LAND USE
BOARD OF APPEALS
Aug 8 2 35 PM '86

BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

OTTO and PAT JENSEN, Petitioners, vs. CLATSOP COUNTY, Respondent, and Bayview Transit, Inc., Respondent-Participant.	LUBA No. 86-025 FINAL OPINION AND ORDER

Appeal from Clatsop County.

Steven L. Pfeiffer, Portland, filed the petition for review and argued on behalf of petitioners. With him on the brief were Sullivan, Sherton, Pfeiffer, Johnson and Kloos.

Dan Van Thiel, Astoria, filed a response brief and argued on behalf of Respondent-Participant Bayview Transit, Inc.

No appearance by Clatsop County.

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

REMANDED 08/08/86

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 THE DECISION

This is an appeal of the county's decision to amend its comprehensive plan and zoning map designation of two parcels. The decision changed the plan map designation from Conservation Forest Lands to Conservation Other Resources. The zoning designation was changed from Forest-80 (F-80) to Quarry and Mining (QM). To make these changes, the county also took an exception to Statewide Goal 4.

FACTS

The applicant, Bayview Transit, Inc. (Bayview), seeks approval of the plan and zone changes to allow quarrying, crushing and stockpiling of aggregate materials for nonforest uses. Mining would take place on 20 acres owned by Crown Zellerbach. Another 10 acre tract, also owned by Crown Zellerbach, would be used for stockpiling. The stockpile tract is near the quarry. Both tracts are forest lands subject to Statewide Goal 4. Although the site had been used by the owner as a source of material for logging roads, the applicant proposes to use rock for nonforest roads.

The operation would be year-round, most intensively during the summer. Approximately 10,000 to 50,000 cubic yards of rock are expected to be mined each year. The operation will include rock crushing and blasting. The applicant also expects to construct an asphalt mixing plant on the site.

FIRST ASSIGNMENT OF ERROR

Petitioners challenge the county's exception to Goal 4. The county found an exception is warranted under the four criteria in ORS 197.732(1)(c). This is commonly called a "reasons" exception. A reasons exception requires compliance with four criteria:

> "(A) Reasons justify why the state policy embodied in the applicable goals should not apply;
>
> "(B) Areas which do not require a new exception cannot reasonably accommodate the use;
>
> (C) The long term environmental, economic, social and energy consequences resulting from the use at the proposed site with measures designed to reduce adverse impacts are not significantly more adverse than would typically result from the same proposal being located in areas requiring a goal exception other than the proposed site; and
>
> (D) The proposed uses are compatible with other adjacent uses or will be so rendered through measures designed to reduce adverse impacts."

Respondent argues that, even though the county granted an exception, no Goal 4 exception is necessary to rezone the land QM. It alleges that quarrying aggregate is allowed by ORS 215.213. Citing SEPA v. Washington County, 4 Or LUBA 236 (1981) and Westerberg v. Linn County, 7 Or LUBA 7 (1982), respondent says no exception is required for uses described in ORS 215.213 on resource lands.

Respondent is wrong. In SEPA, a quarry was proposed for lands subject to both Goals 3 and 4. We held the findings were inadequate to show no exception was required. In addition, the opinion noted that the Land Conservation and Development

Commission (LCDC) determined an exception to Goal 4 is not required if the use is consistent with forest uses or if farm and nonfarm uses described in ORS 215.203-215.213 will retain and protect the existing and potential forest uses.[1] Mining and processing aggregate is listed as a nonfarm use in ORS 215.213 (now ORS 215.283). We note, however, that after SEPA, supra, was decided, LCDC adopted an administrative rule that states:

> "...an exception to Goal 4 'forest lands' is not required for farm uses allowed under ORS 215.203." OAR 660-04-010(1)(b). (Emphasis supplied.)

This rule does not eliminate the need for an exception to Goal 4 to accommodate nonfarm uses described in ORS 215.213 (now ORS 215.283). We follow the agency's current rule rather than the earlier statement in SEPA. An exception from Goal 4 is required for nonfarm or nonforest uses on forest lands. Accordingly, an exception to Goal 4 is required for this quarry.

