

1 Opinion by DuBay.

2 NATURE OF THE DECISION

3 This is an appeal from the board of commissioners'
4 approval of a conditional use permit to extract and remove
5 aggregate.

6 FACTS

7 The 24.9 acre site has the Clackamas River adjacent on
8 the west and a state highway adjacent on the east. A
9 mobile home park, owned by petitioner, is located to the
10 north.

11 The property is zoned future urbanizable 10 acres
12 (FU-10), and has a comprehensive plan designation of low
13 and medium density, resource protection open space and
14 aggregate reserve area. Aggregate operations are listed
15 as a conditional use in the FU-10 zone.

16 FIRST ASSIGNMENT OF ERROR

17 Petitioner claims the decision is in violation of the
18 comprehensive plan because there was no showing of a
19 demonstrated need for minerals. Petitioner notes the
20 comprehensive plan has designated the site as part of
21 Urban Aggregate Reserve Area No. 2. Such designated
22 areas, he says, are to be reserved for future uses by the
23 terms of the plan and should not be utilized until there
24 is a need to do so, and there was no evidence of need in
25 the county for gravel or crushed rock. Petitioner goes on
26 to say that even if some showing of need had been made,

1 there was no consideration given to the impact of meeting
2 that need by aggregate operations on this particular
3 parcel.

4 The comprehensive plan provisions regarding aggregate
5 resources sets two goals:

6 "Insure that sufficient supplies of materials and
7 aggregate deposits are retained near urban areas to
8 meet the needs of the county.

9 "Minimize incompatible land uses and distruptions of
10 the adjacent area and insure site rehabilitation."

11 There are seven policies in connection with those goals.

12 The first policy is as follows:

13 "1.0 Establish urban aggregate reserve areas in and
14 near the Clackamas Industrial Area, as
15 illustrated by figures III-2a and III-2b.

16 "1.1 The reserve areas shall be known deposits of
17 gravel or aggregate relatively free of
18 conflicting land uses on or adjacent to the
19 site. Reserve areas should be located
20 either within or very close to the urban
21 area to minimize haul distances. Future
22 inventories shall identify additional
23 potential aggregate areas.

24 "1.2 Require that proposed land use actions which
25 could conflict with aggregate removal within
26 or near an aggregate reserve area address
the regional need for aggregate, and
demonstrate that alternative sites for the
proposed use are unavailable.

"1.3 Extraction and redevelopment of the
aggregate reserve areas shall not interfere
with the necessary provisions of public
facilities, e.g., storm sewers, sewer pump
stations and water mains."

These policies and the goals do not specifically mandate
there be a demonstration of need prior to the use of designated

1 areas for aggregate surface mining. The provisions appear to
2 recognize the value of having aggregate sources close to urban
3 areas and protection of those sites from conflicting uses which
4 might interfere with or hinder future removal operations. The
5 policies specifically require findings for proposed conflicting
6 uses to show they would affect the supply of aggregate
7 resources in the region and they could not be located
8 elsewhere. At the same time, these policies recognize there
9 are higher priority uses of a public nature such as storm
10 sewers, sewer pump stations and water mains. Residential uses
11 are not given a higher priority in these goals and policies.

12 Since there is no plan or ordinance provision setting a
13 criterion for need, we find Clackamas County was not required
14 to find a need for immediate use of aggregate resources in
15 order to approve this application.

16 The second through seventh policies address the part of the
17 goal regarding minimizing incompatible uses and disruption of
18 adjacent area. One of the seven policies addresses effects on
19 the transportation network and damage to public roads; three
20 policies deal with the effect of surface mining operations on
21 streams, rivers and riparian habitat; one policy requires
22 submission of plans and methods of operations to assure
23 reclamation in accordance with the plan; and one policy
24 addresses the effect on other uses in the area. That policy
25 states:

26 "Buffer existing and proposed extraction sites from

1 incompatible uses. This may include limits to the
2 expansion of existing sites and/or encroachment of
unrelated land uses upon existing sites."

3 This last policy requires buffering techniques and
4 limitation of expansion of existing surface mining operations
5 to carry out the goal. It also limits encroachment of
6 unrelated land uses upon existing sites. It does not recognize
7 prohibition of mining as a tool to protect the adjacent land
8 areas.

9 The county adopted findings that the impact on neighboring
10 properties will be lessened as a result of direct access from
11 the site onto a state highway and also as a result of the
12 method of surface mining which involves removal operations in
13 an enclosed and lowering quarry site without blasting or
14 processing. Conditions were attached to the permit requiring
15 the berm to be lengthened and heightened between the mining
16 site and the mobile home park on the north prior to any
17 operations, and limiting hours of operation.

