BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

MARK L. ZUSMAN, Petitioner, vs. CLACKAMAS COUNTY BOARD OF COMMISSIONERS, Respondent.	LUBA No. 84-078 FINAL OPINION AND ORDER

Appeal from Clackamas County.

Mark L. Zusman, Oregon City, filed the Petition for Review and argued the cause on his own behalf.

Frank Josselson, Portland, filed a response brief and argued the cause on behalf of Respondent River Island Sand & Gravel Co. With him on the brief were Sullivan, Josselson, Johnson & Kloos.

No appearance by Clackamas County.

DUBAY, Referee; BAGG, Chief Referee; KRESSEL, Referee, participated in the decision.

REMANDED 01/03/85

You are entitled to judicial review of this Order. Judicial review is governed by the provisions of ORS 197.850.

Opinion by DuBay.

NATURE OF DECISION

A neighbor appeals from the county's order approving a surface mining reclamation plan.

FACTS

Surface mining operations began in 1963 on a portion of a 190 acre tract along the Clackamas River. The property was first made subject to zoning restrictions in 1967, and is now zoned General Agricultural District (GAD).[1] About 150 acres had been used for mining operations when the operator applied to the county for approval of a reclamation plan for the remaining 40 acres. Approval of a reclamation plan is required by the county zoning ordinance as one of the conditions for a mining permit.

The county planning director approved the reclamation plan. The approval was appealed to the county commissioners who affirmed the planning director's decision. An appeal to this Board followed.

FIRST AND SECOND ASSIGNMENTS OF ERROR

Petitioner alleges approval of the reclamation plan and issuance of the permit will allow surface mining operations on land not previously mined. According to petitioner, surface mining is a conditional use in the GAD zone, and, therefore, approval of the reclamation plan will allow a new mining use without satisfaction of the criteria applicable to conditional uses. Petitioner also explains ORS 215.130(5)[2] allows

continuation of preexisting nonconforming uses but does not allow expansion or alteration of such uses unless the change is found to create no greater adverse impact to the neighborhood.[3]

Respondent[4] makes two preliminary arguments why this Board should not or can not review petitioner's claims. First, respondent says the issues raised here were not raised before the county, and petitioner should not be allowed to "lay in the weeds" until after the opportunity has passed for respondent to make an adequate record regarding the issue. Respondent also says petitioner is attempting to change the nature of the proceeding by raising the unlawful expansion or alteration issues. We do not accept either of respondent's claims.

There is nothing in ORS 215.805 - 215.845 suggesting a person seeking review by this Board must have raised specific issues below. Lane County v. City of Eugene, 54 Or App 26, 633 P2d 1306 (1981).[5] Accordingly, we reject respondent's argument that petitioner cannot raise issues here for the first time.

Respondent's second argument is aimed at the nature of the proceeding. It contends LUBA lacks jurisdiction because approval of a reclamation plan and issuance of a surface mining permit is not a land use decision. This contention is based on the proposition the county's action was not an exercise of zoning and land use power, but an exercise of police power pursuant to ORS 517.780(2).[6]

The contention is rejected. The county zoning ordinance provisions regarding surface mining is prefaced by the following purpose clause:

> "To provide that the usefulness, productivity and scenic values of all lands and water resources affected by surface mining operations within this county shall receive the greatest practical degree of protection and reclamation necessary for the intended subsequent use." Section 818.01 Clackamas County Zoning Ordinance.

In addition to requiring reclamation in accordance with an approved plan, the ordinance has provisions for regulating how mining operations are conducted to control the environmental impacts of mining activities. Approval of the mining permit is an application of the county's zoning ordinance. As such, it meets the definition of "land use decision" as set forth in ORS 197.030(10).[7] We, therefore, reject respondent's claim that the county's action may not be reviewed by LUBA. We turn next to the merits of petitioner's claims.

