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BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

MILL CREEK GLEN PROTECTION ASSOCIATION, BLAISE GRDEN, JOSEPH DAYTON and LUCY DAYTON, Petitioners, vs. UMATILLA COUNTY, Respondent. and KLICKER BROTHERS and ROBERT A. KLICKER, Participants.	LUBA No. 87-003 FINAL OPINION AND ORDER

Appeal from Umatilla County.

Neil S. Kagan, Portland, filed the petition for review and argued on behalf of petitioners.

No appearance by Umatilla County.

Douglas E. Hojem, Pendleton, filed the response brief and argued on behalf of participants. With him on the brief were Corey, Byler, Rew, Lorenzen and Hojem.

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

AFFIRMED 08/14/87

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

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Opinion by Bagg.

NATURE OF THE DECISION

Petitioners appeal a conditional use permit authorizing extraction and processing of rock and gravel in a Grazing Farm/Critical Winter Range Zone.

PROCEDURAL, HISTORY and FACTS

This is the second conditional use permit we have reviewed for this property. The first, resulted in a remand. Allen v. Umatilla County, 14 Or LUBA 749 (1986). We remanded the case for several reasons. The first was about the precise location of the gravel pit and whether or not the pit could be characterized as an existing or a new pit under provisions in the county's ordinance. The second ground for remand was founded in the county's application of certain existing gravel pit criteria. Because we were unable to determine that the applicant's property constituted an existing gravel operation, we found county application of existing pit criteria to be error requiring a remand. We also found the county failed to show compliance with an environmental standard stating

> "The operation complies with all applicable air, noise and water quality regulations of all county, state or federal jurisdictions and applicable state or federal permits are obtained." Umatilla County Zoning Ordinance, Section 7.060(17)(h).

In addition, we deferred consideration of a claim that the permit violated an ordinance requirement that any new gravel pit closer than 500 feet from a property line adjacent to a residential dwelling required the operator to obtain written

release from the residential property owner. In the Allen case, the release was not obtained, but we did not remand the decision for this reason because of our holding that the county must reexamine its use of the existing gravel pit approval criteria. Only after properly characterizing the gravel pit as either an existing or a new gravel pit could the county apply particular approval requirements.

On remand, the county approved a conditional use permit for gravel extraction. The approval specifically incorporated the findings and conclusions in support of its first decision and also adopted "supplemental findings of fact and conclusions of law."

The specific property is 389.78 acres in size and lies on the border between Oregon and Washington in Umatilla County. It is about 12 miles east of the Walla Walla, Washington city limits.

FIRST ASSIGNMENT OF ERROR

> "The county violated ordinance [sections] 7.060 (17)(a)(A)(1) and (17)(a)(B)(1), which require that an extraction hole be centered on the property."

Petitioners say the county ordinance requires gravel extraction holes be centered on the property. This requirement is applicable both to old gravel pits and to new gravel pits. Section 7.060(17)(a)(A)(B). According to petitioners, evidence in the record establishes that the extracting area of the approved gravel pit is not centered on the property, and the county's decision must be reversed on this ground alone.

Respondents do not claim the extraction holes on the subject site are centered on the property but instead argues that this issue is beyond the scope of our review. Respondents insist that the LUBA remand in Allen, was limited to

> "(1) Whether the county properly found that the rock quarry in question was an 'existing' quarry thereby triggering less stringent planning requirements than if the quarry were considered 'new,' and
>
> "(2) Whether the county properly dealt with petitioners' concern over the potential for violations of noise regulations." Brief of respondents at 6.

As we understand respondents' argument, we are precluded from reviewing petitioners' first assignment of error because the matter of compliance with Section 7.060(17) was not a subject for our review in the earlier proceeding.

We previously held that the "law of the case" doctrine applies to proceedings before this Board. See, Portland Audubon Society v. Clackamas County, 14 Or LUBA 433 (1986); Koch v. Southern Pacific Transport Company, 274 Or 499, 547 P2d 589 (1976). Generally, the doctrine limits review in subsequent proceedings of issues which could have been raised in earlier proceedings.[1] See, Abrego v. Yamhill County, 2 Or LUBA 101 (1980).

In this case, while the petitioners are different, the conditional use application is the same. Also, the county's proceeding on remand was limited to answering the issues raised by our remand. The county did not reopen the whole proceeding

or replace any of the findings made in the first proceeding.

Petitioners make no claim they were precluded from participation in Allen, supra. Petitioners could have challenged the county on this centering issue in the first proceeding. Indeed, the county made a finding that the extraction area is not centered on the property, but is "located in an area centered along the proposed projects of replacing the Walla Walla Transmission Line and the Federal Mill Creek Improvement Project." Record I, 6.[2] This finding is an open invitation to challenge the county on the centering criteria. Petitioners did not appear and make such a challenge.

