

APR 1 4 21 PM '81

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

ROBERT VINCENT, ROSWITHA )  
HOPKINS, LAWRENCE KAMPFER, )  
COLAN MCKINNON, RUTH VINCENT, )  
PAULA MCKINNON, )

Petitioners, )

vs. )

BENTON COUNTY, GEORGE )  
NEUMAN and BETTY NEUMAN, )

Respondents. )

LUBA No. 80-103

FINAL OPINION  
AND ORDER

Appeal from Benton County.

Roderick L. Johnson, Corvallis, filed the Petition for Review and argued the cause for Petitioners.

Richard T. Ligon, Corvallis, filed the brief and argued the cause for Respondent Benton County.

Earl H. Mickelsen, Portland, filed the brief and argued the cause for Respondents Neuman.

REYNOLDS, Chief Referee; COX, Referee; BAGG, Referee; participated in this decision.

REMANDED

4/01/81

You are entitled to judicial review of this Order. Judicial review is governed by the provisions of Oregon Laws 1979, ch 772, sec 6(a).

1 REYNOLDS, Chief Referee.

2 NATURE OF THE PROCEEDINGS

3 Petitioners appeal the county's approval of a conditional  
4 use permit which would enable respondents George and Betty  
5 Neuman to operate a rock quarry mining and crushing operation  
6 on their land. Petitioners contend the decision violates ORS  
7 215.416(3) because the gravel operation is not designed to be  
8 compatible with surrounding land uses in violation of the  
9 county's conditional use ordinance. Petitioners also contend  
10 the county's findings of fact are unsupported by substantial  
11 evidence in the record.

12 STATEMENT OF FACTS

13 Respondents' property was in use as a rock quarry sometime  
14 prior to 1972 or 1973. Between this time and the time  
15 respondents Neumans purchased the property in 1976, the site  
16 was not in active use as a quarry. The Neumans resumed quarry  
17 operations but were ordered by the Circuit Court for Benton  
18 County to cease operating the rock quarry unless and until a  
19 conditional use permit was obtained from the county. The  
20 Neumans made their application for a conditional use permit,  
21 which permit was ultimately granted by Benton County. It is  
22 the issuance of this permit which is the subject of this appeal.

23 In 1974, Benton County zoned the area in which the rock  
24 quarry exists rural residential with five acre minimum lot  
25 sizes. From 1971 to 1976, property surrounding the rock quarry  
26 was subdivided, homes were built and the area acquired a

1 residential character. Nine dwellings presently lie within a  
2 one-half mile radius of the site,

3 "...two of which are north of Evergreen Road; one  
4 being about 1300' east of the quarry with a 400'  
5 elevation and the other about 700' to the west with a  
6 500' elevation. These two dwellings are in the FC  
7 zone. The other seven dwellings are located south of  
8 Evergreen Road from 400' to 1400' away, between  
9 300-350' elevation. These dwellings are buffered from  
10 the site with a heavy growth of trees that is 700' in  
11 width to the west, 1500' in width to the east, and  
12 from 200' to 1200' in width to the south. These  
13 dwellings are located in an exclusive farm use (EFU)  
14 zone." Order, p. 2.

15 As the above quotation indicates, present zoning on and  
16 surrounding the rock quarry site is FC (Forest Conservation)  
17 and EFU (Exclusive Farm Use). These zoning designations were  
18 in existence at the time the Neumans filed their application  
19 for a conditional use permit. A rock quarry mining and  
20 crushing operation is a conditional use in these zones.

21 The county found in its order that the rock quarry mining  
22 and crushing operation contemplated by the Neumans does have an  
23 impact on surrounding residences, as testified to by the  
24 property owners (i.e., the Robert Vincents, et al,  
25 appellants). The county also found, however, that the type of  
26 hard rock (Diorite) found at the site is "sparsely located on  
the east slope of the coast range mountains in urban areas" and  
that there was a great demand for this type of rock because it  
was "more durable than most quarried rock in Benton County,  
requiring less rock and lasting longer than other rock."  
Because of these qualities, the Board found that the rock was

