BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

CONSOLIDATED ROCK PRODUCTS, INC., Petitioner, vs. CLACKAMAS COUNTY, Respondent, and JERRY and SUSAN NORDSTROM, MICHAEL HOEVET, SARAH LINDER, and MR. and MRS. R.C. HABERLACH, Intervenors-Respondent.	LUBA No. 88-090 FINAL OPINION AND ORDER

Appeal from Clackamas County.

Gary M. Bullock, Portland, filed the petition for review and argued on behalf of petitioner.

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

James R. Jennings, Gresham, filed a response brief and argued on behalf of intervenors-respondent.

HOLSTUN, Chief Referee; SHERTON, Referee, particiapted in the decision.

AFFIRMED 04/10/89

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

Opinion by Holstun.

NATURE OF THE DECISION

Petitioner challenges a Clackamas County hearings officer's decision approving in part and denying in part petitioner's request for a conditional use permit to continue an aggregate mining operation on its property.

MOTION TO INTERVENE

Jerry and Susan Nordstrom, Michael Hoevet, Sara Linder, and Mr. and Mrs. R.C. Haberlach move to intervene on the side of respondent in this proceeding. There is no opposition to the motion, and it is allowed.

FACTS

A conditional use permit allowing an aggregate mining operation on petitioner's property was first granted in 1980. The present mining operation occupies 33.65 acres. Petitioner's property is located adjacent to the Clackamas River, and is designated General Industrial/Aggregate Overlay by the Clackamas County Comprehensive Plan (plan). The property is part of the Clackamas Industrial Area and is zoned General Industrial (I-3).

Petitioner's lessee, Pacific Rock, Inc., conducted an aggregate mining operation on the property from 1980 to 1986. Petitioner took over the mining operation in 1986 and has continued the mining operation to the present.

The conditional use permit granted in 1980 specified a five year expiration date. Record 270. In securing county approval

of the 1980 conditional use permit, petitioner and neighboring individuals, including four of the six intervenors-respondent, entered an agreement under which the petitioner agreed to specific hours of operation and other limitations on its aggregate mining operation. The 1980 agreement acknowledged the conditional use permit would "be void and of no effect in five years from the date of issuance." Record 51.

In 1984, the conditional use permit was extended to March 1988, and the hours of operation were limited.[1] On March 25, 1988, petitioner requested continuation and revision[2] of the conditional use permit as follows:

"a. Legalization of the conversion of a single family residence to an office, used in conjunction with the mining activity.

"b. Expansion of the mining area by approximately 6.5 acres, to include Tax Lots 1900, 2100 and 2101.

"c. Extension of the time limit for the surface mining until March 1, 1996.

"d. To increase the hours of operation as follows:

From	To
"7am - 5pm Standard, weekdays	7am - 5:30pm weekdays November - April
"7am - 6pm Daylight, weekdays	7am - 9pm weekdays May - October
"8am - 5pm Saturdays (1 per month)	7:30 am - 5:30 . Saturdays (no limit)
"No Sundays	No Sundays No limits on "maintenance"

"e. To allow a finished depth, after reclamation, of

70 feet instead of 75 feet.[3]

"f. To allow the mined depth to be increased from 75 feet to 50 feet. Back-haul of materials to be used to reclaim the site to a finished elevation of 70 feet."

The hearings officer granted the petitioner's requests in paragraph "a" and "b" but did not grant the petitioner's request in paragraph "e." These portions of the hearings officer's decision are not challenged in this appeal. Petitioner challenges the hearings officer's denial of its requests (1) to extend the time of operation to March 1, 1996, (2) to increase the hours of operation, and (3) to increase the allowable depth of the mine from 75 feet to 50 feet above sea level.

INTERVENORS' CROSS PETITION FOR REVIEW

Intervenors-respondent (intervenors) filed a combined response brief and petition for review on February 16, 1989.[4] Our rules permit intervenors-respondent to file a cross-petition for review, but require that "the cross-petition shall be filed within the time required for filing the petition for review * * *." OAR 661-10-075(3). In our Order on Record Objections dated January 5, 1989, we advised the parties the petition for review was due 21 days later, or January 26, and respondents' briefs were due 42 days later, or February 16. See OAR 661-10-026(5). Accordingly, the portion of intervenors' brief constituting a response brief was timely filed, but the portion constituting a petition for review was

not timely filed.

In OAR 661-10-005, we clearly state that failures to timely file a Notice of Intent to Appeal or Petition for Review are not viewed by the Board as mere technical violations which will be excused if there is no prejudice to the substantial rights of the parties. These documents advise the parties of the commencement of an appeal and give notice of the issues in dispute. They are documents particularly important to our review proceedings, and we adhere strictly to their filing deadlines in order to implement the legislative policy "that time is of the essence in reaching final decisions in matters involving land use * * *." ORS 197.805.

