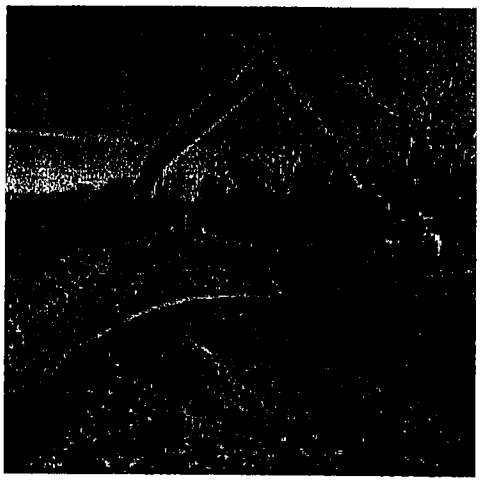


Kamatsu PC 750 long-reach excavator digging slurry wall on the Golden site

This is a design/build project with Compass Environmental for two below grade gravel pit water storage reservoirs with perimeter soil-bentonite slurry wall liners. The project site is near Fort Lupton, Colorado. D&A is providing investigation, analysis, and design, as well as quality control during construction for the 3,700 linear foot Golden Site slurry wall and the 5,300 linear foot Hall/Eber/Oakley slurry wall.

The Golden Site slurry wall is presently under construction. Construction on the adjacent Hill/Eber/Oakley site is planned for later this year.

Client: L.G. Everist
Project Cost: $160,000

Kyger Pit Reservoir
Windsor, Colorado

Typical earthen embankment slope liner construction similar to that planned for the Kyger Pit Reservoir.

The Kyger Pit is currently an active aggregate mine located near the town of Windsor, Colorado. The mine will be reclaimed as a water storage reservoir when mining is complete. D&A is in the process of developing a reservoir lining system for the site. The liner will consist of a low permeability earthen slope liner embankment.

This slope liner will be constructed against the mine highwall and will extend from the claystone mine floor up to the existing ground surface. Approximately 8,000 linear feet of slope liner will be constructed. Engineering services provided include: geotechnical investigation with soil and bedrock sampling and testing, field permeability testing of the bedrock, borrow investigation studies, slope stability and seepage analysis, development of construction drawings, development of technical specifications, and construction related engineering services. Regulatory agency coordination includes the Colorado Division of Minerals and Geology and Colorado State Engineer's Office - Division 1.

Client: Lafarge West, Inc.
Project Cost: $1 million

The Shores
Longmont, Colorado

Soil-bentonite slurry wall reservoir liner system under construction.

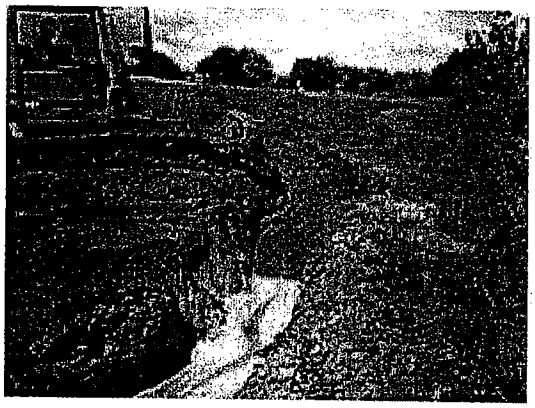
The Shores Reservoirs are below grade, lined, water storage reservoirs constructed in conjunction with aggregate mining activities. The site is located near the St. Vrain River in Weld County, Colorado. Reservoir liners include compacted earthen embankment slope liners and soil-bentonite slurry wall lining systems. In total, over 25,000 linear feet of liner will be constructed. Design challenges include coordinating the reservoir construction with existing irrigation ditch facilities. Eight existing ditches and irrigation laterals crossed the property. Relocation of ditch diversion structures, design and construction of new laterals and diversions to fill the ponds, and configuration of the reservoir layouts required careful consideration and coordination with ditch company boards and individual lateral owners.

Federal permits, including U.S. Army Corps of Engineers' 404 permits were required. New diversions to fill the reservoirs and interconnecting pipeline tunnels between the reservoirs were designed.

Final reservoir storage along with the filling and interconnect facilities will be owned by Central Colorado Water Conservancy District. The projected total water storage volume will be approximately 4,800 acre-feet.

Client: Lot Holding, LLC
Project Cost: $2 million

Siebring Reservoir
Greeley, Colorado



Siebring Reservoir was lined with a 10,000-foot long soil-bentonite slurry wall converting a mined gravel pit into a raw water storage reservoir.

The Siebring Reservoir constructed in 1986 was the first gravel pit reservoir in the State of Colorado to be lined with a slurry wall. The project was designed by D&A personnel and constructed by Hall-Irwin Construction.

The site is located along the Cache la Poudre River just west of Greeley, Colorado. The slurry wall has a total length of 10,000 feet. The slurry wall was constructed during gravel mining operations. After completion of the wall, dewatering requirements ceased.

The total storage is 1,100 acre-feet. The storage rights were purchased by Central Colorado Water Conservancy District.

Client: Central Colorado Water Conservancy District
Project Cost: $450,000

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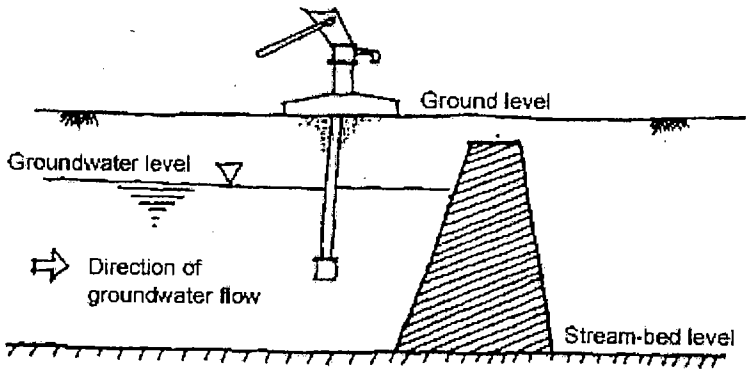
Groundwater Dams

Groundwater dams are structures that intercept or obstruct the natural flow of groundwater and provide storage for water underground. They have been used in several parts of the world, notably India, Africa and Brazil. Their use is in areas where flows of groundwater vary considerably during the course of the year, from very high flows following rain to negligible flows during the dry season.

The basic principle of the groundwater dam is that instead of storing the water in surface reservoirs, water is stored underground. The main advantages of water storage in groundwater dams is that evaporation losses are much less for water stored underground. Further, risk of contamination of the stored water from the surface is reduced because as parasites cannot breed in underground water. The problem of submergence of land which is normally associated with surface dams is not present with sub-surface dams.

There are two main types of groundwater dam: the sub-surface dam and the sand storage dam.

A sub-surface dam intercepts or obstructs the flow of an aquifer and reduces the variation of the level of the groundwater table upstream of the dam. It is built entirely under the ground (see figure 1).



A sub-surface dam

The sand storage dam is constructed above ground. Sand and soil particles transported during periods of high flow are allowed to deposit behind the

PAZC Q5-6151
ORD PA1238
Date 11-1-06
Exhibit No. 221

Memo

Daly • Standlee & Associates, Inc.
4900 S.W. Griffith Drive
Suite 216
Beaverton, Oregon 97005
(503) 646-4420
Fax (503) 646-3385

Date: October 27, 2006

To: Mr. George Staples
Risk Manager

Delta Sand & Gravel
999 Division Avenue
Eugene, Oregon 97404

From: Kerrie G. Standlee, P.E.

Re: Delta Sand & Gravel Mining Area Expansion Noise

DSA File #: 137045

Message: Mr. Staples,

At your request, Daly-Standlee & Associates, Inc. (DSA) conducted additional analyses to determine mitigation measures that could be used to ensure the noise radiating to residences west of Delta's proposed mine expansion area would be in compliance with the DEQ noise regulations during the time material is excavated in the setback area along the northern, western and southern boundaries of the expansion area to allow for the construction of an aquaclude. This memo documents the results of the analyses and provides our recommendations based on those results.

As directed by Delta Sand & Gravel, DSA conducted the analyses assuming a 4 foot thick layer of overburden material from the aquaclude trench area would be used to construct a temporary noise reduction berm between the trenching operations and residences located in the vicinity of a particular work area where trenching is occurring. Also, as directed by Delta Sand & Gravel, DSA assumed that a new CAT 980H front-end loader with a noise suppression package would be used to excavate the material from the aquaclude trench. DSA measured the noise generated by Delta Sand & Gravel's CAT 980G front-end loader during the early stages of the expansion noise study. According to data supplied by CAT, the 980H front-end loader with the noise suppression package is approximately 5 dB quieter than the 980G front-end loader. Therefore, the sound data used in the original noise analysis was adjusted by 5 dB and used in this study.

According to Delta Sand & Gravel, the overburden material used to build the berms will not be sold as resource material and it will be placed back over the trench area once the aquaclude has been constructed inside the trench. Therefore, in the analysis, DSA considered the noise generated during the construction of the berm would be exempt from the DEQ noise regulation limits in accordance with OAR 340-035-0035 (5) (g) and (h).

To aid in conducting the noise analyses, DSA first determined that portion of the aquaclude trench where excavation noise would exceed the DEQ noise regulation limits at a residence if noise reduction berms were not constructed by Delta Sand & Gravel. Figure 1 shows that portion of the aquaclude trench where the noise needs to be mitigated to ensure compliance with the DEQ noise regulation assuming a CAT 980H front-end loader with a noise suppression package or a CAT 330L excavator is used to excavate material below the overburden for more than 30 minutes per hour. Figure 2 shows that portion of the aquaclude trench where the noise needs to be mitigated to ensure compliance with the DEQ noise regulation assuming the front-end loader or excavator operates less than 30 minutes per hour.

To further explain the two figures, Figure 1 identifies that portion of the aquaclude trench located within 475 feet of a residence and Figure 2 identifies that portion of the aquaclude trench located within 250 feet of a residence. Four hundred seventy five (475) feet is the setback distance from a residence needed to meet the ambient hourly L_{50} noise level plus 10 dB limit found at residences along Admiral Lane if a CAT 980H front-end loader with a noise suppression package or CAT 330L excavator operates more than 30 minutes per hour without the presence of a noise reduction berm. Two hundred fifty (250) feet is the setback distance required to not exceed the ambient hourly L_{10} noise level plus 10 dB limit found at residences along Admiral Lane if the equipment operates less than 30 minutes per hour. The setback distances are conservative because, as the trench excavation moves south along the west property line, the ambient noise levels increase. Consequently, the noise limits are higher at residences south of Admiral Lane and the setback distance could decrease.

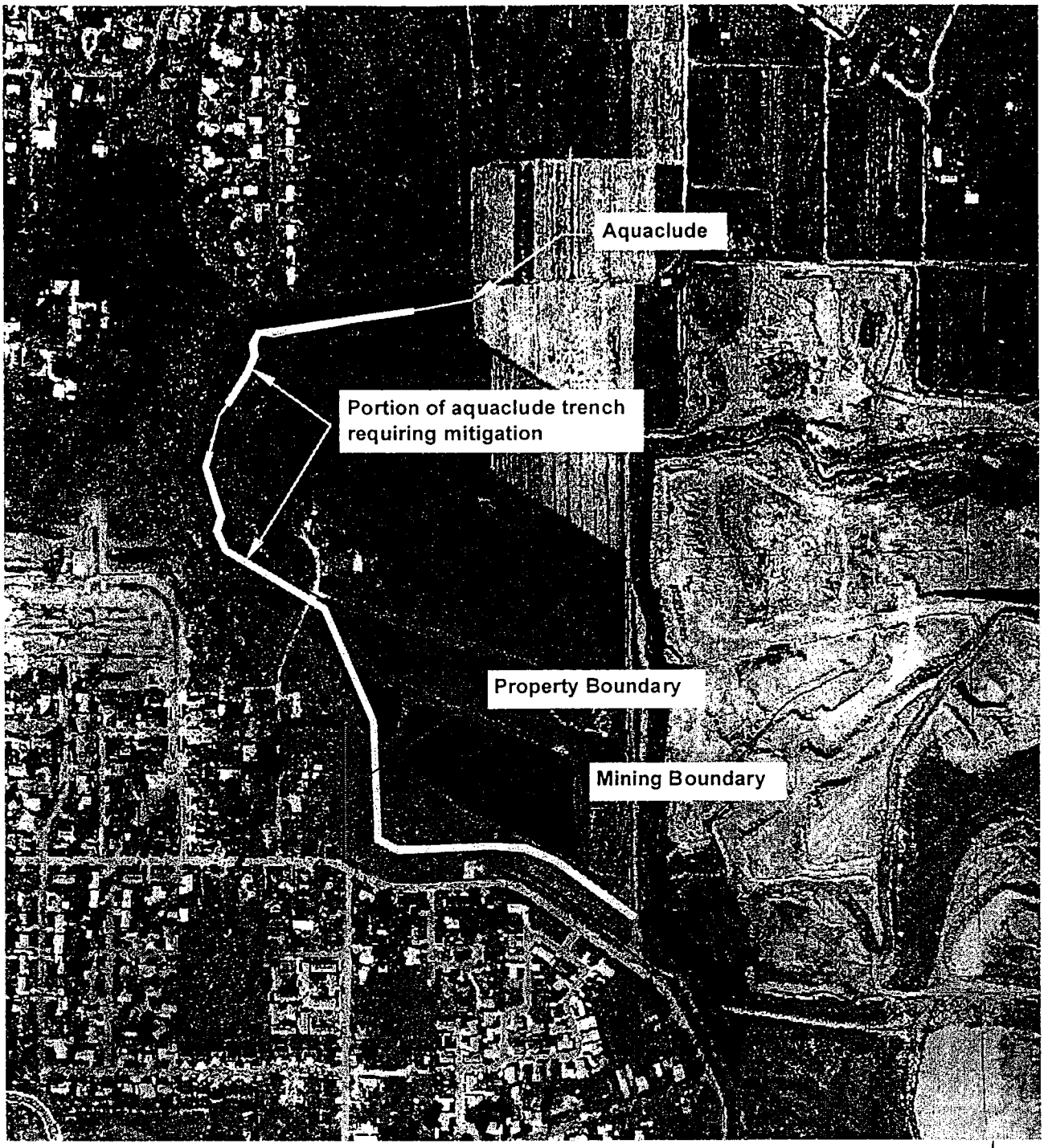
As can be seen by comparing the information in Figure 1 and Figure 2, the use of time limits on the excavation work in the trench can actually be used as a noise mitigation measure itself. If the excavation activity in the trench occurs during less than 30 minutes per hour, then the need for further mitigation is significantly reduced due to the fact that the noise limits specified in the DEQ noise regulation are time dependant. The less time the noise is present, the louder the noise can be when it is present.