1 less costly to consumers than other types of rock used for  
2 gravel purposes. The board found that while some dust is  
3 produced from the crushing operation, the applicant owns a  
4 nearby quarry which he generally operates instead in the summer  
5 months when dust is a problem. The site involved in the  
6 present conditional use permit is used primarily in the winter  
7 rainy season when the dust will be minimized by the seasonal  
8 weather. The county also found that the Neumans had the  
9 capability of watering the rock prior to crushing if dry  
10 conditions prevailed. The board found that if crushing the  
11 rock were done at other locations, "costs will be greatly  
12 increased not only to the operator, but additionally to the  
13 consumer." The board found that a new process called  
14 "sequential blasting reduces the noise level [of blasting]  
15 significantly." Finally, the board found that new rock sources  
16 needed to be developed in order to meet future projected growth  
17 inasmuch as the evidence indicated that existing sources would  
18 be exhausted in approximately 25 years.

19 The board's order concluded that there was a public need  
20 for the type of rock produced at the proposed site because the  
21 rock was durable, could be used for a variety of purposes  
22 including rip-rap and would result in cost savings to the  
23 public if used for gravel purposes due to its durability and  
24 proximity to the Philomath urban area where there is a high  
25 demand. The county concluded the use would be consistent with  
26 the newly adopted comprehensive plan (yet unacknowledged) which

1 recognized that rock materials must be protected. The county  
2 concluded that environmental impacts as expressed during the  
3 hearings process "can be minimized by the application of  
4 conditions regulating the operation." Because the area was  
5 zoned for resource uses (FC and EFU), residential users located  
6 within such resource lands were required to "co-mingle their  
7 land uses with resource users." The county ordered that the  
8 conditional use permit be granted, subject to the following  
9 conditions, among others:

10 "2. The applicant retain 50' buffer strips along  
11 the property lines west and north of the proposed  
12 excavation and a 200' buffer strip south running the  
13 length of the parcel along Evergreen Road, which  
14 includes 1500'. The buffer strips will contain the  
15 existing natural vegetation including all the trees on  
16 the parcel. Only the existing access road shall be  
17 permitted within these buffer areas.

18 "3. Rock stock piles shall be located along the  
19 southern most perimeter of the flat quarry landing  
20 area to serve as noise and sight buffers.

21 "4. a. The hours of normal operations  
22 involving blasting shall be between 8:00  
23 a.m. and 5:00 p.m. on weekdays only.

24 "b. Hauling shall be between 7:30 a.m. and  
25 6:00 p.m. on weekdays only.

26 "c. On-site crushing permitted November 1  
through May 31 annually between 8:00 a.m.  
and 5:00 p.m. on weekdays only including a  
normal engine warm-up not to start before  
7:45 a.m.

"5. Compliance with the following noise  
standards when quarry operations are initiated and  
periodically thereafter:

"a. Blasting noise - Impulse sound shall  
not be more than 100 dba between 8:00 a.m.  
and 5:00 p.m. at a certain distance as

1 specified by DEQ from the closest noise  
2 sensitive dwelling in existence at the date  
of this approval.

3 "b. Equipment noise - Within 7:30 a.m. and  
4 6:00 p.m., noise from equipment shall not  
5 exceed 50 dba more than 50% of the time; 55  
6 dba 10% of the time; and 75 dba 1% of the  
time at a certain distance from the closest  
noise sensitive dwelling in existence at the  
date of this approval.

7 "A noise survey of all noise sources from  
8 the quarry site will be done by the  
Department of Environmental Quality  
periodically.

9 "c. Consult annually with county engineer  
10 and Department of Environmental Quality to  
discuss methods of reducing noise levels."

11 OPINION

12 Petitioners' first assignment of error is that the county's  
13 approval of the conditional use permit violates ORS 215.416(3)  
14 because the approved use, a rock quarry mining and crushing  
15 operation, is incompatible with surrounding land uses in  
16 violation of the county's zoning ordinance.<sup>1</sup> ORS 215.416(3)  
17 relates to approval requirements for permits such as  
18 conditional use permits and provides as follows:

19 "The application shall not be approved if the  
20 proposed use of land is found to be in conflict with  
21 the comprehensive plan of the county and other  
22 applicable ordinance provisions. The approval may  
include such conditions as are authorized by statute  
or county legislation."