We believe that where petitioners had the opportunity to appear and challenge a decision in an earlier proceeding, they should not be allowed to challenge a decision on remand on issues which could have been raised in the first proceeding. We therefore agree with respondents that petitioners are precluded from challenging the county on this issue. We therefore deny petitioners' assignment of error.

Our holding is not without doubt. Therefore, we now consider petitioners' challenge rather than delay final resolution of this case should our application of the law of the case doctrine be mistaken.

The record reveals the extraction area is not centered on the property. The county does not explain the purpose of the standard. The county's order in Allen, supra, states

"1. Extraction holes and sedimentation ponds in an

> existing pit - The inspection revealed that the proposed extraction work would occur beyond the 25 ft. necessary to meet the criteria and will not exceed 75% of the total mass, but is not centered on the property. The proposal, however, is located in an area centered along the proposed projects of replacing the Walla Walla Transmission Line and the Federal Mill Creek Improvement Project." Record I, 6.

This finding is not responsive to the criteria. The standard requires centering the mining operation on the property, not in some other area demarcated by projects or other features. Were we to review this assignment of error on the merits, our review would therefore result in a remand for proper application of the county ordinance.[3]

SECOND ASSIGNMENT OF ERROR

> "The county found the approved gravel pit to be an existing pit without the benefit of substantial evidence in the whole record, and violated ordinance [sections] 7.060 (17)(a)(B)(1) and (17)(b)(B)(1), which require that extraction holes and processing equipment associated with new pits be located no closer than 500 feet from adjacent parcels."

According to petitioners, the county failed to describe clearly the location of the existing gravel pit and the precise location of the proposed new operation as required by our remand. Allen v. City of Portland, 14 Or LUBA at 753.

The new findings state "the area to be mined is the area that has had rock removed from it," Record II, 3, but petitioners find this description vague and not responsive to our remand.

In addition, petitioners argue the county's finding the approved gravel pit is an existing pit (as opposed to a new

one) is not supported by substantial evidence. Petitioners say that the quarry cannot qualify as an existing use under Section 18.70 of the county ordinance because there is only sporadic evidence of quarry use. This issue is important because the approval criteria for existing pits do not apply to new gravel pit operations. An existing pit may lie closer to residential properties than a new pit.

In a further argument under this assignment of error, petitioners say the new pit and processing equipment will be well within 500 feet of several residences including one of petitioners' residences. Petitioners argue this violates Section 7.060(17)(a)(B)(1) and (17)(b)(B)91) of the county code.

In Allen, supra, we agreed with the county that its ordinance permitted it to consider an existing pit to be one in which mining activities occurred at some time. See, Allen v. Umatilla County, 14 Or LUBA at 753. Evidence included in the new record supports the county's claim that the quarry is an existing quarry fitting this definition. Receipts from sales of rock dated 01/23/75, 06/15/79, 10/25/85, 01/17/86, 01/18/86 and 01/20/86 support the county's claim. Record II, 33-34. In addition, an affidavit of Sam Humbert states he hauled and purchased rock from this site and one other at various times from the late 1960s to the present. Record II, 35.

However, there is still some question as to the precise location of the existing pit and the proposed area to be excavated. A plot plan submitted with the application shows

the "existing quarry" to border the Washington/Oregon line and Mill Creek Road for a distance of some 210 feet and is about 60 feet deep. An engineering survey submitted later does not show the area of the existing quarry but rather shows "area to be excavated for gravel and riprap material." Record II, Engineering Map "Exhibit A." This somewhat larger area also borders the Washington/Oregon border and Mill Creek Road. If the two maps are viewed together, it becomes clear that the existing quarry and the new area to be excavated overlap somewhat. It also appears that the new area to be excavated extends considerably deeper into the property than the existing quarry. We conclude that the two drawings, the original plot plan and the engineering drawing, provide sufficient detail to establish the location of the existing pit and the new area to be excavated.

The question remains whether the operations to be conducted on this site can be characterized as an existing quarry or a new quarry. That is, assuming the area identified as an existing quarry on the plot plan is to be enlarged, does that enlargement change the character of the site from an existing quarry to a new one?

Nothing to which we are cited in the ordinance suggests the drafters contemplated that expanding the horizontal contours of an existing gravel pit should or should not be considered a new pit subject to Section 7.060(17)(a)(B).

However, we cannot say as a matter of law that the county's

apparent interpretation, considering the whole site an existing pit, is contrary to the express language of the ordinance. Given the ordinances's ambiguity on this issue, we will defer to the county's interpretation. The result, of course, is that excavation of areas not previously mined is allowable under "existing pit" standards.[4] We believe, then, that the county was justified in considering this as an existing pit and applying existing pit criteria found in Section 7.060(17)(a)(A) in the county ordinance.

