BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

MORRIS KEUDELL, Petitioner, vs. UNION COUNTY, Respondent, and HAY AND CLARK CRUSHING CO., and LLOYD CLARK, Intervenors-Respondent.	)	LUBA No. 90-054 FINAL OPINION AND ORDER

Appeal from Union County.

Greg Hendrix, Bend, filed the petition for review and argued on behalf of petitioner. With him on the brief was Parker, Hendrix & Chappell.

No appearance by respondent.

Thomas C. Tankersley, McMinnville, filed the response brief and argued on behalf of intervenors-respondent. With him on the brief was Drabkin & Tankersley.

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

AFFIRMED 08/03/90

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 appeals a county decision granting conditional use approval for an aggregate extraction operation and temporary processing facilities.

MOTION TO INTERVENE

Hay and Clark Crushing Co. and Lloyd Clark move to intervene on the side of respondent. There is no opposition to the motion and it is allowed.

FACTS

Intervenors-respondent (intervenors) requested conditional use approval to establish a quarry site on approximately 128 acres zoned A-4 (Timber-Grazing Zone) to mine and process approximately 60,000 to 100,000 cubic yards of aggregate. The proposed processing will include rock crushing and a temporary asphalt batch plant. The planning commission approved the application. Following a hearing on petitioner's appeal of the planning commission decision, the Union County Court rejected the appeal and approved the application.

FIRST ASSIGNMENT OF ERROR

> "The decision is not consistent with the comprehensive plan or county ordinance. (ORS 197.835(3))"

A. Consistency with Plan Agriculture and Forest Policies

In granting approval for the contested quarry site and

temporary processing facility, the county identified Union County Zoning, Partition and Subdivision Ordinance (ZPSO) §§ 5.03(2) and 21.07(3) as establishing the relevant approval standards. ZPSO § 5.03(2)(F) requires that the proposed use be consistent with plan agriculture and forest policies.[1] The county found the requirement of ZPSO § 5.03(2)(F) is met because there are no plan policies "which specifically address aggregate operations." Record 14.

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[1]ZPSO § 5.03(2) provides in relevant part:

> "[Aggregate mining and processing] may be established in an A-4 Zone as [a conditional use] subject to finding[s] by the Planning Commission that the proposed activity can satisfy all of the following criteria:
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> "CRITERIA -
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> "A. Evidence is provided supporting reasons why the proposed use should be sited on such lands;
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> "B. That the proposed use will not significantly impact commercial agriculture and forest uses on adjacent and nearby lands;
>
> "C. That the proposed use will not significantly increase the costs of agriculture and forest management on adjacent and nearby lands;
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> "D. That the site is limited in size to that area suitable and appropriate only for the needs of the proposed use;
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> "E. That, where necessary, measures are taken to minimize potential negative impacts on adjacent and nearby commercial agriculture and forest lands; and
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> "F. That the proposed use is consistent with the agriculture and forest policies contained in the comprehensive plan.
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> "* * * * *."

The fact no plan agriculture or forest policies "specifically" address aggregate operations does not necessarily mean all such policies are inapplicable. However, petitioner identifies no plan agriculture or forest policies which he contends are applicable to the proposed use. Instead, petitioner contends "[c]ompliance [with the plan] cannot be shown merely by the absence of standards." Petition for Review 7. We disagree.

ZPSO § 5.03(2)(F) establishes a general requirement that all conditional uses in the A-4 zone be consistent with plan agriculture and forest policies. However, this does not mean that the plan includes policies applicable to each conditional use possible in the A-4 zone. A finding that there are no applicable plan agriculture or forest policies governing aggregate operations, if correct, is sufficient to establish that the proposed use is consistent with plan agriculture and forest policies. Because petitioner does not contend that there are applicable plan agriculture or forest policies, this subassignment of error is denied.

B. Location, Quality, and Quantity of the Resource Available

The parties dispute the correct interpretation of the requirement imposed by ZPSO § 21.07(3)(A)(1).[2] Petitioner

[2]ZPSO § 21.07(3) establishes specific conditional use standards for aggregate extracting and processing and provides in relevant part:

"Standards for extraction and processing of minerals, aggregate or geothermal resources.

"A. Submitted plans and specifications shall contain sufficient information to allow the County Staff or Planning Commission to set standards pertaining to:

"(1) Location, quality, and quantity of resource available.

"(2) Setback from property lines.

"(3) Location of vehicular access points.

"(4) Protection of pedestrians and vehicles through the use of fencing.

"(5) Prevention of the collection and stagnation of water at all stages of the operation.

"(6) Location and type of processing facilities.

"(7) Rehabilitation of the land upon termination of the operation.

"B. Asphalt plants, concrete products manufacture, cement plants, and similar uses often associated with extraction of earth products shall be permitted in conjunction with extraction operations on a temporary basis and subject to an annual review, except in industrial zones where they are allowed on a permanent basis.