23 Section 20.01 and section 20.05 of the Benton County Zoning  
24 Ordinance of 1974 set forth, respectively, the intent and  
25 criteria for review of conditional use permits. Section 20.01  
26 provides as follows:

1 "Although each zoning district is primarily  
2 intended for a predominant type of use, e.g.,  
3 dwellings in residential districts, there are a number  
4 of uses which may or may not be appropriate in  
5 particular district, depending upon all the  
6 circumstances of the individual case. For example,  
7 the location, nature of the proposed use, character of  
8 surrounding development, traffic capacities of  
9 adjacent streets, and potential environmental effects,  
10 all may dictate that the circumstances of development  
11 shall be individually reviewed. It is the intent of  
12 this article to provide review of such uses so that  
13 the county is assured that they are compatible with  
14 their locations and surrounding land uses and will  
15 further the purposes of county ordinances." (Emphasis  
16 added).

17 Section 20.05 provides, in pertinent part, as follows:

18 "2. No conditional use application shall be  
19 approved unless the approving agency finds the request  
20 is consistent with the objects and purposes of this  
21 ordinance and the Comprehensive Plan and is designed  
22 to be compatible with surrounding land uses..."  
23 (Emphasis added).

24 Subsection (2) of section 20.05 quoted above also authorizes  
25 the county to impose modifications or conditions with respect  
26 to such matters as noise, vibration, air pollution and other  
27 environmental influences resulting from a particular use of  
28 land.

29 While a rock quarry mining and crushing operation is a  
30 conditional use within the county's FC and EFU zone,  
31 petitioners contend the evidence and the county's own findings  
32 indicate that the rock quarry mining and crushing operation for  
33 which the conditional use permit was granted is incompatible  
34 with the surrounding residential land uses. Petitioners ask  
35 rhetorically:

36 "What possible use could be any less compatible

1 in a residential neighborhood than a commercial rock  
2 quarrying operation? If ever there was a case for  
3 denying a conditional use application...this must be  
4 it. To put it another way, if the county does not  
5 deny a conditional use application in these [sic] kind  
6 of circumstances, then its policy is apparently to  
7 approve all such applications, either as restricted or  
8 unrestricted uses. Therein lies the improper  
9 application of the law." (emphasis added)

10 The county does not dispute that the use authorized by the  
11 conditional use permit would have an impact on surrounding land  
12 uses. The county argues, however, that a reasonable  
13 interpretation of the compatibility requirement in the  
14 conditional use ordinance requires a balancing of the need for  
15 a proposed use against the negative impacts resulting from that  
16 use. In other words, compatibility under the county's  
17 ordinance must be construed reasonably and, in effect, does not  
18 mean that a proposed use must have no adverse impact on  
19 surrounding land uses in order to be approved. That negative  
20 adverse impact, however, must be reasonable in light of all the  
21 circumstances. The county argues that the conditions imposed  
22 by the county on the rock quarry operation relating to  
23 buffering, hours of operation, months of operation and  
24 permissible noise levels make the use reasonably compatible  
25 with the surrounding land uses. The county also points out  
26 that this area is not exactly an urban neighborhood inasmuch as  
the area is zoned forest conservation and exclusive farm use.  
People living in such areas cannot, according to the county,  
expect the same kinds of non-interference with the use and the  
enjoyment of their property from surrounding land uses as could

1 one expect living in an urban neighborhood.

2 Even granting the county the leeway to construe compatible  
3 so as to allow the county to invoke a balancing test of need  
4 versus adverse impact,<sup>2</sup> we believe the county erred in  
5 concluding that the applicant's proposed mining and crushing  
6 operation would be compatible with surrounding land uses.

7 1. Need.

