

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

LAND USE
BOARD OF APPEALS

MAR 16 3 21 PM '83

LOWELL FORD, RAY BLANCHARD,
and THE SALEM TOWNE CIVIC
ASSOCIATION,

Petitioners,

E. L. CRAWFORD,

Petitioner-Participant)

v.

POLK COUNTY,

Respondent,

WALLING SAND AND GRAVEL, INC.)
Respondent-Participant)

83 011
LUBA NO. 82-081

FINAL OPINION
AND ORDER

Appeal from Polk County.

Richard C. Stein, Salem, filed a petition for review and argued the cause for Petitioners. With him on the brief were Ramsay, Stein, Feibleman & Myers.

E. L. Crawford, Salem, filed a co-petitioner's brief and argued the cause on his own behalf.

David A. Rhoten, Salem, filed a brief and argued the cause on behalf of Respondent-Participant. With him on the brief were Rhoten, Rhoten & Speerstra.

COX, Board Member; BAGG, Board Member; participated in the decision. BAGG, Board Member, Concurs.

Remanded in part. 3/16/83

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.

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1 COX, Board Member.

2 NATURE OF PROCEEDING

3 Petitioners appeal the August 20, 1982 order of Polk County
4 entitled "In the Matter of the Application of Walling Sand and
5 Gravel, Inc." The decision under appeal is designated as Order
6 No. 918 and as Conditional Use 80-56. Petitioners seek
7 reversal of the decision on the grounds that the Polk County
8 Board of Commissioners improperly construed the applicable law;
9 made inadequate and conclusory findings; and made findings not
10 supported by substantial evidence. The contested decision in
11 effect allows Walling Sand and Gravel, Inc. to expand its
12 operation for the exploration, extraction and basic processing
13 of soil, aggregate, mineral resources and sub-surface resources
14 in what is now an exclusive farm use zone. The decision would
15 also allow the hauling of the products of this mining operation
16 to destinations in the City of Salem via Riverbend and Wallace
17 Roads.

18 ALLEGATIONS OF ERROR

19 Petitioners and Petitioner-Participant Crawford set forth a
20 total of some eleven assignments of error. Those assignments
21 address concerns that there was no "need" shown for this
22 aggregate extraction operation and that the decision violates
23 Polk County Comprehensive Plan provisions dealing with
24 agricultural land, natural resources, and the Willamette River
25 Greenway. In addition, petitioners allege improper application
26 of the Plan's provisions regarding compatibility, resource
27 quality and transportation. Finally, petitioners claim there
28 was misapplication of the Polk County Zoning Ordinance

1 provision requiring a reclamation plan submission.

2 FACTS

3 The decision made by the Polk County Commissioners on
4 August 20, 1982 affirmed the decision and findings of the Polk
5 County Planning Commission. That decision granted a
6 conditional use permit to allow expansion of a commercial
7 gravel mining and processing operation being conducted by
8 Walling Sand and Gravel, Inc. (hereinafter Walling). The
9 permit allows the mining and processing of between 300,000 and
10 500,000 tons of gravel annually on 215 acres of agricultural
11 land off Riverbend Road NW in West Salem. USCS (United States
12 Conservation Service) Class I-IV soils are located on a
13 majority of the property. The subject site lies in a
14 floodplain and floodway area of the Willamette River. To the
15 south of the property are Wallace Marine Park and the Salem
16 city limits. To the immediate north and west are agricultural
17 lands and EFU zones. Along Wallace Road NW the use is
18 predominantly residential.

19 Walling has owned the subject property since 1966, but the
20 site has been used for gravel extraction since the mid-1940s.
21 In the early 1970s Polk County sued the Wallings on the ground
22 their extraction activity on the subject property violated the
23 county's zoning code controlling non-conforming uses. The suit
24 asked for cessation of Walling's operations and replacement of
25 that material which had been removed. By mutual agreement of
26 counsel for the parties, the lawsuit was continued during the
27 years of hearings, etc. with the City of Salem, Polk County and
28 LCDC regarding the establishment of Salem's urban growth

1 boundary and the effect on the subject property of that
2 decision. On December 2, 1981, the Oregon Supreme Court handed
3 down a decision in Polk County v. Martin, 292 Or 69, 636 P2d
4 952 (1981). Based on the Martin decision, the Wallings moved
5 for dismissal of the Polk County v. Walling suit. The Polk
6 County Circuit Court granted the dismissal thereby allowing
7 continued aggregate extraction on the subject property as a
8 non-conforming use. That October 1, 1982 decision was not
9 appealed by Polk County.

10 At the present time a commercial aggregate extraction
11 operation is supplying pit run aggregate from the property as
12 it has for the past 15 years. In November, 1980, Walling
13 applied for the presently contested conditional use permit.
14 After amendment of the conditional use permit request and
15 public hearings before the Polk County Planning Commission, a
16 decision by the Planning Commission allowing the permit was
17 entered on April 6, 1982. After appeal to the Polk County
18 Commission, an order affirming the Planning Commission order,
19 adopting findings and imposing conditions was signed on August
20 20, 1982, allowing the conditional use permit. Polk County's
21 Comprehensive Plan has been acknowledged to be in compliance
22 with the statewide goals (ORS Chapter 197).

23 DECISION

24 Assignment of Error No. 1

25 Petitioners allege the Polk County Board of Commissioners
26 "misconstrued the applicable law by construing 'established
27 need' too broadly." A similar allegation is made by
28 Petitioner-Participant Crawford in his first assignment of

1 error. However, Crawford approaches it from the point of view
2 that the findings and conclusion of the Board of Commissioners
3 that "unless the conditional use is granted, there will be a
4 shortage of aggregate [sand and gravel] in the Salem area" are
5 erroneous.