Although cross-petitions for review are not explicitly referenced in OAR 661-10-005, we believe strict adherence to the deadline established in OAR 661-10-075(3) is warranted. In this case, the intervenors' cross-petition raised new issues seven days before the date set for oral argument, and no explanation was offered for why the cross-petition was not filed within the time provided in our rules. Therefore, we do not consider the challenges to the county's decision raised in intervenors' cross-petition for review. We do consider the portions of intervenors' brief constituting a response brief in addressing petitioner's assignments of error below.

FIRST ASSIGNMENT OF ERROR

Petitioner assigns as error the county's failure to allow cross-examination. Petitioner claims the county's failure to

allow cross-examination violates its right to due process under the United States and Oregon Constitutions.[5] Petitioner appears to recognize that although it has rights to present evidence and rebut evidence, no Oregon appellate court has found there is a right, under the Fourteenth Amendment, to cross-examination in quasi-judicial land use proceedings. See Clinkscales v. City of Lake Oswego, 47 Or App 1117, 1122-1123, 615 P2d 1164, rev den 289 Or 741 (1980).

Petitioner points out that courts in some other jurisdictions have concluded due process requires that parties in quasi-judicial land use hearings be accorded a right of cross-examination. Wadell v. Board of Zoning Appeals, 156 Conn 1, 68 A2d 152 (1949); Jarrell v. Board of Adjustment, 258 NC 476, 128 SE2d 879 (1963). Petitioner further contends there should be no mechanical rule "that there is no right to cross-examination in quasi-judicial [land use] hearings" in Oregon. Petition for Review 9.

Petitioner complains

> "* * * the hearings officer heard testimony and examined exhibits presented by public agencies, private organizations, neighboring land owners of petitioner, and parties, all of which are contained in the record submitted to the Land Use Board of Appeals. Petitioner was not given an opportunity to cross-examine any of these witnesses and, thereby, could not determine the basis of the adverse evidence and effectively rebut its truth and relevance. In this case, the constitutionally protected rights of due process require that petitioner be allowed to cross-examine those individuals who testified on behalf of the respondents with regard to its application for a conditional use permit." Petition for Review 9.

However, petitioner does not cite specific evidence in the record which it claims warranted the right of cross-examination.[6]

As we explained in Mason v. Linn County, 13 Or LUBA 1, aff'd in part, rev'd in part on other grounds, sub nom Mason v. Mountain River Estates, 73 Or App 334, 698 P2d 529, rev den 299 Or 314 (1985), in rejecting a petitioner's claim to a due process based right of cross-examination:

> "Petitioner's argument in support of his cross-examination request is difficult to follow. As we read the petition, the argument is that denial of the 'right' of cross-examination constituted denial of another 'right' - the right to offer evidence and argument in rebuttal of the applicant's position. See petition at 16.
>
> "The latter right has been recognized in previous cases involving quasi-judicial land use proceedings. See, e.g., Fasano v. Washington County Commission, supra; Lower Lake Subcommittee v. Klamath County, 3 Or LUBA 55 (1981).
>
> "We have considerable difficulty in understanding how denial of cross-examination can be translated into denial of petitioner's recognized right to offer rebuttal evidence. The two procedural tools are logically distinct. See South of Sunnyside Neighborhood League v. Board of Commissioners of Clackamas County, 27 Or App 647, 663-664, 557 P2d 1375 (1976); reversed 280 Or 3, 569 P2d 1063 (1977).
>
> "We will not attempt to look further into the nature of petitioner's undeveloped argument.
>
> "Petitioner may intend to claim that the asserted right to cross-examine MRE's witnesses has constitutional support independent of the amorphous connection to the right of rebuttal. See generally, Note Specifying the Procedures Required by Due Process, 88 Harv L. Rev 1510 (1975). If this is so, however, we find no discussion in the petition of the

constitutional law theory supporting the claim. We will not speculate on the merits of this undeveloped theory. See Megdal v. Board of Dental Examiners, 288 Or 293, 296-297, 605 P2d 273 (1980); Pierron v. Eugene, 8 Or LUBA 113, 118 (1983)." (footnote omitted) Id. at 6.

We have the same problem in this case that we had in Mason v. Linn County, supra. Although it is not entirely clear in the petition for review, petitioner does not appear to assert a due process right to cross-examination independent of its undisputed right to rebut evidence. Rather, petitioner appears to argue a right of cross-examination is necessary in order for it to exercise effectively its right of rebuttal.

Respondent points out that almost a month passed between the hearing at which the evidence petitioner complains of was received and the later hearing at which petitioner was given an opportunity to submit rebuttal evidence. Petitioner makes no attempt to explain why cross-examination was the only way for petitioner to determine the "basis" for the opponent's evidence.

As we recently explained in Younger v. City of Portland, 15 Or LUBA 210, aff'd 86 Or App 211, 739 P2d 50 (1987), rev'd on other grounds 305 Or 346, 752 P2d 262 (1988):

> "Without a local ordinance or a judicial decision granting the right of cross-examination in land use proceedings, we will not engraft such a procedure on local land use hearings." Id. at 233-234.

