

LAND USE
BOARD OF APPEALS

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

Nov 22 2 42 PM '82

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2
3 NEIGHBORHOOD OPPOSING MORE)
OPERATIONS FOR ROCK EXTRACTION,)
4 an association,)

5 Petitioner,)

6 v.)

7 POLK COUNTY, OREGON and)
DAN VOIGT,)

8 Respondents.)

LUBA NO. 82-002

FINAL OPINION
AND ORDER

9 Appeal from Polk County.

10 Chris L. Lillegard, Dallas, filed a petition for review and
11 argued the cause for Petitioner. With him on the brief were
Lillegard & Luuknien.

12 Paul J. DeMuniz, Salem, filed a brief and argued the cause
13 for Respondent Dan Voigt. With him on the brief were Garrett,
Seideman, Hemann, Robertson & DeMuniz, P.C.

14 Respondent Polk County did not appear.

15 Cox, Referee; Bagg, Referee; participated in the decision.

16 Affirmed.

11/22/82

17 You are entitled to judicial review of this Order.
18 Judicial review is governed by the provisions of Oregon Laws
1979, ch 772, sec 6(a), as amended by Oregon Laws 1981, ch 748.

1 COX, Referee.

2 NATURE OF PROCEEDING

3 Petitioner contests Polk County Conditional Use Permit No.
4 80-27 whereby Respondent Dan Voigt was granted a permit to
5 extract rock from a five acre parcel in Polk County. The
6 parcel is located in an agricultural-forestry zone (A-F).

7 ALLEGATIONS OF ERROR

8 Petitioner sets forth two assignments of error as follows:

9 1. "The findings of fact adopted by the Polk County
10 Planning Commission are inadequate and do not
11 accurately reflect the facts presented."

12 2. "After remand from LUBA the Polk County Planning
13 Commission allowed testimony from the applicant and
14 denied petitioner an opportunity to be heard[,] and
15 petitioner was therefore denied due process."

16 FACTS

17 This is the second time this fact situation has been before
18 the Land Use Board of Appeals. In Neighborhood Opposing More
19 Operations for Rock Extraction v. Polk County, 3 Or LUBA 128
20 (1981), we remanded the matter to Polk County for failure to
21 make adequate findings.

22 Respondent Dan Voigt requested a conditional use permit to
23 allow him to extract rock from a five-acre parcel located in
24 the AF Zone in Polk County. The proposed quarry site is in the
25 Rickreall Creek watershed. The property is located near the
26 floor of a steep canyon. In order to extract the rock,
27 blasting will be necessary approximately twice a year. The
28 county found that the nature and the class of soils in the
subject site are not suited for the primary zone designation of
agriculture and forestry, and at the present time this site is

1 not used for either purpose. The county further found that the
2 site is not designated for residential development, and there
3 are no residences within one-half mile of the proposed site.

4 Upon remand by this Board of the county's prior decision,
5 the Polk County Planning Commission was faced with the question
6 of whether there were sufficient facts in the existing record
7 to make the findings we found to be lacking. Attorneys for
8 both petitioner and respondent were present at planning
9 commission deliberations on the question of whether to reopen
10 the record and made presentations at that October 13, 1981
11 hearing. On November 3, 1981 the planning commission voted to
12 make its decision based on the existing record. On November 4,
13 1981, the planning commission issued the findings and order now
14 before this Board. The November 4, 1981 order was appealed to
15 the Polk County Board of Commissioners, which on December 9,
16 1981 refused to hear petitioner's appeal. Subsequent to the
17 filing of the notice of intent to appeal to this Board, we
18 granted a motion to extend the time to transmit the record on
19 the ground that both parties expected to resolve the matter
20 without hearing before LUBA. The negotiations between the
21 parties broke down, and on August 27, 1981, we received the
22 petition for review.

23 DECISION

24 Assignment of Error No. 1

25 As we understand petitioner's assignment of error, it
26 alleges the findings are inadequate and not supported by
27 substantial evidence. The main thrust of petitioner's
28 arguments is devoted to the alleged incompatibility of the

1 proposed rock extraction activity with existing residences in
2 the area. Compatibility with existing residences or uses is
3 not the standard, however. The standard is harmony with the
4 purpose and intent of the zone. Here the zone is agricultural
5 and forestry, not residential. The applicable Polk County
6 Zoning Ordinance provisions are as follows.

7 Section 137.030 provides in pertinent part:

8 "If authorized under the procedures provided for
9 conditional uses in this ordinance, the following uses
10 will be permitted in the AF Zone:

11 "* * *

12 "(d) Operations conducted for the exploration, mining
13 and processing of geothermal resources (as defined by
14 subsection (4) of ORS 522.010), aggregate, and other
15 mineral and subsurface resources;"

16 Section 119.070 of Polk County Zoning Ordinance provides:

17 "Before granting a conditional use, the Planning
18 Commission shall determine:

19 "(a) That it has the power to grant the conditional
20 use;

21 "(b) That such conditional use, as described by the
22 applicant, will be in harmony with the purpose
23 and intent of the zone;

24 "(c) Any condition deemed necessary for the public
25 health, safety or welfare, or to protect the
26 health or safety of persons working or residing
27 in the area, or for protection of property or
28 improvements in the neighborhood shall be
imposed." (Emphasis added).