The principal thrust of petitioner's challenge in this assignment of error is that excavation where none has occurred before is a new use. If there is a preexisting, nonconforming use for surface mining, according to petitioner, it has not taken place on the 40 acre portion of the tract. Therefore, the argument goes, the new excavation is an expansion or alteration of a nonconforming use, and, in accordance with ORS 215.130(9), cannot be approved unless the county finds the change will not result in greater impact to the neighborhood.

Respondent says there is no expansion or alteration within the meaning of ORS 215.130(9) because all of the tract is protected from new zoning regulations as a preexisting nonconforming use even though mining activities have occurred on only part of the tract. ORS 215.130(5). Although no Oregon precedent exists for this view, there are decisions of other jurisdictions enunciating the principle.[8]

In this state, the courts have considered under what circumstances surface mining operations are protected by ORS 215.130 from subsequently enacted zoning restrictions. See, e.g., Polk County v. Martin, 292 Or 69, 636 P2d 952 (1981); Bither v. Baker Rock Crushing Co., 249 Or 640, 438 P2d 988, 440 P2d 368 (1968); Lane County v. Bessett, 46 Or App 319, 612 P2d 297 (1980). In each of these cases, the question was whether a lawful use for surface mining existed prior to institution of zoning restrictions. Where a lawful use did exist, the courts also considered the nature and extent of the use to determine the limits of protection afforded by ORS 215.130(5). As stated in Polk County v. Martin:

> "The nature and extent of the prior lawful use determines the boundaries of permissible continued use after the passage of the zoning ordinance." Polk County v. Martin, supra at 76.

We understand these cases to hold ORS 215.130(5) allows lawful use of property to continue in the same way and with the same intensity as existed prior to adoption of zoning restrictions. We do not believe they require consideration of

surface mining as a sui-generis use of property in the manner suggested by respondent.[9] The nature and intensity of the lawful use at the time the zoning was adopted are adequate benchmarks of the lawful use protected by ORS 215.130(5) and not the location of surface mining on the particular tract.

Here, the record is clear that the nature of the nonconforming use is surface mining. There is no contention the use was unlawful when established or that, at the time restrictive zoning was adopted, it was so insubstantial that it did not merit statutory protection under ORS 215.130(5). However, neither the findings nor the record disclose the level or intensity of mineral removal existing when zoning was adopted, nor the proposed level of operations when mining the 40 acre portion of the property commences. Without findings of this kind no determination can be made whether the use of the 40 acre portion of the property will exceed the use protected by ORS 215.130(5). See, Polk County v. Martin, supra, 292 Or at 76. We therefore sustain these assignments of error challenging the county's order exempting the 40 acres from the provisions of the zoning ordinance requiring a conditional use.

THIRD ASSIGNMENT OF ERROR

In his third and last assignment of error, petitioner alleges the county failed to find the proposed mining use meets the noise level standard for mining operations established by the zoning ordinance. In addition to this allegation, petitioner argues there is insufficient evidence in the record

to show the noise standard can be met. We understand petitioner to claim there is no finding supported by substantial evidence that mining on the 40 acre tract can comply with the ordinance standard regarding noise. In addition, petitioner claims the failure to make a finding the standard can be met is inconsistent with prior county policies.

Petitioner says the only evidence of noise impacts is a letter from the Department of Environmental Quality (DEQ) that mining operations could threaten DEQ's noise control standards. Petitioner argues that no acoustical study was made after this letter was received by the county, and the county thereafter failed to consider noise impacts before approving the permit.

The relevant ordinance provision states:

> "All surface mining shall meet the following operational requirements:
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> * * *
>
> "C. Sound created by a mining operation, or accessory uses to mining, audible off the site, shall not exceed the maximum permitted by the state Department of Environmental Quality. Various methods of sound control may be required such as installation of earth berms, limiting hours of operation in residential or rural residential areas developed prior to the establishment of the mining uses, and other corrective measures." Section 818.03, Clackamas County Zoning Ordinance.