In Younger v. City of Portland, we further explained the three steps the Board uses to determine whether due process requires the opportunity for cross-examination:

> "1. Did the petitioners assert a right of

cross-examination?

"2. Did the local governing body deny petitioners the right to cross-examine?

"3. Were petitioners prejudiced by the denial of any right to cross-examination? * * *" Id. at 233.

Here, the hearings officer advised the opponent's attorney that he would not be permitted to cross-examine witnesses. Therefore, although the hearings officer's action might be interpreted as denying petitioner, as well as its opponents, the right to cross-examination, petitioner never asserted a right of cross-examination. This problem aside, petitioner has not explained how it was prejudiced by the hearings officer's failure to allow cross-examination, other than to claim, without explanation, that cross-examination was necessary to determine the basis of the opponent's testimony. Some explanation of why cross-examination was the only available route to that information is required.[7] Cf. Younger v. City of Portland, 15 Or LUBA at 233 (opportunity to submit written requests for information sufficient to protect substantial rights). Considering the lack of such an explanation, together with the opportunity provided to petitioner to present rebuttal evidence, we conclude the denial of an opportunity for cross-examination resulted in no prejudice to petitioner's substantial rights and, therefore, provides no basis for remand under ORS 197.835(8)(a)(B).

The first assignment of error is denied.

SECOND ASSIGNMENT OF ERROR

Petitioner argues the county's denial of its request to mine the site to a depth of 50 feet above sea level violates Goal 5 (Open Space, Scenic and Historic Areas, and Natural Resources) and the Clackamas County Comprehensive Plan.

Petitioner's existing mining operation has mined the 33.65 acres subject to the original conditional use permit to approximately 75 feet above sea level. Therefore, unless petitioner's request to mine the property to 50 feet above sea level is granted, future extraction of aggregate from the property will be limited to the additional 6.5 acres approved by the hearings officer. Petitioner provided evidence that mineable aggregate exists between 75 feet and 50 feet above sea level on its property, and respondent and intervenors do not dispute that evidence. Petitioner contends that refusing to allow extraction of this aggregate violates Goal 5 and plan policies protecting aggregate resources.

A. Goal 5

Goal 5 does require protection of mineral and aggregate resources. However, nothing in Goal 5 requires, as petitioner suggests, that in all cases inventoried mineral and aggregate sites must be mined until those resources are exhausted.

More importantly, the decision at issue in this proceeding is a decision concerning a conditional use permit. The Clackamas County Comprehensive Plan and land use regulations have been acknowledged pursuant to ORS 197.251. Generally,

post acknowledgement land use decisions are subject to applicable plan and land use regulation approval standards, not the statewide planning goals. Byrd v. Stringer, 295 Or 311, 313, 666 P2d 1332 (1983).[8]

We find petitioner's subassignment alleging violation of Goal 5 to be without merit.

B. Plan Policies

Petitioner argues its property is located in a designated aggregate resource area. Petitioner acknowledges that the Clackamas County Comprehensive Plan (plan) includes policies to minimize incompatible land uses, reduce conflicts and ensure aggregate extraction site reclamation and reuse. However, petitioner argues "it is doubtful that these goals were meant to prevent complete utilization of known aggregate deposits * * *." Petition for Review 13. Petitioner cites plan language emphasizing the importance of aggregate resources and argues the plan should not be interpreted to allow less than complete extraction of aggregate on its property.[9]

The county responds that petitioner's interpretation of the plan to require complete extraction of the aggregate on petitioner's property is not correct. The county notes the plan explicitly recognizes that conflicting uses may limit extraction of such resources. Aggregate Resources Policy 2.0 provides:

> "Buffer existing and proposed extraction sites from incompatible uses. This may include limits to the expansion of existing sites and/or encroachment of

unrelated land uses upon existing sites." (Emphasis added.)

We agree with the county that the plan explicitly envisions balancing the need for aggregate resources with the impact extraction of such resources may have on adjoining properties. Policy 2.0 quoted above explicitly envisions the possibility that extraction at an aggregate site may be limited.

Although it is true other plan language cited by petitioner encourages extraction of aggregate resources, the cited plan language does not support petitioner's interpretation of the plan to require "complete utilization of known aggregate deposits * * *." Petition for Review 13. Accordingly, petitioner's contention that the plan should be read to require complete extraction of aggregate resources conflicts with the plain language of applicable plan provisions and cannot be sustained. See Fifth Avenue Corp. v. Washington Co., 282 Or 591, 581 P2d 50 (1978); McCoy v. Linn Co., 90 Or App 271, 752 P2d 323 (1988).

This subassignment of error is denied.

The second assignment of error is denied.

