

LAND USE  
BOARD OF APPEALS  
JUN 25 5 51 PM '85

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

3	BURLINGTON NORTHERN RAILROAD	)	
	COMPANY,	)	
4		)	LUBA No. 85-022
	Petitioner,	)	
5		)	FINAL OPINION
	vs.	)	AND ORDER
6		)	
	JEFFERSON COUNTY et al,	)	
7		)	
	Respondents.	)	

8 Appeal from Jefferson County.

9 Douglas A. Shepard, Madras, filed the petition for review  
10 and argued the cause on behalf of petitioner. With him on the  
brief were Shepard & Laws.

11 Michael Sullivan, Madras, filed a response brief and argued  
12 the cause on behalf of Respondent County.

13 Douglas Wilkinson, Madras, filed a response brief and  
14 argued the cause on behalf of Respondent Deschutes Ready Mix,  
Jim Hall and Joe Hall. With him on the brief were Rodriguez,  
Glenn, Wilkinson & Sites.

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

17 AFFIRMED 06/25/85

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

1 Opinion by DuBay.

2 NATURE OF THE DECISION

3 Petitioner appeals from the county's denial of petitioner's  
4 applications for a conditional use permit for a rock quarry on  
5 land zoned for exclusive farm use.

6 FACTS

7 Petitioner applied for a conditional use permit to mine,  
8 crush and remove rock from a site located one and one half  
9 miles west of the Town of Metolius. Approximately six acres of  
10 a 96 acre tract would be used in the quarry operations, which  
11 are expected to last about three months. The property is zoned  
12 A-1, the county's exclusive farm use classification.

13 Mining and processing aggregate is not permitted outright  
14 in any zone in the county. The use is allowed as a conditional  
15 use in three zones, including the A-1 zone. Issuance of a  
16 conditional use permit requires consideration of several sets  
17 of criteria in the zoning ordinance. The county found the  
18 proposal met all criteria except for two provisions of the  
19 exclusive farm use regulations. The county found:

20 "The proposed quarry is inconsistent with Section  
21 301(C)(2)(g) of the Zoning Ordinance because the  
22 applicant has not demonstrated that a public need  
23 exists for development of a new site. Approval of  
24 this quarry would be inconsistent with Section  
25 301(2)(H)(2) [sic] which states that conversion of  
26 agricultural lands to nonfarm uses shall be based upon  
consideration of the unavailability of an alternative  
suitable location for the requested use. Because  
pre-existing rock quarries do exist which could meet  
the needs of Burlington Northern Railroad, it would be  
inconsistent with the comprehensive plan and zoning  
ordinance to allow the development of a new quarry in

1 an agricultural area."

2 Petitioner challenges this finding in three assignments of  
3 error. The application of a public need standard in Section  
4 301(C)(2)(g) of the ordinance is challenged in the second  
5 assignment of error. The findings regarding Section  
6 301(C)(2)(h), concerning availability of alternative sites, are  
7 challenged in the first and third assignments of error. For  
8 convenience, we begin our analysis with the first and third  
9 assignments of error.

10 FIRST AND THIRD ASSIGNMENTS OF ERROR

11 The county found approval of the application would be  
12 inconsistent with Section 301(C)(2)(h)(2) of the zoning  
13 ordinance. Section 301(C)(2)(h) states in relevant part:

14 "Conversion of agricultural lands to nonfarm uses  
15 shall be based upon consideration of the following  
factors:

16 \* \* \*

17 "2. Unavailability of an alternative suitable  
18 location for the requested use."

19 In the county hearings, two commercial rock suppliers  
20 testified their existing quarries can provide sufficient rock  
21 to meet the needs of petitioner. These quarries are farther  
22 from petitioner's proposed loading site than the proposed  
23 quarry site. Use of these existing quarries would also require  
24 purchase of the rock by petitioner from the operators of the  
25 existing quarries. It is because these two quarries can supply  
26 petitioner's needs, that the county found petitioner's proposal

1 did not satisfy the "unavailability of an alternative suitable  
2 location" requirement of Section 301(C)(2)(h).