As can be seen in Figure 2, even after reducing the amount of time trench excavation work occurs during an hour, there will be the need to provide some noise reduction measure to ensure the excavation noise is in compliance with the DEQ noise limits at all residences. This means that noise control berms will be needed at times during the excavation of the aquaclude trench. Using the CAT 980H front-end loader sound data provided by the manufacturer (72 dBA at 50 feet) and the CAT 330L excavator measured by DSA, it was determined that when excavation work in the aquaclude trench occurs for more than 30 minutes per hour, a nine foot high berm in the vicinity of the work area shown in Figure 1 will be enough to ensure compliance with the DEQ noise regulations. If the excavation work

occurs for less than 30 minutes per hour, a six foot high noise reduction berm in the vicinity of the work area shown in Figure 2 will be enough to ensure compliance with the DEQ noise limits.

It is our understanding that Delta Sand & Gravel plans to construct a 10 foot high berm along the length of the aquaclude work area prior to excavating and hauling any material from the aquaclude trench. If that is the case, then excavation operations can occur without time constraints anywhere in the aquaclude work area and meet the DEQ noise regulations.

You indicated during a recent call that the construction of the aquaclude will occur on an "as needed" basis and that the aquaclude may be constructed in 300 to 500 foot segments. If that is the case, noise reduction berms may be constructed on an "as needed" basis. In addition, it should be pointed out that a noise reduction berm does not have to extend the full length of the trench to effectively mitigate the trench excavation noise. If excavation will occur more than 30 minutes per hour, to be effective, a noise reduction berm needs only to extend 50 feet beyond the line of sight between all portions of a work area and any residence located within 475 feet of the work area. If excavation will occur less than 30 minutes per hour, noise reduction berms can be constructed to extend 50 feet beyond the line of sight between the work area and any residence within 250 feet of the work area.



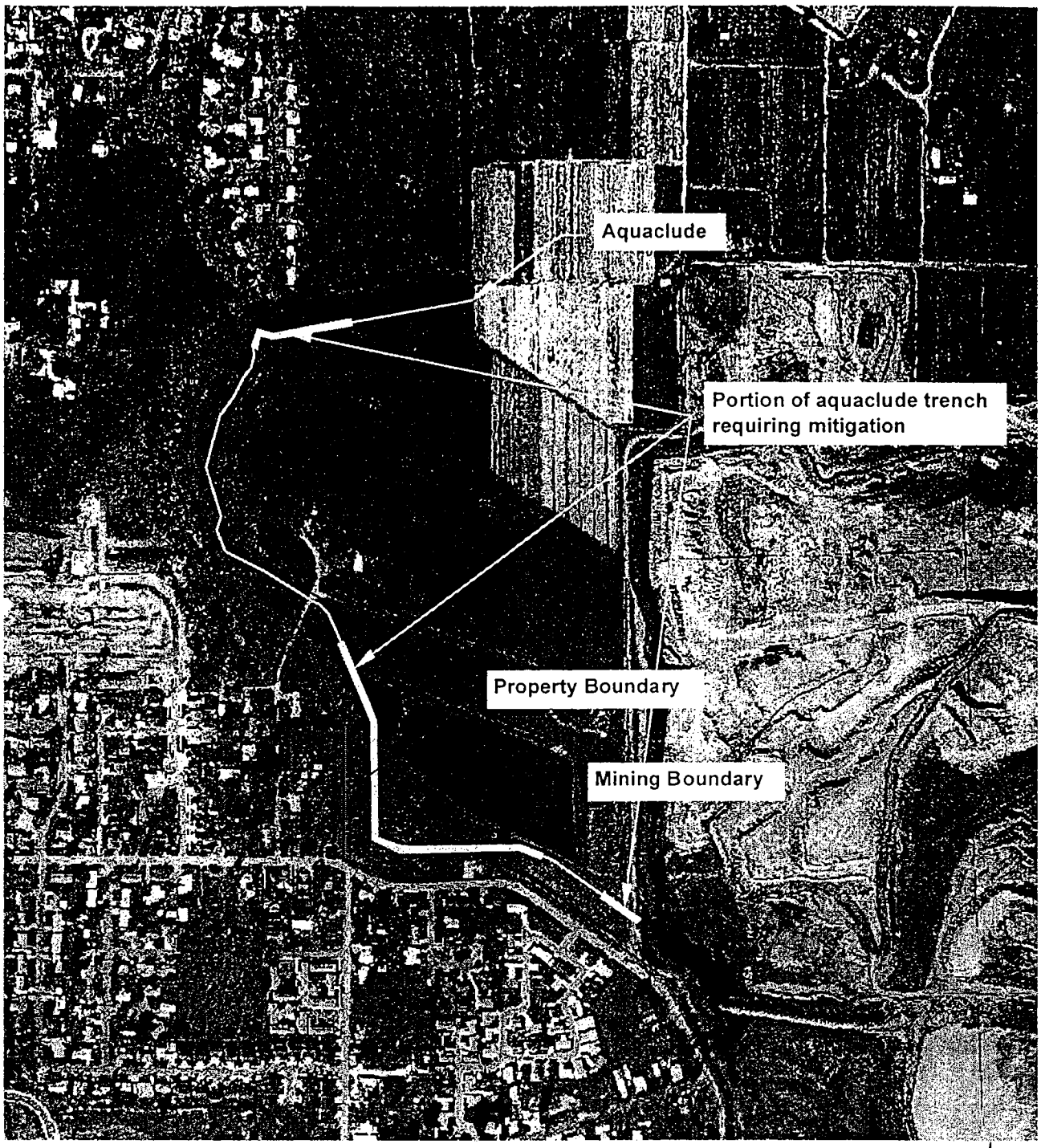
Map data provided by EGR and Associates, Inc.

Daly-Standlee & Associates, Inc.

ph: 503-646-4420
fax: 503-646-3385
email: DSA@acoustechgroup.com

Portion of aquaclude trench where noise mitigation is required if excavation occurs more than 30 minutes per hour

DESIGNED BY.	DRAWN BY	DATE	PROJECT NO.	
	C. OPPENHEIMER	October 2006	137045	Figure 1



Map data provided by EGR and Associates, Inc.

Daly-Standlee & Associates, Inc.

ph: 503-646-4420
fax: 503-646-3385
email: DSA@acoustechgroup.com

Portion of aquaclude trench where noise mitigation is required if excavation occurs less than 30 minutes per hour

DESIGNED BY	DRAWN BY	DATE	PROJECT NO	
	C. OPPENHEIMER	October 2006	137045	Figure 2

LRAPA
Lane Regional Air Pollution Authority

PAZC 05-6151
ORD PA1238
Date 11-1-06
Exhibit No. 222

1010 Main Street
Springfield, OR 97477
phone (541) 736-1056
fax (541) 726-1205
1-877-285-7272
www.lrapa.org
E-mail: lrapa@lrapa.org

October 30, 2006

By Fax and Mail

Mr. George Staples
Risk Manager
Delta Sand & Gravel Company
999 Division Avenue
Eugene, Oregon 97404

Re: Termination of Delta Sand & Gravel Stipulated Final Order

The corrective actions taken by Delta Sand & Gravel provide satisfactory evidence that it has fulfilled the stipulations in the SFO. This letters serves to inform you of the success and closure of Stipulated and Final Order 06-2753. We thank you for your assistance in resolving this matter, the Order is now closed.

Thank you for commitment to continue to improve your systems over time as needed to mitigate fugitive dust.

If you have any questions or comments, please call Doug Erwin at 736-1056.

Sincerely,

Sandra Lopez
Operations Manager

Cc: Glenn Klein

Enclosures: SFO No. 06-2753

SAIF CORPORATION
400 HIGH STREET S.E.
SALEM, OREGON
97312-1000

TELEPHONE (503) 373-8000
WWW.SAIF.COM

PAZC 05-6151
ORD PA1238
Date 11-1-06
Exhibit No. 323

SAIF CORPORATION
On the job for Oregon

INDUSTRIAL HYGIENE SERVICES

October 23, 2006

Mr. George Staples, Manager
Delta Sand & Gravel Co
999 Division Ave
Eugene, OR 97404-2414

Policy No: 521751
Policy Dates: 10/1/2006 to 9/30/2007

Dear Mr. Staples:

This letter summarizes the results from the industrial hygiene survey I conducted on June 7, 2000 at Delta Sand & Gravel's quarry located at 999 Division Avenue in Eugene Oregon. The purpose of the survey was to evaluate employee exposures to respirable dust and silica during their work activities.

Personal exposure monitoring for respirable dust and silica was conducted on two employees who were working at the quarry's screening plant. The respirable dust results for both employees were below the Permissible Exposure Limit (PEL) established by the U.S. Department of Labor's Mine Safety & Health Administration (MSHA). The MSHA PELs are legal exposure limits which mine operators must comply with.

If you have any questions or comments about this letter or the June 7 2000 industrial hygiene survey, please feel free to contact me.

Sincerely,

David S. Friedman, CIH, MSPH, ARM
Industrial Hygienist
Risk Management Services
Telephone: (503) 373-8785
Fax: (503) 373-8772
Toll Free: (800) 285-8525
Email: davfri@saif.com

DSF:dsf/DeltaSand&Gravel06-01

cc: Industrial Hygiene File

PAZC 05-6151
ORD PA1238
Date 11-1-06
Exhibit No. 224

Sarah Hendrickson, M.D.
Lane County Public Health Officer
135 East Sixth Avenue
Eugene, OR 97401
November 1, 2006

As Lane County's public health officer, I've been asked to comment on the medical testimony provided to your Planning Commission on January 17th by Dr. Stephen Kimberley, who makes his living as a paid medical expert. Both as a board certified family physician and as a public health advocate I have experience evaluating complex issues of medical cause and effect with regard to environmental health and public policy.

In his testimony, Dr. Kimberley, who is neither an expert in lung disease nor in occupational medicine, made clear that he was not familiar with this pending application but rather was speaking only generally. Further, Dr. Kimberley referenced coal dust and its relationship to lung disease. Coal dust is not rock dust, and the medical effects can be quite different. I don't think this aspect of his testimony is relevant.
The articles submitted by Dr. Kimberley into the record are very general and do not add to my understanding of this specific situation.

Yes, too much inhaled dust can make preexisting lung disease worse. Folks with asthma and other chronic lung diseases are more sensitive to dust and irritants of all kinds. Too much inhaled dust even in a healthy person will cause lung problems. The state of medical science is that we do not know what exposures to rock dust will cause damage, nor have we made the societal decisions necessary to regulate those exposure limits beyond the standards that have already been set by the regulatory bodies that do have jurisdiction over this business. There is a much larger political arena in which debates regarding air quality are being heard: tobacco smoke, field burning, and fuel emissions are just a few sources with very significant and far greater health impacts to Lane County residents. As a society, we are in the midst of making many such decisions about how much health risk is acceptable, and at what economic and personal costs.

I understand that the proposed expansion that you are considering tonight seeks only to maintain the current amount of production. The crushing facility that is the source of the rock dust would remain where it has been for decades. From a medical point of view there does not appear to be any increased risk either to workers or to residents of surrounding neighborhoods as a result of such expansion.

The gravel mining industry is regulated by the federal Mine Safety Health Administration and monitored by SAIF's Industrial Hygiene services. In addition, the Lane County airshed is regulated by the Lane Regional Air Pollution Authority. The purpose and expertise of these agencies is to protect workers who have the highest risk of exposure, and to protect the public. You are the elected officials with expertise in planning and local government. I suggest you weigh heavily the applicant's record at meeting the standards already set by these public agencies.

On a different but related topic, access to medical care is a critical missing link in our community's health care system. Failure to obtain early medical treatment makes diseases worse and costs both money and community health. I will note that Delta as an employer pays 100% of the health insurance premium for its 135 workers and their dependents.

Thank you for your attention.

PAZC 05-6151
ORD PA 1238
Date 11-06
Exhibit No. 225

SCHULZ Stephanie E

From: YEITER Kurt M [Kurt.M.YEITER@ci.eugene.or.us]
Sent: Wednesday, November 01, 2006 5:08 PM
To: SCHULZ Stephanie E
Subject: FW: Delta Sand and Gravel

From: ROSE Lynda L
Sent: Wednesday, November 01, 2006 5:05 PM
To: YEITER Kurt M
Subject: FW: Delta Sand and Gravel

Messages to and from this email address may be available to the public under Oregon Public Records Law.

From: debra.stiffler@comcast.net [mailto:debra.stiffler@comcast.net]
Sent: Wednesday, November 01, 2006 4:34 PM
To: *Eugene Mayor and City Council
Subject: Delta Sand and Gravel

Dear Mayor Percy and City Council,
I have been a general contractor for thirty years and have relied on Delta Sand and Gravel many, many times for gravel, dirt and concrete. They have always been very professional and helpful. I have never had a problem with them.
I also have been an neighbor to them for twelve years. My family and I live just to the north of the pit. Delta has been a very good neighbor for us and those who live in our area. They maintain the road for us and ask for nothing. I don't think they know how much those of us who use the road appreciate what they do.
At one time I need an easement from Delta Sand and Gravel and the owners did every thing they could to help us.
We appriciate what they do for us.
Thank you for your time,
Mark and Debra Stiffler
455 Delay Dr.
Eugene, 97404

PAZC 05-6151
ORD PA 1238
Date 11-1-06
Exhibit No. 226

MAYOR + City Council
777 PEARL ST.
EUGENE, OR. 97401

RE: DELTA SAND + G.
ZONE CHANGE REQUEST

PLEASE note that DELTA Sand + Gravel is a locally owned business that has a long history of good citizenship. They have been a very responsible company providing a substantial community payroll along with a service and product that we all need. I am asking the City to support DELTA's request for zone change on property owned by Delta and immediately adjacent to existing operations. Please recognize how important it is to have more than one local supplier five years from now.

Thank you

ROBERT A. BALLIN
2045 Potter
EUGENE, OR. 97405

Bob Ballin

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BY CITY MANAGER
NOV 1 2006

PAZC 05-6151
ORD PA1238
Date 11-1-06
Exhibit No. 227

October 30, 2006

Lane County Board of Commissioners
Commissioner Bobby Green
125 East 8th Avenue
Eugene, Oregon 97401

Dear: Commissioner Green

Delta Sand & Gravel has been, and continues to be, the type of corporate citizen that is a model for other businesses in our community. Their corporate philosophy regarding community development and charitable giving, plus the growth and advancement of employees, has made the company and enviable place to work and grow.

Their long term growth strategy for Eugene and Lane County is based on the zoning change before you and your colleagues on the Lane County Commissioner Board. This zoning change is essential for the future economic vitality of our regions infrastructure and I personally ask for your support is approving this zoning change request.

Delta Sand & Gravel has contributed greatly to our community and now is the time to support our long term businesses who have helped this great area be the desirable community that it is. This expansion will also provide the roads which will eventually ease traffic and make our community a much safer place to drive.

Respectfully,

Steve Gross
2020 Westwood Lane
Eugene, Oregon 97401

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OCT 31 2006
LANE COUNTY
BOARD OF COMMISSIONERS

PAZC _____
ORD PA 1238
Date 11-1-06
Exhibit No. 228

October 30, 2006

Mr. Bobby Green
Lane County Board of Commissioners
125 East 8th Avenue
Eugene, OR 97401

Dear Commissioner Green:

As an involved, and concerned, member of our community, I am convinced that our county's long-term economic vitality depends on the long-term health of our region's corporate community partners, such as Delta Sand & Gravel.

