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

HARRY JOSEPH LaCHANCE, JR.,)
HARRY JOSEPH LaCHANCE, SR.,)
SAME L. MARKS, GREGORY MARKS)
and ROBERT COLEE,)
Petitioners,)
vs.)
JOSEPHINE COUNTY and)
L.H. KIRTLEY and)
VIVIAN KIRTLEY,)
Respondents.)

LUBA No. 82-064
FINAL OPINION
AND ORDER

Appeal from Josephine County

Donald M. Pinnock, Ashland, filed the Petition for Review and argued the cause on behalf of Petitioners. With him on the brief were Davis, Ainsworth, Pinnock, Davis and Gilstrap.

Walter L. Cauble, Grants Pass, filed the brief and argued the cause on behalf of Respondents Kirtley. With him on the brief were Schultz, Salisbury and Cauble.

No appearance by Josephine County.

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

Remanded 11/29/82

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 appeal Josephine County's grant of a
4 conditional use permit which would allow gravel and mineral
5 extraction on a 30 acre parcel within an EFU zone. The 30 acre
6 parcel lies near the Applegate River and is partly within the
7 floodway of the river. Flooding has washed away a majority of
8 the top soil, but construction of a dam upstream and a dyke
9 between the parcel and the Applegate River have apparently
10 stopped the flooding problem.

11 Josephine County Zoning Ordinance Section 19.025 permits
12 mineral and aggregate extraction within an EFU zone as a
13 conditional use, provided the use is conditioned upon certain
14 criteria, as follows:

15 "In an Exclusive Farm District, the following uses and
16 their accessory uses are permitted when authorized by
17 the Zoning Commission upon satisfactory demonstration
18 of compliance with the standards of this Ordinance.
19 Additional criteria for review of every use permitted
20 conditionally are addressed in Section 19.026 and
21 52.015 to 52.019."

19 * * *

20 "2. Exploration, mining and processing of aggregate
21 and other mineral resources or other subsurface
22 resources, including development of geothermal
23 resources, conditioned upon, but not limited to,
24 the following criteria:

25 "a. Demonstration that an access or service
26 road, while used for the mining, shall be
maintained in a dust-free condition, by the
operator, for a distance of 200 feet from
public roads or streets or residences
located on adjoining property. If the
mining is the primary cause of road dust on

1 an unpaved public road, that road shall be
2 dust-free for 200 feet from such
3 residences. If more than one mining
4 operation uses the same road, all operators
5 shall be jointly responsible for dust
6 abatement as previously described.

7 "b. If screening of the mining site or
8 construction of berms may be necessary to
9 obscure the view, minimize dust, reduce the
10 sound from the mining, or limit other
11 annoyances to adjoining occupied property,
12 State Scenic Waterways and adjacent public
13 roads, demonstration that such screening
14 will be provided.

15 "c. If the safety of the public requires a fence
16 to control access to the pit, demonstration
17 that a fence will be provided.

18 "d. Demonstration that the operation shall be
19 conducted in accordance with the standards
20 of this Regulation, and any applicable
21 permit from the Oregon State Department of
22 Geology and Mineral Industries or the
23 Department of Environmental Quality.

24 "e. Demonstration that excavation shall be away
25 from the property line a distance adequate
26 to maintain a fence on the property line if
27 needed, and such additional distance as is
28 necessary to allow a normal safe angle of
29 repose during the operation, and to provide
30 the slopes identified in the operational
31 plan, pursuant to the standards of this
32 Regulation for the depth of final
33 excavation."

34 Josephine County Zoning Ordinance Section 19.026 sets forth
35 the standards which must be met for all conditional use
36 permits. Those standards are:

37 "A conditional use may be approved only when findings
38 can be made to satisfy all of the following:

39 "1. That the use will not be injurious to property
40 and improvements in the area of the request.

- 1 "2. That the use will not be detrimental to the
2 health, safety or general welfare of persons
3 residing or working in the area where the
4 proposed use would be located.
- 5 "3. That the use is compatible with farm uses in the
6 nearby area.
- 7 "4. That the use does not interfere seriously with
8 accepted farming practices on adjacent lands
9 devoted to farm use.
- 10 "5. That the use does not materially alter the
11 stability of the overall land use pattern of the
12 area.
- 13 "6. That a disclosure statement is signed and
14 recorded with the County which recognizes that
15 agricultural and forest uses for land zoned
16 Exclusive Farm have priority over all other land
17 uses."

