

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

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VERNON GEARHARD, FRANCES )  
GEARHARD, JOHN C. MAGUIRE )  
and BONNIE MAGUIRE, )  
 )  
Petitioners, )  
 )  
vs. )  
 )  
BOARD OF COMMISSIONERS )  
OF KLAMATH COUNTY, )  
 )  
Respondent, )  
 )  
JAMES M. BARNES and )  
ALLISON GARRIOTT, )  
 )  
Applicants. )

LUBA No. 81-129  
FINAL OPINION  
AND ORDER

Appeal from Klamath County.

William M. Ganong, Klamath Falls, filed the Petition for Review and argued the cause on behalf of Petitioners.

Michael L. Brant, Klamath Falls, filed the brief and argued the cause on behalf of Applicants.

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

REMANDED 2/24/82

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 REYNOLDS, Chief Referee.

2 INTRODUCTION

3 Petitioners challenge Klamath County's decision to grant a  
4 conditional use permit to James Barnes and Allison Garriott to  
5 quarry and crush rock on an 80 acre parcel. Petitioners  
6 contend the decision should be reversed on 3 grounds. The  
7 first ground is that the decision violates statewide Goal 3 by  
8 failing to consider Implementation Factor 1 which states:

9 "Non-farm uses permitted within farm use zones  
10 under ORS 215.213(2) and (3) should be minimized to  
allow for maximum agricultural productivity."

11 Petitioners' second ground is that the county violated  
12 statewide Goal 5 - Open Spaces, Scenic and Historic Areas and  
13 Natural Resources - by failing to consider and enter findings  
14 relating to the "economic, social, and environmental and energy  
15 consequences" of the conflicting potential uses (rock quarrying  
16 and crushing) for the open space. Petitioners also assert the  
17 county violated statewide Goal 5 by failing to consider or  
18 enter conditions controlling the secondary use of the land.  
19 Petitioners' third ground is that the county's conclusions as  
20 to compliance with the conditional use section of the county's  
21 zoning ordinance<sup>1</sup> are not supported by adequate findings or  
22 by substantial evidence in the record. The conclusions with  
23 which petitioners take issue are the following:

- 24 "1. The Board of Commissioners finds site for  
25 proposed use is adequate in size and shape  
26 to accommodate said use and that parking,  
loading and other features required to  
adjust said use with the land and its use in

1 the neighborhood will be adequately provided  
2 for.

3 \* \* \*

4 "3. The Board of County Commissioners finds  
5 proposed use will have no adverse effect on  
6 abutting properties."

7 STATEMENT OF FACTS

8 Applicants Barnes and Garriott applied for a conditional  
9 use permit for a commercial quarry on an 80 acre parcel in the  
10 AF (Agricultural-Forestry) Zone in Klamath County. The request  
11 was to enable the applicants to blast, crush and stockpile rock  
12 on the property. After listening to the testimony and visiting  
13 the property, the Klamath County Hearings Officer issued an  
14 order denying the conditional use permit. The hearings officer  
15 addressed the conditional use section of the county's zoning  
16 ordinance and made the following conclusions:

17 "1. I find the site proposed for the proposed  
18 use is not adequate in size and shape to  
19 accommodate said use, and that the parking,  
20 loading, landscaping and other features  
21 required to adjust said use with the land  
22 and its use in the neighborhood are not  
23 present and will not be adequately provided  
24 for.

25 \* \* \*

26 "3. The proposed use will have a substantial  
adverse effect upon abutting property and  
the permitted uses thereof."

The hearings officer's conclusions were based upon the  
following findings of fact:

"7. The two opposing sites which would be most  
affected by the operations are those of  
Maguire and Gearhart. The Maguire home is

1 new and has a substantial view which  
2 overlooks the area for the proposed use but  
3 does not have a direct view of the proposed  
4 site. The Gearhart site currently has a  
5 mobile home on it, and Mr. Gearhart intends  
6 to build a large house of substantial value  
7 relying upon large windows and solar energy  
8 for heat of said house. The area is  
9 presently isolated from all ongoing  
10 industrial type activity and is a very quiet  
11 area within the County. Eagles have been  
12 known to use a ridge located near the  
13 proposed site. Opponent Gearhart has  
14 invested \$22,000 in developing his site for  
15 the building of his home. His architect,  
16 Mr. Peterson, has viewed the property site,  
17 and could not find any other location within  
18 Mr. Gearhart's property which would be  
19 suitable for the proposed dwelling, and at  
20 the same time would not have a view of the  
21 proposed quarry. The prevailing winds,  
22 according to the Weather Bureau, blow for  
23 nine months out of the year in a direction  
24 which would carry all dust and noise from  
25 the proposed quarry site towards the  
26 property of the Gearharts and Maguires.