Delta Sand & Gravel is a good citizen of our community – employing hundreds of Lane County workers, supplying a valuable tax base and providing the goods and services essential to drive our community's economy. In order to continue being a good corporate partner with our entire region, Delta Sand & Gravel needs the expansion they are requesting.

Therefore, I support the zoning change request you are considering for Delta Sand & Gravel and encourage you to do your part to help our region by approving this zoning change request.

Respectfully,

Mike Higgins
3245 Saint Thomas St.
Eugene, OR 97408

MACHINERY

October 30, 2006

PAZC _____
ORD PA1238
Date 11-1-06
Exhibit No. 229

Lane County
Lane County Board of Commissioners
125 E 8th Avenue
Eugene, OR 97401

Dear Lane County Commissioners:

I am in favor of rezoning the property owned by Alan and Lee Babb, owners of Delta Sand & Gravel.

It has come to my attention that the Eugene City Council and the Lane County Commissioners have voted against approving an application to mine aggregate on one of their pieces of property.

Delta Sand employs a significant amount of good, hard working, tax paying people. A decision by the council or commissioners to refuse use of this land would be devastating to their existence and would negatively affect the long term survival of a well respected organization.

Please reconsider your decision for the good of this fine company and their employees and families.

Sincerely,

Rodger Spears, President
Papé Machinery, Inc.

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OCT 31 2006
LANE COUNTY
BOARD OF COMMISSIONERS

541-683-5073
fax 541-334-3448
www.papemachinery.com

Papé Machinery, Inc.
355 Goodpasture Island Rd., Eugene, OR 97401
PO Box 10527, Eugene, OR 97440

PAZC 05-6151
ORD PA1238
Date 11-1-06
Exhibit No. 230

October 30, 2006

Lane County
Lane County Board of Commissioners
125 East 8th Avenue
Eugene, OR 97401

Dear Commissioners:

As an involved, and concerned, member of our community, I am convinced that our county's long-term economic vitality depends on the long-term health of our region's corporate community partners, such as Delta Sand & Gravel.

Delta Sand & Gravel is a good citizen of our community – employing hundreds of Lane County workers, supplying a valuable tax base and providing the goods and services essential to drive our community's economy. In order to continue being a good corporate partner with our entire region, Delta Sand & Gravel needs the expansion they are requesting.

Therefore, I support the zoning change request you are considering for Delta Sand & Gravel, and encourage you to do your part to help our region by approving this zoning change request.

Respectfully,

Reid Findley

Reid Findley
1083 Tyson Ln.
Eugene, OR 97404

PAZC 05-6151
ORD PA1238
Date 11-1-06
Exhibit No. 231

October 30, 2006

Lane County
Lane County Board of Commissioners
125 East 8th Avenue
Eugene, OR 97401

Dear Commissioners:

As an involved, and concerned, member of our community, I am convinced that our county's long-term economic vitality depends on the long-term health of our region's corporate community partners, such as Delta Sand & Gravel.

Delta Sand & Gravel is a good citizen of our community – employing hundreds of Lane County workers, supplying a valuable tax base and providing the goods and services essential to drive our community's economy. In order to continue being a good corporate partner with our entire region, Delta Sand & Gravel needs the expansion they are requesting.

Therefore, I support the zoning change request you are considering for Delta Sand & Gravel, and encourage you to do your part to help our region by approving this zoning change request.

Respectfully,

John Clafson

John Clafson
591 North 68th Ave
Springfield Or 97478

ROCK PRODUCTS INC.

400 Country Club Rd., Suite 320
Eugene, OR 97401
Tel. (541) 686-8778
FAX (541) 686-8779

PAZC 05-6151
ORD PA1238
Date 11-1-06
Exhibit No. 232(a)

OCTOBER 29, 2006

BOARD OF COMMISSIONERS:
LANE COUNTY
125 EAST 8th AVENUE
EUGENE, OREGON 97401

DEAR COMMISSIONERS:

THIS LETTER IS IN SUPPORT OF THE DELTA SAND & GRAVEL CO. REQUEST FOR EXPANSION OF THEIR CURRENT MINE BY APPROXIMATELY 72 ACRES. WE HAVE OPERATED SEVERAL MINING OPERATIONS IN LINN COUNTY FOR THE PAST SEVENTEEN YEARS AND HAVE SUPPLIED MUCH OF THE CRUSHED ROCK NEEDS OF THE LINN COUNTY ROAD DEPARTMENT DURING THAT TIME IN THEIR FIVE DISTRICTS. WE OPERATED TWO CRUSHING OUTFITS AND SUPPLIED THEIR NEEDS THROUGH PUBLIC BIDDING. THE LINN COUNTY ROAD DEPARTMENT AND THE LINN COUNTY PLANNING DEPARTMENT HAVE BEEN VERY SUPPORTIVE OF OUR MINING OPERATIONS THERE AND THE SUBSEQUENT EXPANSION OF OUR MINES ONTO ADDITIONAL AGGREGATE RESOURCES. WE FOUND THEIR APPROACH TO MAKING NATURAL AGGREGATE RESOURCES AVAILABLE FOR MINING PERMITS THAT ARE IN CLOSE PROXIMITY TO END USE TO HAVE KEPT THEIR ROAD COSTS IN LINE AND CONSEQUENTLY THEY ENJOY A FINE ROAD SYSTEM THAT IS WELL MAINTAINED. WE HAVE THIS YEAR SOLD OUR MINING OPERATIONS IN LINN COUNTY, BUT WISH TO MEMORIALIZE THEIR SUCCESSFUL APPROACH TO BUILDING AND MAINTAINING OF THEIR ROADS AT LEAST COST.

WE URGE YOUR FAVORABLE CONSIDERATION OF THE REQUESTED EXPANSION OF MINING PROPERTIES IN THE LANE COUNTY MARKET AREA. WE FEEL THIS COULD ASSIST YOU IN ACHIEVING AND MAINTAINING SIMILAR RESULTS FOR LANE COUNTY. OREGON STATE GOALS ARE TO PRESERVE PROVEN AGGREGATE RESOURCES FOR MINING AND THIS SHOULD APPLY TO THE REQUESTED AREA OF EXPANSION BY DELTA SAND & GRAVEL CO.

DELTA SAND & GRAVEL CO. HAVE DEMONSTRATED THEMSELVES TO BE VERY CAPABLE, ENVIRONMENTALLY FRIENDLY AND COMPETITIVE OPERATOR IN THE EUGENE AND LANE COUNTY MARKET AREA. THEY DESERVE TO HAVE ADDITIONAL AGGREGATE RESOURCES MADE AVAILABLE TO THEM BEFORE THEY EXHAUST THEIR CURRENT RESOURCES.

VERY TRULY YOURS,

John Gregor

JOHN GREGOR
DIRECTOR

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OCT 3 2006
LANE COUNTY
BOARD OF COMMISSIONERS

XC: MAYOR & CITY COUNCIL
REGISTER GUARD
DELTA SAND & GRAVEL CO.

PAZC 05-6131
ORD PA1238
Date 11-1-06
Exhibit No. 232 (b)

400 COUNTRY CLUB ROAD
SUITE 320
EUGENE, OREGON 97401

GREGOR PROFESSIONAL
CORPORATION

Telephone (541) 686-8777
Facsimile (541) 686-8779
E-mail: gpccpa@attglobal.net

OCTOBER 29, 2006

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OCT 31 2006
LANE COUNTY
BOARD OF COMMISSIONERS

BOARD OF COMMISSIONERS
LANE COUNTY
125 EAST 8th AVENUE
EUGENE, OREGON 97401

DEAR COMMISSIONERS:

THIS LETTER IS IN SUPPORT OF THE REQUEST FOR REZONING FOR EXPANSION BY APPROXIMATELY 72 ACRES OF THE PRESENT MINE OF DELTA SAND & GRAVEL CO. ON DIVISION AVENUE, EUGENE, OREGON.

OUR FIRM HAS CONDUCTED MANY ANNUAL AUDITS OF COUNTIES IN OREGON AND NORTHERN CALIFORNIA INCLUDING THEIR ROAD DEPARTMENTS. WE FOUND THAT THE COST/BENEFIT RATIOS OF THEIR ROAD DEPARTMENTS WERE ENHANCED WHERE THERE WAS ABUNDANT NATURAL AGGREGATE RESOURCES AND COMPETITIVE MINING OPERATIONS. TOWARD THAT GOAL WE URGE APPROVAL OF PERMITTING ADDITIONAL AGGREGATE RESOURCES BE MADE AVAILABLE TO OPERATORS OF PROVEN ABILITIES IN THIS MARKET. OREGON STATE GOALS ARE TO PRESERVE PROVEN RESOURCES FOR MINING AND THIS SHOULD APPLY TO THE REQUESTED EXPANSION AREA.

THE UNDERSIGNED IS A NATIVE BORN EUGENEAN AND HAS OBSERVED THAT DELTA SAND & GRAVEL CO. IS A VERY CAPABLE, ENVIRONMEANTALLY CLEAN, COMPETITIVE MINING OPERATION AND IS IN NEED OF ADDITIONAL AGGREGATE RESOURCES. IT GOES WITHOUT STATING THAT ADEQUATE NEARBY AGGREGATE RESOURCES ARE THE UNDERPINNING OF OUR LOCAL ECONOMY WHICH PROVIDES OUR ABUNDANT LIVELIHOOD.

WE URGE PERMITTING THIS ADDITIONAL RESOURCE FOR DELTA SAND & GRAVEL CO.

VERY TRULY YOURS,

John Gregor

JOHN GREGOR, CPA
PRESIDENT

XC: MAYOR & CITY COUNCIL
REGISTER GUARD MAILBAG
DELTA SAND & GRAVEL CO.

Bravo Excavation LLC.
90116 Territorial Road
Junction City, OR 97448
PH: (541) 935-2804
CCB# 126508

TO: Board of Councilors
City of Eugene
Lane County Commissioners ✓
Register Guard Editors

November 7, 2006

RE: Delta Sand and Gravel Company Zoning Request:

It has come to our attention that the city of Eugene and the Lane County Commission are beginning another dance similar to the Eugene Sand and Gravel fiasco of the recent past; the outcome of which is a demonstration of dim witted official action.

The four major gravel mining companies in the area, Eugene Sand and Gravel, Delta Sand and Gravel, Wildish, and Egge represent solid industrial firms who have done their long range planning to keep their companies reliable into the future, thank God for people who think beyond the next day in planning the allocation of resources. Arguments made against these firms lack persuasion but has the order of politics not science or reasoned conclusions. In the case of Eugene Sand and Gravel, there was much hot air about the terrible dust that mining would create in the farm area. I one of the undersigned have lived most of my life in a rural farm areas of Lane County. At least I thought surrounded by farms, but after hearing the psychobabble about dust from rock mining I realize I was not surrounded by farms but Rock Mines; the great clouds of dust rising from the fields is not farmers cultivation because the dust only comes from rock mining.

We have for a number of years purchased products from the fore mentioned operations. We have found them to be honorable and professional providers, something we have not always found from the bureaucracy of Lane County and the city of Eugene. If the trend continues to harpoon some of the best creators of jobs and essential products, God help the County and the Country. We strongly support Deltas Zone change request. We need these products and the economy they support. Very Truly,

A.S. Garber, member

OJ Garber, member

(541) 935-2804

PAZC 05-6151
ORD PA 1238
Date 11-1-06
Exhibit No. 234

October 30, 2006

Lane County
Lane County Board of Commissioners
125 East 8th Avenue
Eugene, OR 97401

Dear Commissioners:

As an involved, and concerned, member of our community, I am convinced that our county's long-term economic vitality depends on the long-term health of our region's corporate community partners, such as Delta Sand & Gravel.

My neighbor has been an employee of Delta Sand & Gravel for 25 years. He speaks very highly of the company. He talks about how they are such a good neighbor. They are very generous in giving donations to the community. They do a tremendous amount of work around the community. Everywhere you drive in Lane County, you see Delta Sand & Gravel trucks and equipment working away. They employ hundreds of Lane County workers.

In order to continue being a good corporate partner with our entire region, Delta Sand & Gravel needs the expansion they are requesting. Therefore, I support the zoning change request you are considering for Delta Sand & Gravel. I encourage you to do your part to help our region by approving this zoning change request.

Respectfully,

Cynthia L Tidball

Cynthia Tidball
89537 Demming Rd.
Elmira, OR 97437

PAZC 05-6151
ORD PA1238
Date 11-1-06
Exhibit No. 235

Dear Faye Stewart

I have work at Delta sand & gravel 9+ years and am eight in seniority. It has been a good place to work at. They have a good health and pension plan.
would like to have this job long enough to be able to retire from them.

Michael John Nellels
39678 Crow River Rd
Cutler Creek 97427

PAZC 05-6151
ORD PA1238
Date 11-1-06
Exhibit No. 236

Dear Board of Commissioners,

I have worked at Delta Sand & Gravel for 23 years. They have provided me and my family an excellent job with above average wages & health benefits that are payed by the company for myself & my family. I am 47 years of age and would like very much to finish my career at Delta Sand & Gravel, Please vote in favor of us.

Thank you
Mike McMurren
Shop Superintendent
36219 Enterprise Rd.
Creswell OR 97426

RECEIVED
OCT 31 2006
LANE COUNTY
BOARD OF COMMISSIONERS

PAZC 05-6151
ORD PA1238
Date 11-1-06
Exhibit No. 237

THOMAS T. KERSTEN

Customer Service Specialist (Retired)
480 Banton Avenue
Eugene, Oregon 97404

Telephone: (541) 688-2865
email: kersttl@cris.com

November 1, 2006

My name is Thomas T. Kersten; I live at 480 Banton Avenue in Eugene, Oregon also known to us that live here and love it as the Santa Clara area of Eugene.

My wife and I have lived at this location since August of 1974 and in that period of time we have seen many changes in our neighborhood; most of them good, some still open for discussion.

By this time last year, October 1st to November 1st, I had gone through surgery twice. The first time was to remove a ¼ pound tumor from the left side of my face which had obviously grown but remained benign. This was good as it was an elective surgery and I am much prettier now.

Two days after that surgery, my appendix burst resulting in a non elective surgery, not so good. During that surgery a cancerous tumor was found in my appendix, a very not so good situation. Exploratory surgery was done at a later date and no other signs of cancer were, or have been found. More surgery not so good, clean bill of health very, very good.

During this same period of time I believe we, my wife Lynn and I, have been able to attend most, if not all of the neighborhood and meetings with the joint planning commissions. It should come as no great surprise that we agree with the conclusions reached by the planning commissions.

In my mind Delta is somewhat like the tumor & cancer problem I have gone through.

The benign period for my family began when we purchased our home in 1974. At that time much of the noise from Delta's operation was shielded by open space and many more trees. The dust and dirt was not a problem because it was always present. If you have no way to compare one situation to another, the status quo becomes the normal.

When we purchased our home in '74 we were told by our realtor that the field behind us would probably be developed, with up scale housing, within the two years. We have been living lucky as that field was only developed for housing within the past few years. Although we would have preferred to have kept the field behind us open and with hawks nests & other assorted wild life that existed, we were aware of the development that would occur. The housing development has not been all bad for us. When we purchased our home we paid just over $39,000 for home and lot. According to our most recent property tax statement, the land alone now exceeds $100,000.

