

BEFORE THE LAND USE BOARD OF APPEALS

DEC 3 3 47 PM '82

OF THE STATE OF OREGON

UTAH INTERNATIONAL, INC.,)

Petitioner,)

vs.)

WALLOWA COUNTY,)

Respondent.)

LUBA No. 82-061

FINAL OPINION
AND ORDER

Appeal from Wallowa County.

Richard F. Crist, Lake Oswego, filed the Petition for Review and argued the cause on behalf of Petitioner.

D. Rahn Hostetter, Enterprise, filed the brief and argued the cause on behalf of Respondent.

COX, Board Member; BAGG, Board Member; participated in this decision. REYNOLDS, Board Member; participated in oral argument and pre-opinion discussions. REYNOLDS resigned from LUBA effective 11/15/82.

AFFIRMED

12/03/82

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 COX, Board Member.

2 FACTS

3 Petitioner Utah International appeals from the county's
4 denial of its request for a conditional use permit. Petitioner
5 applied for the permit to allow removal of a bulk lignite
6 sample from an area not larger in size than two acres. The
7 property from which the sample was to have been taken is zoned
8 for exclusive farm use (EFU). The proposed sample removal
9 would involve several steps. The company first would drill
10 test holes to verify the existence of lignite. If the mineral
11 were found, the petitioner would remove and stockpile the
12 topsoil and overburden which lies above the lignite layer.
13 Petitioner would then remove 240 tons of lignite, replace the
14 overburden and otherwise restore the land to its original
15 condition.

16 Petitioner's application was first heard by the Wallowa
17 County Planning Commission. Local ranchers and landowners
18 expressed concern about the effect the excavation would have on
19 groundwater and their nearby springs. Petitioner presented
20 testimony of experts who concluded that the proposed activity
21 would not impact local springs and groundwater sources.

22 Petitioner appealed the planning commission's denial of its
23 application to the Wallowa County Court. The county court
24 allowed public testimony, but its content was limited to the
25 record made before the planning commission. The county adopted
26 in large measure the findings of its planning commission. The

1 county court's findings on the ground water issue are:

2 "24. There exists a pattern of spring outcrops in the
3 area with springs occurring at elevations of
3,650 feet, 3,400 feet, 3,200 feet and 3,000 feet.

4 "25. The best estimate of the groundwater movement is
5 that recharge occurs when precipitation falls on
6 the surface and approximately one-third of the
7 total precipitation enters the ground to a depth
8 below the range of plant withdrawal. This water
9 recharges the aquifer. The water moves rapidly
10 down through the sandy overburden and strikes the
11 upper lignite layer, the immediate layer of clay
12 and the lower lignite layer with clay stringers.
Some water does pass through those zones to reach
the basalt, however, when water reaches these
zones, it begins to move laterally at a greater
velocity than it moves downward. The lateral
movement causes the outcroppings of springs on
hillsides and such outcrops can occur from the
top of the upper lignite layer down to the upper
basalt.

13 "26. The lignite layers are major groundwater aquifers
14 throughout the area.

15 "27. Ranches in the area are solely dependent upon
16 springs both for livestock and domestic water.

17 "28. The applicant has performed no drilling activity
18 at the site of the proposed activity.

19 "29. The applicant is uncertain as to the quantity of
20 water in the upper lignite at the test site
21 without performing certain pump tests prior to
22 pit excavation.

23 "30. Testimony reveals substantial uncertainty as to
24 the relationship of spring outcrops and geologic
25 strata occurring on Buck Butte.

26 "31. Testimony reveals substantial uncertainty as to
the mechanism of groundwater movement through the
lignite particularly in regard to fractures and
general saturation seepage.

"32. The testimony by the applicant, particularly that
of the geologist and hydrologist, reveals no site

1 specific data demonstrating the hydraulic
2 relationship of the test site, the upper lignite
3 layer to be disturbed and the springs serving
4 ranches to the northwest."

4 The Wallowa County Court concluded:

5 "A. The proposed excavation activity is an
6 appropriate conditional use within EFU zoned
7 lands, but not all potential sites within the EFU
8 zone may be appropriate for such a use, given the
9 need to protect adjacent lands, and the general
10 welfare of the county.