THIRD ASSIGNMENT OF ERROR

Petitioner next challenges the findings adopted by the hearings officer in denying its request to mine to 50 feet above sea level, and the evidentiary support for those findings.

Before turning to petitioner's specific complaints, we note, and petitioner recognized at oral argument, the heavy

burden it assumes under this assignment of error. A single adequate finding supported by substantial evidence is sufficient to support the hearings officer's denial of petitioner's request. See Kegg v. Clackamas County, 15 Or LUBA 239, 244 (1987); Weyerhauser v. Lane County, 7 Or LUBA 42, 46 (1982). A person challenging a denial of land use approval on substantial evidence grounds must demonstrate that it sustained its burden of proof as a matter of law. See Jurgenson v. Union County Court, 42 Or App 505, 600 P2d 1241 (1979). Finally, petitioner's burden in this case is particularly difficult in that the county must balance and apply plan language which favors exploitation of aggregate resources on the one hand and protection of adjoining properties from the impacts of such exploitation on the other. We may not independently apply the plan to the evidence in this case to determine how we would have applied the plan. Rather, we examine the whole record to determine whether a reasonable person could have reached the conclusion the county did based on the plan standards and the evidence before it.[10]

The hearings officer gave four separate reasons for denying petitioner's request that it be allowed to mine between the 75 foot and 50 foot level. Petitioner challenges each of those reasons in a separate subassignment of error below. As we explained supra, if the petitioner fails in its challenge to any of the four reasons given for denying the requested approval, the county's denial must be upheld.

A. Impacts of Excavating Below Flood Level

One reason given by the hearings officer for denying petitioner's request to excavate below the flood level of the Clackamas River adjoining the property, was that "[t]he file does not contain data sufficient to permit the hearings officer to evaluate possible impacts from allowing the depth of excavation to go below the flood level on this property." Record 8.

Petitioner points to testimony regarding a lack of complaints about water quality as a result of the current mining operation. In addition, petitioner points out evidence that in this area of cemented gravels, water would not seep from the pit to adjoining properties or to the Clackamas River. Petitioner also claims that prior improper discharges of water from the site occurred when the mining operation was run by petitioner's lessee. Petitioner also cites a letter from the Clackamas Water District in which it does not oppose excavation below the flood level. Finally, petitioner sites a water study which demonstrates how water will be managed on the site.

Respondent argues that although the hearings officer did not explicitly identify his concerns with regard to excavating below flood level, the following testimony is in the record:

> "The Army Corps of Engineers has calculated the 100 year flood plain elevation of the Clackamas River along the subject property to range between 70 to 72 feet. The present mining plan calls for development down to an elevation of approximately 50 feet. That

would leave the possibility of flooding prior to reclamation. It also leaves the possibility of storm sewers or other temporary outfall of water into the Clackamas River below that elevation. This could cause drainage problems and exacerbate potential flooding problems." Record 76-77.

As the Court of Appeals explained in Jurgenson v. Union County Court, 42 Or App 505, 600 P2d 1241 (1979):

"In a local land use proceeding the proponent of change has the burden of proof. * * * Could not a local government deny a land-use change on the sole basis that the proponent did not sustain his burden of proof because his evidence was not credible? If so, in what sense would we be expected to say that denial was supported by substantial evidence?

"* * * * *

"* * * A denial is supported by substantial evidence within the meaning of ORS 34.040(3) unless the reviewing court can say that the proponent of change sustained his burden of proof as a matter of law." Id. at 510.

Although the evidence cited by petitioner indirectly addresses the issue of excavating below the flood level of the Clackamas River, we cannot say the evidence cited by petitioner demonstrates as a matter of law that any adverse effects of mining below the flood level are adequately buffered or limited.[11] See Aggregate Resources Policy 2.0, quoted supra.

B. Impacts of Extending Mining Operation to 1996

Another reason relied on by the county in denying the requested increase in mining depth is that "[t]he increased depth would substantially increase the amount of time required to complete the mining operation and reclaim the land for other industrial uses." Record 7. The county found that an

additional four years of operation would be sufficient to complete extraction, including the additional 6.5 acres, to the 75 foot level. However, the county found, and no party disputes, that excavation to the 50 foot level would require a further extension of time. Id. The county determined that the duration of the conditional use permit should be limited to four years (from March 1988 to March 1992), based on the following findings:

> "Provided the conditions of approval are satisfied, the expansion will not alter the character of the surrounding area in a manner which substantially limits, impairs or precludes the use of the surrounding properties for the primary uses listed in the underlying district. Surrounding zoning districts include Industrial and Single Family Residential. While there are impacts on surrounding properties from noise, vibration and dust resulting from the mining operation, it is the finding of the Hearings Officer that the conditions of approval serve to minimize that impact and permit the surrounding properties to be used for the principal uses permitted within their zoning districts.
>
> "The existing mining operation does adversely impact the liveability of surrounding residences and the mining activity does limit potential industrial users in the industrial area (for example, the presence of dust precludes the location of certain electronics companies from locating nearby). These conditions might require denial except that the approval will be for a limited period of time, after which the property will be reclaimed for other permitted uses. Approval of the additional area for mining will not increase the magnitude of any adverse impacts." Record 5.