Petitioners first challenge the county's compliance with the alternative site criterion in ORS 197.732(1)(c)(B) as interpreted by LCDC in OAR 660-04-020. Generally, the rule phrases the critical question to be whether the proposed use can reasonably be accommodated on nonresource land that would not require an exception. In addition, OAR 660-04-020 states an exception may be justifiable in order to take advantage of needed resources available only at a specific location. Under the rule, the findings must show:

> "...a resource upon which the proposed use or activity

> is dependent can be reasonably obtained only at the proposed exception site and the use or activity requires a location near the resource. An exception based on this subsection must include an analysis of the market area to be served by the proposed use or activity. That analysis must demonstrate that the proposed exception site is the only one within that market area at which the resource depended upon can reasonably be obtained." OAR 660-04-022(1)(b).

Petitioners allege the findings are both inadequate and lack evidentiary support to demonstrate that the needed mineral resource cannot reasonably be obtained elsewhere. Three quarry sites are discussed by petitioners to make their point, the Johnson, Darling and Ordway quarries.

The Johnson Quarry

Petitioners challenge the county's basis for rejecting the Johnson quarry as a suitable alternative site. The county's reasons are:

> (1) The smaller crushed aggregate material needed for asphalt has not been produced at the Johnson quarry and is not stockpiled there.[2]
>
> (2) The applicant desires to mine and crush the required grades of rock to have complete quality control.
>
> (3) The applicant can produce crushed rock at less cost than the cost of purchasing crushed rock from other suppliers.

Petitioners contradict the first reason. They say aggregate material from the Johnson quarry has been used to produce the finer grades of rock necessary for asphalt and that the product met State of Oregon Highway Department specifications.[3] Because demand for these grades is small, petitioners say the fine grades are not stockpiled at the

quarry.

The record supports petitioners' allegations. The record includes laboratory test reports on Oregon State Highway Division forms indicating aggregate samples from the Johnson quarry met Highway Division specifications for the critical finer grades. Record at 46-48. The only evidence supporting the challenged finding relates to stocking fine grades; it does not address the suitability of the aggregate resource for fine grade crushed rock. In sum, the only evidence about whether the fine grades can be produced from the aggregate found at the Johnson quarry site is the laboratory test reports showing that the crushed rock from the Johnson Pit met state standards for the critical grades. Under these circumstances, we conclude no substantial evidence supports the finding that the grades of rock necessary for asphalt on state highways cannot be produced from the Johnson quarry.

The county's findings concerning the stockpiling of fine grades of crushed rock and the applicant's desire to control quality do not address whether the resource, i.e., a suitable rock deposit, is available at the Johnson quarry. Instead they address concerns about the characteristics of the product, i.e., crushed rock, and the efficiency of the crushing operations. These factors are not relevant to the inquiry whether aggregate deposits suitable for production of fine grade crushed rock is reasonably available at a site not requiring an exception.

The county's findings compare the estimated cost of crushed rock produced at the proposed site and at the Johnson quarry. This is an appropriate consideration. Economic factors can be considered in determining that the proposed use cannot be accommodated in other areas. OAR 660-04-020(2)(b)(B). Petitioners claim no substantial evidence supports the finding that the applicant can produce crushed rock for $4.20 per cubic yard at the proposal site. We agree.

Respondent does not cite to any evidence in the record supporting the challenged finding. When findings critical to the decision are challenged for lack of evidentiary support, the defenders of the decision must point out where the supporting evidence may be located in the record.[4] 1000 Friends of Oregon v. Washington Co., 13 Or LUBA 65, 67-68 (1985). See also City of Salem v. Families for Responsible Government, 298 Or 574, 684 P2d 965 (1985). Accordingly, we sustain the evidentiary challenge to this finding.

Darling and Ordway Quarries

Petitioners allege the county's findings regarding the Darling and Ordway quarries are not supported by substantial evidence. The county concluded neither quarry contained rock deposits comparable in quality and quantity to the proposed quarry site. In addition, the county found the Darling quarry is a pre-existing, nonconforming use, and the Ordway quarry is operating under a conditional use permit restricting operation to certain months of the year. The county concluded these

quarries are not suitable alternatives to the proposed quarry site on two grounds:

(1) The rock deposits are inadequate compared to the proposed site, and

(2) One site would require an exception and the other a conditional use permit modification to expand the use at these two quarries to accommodate the applicant's requirements.

