

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

MAY 27 3 23 PM '81

DON AND DONNA WESTERBERG,)
EUGENE AND GWEN CARL,)
SAM AND ROMA JEAN EICHER,)
LARENCE AND MARGARET LEE,)
and DONNA RIETZ,)

Petitioners,)

v.)

LINN COUNTY,)

Respondent.)

LUBA NO. 81-009

FINAL OPINION
AND ORDER

Appeal from Linn County.

Robert A. Taylor, Eugene, filed a brief and argued the cause for petitioners.

Edward F. Schultz, Albany, filed a brief and argued the cause for Respondent Linn County.

Cox, Referee; Reynolds, Chief Referee; Bagg, Referee; participated in the decision.

Reversed.

5/27/81

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 COX, Referee.

2 NATURE OF PROCEEDING

3 The decision being reviewed is the December 24, 1980 Linn
4 County Board of Commissioners granting of a conditional use
5 permit to Adella Rietz and Morse Bros., Inc. for the operation
6 of a quarry. Petitioners request that LUBA reverse Linn
7 County's decision.

8 ALLEGATIONS OF ERROR

9 Petitioners assert three assignments of error as follows:

10 "Assignment of Error #1: Respondent Linn County
11 failed to comply with its own comprehensive plan and
12 zoning ordinances in granting the requested permit in
13 that the county failed to review respondent Morse
14 Bros., Inc.'s operation under an earlier CUP; failed
15 to require an approved reclamation plan as a
16 precondition to the granting of the permit; and
17 extended the length of the granted permit beyond the
18 time limits permitted in the zoning ordinances.

15 "Assignment of Error #2: Respondent Linn County
16 failed to adopt adequate findings of fact to support
17 its decision in that the findings failed to set out
18 the applicable standards and demonstrate how the
19 decision being made satisfied those standards.

18 "Assignment of Error #3: Respondent Linn
19 County's determination that the decision being made
20 satisfied the requirements of the zoning ordinances is
21 not supported by substantial evidence in the record in
22 that the evidence in the record consistently indicates
23 that the proposed quarry operations will have an
24 adverse effect on abutting properties."

22 FACTS

23 On July 30, 1980, Adella Rietz, as owner, and Morse Bros.,
24 Inc. (hereinafter Morse Bros.), as operator, applied to the
25 Linn County Planning Department for a Conditional Use Permit
26 (hereinafter referred to as the Morse/Rietz CUP) to allow the

1 operation of an aggregate quarry on the northern 40 acres of
2 the 92.25 acre Tax Lot 400, T. 11S, R. 5W, W.M.. Located
3 approximately 1 1/2 miles southeast of the Albany city limits,
4 Lot 400 is bounded on the south by Spicer Road (Market Road 9)
5 and on the east by Eicher Road (Linn County Road 332). The lot
6 is in an area zoned by Linn County for Exclusive Farm Use (EFU)
7 and designated as Agricultural Resource in the Linn County
8 Comprehensive Plan. The entire parcel is currently in
9 agricultural use with agricultural uses also existing to the
10 south, east and west. Several residences (including those of
11 Petitioners) are located to the south and northwest and along
12 Eicher Road a short distance north of Lot 400.

13 Morse currently operates an aggregate quarry and rock
14 crushing facility immediately to the northwest of Lot 400. The
15 existing operation is governed by a CUP which was granted to
16 Morse Bros. and Edward Spiruta by Linn County on March 26, 1980
17 (hereinafter Morse/Spiruta CUP). The Morse/Rietz CUP for the
18 subject site allows the extension of the existing Morse/Spiruta
19 CUP operation. Morse has stated that it intends to move the
20 rock quarried from the subject site (Lot 400) to its crusher
21 and processing facilities on the Morse/Spiruta CUP property by
22 means of a conveyer belt.

23 DECISION

24 ASSIGNMENT OF ERROR NO. 1

25 Petitioner's first assignment of error is that Linn County
26 improperly construed and applied the applicable law in three

1 ways:

2 (a) Failed to review an existing conditional use permit
3 granted to Morse Bros., Inc. on another parcel;

4 (b) Failed to require an approved reclamation plan; and

5 (c) Failed to apply the proper time limits for a
6 conditional use permit.

