged off land."
22 The statement that "the site will not require removal of
23 timber" does not address the requirements in Goal 4 that:

24 "Forest land shall be retained for the production of
25 wood fibre and other forest uses. Lands suitable for
forest uses shall be inventoried and designated as

1 forest lands. Existing forest land uses shall be
2 protected unless proposed changes are in conformance
with the comprehensive plan.³

3 The county does state in "finding" F of the adopted staff
4 report:

5 "F. With the rehabilitation required by the State and
6 County Ordinances, the site and use will be
7 similar to the surrounding uses, upon completion
of the gravel operation."

8 This is not a finding but a conclusion. Also, the county
9 does not address what kind of forest land is being dealt with
10 here. For instance is there land involved "where extreme
11 conditions 'require' maintenance of vegetative cover
12 irrespective of use." (See Footnote 3).

13 The county indicates there is enough rock for from five to
14 eight years of mining, but it also states that the use will be
15 intermittent. Finding III-B states:

16 "The use would be intermittent crushing and
17 stockpiling with an estimate of rock for approximately
five to eight years."

18 Without a time limit placed on use of the site for mining, it
19 is not known how long the land will be removed from Goal 3 or
20 Goal 4 resource use. Such knowledge is required before
21 deciding that a Goal 2 exception is unnecessary due to future
22 reclamation plans. If, instead of the mining operation, the
23 county were approving housing on the site, a finding that in
24 the future the housing will disappear and the land will be
25 reclaimed would not support a conclusion that an exception is
26 not necessary.

1 The county's findings do not support its conclusion the
2 proposed activity is "compatible and consistent" with Goals 3
3 and 4. Therefore, its determination that no exception to those
4 goals need be taken is likewise unsupported.⁴
5 Statewide Goal 6.

6 Petitioners allege violations of Statewide Goal 6.
7 Petitioners made their concerns about Goal 6 known to the
8 county, but the county failed to address them. Petitioners are
9 concerned about the effect the proposed quarrying activity and
10 related blasting will have on the ground water resources of
11 surrounding properties. Petitioners claim that the neighboring
12 Shadybrook landfill could be disturbed by blasting and
13 quarrying activities. These activities, according to
14 petitioners, could result in the leeching of pollutants
15 contained in the landfill into the ground water serving
16 surrounding properties. Statewide Goal No. 6 states:

17 "GOAL: To maintain and improve the quality of the
18 air, water and land resources of the state.

19 "All waste and process discharges from future
20 development, when combined with such discharges from
21 existing developments shall not threaten to violate,
22 or violate applicable state or federal environmental
23 quality statutes, rules and standards. With respect
24 to the air, water and land resources of the applicable
25 air sheds and river basins described or included in
26 state environmental quality statutes, rules,
standards, and implementation plan, such discharges
shall not (1) exceed the carrying capacity of such
resources, considering long range needs; (2) degrade
such resources; or (3) threaten the availability of
such resources.

"Waste and Process Discharges -- refers to solid
waste, thermal, noise atmospheric or water pollutants,

1 contaminants, or products therefrom. Included here
2 also are indirect sources of air pollution which
3 result in emissions of air contaminants for which the
4 state has established standards."

5 The information included in the record regarding potential
6 problems indicates that Goal 6 is applicable to this decision.
7 However, the county's order does not address the goal. In
8 addition, based on the holdings in City of Wood Village v.
9 Portland Metro Area Local Government Boundary Commission, 48 Or
10 App 79, ___ P2d ___ (1980) and Hillcrest Vineyard v. Bd. of
11 Comm. of Douglas County, 45 Or App 285, 608 P2d 201 (1980), the
12 county, when faced with sufficient evidence to raise an issue
13 concerning a relevant criterion, must address that issue in its
14 findings. Goal 6 is a relevant criterion not only because of
15 the general rule that prior to acknowledgment of its
16 comprehensive plan the county must apply the applicable goals
17 to its land use decisions, but because petitioners introduced
18 considerable evidence on the potential hazards inherent in the
19 quarrying activity. The county should have addressed the goal.

