BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

AL VIZINA, JAN VIZINA, DON HAYTER, KAREN HAYTER, VERN LIESINGER, RUSSELL STEINHAUER and JUANITA STEINHAUER, Petitioners, vs. DOUGLAS COUNTY, Respondent, and STANLEY PAROZ, Intervenor-Respondent.	LUBA No. 88-014 FINAL OPINION AND ORDER

Appeal from Douglas County.

Doyle L. Schiffman, Roseburg, filed the petition for review and argued on behalf of petitioners.

No appearance by respondent county.

Wallace D. Cegavske, Roseburg, filed a response brief and argued on behalf of intervenor-respondent. With him on the brief was Cegavske & Associates, P.C.

SHERTON, Referee; BAGG, Chief Referee; HOLSTUN, Referee, participated in the decision.

REMANDED 08/26/88

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

Opinion by Sherton.

NATURE OF THE DECISION

Petitioners appeal an order of the Douglas County Board of Commissioners approving a conditional use permit to allow mining and processing of aggregate on a ten acre portion of a 426.28 acre parcel in the Farm Forest (FF) and Exclusive Farm Use - Grazing (FG) zoning districts.

MOTION TO DISMISS

Intervenor-respondent (respondent) Stanley Paroz moves to dismiss the petition for review on the grounds petitioners (1) delayed the appeal by making false objections to the record in bad faith; and (2) did not comply with OAR 661-10-030(3)(b)(C), in that the petition does not contain citations to the record. Respondent contends the lack of record citations causes a hardship for him, by making his response to the petition unnecessarily difficult, time consuming and expensive.

Petitioners deny that their record objection was made in bad faith, citing difficulty they had in obtaining tapes from the county with which to produce the desired partial transcript. Petitioners argue that the Summary of Facts in their petition for review includes numerous references to the record. Finally, petitioners argue that any violation of our rules which might have occurred was "technical" in nature, and did not prejudice respondent's substantial rights.

Respondent does not identify any provision of our governing statute or rules as allegedly violated by petitioners' conduct

with regard to their record objection. Respondent simply asserts the record objection was a bad faith delaying tactic.

OAR 661-10-065(2) requires motions regarding the failure of opposing parties to comply with legal requirements for our appeals to be filed "within ten days after the moving party obtains knowledge of such alleged failure." Petitioners' objection to the record was finally resolved by our Order Settling Record dated June 23, 1988. Respondent does not explain how its July 25, 1988 motion complies with OAR 661-10-065(2).[1]

With regard to respondent's claim of a violation of OAR 661-10-030(3)(b)(C), we agree with petitioners that the summary of facts in their petition for review does contain citations to the record. Respondent does not explain how these citations are not adequate to comply with the rule.

Respondent's motion to dismiss is denied.

FACTS

Respondent filed an application with Douglas County (county) for a conditional use permit for aggregate mining and processing on ten acres adjoining the northern boundary of a 426.28 acre parcel. The parcel contains a house and two mobile homes occupied by family members and a rental dwelling. It is used primarily for grazing sheep.

Steinhauer Road crosses the subject parcel in an east-west direction, towards its southern end. Access to the quarry site was proposed to be by a driveway extending north from the

western end of the developed portion of Steinhauer Road.

Property to the north and northwest of the subject parcel is zoned FF. The other property surrounding the subject parcel is zoned FG. Several smaller parcels (5 to 20 acres) with residences adjoin the subject parcel to the northeast and adjoin the portion of Steinhauer Road to the east of the subject parcel. Other properties adjoining the subject parcel are larger parcels in farm use.

The house nearest to the proposed quarry site is located 2,000 feet to the southeast, but this house is topographically screened from the quarry site by a ridge. The closest house not visually screened from the quarry site is approximately 2,700 feet to the southwest.

The Douglas County Planning Commission (commission) approved the conditional use permit, with conditions, on December 3, 1987. This approval was appealed by both petitioners and respondent. The board of commissioners affirmed the commission's decision on February 17, 1988. This appeal followed.