Petitioner admits that excavating to the increased depth would require an extension of its operation for eight years, to 1996. However, petitioner argues the hearings officer fails to explain adequately why he decided to limit the extension of the

operation to four years. According to petitioner, the hearings officer failed to explain why his decision to extend the operation for no more than four years furthers applicable plan objectives and policies.[12]

We understand the county to argue that the above-quoted findings are adequate to explain why the limitation to four years is required to minimize impacts on adjacent properties. See Aggregate Resources Policy 2.0, quoted supra.

The county's findings explain that the mining operation causes adverse impacts on adjoining properties and that some of those impacts are unavoidable. The hearings officer notes the time this mining operation has been in effect has already exceeded the time originally envisioned. Petitioner does not argue that the increase of mining depth to 50 feet will not necessitate extending the mining operation an additional four years. We agree with the county that the above findings are adequate to explain why the mining operation should be limited to an additional four years and, therefore, why the increase in mining depth to 50 feet should be denied.

C. Impacts of Backhauling Fill Material

If petitioner were allowed to excavate to the 50 foot level, fill material would have to be hauled to the site to reclaim the site to 75 feet above sea level, by backhauling at the time aggregate is removed or at some later date.[13] A surface elevation after reclamation of at least 75 feet above sea level is necessary to allow the site to be developed for

industrial uses and be connected via gravity sewers to the sewer system for which petitioner has already been assessed $550,000. As the current mining operation is at approximately the 75 foot level, backhauling of fill will only become necessary if extraction below 75 feet is allowed.[14]

Two of the hearings officer's reasons for denying petitioner's request to extract aggregate to the 50 foot level are dependant on the attendant requirement to backhaul fill material to reclaim the site. First, the hearings officer concluded the risk of backhauling material unsuitable for fill and reclaimation was too great in view of past violations on petitioner's property and its proximity to the Clackamas River. The hearings officer noted the concerns expressed by the Oak Lodge Water District about possible contaminated back fill. Similar concerns were expressed by the Clackamas Water District. Record 254. Second, the hearings officer found the truck traffic generated by backhauling would have unacceptable impacts on adjoining properties.

Petitioner attacks the hearings officer's first reason by arguing the Oak Lodge Water District letter expressing concern about contaminated fill was based on false information and was later effectively recanted. Petitioner points to numerous conditions contained in the 1980 conditional use permit and additional conditions imposed by the hearings officer arguing those conditions are sufficient to assure that no contaminated fill will be placed on the site. Petitioner argues it should

not be held responsible for violations committed by its lessee.

Respondent argues that although conditions concerning the nature of fill can be imposed "as a practical matter there is no way to insure that there would be strict adherence to such conditions." Respondent's Brief 10. According to respondent, petitioner, as the property owner, cannot escape all responsibility for past violations on this site by its lessee.

We agree with respondent that there is sufficient evidence in the record to support the hearings officer's concern about ensuring that acceptable fill material would be used to reclaim the site. The concerns expressed in the Oak Lodge Water District letter were retracted in part in a letter submitted to the hearings officer as part of petitioner's request for rehearing, after the hearings officer had rendered his decision. See n 6 and 7, supra. That partial retraction apparently was based on the District's confidence in petitioner's ability to use suitable fill for reclamation. However, the letter in which the Oak Lodge Water District partially retracted its prior concerns was not part of the record upon which the hearings officer based his decision on the merits.[15] Furthermore, there is no dispute that certain materials may not be utilized for fill if the site is to be reclaimed safely and put to industrial use upon completion of the mining operation. Additionally, there is no dispute that material violations of operating conditions have occurred on the site when the mining operation was conducted by

petitioner's lessee. The hearings officer's finding that the risk posed by excavating below the 75 foot level would be unacceptable in view of past violations on the site is supported by substantial evidence in the record. In other words, a reasonable person could conclude that the risk of excavation below 75 feet would be too great in these circumstances.

The hearings officer's second reason for denial was based on potential impacts of backhauling traffic on adjoining properties. According to petitioner, the hearings officer failed to recognize that the same trucks would be both hauling aggregate away from the site and hauling fill material to the site; and, therefore, no additional impacts to adjoining properties would result.

There are two problems with petitioner's argument. First, there is no assurance that the fill required to reclaim the site could be supplied exclusively through backhauling involving the same trucks carrying aggregate from the site. If aggregate is supplied to sites which do not have fill suitable for use in reclamation, presumably additional truck trips would be required to secure the required fill for reclamation.

More importantly, as the respondent argues:

> "[Petitioner's] argument misses the point. If excavation below 75-feet is not allowed, there is simply no additional need for backhaul at all. The hearings officer correctly concluded that the petitioner had not met its burden of proof on this issue." Respondent's Brief 11.