We agree with petitioners that no substantial evidence supports these conclusions. Respondent cites no evidence shedding any light on the quantity or quality of rock deposits available at the Darling and Ordway quarries, nor any comparison of production volumes at these quarries with volumes of rock required by the applicant. See Zusman v. Clackamas County Board of Commissioners, 13 Or LUBA 39 (1985). Without evidence in the record on which a reasonable person could base a conclusion that Darling and Ordway quarries do not have rock deposits in the quantity and quality needed by the applicant and evidence demonstrating why an exception would be necessary to allow applicant's proposed use at these sites, the findings do not meet the substantial evidence test. Braidwood v. Portland, 24 Or App 477, 546 P2d 777 (1976).

The lack of evidentiary support for the county's findings addressing the alternative sites criteria in ORS 197.732(1)(c)(B) is grounds for a remand.

Petitioners next argue the county's findings are not adequate to show compliance with ORS 197.732(1)(c)(C). This provision states:

"The long term environmental, economic, social and energy consequences resulting from the use at the proposed site with measures designed to reduce adverse impacts are not significantly more adverse than would typically result from the same proposal being located in areas requiring a goal exception other than the proposed site;"

This criterion requires comparison of the consequences of use at the proposed site vis-a-vis the consequences of locating the use in other suitable areas which would also require an exception. Petitioners claim the county failed to satisfy this criterion because the characteristics of other quarries in the vicinity were not described, and the environmental, economic, social and energy (ESEE) consequences of the proposed use at these other quarry sites were not compared with the proposed site.

The county found five other quarry sites are in the vicinity in addition to the Johnson, Darling and Ordway quarries. All five are in the F-80 zone and would require an exception for rock quarrying for nonforest purposes. The findings neither describe these five quarries nor analyze their suitability for the proposed use.

The decision addresses this criterion with several findings regarding the ESEE consequences of the proposed quarry operation at the site selected by the applicant. Record at 248-253. However, no findings compare the ESEE consequences resulting from use at the proposed site with the ESEE consequences which "would typically result from the same proposal being located in areas requiring a goal exception

other than the proposed site" as required by ORS 197.732(1)(c)(C).

Respondent advances two bases for the county's position. We reject both, and, as set forth below, hold the county's findings do not show compliance with the "consequences" criterion.

First, respondent claims the ramifications of quarry use at the five sites in the F-80 zone need not be considered because suitable quantity and quality rock deposits are not available at the five sites. If the other sites are not suitable for the proposed use because the needed resource is not available, respondent's defense to this challenge might have merit. However, as discussed above in connection with the Darling and Ordway quarries, no evidence in the record supports the county's conclusion about the quantity or quality of rock at the five other locations. Without evidence supporting the county's conclusion about these other rock deposits, there is no basis for the county's conclusion about the quantity and quality of rock at the five alternate sites.

Respondent also contends analysis of the consequences resulting from quarry use at the other sites is excused under OAR 660-04-020(2)(c). The portion of the rule relied on by respondent states:

> "A detailed evaluation of specific alternative sites is not required unless such sites are specifically described with facts to support the assertion that the sites have significantly fewer adverse impacts during the local exceptions proceeding."

Respondent argues this rule prevents opponents from raising questions on appeal about specific alternative sites without first identifying the alternative sites and describing their characteristics in the local proceedings.

We agree that the rule has the effect respondent describes. We do not agree the rule excuses a jurisdiction from making findings that show compliance with ORS 197.732(1)(c)(C). The statute requires consideration of impacts that would "typically result" from the proposed use in other areas requiring an exception. Although detailed analysis of specific alternative sites may be excused in the circumstances described in OAR 660-04-020(2)(c), the statute and the rule require a description of the characteristics of alternative areas and reasons why the consequences from use at one site are preferred.[5]

The county identified five quarry sites but did not describe their characteristics other than stating they are located in the F-80 zone. The county did not even generally describe the consequences that would typically result from the proposed use at these five quarries or any other land in the F-80 zone. For these reasons, we sustain petitioners' claim on this issue.