6 Petitioners point to a January 1, 1980 Intergovernmental
7 Agreement between the City of Salem and Polk County to support
8 their allegation that a need standard was applied too broadly
9 by Polk County in granting the conditional use permit.¹

10 Petitioners refer to item no. 4 in that January 1, 1980
11 agreement in which Polk County agreed

12 "[t]o permit expansion of existing operations and
13 establishment of new extracting and processing of
14 aggregate operations in conformance with the
15 applicable statutes, ordinances and regulations in
16 designated areas when there is established a need for
the resource." (Emphasis added).

16 Applicable Burden and Standard

17 Petitioners take the position that the above stated
18 language, when coupled with other goals and policies in the
19 Polk County Comprehensive Plan, requires a clear and convincing
20 immediate need for the gravel resource be shown to justify the
21 destruction of agricultural land. The "other goals and
22 policies" petitioners point to are the Polk County
23 Comprehensive Plan Agricultural Lands Goal 1 and Policies 1.2,
24 1.3 and 1.4.² Our attention is further directed to a staff
25 report as support for the argument that a legislative
26 preference for agricultural use has been established for the
27 Walling property. Due to this preference, petitioners argue a
28 heavy burden has to be overcome to "establish a need."³

1 The Polk County Commissioners, according to petitioners,
2 improperly construed the phrase "when there is established a
3 need for the resource" as being synonymous with "market
4 preference and a vague finding of long-term future need." They
5 argue that this Board's decision in Friends of Benton County v.
6 Benton County, 3 Or LUBA 165 (1981) is squarely on point in
7 holding that such a construction of the "establishment of
8 need," as petitioners have chosen to identify the agreement
9 standard, is improper. In sum, petitioners' entire argument is
10 that the applicant has failed to establish a need for the
11 resource.

12 Respondent Walling counters petitioners' arguments and
13 takes the position that the Polk County Board of Commissioners
14 properly found a need had been established warranting the grant
15 of the conditional use permit. First, in reference to
16 petitioner's burden argument, respondents point to statutes and
17 other proof that a preference for aggregate exists. For
18 example, it argues ORS 517.760 establishes a strong statewide
19 policy to protect and enhance aggregate resources in
20 Oregon.⁴ Respondent also argues Polk County Zoning Ordinance
21 Section 136.040, as amended by PCZO 219, provides that
22 aggregate operations are permissible within an EFU zone as a
23 conditional use. Then pointing to the January 1, 1981
24 Intergovernmental Agreement between the City of Salem and Polk
25 County (see footnote 1), Walling argues that under Section 2 of
26 that agreement, extraction of aggregate resources is a goal of
27 both governmental entities. Specifically, respondents quote
28 the section 2 terminology that provides for protective policies

1 in flood areas to be established that "discourage encroachment of
2 incompatible uses to the extraction and processing of aggregate
3 resources." Walling argues the intergovernmental agreement
4 establishes a preference for aggregate resource development on the
5 West Salem floodplain abutting the City of Salem boundary. It
6 claims that regardless of a statewide policy preference for
7 agricultural land use, (tempered by ORS 517.760 (see footnote 3)),
8 a specific site preference for aggregate resource development on
9 the West Salem floodplain was clearly agreed upon in the LCDC
10 acknowledged urban growth boundary and land use related agreement.

11 We find no additional burden on the applicant is established
12 for this proceeding above that imposed by the requirement to
13 obtain a conditional use permit. The preferences for preservation
14 of agriculture and aggregate resource lands seem to be of equal
15 weight.

16 Application of Need Standard

17 This Board has had a great deal of difficulty attempting to
18 apply the amorphous standard of "need" to land use decisions.
19 See Concurring Opinion, DLCD v. Tillamook County Board, 3 Or
20 LUBA 138 (1981). The standard to be applied in this case is
21 whether "there has been established a need for the resource."
22 Petitioners would have us review that standard in light of our
23 opinion in Friends of Benton County v. Benton County, 3 Or LUBA
24 165 (1981), wherein the standard at issue was a showing of
25 "demonstrated need" for rock. In Benton County the majority of
26 this Board felt that "demonstrated need" equated to "present
27 need" and concluded no findings were made to indicate a present
28 need existed. Here, the type of "need" that is to be shown can

1 be construed as being not only present but also future. The
2 standard herein does not carry a connotation indicating the
3 term or time span over which a need must be shown to exist.
4 The fact that a quarry site overlay zone had already been given
5 to this land identifying it as an existing or possible
6 aggregate site can not be ignored. That initial quarry site
7 overlay zone determination and application to the site in 1978
8 indicates that a determination of need for the resource located
9 at the site had already been established.

10 Even if we were to view the standard to be applied as
11 unclear, the interpretation of its meaning by its creator has
12 to be given great weight in understanding what was meant to be
13 encompassed by the phrase. In that regard, it is interesting
14 to note the other party to the Intergovernmental Agreement,
15 which is the source of the standard, the City of Salem, has
16 chosen not to appeal the interpretation given to the standard
17 by Polk County. In fact finding no. 5, page 26 of Polk
18 County's order indicates the City of Salem approved the Walling
19 operation and reclamation plan on July 20, 1981.

20 The findings point out, Polk County in effect interpreted
21 the "there is established a need for the resource" standard as
22 being prospective in nature. The findings indicate that a
23 planning period to the year 2000 was taken into consideration.
24 The county found the City of Salem area will be deficient in
25 available aggregate resources over the planning period to the
26 year 2000 if no additional new sites are developed or brought
27 into production.

28 Polk County's order and findings in part state:

1 "A concensus has been developed between Polk County
2 and the City of Salem regarding land use of the West
3 Salem Flood Plain. The proposed conditional use is in
4 keeping with agreed upon land uses for the site and
5 local region. A market demand has been documented for
6 the aggregate resources of the site. The general need
7 for aggregate materials in the construction industry
8 has been documented. The proposal has been carefully
9 revised from previous applications to meet the intent
10 and requirements of state and local land use
11 planning. The proposed conditional use application
12 recognizes the agricultural zoning and conflicting
13 resource uses of the site. The proposed conditional
14 use is a result of increasing aggregate demand and
15 recognition of the aggregate values of the site in the
16 land use planning process." (Record 40-41)

17 To arrive at that conclusion, the county made several findings
18 which can be viewed as addressing the need standard. Those
19 include:

20 "14. Economically feasible aggregate resources are
21 site specific and are further limited in utility
22 by zoning, adjacent development and land uses,
23 transportation facilities, market area and local
24 and state regulations, standards, restrictions
25 and requirements.