Two additional arguments are offered by petitioner in support of its contention that the hearings officer erred by not allowing excavation to the 50 foot level because of the attendant requirement for backhauling.

Petitioner argues it should be allowed to receive backhaul from construction sites because many such sites prefer to do business with aggregate suppliers who can both supply the required aggregate and removed unwanted "dirt, rock, asphalt and concrete." Petition for Review 22.

Even if petitioner is correct concerning the preference of some construction sites and is, therefore, at a competitive disadvantage if it is not allowed to mine to 50 feet and to accept fill for backhauling, that would provide no basis for remanding the hearings officer's decision.

Petitioner's final argument is that it must be allowed to backhaul to reclaim its property to the 75 foot level that would allow it to use the property for the designated industrial use, and thereby recoup its investment in utility improvements.

Petitioner's argument is at best perplexing. The hearings officer's decision requires that the property be reclaimed to an elevation of 75 feet. Most of the property currently is at that level. Under the approved conditional use permit, the additional area to be mined may not be mined below the 75 foot level. This condition was expressly imposed to assure that the property would be suitable for industrial use and serviceable

by gravity flow sewers. The only way petitioner could be left without ability to use its property for the intended industrial use, with connection to a gravity flow sewer, is if the hearings officer were to allow excavation below 75 feet but not allow reclamation to the 75 foot level. The hearings officer did not do so.

The third assignment of error is denied.

FOURTH ASSIGNMENT OF ERROR

Petitioner claims the hearings officer's denial of its request to increase its hours of operation is not supported by substantial evidence in the record.

The hearings officer's decision continues the limitation on hours of operation imposed by the county in 1984, but clarifies that those limitations do not apply to normal maintenance of equipment, provided mining and processing equipment are not operated or tested as part of such maintenance. In denying petitioner's request, the hearings officer found:

> "A similar request to change the hours of operation was denied by the Board of County Commissioners on April 11, 1984. There is an existing agreement between the applicant and neighbors which limits the hours of operation to those currently in effect. The limitation on the hours of operation is designed to minimize the impact on neighbors in the area. The applicants have offered no justification for changing those hours except a need for more efficient and competitive business operations. The purpose of the limitation is still valid. Additionally, the hearings officer was impressed with the letter from Youth Adventures, Inc. * * * which points out the adverse impact of extending those hours. The hours of operation will be maintained. To extend them as requested would be inconsistent with subsection 1203.01D of the ZDO."[16] Record 8.

Petitioner argues the hearings officer failed to balance properly the interests of adjoining uses against its interest in utilizing the aggretate resources on its property. Petitioner cites letters in the record which discuss the need for aggregate in Clackamas County and contends the longer operating hours would allow it to complete its mining operation more quickly.

Petitioner notes the record contains a sound study conducted at its operation on the subject property in 1988 which resulted in readings well within the applicable State Department of Environmental Quality regulations. Petitioner contends the letter from Youth Adventures, Inc. is insufficient evidence upon which to base denial. Finally, petitioner contends the hearings officer's finding that petitioner's request is primarily for efficient business operations "belittles petitioner's business" and "shows that [the hearings officer] did not take [petitioner's evidence] into consideration * * *." Petition for Review 28.

The county responds by arguing that in reviewing the justification for imposing a condition on approval of a conditional use permit, LUBA proceeds somewhat differently than when reviewing determinations that a proposed development satisfies applicable approval criteria. Respondent cites our decision in Benjamin Franklin Development v. Clackamas County, 14 Or LUBA 758, 761 (1986), where we explained:

> "We find the appropriate standard for review of approval of conditions to be whether the conditions are reasonable considering the evidence in the record. A reasonable condition is one which furthers the planning policy or goal and which arises out of evidence in the record. The evidence need not prove the need for a condition, but it must lead a reasonable person to conclude that the evidence supports a need for the condition."

Although neither respondent nor intervenor specifically cites evidence in the record showing impacts from petitioner's mining operation, the letter noted by petitioner is sufficient to allow the hearings officer to conclude at least the property occupied by Youth Adventures, Inc. would be adversely affected by the requested longer operating hours. The letters petitioner cites provide no basis for us to question the hearings officer's failure to be persuaded that longer operating hours are warranted.

The evidence in the whole record does, in our view, support the county's decision that the limitation it imposed on operating hours is needed. The county is not required to explain why it was not persuaded by the contrary evidence cited by petitioner. See Cope v. City of Cannon Beach, 15 Or LUBA 546, 552 (1987); Ash Creek Neighborhood Association v. City of Portland, 12 Or LUBA 213 (1984).

The fourth assignment of error is denied.[17]

FIFTH ASSIGNMENT OF ERROR

Petitioner claims the hearings officer's failure to visit the subject property violated its due process rights.