Like many cancers, Delta wishes to grow in a direction of their choice with no apparent concern for the welfare, lifestyle or damage they will be doing to the residential property surrounding them. I do not believe it is possible to prove to me or the home owners the expansion will affect the enlargement of the Delta rock pit will in any; improve their lifestyle, the air they must breathe or the value of our homes and the property.

Since we purchased our home, many wonderful things have been developed in the home building industry. Two by six studding in construction, glue lam beams, and multi-pane windows to aid in heating, cooling and noise reduction. I am willing to be proven wrong, but it would be my best guess, that no one in this room would spend the money that has been invested by the home owners present, so that they and their family's might live ***closer*** to a large, dirty, and very, very noisy rock crushing operation. This does not include some of the hazards involved with the possible contamination of the surround area by the solvents, lubricants and other industrial chemicals required to keep such an operation running.

Thank you for this opportunity to be heard.

PAZC 05-6151
ORD PA 1238
Date 11-1-06
Exhibit No. 238

26 October, 2006

Local gravel mining operations were established when Eugene was still a small town. Sited away from populous areas, the noise and pollution they generated were scarcely noticed. Now, however, mining operations are increasingly where we live and breathe and raise our children.

As population grows, so does the need for gravel. Over time many mining quarries have been depleted. That's why Delta Sand and Gravel wants to expand mining in Santa Clara

We need gravel. But we don't need to extract it in our backyards. Let's give Delta and other companies financial incentives to mine in more remote areas. Yes, the gravel will cost more . But is this not a wise investment for a healthy community? Lands currently being mined as well as those proposed (ie Wildish) should be acquired and turned into parks and open spaces.

Svevo Brooks

81900 Mahr Lane
Creswell, Oregon 97426

PAZC 05-6151
ORD PA1238
Date 11-1-06
Exhibit No 239

RECEIVED
OCT 23 2006
LANE COUNTY
BOARD OF COMMISSIONERS

Dear Board of Commissioners,

I have been employed at Delta Sand + Gravel for 4 years. I hope to work here until retirement. I am 54 years old and fear that without the zoning approval, that may not be possible.

Delta provides my family with good health benifits + income. My son is also an employee at Delta Sand + Gravel and I hope he will have continued employment opportunities at Delta for a long time.

I ask for your support in approving Delta's request for a zoning change.

Sincerely,

Frank Horn
P.O. Box 176
19748 Honey Grove Rd.
Alsea, Or. 97324
541-487-7485

J.P. Hammer
P.O. Box 2266
Eugene, Oregon 97402

November 2, 2006

Lane County Board of Commissioners
125 East 8th Avenue
Eugene, OR 97401

Board Members,

Free enterprise exists with competition in the market place.

Lack of competition creates scarcity driving prices upward, i.e. precious metals, steel, copper, oil, building lot prices in the Eugene metro area, etc. The Eugene community will pay the price for scarcity of the available raw materials.

Delta Sand and Gravel's site is appropriate for mining our future community. A small vocal group – NOT IN MY BACK YARD – should not be allowed to interfere with sustainable resources for the overall community.

Respectfully,

John P. Hammer

Phone: (541) 683-1166 • Fax: (541) 683-2449

PAZC 05-6151
ORD PA 1238
Date 11-7-06
Exhibit No. 241

Carlton Woodard
61 Hilltop Drive
Cottage Grove, OR 97424

November 3, 2006

Lane County Board of Commissioners
1125 East 8th Street
Eugene, OR 97401

Dear Mayor and City Council Members:

Delta Sand and Gravel has been a fine corporate citizen for many years as evidenced by their fairness in business and financial support of area nonprofit groups. Their business and community spirit have added meaningfully to the quality of life in Lane County and the region, as well as faithfully providing employment for local residents.

I support Delta Sand and Gravel's request for a zone change in order to allow them to continue their efforts to serve the community. Your approval of their request would show your support of local businesses and the many people who make their livelihood there.

Your favorable review of the zone change request is encouraged.

Sincerely,

Carlton Woodard

Carlton Woodard

RECEIVED
NOV 06 2006
LANE COUNTY
BOARD OF COMMISSIONERS

PAZC 05-6151
ORD PA 1238
Date 11-7-06
Exhibit No. 242

Casey Woodard
1215 Courtney Place
Eugene, OR 97405

November 3, 2006

Lane County Board of Commissioners
125 East 8th Avenue
Eugene, OR 97401

Dear Commissioners:

Delta Sand and Gravel has served Eugene, Lane County and the region through business and community leadership. They provide gainful employment for our residents and give back to the community through charitable support and volunteerism.

I strongly favor Delta Sand and Gravel's request for a zone change in order to allow them to continue their efforts to serve the community. Your approval of their request would show your support of local businesses and the many people who make their livelihood there.

Your positive review of the zone change request is encouraged.

Sincerely,

Casey Woodard

PAZC 05-6151
ORD PA-1238
Date 11-7-06
Exhibit No. 243

the VICTORY GROUP, inc.

November 3, 2006

To: Kitty Piercy, Mayor
City of Eugene

Bill Dwyer, Chair
Lane County Commission

The sand and gravel issue has been of interest to me ever since I did some pro-bono work on behalf of Delta Sand & Gravel in December of 1996, when the dike broke and flooded its operation.

I assisted them in their efforts to restore the operation by working with state government, which allowed them to remove three billion gallons of water in an environmentally sound manner. The project was very sensitive and they worked diligently to achieve success in not disturbing the river water flow. The process required removal of 60,000 gallons per minute, twenty-four hours per day for three months.

The restoral was vital in providing material for our roads and highways but, more importantly, from the human side, it allowed them to re-establish jobs for over 130 employees. This company pays an hourly scale of $17.00 to $31.00 per hour, has a defined pension plan for all of its full time employees and, in addition, provides full health insurance.

It was what could have been a disaster for these employees in 1996 if the owners of Delta hadn't been positive, responsible and aggressive in restoring their business.

Looking to the future, I see another black cloud on the horizon for the employees of Delta. A black cloud you can give a silver lining by allowing them access to gravel availability on their land adjacent to their existing operation.

This is an example where Eugene and Lane County can dispel the notion that you are anti-business and, in this case, damaging to over 100 families by allowing Delta to use their land to continue a healthy business.

Please support their request for re-zoning their land so they can expand their ability to provide aggregate materials.

Best regards,

Larry

Larry Campbell

Cc: Board of Commissioners, City Council

1191 CAPITOL ST. NE
SALEM, OR 97301
PHONE: 503-315-1411
FAX: 503-315-1416

PAZC 05-6151
ORD PA1238
Date 11-7-06
Exhibit No. 244

SCHULZ Stephanie E

From: MORRISON Anna M
Sent: Monday, November 06, 2006 11:19 AM
To: SCHULZ Stephanie E
Subject: FW: Delta Sand & Gravel

For the record on Delta Sand & Gravel

From: S Hilton [mailto:tlpwtm1@yahoo.com]
Sent: Friday, November 03, 2006 4:31 PM
To: MORRISON Anna M; DWYER Bill J; GREEN Bobby; STEWART Faye H; SORENSON Peter; tlpwtm1@yahoo.com
Subject: Delta Sand & Gravel

Dear Lane County Commissioner:

I support Delta Sand and Gravel's request for a zone change to accommodate their business. They have owned this property for many years, and the recent housing development next to their operations site reminds me of the people who built around the animal shelter out on Greenhill Road a number of years ago and then complained about the barking dogs.

If Delta meets all legal requirements, they should be allowed to proceed. Perhaps a way to make this a win-win situation for everyone would be to work with them to turn the site into a park in the future at the end of their mining operation; or a site for additional housing. Or, being a frequent Belt Line commuter myself, consider putting a spur from Belt Line to River Road out to that high density development that is clogging River Road these days.

I hope this does not become a political decision. The Babb family has been strong supporters of our community for many years and have put both their money and their time where there name is. Please work WITH them to come up with a solution that works for everyone.

Sincerely,

S. Hilton
Eugene , OR 97404
(541) 346-1725

PHIL SHELLEY, Broker

PHONE: Bus. 746-2235
Res. 746-0163

SHELLEY Real Estate & Builders, Inc.

1021 WEST M STREET, SPRINGFIELD, OR 97477

PAZC 05-6151
ORD PA
Date 11-13-06
Exhibit No. 245

Dear Persons,

I have been Building in Lane County, primarily in Eugene and Springfield, since 1962. Delta Sand & Gravel has been an im-Portant supplier of materials. They have continualy improved thier products & delivery. They continually water the yard area and streets leading away from the plant to keep the dust down and the streets clean. I strongly support thier request for a zone change to allow them to continue in business for an extende period of time. They are local people we should support.

Phil Shelley

Phil Shelley, Pres.

WYATT'S TIRE CO.
Since 1925

390 WEST 11th–EUGENE, OREGON 97401-3063
(541) 344-3218 FAX (541) 344-3221

RECAPPING — NEW & USED TIRES

PAZC 05-6151
ORD PA 1238
Date 11-14-06
Exhibit No. 246

Lane County Board of Commissioners
125 East 8th Avenue
Eugene, OR 97401

Dear Lane County Commissioners,

I am writing this letter to urge you to join us in support of Delta Sand & Gravel in allowing a zone change request to mine 75 acres adjacent to their current work site.

Delta Sand & Gravel has been doing business with Wyatts Tire for over 50 years. We are encouraging the Lane County Board of Commissioners to support upstanding, well-established, local businesses. This zone change will allow Delta Sand & Gravel to continue to stay in business for years to come.

Delta Sand & Gravel is a reputable company with high standards, great employees and excellent management. We recognize that we also use and need the products Delta provides us.

We respect that they are good citizens of our community and are deserving of our support. We strongly urge you to support Delta's efforts to obtain this zone change. If they are not allowed, our business as well as others in the community will be devastated.

Sincerely,

Randy Hoepfl
General Manager
Wyatts Tire Co.
390 West 11th Avenue
Eugene, OR 97401
541-344-3218

RECEIVED
NOV 13 2006
LANE COUNTY
BOARD OF COMMISSIONERS

PAZC 05-6151
ORD PA 1238
Date 11-14-06
Exhibit No. 247

OREGON Rubber Co.
3595 W. 1st Avenue - Eugene, Oregon 97402
FAX (541) 343-9376 • (541) 343-6507

November 8, 2006

Lane County Board of Commissioners
125 East 8th Avenue
Eugene, Oregon 97401

Dear Mayor Piercy and Eugene City Council Members:

I am writing this letter in support of Delta Sand and Gravel Co's. request for a zoning change for the property they own adjacent to their present aggregate mining site. This change is critical to their continued viability as an employer in the area. Delta is and has been for many years, a good employer, providing stable employment for many families. Without the requested zoning change, those jobs will be in jeopardy. The loss of Delta would also have a considerable negative impact on our business, thereby impacting our ability to employee local citizens. The ripple effect to the entire community would be substantial.

Please reconsider your position on this issue. It is very important to many of us in the local business community and to many employees of the businesses who will be impacted.

Sincerely,

Julie M. Morris

Julie M. Morris
President

YEITER Kurt M

From: ROSE Lynda L
Sent: Wednesday, November 01, 2006 1:31 PM
To: YEITER Kurt M
Subject: FW: Delta Sand and Gravel Zone Change Request

Importance: High

PAZC 05-6151
ORD PA 1238
Date 11-21-06
Exhibit No. 248

Messages to and from this email address may be available to the public under Oregon Public Records Law.

-----Original Message-----
From: jagoggin@petersonmachineryco.com [mailto:jagoggin@petersonmachineryco.com]
Sent: Wednesday, November 01, 2006 10:09 AM
To: *Eugene Mayor and City Council
Cc: DDoyle@petersonholding.com
Subject: Delta Sand and Gravel Zone Change Request
Importance: High

Dear Mr. Mayor and City Council Members,

Peterson Machinery Co., and the 130 employees working in our Eugene and Springfield operations, STRONGLY SUPPORT the zoning change request of Delta Sand and Gravel Company. Delta is a major employer and has been a good corporate citizen of Eugene for decades. The products they provide are essential for the long term maintenance and growth of Eugene and the surrounding communities. It is important that the requested zone change be approved to ensure Delta's future in our community.

Please continue to demonstrate your support for our local companies and the good jobs they provide for our citizens by approving this zone change for Delta Sand and Gravel.

Sincerely and respectfully submitted,

Peterson Machinery Co.

Jeff Goggin
President

Office: 541.465.8401
jagoggin@petersonmachineryco.com

YEITER Kurt M

From: ROSE Lynda L
Sent: Wednesday, November 01, 2006 1:40 PM
To: YEITER Kurt M
Subject: FW: Delta Sand and Gravel

PAZC 05-6151
ORD PA1238
Date 11-21-06
Exhibit No. 249

Messages to and from this email address may be available to the public under Oregon Public Records Law.

-----Original Message-----
From: Mary Blackburn [mailto:mblack@jb.com]
Sent: Wednesday, November 01, 2006 8:03 AM
To: *Eugene Mayor and City Council; lcocccom@co.lane.or.us
Cc: M Blackburn
Subject: RE: Delta Sand and Gravel

Mayor and City of Eugene Councilors
Lane County Commissioners

W noticed that today is the hearing for zone change application for Delta Sand and Gravel. We hope the right thing is done to allow this company to continue their operations. This company is and has been good for this community and will continue to help their employees and residents of this community. These products are needed for the continued growth in this area. They have been at this site long before any development chose to build close to them. Nothing is more irritating than for people to complain after moving close to a business and then wanting them to change, move or vacate their business practices.
Do the right thing and grant this zone change.
Sincerely,
Michael and Mary Blackburn

YEITER Kurt M

From: ROSE Lynda L
Sent: Wednesday, November 01, 2006 5:05 PM
To: YEITER Kurt M
Subject: FW: Delta Sand and Gravel

PAZC _____
ORD PA1238
Date 11-21-06
Exhibit No. 250

Messages to and from this email address may be available to the public under Oregon Public Records Law.

From: debra.stiffler@comcast.net [mailto:debra.stiffler@comcast.net]
Sent: Wednesday, November 01, 2006 4:34 PM
To: *Eugene Mayor and City Council
Subject: Delta Sand and Gravel

Dear Mayor Percy and City Council,
I have been a general contractor for thirty years and have relied on Delta Sand and Gravel many, many times for gravel, dirt and concrete. They have always been very professional and helpful. I have never had a problem with them.
I also have been an neighbor to them for twelve years. My family and I live just to the north of the pit. Delta has been a very good neighbor for us and those who live in our area. They maintain the road for us and ask for nothing. I don't think they know how much those of us who use the road appreciate what they do.
At one time I need an easement from Delta Sand and Gravel and the owners did every thing they could to help us.
We appriciate what they do for us.
Thank you for your time,
Mark and Debra Stiffler
455 Delay Dr.
Eugene, 97404

Attorneys and
Counselors at Law
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97401-2782

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541 686-9160

FAX
541 343-8693

www.eugene-law.com

James K. Coons
John G. Cox
Douglas M. DuPriest
Frank C. Gibson
Stephen A. Hutchinson
Thomas M. Orr
William H. Sherlock

E. Bradley Litchfield
Zack P. Mittge
Patrick L. Stevens

October 25, 2006

Eugene Mayor and City Council
City of Eugene
777 Pearl Street, Room 105
Eugene, OR 97401

PAZC 05-6151
ORD PA 1238
Date 11-21-06
Exhibit No. 251

Re: **Formal Request to Bifurcate**
November 1st Hearing
Our Clients: Joel & Therese Narva
Our File No. 6274/9064A

Dear City Council Members:

This letter is to address the separate procedures for plan amendments and rezoning specified in the Eugene Code in advance of the hearing presently set for November 1.