26 "15. Sites which contain the quantity and quality of
27 aggregate material found on the Walling site do
28 not exist in upland areas but are found generally
only in the flood plain areas of larger rivers in
the Willamette Valley.

"16. Approval of the application for a Conditional Use
Permit will permit development of the most energy
efficient site in the West Salem - northeast Polk
County area. No alternative site contains the
same volume of material and is located within the
same or less hauling distance to the market
area. Therefore, the Walling site possesses the
greatest energy efficiency of any site with the
proposed scope of operations or identified
potential reserves in the West Salem Flood Plain
area.

"17. The capability of removing aggregate from the
Willamette River has been severely reduced by the
lack of recharge of gravel material in the river
and the adopted policies and regulations of state
and federal agencies. Point Bars can no longer
be removed. Therefore, scalping of point bars

1 will result in limited quantities of aggregate
2 material which will not meet identified needs."

3 "27. Additional employment on the site and secondary
4 employment stimulated offsite by the approved
5 Walling Sand and Gravel operation will contribute
6 to improvement and diversification of the local
and regional economies without further dependence
upon the traditionally dominant seasonal
agriculture and lumber and wood products
industries." (Record 33-35)

7 The county made additional findings under a section entitled
8 "WEST SALEM FLOOD PLAIN INTERGOVERNMENTAL AGREEMENT." Those
9 findings include the following references to the subject of
10 "need":

11 "2. The County has designated the existing site with
12 a 'Quarry Site' overlay on the Comprehensive Plan
13 map adopted by the Polk County Commission in
14 September 1978. The existing extraction and
processing facility is protected by the 'Quarry
Site' designation and by the recent Supreme Court
decision Polk County v. Martin."

15 "4. A deficit in supplies and market demand for
16 aggregate materials was shown by testimony and
17 written presentations at public hearings. Polk
18 County staff determined that 'the concern for the
19 Intergovernmental Agreement and aggregate
need...have been satisfied by the City's recent
action.' Polk County adopted a Sand and Gravel
Resource sites ordinance (Chapter 120.400) in
1973 and amended it in 1974." (Record 38)

20 Finally, under a section entitled "FACTORS MAKING THIS
21 APPLICATION DIFFERENT FROM PREVIOUS APPLICATIONS ON THE WALLING
22 SITE," Polk County found:

23 "3. The Walling site has been designated with a
24 'Quarry Site' overlay on the Land Use Plan Map
25 No. 1 (September, 1978). The purpose of the
26 overlay is to identify 'existing or possible
aggregate sites'. Based on the continuing
aggregate operation on the site and the
identified resource remaining, the overlay is an
appropriate designation for the Walling site."

27 "6. The Oregon Department of Geology and Mineral
28 Industries has completed an inventory of

1 aggregate resources in Polk County. The
2 inventory provides a greater definition of
3 aggregate sites and available reserves. Based on
4 this data and information, it has been determined
5 that the area will be deficient in available
6 resources over the planning period to the year
7 2000 if no additional new sites are developed and
8 brought into production.

9 "7. Within the market area to be served by the
10 Walling site, approximately 12 million tons of
11 aggregate material have been utilized from 1972
12 to 1980. Based on projected population increases
13 and per capita consumption for the area, a demand
14 has been defined to be at least 2 million tons
15 annually. This is expected to increase to 3
16 million tons annually by the year 2000. The
17 result is a total need range of between 40 and 50
18 million [sic] tons for the planning period from
19 1980 to 2000.

20 "8. No alternative site within the West Salem Flood
21 Plain has been identified which contains reserves
22 similar to or greater than the Walling site and
23 possesses the locational characteristics in
24 relation to the market area such that comparable
25 levels of energy efficiency are achieved."
26 (Record 40-41)

27 Based on the findings, we hold Polk County determined the
28 standard that "there is established a need for the resource" is
without an exclusive connotation of immediate need as argued by
petitioners. We believe the county's interpretation of that
standard is reasonable and deny petitioners' first assignment
of error.

ASSIGNMENT OF ERROR NO. 2

Here petitioners allege

"The Polk County Board of Commissioners failed to make
adequate findings of fact to support their [sic]
conclusion that there was an established need for the
gravel resource as required by the Intergovernmental
Agreement and the Agricultural Lands Goal of the Polk
County Comprehensive Plan."

This assignment of error has been answered in our denial of

1 petitioners' first assignment of error. Therefore, we deny
2 petitioners' second assignment of error.

3 ASSIGNMENT OF ERROR NO. 3

4 Petitioners argue in this assignment of error that the
5 "Polk County Board of Commissioners finding of need
6 was not supported by substantial evidence."

7 Petitioners offer their definition of need as being the
8 shortfall between supply and demand. As such, they argue that
9 in order to determine need one must examine both supply and
10 demand. They then point to a statement made by the applicant
11 in its conditional use permit request as support for their
12 argument that no evidence exists to support any shortfall
13 between supply and demand. That statement, made in 1980, is
14 "there are no good figures on total reserves or available
15 supplies in the Salem Metropolitan or Tri-County area." The
16 entire quote is:

17 "There are no good figures on total reserves or
18 available supplies in the Salem metropolitan or
19 tri-county area. In 1960 the Oregon Department of
20 Geology and Mineral Industries conducted a study of
21 the reserves of the Salem metropolitan area and
22 indicated at that time that current reserves would be
23 exhausted by 1976. [Citing Schlicker, H. G. (1961)
24 Gravel Resources in Relation to Urban Development in
25 the Salem Area. Oregon Department of Geology and
26 Mineral Industries. Open File Report, 9 pp.] It is
27 obvious that operators at that time obtained other
28 reserves; however, the problem remains of ensuring
reserves for future production." (Record 1165)

24 Petitioners build their argument on the same premise that
25 was used in their first assignment of error. That premise is
26 the "need" which must be established is an "immediate" need for
27 gravel.