18 The county made findings with respect to each of the above
19 mandated criteria. The county found that Section 19.026(1) was
20 met because the applicant had agreed to comply with all
21 applicable rules and regulations of the county; the access road
22 leading from the gravel operation to New Hope Road would be
23 maintained in dust free condition; the applicant had agreed to
24 provide screening and fencing "if required;" and the applicant
25 had agreed to excavate away from the property line.

26 The county found that Section 19.026(2) had been satisfied
because the applicant agreed to comply with all applicable
county and state rules and regulations; the applicant would
provide a fence around the property if required; and the access
onto New Hope Road would only be allowed if the Public Works
Department determined the access could be safe. The county
also found that, provided normal safety rules were followed, a

1 loaded truck could turn from the access road onto New Hope Road.

2 The county found that Section 19.026(3) and Section
3 19.026(4) had been met because the county operated a gravel pit
4 in the area of the proposed use and the gravel pit had not
5 caused any adverse effects on adjoining farm operations or
6 caused any interference with those farm operations.

7 The county found that Section 19.026(5) was satisfied
8 because fencing and screening of the use would be provided, if
9 required; the use would be monitored by county, state and DEQ
10 officials; and farm use was not the appropriate or highest and
11 best use of the property.

12 The county found that Section 19.026(6) was satisfied
13 because the applicant had agreed to sign and record a
14 disclosure statement if the conditional use permit were granted.

15 OPINION

16 Petitioners set forth seven assignments of error, not all
17 of which need be addressed in this opinion. Petitioners' sixth
18 assignment of error attacks the county's findings which address
19 Sections 19.026(1) through (6) and asserts a lack of evidence
20 concerning these findings. Petitioners contend the findings
21 are not supported by substantial evidence because there is
22 considerable, uncontradicted evidence in the record about the
23 potential incompatibility of this gravel operation with
24 surrounding farm uses. The findings do not, argue
25 petitioners, address this evidence in any way.

26 We agree with petitioners that there is a great deal of

1 testimony which appears to be uncontradicted about the
2 potential incompatibility of this gravel operation. For
3 example, there was testimony from the Deputy Water Master that
4 gravel removal on the 30 acre parcel may weaken the dike which
5 separates the 30 acre parcel from the river and cause the dike
6 to fail. He testified that if the dike were to fail, property
7 to the west would be in danger of serious erosion. Additional
8 testimony was submitted by the Murphy Ditch Association about
9 potential danger to homes, out buildings, livestock and 150
10 acres of land if the dike should fail. The U.S. Stabilization
11 and Conservation Service recommended that the permit be denied
12 because of the danger to the dike.

13 We believe the evidence about possible dike failure relates
14 directly to the criteria in Section 19.026(1) through (5).
15 However, the county's findings do not address this evidence.
16 The only finding which might conceivably be said to address
17 this testimony is the finding that the Corps of Engineers would
18 monitor this gravel operation. While we might presume that the
19 Corps of Engineers would be interested in the structural
20 integrity of the dike, we do not believe that by simply making
21 this finding the county has satisfied its responsibility under
22 Section 19.026 of the ordinance. The county was required to
23 find whether this gravel operation could be conducted safely
24 given the concerns expressed about the effect of allowing this
25 gravel operation on the structural integrity of the dike.

26 Petitioners also argue that the county's findings under

1 Section 19.026(1) through (5) do not address evidence in the
2 record concerning injury which will occur to an adjacent exotic
3 animal farm, potential loss of an irrigation pond,
4 unsightliness of the operation, or the effect of dust and noise
5 from the operation on people's health. Petitioners argue the
6 finding that the proposed use would be compatible with farm
7 uses in the nearby area and will not interfere seriously with
8 acceptable farming practices on adjacent lands is not supported
9 by any evidence in the record. Petitioners argue there is no
10 evidence in the record that the county's gravel pit, which is
11 located in the area of the proposed use, has no adverse effect
12 on farm uses in the area or farming practices on adjacent lands.

