BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

LARRY ALLEN, Petitioner, vs. UMATILLA COUNTY, Respondent.	LUBA No. 86-013
	FINAL OPINION AND ORDER

Appeal from Umatilla County.

Larry Allen, Walla Walla, filed a petition for review and argued on his own behalf.

Douglas E. Hojem, Pendleton, filed a response brief. With him on the brief were Corey, Byler, Rew, Lorenzen and Hojem. Robert Klicker, Walla Walla, argued on his own behalf.

No appearance by Umatilla County.

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

REMANDED 06/11/86

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

Opinion by Bagg.

NATURE OF THE DECISION

Petitioner appeals issuance of a conditional use permit by Umatilla Board of Commissioners. The Board of Commissioners' decision affirmed an earlier permit grant by the county hearings officer.

STANDING

Respondent County challenges petitioner's standing to bring this review proceeding. Respondent claims the petition for review fails to comply with OAR 661-10-030(3)(d). See also ORS 197.830(3)(b) requiring an "appearance before the local government." The rule requires the petition to state facts which "show that petitioner appeared, either orally or in writing, in the proceeding below...." Respondent argues that petitioner made no appearance, either orally or in writing, before the county board of commissioners and should therefore be denied standing.

Petitioner claims his appearance before the county hearings officer is sufficient to meet the "appearance" requirement. Petitioner argued before the hearings officer and he argues here that he would be adversely affected by the proposed development. Petitioner Allen says that he and his family will be adversely impacted by noise, that the value of his property and the safety of his children will be threatened and that his sleep will be adversely affected.[1]

Mr. Allen meets the appearance requirement. While Mr.

Allen did not appear before the county governing body, he did appear before the "local government" in that he was present at the hearing before the hearings officer.[2] His appearance was sufficient to preserve his right to appeal.[3] The record of the hearings officer's decision was submitted for review to the county board. The county board's decision was, then, a continuation of the matter initiated before the hearings officer. In a similar situation, the Supreme Court found an appearance before the hearings officer to be sufficient. The Court noted

> "in a case such as this, where the local governing body bases its land use decision, in whole or in part, on the record obtained in a prior proceeding before a planning commission, hearings officer, or other approval authority, whichever is delegated responsibility to gather evidence and make land use decisions or recommendations to the local governing body, then an appearance on the record before that authority is an appearance before the local governing body. The test is not, of course, whether the local governing body actually considers or is persuaded by the record made below, but only whether local ordinances require that a record in the prior stage of the local proceeding be made and forwarded to the local governing body for consideration." Warren v. Lane County, 297 Or 290, 297-8, (1984) (footnote omitted).

Petitioner has standing to bring this appeal.

FACTS

In November, 1985, Klicker Brothers applied for a conditional use permit to extract and process rock and gravel on a 389.78 acre site in Umatilla County. The property fronts the north and south sides of Mill Creek and Mill Creek Road, and is about 12 miles east of the Walla Walla, Washington city

limits. Soils on the site are predominantly SCS Class VIII, but the property has been used for grazing.[4]

The county hearings officer (and later the county board) treated the parcel as an existing gravel pit, and therefore applied "existing pit" criteria to the application. Portions of the record refer to the site as in "old existing rock quarry," Record 50, but there is no indication that the site is presently used for rock or gravel extraction or processing. The record does not reveal how much time has passed since extraction and processing activities occurred on the parcel.[5] Also, there is no clear indication as to whether the proposed conditional use will involve the exact quarry location described as "the old pit" or some other portion of the property.

In approving the application, the hearings officer (and later the county board) imposed certain conditions designed to lessen the impact on adjacent property from noise, dust and traffic.

FIRST ASSIGNMENT OF ERROR

> "Umatilla County's finding that the proposed quarry site was in or adjacent to an existing commercial pit is not based on substantial evidence and is in conflict with unrebutted testimony and substantial evidence in the whole record."

Petitioner argues the record does not support the county's conclusion that the proposed quarry site was in or adjacent to an existing quarry. Whether the pit is an existing quarry or a new quarry is important because under Section 7.060(17) of the

county's development ordinance, different standards apply in evaluating conditional use permits for existing pits and new pits.