FIRST ASSIGNMENT OF ERROR

> "The Finding and Decision is inconsistent with and contrary to the aims and purposes of Douglas County's Comprehensive Plan, Goals and Policies, taken together as they relate to the subject property and the property surrounding the subject property."

Petitioners argue the county failed to adopt findings demonstrating compliance with the following Mineral and Energy Resources Policy Implementation Statements[2] of the Douglas

County Comprehensive Plan (plan):

> "2. Where required, review of applications for the development of aggregate resources shall consider the impact of such an operation on:
>
> > "a. Surrounding land uses in terms of satisfying Department of Environmental Quality standards for noise, dust, visual impact as well as impacts on traffic created as a result of the operation.
> >
> > " * * * * *
>
> "3. Prior to the County granting permits for new aggregate or mineral extraction operations, the applicant shall have met all other regulations as required by the Division of State Lands and the State Department of Geology and Mineral Industries." Plan, p. 6-106.

Petitioners argue the above-quoted plan provisions require the county, in approving an application for aggregate mining, to find that the proposed operation will satisfy all requirements of Division of State Lands (DSL) and DOGAMI regulations, and all Department of Environmental Quality (DEQ) standards for noise, dust, visual impacts and impacts on traffic. Petitioners point out these plan provisions use mandatory language -- i.e., "shall consider" and "shall have met." According to petitioners, no such findings were made.

Petitioners concede that the county imposed conditions requiring the quarry operations to be conducted in compliance with DOGAMI permit regulations and DEQ air and water quality regulations.[3] However, petitioners argue that these are conditions subsequent and do not satisfy the requirement of the plan implementation statements. Furthermore, petitioners argue

that, even if these conditions were adequate to satisfy portions of the above-quoted implementation statements, they do not require compliance with DSL regulations or DEQ regulations on noise, visual impacts and traffic impacts.

As general responses to this assignment, respondent argues (1) petitioners improperly attempt to raise a procedural issue for the first time in their appeal to LUBA; and (2) petitioners have not sufficiently explained the legal basis for their assignment of error, as they have not identified agency regulations allegedly not satisfied by the application, citing our decisions in Gordon v. Clackamas County, 13 Or LUBA 46, 56, aff'd 73 Or App 16 (1985) and Dougherty v. Tillamook County, 12 Or LUBA 20, 33 (1984).

This assignment does not allege the county failed to follow applicable procedures, but rather that the county improperly construed the applicable law. See ORS 197.835(8)(a)(D). In the circumstances presented by this case, there is no requirement that the petitioners must raise such a substantive issue during the county proceedings. See McNulty v. City of Lake Oswego, 14 Or LUBA 366, 369-370, aff'd without opinion, 83 Or App 275 (1986). But see ORS 197.762.

We also find that petitioners sufficiently explain the legal basis for their argument concerning the county's failure to adopt findings addressing the requirements of Mineral and Energy Resources Policy Implementation Statements 2a and 3. Unlike the situation in Gordon v. Clackamas County, supra,

petitioners here explained the nature of the alleged violation -- i.e., a lack of required findings.[4] We will therefore proceed to consider separately respondent's arguments with regard to the two policy implementation statements at issue.

A. Policy Implementation Statement 3

Respondent argues that DSL regulations have no provisions applicable to the proposed quarry operation. Respondent asserts the reclamation plan in the record indicates that a DSL permit is not required for the proposed use. Record 181. Respondent contends it would be nonsensical to require findings applying nonexistent criteria.

Respondent also argues that DOGAMI rules simply require application for and annual renewal of a mined land reclamation permit. Respondent contends the findings in the staff report and the commission decision[5] adequately find the applicant met all regulations required by DOGAMI by incorporating a portion of the DOGAMI reclamationist's site inspection report and referring to the report of the state geologist.

Respondent agrees with petitioners that the condition requiring future compliance with DOGAMI permit regulations is a condition subsequent, but contends it is "a prudent and proper one that gives the county authority they [sic] would not otherwise have to terminate the use if a violation occurs." Intervenor-respondent's Brief 10.