28 As we held in the first assignment of error, the showing

1 that "there has been established a need for the resource" is
2 not exclusively related to the immediacy of that need for
3 gravel. The Polk County Commissioners determined that the
4 establishment of need could be prospective through the life of
5 the comprehensive plan, i.e. the year 2000 A.D.

6 We reviewed the record to see whether Polk County's
7 interpretation of the "need" standard is supported by
8 substantial evidence. In conducting our review, we also took
9 note of petitioners' admission that "need" is shown by the
10 "shortfall between supply and demand." The record contains
11 material indicating no new aggregate supplies had been
12 developed within the Salem Metropolitan area between the years
13 1972 and 1980. At the same time, river gravel extraction
14 operations have been severely limited by resource agencies. On
15 pages 534 through 543 of the record is evidence concerning the
16 aggregate supplies. This information is summarized from recent
17 information developed by the Oregon Department of Geology and
18 Mineral Industries. Included in this evidence is a statement
19 there is a deficit of from 15 to 20 million tons of reserved
20 aggregate supplies for the planning period of 1982 to 2000.
21 The demand-supply comparison was based on per capita usage,
22 historic production rates and a projection indicating the
23 Walling site will satisfy 9 to 22 percent of the local demand
24 for the life of the site. To that is added evidence that
25 aggregate demand has increased for the Salem urban growth area
26 and the area served by Walling. (Record 432). There is also
27 an analysis of an alternative site [Hayden Island] which
28 concludes that only 350,000 tons could be supplied from this

1 alternate site. It is also stated that the Walling site is
2 typical of the majority of the aggregate sites in the immediate
3 market area in that it is within the flood plain of the
4 Willamette River.

5 Petitioners base their argument about lack of substantial
6 evidence to some extent on the Court of Appeals opinion in
7 Still v. Board of County Comm'rs, 42 Or App 115, 122, 60 P2d
8 433, rev den (1977) wherein the court held that

9 "A market demand for rural residential development,
10 however, does not constitute a 'need' for it, as that
11 word is used in Goal #2. Goal #3 was enacted to
12 preserve agricultural land from encroachment by urban
13 and suburban sprawl by subordinating the free play of
14 the marketplace to broader public policy objectives.
15 Land is not excepted from the agricultural goal merely
16 because somebody wants to buy it for a house."

17 Applying the Still decision, petitioners believe there is
18 no substantial evidence to support Polk County's decision. If
19 the demand side of a supply-demand comparison is not an
20 appropriate consideration, then only evidence supporting the
21 supply side of the equation is valid and supply data alone does
22 not justify a need. We disagree with that analysis for the
23 reasons set forth above (i.e. Polk County has given a different
24 interpretation of the meaning of the applicable standard).
25 Furthermore, the Still court had before it only data
26 establishing demand, whereas here we have evidence to support
27 both demand and supply findings. In addition, the Still court
28 was dealing with residential property in an agricultural area,
here we are dealing with aggregate extraction from an
established quarry overlay zone. Finally, we must remind
petitioners that they admit in their brief that one way of

1 establishing need is to determine if there is a shortfall
2 between supply and demand. The evidence in the record supports
3 the interpretation of "need" chosen by Polk County and the
4 county's findings. As the Court of Appeals held in Christian
5 Retreat Center v. Comm. For Wash. Co., 28 Or App 673, 679, 560
6 P2d 1100 (1977):

7 "Where, as here, it is alleged that the findings of
8 the lower tribunal are not supported by substantial
9 evidence, the inquiry to be made by this court is the
10 limited one of whether the record contains evidence
11 which a reasonable mind might accept as adequate to
12 support the findings challenged. Where the record
13 includes conflicting believable evidence, that
14 conflict is to be resolved not by this court but by
15 the lower tribunal which may choose to weigh the
16 evidence as it sees fit."

17 We have followed that application of the substantial evidence
18 standard in the past. See Hinson v. Jackson County, 1 Or LUBA
19 24, 28 (1980). Based on the foregoing, petitioners' third
20 assignment of error is denied.

21 ASSIGNMENT OF ERROR NO. 4

22 Petitioners allege

23 "The Polk County Board of Commissioners' Approval of
24 this Conditional Use Violates the Polk County
25 Comprehensive Plan's [sic] Agricultural Lands Goal 1
26 and Policies 1.2, 1.3, and 1.4."

27 Petitioners' concern is that the granting of this conditional
28 use permit will not preserve agricultural land and thus
violates Polk County's Comprehensive Plan Goal #1 which is "* *
* to preserve and protect county agricultural lands." The goal
is expanded upon by the Comprehensive Plan Policy 1.2 which
states:

1 "Polk County will preserve those areas for agriculture
2 which exhibit a predominance of agricultural soils and
3 in absence of non-farm use interferences and
4 conflicts."

5 Petitioners then go on to argue that Policy 1.3 indicates Polk
6 County will discourage the development of non-farm uses in
7 agricultural areas. Finally, petitioners argue that Policy 1.4
8 which sets out the criteria for permitting a non-farm use in
9 agricultural areas has been violated as well. (See footnote 2
10 supra).