"8. There was insufficient evidence presented from which the Hearings Officer could make a finding as to whether or not there are sufficient gravel pits within the County presently. All roads leading to and from the proposed site are dirt and/or gravel roads, and the use of said roads by heavy trucks would contribute to an increase in the dust in the air around the proposed site affecting the Maguires, Gearharts, and possibly other property owners. Both the Maguire property and the Gearhart property have exceptional and unique views of the surrounding physical features, including mountains, valleys, rolling hills, etc. The proposed quarry site would be within 300 feet of the Gearhart property line, and 1800 feet or less to the site of the Gearhart's home."

The Klamath County Board of Commissioners reversed the hearings officer's decision and adopted conclusions opposite

1 from those of the hearings officer quoted above. The board of  
2 commissioners made the following findings:

3 "The Board of Commissioners finds per applicants'  
4 testimony that blasting would be done by down-drilling  
5 to crack and loosen rock which would reduce noise and  
6 air pollution. Rock would not be blasted out of  
7 ground."

8 "The Board of County Commissioners finds per  
9 testimony from applicant, and in reviewing site, that  
10 the location of proposed site for quarry and location  
11 of existing house and mobile home was not exactly  
12 identified, and, therefore proposed use may not have a  
13 detrimental effect on the existing two houses."

14 "The Board of County Commissioners finds per  
15 testimony that all roads presently existing are  
16 graveled and that any new access roads would be  
17 graveled along with a dust retardent to cut down on  
18 air pollution."

19 "From observation of the property it appeared  
20 that the proposed quarry would be below, and therefore  
21 out of the main line of vision of the proposed  
22 Gearhart residence."

23 "From observation of the property it appeared  
24 that the proposed quarry site is separated from the  
25 Maguire property by at least one-quarter mile which  
26 includes a ridge of land rising above the proposed  
27 quarry site and above the level of the Maguire  
28 property."

29 "Observation of the property in the general area  
30 showed that the soil was quite rocky that several  
31 cinder or gravel pits are already operating in the  
32 vicinity. That the topography ranges from rolling to  
33 steep."

34 In addition to the foregoing findings, the board of  
35 commissioners found that based upon its observation of the  
36 property there was "no indication of recent agricultural use."  
37 The board of commissioners found that the "site appears not to  
38 be producing agricultural products from a cultivation  
39

1 standpoint as site is rolling to steep, plus having an outcrop  
2 of rock on site and also has some scattered sagebrush and grass  
3 that makeup the exising vegetation." The board of  
4 commissioners also found that soils on the property were Class  
5 VI "having soils with severe limitations that make them  
6 generally unsuited for cultivation and limit their use largely  
7 to range and woodland uses." The board of commissioners found  
8 that the property has slopes from 2% to 25% "with soils being  
9 generally shallow with depth of bedrock being 10 to 20  
10 inches." The board of commissioners found that the planning  
11 department had not indicated the proposed site "as a critical  
12 wildlife habitat area."

13 OPINION

14 We discuss only petitioners' third assignment of error  
15 which is that the board of commissioners failed to comply with  
16 the conditional use section of its zoning ordinance.  
17 Petitioners contend that two of the board of commissioners'  
18 conclusions critical to its decision are not supported by  
19 findings of fact. The first conclusion challenged by  
20 petitioners is as follows:

21 "The Board of Commissioners finds the site  
22 proposed use is adequate in size and shape to  
23 accommodate said use and that parking, loading and  
24 other features required to adjust said uses with the  
25 land and its use in the neighborhood will be  
26 adequately provided for."

We agree with petitioners that this conclusion is not supported  
by any findings of fact. It is the responsibility of a local

1 governing body in a quasi-judicial proceeding to make findings  
2 of fact which explain the reasons for its decision. Sunnyside  
3 Neighborhood League v Clackamas County, 280 Or 3, 569 P2d 1063  
4 (1977). Findings of fact are also required by Section  
5 123.002(14) of the Klamath County Zoning Ordinance which  
6 requires the board of commissioners on appeal of a hearings  
7 officer decision to "sustain, reverse or modify the decision"  
8 and to "set forth its findings." All the board of  
9 commissioners has done is restate as a conclusion the legal  
10 standard it is required to meet. This is not sufficient.  
11 Sunnyside, supra; Davis v City of Nehalem, \_\_\_ Or LUBA \_\_\_  
12 (LUBA No. 81-030, 1981).

