BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

VERNON GEARHARD and FRANCES GEARHARD, Petitioners, v. KLAMATH COUNTY, Respondent, JAMES M. BARNES and ALLISON GARRIOTT, Applicants.	)	LUBA NO. 82-053 FINAL OPINION AND ORDER
JOHN G. MAGUIRE and BONNIE MAGUIRE, Petitioners, v. KLAMATH COUNTY, Respondent, JAMES M. BARNES and ALLISON GARRIOTT, Applicants.	)	LUBA NO. 82-056

Appeal from Klamath County.

LUBA Nos. 82-053 and 82-056 consolidated by agreement of the parties.

William A. Ganong, Klamath Falls, filed a petition for review and argued the cause for Petitioners.

Michael L. Brant, Klamath Falls, filed a brief and argued the cause for Applicants.

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

Remanded 11/23/82

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), as amended by Oregon Laws 1981, ch 748.

BAGG, Referee.

NATURE OF THE DECISION

Petitioners appeal the issuance of a conditional use permit by the Klamath County Board of Commissioners allowing a commercial rock quarry, including blasting, crushing, stockpiling and asphalt mixing operations, in an agricultural-forestry (AF-5) zone. A similar land use decision was before this Board on two earlier occasions. An order was made on May 21, 1981 allowing a conditional use permit to quarry and crush rock, and that matter was appealed to the Board. At the request of the county, the matter was remanded to Klamath County for further proceedings. Supplemental findings were issued and a new order made on November 6, 1981, and an appeal to this Board followed. We reviewed that decision in Gearhard v. Klamath County, 5 Or LUBA 111 (1982). We remanded the matter to Klamath County for the entry of findings showing compliance with the conditional use section of the county's zoning ordinance. Our order stated that the county board made inadequate findings by simply stating standards in the ordinance as legal conclusions. Additionally, we found the county failed to show how the conditional use permit would, as required by the ordinance, "have no adverse affect on abutting properties." In an order dated June 3, 1982, the county made new findings and approved the issuance of the permit.

FACTS

The property subject to the conditional use permit is an 80

acre parcel some three miles west of Merrill, Oregon. The area to be used for extraction of rock will be approximately 4.5 acres in size (200 feet by 1000 feet). A rock crusher will occupy a site of some 200 square feet, and about five acres of the site will be used to stockpile crushed rock. An additional three acres will be used for equipment storage and loading. The proposed quarry would require the construction of a private road leading from the western side of the property to Cheyne Road, a county road about a mile to the north. The operation would include blasting, crushing and stockpiling rock. Also included in this newest conditional use application is the placement of an asphalt plant used to make asphalt. The asphalt plant was not part of the earlier conditional use permit appealed to this Board.

As mentioned above, this case was remanded to Klamath County in 5 Or LUBA 111 (1982). Pursuant to that order, the county commissioners held a hearing on April 5, 1982 to take additional testimony on the merits. On April 8, the commissioners visited the proposed site and adjoining properties. On April 12, the county commissioners held a hearing to discuss their observations made on the visit. The commissioners announced their decision to grant the conditional use permit, and an order to that end was made on the 3rd day of June, 1982.

On or about November 30, 1981, the Board of Commissioners adopted County Ordinance No. 45, implementing the county

comprehensive plan and land development code. The ordinance carried an emergency clause and become effective immediately. The ordinance repealed and replaced the zoning ordinance then in effect, including the ordinance in effect at the time applicants first submitted their conditional use permit for a gravel mining operation.

Section 12.001 of the ordinance provides that new code applies to all structures in uses of land to be established unless specifically exempted. The exemption is provided only for existing the uses lawfully established on the date of the adoption of the code, "unless an alteration, expansion or modification to an existing use is proposed which requires a land use decision pursuant to this code."[1]

ASSIGNMENT OF ERROR NO. 1

Assignment of error no. 1 claims the county commissioners failed to consider or follow the applicable law by failing to apply Klamath County Ordinance No. 45. Petitioners reject respondent's argument that the old code applied, relying on section 12.001 cited, supra. Petitioners argue that the original issuance of the conditional use had been remanded by LUBA after the new ordinance was adopted. The quarry was not, therefore, lawfully established on the date of the adoption of the ordinance, according to petitioner.