20 Remaining Statewide Goals

21 In addition to the above addressed allegations regarding
22 the statewide goals, petitioners allege violations of Goals 1,
23 2, 5, 7, 11, 12 and 14. Petitioners set forth with
24 particularity their concern about those goals in their notice
25 of review and again by reference in their petition for
26 rehearing. The county made only cursory, conclusive mention of
Goals 3, 4, 5, and 13 in its order. That mention is found in

1 applicant's proposed conclusions 5, 6 and 7 as adopted by the
2 county. It did not satisfactorily address petitioners' goal
3 concerns. It should have done so. Twin Rocks Water District
4 v. City of Rockaway, 2 Or LUBA 36 (1980). City of Wood
5 Village, supra.

6 CONCLUSION

7 The petitioners assert numerous other assignments of error
8 and arguments in support thereof dealing with non-goal related
9 issues which we find unnecessary to address at this time. The
10 county's order is clearly defective as applies to the goals
11 which results in violation of ORS 215.416. This Board does not
12 believe it necessary to go through the entire county order and
13 point out every error that exists.. We do stress, however, that
14 the county has a responsibility to make findings, and the mere
15 recitation that statements have been made by its staff or local
16 or state agencies, without an indication that the county
17 believes those statements, is not sufficient to meet the
18 standards of ORS 215.416 or the various holdings of state
19 courts. See Marbet v. Portland Gen. Elect., 277 Or 447, 470,
20 561 P2d 154 (1977) wherein the Supreme Court stated:

21 "It is doubly important that such non-professional
22 agency heads not think of their staff as the agency
23 and themselves as a reviewing body, but rather
24 understand clearly that it is their personal
25 responsibility to determine the facts and to set and
26 apply the standards entrusted to them * * * *"

25 See also Sunnyside Neighborhood, Home Plate, and City of Wood
26 Village, supra.

1 The county's order is remanded for further consideration
2 not inconsistent with this opinion.

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FOOTNOTE

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ORS 215.415, in pertinent part, states:

4 "(3) The application shall not be approved if
5 the proposed use of land is found to be in conflict
6 with the comprehensive plan of the county and other
7 applicable ordinance provisions. The approval may
include such conditions as are authorized by statute
or county legislation.

8 "* * * *

9 "(5) Approval or denial of a permit application
10 shall be based on standards and criteria which shall
11 be set forth in the zoning ordinance or other
12 appropriate ordinance or regulation of the county and
13 which shall relate approval or denial of a permit
application to the zoning ordinance and comprehensive
plan for the area in which the proposed use of land
would occur and to the zoning ordinance and
comprehensive plan for the county as a whole.

14 "(6) Approval or denial of a permit shall be
15 based upon and accompanied by a brief statement that
16 explains the criteria and standards considered
17 relevant to the decision, states the facts relied upon
in rendering the decision and explains the
justification for the decision based on the criteria,
standards and facts set forth."

18 2

19 Statewide Goal 3 defines "Agricultural Land" as
20 follows:

21 "In western Oregon is land of predominantly Class I,
22 II, III and IV soils and in eastern Oregon is land of
23 predominantly Class I, II, III, IV, V and VI soils as
24 identified in the Soil Capability Classification
25 System of the United States Soil Conservation Service,
26 and other lands which are suitable for farm use taking
into consideration soil fertility, suitability for
grazing, climatic conditions, existing and future
availability of water for farm irrigation purposes,
existing land use patterns, technological and energy
inputs required, or accepted farming practices. Lands
in other classes which are necessary to permit farm

1 practices to be undertaken on adjacent or nearby
2 lands, shall be included as agricultural land in any
event.

3 "More detailed soil data to define agricultural land
4 may be utilized by local governments if such data
permits achievement of this goal."

