

JUL 13 4 25 PM '87

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

3	LILLIAN MEYERS,)	
)	
4	Petitioner,)	LUBA No. 87-028
)	
5	vs.)	
)	
6	CLACKAMAS COUNTY,)	FINAL OPINION
)	AND ORDER
7	Respondent.)	

8 Appeal from Clackamas County.

9 John H. Hammond, Jr., West Linn, filed the petition for
10 review and argued on behalf of Petitioner.

11 Michael E. Judd, Oregon City, filed a response brief and
argued on behalf of Respondent.

12 HOLSTUN, Referee; DuBAY, Chief Referee; BAGG, Referee;
13 participated in the decision.

14 AFFIRMED 07/13/87

15
16 You are entitled to judicial review of this Order.
Judicial review is governed by the provisions of ORS 197.850.

1 Opinion by Holstun.

2 NATURE OF THE DECISION

3 Petitioner challenges a condition in a surface mining
4 renewal permit issued by Clackamas County.

5 FACTS

6 Petitioner conducts a mining operation in which sand and
7 gravel are extracted and processed through rock crushing and
8 screening machinery. The mining operation is conducted on
9 approximately 12 acres of the 43.59 acres owned by petitioner.
10 In 1969, the Clackamas County Circuit Court determined that
11 petitioner's mining operation was a preexisting nonconforming
12 use. The parties agree that because the mining operation is a
13 nonconforming use, certain zoning standards are inapplicable.¹

14 The mining operation site is located on a relatively level
15 terrace north of the Clackamas River. Along the Clackamas
16 River the terrace ends at a high bluff. From the base of the
17 bluff to the median low water line of the Clackamas River the
18 distance varies from 75 feet to well over 150 feet. The face
19 of the bluff is densely vegetated with some portions forested
20 from the base to the top of the bluff.

21 In 1979, Clackamas County's surface mining regulations were
22 approved by the Oregon Department of Geology and Mineral
23 Industries. Pursuant to ORS 517.780(2) the county administers
24 those regulations. Section 818.05 of the surface mining
25 regulations requires that permit applicants submit a
26 reclamation plan.

1 "A plan for reclaiming land affected by surface mining
2 shall minimize any adverse impact of mined land on the
3 livability, value and appropriate development of the
4 affected land and adjacent property...." Section
5 818.05.

6 Reclamation plans specifically are required to provide for,
7 inter alia, slope control, rehabilitation and revegetation, and
8 stream protection. Section 818.08 of the surface mining
9 regulations requires that surface mining permits be renewed
10 annually.²

11 Petitioner's reclamation plan submitted with her 1986
12 application for a surface mining renewal permit was identical
13 in all material respects to the reclamation plans previously
14 approved by the county in 1983, 1984 and 1985.³ Petitioner's
15 reclamation plan for the 1986 surface mining renewal permit
16 provides for a 30 foot vertical excavation of the 100 foot high
17 bluff along the Clackamas River. A five foot high natural berm
18 would be left at the top of the bluff as an erosion control
19 measure and to provide a visual buffer.

20 If the site can be mined as approved under prior permits,
21 the operation will have a remaining useful life of eight to ten
22 years. Clackamas County added a condition to the 1986 renewal
23 permit that a 50 foot natural buffer setback be retained from
24 the top of the high bluff adjoining the Clackamas River. If
25 the condition is imposed, petitioner claims the useful life of
26 the project will be reduced to one and one half years.

FIRST ASSIGNMENT OF ERROR

"Respondent's interpretation of its surface mining
ordinance is violative of preemptive state standards."

1 Petitioner alleges the county has no authority to impose
2 the following condition:

3 "Any extension of the present mining site shall have
4 at least a 50 foot setback from the top of the
5 escarpment overlooking the Clackamas River and Deep
6 Creek, and the extraction slope along the river and
7 creek shall be no steeper than one-one half feet
8 horizontal to one foot vertical. All activities
9 associated with mining shall meet this setback
10 requirement."