> "Commercial gravel pits or extraction, surface mining and processing and the operations conducted for the exploration, mining and processing of geothermal resources, other mineral resources, or other subsurface resources.
>
> (a) Extraction holes and sedimentation ponds shall comply with the following restrictions and regulations under the following circumstances:
>
> "(A) In an existing pit
>
> "1. They shall not be allowed within 25 feet of a public road, county road or utility right-of-way and shall not exceed over 75% of the total land mass and shall be centered on the property.
>
> "2. They shall not be allowed within 100 feet from the part of a property line which is adjacent to a residential dwelling.
>
> "(B) In a new pit:
>
> "1. They shall not be located closer than 500 feet from any part of a property line adjacent to a residential dwelling unless the operator can obtain a written release from the adjacent residential property owner allowing a closer setback. They new pit shall be centered on the property and not exceed 75% of the total land mass."[6]

Petitioner claims there is no evidence showing that the subject property contains an existing pit. Petitioner asserts that the more strict standards found at Section 7.060(17)(a) are therefore applicable.[7]

Evidence in the record about this issue consists of the

applicant's statement that his chosen site is an existing gravel pit and other testimony referring to the site as "the old quarry." See Record 25, 38, 63. We are cited to no evidence establishing that this "existing" gravel pit is now in use or has been in use recently. There is a report by the county planning staff stating that the site is currently in evergreen trees. See Record 60.

The county commission's order does not identify the precise location of the mining activity. The order requires the applicant to submit a site plan showing roadways, utility facilities and the "location of each phase of the mining activity...." Record 5.

The county development ordinance does not define the term "existing" or explain how the term is be to applied in Section 7.060(17).[8] The county order does not provide an explanation. We assume, from the written decision, that the county does not define existing pit to mean one presently being mined, but rather be an identifiable feature on the property. That is, an existing pit is one in which mining activities occurred at some time. While we believe an equally valid interpretation would define an existing pit as a currently operating quarry, we cannot say, as a matter of law, that the county's interpretation is incorrect.[9]

What is missing from the county's order and this record, however, is a clear description of the location of the "existing" gravel pit and the precise location of the proposed

new operation. Because of uncertainty as to the location of the proposed use, we cannot say that the county was correct in interpreting the applicant's proposal to encompass simply the reopening of an "existing" quarry. Therefore, we must agree with the petitioner that county application of Section 7.070(17)(a)(B) is not supported by substantial evidence.[10] This error requires a remand. OAR 661-10-070(1)(b)(C).

SECOND ASSIGNMENT OF ERROR

> "Umatilla County authorized a new commercial gravel pit in violation of the protective setback requirements of Development Ordinance 7.060(17)(a)(B)."

In this assignment of error, petitioner complains the conditional use permit improperly approved operation of the gravel pit at distances less than 500 feet from the closest property lines of adjacent residential and recreational property. This allowance violates Section 7.070(17)(a)(A), according to petitioner.[11]

Petitioner's argument depends upon his earlier assertion that the standards applicable to new gravel pits apply, not those less stringent standards the county found applicable. Because of our holding under Assignment of Error No. 1, we agree with petitioner. There is nothing in the record to show that this permit authorizes continuation of an existing gravel operation. Without this showing, the county erred in applying the "existing" pit criteria to this application. This error requires a remand. OAR 661-10-070(1)(b)(C).

ASSIGNMENT OF ERROR NO. 3

> "The County's decision violates Development Ordinance Provisions requiring the written consent of adjacent property owners to new commercial gravel pits at less than generally required protective setback distances."

As with petitioner's two previous assignments of error, this argument rests on petitioner's view that the county applied the wrong conditional use standard. Section 7.060(17)(b)(B)(1) requires that for any new gravel pit closer than 500 feet from a property line adjacent to a residential dwelling, the operator must obtain a written release from the residential property owner. Because the applicant did not seek and obtain the release, petitioner asserts issuance of this permit violates the ordinance.

Because of our holding under Assignments of Error 1 and 2, the county must re-examine its use of "existing" pit approval criteria. After that examination, the county can then apply the correct approval criteria.

ASSIGNMENT OF ERROR NO. 4

> "The County violated its own development ordinance in approving quarrying operations which would presumably cause violations of state environmental standards."

In this assignment of error, petitioner begins by quoting witnesses opposed to the conditional use permit. The testimony states it will not be possible for the quarry to meet federal noise regulations. Petitioner states code Section 7.060.(17)(h) requires that gravel operations comply with applicable air, noise and water quality regulations.

While we will not presume that a proposal will violate the law, the petitioner's concern that the applicant will be unable to meet environmental standards requires a response by the county. Section 7.060(17)(h) requires that

> (t)he operation comply with all applicable air, noise and water quality regulations of all county, state or federal jurisdictions and all applicable state or federal permits are obtained."