Petitioners next argue the county failed to show compliance with ORS 197.732(1)(c)(D). Petitioners allege that the county failed to assess the compatibility of the proposed use with

nearby residential uses. Petitioners note there are five residences within 3,000 feet of the proposed quarry and one home is within 2,000 feet of the quarry and within 800 feet of the stockpile. According to petitioners, the county's findings address the compatibility of the proposed quarry use with adjacent forest uses while ignoring these residences on adjacent tracts. They say the findings are not adequate to satisfy the compatibility criterion.

The findings describe nearby residential use as follows:

> "There are five residences within 3,000 feet of a proposed quarry. Four of these are located within the AF-20 zone and the other is within a GC General Commercial zone. All of these residences are within 150 feet of Highway 26/101 Intersection."
>
> "The nearest residence, Otto and Pat Jensen's mobile home, is approximately 2,000 feet from the proposed quarry site and 800 feet from the proposed stockpile site. The Jensens have a conditional use permit to allow a nonforest dwelling within an AF-20 Forest zone." Record at 350.

The county made no findings about the compatibility of the proposed use with these homes. The county did make findings concerning compatibility with adjacent forest land uses.

Respondent claims the exception criteria require only that compatibility with adjacent resource uses must be addressed. We disagree with such a narrow interpretation.

The statute, ORS 197.732(1)(c)(D), refers only to "adjacent uses." The agency interpretive rule is ambiguous. It states in part:

> "The exception shall describe how the proposed use will be rendered compatible with adjacent land uses.

> The exception shall demonstrate that the proposed use is situated in such a manner as to be compatible with surrounding natural resources and resource management or production practices." (Emphasis added) OAR 660-04-020(2)(d).

We do not, as respondent apparently does, read the second sentence quoted above as modifying the first sentence by restricting the scope of "adjacent land uses" to "surrounding natural resource uses and practices." Rather, the rule requires consideration of compatibility with both adjacent uses and surrounding natural resources and practices.

We also reject respondent's claim that the compatibility criterion is satisfied because the county "received and reviewed a substantial amount of testimony upon potential noise and dust impacts before reaching conclusions outlined (in) the record." Respondent's Brief at 11. ORS 197.732(4) clearly requires findings of fact and a statement of reasons demonstrating the exception standards have been met.[6] Unless the county makes such findings, we are unable to determine whether the decision meets the applicable criteria.[7] Sunnyside Neighborhood v. Clackamas Co. Comm., 280 Or 3, 569 P2d 1063 (1977).

Petitioners' claim about failure to address compatibility with the residences is sustained.

This assignment of error is sustained. To approve the application the county must make findings supported by substantial evidence that the rock deposits suitable for making the grades of crushed rock in asphalt production are not

available at the Johnson, Darling and Ordway quarries. In addition, the county should make findings demonstrating compliance with ORS 197.732(1)(c)(C) and (D) to correct the errors identified above.

SECOND ASSIGNMENT OF ERROR

Petitioners allege that QM zoning will allow uses that were not authorized by the exception to Goal 4. They say the county's exception justifed nonforest quarry, crushing, stockpiling and asphalt plant uses. In addition to those uses, the QM zone also authorizes concrete and ready mix plants, as well as offices and warehouses appropriate for all uses permitted in the district. Petitioners rely on OAR 660-04-018(3)(a). When a local government takes an exception under ORS 197.732(1)(c), this rule requires that plan and zone designations "must limit the uses and activities to only those uses and activities which are justified in the exception."[8]

The rule reflects the statutory language that reasons exceptions under ORS 197.732(1)(c) take account of the consequences and compatibility of the "proposed use." However, we do not read the statute or the rule to mean that a reasons exception for the zone change is not valid unless findings measure each specific use allowed in the zone against the criterion in ORS 197.732(1)(c). The purpose of the rule is to prevent development which is more inconsistent with adjacent uses than development contemplated when a reasons exception is originally taken. This interpretation would permit other uses

of the same type which are not more inconsistent with adjacent uses than the uses contemplated in the exception process.