3 Petitioner's first and third assignments of error challenge  
4 the finding that the two commercial quarries are suitable  
5 locations for the requested use. Petitioner claims the finding  
6 is inadequate, not supported by substantial evidence and leads  
7 to a result contrary to the county's comprehensive plan and  
8 zoning ordinance. Petitioner makes several arguments to  
9 buttress these claims.

10 First, petitioner claims the alternative sites are  
11 unsuitable because of adverse impacts incident to their use.  
12 According to petitioner, transporting rock from the existing  
13 quarries involves a six mile haul through residential areas and  
14 downtown Madras. Petitioner says this will cause adverse  
15 impacts to the public.

16 Petitioner cites no evidence in the record about adverse  
17 impacts resulting from hauling rock through downtown Madras.  
18 We will neither search the record to find such evidence nor  
19 will we assume hauling rock through Madras will be harmful.

20 However, petitioner does cite a letter to the county  
21 commissioners from two residents on Birch Lane who opposed  
22 hauling rock along that road, which is on the route from the  
23 existing quarries to petitioner's proposed loading site.<sup>1</sup>  
24 They object because the trucks will be frequent (every four or  
25 five minutes), will be disruptive to the neighborhood and  
26 dangerous to children and pets in the area.

1 The county's only finding that the existing quarries meet  
2 the "alternative suitable location" requirement of Section  
3 301(C)(2)(h) is stated as follows:

4 "In addition, the proposal is not consistent with  
5 Section 301(C)(2)(h)(2) because alternative suitable  
6 quarry locations are presently available."

7 This finding states a conclusion. The letter referred to  
8 earlier clearly raises issues bearing on the suitability of the  
9 alternative sites, yet the findings do not disclose how the  
10 county commissioners resolve these claims, or whether they  
11 considered them at all. In these circumstances, the bare  
12 conclusion there are "suitable" alternatives available does not  
13 suffice. Sunnyside Neighborhood v. Clackamas Co. Comm., 280 Or  
14 3, 569 P2d 1063 (1977); Home Plate, Inc. v. OLCC, 20 Or App  
15 188, 530 P2d 862 (1975).

16 Petitioner also claims use of the alternative sites will  
17 inconvenience the other customers of those quarries. Again,  
18 petitioner does not cite any evidence in the record which might  
19 require a corresponding finding by respondent. We therefore  
20 reject it. See Dougherty v. Tillamook County, \_\_\_ Or LUBA \_\_\_  
(1984) (LUBA No. 84-040, Slip Op. dated July 26, 1984).

21 Petitioner next argues that use of the alternative sites to  
22 meet its rock requirements will not satisfy certain  
23 comprehensive plan provisions. Petitioner says use of the  
24 alternative sites would not be as energy efficient as the  
25 proposal and, therefore, their use in this instance violates  
26 comprehensive plan provisions promoting energy efficiency.

1 Petitioner also faults the county for failing to make findings  
2 regarding these plan policies. Petitioner further complains  
3 the county failed to make findings about how use of the  
4 alternative site will comply with the plan objective that  
5 continued availability of mineral and aggregate resources will  
6 be provided.

7 For the reasons discussed below, we uphold petitioner's  
8 claim the county should have made findings to show compliance  
9 with plan provisions regarding energy conservation. However,  
10 we deny the remaining claims of comprehensive plan violations.

11 Policy 13-A-3 of the county's comprehensive plan states:

12 "Industrial activity shall be located so that it has  
13 optimum access to economical transportation."

14 This policy implements Objective 13-A of the plan which is  
15 to "[e]ncourage energy efficiency in future development."

16 Although the alternative suitable location criterion in  
17 Section 301(C)(2)(h)(2) does not describe what factors are to  
18 be considered in determining whether an alternative site is  
19 "suitable," it is clear from the criterion that location of the  
20 proposed site is a necessary consideration. The county,  
21 however, made no findings applying the locational criterion in  
22 Policy 13-A-3 to the question of suitability, other than the  
23 conclusion that petitioner's proposed site satisfies the  
24 policy. Record 145.

25 The existing quarries are farther from the proposed  
26 railroad loading destination than the proposed site.<sup>2</sup> We

1 believe the county must consider how the alternative locations  
2 carry out these plan provisions encouraging energy efficiency  
3 and optimum access to economical transportation. Findings are  
4 necessary to show these applicable criteria have been  
5 considered in the decisionmaking process. Sunnyside  
6 Neighborhood v. Clackamas Co. Comm., 280 Or 3, 569 P2d 1063  
7 (1977).