11 We do not agree with petitioners' position. The Polk
12 County Commission approved the requested conditional use permit
13 after applying the conditional use standards found in its
14 plan. Those standards were designed to implement the
15 comprehensive plan and its policies. There appears to be no
16 quarrel over the fact that the conditional use permit process
17 was the appropriate standard to apply in reaching the decision
18 which is now under appeal. This is consistent with the
19 dictates of ORS 215.213(2).⁵ The fact Polk County's
20 Comprehensive Plan has been acknowledged puts this Board in a
21 position on review of ordinances that purports to implement
22 that comprehensive plan to accept the ordinances as written.
23 Byrd v. Stringer, 60 Or App 1, ____ P2d ____ (19__) review
24 granted, 294 Or 460 (1983).

24 ASSIGNMENT OF ERROR NO. 5

25 Petitioners claim in this assignment of error that

26 "[t]he Polk County Board of Commissioners approval of
27 this conditional use violates the Polk County
28 Comprehensive Plan's Natural Resource Section Goal 6."

Polk County Comprehensive Plan Goal 6 states:

1 "To conserve and manage the water resources in order
2 to maintain and protect water quantity and quality and
3 to abate flood, erosion, and sedimentation problems."
 (emphasis added)

4 Petitioners reason that the flood erosion danger is higher if
5 the aggregate operation is allowed to expand. Therefore,
6 instead of abating the flood, erosion and sedimentation
7 problems, petitioners worry the approval of the permit actually
8 increases those problems. Petitioners point to several pages
9 of the record to support their claim that flood and erosion
10 danger is higher if the project is constructed than if it is
11 not.

12 The record is full of Polk County's consideration of this
13 problem from both petitioners' viewpoint and applicants'
14 viewpoint. The commissioners' findings are extensive regarding
15 the flood and erosion danger and consequently the sedimentation
16 concerns. The findings explain the evidence used to conclude
17 there is no such hazard providing recommended (and adopted)
18 conditions are met. Specifically, by way of illustration, the
19 county found:

20 "The Corps of Engineers criteria to allow activity
21 within the floodway boundary is based on flood water
22 elevation changes. Increase in flood stage as a
 result of manmade activity is not acceptable and will
 not occur on the site based on the plan as proposed."

23 "* * * The calculations provided the conclusion that
24 no measureable change in water stage will occur at the
 100 year flood flow with the pit excavation." (Record
25 23).

26 Petitioners do not allege the county commissioners failed
27 to acknowledge or consider the evidence that was submitted
28 regarding their concerns. In addition, petitioners do not

1 allege that there is a lack of substantial evidence to support
2 the findings made by Polk County. We view petitioners'
3 allegation under this assignment of error to be in effect a
4 request that we substitute our judgment for that of the Polk
5 County Commissioners. That is not the role of this Board.
6 Petitioners' fifth assignment of error is denied.

7 ASSIGNMENT OF ERROR NO. 6

8 In this assignment of error, petitioners allege

9 "[t]he Polk County Board of Commissioners approval of
10 this conditional use violates the Polk County
11 Comprehensive Plan's [sic] Willamette Greenway Goal 1."

12 Goal No. 1's purpose is to "protect, conserve, enhance, and
13 maintain the scenic, historical, agricultural, economic and
14 recreational quality of land along the Willamette River." This
15 appears to be another way of petitioners' presenting the
16 argument made in assignment of error no. 5. Petitioners stress
17 the same concern that the results of an increased flood danger
18 would cause rechannelization of the river.

19 Once again, we disagree with petitioners and deny their
20 assignment of error. The extraction operation as proposed does
21 not appear to be within the Willamette River Greenway per the
22 Polk County Comprehensive Plan as acknowledged by LCDC.
23 Specifically, a condition placed on the permit for aggregate
24 extraction states:

25 "No structures, stock piles, burms and/or storage
26 areas shall be allowed within the floodway portion of
27 the Willamette River Flood Plain as shown on the Corps
28 of Engineers' Map WR-20-14/1 dated November 17, 1978
or within the slough channel.

"No operation shall be conducted within 150 feet of
the Willamette River Greenway, the boundary of which
is depicted upon the official county greenway maps on

1 file in the County Clerk's office except this setback
2 maybe [sic] reviewed by the Planning Commission for
adequacy as relates to flood protection as follows:

3 "(1) During the review of each new phase of
4 development as specified on the master plan; and

5 "(2) In conjunction with a major flooding event
6 equivalent to that of a 100 year flood or
greater." (Record 10)

7 Those conditions as well as the findings referred to in our
8 discussion of assignment of error no. 5 indicate petitioners'
9 concerns under this assignment of error are misplaced.

10 ASSIGNMENT OF ERROR NO. 7

11 In this assignment of error petitioners claim

12 "[t]he Polk County Board of Commissioner's approval of
13 this conditional use violates the Polk County
14 Comprehensive Plan's Land Capability and Resource
Quality Section's Goals 1 and 2."

15 The purpose of Goals 1 and 2 are:

16 "1. To protect life and property from natural hazards
17 and disasters. 2. To protect and improve the quality
of land resources in the county and affected regions."

18 In this assignment of error petitioners merely adopt their
19 arguments made under assignments of error 4, 5 and 6. They
20 conclude that property or life or both are threatened by this
21 action, not to mention the quality of land resources. They
22 then end with the rhetorical question "[w]hy court a disaster
23 when this facility is simply not needed?" In denying this
24 assignment of error we refer petitioners back to our holdings
25 in assignments of error 4, 5 and 6. As to the rhetorical
26 question, the issue of need was dealt with in our order on
27 assignments of error 1, 2 and 3 and we refer petitioners to
28 that portion of this decision.

1 ASSIGNMENT OF ERROR NO. 8

2 Here petitioners claim

3 "[t]he Polk County Board of Commissioner's approval of
4 this conditional use violates the Polk County
5 Comprehensive Plan's Transportation Section's [sic]
6 Goal 2."

7 The transportation section Goal 2 purpose statement as
8 identified by petitioners, is "[t]o develop and assist in the
9 develoment of a safe, convenient and economic transportation
10 system available to all person."