5

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6 Statewide Goal 4 defines "Forest Lands" and "Forest
7 Uses" as follows:

8 "Forest Lands -- are (1) lands composed of existing
9 and potential forest lands which are suitable for
10 commercial forest uses; (2) other forested lands
11 needed for watershed protection, wildlife and
12 fisheries habitat and recreation; (3) lands where
13 extreme conditions of climate, soil and topography
require the maintenance of vegetative cover
irrespective of use; (4) other forested lands in urban
and agricultural areas which provide urban buffers,
wind breaks, wildlife, and fisheries habitat,
livestock habitat, scenic corridors and recreational
use.

14 "Forest Uses -- are (1) the production of trees and
15 the processing of forest products; (2) open space,
16 buffers from noise, and visual separation of
17 conflicting uses; (3) watershed protection and
18 wildlife and fisheries habitat; (4) soil protection
from wind and water; (5) maintenance of clean air and
water; (6) outdoor recreational activities and related
support services and wilderness values compatible with
these uses; and (7) grazing land for livestock."

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20 LCDC issued the following determination in this case:

21 "The Land Conservation and Development Commission
22 hereby adopts the Land Use Board of Appeals proposed
23 opinion in LUBA 81-023 as it relates to Goals 2, 5, 6,
7, 11, 12 and 14. The Commission determines that
Commission policy relevant to the application of Goals
3 and 4 in this case is as follows:

24 "An exception to the Agricultural Lands Goal is
25 not required if the proposed land use decision
26 involves one of the farm or nonfarm uses
permitted in an EFU Zone under ORS 215.203 -

1 .213. An exception to the Forest Lands Goal is
2 not required if the proposed land use decision is
3 consistent with forest uses as defined in Goal 4
(Exceptions Process Policy, Part II, March 10,
1978; amended May 3, 1979).

4 "A rock quarry' is a nonfarm use permitted by ORS
5 215.213(2)(b). Therefore, a rock quarry is
6 consistent with Goal 3 and does not require an
7 exception.

8 "Farm and nonfarm uses may also be allowed under
9 Goal 4 as nonforest uses if at the time of the
10 decision a finding is made that the forest lands
11 will be retained and protected for existing and
12 potential forest uses, despite the nonforest use
13 allowed.

14 "LUBA should revise its proposed opinion relating
15 to Goals 3 and 4, consistent with the above Commission
16 policy."

17 We do not believe our opinion is inconsistent with the
18 above determination. This is a findings case in which we have
19 said concerning Goals 3 and 4 that the county simply failed to
20 make findings showing what the impact of this quarry use would
21 have on resource uses both on and adjacent to the resource
22 site. We wish to note, however, what appears to be an inherent
23 contradiction in the LCDC determination regarding Goal 4. How
24 can a finding be made that a non-forest use on forest lands
25 will retain that land for existing forest uses? Liberally
26 construed, however, we view the LCDC determination as
requiring, as a preliminary matter, findings addressing the
impact of the non-forest use on forest lands. As mentioned
above, no such findings were made by the county in this case.



STATE OF OREGON

INTEROFFICE MEMO

TO: MEMBERS OF THE LAND CONSERVATION
AND DEVELOPMENT COMMISSION

DATE: 9/04/81

FROM: THE LAND USE BOARD OF APPEALS

SUBJECT: SHADYBROOK V. WASHINGTON COUNTY
LUBA NO. 81-023

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

This case involves the approval of a conditional use permit allowing a rock quarry on property in rural Washington County. We find the county failed to properly address the goals and remanded the decision. We analyze only the county's findings relating to Goals 2, 3, 4 and 6. We also find that the county failed to comply with ORS 215.416 which sets forth what must be contained in findings whether they relate to the goals or some other criteria. Our discussion of the goals and ORS 215.416 is intertwined so your review of the entire decision will be necessary in order to understand our holdings relating to the goals.

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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24 Remanded.

9/4/81

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