"C. Environmental Limitations:

"(1) Mining equipment and access roads shall be constructed, maintained, and operated in such a manner as to eliminate, as far as is practicable, noise, vibration [and] dust which are injurious or substantially annoying to persons living in the vicinity or to crops or livestock being in the vicinity.

"(2) Contamination or impairment of the groundwater table, streams, rivers or tributary bodies thereto shall not be permitted as a result of the extraction and/or processing activity. All operations which include some form of washing process must make application with the Oregon

contends ZPSO § 21.07(3)(A)(1) requires that the county adopt findings to establish the location, quality and quantity of aggregate on the site. Petitioner contends the county failed to adopt such findings and there is not substantial evidence in the record to support such findings.[3]

Petitioner is correct that the county did not adopt findings establishing the location, quality and quantity of aggregate available at the site.[4] However, intervenors contend such findings were not required because ZPSO § 21.07(3)(A)(1) is not an approval standard and, therefore, does not impose a requirement that the county adopt findings establishing the location, quality and quantity of the

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> Department of Environmental Quality and comply with the applicable laws, rules and regulations.
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> "(3) All extraction and/or processing activities which will produce noise, air, dust, odors, and other pollutants shall acquire an air contaminant discharge permit from the Oregon Department of Environmental Quality and/or comply with the applicable laws, rules and regulations."

[3]Petitioner contends the county relied upon unreliable hearsay testimony that the site contains 100,000 cubic yards of usable rock. Petitioner submitted evidence that the site includes a large amount of oversized material and that 25% to 40% of the material produced from the site would be rejected, creating a significant waste and reclamation problem.

Intervenors point out the record does include evidence of the quality of rock in the area and testimony by the applicant that the rock on the site is hard and usable for the intended purpose. The applicant also testified the site is close to the state highway project where the end product is to be used.

[4]The county did find that the applicant proposed to remove 60,000 to 100,000 cubic yards of rock, but there are no findings establishing how much rock is available at the site.

aggregate resource on the subject property. Intervenors contend ZPSO § 21.07(3)(A) is simply a requirement that the applicant provide information and provides that the county may or may not impose standards or conditions based on that information. We agree with intervenors.

The first paragraph of ZPSO § 21.07(3) states that the provisions in that section which follow the first paragraph establish standards. See n 2, supra. Paragraphs (B) and (C) of ZPSO 21.07(3) do establish standards. However, paragraph (A) does not establish approval standards. Rather, the provisions of ZPSO § 21.07(3)(A) impose a requirement that information be provided which may or may not be used by "County Staff or [the] Planning Commission to set standards."[5] See n 2, supra.

The county is required to address in its findings the approval standards in ZPSO § 5.03(2) and ZPSO § 21.07(3)(B) and (C), and those findings must be supported by substantial evidence. In addition, it is possible that the county might impose the kinds of conditions envisioned under ZPSO

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[5]We note that although ZPSO § 21.07(3)(A) states that "standards" will be set by county staff or the planning commission, we assume the term "conditions" was intended. ORS 215.416(8) requires that a county decision to approve or deny "a permit application shall be based on standards or criteria which shall be set forth in the zoning ordinance or other appropriate ordinance or regulation of the county * * *." Although it is permissible for a county to include in its land use regulations the bases upon which it may impose "conditions" of approval, mandatory approval "standards or criteria" must be set forth in the plan or land use regulations, not developed on an ad hoc basis after a permit application is submitted.

21.07(3)(A) to assure compliance with the approval standards in ZPSO §§ 5.03(2) and 21.07(3)(B) and (C).[6] We address petitioner's challenges to the county's decision concerning those approval standards elsewhere in this opinion. However, we do not believe the county is required to adopt findings supported by substantial evidence addressing the informational requirements of ZPSO 21.07(3)(A) themselves, as petitioner alleges. See Storey v. City of Stayton, 15 Or LUBA 165, 187 (1986).

Finally, we reject petitioner's suggestion that our recent decision in Eckis v. Linn County, ___ Or LUBA ___ (LUBA No. 89-005, March 14, 1990) requires a different result. That case concerned a county decision to amend its comprehensive plan to include a site not previously included in the county's acknowledged comprehensive plan inventory for aggregate sites. Therefore, the county's decision in Eckis was subject to Statewide Planning Goal 5 (Open Spaces, Scenic and Historic Areas, and Natural Resources) and the requirements of the Goal 5 administrative rule, including the detailed inventory requirements of OAR 660-16-000. Those rule provisions are significantly different from ZPSO

[6]For example, in demonstrating that "measures are taken to minimize potential negative impacts on adjacent and nearby commercial agriculture and forest lands," as required by ZPSO § 5.03(2)(E), the county might impose a condition limiting the quantity of rock that may be removed from this site, and in doing so the county might use information submitted by the applicant pursuant to ZPSO § 21.07(3)(A)(1) to establish such a condition.