11 "B. Applicant has not satisfactorily established that
12 there is no significant risk to the groundwater
13 springs serving adjacent landowners. There was
14 inconsistent and conflicting testimony on possible
15 hydrological impacts from the parties at interest.

16 "C. The proposed activity imposes a significant risk
17 of severe economic damage.

18 "D. The public need for the proposed us [sic] is not
19 reasonably met at the proposed site. The public
20 need would be better met at sites which are more
21 distant from springs which are essential to a
22 farming or ranching operation."

23 OPINION

24 First and Second Assignments of Error

25 Petitioner's first and second assignments of error are that
26 there was no substantial evidence to support the county's
denial of its conditional use permit. Petitioner contends it
presented substantial evidence showing compliance with each of
the relevant criteria and no substantial evidence was presented
to the contrary.¹ As petitioner argues:

"The only substantial evidence in the record requires
the finding by the County Court that the application
and proposal posed no threat to nearby springs and
water supplies.

1 "In contrast to the expert testimony presented by
2 petitioner, testimony in opposition is limited to
3 concerns over the springs and the belief by the Bacons
4 and others that the proposed test pit may impact those
5 springs. However, the testimony presented in
6 opposition cannot rise to a level of 'substantial
7 evidence' to justify a finding as made by the County
8 Court for Wallowa County. No one trained in
9 groundwater hydrology testified in opposition to this
10 request. No one other than Larry Bacon (page 72), and
11 Spencer Bacon (page 72) gave any basis for their
12 concerns for impact on their springs. The basis for
13 their concerns is limited to their beliefs that the
14 groundwater for their springs comes from some location
15 out of the area and might be cut off by the proposed
16 pit. The testimony of each of the experts called by
17 the applicants as witnesses establishes that the
18 groundwater for the spring comes from precipitation
19 falling directly onto the butte and not from any
20 outside source." Petition for Review 17-18.

11 The testimony in opposition referred to by petitioner is
12 that of nearby landowners who have operated farms and ranches
13 in the area for many years. They testified that it was not
14 possible for the springs on their property to be replenished
15 solely by precipitation on a neighboring butte. The basis for
16 their opinion was that the butte area which petitioner's
17 "experts" indicate acts as the collector of precipitation is
18 too small to provide all the water discharged by the springs.
19 The farmers and ranchers believe a good portion of the spring
20 water comes, not from the butte area, but from the Wallowa
21 Mountains. They believed the Wallowa Mountains' water flow
22 might be disrupted by Utah International's proposal. In
23 addition, a representative of petitioner acknowledged that two
24 general theories as to the origin of the groundwater existed.
25 One theory is that expressed by a United States Geological
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1 Service (USGS) hydrologist who believes the groundwater comes
2 entirely from local precipitation. A second theory, she
3 acknowledged, was that held by a number of people in Wallowa
4 County and Don Baldwin, the United States Soil Conservation
5 Service, District Conservationist. They believe the
6 groundwater comes from the Wallowa Mountains.

7 A denial of a land use request is supported by substantial
8 evidence unless a reviewing body can say the applicant
9 sustained its burden as a matter of law. Jurgenson v. Union
10 County Court, 42 Or App 505, 600 P2d 1241 (1979). In this case
11 the applicant must prove, as a matter of law, that the
12 excavation authorized by the conditional use permit will not
13 adversely affect springs in the area. Whether the excavation
14 will adversely affect groundwater is not a matter entirely
15 within the knowledge or competence of lay persons. Proof of
16 this issue, therefore, necessarily is aided by testimony from
17 experts. But expert opinion testimony need not be accepted by
18 the trier of fact, in this case the county court, particularly
19 when the opinion is to the ultimate issue in the case. As was
20 recently expressed in W. R. Chamberlin and Co. v. Northwestern
21 Agencies, Inc., 289 Or 201, 611 P2d 652 (1980):

22 "The question to be decided is whether the jury should
23 have been bound to accept the expert's uncontradicted
24 opinion. We hold that the jury may reject this
25 conclusion because the weight of the opinion of an
26 expert witness is a matter particularly within the
province of the jury. * * *

"* * * Even if a jury accepts that an expert witness
has expressed an opinion which he believes to be

1 entirely truthful, the jury may not be persuaded on
2 the ultimate issue to be decided." 289 Or 201 at
3 207-208.