8 Petitioner next points to the county's failure to make  
9 findings addressing Objective 5-B of the comprehensive plan.  
10 Objective 5-B states:

11 "Provide for continued availability of mineral and  
12 aggregate resources."

13 Petitioner does not explain how this plan objective applies to  
14 the county's decision. The objective appears to set a goal for  
15 the county's land use regulations rather than stating criteria  
16 for individual land use decisions. We will not speculate on  
17 petitioner's theory how the objective applies here.

18 Petitioner's remaining two claims that the county failed to  
19 make necessary findings must also be denied. The first is that  
20 the county failed to find petitioner could not acquire  
21 ownership of the alternative sites. The second is that the  
22 county failed to make findings of the "public need to be free  
23 of adverse impacts." Again, petitioner cites no authority for  
24 requiring findings of these kinds, and we do not agree they are  
25 required.

26 We sustain these assignments of error.

1 SECOND ASSIGNMENT OF ERROR

2       Petitioner argues the county misconstrued its zoning  
3 ordinance by denying the application on grounds it did not  
4 satisfy a public need. Its argument is summarized in the  
5 petition as follows:

6       "There is no requirement, either as part of the  
7 Jefferson County Zoning Ordinance or otherwise, that a  
8 public need for the quarry be found as a condition  
9 precedent to the granting of the conditional use  
10 permit." Petition at 12.

11       We must reject this challenge. Section 301(C)(2) of the  
12 county zoning ordinance states:

13       "The following criteria shall be used when evaluating  
14 a Conditional Use for an EFU area.

15       "\* \* \*

16       "9. The public need for the proposed development.

17       "\* \* \*" Section 301(C)(2) Jefferson County Zoning  
18 Ordinance.<sup>3</sup>

19       The county was not required by law to impose this criterion  
20 on conditional use permit applications. Kristensen v. City of  
21 Eugene Planning Comm., 24 Or App 131, 544 P2d 591 (1976)  
22 (Fasano's public need standard inapplicable in conditional use  
23 permit cases). Having done so in the ordinance, however, the  
24 county was obligated to assure the standard was satisfied.  
25 Feitelson v. City of Salem, 46 Or App 815, 613 P2d 489 (1980).  
26 It follows that denial of the request could be based on the  
determination the standard was not satisfied.

      In this assignment of error it bears notice that  
petitioner's only charge is that public need is not a standard



1 of approval under respondent's ordinance. No claim is made  
2 that as a matter of law, the county could not impose such a  
3 standard in the zoning ordinance. Further, no challenge to the  
4 adequacy of the county's finding under Section 301(C)(2)(g) is  
5 presented. We conclude this assignment of error must be denied.

6 Because we do not sustain petitioner's challenge to the  
7 county's finding that the application does not meet the public  
8 need criteria of the ordinance, we affirm the county's denial  
9 decision. The findings need only be adequate to show one of  
10 the applicable criteria has not been met to affirm a local  
11 government's denial of an application. Heilman v. City of  
12 Roseburg, 39 Or App 71, 591 P2d 390 (1979); Weyerhaeuser v.  
13 Lane County, 7 Or LUBA 42 (1982).

14 Affirmed.

FOOTNOTES

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3 1

We do not understand Birch Lane to be in downtown Madras.

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5 2

There is some evidence in the record the haul distance from one existing quarry to a different loading site at the Weyerhaeuser log dump is roughly equal to the haul distance in the proposal. Record 58. The county, however, made no findings whether the alternative loading point was taken into consideration in its determination of suitable alternatives.

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9 3

Concededly, some of the "criteria" in Section 301(C)(2) may be better described as "requests for information" rather than decisionmaking standards. Marbet v. Portland General Electric Company, 277 Or 447, 465, 561 P2d 154 (1977). However, we do not believe Section 301(C)(2)(g) (public need) has that defect. Public need is not an unusual standard in land use cases. The phrase was enshrined in Fasano v. Board of County Commissioners of Washington Co., 264 Or 574, 507 P2d 23 (1973).