7 Review of Existing Conditional Use Permits.

8 Linn County's Aggregate Resource Policy No. 7 states:

9 "Conditional use permits issued for aggregate
10 extraction shall identify an area for extraction and
11 standards for development. A proposed expansion
12 beyond the identified extraction area shall require an
13 evaluation of the operation's performance under the
14 existing permit conditions." Linn County
15 Comprehensive Plan, 9/2/80, p. 75.

16 The Linn County Comprehensive Plan implementation section
17 referring to Aggregate Resource Policy No. 7 states:

18 "Conditional use permits granted by Linn County
19 shall identify an extraction area and provide
20 performance standards as conditions of use. An
21 expansion proposal shall initiate a county review of
22 the operation's performance."

23 Petitioners argue that based on the above cited portions of
24 the Linn County Comprehensive Plan, Linn County was required to
25 review Morse Bros.' compliance with the conditions of the
26 Morse/Spiruta CUP and any other CUP governing operations on
neighboring property. Petitioners point to evidence in the
record indicating potential violations of Morse/Spiruta CUP
conditions. These violations are alleged because of complaints
regarding inadequate construction and improper location of a
required berm and negative impacts of the existing operation on

1 surrounding property. Petitioner argues that Linn County
2 failed to satisfy standards of its own comprehensive plan
3 because it made no review of the existing Morse/Spiruta CUP.

4 Respondent Linn County takes the position that the subject
5 property is not under common ownership with the Spiruta
6 property, that the two CUP applications were made at separate
7 times and that two separate termination dates apply to the
8 use. Linn County, therefore, reasons that the subject
9 application is a separate conditional use request which is to
10 be reviewed on its own merit and does not constitute an
11 expansion of the existing Morse/Spiruta extraction area.

12 Respondent argues there is nothing in the comprehensive plan
13 language cited above which indicates the policies are intended
14 to apply to a situation in which the applicant desires a
15 conditional use permit for a separate, albeit, adjoining
16 parcel.

17 We do not agree with respondent. The Morse/Reitz
18 conditional use permit request is by all reasonable
19 interpretations merely an expansion of the existing Morse Bros.
20 extraction operation allowed by the Morse/Spiruta CUP. The
21 property governed by the requested CUP is adjacent to an
22 existing Morse Bros. aggregate extraction operation. Morse
23 Bros. will convey the aggregate obtained under this CUP to that
24 existing adjacent operation for processing, via conveyor belt.
25 Although this CUP is in a different name and governs property
26 under separate ownership from that of the adjacent operation,

1 the same entity, Morse Bros., controls the extraction operation
2 at both sites.

3 These factors all go to indicate that an "expansion" within
4 the scope of Linn County's Comprehensive Plan Aggregate
5 Resource Policy No. 7 (supra) is taking place. In addition,
6 the attorney for Morse Bros. and the landowner stated:

7 "This extraction has existed in this area. It's
8 simply expansion of it. Record 29.

9 Finally, Linn County's findings themselves indicate this CUP
10 application amounts to an expansion of the existing Morse Bros.
11 operation. Finding No. 9 states:

12 "According to the applicant, the proposal is to
13 increase the supply of raw material for the existing
14 operation. The applicant has said that the use of the
15 property will insure the continuation of the existing
16 operation which generates sand and gravel, ready-mix
17 concrete, and asphaltic concrete for the Albany area."

18 Since this CUP request constituted "a proposed expansion
19 beyond the identified extraction area" an evaluation of Morse
20 Bros. performance under the "existing permit conditions" should
21 have been conducted. Linn County has not conducted such a
22 review and, therefore, violated its comprehensive plan.

23 In light of our holding on petitioners' first allegation of
24 error, we do not address their remaining assertions. Kerns v.
25 Pendleton, 1 Or LUBA 1, 13, Ftn 6 (1980). Petitioners' other
26 concerns can be dealt with during Linn County's review under
Aggregate Policy No. 7.

Reversed.