11 Petitioner-Participant E. L. Crawford makes a similar
12 argument in his assignment of error no. 2 wherein he claims the
13 "Planning Commission and the Board of Commissioners by their
14 adoption of their findings are in error in allowing the
15 conditional use as it will have a very adverse affect upon
16 adjacent and other property." Mr. Crawford's concern is
17 associated with the traffic generated as a result of the
18 aggregate operation's expansion. His concern goes to the
19 inability of the roads in the area to handle the increased
20 traffic and the destruction of livability which he feels will
21 be the result of increased traffic.

22 The Polk County Commission order and findings on this
23 subject are confusing. The county adopted the planning
24 commission's findings verbatim and on page 28 of the record it
25 appears the planning commission addressed the petitioners'
26 concerns about the traffic matter by placing "mitigating
27 measures required for this operation" on their recommendation
28 to grant the permit. Those measures, which were arguably
 adopted by the county commissioners include:

1 "a. Riverbend Road be widened and upgraded to 34 feet
2 (provides 17-foot travel lanes which are adequate
3 for two-way traffic), curbs and sidewalks on the
4 south side of Wallace Road to a point 700 feet
east. This would provide adequate walking area
for the existing residences on the south side of
Riverbend Road.

5 "b. Riverbend Road be widened to 34 feet without
6 curbs and sidewalks from a point 700 feet east of
Wallace Road to the existing access point. [No
existing pedestrian traffic.]

7 "c. Wallace Road be widened to provide: .

8 "1) An acceleration lane on the west side of
9 Wallace Road south of Riverbend Road;

10 2. A deceleration lane on the east side of
Wallace Road south of Riverbend Road.

11 "d. The City continue to monitor the intersection of
12 Riverbend and Wallace Roads for future traffic
13 signal installation." (Record 28)

14 While the Board of Commissioners did say it was adopting the
15 planning commission's findings of fact wherein the above quoted
16 material is to be found, it also imposed a set of its own
17 conditions on the conditional use permit. In that set of
18 conditions is a reference to some of the traffic concerns
19 addressed by petitioners in their brief and at the time of
20 hearings before the Polk County Commission and the Polk County
21 Planning Commission. Specifically, the Board of Commissioners
22 stated:

23 "18. The intersection of Wallace Road and Riverbend
24 Road shall have the following improvements made
before the applicant commences operation under
this conditional use.

25 "a. North and south approaches of Wallace Road
26 shall be signed for 'trucks'.

27 "b. Wallace Road northbound approach to River
28 Bend Road shall be improved to provide a
deceleration taper and 30 foot curb radius
pursuant to Planning Department standards.

1 "c. A flashing yellow warning light shall be
2 installed at the intersection of River Bend
Road and Wallace Road." (Record 11)

3 Petitioners raised the issue in their brief that the Polk
4 County Order had in effect deleted portions of the planning
5 commission's findings and recommendation by excluding those
6 when the above stated conditions were imposed upon the grant by
7 the Polk County Commission. Respondent did not deny this
8 allegation. Therefore, we are left in the dark as to exactly
9 what the Polk County Board of Commissioners intended regarding
10 the transportation problem identified by petitioners. Did it
11 mean that the roadways and their use were to be modified in the
12 manner identified by the planning commission as well as the
13 conditions imposed by its order, or was it rejecting the
14 planning commission's findings regarding the roadways in all
15 aspects except those more specifically identified by the
16 conditions placed on the permit?

17 Petitioners and Petitioner-Participant further question
18 whether the proposal is safe pursuant to transportation plan
19 Goal 2 (supra) and the requirement of conditional use permit
20 Section C. Section C requires a finding that the proposed use
21 is consistent with the public health, safety and welfare.
22 Petitioner-Participant argues there is evidence in the record
23 pointing to an access alternative to the Wallace Road/Riverbend
24 Road choice made by Polk County. This alternative is not
25 discussed in the findings but there appears to be enough
26 evidence in the record to indicate it should have been. Gruber
27 v. Lincoln Co., 2 Or LUBA 180 (1981); Lee v. City of Portland,
28 3 Or LUBA 31, 57 Or App 798, 646 P2d 662 (1982). For the

1 foregoing reasons, we affirm petitioners' eighth assignment of
2 error.

3 ASSIGNMENT OF ERROR NO. 9

4 Here petitioners argue the Polk County Board of
5 Commissioners' approval of this conditional use

6 "violates the Polk County Comprehensive Plan's Zoning
7 Ordinance (PCZ) 120.400 et. seq. in that review and
8 approval of the reclamation plan prior to approving
the conditional use was not accomplished and the plan
was incomplete."

9 Petitioners' basic argument is that the conditions imposed
10 by the Polk County Commissioners on reclamation of the
11 aggregate extraction site make it clear that a post approval
12 submission of a reclamation plan is intended. Petitioners
13 argue that this is at odds with the ordinance provisions found
14 at PCZO 120.430(c) which they claim requires that a
15 rehabilitation plan accompany the application. Petitioners
16 stress that a proper application must include a map at not less
17 than 1-400 foot scale and indicating topographic contours at
18 intervals of not less than 25 feet. Petitioners argue no
19 topographic contours are present in the materials in the record.

20 To begin with, we disagree with petitioners' claim that
21 there is no topographical contours present in the materials in
22 the record. Exhibit 4A, Volume IV, of the record contains a
23 "Conceptual Redevelopment Plan" map. On that map there are
24 topographic contour lines, more specific than the required 25
25 foot interval, drawn at intervals of ten feet.

26 In response to petitioners' general argument that there has
27 been an insufficient reclamation plan submitted prior to
28 approval of the conditional use permit, we also disagree with

1 petitioners' assertion. The record contains maps detailing the
2 operational phasing plan, a detail plan for stockpiling and
3 operations of the area, and, as above identified, a conceptual
4 redevelopment plan. There is testimony in the record starting
5 at or about page 765 which deals with the question of
6 reclamation and the plan to reclaim each of the phases as
7 aggregate extraction has been completed. Discussions of
8 possible uses for recreation purposes and reclamation for those
9 purposes are contained in the record.