Because the new code applies, petitioners' posit that the County Board of Commissioners should not have held new public hearings to take new testimony. Article 24 of the new code

requires that hearings on conditional use permits be held by the county's hearings officer. Appeals of the hearings officer's decision are provided for in section 33 of the code, and section 33 limits the scope of review "to the record made on the decision being appealed." Section 33.004. Petitioners argue that the commissioners should have remanded the matter to the hearings officer for further proceedings pursuant to section 33 of the new code. Petitioners claim the erroneous procedure followed by the Board of Commissioners prejudiced the petitioners. This prejudice occurred because the petitioners believe the county commissioners were not an impartial tribunal and because, as we understand petitioners, the written orders required by the new code are more detailed than those apparently given by the county commission.

The respondent argues that the April 5, 1982 hearing was held to add to previous testimony in order to make findings as called for in the LUBA order. Petitioners and applicants were both afforded the opportunity to present evidence, and petitioners were, therefore, not prejudiced, claim respondents. The county argues that the proceedings were held under the old ordinance because this conditional use permit was a "left over matter."

We believe the county was obliged to proceed under the provisions of its new code. There is nothing in the county ordinance exempting matters on appeal from new ordinance requirements. It is correct that section 12.001 does exempt

existing uses lawfully established from its provisions.[2] However, as this particular conditional use permit had been remanded to the county for further proceedings, no such use existed at the time the county considered the matter on remand. We also note application of the new code is in accordance with the general rule that "[i]f a zoning ordinance has been amended between the moment of administrative action or decision and the moment of review, the amendment will apply." 4 Anderson, American Law of Zoning, sec 25.31 (2d ed, 1977).

Because of our conclusion that Ordinance 45 applies, we believe the county failed to follow the procedure applicable to the matter before it. The matter should have been remanded to the county's hearings officer for additional testimony and findings. However, we do not believe this error alone warrants reversal or remand on our part because we do not believe petitioners have shown sufficient prejudice to warrant reversal.[3] Petitioners' claims (1), that one of the commissioners was hostile to the land use process and LUBA and (2), that one of the county commissioners believed that to deny the conditional use permit would amount to a taking of property without compensation, are not sufficient allegations to conclude that petitioners failed to receive a fair hearing in front of the commissioners. We do not believe that petitioners' burden of showing prejudice is sustained simply because members of the county commission may have views which may be at odds with those of the petitioners. As stated in

respondent's brief, the petitioners were allowed to present evidence to support their views in this matter, and we believe they were, therefore, not prejudiced in this proceeding.

We do not understand petitioners' allegation that Statewide Land Use Planning Goal 1 has been violated. Perhaps, petitioners are claiming they were denied the right to be fully involved in the decision.[4] We do not believe petitioners have adequately explained this allegation, and we decline to rule on it without further explanation from petitioners.

Assignment of error no. 1 is denied.

ASSIGNMENT OF ERROR NO. 2

The second assignment of error alleges that conclusions of law 1 and 3 in the county's order are not supported by findings of fact or by substantial evidence in the record. Conclusions 1 and 3 are as follows:

> "1. The site is adequate in size and shape to accommodate the proposed use along with all yards, spaces, parking, loading and other features required to adjust said use with land and uses in the neighborhood."
>
> "3. The proposed use will have no adverse affects [sic] on abutting property or the permitted use thereof."

Petitioners argue these failings constitute violation of the county Land Development Code and Statewide Goal No. 1. Petitioners' claim the county Development Code was violated rests on its belief that the county failed to meet the requirements of section 31.011 of the county ordinance. Section 31.011 of the ordinance requires

"A. The applicable criteria and standards be set forth in the order.