18 It must be conceded that completely eliminating all impacts
19 of any surface mining operation is an impossibility. However,
20 we believe the measures imposed by the county are in compliance
21 with the goals and policies of the aggregate resources section
22 of the comprehensive plan. This assignment of error is denied.

23 SECOND ASSIGNMENT OF ERROR

24 To ensure completion of the reclamation plan the permit is
25 conditioned upon the applicants submitting a security bond in
26 the sum of \$14,400. Where aggregate mining operations are

1 conducted under the permits issued by the Department of Geology
2 and Mineral Industries of the State of Oregon pursuant to ORS
3 517.790, deposit of a bond or security deposit with the state
4 agency is required.¹ ORS 517.810(1) provides that in no
5 event shall such bond exceed the sum of \$2,000 for each site
6 plus \$500 per acre of land to be surface mined. A bond within
7 those limits for the 14 acre site at issue here would be in the
8 amount of \$9,000. Petitioner alleges as error the decision of
9 the Clackamas County Court in setting a bond amount in excess
10 of those statutory limits. Petitioner has taken a position the
11 higher bond limit by itself makes the order voidable. In
12 addition, during the deliberations prior to adoption of the
13 order granting the permit, two of the county commissioners
14 expressed reservations about granting a permit if performance
15 of the reclamation plan is secured by a bond within the
16 statutory limits. That, petitioner says, indicates an
17 intention of the commissioners to adopt the order only if a
18 legally binding obligation in an amount higher than a statutory
19 limit could be imposed.

20 We express no opinion upon the validity of the legal
21 obligation of the principal and surety upon any bond given in
22 compliance with the conditions of the permit. Such an opinion
23 would amount to a declaratory judgment, an act not within our
24 jurisdiction, but in the circuit court. ORS 197.825(4)(a). It
25 should be noted the applicant has participated in this
26 proceeding, and his brief asserts the bond limits are

1 acceptable to the applicant/participant. He further argues the
2 applicant is the only proper party to challenge the county in
3 setting the higher bond limits. We agree. Such limits, if
4 applicable, are obviously for the protection of surface mining
5 operators against high, and possibly unreasonable, estimates of
6 rehabilitation costs. The benefitted party has not challenged
7 the decision of the county on the basis the board of
8 commissioners acted beyond their jurisdiction.

9 We further note the order itself is not conditioned upon
10 any determination regarding the legal sufficiency of the bond
11 limits. What may have been said by one or more commissioners
12 during deliberation cannot be inserted by this Board into the
13 order to make it conditioned upon a declaration of the legal
14 sufficiency of the bond. For these reasons, this assignment of
15 error is denied.

16 THIRD ASSIGNMENT OF ERROR

17 In this assignment of error petitioner alleges the decision
18 by the county board of commissioners was based upon a mistake
19 of fact and therefore the decision should be reversed. During
20 deliberations two of the commissioners stated it was a mistake
21 made in the past to allow the mobile home park to locate in an
22 area zoned for aggregate resources. Petitioner alleges the
23 property was not zoned for aggregate resources when the mobile
24 home park was built, and the commissioners were mistaken about
25 that history when they deliberated on this order.

26 We have no way of knowing how much or how little those

1 comments may have affected the outcome of the deliberation.
2 There was no finding regarding the matter, and nothing of that
3 prior history is reflected in the final order. For this Board
4 to reverse or remand a decision for falsity of some factual
5 matter before a governing body would be an intrusion into the
6 function of that body. In addition, this Board has no
7 jurisdiction to review a decision like the one here for any
8 grounds other than those listed in ORS 197.835(8).² This
9 assignment of error is denied.

10 The decision is affirmed.

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FOOTNOTES

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1 Surface mining permits may be issued by cities and counties where the Department of Geology and Mineral Industries has approved the ordinance authorizing the local government to issue such permits. ORS 517.780(2). No issue has been raised here whether the boundary limits established by ORS 517.810 may be exceeded where a local government issues a permit rather than the state agency.

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- 2 ORS 197.835 permits in part:
- 3 "(8) In addition to the review under subsections (1) to (7) of this section, the board shall reverse or remand the land use decision under review if the board finds:
 - 4 (a) The local government or special district:
 - 5 (A) Exceeded its jurisdiction;
 - 6 (B) Failed to follow the procedures applicable to the matter before it in a manner that prejudiced the substantial rights of the petitioner;
 - 7 (C) Made a decision not supported by substantial evidence in the whole record;
 - 8 (D) Improperly construed the applicable law; or
 - 9 (E) Made an unconstitutional decision;...."