As we have previously pointed out to the City attorney, the Eugene Code provides that for a Type II – Plan Amendment Approval Process involving two jurisdictions (like that at the upcoming hearing):

> "The governing bodies' decisions shall be based **solely on the evidentiary record created before the planning commissions. No new evidence shall be allowed** at the governing body joint hearing." EC 9.7740(4)

The Lane Code integrates the same language for two-jurisdiction plan amendments. LC 12.235(4). This language is clear, mandatory and should be followed.

While both County and City codes require on the record hearings for plan amendments (where no new evidence is submitted), zone changes may be treated differently. The Eugene Code appears to provide for a "de novo" standard of review for hearings on rezoning. EC 9.7445.

Accordingly, we formally request that both jurisdictions hereby bifurcate the upcoming hearing. The first hearing would be an "on the record" hearing for the plan amendment component of the application. This would conform to the requirements of LC 12.235(4) and EC 9.7740(4) by ensuring that any decision by yourselves or the Board of Commissioners on the plan amendment would be based "solely on the evidentiary record created before the planning commissions" and that "[n]o new evidence" would taint this decision.

Following the combined decision on the plan amendment, a second "de novo" hearing could then be held to address the rezoning application.

This approach would permit the City and County to give effect to all relevant provisions of their Codes. It would also eliminate the risk that the County or City would improperly rely on new evidence to render a decision on the plan amendment.

Given the complexity of this case, the Council is unlikely to resolve this matter with only one hearing. Since multiple hearings are likely, following the sequence specified by the Code may not result in "more hearings." Moreover, a bifurcated hearing could provide for a speedier and more economical resolution of the case, as a decision denying the plan amendment at the first hearing could eliminate the need for a second hearing.

Heretofore, applicants have had a consolidated review process on their applications. However, as a practical matter, the planning commissions for the City and County have performed this consolidated review in a series of hearings due to the number of issues in the application. Bifurcating the hearing, at this time, to conform to the City and County codes would not fundamentally alter how the applications are reviewed. Instead, it would provide a different way of organizing these multiple hearings before the final decision-makers, and one that would take into account all of the prior work done by the planning commissions.

For all the foregoing reasons, we request that the hearing on the plan amendment and zone change be bifurcated into two separate proceedings.

Very truly yours,

HUTCHINSON, COX, COONS,
DuPRIEST, ORR & SHERLOCK, P.C.

Douglas M. DuPriest
Zack P. Mittge

Enclosure (copy of letter to Lane County Board of Commissioners)
cc: Clients
Lane County Board of Commissioners
Stephen Vorhes
Emily Jerome
Steven Cornacchia

Hutchinson Cox Coons DuPriest & Orr Sherlock P.C.

Attorneys and Counselors at Law
Established 1970

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777 High Street
Eugene, Oregon
97401-2782

PHONE
541 686-9160

FAX
541 343-8693

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James K. Coons
John G. Cox
Douglas M. DuPriest
Frank C. Gibson
Stephen A. Hutchinson
Thomas M. Orr
William H. Sherlock

E. Bradley Litchfield
Zack P. Mittge
Patrick L. Stevens

November 10, 2006

Emily N. Jerome, Esq.
Harrang Long Gary Rudnick P.C.
360 East 10th, Suite 300
Eugene, OR 97401

Via Hand Delivery

[redacted]

RE: Limits on Discretion and Scope of Review
Delta Sand and Gravel Plan Amendment/Rezone

Our Clients: Joel and Therese Narva
Our File No. 9064A

Dear Emily:

This follows from the recent City Council meeting on this matter. After substantial discussion, the council tied on whether to follow the City Code requirement that its review of the plan amendment be limited to the record. Apparently believing that any error would be procedural and could be cured by providing an opportunity to respond, the Mayor broke the tie in favor of allowing new evidence. Should the City Council open the record and accept new evidence on the plan amendment, it would commit reversible error.

First, we note that the City has no role in deciding whether to approve any zone change that might follow approval of a comprehensive plan amendment. Legal counsel for Lane County apparently believes the procedures for the possible rezone weigh in favor of ignoring the County's express code requirement that the Board proceeding on the plan amendment be limited to the record. While we dispute the County's authority to disregard its adopted procedures, how the County decides to handle this issue is irrelevant to what the City Code requires the City to do. While we can understand the desire for comity between the City and County, a desire to cooperate cannot trump the requirement that the City comply with its own Code.

Second, the City confined its discretion when it adopted EC 9.7740(4):

case, the council decided to treat as a legislative decision, a proceeding that started as a quasi-judicial rezone request. More importantly, relying on *Smith v. Douglas County*, LUBA held the error was substantive, not procedural, and reversed the city's decision.

Another example is *Walmart Stores, Inc. v. City of Medford*, 49 Or LUBA 52, 57-60 (2005). In this case, the city code limited the city council's review to determining whether there was substantial evidence in the record supporting the planning commission's findings. Walmart argued the city council exceeded its scope of review by instead re-examining issues of fact and making their own findings. LUBA agreed with Walmart, holding that the city exceeded the scope of review it created for itself when it adopted the code provision in question.

This issue is not going away. The question is whether the city will act consistently with its own code procedure in this first proceeding. If it does not, we are confident that LUBA would reverse. The Narvas respectfully submit it is a better use of public and private time and resources to use the correct procedure the first time through this matter.

Thank you, in advance, for your consideration of this letter and for your professional courtesies.

Very truly yours,

HUTCHINSON, COX, COONS
DuPRIEST, ORR & SHERLOCK, P.C.

Douglas M. DuPriest

DMD:hs

Encl: Cases cited above

cc: Clients

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November 10, 2006

Via Hand Delivery

Emily N. Jerome, Esq.
Harrang Long Gary Rudnick P.C.
360 East 10th, Suite 300
Eugene, OR 97401

RE: Limits on Discretion and Scope of Review
Delta Sand and Gravel Plan Amendment/Rezone

Our Clients: Joel and Therese Narva
Our File No. 9064A

Dear Emily:

This follows from the recent City Council meeting on this matter. After substantial discussion, the council tied on whether to follow the City Code requirement that its review of the plan amendment be limited to the record. Apparently believing that any error would be procedural and could be cured by providing an opportunity to respond, the Mayor broke the tie in favor of allowing new evidence. Should the City Council open the record and accept new evidence on the plan amendment, it would commit reversible error.

First, we note that the City has no role in deciding whether to approve any zone change that might follow approval of a comprehensive plan amendment. Legal counsel for Lane County apparently believes the procedures for the possible rezone weigh in favor of ignoring the County's express code requirement that the Board proceeding on the plan amendment be limited to the record. While we dispute the County's authority to disregard its adopted procedures, how the County decides to handle this issue is irrelevant to what the City Code requires the City to do. While we can understand the desire for comity between the City and County, a desire to cooperate cannot trump the requirement that the City comply with its own Code.

Second, the City confined its discretion when it adopted EC 9.7740(4):

> "The governing bodies' decisions **shall be based solely on the evidentiary record created before the planning commissions. No new evidence shall be allowed** at the governing body joint hearing." *See also* LC 12.235(4).

Having limited its discretion, the City would exceed its authority were it to act contrary to that self-imposed limitation.

Third, while this issue has a procedural aspect to it, were the City to violate its Code and accept new evidence, that would constitute **substantive** error that could result in the case being remanded back to the City. We question whether the City wishes to build reversible error into its decision, when it can easily be avoided.

There is a body of case law that holds that a local government's failure to follow its adopted hearing procedures constitutes substantive error. In *Smith v. Douglas County*, 93 Or App 503 (1983) *aff'd* 308 Or 191 (1989), the court held the County exceeded its scope of review in considering an issue not stated in the notice of appeal, when the county code specifically limited the board's consideration on appeal to issues stated in the notice of appeal. LUBA had found this error to be procedural. The Court of Appeals disagreed and found the error to be substantive, explaining:

> "The propriety of the Board's action, however, does not concern how the Board exercised its authority, but, rather, whether the Board had authority to do what it did. In considering the compatibility issue, **the Board exceeded its scope of authority as defined in its ordinance and consequently, acted inconsistently with its land use regulation. See ORS 197.835(3). That is a substantive error.** OAR 61-10-071(1)(c0 provides that **LUBA "*shall* reverse a land use decision" (emphasis supplied [by Court of Appeals]) if the decision "violates a provision of applicable law and is prohibited as a matter of law."** See ORS 197.835(1). The Board's violation of its ordinance required a reversal." (Emphasis supplied.) *Id.* at 507.

Since the error is substantive, no showing of prejudice is required and providing alternative non-code safeguards will not cure the error.

Simply put, failure to follow the code prescribed hearing procedures is substantive error and is grounds for reversal. LUBA follows the rule set forth in *Smith v. Douglas County*. For example, in *Anderson v. City of Shady Cove*, 33 Or LUBA 173, 178-179 (1997), LUBA held the city council erred when it attempted to avoid a code requirement limiting review to the record. In that

case, the council decided to treat as a legislative decision, a proceeding that started as a quasi-judicial rezone request. More importantly, relying on *Smith v. Douglas County*, LUBA held the error was substantive, not procedural, and reversed the city's decision.

Another example is *Walmart Stores, Inc. v. City of Medford*, 49 Or LUBA 52, 57-60 (2005). In this case, the city code limited the city council's review to determining whether there was substantial evidence in the record supporting the planning commission's findings. Walmart argued the city council exceeded its scope of review by instead re-examining issues of fact and making their own findings. LUBA agreed with Walmart, holding that the city exceeded the scope of review it created for itself when it adopted the code provision in question.

This issue is not going away. The question is whether the city will act consistently with its own code procedure in this first proceeding. If it does not, we are confident that LUBA would reverse. The Narvas respectfully submit it is a better use of public and private time and resources to use the correct procedure the first time through this matter.

Thank you, in advance, for your consideration of this letter and for your professional courtesies.

Very truly yours,

HUTCHINSON, COX, COONS
DuPRIEST, ORR & SHERLOCK, P.C.

Douglas M. DuPriest

DMD:hs

Encl: Cases cited above

cc: Clients

PAZC 05-015
ORD PA1238
Date 11-22-05
Exhibit No. 2520

Argued and submitted August 15, reversed and remanded with instructions; otherwise affirmed October 19, reconsideration denied December 9, 1988, petition for review allowed January 31, 1989 (307 Or 340)
See later issue Oregon Reports

SMITH,
Petitioner,
v.
DOUGLAS COUNTY,
Respondent,
and
WEDDLE et al,
Intervenors-Respondents below.
(88-016; CA A48949)
763 P2d 169

The County Board of Commissioners reversed decision of County Planning Commission which approved landowner's conditional use permit to allow existing rural residence to be used as church, and landowner appealed. The Land Use Board of Appeals remanded case to board for further consideration, and landowner sought review. The Court of Appeals, Deits, J., held that: (1) board violated ordinance and exceeded scope of review when considering issue not relied upon in notice of review filed by opponents of land use permit; (2) upon remand, board could not consider issue not relied upon by opponents in their notice of review; (3) on remand, board could consider assignments of error alleged in opponents' notice of review which were not addressed by board in its order denying permit; and (4) board was not required to grant conditional use permit to landowner where additional issues raised by opponents of permit had yet to be addressed by board.

Reversed and remanded with instructions in part; affirmed in part.

1. Zoning and planning—Permits, certificates and approvals—Proceedings to procure

County board of commissioners exceeded its scope of review of decision by planning commission approving conditional use permit and violated ordinance providing that review by board shall be *de novo* review of record, limited to grounds relied upon in notice of review if review is initiated by such notice, by considering issue not raised in notice of review.

2. Zoning and planning—Judicial review or relief—Scope of review

County board of commissioners' consideration of issue not raised in notice of review, which violated land use regulation stating that review, by board, of decision by planning commission shall be *de novo* review of record limited to grounds relied upon in notice of review, was substantive rather than procedural error, and thus required reversal as to issue incorrectly considered by board and did not allow consideration of that issue on remand.

3. Zoning and planning—Judicial review or relief—Determination

Landowner's request for conditional land use permit was still pending before county board of commissioners, upon reversal of board's denial of request on the basis of an issue not properly raised, as allegations of error which board did not previously address on appeal from planning commission remained pending, and thus Court of Appeals could remand for consideration of those issues, even though those issues were not appealed to court.

4. **Zoning and planning—Administration in general—Procedure**

County board of commissioners is not required to address all issues raised in appeal of land use decision.

5. **Zoning and planning—Judicial review or relief—Determination**

Failure of county board of commissioners to consider certain allegations of error raised on appeal from land use decision of planning commission was not a denial of those allegations, such that failure to raise the denials before the Land Use Board of Appeals would result in waiver of the issues on appeal, and thus the issues could be considered on remand to the county board following reversal on the issue on which it had ruled.

6. **Constitutional law—Due process of law—Zoning and planning—Judicial review or relief—Determination**

Expedited review provision in land use statutory scheme did not give landowner petitioning for land use permit any substantive protection against remand to county board of commissioners, and thus order of remand by Court of Appeals did not violate landowner's right to due process of law. US Const, Amend XIV.

7. **Zoning and planning—Permits, certificates and approvals—In general**

County board of commissioners was not required to grant landowner a conditional use permit, even though board erred as matter of law in denying request on basis of issue not relied upon in opponents' notice of review, where record did not establish that board was required to grant landowner a conditional use permit, in light of additional issues raised by opponents of permit, but not yet addressed by board. ORS 197.835(9).

CJS, Zoning and Land Planning § 214.

Judicial Review from Land Use Board of Appeals.

Allen L. Johnson, Eugene, argued the cause for petitioner. On the brief were Bill Kloos, and Johnson & Kloos, Eugene.

Paul Nolte, County Counsel, Roseburg, argued the cause and filed the brief for respondent Douglas County.

No appearance for other respondents.

Before Richardson, Presiding Judge, and Newman and Deits, Judges.

DEITS, J.

Reversed and remanded with instructions to reverse county's decision on compatibility issue; otherwise affirmed.

DEITS, J.

Petitioner seeks review of a LUBA decision remanding to the Douglas County Board of Commissioners (Board) their order denying petitioner a conditional use permit. Petitioner contends that LUBA should have reversed the decision and directed the Board to approve the permit. He also contends that LUBA erred in holding that, on remand, the Board could consider six other issues raised in the initial notice of review before the Board, but not decided in its denial of the permit. We reverse in part and affirm in part.

Petitioner seeks a conditional use permit to allow an existing rural residence to be used as a church. The Douglas County Planning Commission (Commission) voted to approve the conditional use permit.[1] That decision was appealed to the Board by nine neighbors. In their notice of review to the Board, they alleged seven errors. However, the Board considered only one of them, which involved the Commission's refusal to admit evidence concerning petitioner's personal, financial and religious background. The Board concluded that the Commission did not err.