4 The "substantial" evidence upon which petitioner bases its
5 claim to permit entitlement is testimony of its experts who
6 opined that lignite removal would not adversely impact nearby
7 springs. Even if no contradictory testimony was introduced,
8 under the rule expressed in W. R. Chamberlin and Co. v.
9 Northwestern Agencies, Inc., supra, the Wallowa County Court,
10 acting as the trier of fact, was not required to accept the
11 expert testimony as establishing the ultimate fact in issue.

12 In Sims v. Tillamook County, 2 Or LUBA 83 (1980), we agreed
13 with petitioner that the county's decision denying a road
14 permit was not supported by substantial evidence in the whole
15 record. In Sims, the applicant for the road permit introduced
16 expert opinion that a proposed road would not materially affect
17 flood water discharge capacity or cause diversion of flood
18 water to areas not previously subject to such diversion. Safe
19 flood water discharge and diversion was a criterion which had
20 to be satisfied under the county's flood hazard zone
21 ordinance. The only testimony in the record directly related
22 to that criterion was that of petitioner's expert. In Sims, we
23 held:

24 " * * * There is no substantial evidence in this
25 record, as previously mentioned, that the proposed
26 road would materially affect flood water discharge
capacity or would cause diversion of flood water to
areas not previously subject to such diversion. The
county was not necessarily required to accept the
opinion of petitioner's expert, a professional

1 registered engineer, with respect to the effect of the
2 road on discharge capacity and diversion of flood
3 waters. However, it can not, without some explanation
4 for doing so, simply ignore that testimony when there
5 is no testimony in the record which specifically
6 refutes the expert's opinion." 2 Or LUBA 89.

7 It would have been more consistent with the Supreme Court's
8 decision in W. R. Chamberlin and Co. v. Northwestern Agencies,
9 Inc., supra, for us to have held in Sims, supra, that findings
10 are inadequate when they fail to explain why uncontradicted
11 expert testimony is not believed, rather than to have held, as
12 we did, that no substantial evidence existed to support the
13 county's decision. In relying on W. R. Chamberlin, supra, we
14 recognize that in quasi-judicial land use cases, unlike jury
15 cases, there must exist written findings which provide the
16 basis for subsequent review of the county's decision.
17 Sunnyside Neighborhood v. Clackamas Co. Comm., 280 Or 3, 569
18 P2d 1063 (1977). A jury does not have to set forth its reasons
19 for disregarding an expert's testimony. In review of a jury
20 decision, an appellate court does not require an explanation of
21 why an expert's opinion was not followed. In review of a land
22 use case, however, a reviewing body, whether it be this Board
23 or a court, must know why the county decided not to follow an
24 expert's uncontradicted opinion. That explanation, if
25 applicable, should exist in the local government's findings.

26 We believe the Wallowa County Court's findings in this case
adequately explain why the opinions of petitioner's expert
witnesses were not convincing. The county court found:

1 "The testimony by the applicant, particularly that of
2 the geologist and hydrologist, reveals no site
3 specific data demonstrating the hydraulic relationship
4 of the test pit, the upper lignite layer to be
5 disturbed and the springs serving ranches to the
6 northwest."

7 The county found the applicant had not performed any drilling
8 activity at the site of the proposed pit and was uncertain as
9 to the quantity of water in the upper lignite layer at the test
10 site. This uncertainty existed because no pump test at the
11 site had been performed. The county found there was
12 "substantial uncertainty as to the relationship of spring
13 outcrops and geological strata occurring on Buck Butte."

14 Finally, the county found there was "substantial uncertainty as
15 to the mechanism of groundwater movement through the lignite
16 particularly in relation to fractures and general saturation
17 seepage."

18 The foregoing findings of fact indicate that Wallowa County
19 was not adequately convinced petitioner's test pit would not
20 harm the groundwater and springs needed by area farmers and
21 ranchers. We believe the county's findings adequately explain
22 why it was not persuaded by petitioner's evidence and experts.