"B. That findings of fact establishing compliance with criteria be set forth in the order.

"C. That reasons for conclusions be set forth in the order and the evidence concerning a conditional use permit be taken by an impartial hearings officer."

Petitioners say the order contains no findings whatever to support conclusion of law no. 1. As to conclusion of law no. 3, petitioners state there is considerable evidence in the record concerning dust, noise, damage to wells and odors associated with the plan. Petitioners state these effects of plant operation constitute adverse effect where the ordinance requires no adverse effect on adjacent property. Respondent replies that the finding the property is adequate in size and shape to accommodate the use is supported in the record.

The first part of the finding (or conclusion) states the county's view that the property is proportioned adequately to accommodate the proposed use. As such, it is not objectionable. The record supports this conclusion. However, the second part of the conclusion, that the site is adjusted to other uses in the neighborhood is not supported. We have the same complaint with the whole of finding no. 3. The county ordinance requires that there be "no adverse affect" on adjacent properties. The record is replete with evidence about adverse effects, as mentioned above, and the county's findings fail to state how it is that these claimed adverse effects either do not exist at all or are not adverse to petitioners.

We believe the county ordinance standard is a very stringent standard and one that may, indeed, be impossible to meet for any gravel or intensive use such as the one proposed in this conditional use permit. Nonetheless, this "no adverse affect" requirement exists in the county ordinance, and the county may not escape provisions of its own ordinance. See 5 McQuillin Municipal Corporations, Sec 15, 14 (3d Ed 1969); Cannady v Roseburg, 2 Or LUBA 134 (1980).

Assignment of error no. 2 is sustained.

ASSIGNMENT OF ERROR NO. 3

Assignment of error no. 3 alleges that allowance of an asphalt hot plant in an agricultural zone violates the county's land development code and statewide planning goals 2 and 3.

Petitioners first argue the county's new zoning ordinance of November 30, 1981, zoning the property AU-5, does not allow as a permitted or a conditional use the asphalt hot plant requested by the applicants. The AU-5 zone does not list mineral or aggregate mining or asphalt hot plants as a permitted or conditional use. Petitioners admit the existence of a mineral extraction overlay zone, Section 84 of the Code, which arguably might allow the asphalt hot plant if the overlay zone were applied to this property. The overlay zone is applied on a site specific basis through the conditional use process; and, when supplied, mineral extraction activities may be conducted on the property. Petitioners argue the overlay zone (1) has not yet been applied to this property; (2) if

applied, was applied incorrectly; and (3) even if applied correctly, an asphalt hot-mix plant is not a mineral extraction activity within the meaning of the overlay zone.[5]

Secondly, petitioners argue Statewide Goals 2 and 3 are violated because an asphalt hot-mix plant is a manufacturing use not permitted in an exclusive farm use zone without a proper goal exception.

Petitioners are correct that the mineral extraction overlay zone was not applied to this property. Respondent County did not view the new comprehensive plan and zoning ordinance to apply and so apparently saw no need to apply the overlay zone. As this case is being remanded to the county, however, we wish to comment on part of petitioners' argument in order to provide some assistance to the county in conducting further proceedings. Petitioner reads the county ordinance to allow application of the mineral extraction overlay zone only to those properties lying within zones that provide for mineral extraction as permitted or conditional uses. It is our view that each and every part of the county's ordinance must be given effect. To read the county's ordinance as petitioner do is to make the mineral extraction overlay zone mere surplusage. If mineral extraction is a permitted or conditional use in the underlying zone, then for what reason might the county apply the mineral extraction overlay zone? The fact that the overlay zone is applied to the conditional use process does not alter our view. We view the conditional

use process as simply a means of securing compatibility of the proposed use with existing uses that may be in the area. Through the conditional use process, the county has broad discretion to permit or not permit application of the mineral extraction overlay zone.