This provision appears to require a finding that "(T)he application complies..." with particular environmental standards. It is, therefore, an approval standard (as contrasted to other performance standards such as screening requirements). See Section 7.060(17)(d), (h). The county's order simply states that "the applicant will be required to meet all federal, state and local requirements pertaining to air, noise and water quality." There is, then, no finding that the applicant will comply with these requirements.

The county's failure to respond to this criterion and to the evidence that it will be violated is error. Where petitioner raises concern about compliance with a particular approval criterion, the county owes a response showing that the standard will be met. Norvell v. Local Government Boundary Commission, 43 Or App 849, 604 P2d 896 (1979); City of Wood Village v. Portland Metro, 48 Or App 79, 616 P2d 528 (1980); Hillcrest Vineyard v. Board of Commissioners of Douglas County, 45 Or App 285, 608 P2d 201 (1980). Failure to respond requires a remand.

The decision of the Umatilla County is remanded for proceedings not inconsistent with this opinion.

FOOTNOTES

1

Petitioner states that he resides on property within 250 feet of the land subject to the conditional use permit. Petitioner asserts further that he received mailed notice of the hearing before the hearings officer and a later hearing before the county board of commissioners. Petitioner asserts that he was entitled to these notices as of right under the provisions of the Umatilla County Development Ordinance.

2

See ORS 197.830(3)(b). The hearings officer's approval of the conditional use permit was appealed by an organization known as the Mill Creek Glen Protection Association. That appeal was heard by the county board which upheld the decision of the hearings officer. Mill Creek Glen Protection Association is not a party to this appeal.

3

ORS 197.830(3), and our rule, OAR 661-10-030, require that a person seeking to appeal a quasi-judicial land use decision have appeared before the local government orally or in writing. In addition, he must either be entitled as of right to notice and hearing prior to the decision appealed or, he must show that he is adversely affected or is aggrieved by the decision. ORS 197.830(3)(c). Mr. Allen states his aggrievement in terms clearly showing that he meets the statutory test of aggrievement as discussed by the Supreme Court in Jefferson Landfill Committee v. Marion County, 297 Or 280, 686 P2d 310 (1984). Further, he states he was entitled as of right to notice prior to the decision on review, and indeed mailed notice was provided to him by the county board.

4

East of the Cascades, agricultural soils are defined as SCS Class I through VI

> "and other lands which are suitable for farm use taking into consideration soil fertility, suitability for grazing, climatic conditions, existing future availability of water for farm irrigation purposes, existing land use patterns, technological and energy inputs required, or accepted farming practices. Lands in other classes which are necessary to permit farm practices to be undertaken on adjacent or nearby land,

shall be inventoried as agricultural land."

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5 The facts recited above are taken from the record. Respondent challenges the facts recited in the petition for review, claiming petitioner's statements of fact are not to be found in the record. Respondent uses this challenge to move this board to strike the petition for review. We will not strike the petition for review. Failure to follow board rules about the content of the petition for review will not result in dismissal. See OAR 661-10-005.

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6 Section 70.60(17)(b) applies similar location restrictions to processing equipment. The distinction between an existing pit and a new pit is maintained, with greater restriction on location of processing equipment at a new pit (except where any residential property owner consents to closer setbacks).

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7 Petitioner notes the applicant's plot plan shows an existing quarry lying adjacent to the county road and opposite the parking lot of a summer camp. Petitioner posits that since the county roadway is 40 feet in width, processing equipment operating in the existing quarry would necessarily be within a 100 feet of the summer camp property line. Petitioner states the proposed use can not be so cited without a violation of the setback requirements in 7.010(17)(a). We do not pass on the accuracy of petitioner's claim in this instance.

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8 There is, however, a definition of "existing use" in the "DEFINITIONS" Section of the code. Section 18.70 defines "existing use" as "the use of a lot or structure at the time of the enactment of this Ordinance." The ordinance was adopted on September 6, 1984, and there is nothing in the record to indicate that a gravel pit on the subject property was in use as of that date.

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9 We do not believe it reasonable to interpret "existing" to include the whole of the applicant's ownership. That is, we find no indication in the ordinance that would allow the county to consider an existing quarry operation as one encompassing the entirety of a piece of property.

[10] The applicant's plot map appearing at Record page 67 shows the processing equipment and extraction holes will be within 500 feet of residential and recreational structures also shown on the plot map.

[11] Respondent seems to focus on size or profit-making nature of the enterprise as determinative to whether or not the quarry is existing or not existing. The ordinance makes no such distinction.