We deny this assignment of error.

THIRD ASSIGNMENT OF ERROR

> "The county failed to to [sic] make a finding required to be made by ordinance [section] 7.060 (17)."

Petitioners argue that the county failed to make the finding required by Ordinance 7.060(17)(H), that "all applicable state or federal permits are obtained." Petitioners argue the applicant was required to obtain an air pollution discharge permit, and the county made no finding that the applicant had obtained such a permit.

The county does not respond to this argument, stating instead that this assignment of error should not be considered for the reasons discussed supra under Assignment of Error No. 1.

For the reasons discussed under assignment of error one, we agree with respondents. Petitioners had the opportunity to appear and challenge the county in the first Allen proceeding and did not do so. They are precluded from doing so here. We

deny this assignment of error.

Again, in case we are in error in declining to review petitioners' complaints, we will examine petitioners' argument.

Clearly, the ordinance requires a finding that all needed permits are obtained. The county made such a finding in its first order found at Record I, 6. The order states

> "the operation complies 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."

While this finding is stated in conclusional terms, petitioners only claim the county made no such finding and do not attack the finding on other grounds. Petitioners do not argue that the finding is somehow inadequate or not supported by substantial evidence. We would deny this assignment of error, therefore.

FOURTH ASSIGNMENT OF ERROR

> "The county's finding that Klicker will meet all applicable air, noise, and water quality regulations is not supported by substantial evidence in the whole record."

Petitioners complain that while the county found the applicant will meet applicable air, noise and water quality regulations, the finding is not supported by substantial evidence in the record. Petitioners argue the record only reveals testimony from an unqualified individual that air and noise pollution will be kept within acceptable limits. See, new record 44. Petitioners cite other evidence by an individual claimed to be qualified "with 40 years of experience

in quarrying and rock processing" that no technological fix is available for noise pollution. See, Record II, 21. Petitioners go on to complain that there is no evidence that the applicant will incur the expense necessary to obtain the technology necessary to ensure compliance with this criterion.

The county found that the applicant's expert, Rich Young, was "an expert witness in the field of gravel extraction...." Record I, 3. The county additionally found that the applicant submitted a letter by Mr. Young which details availability of equipment that will meet or exceed all local, state and federal noise standards. The letter goes on to describe baffling made of "varying materials" able to control "excessive noise pollution." Record II, 44.

It is not our responsibility to weigh conflicting believable evidence. Younger v. City of Portland, ___ Or LUBA ___ (LUBA No. 86-046, January 30, 1987); aff'd 86 Or App 211, ___ P2d ___ (1987). The evidence introduced by the applicant is sufficient, in our view, to qualify as substantial evidence that the applicant can meet applicable standards.

We therefore deny this assignment of error.

FIFTH ASSIGNMENT OF ERROR

> "The county failed to find that the conditional use is in conformance with the plan, as required by ordinance [section] 7.020 (3).

In this assignment of error, petitioners complain that the applicant failed to show compliance with the comprehensive plan. Petitioners cite the following policy:

> "When conflicting uses are proposed for identified areas of sensitive wildlife habitat, Umatilla County shall evaluate the social, economic, environmental and energy [SEEE] consequences of allowing the conflicting use, and develop programs to minimize impacts on wildlife habitat." Open Space, Scenic and Historic Areas, and Natural Resources Policy No. 2 (b) (Appendix 18 of petitioners' brief).

Ordinance Section 7.020(3) requires conformity with the comprehensive plan for any conditional use, and petitioners' argument is that as the gravel extraction will take place in a sensitive wildlife habitat, the county was required to show conformity with this comprehensive plan standard. Conformity may only be shown by conducting a study to evaluate the social, economic, environmental and energy consequences of allowing the conflicting use.

Respondents, consistent with their view that this challenge is beyond our scope of review, do not respond. For the reasons discussed under assignment of error one, we agree with respondents that this challenge is beyond our review. Petitioners were able to challenge the county's first order for compliance with this criterion and did not do so. They are precluded from doing so here. We therefore deny this assignment of error.

In the alternative, and should we be in error regarding applicability of the law of the case doctrine in this proceeding, we will consider petitioners' assignment of error.

We are cited to nothing in the record to show if the site is in a sensitive wildlife habitat. We note, however, that the

property appears subject to a "critical winter range overlay zone," previous record p. 60. See, Section 3.572 of the county's ordinance at Appendix 44 applying that overlay. Given apparent applicability of the overlay, the county was obliged to discuss applicable overlay criteria in its order. Without findings on this issue, we would be unable to perform our review function. Hoffman v. Dupont, 49 Or App 699, 621 P2d 63 (1980). We would, therefore, sustain this assignment of error.