Policy Implementation Statement 3 requires the county, in approving a permit for a new aggregate extraction operation, to

find that the proposed use meets all applicable regulations of DSL and DOGAMI. Respondent does not cite us to any findings addressing DSL regulations.[6] The findings[7] to which respondent cites us addressing DOGAMI regulations simply state that the site can be reclaimed, adverse impacts can be minimized and future "observance" of DOGAMI regulations with regard to use of roads "should mitigate the suggested incompatibilities." Record 99 and 101. This statement is not the equivalent of a finding that the proposed use meets applicable DOGAMI regulations.

Once a local government decides that a proposed use can meet applicable criteria, the imposition of conditions is an appropriate way to insure that the criteria are met. Sigurdson v. Marion County, 9 Or LUBA 163 (1983). However, in this case, the county never determined the proposed use can meet applicable DOGAMI regulations. The condition imposed by the county requiring that DOGAMI regulations be met in the future does not cure this defect in the findings. See Lousignont v. Union County, ___ Or LUBA ___ (LUBA No. 87-065, December 9, 1987) slip op. at 9.

This subassignment of error is sustained.

B. Policy Implementation Statement 2a

Respondent asserts that DEQ noise regulations do not require a permit for the proposed use. According to respondent, where there is no permit required, Policy Implementation Statement 2a does not apply. Respondent also

asserts the county's findings "determine the noise problem to be minimal." Intervenor-respondent's Brief 10.

Respondent argues that DEQ has no standards for visual or traffic impacts. Once again, respondent contends that the county should not be required to address nonexistent standards in its findings.

Respondent states that DEQ regulations do include standards for dust control. Respondent argues that the county's finding that the equipment to be used at the proposed quarry is licensed by the DEQ as an air contaminant point source and therefore must meet DEQ regulations (Record 75) is adequate to establish compliance with the policy implementation statement.

Policy Implementation Statement 2a requires the county, in reviewing applications for the development of aggregate resources, to consider the impact of such an operation on surrounding land uses in terms of whether the proposed use will satisfy DEQ standards for noise, dust, visual and traffic impacts. Thus, the county is required to make a determination in its findings of whether the proposed use will meet applicable DEQ standards.[8]

With one exception, respondent does not cite us to any findings addressing compliance of the proposed use with DEQ standards.[9] The single exception is the finding concerning the equipment to be used in the operation being licensed by DEQ as air contaminant point sources. However, this recitation is not the equivalent of a finding that the proposed use meets DEQ

dust standards.

Finally, the condition imposed that the quarry operation be conducted in compliance with DEQ regulations to maintain air and water quality standards is not the equivalent of a determination of whether the proposed operation will meet such standards and does not address compliance with any applicable noise, visual impact and traffic impact standards.

This subassignment of error is sustained.

The first assignment of error is sustained.

SECOND ASSIGNMENT OF ERROR

> "Respondent, County, misconstrued the applicable law and failed to comply with its Comprehensive Plan and implementing land use and development ordinance by failing to demonstrate, through adequate findings supported by substantial evidence, that its decision to grant the Conditional Use Permit complied with all applicable criteria contained in Sec. 3.3.15 [sic 3.3.150], Sec. 3.5.125 and Sec. 3.39.050."

THIRD ASSIGNMENT OF ERROR

> "The findings and determination by Respondent, County, are not supported by substantial evidence in the whole record."

A. Noninterference and Stability

The Douglas County Land Use and Development Ordinance (LUDO) conditional use approval standards for the FG zone include the following:

> "The use would not seriously interfere with accepted farming practices as defined in ORS 215.203 on adjacent lands suitable for farm use.
>
> "Granting of the permit would not materially alter the stability of the overall land use pattern for the area." LUDO 3.3.150.2 and 3.

LUDO conditional use approval standards for the FF zone include the following:

> "The use would not seriously interfere with farm uses defined in ORS 215.203 or forest practices as defined and regulated by ORS 527.610 to 527.730 on adjacent lands devoted to, or suitable for, such uses.
>
> "The grant of the application would not materially alter the stability of the overall land use pattern in the area." LUDO 3.5.125.2.b and c.

Petitioners argue that the issues of interference with accepted farming practices on adjacent land and the stability of the overall land use pattern in the area were the subject of extensive testimony during the proceeding before the county. Petitioners contend the county erred by failing to adopt specific findings addressing in detail the above-quoted mandatory standards.