11 Respondent bases its requirement for the buffer on its
12 interpretation of standards contained in the county surface
13 mining regulations.⁴ The standard at issue provides as
14 follows:

15 "The Planning Director may subject approval of a
16 renewal permit for surface mining, or any accessory
17 use to surface mining, made pursuant to this section
18 to such conditions as will safeguard the public
19 health, safety and general welfare, and insure
20 consistency with the declarations and policies set
21 forth in ORS 517.760." Section 818.10(D).

22 Petitioner contends that the county's surface mining
23 regulations, approved by the Oregon Department of Geology and
24 Mineral Industries, provide no basis for imposing a buffering
25 requirement in a reclamation plan. Petitioner notes that no
26 state administrative rules or statutes applicable to surface
mining operations require vegetative buffering. Petitioner
argues that even if counties may be able to impose buffers in
appropriate circumstances through their zoning powers, they may
not do so through their surface mining regulations. According
to petitioner, the lack of express requirements for buffers in
state statutes or administrative rules should mean that

1 counties may not interpret broadly worded standards to impose
2 buffers.

3 Petitioner cites La Grande/Astoria v. PERB, 281 Or 137, 576
4 P2d 1204 (1978) to support her position that state law in a
5 substantive area of policy displaces incompatible local law.
6 However, petitioner has cited no statutory provisions that
7 suggest that the standards prescribed by ORS 517.750 to 517.955
8 and OAR 632-30-005 to 632-30-060 are maximum standards.

9 We agree with Respondent County that State ex rel Haley v.
10 City of Troutdale, 281 Or 203, 576 P2d 1238 (1978) is more on
11 point. There, the Supreme Court concluded that unless the
12 legislature expresses a contrary intent, more stringent local
13 regulations are not necessarily inconsistent with state
14 standards and are not preempted.⁵ We can find no indication
15 of legislative intent to adopt preemptive standards in ORS
16 517.750 to 517.955. Because the county is not preempted by
17 state surface mining standards, it is free to regulate more
18 stringently in pursuing its legitimate health, safety and
19 general welfare objectives.⁶ See, our discussion under the
20 third assignment of error, infra.

21 For the above reasons, petitioner's first assignment of
22 error is denied.

23 SECOND ASSIGNMENT OF ERROR

24 Petitioner alleges that Section 818.09 of the county's
25 surface mining regulations is controlling in this appeal and
26 that it

1 "provides that only renewal applications which involve

2 '...an extension of the mining operation...
3 in areas for which a detailed reclamation
4 plan has not been approved...are subject to
5 new reclamation standards.'" Petition for Review
6 at 11.

7 According to petitioner, unless the reclamation plan submitted
8 with her annual renewal permit applies to new areas not
9 previously covered by an approved reclamation plan, the county
10 may not apply Section 818.10(D) to impose new conditions.

11 Petitioner argues that because its reclamation plans approved
12 by the county in 1983, 1984 and 1985 are substantially
13 identical to the 1986 plan at issue in this appeal, the
14 contested condition cannot be imposed.

15 Respondent County contends that petitioner misquotes
16 Section 818.09, that the quotation is taken out of context and
17 that the provision is irrelevant.⁷ The county says that
18 Section 818.09 merely states what must be included in the
19 renewal permit application. According to the county, Section
20 818.10(D), quoted supra at page 4, grants the county broad
21 authority to impose conditions in approving renewal permit
22 applications. The county contends that while Section 818.09
23 makes it clear that extending a mining operation into new areas
24 may result in new conditions, that does not mean Section
25 818.10(D) may not be applied as it was here to impose a
26 condition on the required renewal permit for an area covered by
a previously approved reclamation plan. The county says this
application of the ordinance is true even if the plan is not

1 proposed to be changed.

2 We reject the petitioner's argument that the county's broad
3 interpretation of the authority granted under Section 818.10(D)
4 amounts to a de facto amendment of the standard. The county
5 does not dispute that the reclamation plan submitted to the
6 county in this appeal is the same as plans approved in prior
7 years. However, the record does show that the county had
8 concerns with expansion of the mining operation toward the
9 Clackamas River. Record 44.