In its review of the Commission's decision, the Board also considered an issue which was not assigned as error in the notice of review to the Board: whether the requested use was compatible with surrounding uses pursuant to the standards defined in the Douglas County Land Use and Development Ordinance (LUDO). The pertinent provision of LUDO states:

> "[T]he proposed use is or may be made compatible with existing adjacent permitted uses and other uses permitted in the underlying zone." § 3.39.050(1).

The Board concluded that petitioner had not met his burden of showing that the proposed use would be compatible with adjacent uses and other uses permitted in the underlying zone and reversed the Commission's decision approving the permit.

Petitioner appealed the Board's decision to LUBA. LUBA held that the Board's consideration of the compatibility issue violated LUDO § 2.700(2), which limits Board review to issues identified in the notice of review, and that its

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[1] An initial vote by the Commission resulted in a tie, and the permit was denied. That denial was appealed and, on remand from the Board, the permit was approved.

denial of the permit based on the compatibility issue was not supported by substantial evidence. LUBA also held, however, that the Board's error in addressing the compatibility issue was a procedural error, rather than a substantive error, and that, therefore, on remand, the Board could consider the compatibility issue if adequate notice were provided to the parties. Additionally, LUBA held that the Board could consider the other six allegations of error in the opponents' notice of review which the Board did not initially address.

Petitioner assigns as error LUBA's holding that the Board's violation of its scope of review pursuant to LUDO § 2.700(2) was a procedural, not a substantive error, and that, therefore, LUBA could consider the issue on remand. The pertinent provision of the county's ordinances provides:

> "Review by the Board shall be a *de novo* review of the record *limited to the grounds relied upon in the notice of review* * * * if the review is initiated by such notice." LUDO § 2.700(2). (Emphasis supplied.)[2]

1. The issue of compatibility was not raised by the opponents in their notice of review to the Board. Therefore, we conclude, as did LUBA, that the Board violated the ordinance and exceeded its scope of review in considering the compatibility issue. Although the Board, in enacting the ordinances, could have reserved to itself the authority to consider issues beyond those identified in a notice of review, it did not do so.[3]

2. We hold, however, that LUBA erred in concluding that the error was procedural rather than substantive. LUBA characterized the Board's action as a failure to follow adopted appeal procedures and, as such, held that it was a procedural error. The propriety of the Board's action, however, does not concern how the Board exercised its authority but, rather, whether the Board had authority to do what it did. In considering the compatibility issue, the Board exceeded its scope of authority as defined in its ordinance and, consequently, acted inconsistently with its land use regulation. *See* ORS 197.835(3). That is a substantive error. OAR 661-10-071(1)(c) provides that LUBA *"shall* reverse a land use decision" (emphasis supplied) if the decision "violates a provision of applicable law and is prohibited as a matter of law." *See* ORS 197.835(1). The Board's violation of its ordinance required a reversal. LUBA erred in holding that the Board can consider the compatibility issue on remand.

3. Petitioner next contends that LUBA erred in holding that the Board, on remand, can consider the assignments of error alleged in the opponent's notice of review which were not addressed by the Board in its order denying the permit. Petitioner argues that the Board's failure to act must be considered a denial of the allegations and that, because the denials were not raised by the opponents before LUBA, the right to appeal the issues was waived, and they cannot be considered on remand.[4] We disagree.

4-6. The Board expressly stated that it was addressing only one of the opponents' seven grounds of appeal.[5] Although, as petitioner suggests, there may be sound policy reasons for requiring a local governing body to address all the issues raised in an appeal of a land use decision, there is no authority that *requires* the Board to do so. In addition, there is no authority for the proposition that the Board's failure to consider allegations of error must be considered a denial of

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[2] This case does not involve an issue which the reviewing body has a duty to review and decide. *See 1000 Friends of Oregon v. Jackson Co.*, 79 Or App 93, 718 P2d 753, *rev den* 301 Or 445 (1986).

[3] The county ordinances do include a provision allowing the Board to initiate review on its own motion. LUDO § 2.500(2) provides, in pertinent part:

> "Review of the decision:
>
> "a. * * *
>
> "b. May be made by the Board, pursuant to section 2.700 [*sic*] on its own motion passed within 10 days of the filing of the written decision sought to be reviewed."

However, the Board did not initiate review in this case.

[4] Petitioner also contends that, because the Board's decision on the compatibility issue requires reversal and not remand, there is no mechanism for the additional issues to come before the Board again. Petitioner argues that, because the Board cannot consider the compatibility issue, and because the other issues were not appealed, there is no basis to remand the case from this court to the Board. Petitioner's contention is incorrect. The Board denied petitioner's permit based on compatibility. As discussed in the opinion, this denial was erroneous. Accordingly, petitioner's permit is still pending before the Board and the allegations of error it did not previously address remain pending.

[5] The Board's decision states:

> "In this appeal the appellants filed a single Notice of Review and stated [seven] grounds for the appeal. Only one ground is addressed in this order as it is dispositive of the matter before us."

those allegations. The opponents did not waive their right to appeal on the additional issues because the Board did not dispose of those issues and, therefore, there was nothing to appeal. LUBA did not err in holding that the additional assignments of error could be addressed on remand.[6]

7. Petitioner next contends that ORS 197.835(9) requires a reversal in this case and that LUBA erred in not so holding. ORS 197.835(9) provides, in part:

> "The board shall reverse a local government decision and order the local government to grant approval of an application for development denied by the local government if the board finds, based on the evidence in the record, that the local government decision is outside the range of discretion allowed the local government under its comprehensive plan and implementing ordinances."

ORS 197.835(9) is only applicable if the record establishes that, as a matter of law, an application must be approved. In this case, although the Board erred as a matter of law in its consideration of the compatibility issue, the record did not establish that the Board was required to grant petitioner the conditional use permit. As previously discussed, additional issues raised by the opponents of the permit have yet to be addressed by the Board.

Petitioner's request for attorney fees pursuant to ORS 197.835(9) is denied.

Reversed and remanded with instructions to reverse the county's decision on the compatibility issue; otherwise affirmed.

[6] Petitioner also contends that permitting the Board to consider the six issues on remand conflicts with the land use statutory scheme, which affords petitioner a substantive right to expedited review and, as such, violates petitioner's right to due process. We do not agree. Although the land use statutes include numerous procedures to expedite review of decisions, none of them gives petitioner any substantive protection against a remand of a decision.

Argued and submitted July 20, reversed and remanded for new trial October 19, 1988

STATE OF OREGON,
Respondent,
v.
ROGER MICHAEL CROOK,
Appellant.
(C86-08-33826; CA A47137)
762 P2d 1062

Defendant was convicted after trial on stipulated facts in the Circuit Court, Multnomah County, Stephen L. Gallagher, J., of burglary in the second degree, and defendant appealed, challenging denial of motion to suppress evidence. The Court of Appeals, Riggs, J. pro tempore, held that: (1) unknown whereabouts of defendant at time of search of defendant's automobile did not provide exigent circumstances justifying warrantless vehicle search; (2) even assuming existence of ordinance prohibiting car from being parked with keys still in it, apparent violation of ordinance by defendant was not exigent circumstance sufficient to justify warrantless search of automobile; (3) in absence of evidence that officer believed automobile to be abandoned, fact that vehicle was unattended did not justify warrantless search of vehicle; (4) suppression of evidence of presence of stolen property in defendant's vehicle was not warranted; and (5) photograph of defendant derived from evidence found in defendant's automobile, as well as testimony about identification made in subsequent photo "throwdown" was subject to suppression.

Reversed and remanded for new trial.

1. Searches and seizures—In general—Motor vehicles

Unknown whereabouts of defendant at time of search of defendant's automobile did not provide exigent circumstances justifying warrantless vehicle search, where officer who conducted search did not participate in manhunt and was free to remain with car to maintain its security while warrant was obtained. US Const, Amend IV.

2. Searches and seizures—In general—Motor vehicles

Even assuming existence of ordinance prohibiting car from being parked with keys still in it, apparent violation of ordinance by defendant was not exigent circumstance sufficient to justify warrantless search of automobile. US Const, Amend IV.

3. Searches and seizures—In general—Motor vehicles

In absence of evidence that officer believed automobile to be abandoned, fact that vehicle was unattended did not justify warrantless search of vehicle on grounds of abandonment. US Const, Amend IV.

4. Criminal law—Evidence—Materiality and competency in general

Suppression of evidence of presence of stolen property in defendant's vehicle was not warranted, even though improper warrantless search of vehicle had been conducted, where stolen property in automobile was in plain view and its discovery not product of illegal search. US Const, Amend IV.

5. Criminal law—Evidence—Materiality and competency in general

Photograph of defendant derived from evidence found in defendant's automobile, as well as testimony about identification made in subsequent photo "throwdown" was subject to suppression, where evidence found in car was discovered in process of illegal warrantless search. US Const, Amend IV.

CJS, Searches and Seizures § 66.

ELIZABETH ANDERSON,
Petitioner,

vs.

CITY OF SHADY COVE,
Respondent,

and

JAMES C. SHIELDS,
Intervenor-Respondent.

LUBA No. 96-183

Appeal from City of Shady Cove.

Elizabeth Anderson, Shady Cove, filed the petition for review and argued on her own behalf.

No appearance by respondent.

James C. Shields, Shady Cove, filed the response brief and argued on his own behalf.

GUSTAFSON, Referee; HANNA, Chief Referee, participated in the decision.

REVERSED 04/23/97

1. **Local Government Procedures - Compliance with Local Ordinances/Regs - Deviations From.**

   Local Government Procedures - Compliance with Local Ordinances/Regs - Appeal Requirements.

   Local Government Procedures - Legislative/Quasi-judicial Distinction.

A city council may not convert an on-the-record quasi-judicial appeal of a planning commission decision into a *de novo* legislative hearing where the city code: (1) provides that legislative proceedings may only be commenced by the planning commission or city council, and the subject proceeding was initiated by an individual; (2) includes no provisions for converting a quasi-judicial appeal proceeding into a legislative proceeding; and (3) requires that appeals of planning commission quasi-judicial decisions be heard on the record.

2. **LUBA Scope of Review - Grounds for Reversal/Remand - Procedural Errors.**

LUBA Scope of Review - Grounds for Reversal/Remand - Noncompliance with Applicable Law.

A city's error in converting an appeal of a quasi-judicial decision into a *de novo* legislative proceeding is substantive rather than procedural, and its decision is prohibited as a matter of law.

Opinion by Gustafson.

NATURE OF THE DECISION

Petitioner appeals the city's adoption of a zone change.

MOTION TO INTERVENE

James Shields, the applicants' agent below, moves to intervene on the side of respondent. There is no opposition to the motion, and it is allowed.[1]

FACTS

The applicants before the city filed an application to change the zoning designation of two contiguous parcels totaling approximately 7 acres, from R-1-20 to R-1-10. The applicants propose to develop the subject property, along with an adjacent parcel, with a residential planned unit development. No development application has yet been submitted to the city for approval.

After conducting public hearings on the zone change request, the city planning commission denied the application, issuing a "final order of denial." The applicants appealed that denial to the city council, which set the matter for an appeal hearing. Notice of the appeal hearing was provided to surrounding property owners. Because the planning commission had conducted a public hearing on the application, the city's code required that the appeal hearing be based on the record established during the planning commission hearing. However, at the commencement of the appeal hearing, the city council voted to treat its hearing as a "legislative" proceeding to amend the zoning on the subject property. Accordingly, the city council treated

[1] In this appeal, intervenor represents only himself, and not the local applicants.

the planning commission's decision as a "recommendation" to the city council rather than a final decision, and the hearing was held *de novo*. At that hearing, the city council then accepted new evidence from the applicant in support of the zone change. Following the hearing, the record was left open for seven days for additional new evidence, and an additional seven days for the applicant to respond to any additional new evidence. On the last day of the first seven-day period, the applicant submitted new evidence, to which opponents were precluded from responding.

On the date of the city council hearing to render a decision on the application, the mayor pro-tem visited the subject property with the applicants. At the hearing, after an opponent raised the issue of the site visit, the mayor pro-tem acknowledged the visit and stated that the purpose was "to properly understand the site in question, and to make an informed vote." Record 23. No opportunity was provided for hearing participants to question the mayor pro-tem on the scope or substance of the site visit. At that hearing, the city council approved the application.

Petitioner appeals that approval.

FIRST ASSIGNMENT OF ERROR

Petitioner asserts the city council erred by treating the application that led to the challenged decision as legislative, and by converting the proceeding that led to the decision from an appeal of the planning commission's final order of denial on a quasi-judicial application to a review of a planning commission recommendation in a legislative proceeding. Intervenor responds, essentially, that because the planning commission recognized that the proposed development would have an impact beyond the boundaries of the subject property, it should have processed the application as a legislative proceeding, and that, therefore, the city committed no error in recognizing the application as "legislative" rather than "quasi-judicial." Intervenor further argues that the city council's process provided all the procedural protections of ORS 197.763, so any error in treating the application as legislative rather than quasi-judicial was harmless.

The city's development code, Ordinance 111-1, provides, in relevant part:

"26.2 Initiation of Action

"A. A 'legislative' amendment to the text of the comprehensive Plan or a land use regulation *may be initiated by the City Council or the Planning Commission.*

"B. A 'quasi-judicial' amendment to the Comprehensive Plan Map or Zoning Map, as it affects a specific property or area, may be *initiated by the Planning Commission, City Council, or by a property owner or his authorized agent.*

" * * * * *

"26.4 Major or Legislative Amendments

"A. Major or legislative amendments are those which may have widespread and/or significant impact on the neighborhood or community beyond the limits of the specific property. A major amendment may also involve a qualitative change of land use or a special change affecting a large area or a number of properties.

"B. Major or legislative amendments require at least one public hearing before the Planning Commission. If approved by the Commission, the City Council will also conduct at least one hearing prior to making the final decision.

"26.5 Minor Amendments

"A. Minor or quasi-judicial amendments to the Comprehensive Plan or Zoning Map are those which involve one parcel or a small group of parcels and which will not have any significant impact on other lands.

"B. Minor amendments require at least one public hearing before the Planning Commission. If approved by the Commission, the City Council will also conduct at least one hearing prior to making the final decision. *If denied by the Planning Commission, the applicant may appeal that decision to the City Council in accordance with the City's appeal procedures.*

" * * * * *

"27.3 Action on the Appeal

" * * * * *

"B. In accepting public testimony at the public hearing, the City Council shall allow all parties to speak and present their arguments, may permit others to speak, at the discretion of the chairperson, and shall also review the record of the previous decision.

"C. If there is significant new information that was not available at the time of the appealed decision, or if there are special circumstances or unusual characteristics of the property involved, then the City Council may determine that the original decision was correct, but that the matter should be remanded to staff or another body to reconsider the request and new information.

" * * * * *

"F. *When the original decision followed a public hearing, the appeal of that decision shall be heard and considered only on the record of that decision and testimony and arguments shall be confined to that record.* If the decision being appealed did not involve a public hearing, the record shall consist of the application materials, the record of the decision, supporting documentation from both staff and the applicant prior to the decision, and the appellant's appeal statements." (Emphasis supplied.)