Respondent calls our attention to several county findings which purport to address the noninterference with accepted farming practices and stability of the overall land use pattern issues, e.g., staff report finding 6 (Record 81) and commission findings 7, 25 and 26 (Record 99 and 101). Petitioners do not explain why these findings are inadequate to address the LUDO standards or how they fail to address relevant issues focussed on by petitioners in their testimony.

This subassignment of error is denied.

B. Compatibility

LUDO 3.39.050.1 requires that any proposed conditional use meet the following approval criterion:

"The proposed use is or may be made compatible with existing adjacent permitted uses and other uses permitted in the underlying zone."

Petitioners first argue that the above-quoted standard requires the county, in approving the proposed conditional use in the FF and FG zones, to adopt findings that the proposed use is or may be made compatible not only with the existing adjacent uses, but also with every other use permitted within the FF and FG zones. According to petitioners, those uses include churches, schools, kennels, stables and parks. Petitioners contend the county failed to adopt such findings.

Petitioners also argue the county failed to make a specific finding on whether the noise and dust attendant to the proposed use will be mitigated enough to render the quarry operation compatible with existing adjacent uses. According to petitioners, findings that noise and dust will be "minimized" "to the extent possible" do not meet the requirement of the LUDO standard for findings that the proposed use is or may be made compatible with existing adjacent uses.

Finally, petitioners argue that, even if we find the county's findings and conclusions adequate to demonstrate compliance with LUDO 3.39.050.1, the county's decision is not supported by substantial evidence. According to petitioners, the county's conclusion that the proposed use can be made compatible with adjacent uses relies upon (1) noise-related conditions that equipment be muffled "to the extent possible" and that prior notification be given of blasting activities;

and (2) a finding that noise and dust impacts will be mitigated by natural topography. Petitioners argue this finding and the county's conclusion regarding the effect of the imposition of these conditions are not supported by substantial evidence in the record.

LUDO 3.39.050.1 requires the county to find that the proposed use is or may be made compatible with existing adjacent uses and with "other uses [potentially] permitted in the underlying zone." Petitioners are correct that the underlying FF and FG zones potentially allow uses such as schools, churches, kennels and parks. Respondent does not direct our attention to findings on compatibility which address other than the existing farm and residential uses adjacent to the proposed quarry operation. The county's findings, therefore, fail to comply with LUDO 3.39.050.1 in that they do not address compatibility with other uses of adjacent property potentially permitted under the FF and FG zones.

However, we do agree with respondent that the findings adequately state the conclusion required by LUDO 3.39.050.1 that the proposed use is or may be made compatible with existing adjacent uses with regard to noise and dust impacts. Respondent calls our attention to several findings addressing the dust and noise impacts issues, including the following conclusion:

> "The operation of the 10 acre site as a quarry is near the northern border of the subject property, and would not create incompatibilities with adjacent uses as

long as the conditions proposed are observed. The effects of both noise and dust created will be mitigated by natural topography." Record 101-102.

Respondent further argues that the county's reliance on the mitigation of noise and dust impacts by natural topography and on the effects of conditions requiring muffling of equipment and notification of blasting[10] is supported by substantial evidence in the DOGAMI reclamationist's report and the staff report. Record 67-82, 215-217.

The reclamationist's report to which we are cited by respondent establishes that ridges to the east and west of the site "screen it from all but approximately half a dozen houses in Happy Valley." Record 216. The report also states that by leaving as many trees as possible, by placing crushed rock stockpiles between the crusher and the opening to the valley and by putting a muffler on the crusher, the operator is "taking steps to contain noise on the site." Id. However, the report also states that during the relatively infrequent periods of drilling or blasting "the noise will go down the valley." Id. The staff report states that the equipment "shall be muffled to the extent possible to control noise." Record 81.