10 The county apparently believed that other conditions would
11 be sufficient to address its concerns without imposing a buffer
12 requirement. Respondent's Brief 2, 7; Record 44, 109, 115. We
13 agree with the county that an additional permit requirement can
14 be added to a renewal permit, provided the requirement falls
15 within the reach of the surface mining regulations standards.
16 We agree with the county that the required setback is
17 consistent with Section 818.10(D) of its Zoning Code. Under
18 the county's interpretation and application of Section
19 818.10(D), additional conditions may be imposed on a renewal
20 permit based, e.g., on changed circumstances or a reassessment
21 of limitations necessary to meet surface mining regulations,
22 even if the applicant does not propose to change the previously
23 approved reclamation plan. While the county perhaps could
24 interpret its regulations more narrowly than it has, we believe
25 the interpretation it has adopted is reasonable. Petitioner
26 presents no legal basis for her claims that new restrictions

1 cannot be added to the permit. We sustain the county. See,
2 Fisher v. City of Gresham, 69 Or App 411, 416, 685 P2d 486
3 (1984); Alluis v. Marion County, 64 Or App 478, 668 P2d 1242
4 (1983); Younger v. City of Portland, ___ Or LUBA ___ (1987)
5 (LUBA No. 86-046, January 30, 1987).

6 For the reasons set forth above, we deny the second
7 assignment of error.

8 THIRD ASSIGNMENT OF ERROR

9 "Respondent's imposition of buffering requirements is
10 invalid as it bears no substantial relationship to
11 respondent's police powers and constitutes a taking
12 for public use without just compensation."

13 Petitioner argues that the result of the buffer requirement
14 is similar to the result that could have been achieved by
15 purchase of an easement through the scenic rivers program.
16 Petitioner appears to argue that because a decision was made
17 not to purchase an easement, the buffer required by the county
18 results in a taking of property without just compensation.
19 Petitioner argues that the coincidence of the decision not to
20 purchase an easement under the scenic rivers program and the
21 decision to impose the buffering requirement at issue in this
22 appeal demonstrate an improper motive on the county's part to
23 accomplish what the Department of Transportation elected not to
24 do. Petitioner argues this results in a taking of her property.

25 Petitioner concedes that the nonconforming use status of
26 the mining operation does not mean petitioner has an unfettered
right to mine every square foot of the property. Record

1 45-46. It is clear that nonconforming uses remain subject to a
2 variety of public health, safety and welfare requirements. 1
3 Anderson American Law of Zoning, Sec. 6.78 (3d. Ed., 1986); 4
4 Rathkopf, The Law of Zoning and Planning, Sec. 51.06 [1] (1987).

5 While nonconforming uses may remain subject to a variety of
6 regulations, the courts and this Board are mindful that such
7 regulations could have the effect of rendering the use
8 impossible. Anderson, supra, at 679. We agree with the county
9 that the condition in this case is reasonable. As Respondent
10 County correctly notes, the record contains several statements
11 regarding the desirability of the buffer to minimize erosion,
12 turbidity and sedimentation dangers. Respondent's Brief at 7.
13 We conclude the record supports the county's contention that
14 the buffer is a reasonable condition to avoid potential adverse
15 effects of breaching and lowering the escarpment. Benjamin
16 Franklin Dev. v. Clackamas County, 14 Or LUBA 758 (1986).

17 We do not believe the kind of improper motive found in
18 Robertson v. City of Salem, 191 Fed Supp 604 (D. Or 1964),
19 cited by petitioner, is present in this appeal. Petitioner
20 notes that the Scenic Waterways staff in 1985 recommended a 75
21 foot buffer be imposed on petitioner's property. The Scenic
22 Waterways Advisory Committee recommended against the 75 foot
23 buffer and the Department of Transportation took no action
24 within the required one year period. See, footnote 2. The
25 county then imposed its 50 foot buffer condition in 1986.
26 Nothing in that course of events or the portions of the record

1 cited by petitioner provide a basis for implying an improper
2 motive by the county and we decline to do so.