1 The threshold question in this case is whether the city council could, on its own initiative, decide that the planning commission should have treated the application as legislative, and thereby convert an on-the-record hearing on a quasi-judicial appeal into a *de novo* hearing on a planning commission legislative recommendation. The answer is, unequivocally, no. At the very least, the procedures used by the city council in considering the applicant's appeal violated the city's code requirements in numerous respects. For example, the city's code clearly provides that a legislative proceeding can be commenced only by the planning commission or the city council. Intervenor could not file an application to initiate a legislative proceeding, and in fact did not attempt to do so in this case.[2] In addition, the code does not provide for "converting" an appeal on a planning commission final order on a quasi-judicial application into a legislative

[2] Whether the proceeding that led to the challenged decision should have been characterized by the planning commission as legislative, and thus, whether the planning commission erred in accepting the application from the applicants is not relevant to this proceeding, and we do not decide that question.

proceeding. Finally, the city's code requires that appeals of planning commission final decisions where a public hearing has been held must be heard on the record. The code does not allow for a *de novo* review of such proceedings, as was done in this case.

The real question in this appeal is not whether the city violated its code, but rather the consequences of those violations. That answer turns on whether the city's errors are procedural or substantive. The Court of Appeals discussed the distinction between procedural and substantive errors in *Smith v. Douglas County*, 93 Or App 503, 763 P2d 169 (1988), *aff'd* 308 Or 191, 777 P2d 1377 (1989), where the county had violated its procedural requirements for conduct of an appeal hearing by considering issues not raised in the opponents' notice of appeal. The court stated:

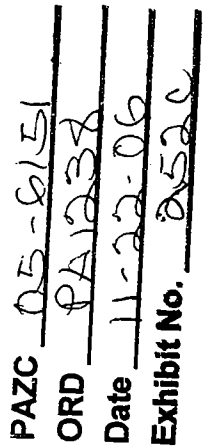
> "Petitioner assigns as error LUBA's holding that the Board's [of Commissioners] violation of its scope of review pursuant to [Land Use and Development Ordinance] LUDO §2.700(2) was a procedural, not a substantive error, and that, therefore, [the Board] could consider the issue on remand. The pertinent provision of the county's ordinances provides:
>
> > " 'Review by the Board shall be a *de novo* review of the record limited to the grounds relied upon in the notice of review * * * if the review is initiated by such notice.' LUDO §2.700(2).
>
> "The issue of compatibility was not raised by the opponents in their notice of review to the Board. Therefore, we conclude, as did LUBA, that the Board violated the ordinance and exceeded its scope of review in considering the compatibility issue. Although the Board, in enacting the ordinances, could have reserved to itself the authority to consider issues beyond those identified in a notice of review, it did not do so.
>
> "We hold, however, that LUBA erred in concluding that the error was procedural rather than substantive. LUBA characterized the Board's action as a failure to follow adopted appeal procedures and, as such, held that it was a procedural error. The propriety of the Board's action, however, does not concern how the Board exercised its authority but, rather whether the Board had authority to do what it did. In considering the compatibility issue, the Board exceeded its scope of authority as defined in its ordinance and, consequently, acted inconsistently with its land use regulations. *See* ORS 197.835(3). That is a substantive error. OAR 661-10-071(1)(c) provides that LUBA 'shall reverse a land use decision if the decision 'violates a provision of the applicable law and is prohibited as a matter of law.' *See* ORS 197.835(1). The Board's violation of its ordinance required a reversal. LUBA erred in holding that the Board can consider the compatibility issue on remand." *Id.* at 506-07. (Emphasis in original omitted.)

2 As was the case in *Smith v. Douglas County*, in this case the city's error was substantive. The city council exceeded its authority when it converted a quasi-judicial appeal into a legislative proceeding and approved a legislative zone change based on that quasi-judicial appeal. The city's decision is prohibited as a matter of law. Therefore, the city's decision must be reversed.

The first assignment of error is sustained.

Because the city's decision must be reversed based on the city council's lack of authority to process the application as it did, we do not reach petitioner's additional assignments of error that challenge the city's compliance with provisions of ORS 197.763 and the merits of the city's decision.

The city's decision is reversed.



WAL-MART STORES, INC.,
Petitioner,

vs.

CITY OF MEDFORD,
Respondent,

and

WILLIAM A. MANSFIELD
and WENDY SIPOREN,
Intervenors-Respondent.

LUBA No. 2004-095

SOUTH GATEWAY PARTNERS,
Petitioner,

vs.

CITY OF MEDFORD,
Respondent,

and

WAL-MART STORES, INC.,
Intervenor-Respondent.

LUBA No. 2004-096

Appeal from City of Medford.

E. Michael Connors, Portland, filed a petition for review and argued on behalf of petitioner Wal-Mart Stores, Inc. With him on the brief were Gregory S. Hathaway and Davis Wright Tremaine, LLP.

Dana L. Krawczuk, Portland, filed a petition for review and argued on behalf of petitioner South Gateway Partners. With her on the brief was Ball Janik, LLP.

Ronald L. Doyle, City Attorney, Medford, filed a response brief and argued on behalf of respondent. With him on the brief was Lori J. Cooper.

William A. Mansfield, Medford, and Wendy Siporen, Talent, represented themselves.

E. Michael Connors, Portland, filed a response brief and argued on behalf of intervenor-respondent Wal-Mart Stores, Inc. With him on the brief were Gregory S. Hathaway and Davis Wright Tremaine, LLP.

DAVIES, Board Member; HOLSTUN, Board Chair; participated in the decision.

REMANDED 03/11/2005

1. **25.4.5 Local Government Procedures – Compliance with Local Ordinances/Regs – Deviations From.**

Where a local code provision limits a city council's scope of review on appeal from a planning commission to "determining whether there is substantial evidence to support the findings" and whether "errors of law were committed," the city council violates its limited scope of review where it makes its own findings of fact and determines on its own that the applicant failed to establish compliance with the applicable criteria.

2. **1.4.4 Administrative Law – Adequacy of Findings – Explanation of Rationale.**

30.4 Zoning Ordinances – Interpretation.

A challenge to the adequacy of findings will be sustained where the decision maker fails to explain why a code provision that prohibits development unless a developer makes transportation improvements necessary to maintain a particular level of service applies only at the time of a zone change and not to a site plan and architectural review application.

3. **1.4.4 Administrative Law – Adequacy of Findings – Explanation of Rationale.**

A conclusory finding that a traffic study is sufficient to determine access requirements is inadequate where the finding fails to set out the applicable criteria or explain what those access requirements are.

4. 1.4.6 **Administrative Law - Adequacy of Findings - Issues Addressed.**

16. **Goal 12 - Transporation/ Goal 12 Rule.**

Where a petitioner argues at the local level that the Transportation Planning Rule (TPR) applies to the challenged decision because a condition of approval of a previous zone change arguably requires application of the TPR, the decision maker is required to at least address the issue in its decision and explain why the TPR does not apply.

Opinion by Davies.

NATURE OF THE DECISION

Petitioners appeal a city decision denying petitioner Wal-Mart Stores, Inc.'s (Wal-Mart's) application for site plan and architectural review approval for a retail/grocery store.

MOTION TO INTERVENE

William A. Mansfield and Wendy Siporen move to intervene on the side of the city in LUBA No. 2004-095. Wal-Mart moves to intervene on the side of the city in LUBA No. 2004-096. There is no opposition to these motions, and they are granted.

SGP'S MOTION TO TAKE OFFICIAL NOTICE AND WAL-MART'S MOTION TO STRIKE

Wal-Mart moves to strike documents included in South Gateway Partners' (SGP) petition for review.[1] SGP initially sought to include these documents as part of the record through an objection to the record. That objection sought to supplement the record with a 1991 ordinance adopting a zone change and minutes and a resolution or ordinance "memorializing a December 21, 1995 city council hearing in which the city council accepted SGP's traffic study and 'allowed development of 600,000 square feet.'" 47 Or LUBA 650, 654 (2004). In addressing SGP's request, in its record objection, that we take official notice of

[1] Those documents are a 1991 staff report for a zone change request, a final decision on a zone change dated February 7, 1997, and minutes of a December 21, 1995 city council meeting. SGP Petition for Review App B6, B7 and B8.

those documents, we noted that even if we were to take official notice of them, they would not thereby become part of the local record. Accordingly, we denied SGP's request to include those documents in the record. SGP now requests that we take official notice of documents related to those previous zone changes.[2]

Appendices B6, B7 and B8 do not constitute judicially cognizable law under OEC 202.[3] Although the 1991 staff report, which the Medford Planning Commission apparently adopted as its final decision, includes a cover letter that references Resolution #91-5, that resolution is not attached. Furthermore, it appears that SGP requests that we take official notice of those prior decisions so that we can consider adjudicative facts. We noted in our September 21, 2004 order that we may not take official notice of adjudicative facts. *Id.* at slip op 6 n 5 (citing *Ramsey v. City of Portland*, 23 Or LUBA 291, 294 (1992)).

For the foregoing reasons, we deny SGP's request that we take official notice of those documents, and we grant Wal-Mart's motion to strike.[4]

FACTS

On July 28, 2003, Wal-Mart filed an application for site plan and architectural review approval for a 206,533 square foot retail store on 20.51 acres. The portion of the subject property on

[2] Although SGP does not specifically request that we take official notice of the city council minutes, we assume that SGP makes that request for all three documents.

[3] OEC 202 provides:

"Law judicially noticed is defined as:

"* * * * *

"(7) An ordinance, comprehensive plan or enactment of any county or incorporated city in this state, or a right derived therefrom. As used in this subsection, 'comprehensive plan' has the meaning given that term by ORS 197.015."

[4] As discussed later in this opinion, those adjudicative facts were summarized in the local notice of appeal filed by SGP's attorney, Record 87-94, so our resolution of these motions is likely inconsequential.

which the store is proposed is zoned Regional Commercial (C-R). The proposed use is permitted outright in the C-R zone, subject to site plan and architectural review.

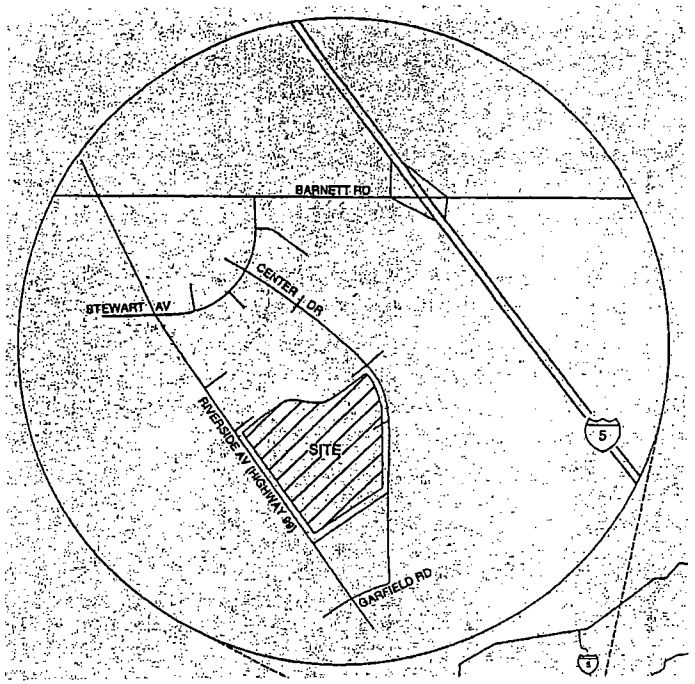
The subject property, commonly referred to as Miles Field, is located between Highway 99 on the west and Center Drive on the east. *See* diagram on following page. Center Drive, Stewart Avenue, Barnett Road, and Garfield Road/Belknap Road are classified as major arterials.[5] Interstate 5 runs generally north/south some distance to the east of the subject property, and intersects with Barnett Road northeast of the property. Over the next several years, an approved project will extend Garfield Road to the east and replace the interchange at Barnett Road with an interchange at the intersection of I-5 and Garfield/Belknap, which will be closer to the subject property than the existing Barnett Road/I-5 interchange.

At hearings before the Site Plan and Architectural Commission (commission), Wal-Mart presented a traffic impact analysis (TIA) that addressed the proposed store's impact on some but not all of the nearby intersections.[6] Despite SGP's arguments that Wal-Mart's TIA must analyze other intersections that would be impacted, the commission conditionally approved Wal-Mart's application. SGP, among others, appealed the commission's decision to the city council. The city council found that the TIA was adequate, but denied the application, concluding the proposal was incompatible with uses and development on adjacent land.

These appeals followed.

[5] The arterial identified as Garfield Road on the diagram is also referred to as Belknap Road.

[6] Specifically, the TIA analyzed the following intersections: Stewart Avenue/ Highway 99 (Riverside Avenue); Garfield Road/ Highway 99; Stewart Avenue/Center Drive. The TIA also analyzed the impacts on existing and proposed access points. Record 1115. The TIA did not take into account the impacts on the existing I-5 interchange or the possible effects of the proposed relocation of the I-5 interchange.



WAL-MART'S FIRST ASSIGNMENT OF ERROR

Wal-Mart argues that the city council exceeded its scope of review on appeal of the commission's decision. Medford Code (MC) 10.053, which limits the city council's scope of review on appeal of a decision of the commission, provides in relevant part:

> "Upon review, the City Council shall not re-examine issues of fact and shall limit its review to determining whether there is substantial evidence to support the findings of the tribunal which heard the matter, or to determining if errors of law were committed by such tribunal."

Wal-Mart argues that the city council did not limit its review to determining whether the findings of the commission were supported by substantial evidence or whether the commission committed legal error, as required by MC 10.053. Rather, it re-examined the issues of fact, made findings of fact that are inconsistent with those of the commission, and on the basis of

those findings, denied Wal-Mart's application. Wal-Mart compares the city council's scope of review in this case to LUBA's scope of review under ORS 197.835(9)(a).[7] The city claims that the commission's order contained few factual findings addressing the applicable criteria of MC 10.290, and that the city council denied the application because those findings were not supported by substantial evidence.[8]

1. We agree with Wal-Mart that the city council exceeded its scope of review. Although the city council concluded that "there is not substantial evidence in the record to support the [commission's] decision and that errors of law occurred" in the commission's decision approving the subject application, the city's attorney at oral argument conceded that this is boilerplate language. In any event, the remainder of the challenged decision

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[7] ORS 197.835(9) provides, in relevant part:

"[LUBA] shall reverse or remand the land use decision under review if [LUBA] finds:

"(a) The local government or special district:

"(A) Exceeded its jurisdiction;

"(B) Failed to follow the procedures applicable to the matter before it in a manner that prejudiced the substantial rights of the petitioner;

"(C) Made a decision not supported by substantial evidence in the whole record;

"(D) Improperly construed the applicable law; or

"(E) Made an unconstitutional decision[.]"

[8] MC 10.290 provides:

"The Site Plan and Architectural Commission shall approve a site plan and architectural review application if it can find that the proposed development conforms, or can be made to conform through the imposition of conditions, with the following criteria:

"(1) The proposed development complies with the applicable provisions of all city ordinances.