With those standards and provisions in mind, we review the
findings and evaluate the petitioner's allegations. The
ordinances which govern this decision allow quarry operations
as a conditional use within the AF zone. Further, pursuant to
Polk County Ordinance Section 119.030, it is within the power

1 of the Polk County Planning Commission to grant the requested
2 conditional use permit. Therefore, the planning commission was
3 correct in finding, as required by 119.070(a) above, that it
4 has the power to grant the conditional use.

5 Harmony with Zone

6 The planning commission, pursuant to Section 119.070(b),
7 made findings to support its conclusion that the conditional
8 use will be in harmony with the purpose and intent of the
9 zone. As is stated in Polk County Zoning Ordinance Section
10 137.030 above, mining is a conditional use in the AF zone. The
11 purpose of the AF zone is to:

12 "encourage agriculture and forestry as the dominant
13 use of such lands, to preserve such lands as long as
14 possible for the production of agriculture and forest
15 products, and to insure that the conversion of such
lands to nonfarm rural uses, where necessary and
appropriate, occurs in an orderly and economical
manner."

16 Specifically, the county found:

17 "(a) Although the purpose and intent of the AF
18 (Agricultural and Forestry) Zone is to maintain
19 agriculture and forestry as the dominant use of the
20 land in that Zone, at the present time the subject
21 property is not used for either purpose and would not
22 be classified as agricultural or forestry land due to
23 the class of soils on the property, the topography of
24 the land, and the parcel size. These soils are not
conducive to either agriculture or forestry. The soil
type in this parcel would be a good source of rock due
to the particular soil characteristics. The AF Zone
does not specifically address extraction of mineral
aggregate, except for allowing it as a Conditional
Use."

25 The data contained in that finding is supported by a letter in
26 the record from the Chairman of the Polk County Soil and Water
27 Conservation District.

28 The planning commission acknowledged the Polk County

1 Comprehensive Plan requires it "to protect mineral and
2 aggregate deposits for future extraction, provided such
3 deposits are not located on land for which the comprehensive
4 plan designates a use that is not compatible with mineral and
5 aggregate extraction." The commission pointed out the specific
6 policies for implementation of the comprehensive plans to be:

7 "Polk County may permit extraction from mineral and
8 aggregate resource sites only after public hearings
9 have been held. Polk County will require the
10 reclamation or restoration of all lands subject to
quarrying. Polk County will discourage mining
activities in areas designated for residential
development."

11 Applying those policies, the county determined there are no
12 residences within approximately one-half mile of the proposed
13 site, and other rock quarries are already in existence in the
14 area. The commission found that this is not an area designated
15 for residential development.¹

16 The county also found:

17 "Site reclamation, and environmental cost is mandated
18 by State law. A Development Plan and Reclamation Plan
19 would have to be submitted by the applicant to the
20 Oregon Department of Geology and Mineral Industries
21 for approval prior to surface mining. When a mining
22 site is abandoned, it must be left in a condition
23 reasonably compatible with the surrounding
environment. The Voigt quarry site is located
topographically where a re-contouring of the mined
slope can be accomplished to meet reclamation
requirements. Reclamation in this instance,
therefore, should be a rather simple process because
of the topography."

24 Further, the county found:

25 "The State Highway Division confirms that the property
26 in question appears quite suitable for a quarry
27 operation. Samples submitted to the Oregon State
28 Central Laboratory resulted in the findings that the
rock in question is good for base rock and asphaltic
concrete. Surface investigation indicated the basalt
present is fairly well fractured, and should be

1 relatively easy to extract. Rock shooting, when
2 necessary could be done in shallow lips with a minimal
3 amount of explosive, just to loosen the rock. The
4 location of the site is such that the establishment
5 and operation of a quarry there should not present any
6 environmental problems. The explosives should have no
7 effect on the groundwater in the area, nor upon
8 foundations of residences in the area. It is
9 estimated that blasting should occur approximately
10 only twice a year, and the main body of rock to be
11 extracted can be done by machine thereafter."

12 All the above material finds support in the original
13 record, including the staff report, testimony of Dr. Paul
14 Hughes, engineering geologist, and a letter from Oregon State
15 Highway Division geologists. From this and additional material
16 the county concluded:

17 "The conditional use as described by the applicant
18 will be in harmony with the purpose and intent of the
19 zone."