8 The county's findings demonstrate that there is a need for  
9 rock such as diorite rock for rip-rap purposes because softer  
10 grades of rock and river rock are not suitable for such uses.  
11 The evidence and the county's findings also show that the  
12 supply of diorite rock is limited. However, the evidence also  
13 establishes that the need for rock such as diorite for  
14 revetment or rip-rap purposes is intermittent. While the  
15 supply of diorite rock is limited, there is no showing that the  
16 present supply of such rock is inadequate to meet the demand  
17 for rock for revetment purposes for the immediate or  
18 foreseeable future. The applicant himself owns another quarry  
19 located approximately three-quarters of a mile from the  
20 proposed site which he operates generally during dry weather.  
21 There is no evidence in the record nor any finding which shows  
22 that this quarry in conjunction a second intrusive rock quarry  
23 in the area cannot meet the need for rock for revetment or  
24 rip-rap purposes.

25 The facts found by the county establish a preference for  
26 use of diorite rock for gravel purposes because it lasts longer

1 resulting in decreased costs to the consumer. However, this  
2 finding, standing alone, does not show why there is a public  
3 need to use diorite rock for gravel purposes. This is  
4 particularly so given other evidence in the record that other  
5 types of rock are suitable for road purposes, although perhaps  
6 not as suitable because these softer types of rock are less  
7 durable and, hence, costlier. The county made no finding,  
8 however, that the cost difference between use of diorite for  
9 gravel purposes and other types of rock which are available is  
10 such that this difference in cost constitutes a public need to  
11 use diorite for gravel purposes.

12 Even if the county had established a need to use diorite  
13 from the applicant's site for gravel purposes, there was no  
14 adequate finding of a need to allow the rock to be crushed on  
15 the applicant's site. The county found that crushing diorite  
16 rock off the applicant's site would increase the cost to the  
17 operator as well as to the consumer.<sup>3</sup> The county did not,  
18 however, state what the cost difference would be or explain why  
19 a difference in cost equals a need to crush the rock on-site.

20 For purposes of establishing need, the county also relied  
21 upon its finding that there had been a decrease in the supply  
22 of rock in Benton County and that there was a need to develop  
23 new rock sources in order to meet the need. The county found  
24 that based upon the testimony in the record, existing rock  
25 sources will be exhausted in approximately 25 years if the use  
26 of rock continues at present levels. The county also cited its

1 comprehensive plan provisions which recognize that rock  
2 materials must be protected. These findings, however, only  
3 establish the need for the county to do what it can to protect  
4 this site as a source of rock for the county for the future.  
5 It does not establish a need to develop this site now for rock  
6 quarrying purposes.

7 What the Board concludes, from a review of the findings as  
8 a whole, is that there is no finding by the county that the  
9 present supply of diorite is insufficient to meet the present  
10 need for diorite for revetment or for rip-rap purposes. We  
11 also conclude that the county's findings, taken as a whole, do  
12 not demonstrate a need to use diorite from the applicant's site  
13 for gravel purposes.

#### 14 2. Adverse Impact.

15 The county specifically found in its order that use of the  
16 applicant's site for quarry purposes will cause environmental  
17 impacts on adjacent property owners. The county also found,  
18 however, that the imposition of certain conditions would lessen  
19 the adverse impacts on surrounding property owners from the  
20 mining and crushing operation. However, a careful review of  
21 the findings indicates that none of the conditions imposed by  
22 the county, with the exception, perhaps, of one condition, will  
23 lessen the noise impact. The conditions concerning D.B.A.  
24 levels and buffering with trees will only maintain the status  
25 quo, not reduce noise levels. The only condition which may  
26 reduce the noise level somewhat is that requiring the

1 stockpiling of rocks on the southern edge of the site. The  
2 county did not, however, expressly find that stockpiling rock  
3 would reduce the noise impact on surrounding property owners.  
4 Even if a liberal reading of the county's finding concerning  
5 stockpiling rocks would allow such a conclusion to be drawn,  
6 there is no evidence in the record that stockpiling rocks will  
7 lessen the noise impact. The best evidence in the record is  
8 that of the DEQ representative who stated in a letter to the  
9 applicant that stockpiling rocks "could" reduce the noise  
10 impact. This is not sufficient evidence, in our view, from  
11 which a reasonable person would conclude that stockpiling rocks  
12 will, in fact, reduce the noise impact of the applicant's  
13 crushing operation.