10 In addition to the recorded material, the order of the
11 Board of County Commissioners indicates the reclamation
12 concerns of petitioners were dealt with prior to permitting the
13 requested use. Specifically, the order states the

14 "applicant shall demonstrate satisfactory progress of
15 approved reclamation measures for each previous phase
16 with the ultimate reuse of the property to be
17 determined during the approval of Phase III." (Record
18 9)

19 Section 1(c) of the findings states:

20 "In the case of a finding by the county of
21 non-compliance and/or inadequate reclamation measures,
22 approval of the initiation of any phase shall be
23 withheld until all requirements are satisfied."
24 (Record 10)

25 In addition, the following conditions must be met:

26 "9. All final inwater slopes to be no greater than 3
27 to 1 to a depth of 6 feet below mean low water.

28 "10. A detailed operational and reclamation plan drawn
to scale and fully dimensioned shall be submitted
to the Planning Director for review and approval
prior to the initiation of each phase.

"11. The reclamation plan shall include specifications
for land form, water body, banks, slops, ground
cover and tree planting reclamation measures.

1 "12. The reclamation plan shall include all areas of
2 previous and current aggregate extractational
operations.

3 "13. All extraction operations and reclamation plans
4 shall comply with Department of Environmental
5 Quality and the Department of Geology and Mineral
Industry Standards.

6 "* * *

7 "15. Excavations made to a water producing depth
8 creating lakes or ponds shall be deep enough to
prevent stagnation and development of insect
breeding areas or be backfilled with a material
that will not impair ground water quality.

9 "* * *

10 "19. The applicant shall agree to accept, to be
11 responsible for or be liable for:

12 "* * *

13 "c. Rehabilitation and restoration of the site
14 upon termination pursuant to 120.445."
(Record 10, 11)

15 We are cited to no ordinance provision requiring more
16 specificity than appears in the county's findings and
17 reclamation requirements. Based on the foregoing, we do not
18 agree with petitioners and dismiss their ninth assignment of
19 error.

20 We remand this matter to the Polk County Commission to
21 properly deal with the allegations made by petitioners and
22 petitioner-participant in their respective assignments of
23 error. In addition to clarifying exactly what the
24 transportation system will entail, i.e. explaining the
25 confusion created by the way their order was adopted as
26 discussed supra, the county is to make findings which explain
27 why the alternative access route is not a viable solution to
28 the problems raised by petitioners. In so doing, the county

1 must fully address petitioners argument as to the safety of the
2 project and its compliance with county transportation goal 2
3 and conditional use section C. It is so ordered.

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1 BAGG, Board Member, Concurring.

2 I agree with the result in this case, but I believe the
3 county's decision is defective for additional reasons.

4 The county's findings suggests that the county believes
5 that agricultural uses and aggregate resource uses are to be
6 given equal preference. I do not believe the provisions of
7 state law, the county's ordinance and its agreement with the
8 City of Salem support that view. Mining aggregate resources in
9 agricultural land requires the county to go through a
10 conditional use permit process. It is that conditional use
11 permit process that weighs the advantages and hazards of
12 converting agricultural land to aggregate resource use. The
13 fact that the process exists, as opposed to allowing aggregate
14 mining as an outright permitted use, is sufficient indication
15 that agricultural uses are to be given priority.

16 Of critical significance to the conversion of agricultural
17 land to aggregate resource use is a finding of "need." As
18 mentioned in the body of the opinion, exactly what "need" means
19 is a difficult question. Subject to further detailed
20 explanation in the county's findings, I believe the words,
21 "when there is established a need for the resource" in the
22 intergovernmental agreement denote a need of more immediacy
23 than that suggested by the county. The county has already
24 recognized that there may be a future need of some sort for
25 aggregate mining operations in this area. By making use of the
26 aggregate overlay and providing for a conditional use process
27 to permit mining, the county has declared that at some time in
28 the future the property may be used for aggregate mining

1 purposes. I believe this legislative action shows belief in a
2 future need for this resource. The agreement, on the other
3 hand, compliments this legislative recognition of future need
4 by requiring that before agricultural lands are used for
5 mining, there must be a present need for the aggregate resource.

6 It could be argued that the language chosen by the parties
7 to the Intergovernmental Agreement simply means that all of the
8 planning for aggregate resource needs has not been completed
9 and when it is completed, and when a need (whether now or in
10 the future) is shown, the conversion to aggregate mining uses
11 may occur. I don't think that interpretation is consistent
12 with the county's Agricultural lands Goal and Policies 1.2, 1.3
13 and 1.4. These policies show, in my view, the county to hold
14 agricultural uses of primary importance and, with the
15 agreement, to restrict other uses until conditions change. See
16 footnote 2, supra.

17 On remand, then, I would have the county either show that a
18 need now exists for the resource or fully explain how it is
19 that it understands "when there is a need established for the
20 resource" to mean a future need for the resource. The
21 explanation, of course, would be reviewable for its
22 reasonableness and correctness. Fifth Avenue Corporation v
23 Wahington County, 282 Or 591, 581 P2d 50 (1978); Bienz v City
24 of Dayton, 29 Or App 761, 566 P2d 904, rev den (1977).

FOOTNOTES

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The Intergovernmental Agreement states:

"WHEREAS, the City and County are involved in a cooperative process pursuant to ORS Chapter 197 and the Land Conservation and Development Commission's goals of establishing an urban growth boundary; and

"WHEREAS, the urban growth boundary as set forth in the proposed Salem Area Comprehensive Plan excludes a large portion of the West Salem flood plain; and

"WHEREAS, said flood plain has been identified as containing aggregate resources; and

"WHEREAS, City is desirous that these resources be protected, and that extraction be permitted by County pursuant to applicable statutes and regulations;

"NOW, THEREFORE, the premises being in general as stated above, the parties hereto agree as hereinafter set forth.