23 Third Assignment of Error

24 Petitioner's third assignment of error is as follows:

25 "The County Court for Wallowa County erred in basing
26 its decision of denial on findings not supported by
any substantial evidence within the record that the
public need for the proposed need [sic] is not
reasonably met at the proposed site and would be
better met at sites which are more distant from
springs, and in finding that the proposed activity
imposes a significant risk of severe economic damage."

1 The county court is alleged to have found that alternative
2 sites could better meet the need for the proposed use. It is
3 true that the county court made the following conclusion
4 concerning public need:

5 "The public need for the proposed us [sic] is not
6 reasonably met at the proposed site. The public need
7 would be better met at sites which are more distant
8 from springs which are essential to a farming or
9 ranching operation."

10 However, in the "Discussion" section of its findings document,
11 the Wallowa County Court made the following statement:

12 "Utah International also contends that the Planning
13 Commission's finding that other sites are available
14 which may satisfy the public need for mineral
15 exploration are not supported by substantial
16 evidence. The Court finds that although there very
17 well may be other available sites which would more
18 reasonably meet the public need without disrupting the
19 activities of adjacent landowners, consideration of
20 alternative available sites is applicable only in the
21 context of zoning change applications, and is not
22 appropriate to this decision on a conditional use
23 permit application. Kristensen v. Eugene Planning
24 Commission, supra. The Court therefore has not
25 considered any evidence presented with regard to
26 alternative sites."

 Given the above quoted statement, we do not believe Wallowa
County based its decision to deny this conditional application
on the availability of alternative sites. Even if it had, we
would not view its action as grounds for reversal. Petitioner
does not contest that one of the criterion to be met was proof
that the test pit would not adversely impact groundwater. The
county concluded, as discussed above, that this standard had
not been complied with. Therefore, regardless of whether we

1 were to hold Wallowa County erred in applying the alternative
2 sites standard, basing its denial on petitioner's failure to
3 satisfy the groundwater damage standard is sufficient. Heilman
4 v. City of Roseburg, 39 Or App 71, 591 P2d 390 (1979); Bienz v.
5 City of Dayton, 29 Or App 761, 566 P2d 904 (1977).

6 Fourth Assignment of Error

7 Petitioner next alleges it was denied the right to a
8 hearing before a fair and impartial tribunal. According to
9 petitioner, two members of the planning commission should not
10 have participated in the planning commission's decision.
11 Apparently one planning commission member, before being
12 appointed to the commission, appeared, offered testimony, and
13 signed a petition in opposition to Utah International's
14 application. Another member of the commission allegedly
15 belongs to an organization opposing lignite mining in Wallowa
16 County in general and Utah International's application in
17 particular.

18 The contested decision arose out of the Wallowa County
19 Court's review of the Wallowa County Planning Commission denial
20 of applicant's request. Petitioner seeks review of the Wallowa
21 County Court decision, not the decision of the planning
22 commission. The county court's decision was de novo, with aid
23 of a record made before the planning commission to limit the
24 scope of testimony. The county court adopted its own order,
25 findings, conclusions, and reasons for its decision. Even if
26 we were to agree that the planning commission proceeding was

1 not fair to petitioner in some respect, we have been shown no
2 fatal link between the alleged lack of fairness at the planning
3 commission level and the county court decision before this
4 Board.²

5 For the foregoing reasons, the decision of the Wallowa
6 County Court is affirmed.

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FOOTNOTES

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Petitioner does not contest that the county was required by its plan and zoning ordinances to find the conditional use permit would have no adverse impact on surrounding springs.

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Whether the planning commission members were active or had expressed views about a matter which later came before them would not necessarily preclude them from participating. The issue is whether the planning commission members who participated in the decision were biased. See Neuberger v. City of Portland, 288 Or 585, 607 P2d 722 (1980); Eastgate Theatre v. Bd. of County Comm'rs., 37 Or App 745, 588 P2d 640 (1978); Tierney v. Duris, Pay Less Properties, 21 Or App 613, 536 P2d 435 (1978).