Thus, whereas we are cited to substantial evidence in the record supporting the finding that the effects of dust and noise from the proposed use will be mitigated by natural topography, we are not cited to substantial evidence in support of the essential conclusion that the proposed use, as

conditioned, will be compatible with adjacent uses with regard to dust and noise. The evidence recognizes that there are approximately six residences which are not screened from the site by natural topography. The evidence shows that steps can be taken to minimize and control the noise to which these residences are exposed, but does not show that the end result of such steps will be "compatibility."

With regard to blasting and drilling, the evidence is that such noise "will go down the valley," presumably to the six unscreened houses. There is no evidence as to what the level of noise at these houses will be and whether it can be considered "compatible" with the residential use. There is no evidence that the blasting notification procedure established by condition will render the blasting noise "compatible" with the residential use.

This subassignment of error is sustained, in part, with regard to (1) the failure of the findings to address compatibility with other uses potentially permitted on adjacent land zoned FF and FG, and (2) lack of substantial evidence to support the conclusion that the proposed use is or can be made compatible with the approximately six unscreened residences with regard to dust and noise impacts.

C. Activities/Impacts Outside the Ten Acre Site

Petitioners argue the county failed to make specific findings dealing with proposed activities by the applicant outside the ten acre quarry site. Petitioners specifically

argue that they raised, and the county should have addressed, the issues of dust, noise and visual impacts from trucks hauling aggregate on the applicant's private driveway. Petitioners also argue that the county improperly failed to address the impacts on land outside the ten acre quarry site of noise, dust and run-off from overburden stockpiling and from piling of sludge deposits from the excavation of settling ponds.

Respondent contends the county did adopt findings addressing the impacts outside the ten acres of the truck traffic hauling aggregate from the site. Respondent points to commission findings 10 and 15-19 (Record 99 and 100) and board of commissioners' finding 9(e) (Record 5) as addressing this issue. Respondent also contends the findings do address the off-site impacts of overburden stockpiling and run-off, citing findings of the staff report (Record 77) and commission findings 22 and 23 (Record 101). With regard to impacts of sludge deposits excavated from the settling ponds, respondent argues that petitioners fail to meet their burden to demonstrate that such a finding is necessary to the decision.

In order to prevail in this subassignment of error, petitioners must explain how the county's findings are inadequate and identify a required approval criterion which is not complied with as a result of that inadequacy. Lane County School Dist. 71 v. Lane County, 15 Or LUBA 150, 152-153 (1986). In this case, petitioners do not explain why the findings cited by respondent, which apparently do address

off-site impacts of the truck traffic and overburden storage, are deficient. Petitioners also do not explain why these and other findings they argue are lacking are essential to the decision -- i.e., they do not identify a required approval standard with which compliance is not demonstrated as a result of the alleged deficiency in the findings.

This subassignment of error is denied.

D. Use of Conditions

Petitioners argue that the county has impermissibly used the imposition of conditions subsequent as a means to defer determinations of compliance with mandatory approval criteria for the subject conditional use permit. Petitioners contend that under our decision in Margulis v. City of Portland, 4 Or LUBA 89, 98 (1981), the failure of the county "to determine the feasibility of compliance with all of the conditions precedent by applicant, prior to the issuance of the permit, requires a remand." Petition for Review 17.

Other than as discussed under subassignment B, supra, petitioners do not identify either the conditions they believe to represent impermissible deferrals of compliance with mandatory approval criteria. It is petitioners' responsibility to present the facts and argument which support their claim and to tell us the basis upon which we might grant relief. Deschutes Development v. Deschutes County, 5 Or LUBA 218, 220 (1982).

This subassignment of error is denied.

The second and third assignments of error are sustained in part.

FOURTH ASSIGNMENT OF ERROR

> "Respondent, County, erred in relying on reports, diagrams, studies, documents and testimony prepared and presented by applicant which were inconsistent, contradictory, without basis and simply submitted to achieve the desired result of obtaining the Conditional Use Permit to develop a rock quarry and rock crushing plant facility."

Respondent correctly points out that this assignment of error is not supported by any argument in the petition for review.[11]

It is not our function to supply petitioners with legal theories or to make petitioners' legal arguments for petitioners. Deschutes Development v. Deschutes County, supra.

This assignment of error is denied.

The county's decision is remanded.