13 We agree with petitioners that the county's finding
14 concerning Section 19.026(1) through (4) are inadequate because
15 they fail to respond to evidence in the record about potential
16 adverse consequences resulting from the proposed use. The
17 county's findings pertaining to Section 19.026(3) and (4) are
18 defective also because there is no evidence in the record to
19 support these findings. The only substantial evidence in the
20 record concerning the impact of the county's gravel operation
21 appears at pages 120-121 of the record. That testimony is to
22 the effect that the county's gravel operation is unsightly,
23 noisy and causes nearby residents to "quite literally eat dust
24 in summer." In any event, there is no evidence that the
25 county's gravel operation is compatible with farm uses and does
26 not interfere seriously with accepted farming practices on

1 adjacent lands.¹

2 Petitioners have also asserted the county's findings
3 concerning Section 19.026(2) pertaining to the health, safety
4 and general welfare of persons residing in the area are not
5 supported by substantial evidence because the county's finding
6 that trucks could safely enter onto New Hope Road from the
7 access road is not supported by substantial evidence. The
8 county Public Works Director said the turn from the access road
9 onto New Hope Road could only be made safely if the access road
10 were made into a two lane approach with a 24 foot wide
11 surface. Petitioners argue that it is questionable whether the
12 applicants have the ability to widen the road because of a
13 dispute as to whether the applicants own an easement for the
14 access road. Petitioners believe the county should have
15 conditioned approval of the conditional use on a demonstration
16 of proof of control over the access way.

17 We believe there is substantial evidence in the record that
18 trucks could safely turn onto New Hope Road from the access
19 road. The applicant stated there was sufficient room for
20 ingress and egress to New Hope Road from the access road. This
21 testimony was supported by testimony from an individual
22 representing the Sand and Gravel Industry of Josephine County.
23 It may be that the Public Works Department will not issue an
24 access permit unless the access road is, as the Public Works
25 Director stated would be necessary, widened to 24 feet and two
26 lanes of travel are provided. It may be that the applicant

1 will be unable to comply with this requirement because it may
2 not own the underlying easement. Those issues, however, do not
3 appear to be ones which the county was required to resolve in
4 order to grant this conditional use permit. The county was
5 required to determine whether access onto New Hope Road could
6 be made safely. The county resolved this issue in the
7 applicant's favor. The county, therefore, satisfied its
8 responsibility on this issue.

9 Petitioners contend the county's findings to do not address
10 the standards set forth in Section 19.026(5). That section of
11 the ordinance requires a determination that the proposed use
12 will not materially alter the stability of the overall land use
13 pattern in the area. Petitioners argue the land use pattern in
14 the area is farming and residential living and that numerous
15 people testified as to the impact this gravel operation would
16 have on their lives. We agree with petitioners that the
17 findings under Section 19.026(5) are not responsive to the
18 standard. To the extent the county may be attempting to show
19 in its findings that the proposed gravel operation would not
20 alter the stability of the overall land use pattern because the
21 operation would not have any adverse impact on surrounding
22 uses, the county's findings are defective because they fail to
23 address the evidence in the record, alluded to previously,
24 about adverse impacts from this operation.

25 Petitioners argue Section 19.026(6) was not complied with.
26 That section requires a disclosure statement be signed and

1 recorded with the county recognizing agricultural and forest
2 uses in the EFU zone have priority over all other uses.
3 Petitioners believe it was the county's duty under this
4 requirement to find that the applicant had signed the
5 disclosure statement. The county did not make such a finding
6 but instead found that the applicant had promised to sign the
7 disclosure statement.

8 We do not believe Section 19.026(6) requires the
9 interpretation advanced by petitioners. We agree with
10 respondent that it is enough that the disclosure statement be
11 signed before the conditional use permit is actually issued.

12 For the foregoing reasons, petitioners' sixth assignment of
13 error is sustained.

14 Petitioners' seventh assignment of error is that the board
15 of commissioners erred in conducting a view of the property
16 after the hearing was closed and then refusing to allow the
17 opponents an opportunity to present evidence rebutting the
18 evidence obtained at the view. Petitioners contend the manner
19 in which the board conducted the view was improper for two
20 reasons. The first reason is that the board apparently
21 witnessed, or at least one commission member witnessed, a truck
22 attempting to turn from the access way onto the highway. The
23 commissioners discussed this event among themselves but allowed
24 no one to present testimony about the event or rebut what the
25 commissioners observed. The second problem with the procedure
26 followed by the commissioners relating to the view advanced by

1 petitioners is that the commissioners failed to disclose what,
2 if any, additional evidence they saw at the view other than the
3 truck incident. Petitioners contend in Friends of Benton
4 County v Benton County, 3 Or LUBA 165 (1981), we held that any
5 evidence obtained at a view must be disclosed on the record so
6 that parties will have the opportunity to rebut that evidence.
7 Petitioners believe they were denied the opportunity to rebut
8 evidence of the truck incident, which was disclosed, and denied
9 the opportunity to rebut evidence of other things observed by
10 the commissioners which were not disclosed.