"I. POLK COUNTY AGREES:

"1. To designate in its comprehensive plan existing and possible future aggregate extraction and processing sites in the West Salem flood plain.

"2. To establish protective policies in the flood area that discourage encroachment of incompatible uses to the extraction and processing of aggregate resources.

"3. To permit the existing extraction and processing of aggregate in the West Salem flood plain to continue to the extent it is presently being conducted.

"4. To permit expansion of existing operations and establishment of new extracting and processing of aggregate operations in conformance with applicable statutes, ordinances and regulations in designated areas when there is established a need for the resource.

"5. To adopt appropriate ordinances governing the extraction and processing of mineral and aggregate resources.

"II. THE PARTIES AGREE:

1 "1. That prior to expansion of existing
2 extraction of aggregate operations, or the
3 establishment of new extraction operations, a
4 reclamation plan shall be prepared and approved by
City and County. The city shall not unreasonably
withhold its approval.

5 "2. That the term of this agreement shall be
6 five (5) years to and including December 31, 1984,
7 provided said agreement may be extended for an
8 additional period upon terms mutually agreed upon by
the City and County."

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9 The purpose of the Polk County Comprehensive Plan
10 Agricultural Lands Goal 1 is to "preserve and protect the
11 county agricultural lands." This goal is expanded on by the
12 following comprehensive plan policies:

11 "1.2 Polk County will preserve those areas for
12 agriculture which exhibit a predominance of
13 agricultural soils, and in absence of nonfarm use
interferences and conflicts.

14 "1.3 Polk County will discourage the development of
nonfarm uses in agricultural areas.

15 "1.4 Polk County will permit those nonfarm uses in
16 agricultural areas for which it can be demonstrated
that the uses:

17 "a. Are compatible with established farm uses in
18 the area;

19 "b. do not interfere with established farming
practices;

20 "c. do not alter the stability of the overall
21 land use pattern of the area;

22 "d. are situated upon land unsuitable for the
23 production of farm crops and livestock (considering
the terrain, adverse soil or land conditions, drainage
and flooding, vegetation, location and size of tract)."

24 Petitioners also cite to ORS 215.213(2) which states:

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

28 "(a) Commercial activities that are in

1 conjunction with farm use.

2 "(b) Operations conducted for the mining and
3 processing of geothermal resources as defined by ORS
4 522.005 or exploration, mining and processing of
5 aggregate and other mineral resources or other
6 subsurface resources.

7 "* * * * *"

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11 The Polk County Staff Report, referred to by petitioners,
12 states:

13 "The conflict between the Agriculture and Quarry Site
14 plan designations is a common one. Typically, a local
15 jurisdiction will zone for mineral extraction those
16 sites identified as needed for and capable of
17 providing a long-term aggregate resource. Those sites
18 determined to be not needed or desired for continued
19 operation or expansion are generally designated for a
20 different purpose, most often agriculture. The
21 Walling operation is a classic example of the apparent
22 conflict between an identified aggregate resource and
23 an Agriculture plan designation. This has been a
24 long-recognized conflict, however. In 1973, the Polk
25 County Board of Comissioners denied a Zone Change
26 (72-15) for the Walling property, based largely on the
27 finding that the prime agricultural land resource of
28 the area was at least equal in importance to the
aggregate resource. A copy of Resolution 197, denying
the Zone Change is attached as Exhibit B. The
inclusion/exclusion of the West Salem floodplain and,
specifically, the Walling property, in the Salem urban
growth boundary was the basis of a five year
disagreement between the City of Salem and Polk
County. Among reasons cited by the city for inclusion
of the floodplain was that expansion of the Walling
operation could be better accomplished by
incorporation of the property. Polk County countered
that the entire floodplain was an agricultural area,
did not belong within an urban growth boundary, and
could be best protected through an Agricultural plan
designation and Exclusive Farm Use Zoning. The
long-standing dispute was finally resolved in
September 1979 with the exclusion of the West Salem
floodplain from the urban growth boundary.

29 "The County's Comprehensive Plan has been revised and
30 modified a number of times since the 1972 Zone Change
31 request by Walling. At no time has the County chosen
32 to rezone the Walling property to Mineral extraction
33 or to otherwise give pre-eminence to the aggregate
34 resource over the agricultural resource." (R 1061)

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ORS 517.760 states:

"(1) The Legislative Assembly finds and declares that:

"(a) The extraction of minerals by surface mining operations is a basic and essential activity making an important contribution to the economic well-being of the state and nation.

"(b) Proper reclamation of surface-mined lands is necessary to prevent undesirable land and water conditions that would be detrimental to the general welfare, health, safety and property rights of the citizens of this state.

"(c) Surface mining takes place in diverse areas where the geologic, topographic, climatic, biological and social conditions are significantly different and that reclamation operations and the specifications therefor must vary accordingly.

"(d) It is not practical to extract minerals required by our society without disturbing the surface of the earth and producing waste material and that the very character of many types of surface mining operations precludes complete restoration of the affected lands to their original condition.

"(e) Reclamation of surface mined lands as provided by ORS 517.750 to 517.900 and subsection (4) of 517.990 will allow the mining of valuable minerals in a manner designed for the protection and subsequent beneficial use of the mined and reclaimed lands.

"(2) The Legislative Assembly, therefore, declares that the purpose of ORS 517.750 to 517.900 and subsection (4) of 517.990 are:

"(a) To provide that the usefulness, productivity, and scenic values of all lands and water resources affected by surface mining operations within this state shall receive the greatest practical degree of protection and reclamation necessary for their intended subsequent use.

"(b) To provide for cooperation between private and governmental entities in carrying out the purposes of ORS 517.750 to 517.900 and subsection (4) of 517.990."

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ORS 215.213(2)(a) and (b) state:

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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:

"(a) Commercial activities that are in conjunction with farm use.

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