14 The county also imposed some conditions restricting the  
15 hours of operation and the seasons in which the applicant could  
16 mine and crush rock on his site. However, restricting the  
17 hours of the daily crushing operation to between 8:00 a.m. and  
18 5:00 p.m. and restricting that operation to weekdays only, only  
19 achieves the purpose of reducing by a few hours the number of  
20 hours a day surrounding property owners will be subjected to  
21 the noise. It does nothing to reduce the noise level during  
22 that 9 hour period.

23 We conclude, therefore, that the conditions imposed by the  
24 county will have little or no appreciable effect in reducing  
25 the adverse noise impact which affects the surrounding property  
26 owners use and enjoyment of their property. The conditions at

1 best will only ensure that the noise situation will not be  
2 further aggravated.

3 One other deficiency in the county's findings concerning  
4 adverse impacts bears mentioning. Concerning adverse effects  
5 on water quality caused by the mining and crushing operation,  
6 the county found as follows:

7 "Conflicting testimony was presented regarding  
8 potential damage to the water sources of the nearby  
9 residences. The Board finds that no conclusive  
evidence was submitted indicating that the water  
sources have been, or will be damaged."

10 The above finding only says that the opponents have not  
11 presented "conclusive evidence" that water sources will be  
12 damaged. The burden, however, in a quasi-judicial proceeding  
13 such as this is upon the applicant to produce evidence which  
14 meets the applicable standard. The burden is not on the  
15 opponents to prove that the standard will not be met. In view  
16 of the concern expressed by the opponents of the conditional  
17 use permit during the hearing before the county as to adverse  
18 effects on water quality, the burden was on the applicant to  
19 prove that the water quality will not be impaired. If a  
20 potential adverse impact resulting from the proposed use is  
21 impairment of water quality, the county must find, based upon  
22 evidence in the record, that water quality will not be  
23 impaired. The county made no such finding in this case.

24 Based upon the foregoing, therefore, we conclude the  
25 county's findings are inadequate to justify its determination  
26 that the mining and quarrying operation on the applicant's

1 property will be compatible with uses on surrounding lands.  
2 Petitioner's first assignment of error is sustained. Because  
3 we conclude the county's findings are inadequate, we do not  
4 address petitioners' second assignment of error which asserts  
5 that there is a lack of substantial evidence to support the  
6 findings which the county did make. The county's order in this  
7 matter is remanded for further proceedings consistent with this  
8 opinion.

9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26

FOOTNOTES

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26

---

1  
We interpret petitioner's assignment of error to be that the facts found by the county do not justify the conclusion that the proposed use, as approved, would be designed to be compatible with surrounding land uses.

---

2  
We do not decide whether the county's interpretation of the term "compatible" was proper. As to this Board's proper scope of review in making such a determination, see Springfield Education Assn. v. School District, 290 Or 217, P2d (1980), Fifth Avenue Corp. v. Washington Co., 282 Or 591, 581 P2d 50 (1978).

---

3  
We reiterate that the permit here would not only allow mining the rock for gravel purposes but would also allow on-site crushing of the rock.

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

AILANTHUS ACRES CITIZENS GROUP, et al, )  
 )  
 ) Petitioners, ) LUBA No. 80-102  
 )  
 ) vs. ) ORDER REVERSING  
 ) LAND USE DECISIONS  
 )  
 ) MARION COUNTY, ROY INKS, and LARRY LASSEN, )  
 )  
 ) Respondents. )  
 )

Based upon the stipulation of the parties hereto that Marion County and the Marion County Planning Commission failed to follow procedures applicable to the matters before such bodies in manners that prejudiced the substantial rights of the Petitioners, the Board makes such a finding and based upon such finding orders as follows: the August 1, 1980 ORDER of the Marion County Board of Commissioners is reversed; the July 1, 1980 written ACTION of the Marion County Planning Commission is reversed; and the July 1, 1980 decisions of the Marion County Planning Commission as reflected in the minutes thereof are reversed.

DATED this 17<sup>th</sup> day of November, 1980.

LAND USE BOARD OF APPEALS

Michael D. Reynolds

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

*Handwritten notes:*  
Page 1 of 1  
11-17-80

ATTORNEY AT LAW  
SUITE 205 EQUITABLE CENTER  
530 CENTER STREET N.E.  
SALEM, OREGON 97301  
503-362-1322

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28