The hearings officer who rendered the decision at issue in

this proceeding also was the hearings officer in the proceedings that led to approval of the 1980 conditional use permit. The petitioner asked the hearings officer if he was going to conduct a site visit. The hearings officer responded:

> "* * * I have not been requested to in this and frankly, I have a pretty good memory and general knowledge of the area in any event." Record 133.

Petitioner argues it is the hearings officer's duty to make an adequate record, and the hearings officer's

> "previous knowledge of the mining site destroyed his impartiality in the case, and his refusal to visit the site deprived petitioner of a complete record in the case upon which adequate findings could be executed. Fasano v. Washington County Commissioners, 264 Or 576, 588 (1973)." Petition for Review 30-31.

Petitioner goes on to argue that the hearings officer's decision is based on conflicting evidence regarding impacts on adjoining properties, and his decision appears to be based on "preconceived notions of the mining operation." Petition for Review 31. Petitioner argues the hearings officer was not the "impartial tribunal" it is entitled to under Fasano v. Washington County, supra and the Fourteenth Amendment to the United States Constitution.

Petitioner does not cite and we are not aware of any general requirement that local land use decision making bodies must conduct a site visit.[18] Although we cannot say it is impossible that refusal to conduct a site visit could run afoul of a party's rights to present and rebut evidence before an impartial tribunal, such is not the case here.

In this case, the hearings officer had some familiarity with the property as a result of the 1980 conditional use permit proceedings. Petitioner does not cite evidence in the record which would lead us to conclude that the hearings officer was biased against petitioner because of his prior knowledge of the site. Neither has petitioner moved for an evidentiary hearing to present evidence of such bias. We cannot tell from the record whether any party received any advantage as a result of the hearings officer's familiarity with the property. We do note that the hearings officer's prior consideration led to his approval of the conditional use permit in 1980.

Finally, as the respondent notes, the record does not show that petitioner actually requested the hearings officer to conduct a site visit. We find no error in the hearings officer's failure to conduct a site visit.

The fifth assignment of error is denied.

SIXTH ASSIGNMENT OF ERROR

Under this assignment of error petitioner argues the hearings officer erred by denying its request for a rehearing.

On September 23, 1988, following the hearings officer's September 14, 1988 decision, the petitioner requested rehearing pursuant to Clackamas County Zoning and Development Ordinance (ZDO) Section 1304.03.A.[19] The hearings officer denied the request for rehearing on October 3, 1988. Petitioner contends the hearings officer's decision denying its request for

rehearing is not supported by substantial evidence in the whole record.

Respondent contends ZDO Section 1304.03.A provides no criteria controlling the hearings officer's decision concerning a request for rehearing. According to respondent, the section leaves the decision whether to grant a rehearing "completely within the discretion of the hearings officer." Respondent's Brief 13.

Petitioner does not identify criteria controlling the hearings officer's decision on a petition for rehearing. We agree with the county's interpretation of ZDO Section 1304.03.A.

The sixth assignment of error is denied.

The county's decision is affirmed.

FOOTNOTES

1

As limited by the county's 1984 decision, the permitted hours of operation were as follows:

"7:00 a.m. to 5:00 p.m. standard time, 7:00 a.m. to 6:00 p.m., daylight time, and * * * one full Saturday a month from 8:00 a.m. to 5:00 p.m. * * *." Record 43.

2

Although the mining operation on the site continues, the conditional use permit granted in 1980, and extended in 1984, expired in April 1988. It is not clear whether the county's decision in this matter is correctly characterized as a grant of a new conditional use permit or a decision to revive, amend and extend the prior conditional use permit. However, no party argues that the manner in which the decision is characterized is legally significant.

3

The references to feet of finished elevation and mine depth are to elevation above sea level.

4

Intervenors-respondent also could have filed a separate notice of intent to appeal the county's decision as petitioners, or intervened both as petitioners and respondents, but did not do so.

5

The Fifth and Fourteenth Amendments to the U.S. Constitution provide no person shall be deprived "of life, liberty or property, without due process of law * * *." The Oregon Constitution contains no explicit due process clause. See [Hans A.] Linde, Without "Due Process", 49 Or Law Rev 125, 135-138 (1970).

6

Petitioner does, under the third assignment of error, complain that a letter dated May 3, 1988, from the Oak Lodge Water District concerning excavation and filling below flood level was based on false information supplied by one of the opponents of the conditional use permit.

After the appealed decision was made, petitioner requested reconsideration by the hearings officer and attached to its request a second letter from the water district which modified the district's earlier statement.

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[7] In fact petitioner apparently did discover, without cross-examination, the basis for the May 3, 1988 Oak Lodge Water District letter, and arranged for a second letter to be prepared. See n 6, supra. Although the second letter was submitted after the hearings officer's decision, petitioner provides no explanation for why the second letter could not have been submitted earlier.