We are doubtful that the mineral extraction overlay zone is of use in this case, however. We see nothing in the overlay zone that would permit an asphalt hot-mix plant or other manufacturing uses. The zone appears to provide only for "mineral extraction." The zone does not provide for other more intensive uses. If the zone were to have been applied in this case, the specific uses requested by the applicant that are more intensive than simple aggregate extraction would be outside the scope of the zone.

We also agree with petitioners that allowance of the hot-mix plant in the AU-5 zone violates statewide planning goals 2 and 3. Within an exclusive agricultural zone, goal 3 allows only those farm uses and non-farm uses contained in ORS 215.213. Mining and processing of aggregate is a non-farm use that is allowed under ORS 215.213(2)(b), but this allowance does not extend to manufacturing activities. We believe the word "processing" as it appears in ORS 215.213(2)(b) means the crushing of aggregate and associated processes, but not changing aggregate into asphalt or other refined products.[6] The asphalt hot-mix plant is a manufacturing activity. As a manufacturing activity, it is not permissible within an exclusive agricultural zone without a

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proper goal exception. See Kalmiopsis Audubon Society v. Curry County, 4 Or LUBA 185 (1981); Hilltown Township v. Horn, 320 Atlantic 2d 153, 156-157 (Pennsylvania, 1974), reversed on other grounds, Horn v. Township of Hillton, 337 Atlantic 2d 858 (Pennsylvania 1975); Clark County v. Board of Commissioners v. Tager Construction, 615 P2d 965, 968 (Nevada, 1980).

Assignment of error no. 3 is sustained.

ASSIGNMENT OF ERROR NO. 4

Assignment of error no. 4 alleges the commissioners failed to consider implementation factor no. 1 of Goal 3. Implementation factor no. 1 of Goal 3 requires that non-farm uses permitted within farm use zones should be minimized.[7]

We are unable to discuss this assignment of error because there are no findings or conclusions in the county's order about agricultural use of this property or whether, indeed, the property is agricultural land. Without findings on Goal 3 criteria as they may be applicable to this property, we can not review the decision.

ASSIGNMENT OF ERROR NO. 5

Assignment of error no. 5 alleges that the commissioners violated Statewide Planning Goal 5 by failing to enter findings about the "economic, social, environmental and energy consequences of the conflicting uses for this land." Petitioners point to an LCDC staff report stating that the county comprehensive plan fails to consider or implement the conflict resolution procedure required by Goal 5.[8]

Respondent states that the "land which is the subject of these proceedings does not fit the description of open space or scenic space as defined in the Statewide Planning Goal 5." Respondent adds that petitioners did not raise Goal 5 considerations earlier in the proceedings.

There are no findings in the county order which would suggest that the property is subject to Goal 5. However, at hearings before the county commission, petitioners raised the matter of compliance with Statewide Goal 5. We believe the county was, therefore, under an obligation to explain why it is that Goal 5 is not applicable, if indeed the county believes so. Gruber v Lincoln Co., 2 Or LUBA 180 (1980); Twin Rocks Water District v. City of Rockaway, 2 Or LUBA 36 (1980). If the county believed Goal 5 to be applicable, then the county was under an obligation to explain how the permit complied with the goal. Absent these findings, we are, as in assignment of error no. 4, unable to review the decision.

ASSIGNMENT OF ERROR NO. 6

Assignment of error no. 6 alleges that the county commission was biased in its personal philosophy because the commissioners, according to petitioners, believe "that a person should be able to do what they want with their land without regard to the adverse impact on the neighbors and without regard to statewide land use planning laws."

Respondent states there is no evidence that the commissioners acted with bias, prejudice or partiality. We

agree. Whether or not a commissioner or all the commissioners happen to believe that an individual should be able to do what he might wish with his land does not mean that the commissioner can not render a decision as required by law. A county commissioner is not expected to be "detached, independent and nonpolitical." See Eastgate Theatre v Board of County Commissioners, 37 Or App 745, 588 P2d 640 (1978).