3 The Oregon Supreme Court has never invalidated a regulation
4 of private property for failure to pay compensation, but has
5 cautioned that compensation may be required if a property owner
6 is denied any economic use of the property where eventual
7 acquisition is planned. See, Dunn v. City of Redmond, 303 Or
8 201, 205, ___ P2d ___ (1987); Suess Builders v. City of
9 Beaverton, 294 Or 254, 262-263, 656 P2d 306 (1982); Fifth
10 Avenue Corp. v. Washington County, 282 Or 591, 608-614, 581 P2d
11 50 (1978).

12 The record in this case shows that even with the condition
13 imposed by the county one and one half years of useful life
14 remain for this mining operation which has been a nonconforming
15 use since 1964. There is no contention that other uses allowed
16 under current zoning are not available. We conclude that the
17 county's requirement does not amount to a taking without
18 compensation.

19 For the reasons set forth above, we deny the third
20 assignment of error.

21 The county's decision is affirmed.

FOOTNOTES

1

Petitioner contends that the Circuit Court's order determined that the entirety of her 43.59 acres is a nonconforming use. The county appears to concede the point. Respondent's Brief at 3. The partial transcript of the Circuit Court proceedings included in the record is certainly less than clear on the point. Record 13-17. Because the county's surface mining ordinance, not the general zoning ordinance, is the basis for the condition at issue in this appeal, we need not and do not address this issue.

2

The portion of the Clackamas River adjacent to the mining site is affected by the Scenic Rivers Act. ORS 390.805 through 390.925. The act provides that before development may occur in areas subject to the act, a notice of intent to develop must be filed with the State Department of Transportation. The Department of Transportation then has a period of one year from that time to reach an agreement with the landowner to acquire desired buffers or setbacks or to commence condemnation. The Department of Transportation was given the required notice of intent to develop in 1985 but did not act within one year. Therefore, the requirements of the Scenic Rivers Act do not apply.

3

As a condition to the reclamation plan approved in 1984 and 1985, the county required that there be no extension of mining toward the Clackamas River until a state scenic waterway permit was approved. This requirement was not included in the permit at issue in this appeal. We therefore do not address petitioner's contention that the condition constitutes an unlawful delegation.

4

Like the parties, we assign no significance to the fact that the surface mining regulations are codified as a section of the county zoning ordinance.

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In 1979 the legislature amended ORS 456.775 to make the state building code preemptive. Or Laws 1979, ch 838, sec 5.

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Under ORS 517.785 the Department of Geology and Mineral Industries may "withdraw approval" of the county's surface mining regulations if the department concludes that the county's implementation of those regulations "fails to comply with the standards prescribed by ORS 517.750 to 517.955, or any rules promulgated thereto...."

7

The county is correct. The above quotation is inaccurate. The words "are subject to new reclamation standards" do not appear in Section 818.09. The quotation from the petition for review is actually from subsection D of Section 818.09. Section 818.09 provides in its entirety:

"SURFACE MINING PERMIT - RENEWAL APPLICATION

"A. A county permit for surface mining expires one (1) year after being issued. If the mining is to continue an application for renewal of the permit shall be submitted to the Planning Director thirty (30) days before its expiration.

"B. If the initial surface mining permit was reviewed and approved by the State Department of Geology and Mineral Industries, the permittee shall submit with the application the reclamation plan approved by the State for the mining together with additional information the County finds necessary to assure that mining by the permittee conforms to all conditions of the State permit. Reclamation completed under State permit at the time application is made for a County permit shall be accepted if it complies with the plan approved by the State for that reclamation.

"C. The application for renewal shall state whether or not any change is to occur in the information that was submitted previously and describe the change.

"D. When an extension of the mining operation is proposed in areas for which a detailed reclamation plan has not been approved, or a bond or other acceptable assets secured by the County, the renewal application shall be subject to provisions for application, reclamation, financial security and noncompliance under subsections 818.03, 818.04, 818.05, and 818.06."