The uses allowed in the QM zone claimed by petitioners to violate the rule are uses either accessory to or associated with aggregate mining and processing. Petitioners do not allege these uses are more intensive, inconsistent or incompatible with adjacent uses than the rock quarrying, crushing and processing into asphalt proposed by the applicant. In sum, the uses allowed in the QM zone are not beyond the scope of uses contemplated in the county's exception to Goal 4. This assignment of error is denied.

THIRD ASSIGNMENT OF ERROR

Petitioners allege the decision violates Statewide Planning Goal 5, Open Space, Scenic and Historic Areas and Natural Resources. According to petitioners, the county neither made findings addressing Goal 5 nor analyzed whether the proposed use conflicts with fish habitat protected by Goal 5. Petitioners say that although evidence in the record shows Circle and Square Creeks in the area of the proposed use are anadromous fish habitat, the county did not apply the criteria and procedures in Statewide Goal 5 and the Land Conservation and Development Commission's Goal 5 rules.

Whether Goal 5 should be applied depends upon whether the county's acknowledged plan inventory lists resources subject to Goal 5 that may be affected by the zone and plan change under consideration.[9]

Petitioners argue that the county's plan is ambiguous and does not identify Square and Circle Creeks as fish habitat streams subject to Goal 5. Respondent does not contend the two creeks are not in the inventory of Goal 5 resources. Indeed, it contends the county satisfied Goal 5's requirements.

We agree that the county satisfied some requirements of the goal. It did not satisfy all.

We first note that LCDC's administrative rule interpreting Goal 5 sets forth procedures to be used in the formulation of comprehensive plans rather than later plan implementation or plan amendment stages. When a plan is amended, however, new uses may be authorized that conflict with protected resources. The rules does not describe a specific procedure for assessing and resolving these later arising conflicts. However, we conclude the procedures described in OAR 660-16-005 et seq apply both at the plan inception and at the plan amendment phases of plan development.

When resources protected by Goal 5 have been inventoried, the goal and LCDC's rules require (1) identification of conflicting uses; (2) determination of the economic, social, environmental and energy (ESEE) consequences of conflicting use; and (3) development of programs to achieve the goal. OAR 660-16-005, 660-16-010. The county complied only with the first requirement.

The conflicting use identified by the county is the quarry and processing of crushed rock. The findings quote the

district fish biologist of the Oregon Department of Fish and Wildlife who testified about the risk of creating turbid water conditions in Circle Creek. This creek produces salmon, steelhead and cut-throat trout. Record at 249. He recommends settling basins and disposal sites for non-usable material as stream protection measures. The county found the risk of sedimentation of Square and Circle Creeks to be the major concern about fish habitat. The county thereby identified the conflicting use.

Having identified the conflicting use, the next step required by the rule is to consider the impacts on the resource site and on the conflicting use and to determine the ESEE consequences of allowing the conflicting use. OAR 660-16-005(2). Here, the county failed. The findings do not disclose what the ESEE consequences could be from the quarry operations. Without a determination of the consequences, the county is ill equipped to justify placing limitations on the quarry operation or to determine the efficacy of any conflict reduction measures. Also, without findings showing what the county considered the ESEE consequences to be, we are not in a position to review whether the county satisfied the requirements of OAR 660-10-005(2). Sunnyside Neighborhood, supra.

Petitioners also allege the county failed to develop a program to achieve the goal as required by OAR 660-16-010. Petitioners argue that the conditions to the approval were not

adopted by the county commission. The ordinance incorporated findings and conclusions but made no specific mention of the conditions.

Given our previous discussion about the failure to analyze the ESEE consequences to the fish habitat, an analysis of the county's program to resolve the conflicts is premature. We note, however, that we believe the conditions were incorporated into the decision as discussed in the Fourth Assignment of Error, infra.

Because we find the county's decision does not include a full analysis of the ESEE consequences which would result from allowance of the quarry operations as required by OAR 660-16-005(2), we sustain this assignment of error.

FOURTH ASSIGNMENT OF ERROR

Petitioners allege the decision fails to show compliance with two comprehensive plan provisions. First, petitioners say the decision does not comply with the following Goal 5 policy concerning aggregate sources:

> "Preventive measures shall be taken to assure that excessive noise, dust, vibrations and other nuisances associated with mining activities are avoided." Policy 6, Goal 5, Clackamas County Comprehensive Plan.