11 Because this case must be remanded to the county on other
12 grounds, we need not decide whether the manner in which the
13 board of commissioners conducted its view is itself grounds for
14 remand. We agree with respondents that petitioners did have an
15 opportunity to provide input to the board of commissioners
16 concerning the truck incident. The issue was brought to the
17 attention of the board of commissioners as well as the parties,
18 and opposing counsel submitted letters to the board of
19 commissioners. These letters were read into the record and
20 addressed the alleged impropriety. This should, it seems to us,
21 be sufficient to avoid any claim of prejudice to petitioners
22 resulting from this incident.

23 We agree with respondents that the purpose of this view, as
24 with all views, is to simply to afford the board of
25 commissioners the opportunity to better understand the
26 evidence, and not to gain new evidence. Nevertheless, the

1 board of commissioners should, during the public hearing
2 following the view, disclose whether they in fact saw anything
3 at the view which could be considered as "new evidence." Such
4 a disclosure can be made in this case following remand. If any
5 new evidence other than the truck incident came to the
6 attention of the commissioners, petitioners as well as other
7 parties should then be afforded the opportunity to rebut that
8 new evidence. Friends of Benton County v Benton County, 3 Or
9 LUBA 165 (1981).

10 Two other assignments of error raised by petitioners should
11 be addressed because the issues may resurface on remand.
12 Petitioners contend in their second assignment of error that
13 the county erred in failing to take an exception to Goal 3
14 pursuant to Goal 2, Part II, in granting the conditional use
15 permit. Petitioners recognize that a gravel operation is a
16 conditional use permitted in an exclusive farm zone by ORS
17 215.213. However, petitioners believe this particular gravel
18 operation violates Goal 3 because it will not be possible to
19 reclaim the property for an agricultural use. Petitioners
20 assert that the high water table will result in a stagnant lake
21 once the gravel operation is concluded. In their fifth
22 assignment of error petitioners argue that the county violated
23 Goal 3 in permitting the conditional use permit without first
24 determining that the need for aggregate from the parcel
25 overcame Goal 3's purpose of preserving and maintaining
26 agricultural lands. Petitioners argue the standard in Goal 3

1 for converting rural agricultural lands to urbanizable lands
2 requires an analysis of alternative sources, which analysis was
3 not undertaken by the county in this case.

4 We believe petitioners' Goal 3 concerns were addressed in
5 SEPA v Washington County, 4 Or LUBA 236 (1981). LCDC stated
6 the following as its determination concerning the need for an
7 exception to Goal 3:

8 "An exception to the agricultural lands goal is not
9 required if the proposed land use involves one of the
10 farm or non-farm uses permitted in an EFU zone under
11 ORS 215.203-213...

12 "A rock quarry is a non-farm use permitted by ORS
13 215.213(2)(b). Therefore, a rock quarry is consistent
14 with Goal 3 and does not require an exception.***"

15 The "alternative suitable location" criterion of Goal 3 was
16 not required to be applied by the county in this case because
17 the county, in approving this conditional use permit, was not
18 converting rural agricultural land to urbanizable land. Such
19 conversion can only occur when an urban growth boundary is
20 amended to include within the boundary rural agricultural
21 land.² No amendment to an urban growth boundary is involved
22 in granting this conditional use permit. The property is, as
23 we understand it, outside any urban growth boundary and remains
24 rural agricultural land after the granting of this conditional
25 use permit.

26 One final comment should be made concerning petitioners'
third assignment of error and the manner in which the county
attempted to comply with the provisions of Section 19.025 (see

1 Statement of Facts, supra. The findings recognize the
2 existence of the conditions set forth in Section 19.025. The
3 county did not determine whether these conditions, such as
4 screening or fencing, were required for this conditional use
5 permit. The county simply found that the applicant had agreed
6 to comply with these conditions "if required." We do not
7 believe these findings satisfy the requirements of Section
8 19.025. It is at the time the county considers granting the
9 conditional use permit that it must, in our view, determine
10 whether screening of the mining site or construction of berms
11 "may be necessary" or whether the safety of the public requires
12 a fence. There does not appear to be any process in the
13 Josephine County Zoning Ordinance, at least of which we have
14 been made aware, which would enable the county after granting
15 this conditional use permit to then require of the applicant
16 that a fence or screening be installed on the site. We believe
17 it was the intent of Section 19.025 to require that analysis at
18 the time the conditional use permit was granted. On remand the
19 county will, if it concludes that the conditional use permit
20 should be granted, have the opportunity to consider whether
21 fencing and screening, among other conditions required by
22 Section 19.025, should be imposed on the applicant.