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[8] As noted recently by the Court of Appeals, plan and land use regulation amendments must comply with the goals. Dickas v. City of Beaverton, 92 Or App 168, 171 P2d 451 (1988); ORS 197.835(4). However, petitioner does not claim that the county adopted a plan or land use regulation amendment.

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[9] Petitioner cites the following language from the Aggregate Resources and the Natural Resources and Energy sections of the county's plan:

> "Aggregate reserve areas are known deposits of gravel and are designated on the urban land use plan map. Access to this valuable resource should be reserved for the future. Aggregate should be extracted where economically feasible." Plan at 30.
>
> "Insure that sufficient supplies of minerals and aggregate deposits are retained near urban areas to meet the needs of the county." Plan at 30.
>
> "Aggregate supplies are integral to general economic development in the county; however, supplies near the urban area are limited due to encroachment of urban land uses." Plan at 12.

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[10] Our consideration of this assignment of error is hampered somewhat by the failure of the hearings officer's decision to identify explicitly the plan policies or other standards applied. Neither do the parties state clearly which plan or land use regulation standards are at issue

under this assignment of error. We note that Clackamas County Zoning and Development Ordinance (ZDO) Section 1203.01 provides in pertinent part:

> "D. The proposed use will not alter the character of the surrounding area in a manner which substantially limits, impairs, or precludes the use of surrounding properties for the primary uses listed in the underlying district.
>
> "E. The proposal satisfies the goals and policies of the comprehensive plan which apply to the proposed use."

As we explained, supra, in our discussion under the second assignment of error, petitioner cites language from the comprehensive plan supporting its position that aggregate resources are to be utilized, while respondent cites a plan policy requiring measures to limit the impacts of aggregate mining on adjoining properties. See n 9, supra.

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[11] The hearings officer did not indicate explicitly how the data was defective or what type of data would address his concern. However, petitioner does not allege the hearings officer erred by failing to provide such guidance. See Commonwealth Properties v. Washington County, 35 Or App 387, 582 P2d 1384 (1978).

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[12] Petitioner also makes a confusing argument that the hearings officer's decision will not allow it to amortize approximately $550,000 in utility assessments. We address this argument under our discussion of the need for backhauling, infra.

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[13] We understand the term backhauling to mean that after hauling aggregate to construction sites, the delivery truck would pick up material suitable for fill, and haul the fill material back to petitioner's mining site in a single round trip.

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[14] Petitioner also requested that it be allowed to reclaim the site to 70 feet rather than 75 feet. The

hearings officer treated this request as having been withdrawn, and indicated the request would be denied in any event because the property would be unuseable for industrial development if only reclaimed to that level. This aspect of the hearings officer's decision is not challenged in this appeal.

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15 In our Order on Record Objections dated January 5, 1989, we allowed the second Oak Lodge Water District letter to be added to the record because petitioner challenged in this proceeding both the hearings officer's decision on the merits and his later decision to deny rehearing.

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16 The letter from Youth Adventures, Inc., signed by its executive director, states:

> "I must register my objections to the request of Consolidated Rock Products, Inc. to lengthen the days and hours of operation. I represent Youth Adventures, Inc., a private, nonprofit residential treatment center for adolescents. We are located directly across the river, and the noise from the mining operation has a tremendous impact on the staff and residents. This is especially true since these boys and girls are placed here for treatment of mental and emotional disorders.
>
> "The current hours of operation are tolerable, but the proposed increases would have a very adverse effect on our treatment program. * * *" Record 148.

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17 The hearings officer noted the existence of the 1980 agreement between petitioner and the neighbors to limit petitioner's hours of operation. Petitioner contends the agreement expired in 1985. Intervenors argue the agreement simply acknowledged the five year term of the 1980 conditional use permit and, contrary to petitioner's argument, the agreement continues in effect. We agree with intervenors' reading of the agreement, but find it unnecessary to determine whether that agreement continues in effect. The hearings officer simply acknowledged the existence of the agreement. We do not read the hearings officer's decision to be based on the fact that an existing enforceable agreement exists, but rather on the

need to "minimize impacts on neighbors in the area," irregardless of the current legal status of the agreement. Record 8. The county clearly was not bound to impose in the conditional use permit the same time limits on operating hours specified in the 1980 agreement. In fact, the limits on operating hours imposed in 1984 and continued by the hearings officer in the challenged decision impose different limitations on Saturday operations than provided in the original 1980 agreement.

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18 We have, however, noted on numerous occasions the steps local governments must follow if they elect to conduct site visits. Jessel v. Lincoln County, 14 Or LUBA 376, 381 (1986); McCoy v. Tillamook County, 14 Or LUBA 108, 124 (1985); Friends of Benton County v. Benton County, 3 Or LUBA 165, 173 (1981).

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19 ZDO Section 1304.03.A provides as pertinent:

"The hearings officer may rehear a matter before it either on its own motion or upon a petition for rehearing by an aggrieved party submitted within ten (10) days of mailing its written decision. * * *"