This noise standard, as well as the other requirements in Section 818.03, is described in the ordinance as an "operational requirement." We understand these ordinance

provisions to describe the measures that must be employed or the performance standards that must be satisfied during mining operations. Such performance standards are not necessary prerequisites to issuance of a permit although they may be stated as conditions to operations under a permit. See, e.g., Stephens v. Multnomah County, ___ Or LUBA ___ (1984) (LUBA No. 83-110, February 17, 1984) where a performance standard for a conditional use was made a condition of the permit. Here, the county elected to make compliance with the noise standard a condition to the permit to protect nearby properties.[10] We do not believe the county was required by its ordinances to find the noise standard satisfied as a prerequisite to a surface mining permit. Therefore, we deny this assignment of error.

The decision is remanded to the county.

FOOTNOTES

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[1] Surface mining is not a permitted use in a General Agricultural district but is listed as a conditional use. Clackamas County Zoning Ordinance, Section 402.06(B)(5).

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[2] ORS 215.130(5) reads:

"(5) The lawful use of a building, structure or land at the time of the enactment or amendment of any zoning ordinance or regulation may be continued. Alteration of any such use may be permitted to reasonably continue the use. Alteration of any such use shall be permitted when necessary to comply wth any lawful requirement for alteration in the use. A change of ownership or occupancy shall be permitted."

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[3] ORS 215.130 provides in part:

"(5) ...alteration of any such (nonconforming) use may be permitted to reasonably continue the use.

* * *

"(9) As used in this section, 'alteration' of a nonconforming use includes:

"a. A change in the use of no greater adverse impact to the neighborhood; and

"b. A change in the structure or physical improvements of no greater adverse impacts to the neighborhood."

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[4] We refer to Intervenor River Island Sand & Gravel as respondent in this opinion. Respondent County made no appearance.

[5] We also do not believe respondents have been misled by petitioner's unlawful expansion claim in this appeal. The findings elaborate in detail the county's view that surface mining on the 40 acre tract is not an enlargement of the existing nonconforming use. The county order shows, therefore, the county was well aware of this potential issue. Record 3-5.

[6] ORS 517.750 to 517.955 provide a scheme for approval of certain surface mining operations by the Oregon Department of Geology and Mineral Industries. Regulated surface mining operations are prohibited without a permit issued only after a reclamation plan is approved. Permits are issued by the state agency or by cities and counties having an ordinance approved by the agency before July 1, 1984. The county has such an approved ordinance which is incorporated in the county zoning ordinance.

[7] The essence of ORS 197.030(10) states:

"Land use decision...(i)ncludes...(a) final decision or determination made by a local government or special district that concerns the...application of...(a) land use regulation...."

[8] See e.g., Village of Terrace Park v. Everett, 12 F2d 240 (6th Cir 1941); McCaslin v. City of Monterey Park, 329 P2d 522 (Cal, 1958); County of DuPage v. Elmhurst-Chicago Stone Co., 165 NE2d 310 (Ill, 1960); Hawkins v. Talbot, 80 NW2d 863 (Minn, 1957); Moore v. Bridgewater TWP., 173 A2d 430 (NJ, 1961); Syracuse Aggregate Corp. v. Weise, 414 NE2d 651 (NY, 1980).

[9] The facts of this case do not warrant a discussion of the circumstances in which an allegedly nonconforming mining operation might not be authorized to extend to the boundaries of the property in question. See Syracuse Aggregate Corp. v. Weise, 414 NE2d 651 (NY, 1980).

[10] The findings include discussion of the claims by neighbors regarding noise and the evidence for both sides at the hearing

about noise, and possible measures to contain it. We draw no conclusion from such discussion whether or not the county considered satisfaction of the noise standard as a prerequisite to issuance of a permit. We note, however, that the findings make no conclusion that noise from the site will not exceed the maximum permitted by the Department of Environmental Quality as required by the ordinance.