Petitioners contend the county made no findings either assessing the extent of "noise, dust, vibrations and other nuisances" or discussing what mitigation measures will be necessary. Petitioners point to the testimony by residents in the area who oppose the application. The residents were

concerned about degradation of the rural character of the area by noise, dust and stream siltation. Petitioners allege this testimony about dust and noise was not adequately addressed, and the findings do not explain what facts about the dust and noise the county believes to be true or how the plan criterion is satisfied. Petitioners cite Spalding v. Josephine County, 14 Or LUBA 143 (1985) as authority for their claim.

In Spalding, supra, the county referred to testimony of certain witnesses explaining that the applicant's intentions for a sewage disposal system were adequate to support the development. The county also found that plans for the system must be approved by the Department of Environmental Quality. We held the findings inadequate. Although the findings here lack detail, they do address the complaints of dust and noise with more specificity than was evident in Spalding, supra.

Summarized, the county's findings are:

(1) Five residences are within 3,000 feet of the quarry, the closest being approximately 2,000 feet away.

(2) The zoning ordinance requires all access roads to be maintained dust-free.

(3) The closest resident has heard noise from the quarry site. (He also has heard noise from other quarries and traffic noise from Highway 101.)

(4) A noise study by a consulting engineer shows quarry and batch plant operations can be conducted within state noise regulation limits.

(5) Noise from the quarry will be no greater than from normal logging activites in the area.

(6) "Measures have been taken to reduce potential

> fish habitat, noise and dust impacts to acceptable levels." Record at 257.

The findings are adequate to show what facts the county believed about the noise and dust from quarry operations.

The critical issue, however, is whether the decision meets the plan policy requiring that preventive measures be taken to avoid "excessive noise, dust, vibrations and other nuisances associated with mining." Petitioners contend the policy is not satisfied because the county did not attach any conditions to the approvals. Petitioners base this claim on certain language in the challenged ordinance, which specifically adopts the findings and conclusions in an "Exhibit A" but fails to adopt, or even mention, conditions. Petitioners are correct that the adopting ordinance mentions only findings and conclusions in the exhibit. However, for reasons set forth below, we do not agree the conditions were not adopted.

The minutes of the commissioners' meeting of April 2, 1985, described the commissioners' debate whether to include a condition limiting blasting. The planning staff presented two alternative sets of conditions. One set included a condition regarding blasting, and one did not. Record at 234. After receiving testimony and discussing the matter, the commission made the following motion:

> "Motion made and passed unanimously to proceed with the first reading of the ordinance, Alternative No. 2, allowing the blasting." Minutes of Commissioners' Meeting dated April 2, 1985, Record at 235.

We take this language to mean the ordinance adoption

proceedings went forward with conditions as part of the approval. The conditions were those in the second alternative reviewed by the commission at its April 2 meeting. We also observe that the record includes 14 conditions immediately following the findings. The conditions are marked "Exhibit A, Part 3, Alternative 2." Record at 260. We hold the conditions were adopted.

Our inquiry is not ended because petitioners also contend these conditions are not adequate preventive measures to avoid excessive noise, dust, and vibrations. The pertinent conditions state:

> "1. Preventive measures shall be taken to assure that excessive noise, dust, vibrations, and other nuisances associated with mining activities are avoided. The applicant shall coordinate with the noise pollution control section of the Department of Environmental Quality to mitigate possible excessive noise emissions from rock extraction and sorting operations. Steps to lessen noise pollution impacts on nearby residential/commercial properties should include time of operations.
>
> * * *
>
> "2. The proposed use will require protection of water quality in nearby Circle Creek and its tributary creeks. The applicant shall coordinate with the Oregon Department of Fish and Wildlife for proper drainage design from the pit so water turbidity levels are not increased in Circle Creek and Square Creek. Settling basins as well as an upland site to dispose of non-usable material shall be required if pit drainage is directed to Circle Creek.
>
> "4. Rock crushing operation shall comply with Air Contaminant Discharge Permit issued by the State Department of Environmental Quality and Section 3.470 of Clatsop County Ordinance 80.14.