FOOTNOTES

1

The original record in this case was received on March 29, 1988. On April 8, 1988, petitioners filed an objection to the record, asking that transcripts of certain tapes be included. The objection represented that an agreement had been reached between petitioners and the county to allow petitioners sufficient time to obtain and transcribe the necessary portions of the county's tapes.

On April 13, 1988, the motion to intervene on the side of respondent county was filed. However, respondent made no response to the objection to the record at that time. Nothing more was heard from respondent until a motion to dismiss or, in the alternative, to set a time for submission of the transcripts was filed on May 27, 1988. In our June 8, 1988 order responding to that motion, we set a deadline of June 20, 1988 for submission of the transcripts. On June 20, 1988, petitioners did not file the transcripts, but rather a document attempting to add to the record all of the original tapes, because of difficulty experienced by them in obtaining coherent tapes for transcription.

In a telephone conference on June 23, 1988, respondent argued that petitioners had engaged in delaying tactics. However, respondent filed no motion to dismiss at that time. We entered an order settling the record as of that date.

2

We note with regard to the status in the plan of the quoted Policy Implementation Statements that the plan's introduction states:

> "The Douglas County Comprehensive Plan officially establishes, as County policy, findings, goals, objectives, policies and policy implementation statements addressing issues described in the following Countywide Plan elements:
>
> " * * * * *
>
> "Natural Features" Plan, p. viii - ix.

The quoted Plan Implementation Statement provisions are found in the plan's Natural Features element.

[3] The relevant conditions imposed by the county state:

"1. The quarry operation shall be conducted in compliance with the D.E.Q. regulations to maintain air and water quality standards.

" * * * * *

"3. The quarry operation shall be conducted in compliance with Department of Geology and Mineral Industries permit regulations." Record 102.

[4] However, had the county adopted any findings stating that these policy implementation statements had been complied with, we would agree with respondent that petitioners have not established a legal basis for arguing that such findings are inadequate. See Dougherty v. Tillamook County, supra.

[5] The board of commissioner's order incorporates by reference the findings in the staff report and the findings and decision sections of the commision's decision. Record 6.

[6] Arguably, Policy Implementation Statement 3 could be satisfied by an adequate finding that there are no DSL regulations applicable to the proposed use. However, a statement that DSL does not require a permit for the proposed operation is not the equivalent of such a finding. An agency may have regulations establishing standards applicable to a particular activity without requiring that a permit be obtained from the agency for that activity. In any case, the only reference in the record to which we are directed concerning the lack of a DSL permit requirement is a statement by the applicant, not a finding by the county.

[7] Respondent also cites us to portions of the staff report which quote comments by a DOGAMI staff person. However, these provisions are actually recitations of evidence rather than statements of what the county believed to be the facts. See Hill v. Union County Court, 42 Or App 883, 887, 601 P2d 905 (1979). In any case, the quoted DOGAMI testimony does not state that the proposed use complies with applicable DOGAMI

regulations.

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[8] We note that, contrary to petitioners' argument, this policy implementation statement does not necessarily require the county to deny an application if it determines that the proposed aggregate use will not meet DEQ standards. However, there may be other county plan or ordinance provisions which have such an effect.

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[9] As we stated under the previous subassignment, a finding that there are no relevant DEQ standards applicable to the proposed use might well satisfy this policy implementation statement. However, the county made no such findings. Also as stated under the previous subassignment, a statement that DEQ does not require a permit for the proposed use would not be the equivalent of such a finding.

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[10] The conditions at issue state:

"2. The equipment used at the site shall be muffled to the extent possible.

" * * * * *

"6. Interested parties shall be notified of any blasting to occur on the 10 acre site by a mailing four days prior to blasting. Interested parties are the remonstrators in this action and any other individual who specifically requests to be placed on the mailing list. It shall be the responsibility of the interested party to provide the address for mailing."

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[11] Petitioners do make some statements at pages 15-16 of the petition for review which appear to complain about the evidentiary scope of review employed by the board of commissioners in reviewing the planning commission's decision. However, we are unable to determine what, if any, legal standard petitioners may be claiming is violated and whether or how this complaint relates to their fourth assignment of error.