20 Necessary Conditions

21 The final standard that must be dealt with in granting the
22 conditional use permit is Polk County Zoning Ordinance Section
23 119.070(c), see above. That section requires the imposition of
24 permit conditions necessary for the protection of the public
25 health, safety and welfare. In responding to that requirement,
26 the planning commission required compliance with Polk County Ordi-
27 nance 120.400 and state law. The county apparently did not feel
28 any special conditions other than certain controlling provisions
of its code were needed. Specifically, the findings state:

"The following conditions were imposed by the
Commission to regulate the manner in which the
Conditional Use is to be carried out:

"(a) Polk County Ordinance 120.400 -- 'Sand and
Gravel Resource Site.' This ordinance regulates the
requirements in terms of control of air pollution,
water pollution, access roads, excavation, screening,
control of operation, time of operation, and noise

1 standards. Applicant would have to go through the
2 proper procedure of submitting his plan for specifics
3 of excavation and get approval by the Planning
4 Commission under the above listed criteria, subsequent
5 to the approval of the Conditional Use Permit.

6 "(b) Additionally, State laws pertaining to rock
7 quarrying must be met over and above those listed in
8 the Polk County Ordinance cited above. If applicant
9 fails to comply with the stated conditions of use, a
10 Conditional Use granted herein will be terminated."

11 We find no error on the part of the planning commission.
12 Polk County Zoning Ordinances have been complied with and there
13 exist satisfactory findings addressing each of those ordinance
14 provisions. Sunnyside Neighborhood v. Clackamas Co. Comm., 280
15 Or 3, 569 P2d 1063 (1977). The findings are supported by
16 evidence in the record and that evidence of a substantial
17 nature within the terms of Christian Retreat Center v. Comm.
18 for Washington County, 28 Or App 673, 560 P2d 1100 (1977);
19 Stringer v. Polk County, 1 Or LUBA 104 (1980).

20 Assignment of Error No. 2

21 In this assignment of error petitioner claims it was denied
22 due process. Petitioner argues the planning commission allowed
23 testimony by the applicant and in fact questioned the applicant
24 when no such opportunity was granted to the petitioner. It is
25 the petitioner's point of view that the alleged due process
26 violations occurred at the October 13, 1981 meeting of the
27 Planning Commission when the subject of whether to reopen the
28 record for additional testimony or to merely review the
existing record to make the required findings was being
discussed. In addition, petitioner alleges that one of the
commissioners visited the site and offered observations without
allowing petitioner an opportunity to be heard.

1 A review of the record does not support petitioner's
2 allegations. While there is evidence that Mr. Voigt did speak
3 at the October 13, 1981 hearing, his statements do not amount
4 to substantive testimony but rather are comments on the
5 procedural posture of the case. Those statements were
6 primarily in response to similar comments made at the same
7 hearing by petitioners' attorney. .

8 With reference to the "site visit," the statement to which
9 petitioner is referring is recorded in the minutes of the
10 November 3, 1981 hearing as:

11 "Comm. Fisher stated that he had looked at the
12 property and he feels it is a good site to take rock
13 out of. In looking at the canyon it has been used for
14 many years for that reasons. He would suppose that
15 most of the people who live in that area knew that
16 when they built there. Did not see any residential
17 properties that would be immediately disturbed and he
18 got the impression that it is an excellent place to
19 take rock out of."

20 The visit to the site was, in fact, proposed by the attorney
21 for petitioner at the October 13, 1981 hearing. This Board has
22 previously held that parties to a contested case must be
23 afforded a fair opportunity to refute any and all facts which
24 result from a personal inspection of a site. As we held in
25 Concerned Property Owners of Rocky Point v. Klamath County, 3
26 Or LUBA 182 (1981) quoting Hyman v. Coe, 102 F Supp 254, 257
27 (1952):

28 "If there be facts within the expert knowledge of the
members of the Board or acquired by personal
inspection of the premises, these should be revealed
at the hearing so that opportunity may be afforded to
meet them by evidence or argument."

The facts in this case differ from those in Concerned
Property Owners, supra. Here, not only was the planning

1 commission invited to view the site by petitioner's attorney,
2 the planning commission member announced his visit, what he had
3 observed and what he believed as a result of his observations.
4 Those revelations were announced during a public hearing of
5 which petitioner had notice. The record indicates that members
6 of the audience began discussing the "view" with Commissioner
7 Fisher, but the minutes neither reveal an objection to the
8 Commissioners' statements nor a demand to be allowed rebuttal
9 time. Without more, we decline to hold an error of the type
10 identified in Concerned Property Owners, supra, has occurred.

11 Based on the foregoing, petitioner's second assignment of
12 error is denied.

13 Affirmed.
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FOOTNOTES

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The county recognized that a number of residences exist along Ellendale Road and are at such an elevation that some of those homes afford a view of the site. The county found those views will be somewhat protected because the applicant intends to screen a majority of the quarry.