23 For the foregoing reasons, this case must be remanded to
24 Josephine County for further proceedings not inconsistent with
25 the opinion.

26

FOOTNOTES

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4 It is at least partly because of concerns that aggregate
5 resource extraction activities pose compatibility problems with
6 adjacent uses that aggregate extraction is a conditional use
7 rather than an outright permitted use under ORS 215.213(2)(b).

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10 The statewide goals define "rural land" and "urbanizable
11 land" as follows:

12 "RURAL LAND: Rural lands are those which are
13 outside the urban growth boundary and are: (a)
14 Non-urban agricultural, forest or open space
15 lands or, (b) Other lands suitable for sparse
16 settlement, small farms or acreage homesites with
17 no or hardly any public services, and which are
18 not suitable, necessary or intended for urban use.

19 "URBANIZABLE LAND: Urbanizable lands are those
20 lands within the urban growth boundary and which
21 are identified and (a) Determined to be necessary
22 and suitable for future urban areas (b) Can be
23 served by urban services and facilities (c) Are
24 needed for the expansion of an urban area.

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

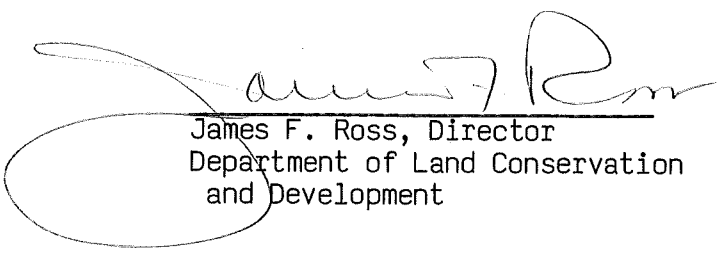
HARRY JOSEPH LaCHANCE, JR.,)
HARRY JOSEPH LaCHANCE, SR.,)
SAME L. MARKS, GREGORY MARKS)
and ROBERT COLLEE,)
Petitioner(s),)
v.)
JOSEPHINE COUNTY and)
L.H. KIRTLEY and)
VIVIAN KIRTLEY,)
Respondents.)

LUBA NO. 82-064
LCDC Determination

The Land Conservation and Development Commission hereby approves
the recommendation of the Land Use Board of Appeals in LUBA Case
No. 82-064 .

Dated this 22 day of November, 1982.

For the Commission:


James F. Ross, Director
Department of Land Conservation
and Development

JFR:DB:af
2005B-5/7B



STATE OF OREGON

INTEROFFICE MEMO

TO: MEMBERS OF THE LAND CONSERVATION AND DEVELOPMENT COMMISSION DATE: 11/02/82

FROM: THE LAND USE BOARD OF APPEALS

SUBJECT: LaCHANCE v JOSEPHINE COUNTY
LUBA No. 82-064

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

Petitioners appeal Josephine County's grant of a conditional use permit which would allow gravel and mineral extraction on a 30 acre parcel within an EFU zone. Petitioners contend the county's decision was not made in compliance with the Josephine County Zoning Ordinance as well as with statewide planning Goals 2 and 3. The Board agreed with petitioners that the county had not made findings which were adequate to meet the county's conditional use criteria for allowing a mineral extraction within an EFU zone. The Board also addressed petitioners contention that the mineral extraction operation violated Goals 2 and 3. The Board's discussion of these goal issues begins on page 12 of the opinion. The Board concluded that no exception to Goal 3 was required based upon LCDC's determination in SEPA v Washington County, 4 Or LUBA 236 (1981). The Board also disagreed with petitioners that the "alternative suitable location" criterion of Goal 3 was required to be applied by the county in approving the mineral extraction operation. We said this criterion is only applicable when the county is converting rural agricultural land to urbanizable land. As no amendment to an urban growth boundary was involved in this case, the alternative suitable location criterion was not applicable.

The Board is of the opinion that oral argument will 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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