§ 21.07(3)(A) and clearly do require findings to establish the "location," "quality" and "quantity" of Goal 5 resources before resource sites are included in the plan Goal 5 inventory. However, Union County's plan is acknowledged; the plan is not amended by the decision challenged in this appeal; and, therefore, Goal 5 and OAR 660-16-000 are inapplicable.

This subassignment of error is denied.

The first assignment of error is denied.

SECOND ASSIGNMENT OF ERROR

> "County failed to follow procedures resulting in substantial prejudice to petitioner. (ORS 197.835(8)(B))"

Under this assignment of error, petitioner argues the county's findings are inadequate to demonstrate compliance with the requirement of ZPSO § 21.07(3)(C)(1) that the use must be conducted in a manner that will "eliminate [noise], as far as is practicable * * *."[7]

Intervenors contend petitioner never raised any issue below concerning noise and, therefore, is precluded from raising that issue for the first time on appeal to LUBA. ORS 197.835(2) provides that our scope of review is limited to issues "raised by any participant before the local hearings body * * *," provided the notice and procedural

[7]Petitioner apparently contends the county is also required to address noise concerns under ZPSO § 5.03(2)(E).

requirements specified in ORS 197.835(2)(b) and 197.763 are met.

Petitioner does not contend he raised any issue concerning noise during the local proceedings, that the notice given by the county fails to comply with the requirements of ORS 197.835(2)(b) and 197.763 or that the other procedural requirements of ORS 197.763 were not observed by the county. Accordingly, under ORS 197.835(2), the noise issue presented in this assignment of error is beyond our scope of review.[8]

The second assignment of error is denied.

THIRD ASSIGNMENT OF ERROR

> "Decision is not supported by substantial evidence in the whole record. (ORS 197.835(8)(C))"

Under this assignment of error, petitioner repeats his evidentiary challenge to the county's decision based on his contentions that the record does not include substantial evidence establishing the location, quality, and quantity of aggregate on the site. For the reasons explained in our discussion of the first assignment of error, we reject the challenge.

However, petitioner also contends under this assignment of error that the following finding is inadequate because it

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[8]Petitioner suggested at oral argument that he should be allowed to raise the noise issue because the county itself raised the issue in the sense it addressed noise concerns in its findings addressing ZPSO § 21.07(3)(C)(1). We reject the suggestion.

simply concludes that there will be no significant impacts on adjoining properties:

> "The proposed uses will not significantly increase the costs of agriculture on adjacent and nearby lands because no external environmental impacts which affect livestock grazing uses are anticipated." Record 13.

The above finding was adopted to demonstrate compliance with ZPSO § 5.03(2)(C), which requires "[t]hat the proposed use will not significantly increase the costs of agriculture and forest management on adjacent and nearby lands."[9]

We agree with petitioner that the above quoted finding by itself is simply a conclusion and is therefore inadequate to explain why the proposed use, a use the ZPSO clearly recognizes may have adverse environmental impacts on adjoining property, will not result in such impacts. However, findings not challenged by petitioner appearing immediately before the finding petitioner does challenge, explain that the uses adjoining the subject property are spring livestock grazing and because excavation is not to begin until the fall of 1990, there could be no possible impact on such uses until the spring of 1991. Those findings go on to explain that, by virtue of imposition of DEQ dust control standards, there will be "no off-premise environmental impacts which could impact livestock grazing

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[9]Intervenors do not contend that petitioner failed to raise this issue during local hearings.

activities." Record 13. Other findings adopted by the county make it clear that the aggregate will be used in conjunction with a state highway project of limited duration.

The above quoted finding challenged by petitioner clearly relies on the immediately preceding finding that there will be no off-premise environmental impacts affecting the adjoining seasonal grazing operations. Although the more explanatory finding that precedes the challenged finding is also somewhat conclusory, petitioner does not explain why the unchallenged finding that there will be no off-premise environmental impacts is inadequate, and the challenged finding relies in large part on that unchallenged finding. Without such an explanation, we are unable to agree the county's finding that ZPSO § 5.03(2)(C) is satisfied is inadequate.

The third assignment of error is denied.

FOURTH ASSIGNMENT OF ERROR

> "County improperly construed the applicable law. (ORS 197.835(8)(D))"

ORS 215.298(2) provides:

> "A permit for mining of aggregate shall be issued only for a site included on an inventory in an acknowledged comprehensive plan."

Petitioner contends there is no evidence in the record establishing that the subject property is included on a comprehensive plan inventory.

The parties dispute whether ORS 215.298(2) applies only to exclusive farm use zones and, if so, whether the A-4 zone is an exclusive farm use zone. However, petitioner conceded at oral argument that the issue presented in this assignment of error was not raised during the local proceedings in this matter. For the reasons explained under our discussion of the second assignment of error, the issue is beyond our scope of review. ORS 197.835(2).

The fourth assignment of error is denied.

The county's decision is affirmed.