SIXTH ASSIGNMENT OF ERROR

> "The county failed to make findings required to be made by ordinance [section] 3.065."

Ordinance Section 3.065 provides, in part, as follows:

> "The following limitations shall apply to a conditional use in a GF Grazing/Farm zone:
>
> "(1) Is compatible with farm uses described in ORS 215.203(2) and the intent and purpose set forth in ORS 215.243, and is compatible with and will not significantly affect other existing resource uses that may be on the remainder of the parcel or on adjacent lands.
>
> "(2) Does not interfere seriously with accepted farming practices as defined in ORS 215.203(2)(c) on adjacent lands devoted to farm uses, nor interfere with other resource operations and practices on adjacent lands.
>
> "(3) Does not materially alter the stability of the overall land use pattern of the area.
>
> "(4) Is situated upon generally unsuitable land for the production of farm crops and other resource activities considering the terrain, adverse soil conditions, drainage and flooding, vegetation, location and size of the tract.
>
> "(5) Is consistent with agricultural and grazing/forest policies in the Comprehensive Plan and the purpose of this zone."

The county made no findings assessing whether approval of the application will be consistent with the purpose of conserving and protecting critical deer and wildlife habitat. Because of failure to make this finding and, indeed, the other findings required by Section 7.060, petitioners urge the decision be remanded.

Once again, respondents complain that petitioners' challenge is beyond the scope of the remand and therefore should be ignored. We agree for the reasons stated earlier, and deny this assignment of error. However, should we be in error in this regard, we offer the following discussion of petitioners' assignment of error.

Neither of the county's orders fully address these criteria. The county does find that

> "appoval of this request would not be detrimental to Umatilla County as the applicant has agreed to meet the criteria of the county development ordinance code and the following conditions:"

There follow several conditions regarding setback, fencing and other matters. The county also found that approval of the request "will not remove any prime farm land from production as the applicant will use the least productive land for his mining operation." Record I, 8. This finding is at least responsive to Ordinance Section 3.065(4). We therefore disagree with petitioners that the county failed to make findings on all the criteria in ordinance Section 3.065.

However, the finding is incomplete. It does not provide

facts upon which to base its conclusions about farmland. Further, whether "prime" farmland is removed from production is not the issue. The issue is the compatibility of the use with farm use and grazing, generally. See, Section 3.065(4).

Were this assignment of error reviewable, it would be sustained.

SEVENTH ASSIGNMENT OF ERROR

> "The county improperly construed ordinance [section] 3.065 (3), which requires that the conditional use not materially alter the stability of the overall land use pattern of the area, and its finding that the overall land use pattern in the area would not be materially altered is not supported by substantial evidence in the whole record."

Petitioners argue the county failed to meet the requirements of ordinance Section 3.065(3) requiring a finding that the conditional use permit "does not materially alter the stability of the overall land use pattern of the area." Petitioners claim that the county's finding that the project will not "materially alter the overall land use pattern in the area" (Record I, 8) is not responsive. Petitioners argue whether or not the permit will alter the overall land use pattern in the area is different than whether it will alter the stability of that land use pattern.

This argument, as with earlier ones, is subject to respondents' and our view that petitioners are precluded from raising this concern because they did not raise it at the first possible opportunity. We therefore deny this assignment of error.

However, should we be in error, we will discuss petitioners' challenge.

We do not believe there is substantial difference in the county's choice of words and the ordinance standard. However, the conclusional finding of compliance with the criterion is not accompanied by supporting findings of fact. Conclusions standing alone will not support a decision. See, South of Sunnyside Neighborhood League v. Clackamas Co. Comm., 280 Or 3, 569 P2d 1063 (1977); Tompkins v. Forest Grove School Dist. #15, 86 Or App 436, 443, ___ P2d ___ (1987).

This assignment of error would be sustained were we reviewing all petitioners' assignments of error.

The decision of Umatilla County is affirmed.

FOOTNOTES

1

But see, Marr, et al v. Putnam, et al, 213 Or 17, 321 P2d 1061 (1958) in which the court held that a court should not blindly adhere to former decisions that are manifestly erroneous. See also, Stager v. Troy Laundry Co., 41 Or 141, 68 Pac 405 (1902), in which the court listed identity of the parties as an intregal part of the doctrine.

2

The record in our first case is referred to as "Record I." The new record is referred to as "Record II."

3

In the alternative, of course, the county could choose to eliminate this requirement from its ordinance in favor of more traditional setback provisions.

4

This holding is not without doubt. In the county's original order, it noted both existing and original pit criteria, and quoted the criteria in its order approving the conditional use application. This choice of wording suggests that the county considered that perhaps both criteria applied.