13 The second conclusion challenged by petitioners is as  
14 follows:

15 "The Board of County Commissioners finds proposed  
16 use will have no adverse effect on abutting  
properties."

17 The findings which relate to this conclusion are set forth,  
18 supra, at page 5. The first finding is that "down-drilling"  
19 will be used to crack and loosen rock, and that this procedure  
20 will "reduce noise and air pollution." While this procedure  
21 may, in fact, reduce noise and air pollution below a level  
22 caused by some other blasting procedure, no inference can be  
23 made that the noise and air pollution from this procedure will  
24 still not adversely affect abutting properties. Petitioner  
25 Gearhard submitted weather reports from the local airport  
26 indicating that prevailing winds nine months out of the year

1 were from the south and the hearings officer so found.

2 Therefore, nine months out of the year, any dust and noise from  
3 the proposed operation would be carried over the property of  
4 either the Gearhards or the Mcguires or both because their  
5 properties lie to the north of the applicant's property. A  
6 reduction in the level of noise and dust would, it appears,  
7 only lessen the effect on petitioners' property and not  
8 necessarily result in "no adverse effect" as required by the  
9 county's zoning ordinance. In addition, if down-drilling were  
10 determined to cause no adverse effect on abutting properties,  
11 but some other procedure might, down-drilling should be made a  
12 condition of the county's approval. No such condition was made.

13 The second finding is that the "proposed use may not have a  
14 detrimental effect on the existing two houses" because the  
15 "location of proposed site for quarry and location of existing  
16 house and mobile home was not exactly identified." If the  
17 exact location of the quarry and houses must be identified to  
18 know whether there will be a detrimental effect, the board of  
19 commissioners must determine where these uses are or will be  
20 located in order to conclude there will be no adverse effect.  
21 As the finding indicates, the board of commissioners failed to  
22 make this determination.

23 The third finding indicates that any new access roads would  
24 be graveled and sprayed "with a dust retardant to cut down on  
25 air pollution." The finding also notes "that all roads  
26 presently existing are graveled" but says nothing about whether



1 a dust retardant will be applied to these roads or whether  
2 trucks from the proposed operation (estimated by the applicant  
3 at 10 trucks per day) will utilize existing graveled roads. As  
4 with the first finding, the fact that new access roads will be  
5 sprayed with a dust retardant and this spraying will "cut down"  
6 on air pollution does not mean there will be no adverse effect  
7 on abutting properties. The board of commissioners does not  
8 find that dust retardant will be sprayed on existing graveled  
9 roads to lessen the dust generated by truck traffic, if any, on  
10 these roads. Moreover, if application of a dust retardant is  
11 necessary to prevent an adverse effect on abutting properties,  
12 then its application should be a condition of approval.

13 Because the board of commissioners failed to condition its  
14 approval on application of a dust retardant on graveled roads  
15 and failed to explain why it is that the air pollution that  
16 would still result even with application of dust retardant  
17 would not adversely affect abutting properties, the board of  
18 commissioners' finding does not support the conclusion that no  
19 adverse effect on abutting properties will result from the  
20 proposed use.

21 The last three findings say nothing about whether the  
22 operation of the gravel pit will adversely affect adjacent  
23 properties. Accordingly, these findings do not justify a  
24 conclusion that the proposed conditional use will not adversely  
25 affect abutting properties.

26 For the foregoing reasons, we conclude the findings of fact

1 do not support the board of commissioners' determination that  
2 the proposed use complies with the conditional use section of  
3 the Klamath County's Zoning Ordinance. This matter is remanded  
4 to the board of commissioners for further proceedings not  
5 inconsistent with this opinion.

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FOOTNOTE

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4 Section 123.001 of Article 123 of the Klamath County Zoning  
Ordinance states, in pertinent part:

5 "The Hearings Officer, before granting a  
6 Conditional Use Permit, shall determine:

7 "1. The site for the proposed use is adequate in  
8 size and shape to accommodate said use and  
9 all yards, spaces, walls and fences,  
parking, loading, landscaping and other  
features required to adjust said use with  
land and uses in the neighborhood.

10 \* \* \*

11 "3. The proposed use will have no adverse effect  
12 on abutting property or the permitted use  
thereof.

13 "4. The conditions stated in the decision are  
14 deemed necessary to protect the public  
health, safety and general welfare."