"(2) The proposed development is compatible with uses and development that exist on adjacent land."

supports Wal-Mart's argument that the city council exceeded its scope of review. The challenged decision states that the city council's determination is "based upon the findings of fact and conclusions of law which are attached as Exhibit A * * *." Record 17. Exhibit A contains the findings of fact of the city council.[9]

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[9] The challenged decision contains ten findings of fact. The findings relevant to Wal-Mart's first assignment of error provide:

"3. In accordance with Medford Land Development Code Section 10.227, the City determines the adequacy of public facilities for a property at the time of a zone change for that particular property, not at the time of site plan application.

"4. At the time of Site Plan and Architectural Commission review of a proposed project, the Public Works Department may request a Traffic Impact Analysis (TIA) to determine access requirements of a development.

"5. A TIA was conducted by the applicant and the City finds that the traffic study is adequate to determine access requirements of the proposed development.

"6. The building proposed is a single-story structure. The building is rectangular in shape, measuring approximately 530 by 350 feet. The building lacks architectural features to lessen the building's bulk. Other adjacent buildings have a higher degree of architectural features.

"7. The building's entrance faces Center Drive. The back of the building faces South Pacific Highway. South Pacific Highway is one of the major vehicular gateways to the City of Medford.

"8. There is proposed a 920-foot long screen wall along the South Pacific Highway frontage. The purpose of the wall was to screen the building and the outdoor storage containers from the public right-of-way. The effect of the wall and rear orientation forecloses any aesthetically pleasing highway frontage. No other buildings in the adjacent area have a wall, which screens the building and associated facilities.

"9. The largest single-story building adjacent to the proposed building is the Fred Meyer store consisting of 158,500 square feet, which is 31 percent smaller than the proposed building.

"10. Other buildings adjacent to the proposed building are:

"Rogue Federal Credit Union building—two stories at 30,770 square feet.

Those findings make no reference to the commission's findings, however, nor do they explain why the city council concluded the commission's findings are unsupported by substantial evidence. It appears that the city council reviewed the evidence and record of the commission and found its own facts on which it based its denial.

Finally, the challenged decision concludes:

> "Based upon the preceding Findings of Fact, the city concludes that the applicant has failed to establish by substantial evidence that the proposed development is compatible with uses and development that exist on adjacent land." Record 19.

The foregoing makes clear that the city council made its own findings of fact and determined that the applicant failed to establish compliance with the applicable criteria. However, the city code requires the commission, not the city council, to determine whether the applicant satisfied its burden of demonstrating compliance with the applicable criteria. The city council's scope of review, pursuant to MC 10.053, is limited to (1) determining whether the commission's findings regarding the applicant's success or failure in carrying its burden are supported by substantial evidence and (2) whether the commission committed any errors of law. The city council did not merely review the commission's findings to determine whether they were supported by substantial evidence, but rather, based on its own adopted findings, concluded that the applicant had not carried its burden of demonstrating compliance with the applicable criteria. Accordingly, it exceeded its limited scope of review under MC 10.053.

"The Armory building—single story with mezzanine at approximately 40,000 square feet.

"Harry and David building has a two-story component.

"The Comfort Inn is a four-story building." Record 18-19.

Wal-Mart's first assignment of error is sustained.[10]

SGP'S FIRST ASSIGNMENT OF ERROR

Although the city council denied the application based on other considerations, as discussed earlier in this opinion, it adopted findings concluding that the TIA submitted by Wal-Mart was adequate to determine access requirements. *See* n 9, Findings 3-5. SGP challenges those findings and asserts that if we remand the decision based on Wal-Mart's assignments of error, we should also review the city's traffic findings and remand the city council's decision for the additional reason that the city erred in failing to require a more comprehensive TIA.

The city required Wal-Mart to complete a limited TIA that addressed access to the site and some of the adjacent intersections. However, it did not require a comprehensive traffic analysis studying the impacts of the proposed development on all of the intersections that could be impacted, as SGP contends it must. Specifically, SGP argues that MC 10.290, which provides the applicable review criteria for the subject application, requires that the application comply with "the applicable provisions of all city ordinances." *See* n 8. SGP argues that both MC 10.462 and MC 10.291 are applicable provisions that the city was required to consider in determining compliance with the applicable criteria.

MC 10.462 prohibits development unless the developer makes roadway and other improvements necessary to maintain a level of service (LOS) of D or better for arterials and collectors.[11] SGP argues that MC 10.461(2) spells out the level of detail required of a TIA and provides guidance regarding which arterials and collectors must be included in determining

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[10] Because we sustain Wal-Mart's first assignment of error, and the city council will be required to adopt a new decision on remand applying the correct scope of review, we do not address its remaining assignments of error.

[11] MC 10.462 provides:

> "Whenever level of service is determined to be below level D for arterials and collectors, development is not permitted unless the developer makes the roadway or other improvements necessary to maintain level D service respectively."

compliance with MC 10.462.[12] MC 10.461(2) requires that the study area for a TIA include at least the following: all proposed access points, intersections directly adjacent to the property and any intersections that will be substantially impacted by the development; *i.e.*, intersections where proposed development can be expected to contribute 25 or more trips during the analysis peak period. The TIA prepared by Wal-Mart's experts is limited to an analysis of accessibility, LOS and volume to capacity (v/c) ratios for the proposed development's access points and only three other intersections. SGP alleges that Wal-Mart cannot demonstrate compliance with MC 10.462 with the limited scope of its TIA.

The city found that the adequacy of public facilities is determined at the time of zone change, not at the time of a site plan application. *See* n 9, Finding 3. SGP asserts that this finding is an implicit interpretation that MC 10.462 does not apply to the decision challenged in this appeal, and that that implicit interpretation is inconsistent with the express language and context of the regulation and the purpose and policy of the regulation, which is to insure that land use designations and development do not cause the minimum LOS to be exceeded. Medford Comprehensive Plan, Transportation Goal 2, Policy 3.

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[12] MC 10.461(2) provides:

"The [TIA] study area shall be defined by the Public Works Department in the scoping letter and shall address at least the following areas:

"(a) All proposed site access points;

"(b) Any intersection where the proposed development can be expected to contribute 25 or more trips during the analysis peak period. Impacts of less than 25 peak period trips are not substantial and will not be included in the study area. This volume may be adjusted, at the discretion of the Public Works Department, for safety or unusual situations; and

"(c) Any intersections directly adjacent to the subject property.

"The Public Works Department may, at its discretion, waive the study of certain intersections when it is concluded that the impacts are not substantial."

The city and Wal-Mart argue that a comprehensive TIA is not required for site plan and architectural review.[13] According to the city, MC 10.462 is not made applicable to the challenged decision through MC 10.290(1), which requires that development comply with "*applicable* provisions of all city ordinances." (Emphasis added). MC 10.462, the city argues, does not *apply* here; it applies only at the time of a zone change. This interpretation, it asserts, is supported by MC 10.227, which requires that zone changes demonstrate that adequate transportation facilities are adequate to "serve permitted uses allowed under the proposed zoning."[14] Further, MC 10.285, which applies specifically to site plan and architectural review, requires only a limited traffic analysis.[15]

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[13] Wal-Mart filed a response brief defending the city's decision regarding the assignments of error raised by SBG. The city's response brief to SGP's petition for review incorporates Wal-Mart's response as its own.

[14] MC 10.227, entitled "Zone Change Criteria" provides, in relevant part:

"The approving authority (Planning Commission) shall approve a quasi-judicial zone change if it finds that the zone change complies with subsections (1) and (2) below:

"(1) The proposed zone is consistent with the Oregon Transportation Planning Rule (OAR 660) and the General Land Use Plan Map designation. * * *

"* * * * *

"(2) It shall be demonstrated that Category A urban services and facilities are available or can and will be provided, as described below, to adequately serve the subject property with the permitted uses allowed under the proposed zoning * * *"

[15] MC 10.285 provides, in relevant part:

"* * * Site Plan and Architectural Review considers consistency in the aesthetic design, site planning and general placement of related facilities such as street improvements, off-street parking, loading and unloading areas, points of ingress and egress as related to bordering traffic flow patterns, the design, placement and arrangement of buildings as well as any other subjects included in the code which are essential to the best utilization of land in order to preserve the public safety and general welfare, and which will encourage development and use of lands in harmony with the character of the neighborhood within which the development is proposed."

2. The city's and Wal-Mart's explanation in their briefs and at oral argument for why MC 10.290(1) should not be interpreted to make MC 10.462 apply to the disputed application may be supported by the MC provisions they cite. However, that interpretation is not found in the challenged decision. Although the findings state that the adequacy of public facilities is determined only at the time of a zone change, the findings fail to explain why MC 10.462 applies only when the zoning is changed and not also at the time an application for site plan and architectural review approval is submitted. Accordingly, SGP's challenge to the adequacy of the city's findings is sustained. On remand, the city must address MC 10.462 and either apply that provision to the disputed application or explain why it does not apply.[16]

SGP's first assignment of error is sustained.

SGP'S SECOND ASSIGNMENT OF ERROR

In its second assignment of error, SGP argues that MC 10.291, which authorizes the commission to impose conditions to "protect the health, safety and general welfare," requires a more comprehensive TIA.[17] In order to ensure the protection of health, safety and welfare, it argues, a more comprehensive TIA than the one that was provided by Wal-Mart is required. Wal-Mart argues that this argument is completely dependent on the previous argument; *i.e.*, the city did not have the evidence it needed to impose conditions to protect the health, safety and general welfare because the TIA did not adequately address the traffic impacts of Wal-Mart's proposed development. If a more comprehensive TIA is not required under MC 10.462, then SGP's second assignment of error, which turns on the adequacy of the TIA, must also fail.

We are not sure that we agree with Wal-Mart that SGP's argument based on MC 10.291 under the second assignment necessarily is entirely dependent on the arguments presented under the first assignment of error. However, it is difficult to see how a provision that grants the commission the *option* to impose conditions that it believes are "reasonably necessary" to comply with other requirements could itself impose a requirement that the city demand a detailed TIA. Whatever the case, given our disposition of SGP's first assignment of error, the city will be required on remand to consider whether it is obligated under MC 10.290(1) to consider traffic impacts under 10.462 and require the TIA described in MC 10.461. If the city interprets the MC not to impose that requirement, it can then consider whether MC 10.291 independently imposes such a requirement. Accordingly, we do not reach SGP's second assignment of error.

SGP'S THIRD ASSIGNMENT OF ERROR

SGP's third assignment of error alleges that the city's findings are inadequate and unsupported by substantial evidence because they fail to identify the access requirements of the proposed development and fail to explain how those access requirements have been satisfied. The challenged decision provides simply that "[a] TIA was conducted * * * and * * * the traffic study is adequate to determine access requirements of the proposed development." *See* n 9, Finding 5. Wal-Mart notes that, in essence, this assignment of error incorporates the same arguments presented in SGP's first and second assignments of error.

[16] Given the city council's scope of review on remand, that interpretation will be made in the city council's analysis of whether the commission's transportation findings are supported by substantial evidence or whether the commission made legal errors in concluding as it did regarding those transportation issues.

[17] MC 10.291 provides in relevant part:

> "In approving a site plan and architectural review application, the Site Plan and Architectural Commission may impose, in addition to those standards expressly specified in this code, conditions determined to be reasonably necessary to ensure compliance with the standards of the code and the criteria in Section 10.290, and to otherwise protect the health, safety and general welfare of the surrounding area and community as a whole. These conditions may include, but are not limited to the following:
>
> "* * * * *
>
> "(2) Requiring the installation of appropriate public facilities and services and dedication of land to accommodate public facilities when needed[.]"

3. We read SGP's third assignment of error to allege different deficiencies in the findings than those alleged in its first two assignments of error. While we concede that the requirements for findings may be somewhat different where the scope of review is limited in the manner the city council's review is limited in this case, the city council must still, at a minimum, set out the applicable criteria and explain why the commission's determination is legally correct or supported by substantial evidence. The city council adopts a conclusory finding that the traffic study is adequate to determine access requirements. That finding is inadequate to explain what those access requirements are and how the commission's decision on this issue is supported by substantial evidence.

SGP's third assignment of error is sustained.

SGP'S FOURTH ASSIGNMENT OF ERROR

SGP argues that the challenged findings are inadequate because they fail to address issues raised below that Wal-Mart was required to complete a more comprehensive TIA in order to comply with unfulfilled conditions of approval from a previous zone change. A brief summary of the previous land use history is necessary to a complete understanding of this assignment of error.[18]

4. In 1991, the city planning commission approved a zone change to C-C (Community Commercial) for the subject property. In 1997, the city council approved a zone change from C-C to C-R (Regional Commercial). A condition of the 1991 zone change required:

> "1. A comprehensive traffic study of the site and the surrounding area shall be completed by a professional traffic engineer and reviewed and approved by ODOT and the City of Medford prior to the first application for Site Plan and Architectural Commission review.

[18] Although earlier in this opinion we denied SGP's attempts to include certain documents in its brief, the history of those previous land use actions is adequately preserved in the record through written submittals by SGP's attorney. Record 87-94.

> "All street improvements, identified by the City of Medford as necessary to support development of each phase of the site, shall be completed or guaranteed prior to issuance of any building permits for the respective phase." Record 88.

SGP conducted a traffic study that analyzed the traffic impacts generated from its own commercial development. In 1995, SGP prepared a supplemental traffic study, which the city council approved. Record 88. The property that is now the subject of this appeal was not included in that supplemental traffic study prepared by SGP. SGP argued below that the 1991 conditions of approval continue to apply because the 1997 zone change relied upon the 1991 zone change to address the Transportation Planning Rule and Goal 12 and that the traffic impacts for Wal-Mart's proposed development have yet to be studied. SGP now asserts that the challenged findings do not address the continuing applicability of the 1991 conditions of approval or the applicability of the TPR. The challenged findings are silent on this subject, and we agree with SGP that the findings must address this issue, which SGP raised at the local level.

SGP's fourth assignment of error is sustained.

The city's decision is remanded.

YEITER Kurt M

From: ROSE Lynda L
Sent: Thursday, November 09, 2006 10:15 AM
To: YEITER Kurt M
Subject: FW: Delta Sand & Gravel Zone Change Request

PAZC _____
ORD PA 1238
Date 11-21-06
Exhibit No. 253

Messages to and from this email address may be available to the public under Oregon Public Records Law.

From: Stokes3598 [mailto:sheilam39@comcast.net]
Sent: Thursday, November 09, 2006 8:46 AM
To: mayorandcc@eugene.or.us; lcboccom@lane.or.us; RGLetters@guardnet.com
Subject: Delta Sand & Gravel Zone Change Request

Delta Sand and Gravel and Lee and Alan Babb are contributing, conscientious citizens of our community. They run a business enterprise that is essential to the reasonable growth needs of our community and they are good managers of the resources they own and operate. In addition, they are good employers who provide excellent wages and benefits to their employees. Like any business, Delta needs the resources to continue to stay in business and the zone change request is part of their long-term basic need to provide the products necessary to pave our streets, repair our roads and provide materials for other necessary construction projects as our community renews its existing infrastructure and provides for reasonable growth.

Delta's request for a zone change is both warranted and necessary for their continuing operations. I respectfully request that you approve this request.

Richard D. Stokes, Jr.
2788 Tomahawk Lane
Eugene, Oregon