* * *

6. All private access and service roads shall be maintained dust-free condition during intensive operations.

* * *

"12. Obtain a Clatsop County Land and Water Development and Use permit to validate that conditions 1, 2, 3, 4, 5, 6, 7, 8, and 11 have been completed prior to rock extraction and stock pile operations." Record at 260-261.

We agree with petitioners that Condition No. 1 does not specify what preventive measures must be taken to avoid excessive noise, dust, vibrations and the other adverse affects of mining. However, the comprehensive plan and zone change under review is not the final decision to assure implementation of preventive measures. Condition No. 12 requires that a use permit must be obtained "to validate that Conditions 1, 2, 3, 4, 5, 6, 7, 8, and 11 have been completed prior to rock extraction and stockpile operations." Based on the noise study submitted by the applicant, the county found compliance with DEQ noise regulations is feasible. The measures to be taken to obtain compliance with DEQ standards and with standards in Policy 6 in the Goal 5 element of the county's plan, will be scrutinized in the use permit proceedings required by Condition No. 12. Since the permit must be measured against the discretionary standards in the plan policy, the permit granting procedure will be subject to the requirements of notice and hearing set forth in ORS 215.416. This two step process to

approve compliance with applicable standards is adequate. Margulis v. City of Portland, 4 Or LUBA 89 (1981).

Similarly, the adequacy of siltation prevention measures required by Condition No. 2. will be reviewed in the use permit procedure.

Measures to prevent air contamination consist of ordinance provisions requiring dust-free maintenance of access roads and the air contaminant discharge regulations by DEQ. Both measures are incorporated into the conditions. The plan policy at issue is sufficiently open-ended to allow this method of taking preventive measures. We therefore conclude the decision does not violate Policy 6 of the Goal 5 element of the plan as petitioners contend. This subassignment of error is denied.

Petitioners next allege the Goal 6 element of the county's plan imposes a stricter procedural standard than the two step approval process. The policy states:

> "Any development of land, or change in a designation of use of land, shall not occur until it is assured that such change or development complies with applicable state and federal environmental standards."

Petitioners say this policy requires findings showing that each use allowed in the QM zone will meet all environmental standards before the QM designation may be applied to the land. Under this view, review of compliance with environmental regulations may not be deferred to later permit proceedings.

We do not agree with petitioners' contention that the county's only available method to obtain assurance of

compliance with environmental regulations is to find compliance at the time of the zone change. The county's zoning ordinance requires that all uses in the QM zone comply with state and federal standards regarding air, noise, water and noise decisions. The zoning standard and the two-step process invoked by the county will insure these standards will be met prior to authorization of any proposed uses allowed in the QM zone. Margulis v. Portland, supra. These assurances are sufficient to comply with the plan policy.

This subassignment of error is denied.

FIFTH ASSIGNMENT OF ERROR

Petitioners claim the county's hearing procedure denied opponents an adequate opportunity to rebut evidence.

The application was approved by the county planning commission at its meeting on February 11, 1985. At that meeting, the applicant submitted a noise study report prepared by a registered engineer. Petitioners' attorney requested 7-10 days to review the report, but the request was denied. The commission then voted to approve the plan and zone changes. The county board of commissioners took up the application and the planning commission's recommendation of approval the next day, February 12. At the February 12 meeting, the commissioners received additional testimony and set February 26 as the date of the first reading of the ordinance.

Petitioners argue that due process requires a meaningful opportunity to rebut opposing evidence, particularly expert

technical evidence. According to petitioners, their substantial rights have been prejudiced by the county's refusal to allow sufficient time to review and respond to the technical report.

A similar claim of error was considered in Greenwood v. Polk County, 11 Or LUBA 230 (1984). There, a request was made to keep the record open for 15 days to allow petitioners an opportunity for rebuttal of evidence submitted by the applicant. The applicant's evidence was a letter with financial data and gross profit projections. Petitioners had the opportunity to present contradictory evidence at the same hearing at which the letter was submitted. We said that we do not consider further opportunity to review the evidence and submit further evidence to be a constitutionally protected right in those circumstances. Greenwood v. Polk County, supra at 238.