Assignment of error no. 6 is denied.

CONCLUSION

Because the county failed to make findings, supported by substantial evidence in the record, showing compliance with applicable legal criteria, this matter is remanded for further proceedings not inconsistent with this opinion.

FOOTNOTES

[1] Of some additional importance in this matter is a county order made on March 19, 1981 detailing how the county would process applications for land use permits. The order recited that from time to time amendments are made to county ordinances and that an "effective date" policy should be imposed which would control the "regulatory structure to be appplied to applications being processed." The order provided that

> "All applications receiving official preliminary approval, thus reaching their 'effective date' prior to the date and time of the that amendment shall be processed under the earlier law, and all applications reaching their 'effective date' on or after that date and time shall be processed under and meet the amended law; and all appeals procedures shall be consistent with this procedure * * * *"

The order went on to say that the "effective date" of a land use application under the county's August 1, 1972 comprehensive plan, County Zoning Ordinance No. 17 and County Subdivision Ordinance No. 40

> "shall be the date and time on which an application receives official preliminary approval or denial. This shall be the date and time on which the formal decision is made in open public meeting by the appropriate hearing body, or in the case of administrative approval, the date and time on which the permit is signed by the County Planning Director."

[2] We believe the county ordinance provision at section 12.001, providing for application of Ordinance 45, controls and not the county order of March 19, 1981. We do not believe a county order, not adopted with the formalities of an ordinance, can amend the ordinance or otherwise control application of an ordinance. Fifth Ave. Corp. v Washington County, 282 Or 591, 581 P2d 50 (1978).

[3] We are allowed to reverse for procedural errors only when the error has prejudiced the substantial rights of petitioners. 1979 Or Laws, ch 772, sec 5(4)(a)(B), as amended

by 1981 Or Laws, ch 748.

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Goal 1 controls citizen involvement in plan and ordinance development. We do not believe petitioners have articulated how it is that Goal 1 controls a quasi-judicial decision such as a conditional use application where normal due process standards apply. See Clemens v Lane County, 4 Or LUBA 63 (1981).

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Petitioners buttress their argument with a citation to an LCDC staff report, issued as part of the LCDC compliance acknowledgment order of March 22, 1982, stating that the Klamath County land development code would only allow mineral extraction in zones listing mineral extraction as a stated permitted or conditional use.

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

"(b) Operations conducted for the mining and processing of geothermal resources as defined by ORS 522.005 or exploration, mining and processing aggregate and other mineral resources or other subsurface resources."

7

No. 1, "Implementation" under Goal 3 states:

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

"Implementation" is a four-part subheading under "GUIDELINES." Goal guidelines are not mandatory standards. See ORS 197.015(9).

8

Goal 5 states:

GOAL: To conserve open space and protect natural and

scenic resources.

Programs shall be provided that will: (1) insure open space, (2) protect scenic and historic areas and natural resources for future generations, and (3) promote healthy and visually attractive environments in harmony with the natural landscape character. The location, quality and quantity of the following resources shall be inventoried:

a. Land needed or desirable for open space;
b. Mineral and aggregate resources;
c. Energy sources;
d. Fish and wildlife areas and habitats;
e. Ecologically and scientifically significant natural areas, including desert areas;
f. Outstanding scenic views and sites;
g. Water areas, wetlands, watersheds and groundwater resources;
h. Wilderness areas;
i. Historic areas, sites, structures and objects;
j. Cultural areas;
k. Potenial and approved Oregon recreation trails;
l. Potential and approved federal wild and scenic waterways and state scenic waterways.

Where no conflicting uses for such resources have been identified, such resources shall be managed so as to preserve their original character. Where conflicting uses have been identified the economic, social, environmental and energy consequences of the conflicting uses shall be determined and programs developed to achieve the goal."