Petitioners here had the opportunity to submit rebuttal evidence at the planning commission meeting of February 11 and at the board of commissioners meeting on February 12. Petitioners did not allege they were prevented from presenting rebuttal evidence at the first reading of the ordinance scheduled for February 26.[10] Under these circumstances, we decline to depart from Greenwood, supra. The assignment of error is denied.

The decision is remanded.

FOOTNOTES

1

An exception to Goal 4 was not at issue in Westerberg v. Linn County, 7 Or LUBA 7 (1982). The opinion discussed the need for Goal 2 exception to Goal 2 to allow mineral extraction and processing on agricultural land.

2

The applicant's asphalt-making process requires three fine grades of crushed rock: one half inch to one quarter inch, one quarter inch to ten, and ten minus rock. One quarter inch to ten refers to rock between one quarter inch and one tenth inch in size. Ten minus refers to rock less than one tenth inch in size.

3

The fine grades of crushed rock were required for a previous state highway project. The screening equipment to produce these grades was provided by the contractor for the job. A letter from the contractor explains the Johnson quarry owner lacked experience producing fine grades at the time. Now the owner has confidence to produce the three sizes of asphalt rock. Record at 117. However, the owner needs to acquire additional equipment to produce the finer grades.

4

The only reference to the cost of crushed rock that we observed in the record is in proposed findings submitted by the applicant. Record at 65. This proposed finding was included as the challenged Finding No. 19 in the final order. Findings may not be bootstrapped in this fashion. That is, findings supported only by unadopted drafts of findings are not supported by substantial evidence.

5

In significant part, OAR 660-04-020(2)(c) states:

"(c) The exception shall describe the characteristics of alternative areas considered by the jursidiction for which an exception might be taken, the typical advantages and disadvantages of using the area for a use not allowed by the Goal, and the typical positive and negative consequences resulting from the use at the

proposed site with measures designed to reduce adverse impacts. A detailed evaluation of specific alternative sites is not required unless such sites are specifically described with facts to support the assertion that the sites have significantly fewer adverse impacts during the local exceptions proceeding. The exception shall include the reasons why the consequences of the use at the chosen site are not significantly more adverse than would typically result from the same proposal being located in areas requiring a goal exception other than the proposed site. Such reasons shall include, but are not limited to, the facts used to determine which resource land is least productive; the ability to sustain resource uses near the proposed use; and the long-term economic impact on the general area caused by irreversible removal of the land from the resource base. Other possible impacts include the effects of the proposed use on the water table, on the costs of improving roads and on the increase cost to special service districts."

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[6] ORS 197.732(4) states:

"(4) A local government approving or denying a proposed exception shall set forth findings of fact and a statement of reasons which demonstrate that the standards of subsection (1) of this section have or have not been met."

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[7] The county may have concluded the residences are too distant from the proposed use to be affected by it. However, without findings on the matter, we are unable to review what the county determined, or even if any determination was made, about compatibility with these residences.

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[8] OAR 60-04-018(3)(a) applies to exceptions taken after March 20, 1986, the effective date of the rule in OAR 660-04-018(4). The county's decision was adopted April 2, 1986.

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[9] Petitioners contend that fish habitat is subject to Goal 5

protection even if the habitat was not included in the acknowledged inventory. However, in Urquhart v. Lane Council of Governments, ___ Or App ___ (1986) (Slip Op. dated July 2, 1986), the Court held that in plan amendment proceedings we may not review defects in the inventory which are not directly or indirectly attributable to the amendment. The periodic review proceedings in ORS 197.640 - 197.647 are the forum to make corrections of this kind. The changes under review here do not alter the comprehensive plan inventories of fish habitat. We must reject petitioners' claim that fish habitat should be subject to Goal 5 procedures even if habitat is not included in the county's acknowledged inventory of Goal 5 resources.

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10 No minutes of a meeting of the board of commissioners on February 26 appear in the record. The record does include minutes of a second reading of the ordinance on March 12.

CERTIFICATE OF MAILING

I hereby certify that I served the foregoing Final Opinion and Order for LUBA No. 86-025, on August 8, 1986, by mailing to said parties or their attorney a true copy thereof contained in a sealed envelope with postage prepaid addressed to said parties or their attorney as follows:

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Dated this 8th day of August, 1986.

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Administrative Assistant