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February 17, 2021
HEARING LETTER

Columbia County Board of Commissioners
c/o Matt Laird
230 Strand
St. Helens, OR 97051

RE: Lost Creek Rock Products; LUCs appeal; Map 7-4-11, TL 1000 (LUC 21-15)

Dear Commissioners:

I. The Board lacks jurisdiction to hearing this appeal

As a preliminary note, the Board lacks jurisdiction to hear this appeal. The Board must remand this appeal to the Planning Commission for review consistent with CCZO 1702, or appoint a hearing official and conduct a "special hearing" consistent with CCZO 1612, 1613 and 1614.

The LUCs decision was made by the planning Director. See page 13 of Decision. Pursuant to the mailed "Appeal Information for Final Order LUC 21-15" and CCZO 1702, the applicant filed an appeal to the Planning Commission. There is no process in the CCZO for an appeal of a Director's decision directly to the Board.

Staff attempts to reference Ord 91-2. But that ordinance is not adopted into the CCZO and is contrary to the provision found within. The administrative regulations of the CCZO must be followed.

II. Application

The applicant proposes an aggregate quarry, which includes removal, excavation, processing and stockpiling of aggregate materials. In addition, the applicant proposes a truck scale, a portable/nonfixed office, a sedimentation pond and storage of heavy equipment associated with the use. All of the elements of the use are listed as outright permitted uses in the SM zone. See CCZO 1042.1, .2, .3, .5 and .6.

Uses allowed outright in the SM zone are subject to the Operating/Siting Standards of CCZO 1044, which includes the following impact mitigation measures: minimum lot size, operating setbacks, operating hours, visual impact screening, access assurances and dust mitigation, noise

limitation, water quality protection, archeological site protection, erosion protection, slope and grade minimums, and land reclamation requirements. Thus, the code includes performance standards that ensure these permitted uses with be a good neighbor.

Because the proposal was an outright permitted use, a process was needed to establish compliance with the Operation/Siting Standards of CCZO 1044. At the County's direction, the applicant filed the LUCs to establish compliance with these performance standards. The LUCs request was very specific; it was filed to establish compliance with CCZO 1044. It was not filed to establish compliance with any other section of the ordinance.

The County issued a LUCs decision that concurred that all elements of CCZO 1044 were met. However, the Director included three conditions:

a. Preapplication conference (*Design Review requirement*)
b. Design Review application
c. Traffic Impact analysis

These conditions do not relate to any approval criterion and are thus improper. Further, Conditions a and b attempt to mandate compliance with the CCZO 1550 Site Design Review zone. That section of the Code is not applicable.

III. The LUCs is a land use decision.

ORS 197.015(10)(a) defines a "land use decision,"

> *"(A) A final decision or determination made by a local government or special district that concerns the adoption, amendment or application of: (i) The goals; (ii) A comprehensive plan provision; (iii) A land use regulation; or (iv) A new land use regulation; ***"*

Per ORS 297.015(10)(b), land use decision,

> *"(b) Does not include a decision of a local government: (A) That is made under land use standards that do not require interpretation or the exercise of policy or legal judgment; (B) That approves or denies a building permit issued under clear and objective land use standards; ***."*

The LUCs decision is a final decision made by the local government that concerns the application of the CCZO 1044. It is a land use decision. Pursuant to CCZO 1701, such a decision can be appealed.

IV. The LUCs is improperly conditioned. The Conditions do not relate to any approval criterion.

To be valid, a Condition of Approval must relate to an approval criterion. *Skydive Oregon v. Clackamas County,* 25 Or LUBA 294 (1993). The subject application was filed to establish compliance with CCZO 1044. CCZO 1044 lists 14 criteria, and each criterion is identified in the applicant's October 23 narrative. None references or relates to Design Review[1]. Conditions a and b are improper on their face, and must be removed.

We ask that the Commissioners put themselves in the applicant's shoes. Imagine that you take your dream home building plans to the building permit counter for building permit for your dwelling that the code says is a use permitted outright. The building official says they are ready to issue your building permit, but the planning department says a Design Review approval is needed first, and, that Design Review application might be denied. You are outraged; you visit the planning counter and demand an explanation. Where does the zoning code allow you to condition my building permit application with as Design Review process? They can't show you because the code does not require it. How would you proceed? In this instance our client has done the only thing possible – appeal the planner's imposition of the Design Review requirement up to the County Board. That is where we are now.

V. <u>Design Review does not apply to Goal 5 aggregate resources or uses.</u>

A. History

- Columbia County went through Goal acknowledgement process in 1984. Ordinance 84-4 adopted the Columbia County Comprehensive Plan (Comp Plan) and implementing ordinance. DLCD acknowledged the documents on August 9, 1985. Exhibit C.
- Goal 5, including aggregate, was addressed as part of acknowledgment.
- The subject property was included on the list in significant resources as being a site with an active permit. Exhibit D (1984 Comp Plan), page 215, 217, also see Exhibit E (current Comp Plan), page 227.
- The SM (Surface Mining) zone was adopted to achieve Goal 5 related to mineral and aggregate resources. Ord. 84-4
- In 1998, the County went through the PAPA process to address the new Goal 5 rules in OAR 660, Division 23 related to mineral and aggregate resources.
- Via Ordinance 98-01, the Comp Plan and zoning ordinance were amended to comply with the new rules. Zoning ordinance amendments included: a new section of the Code

[1] Further, it is improper to condition an application on obtaining an additional land use approval. For such a condition to be valid, not only must the condition relate to an approval criterion, there must be evidence in the record that the condition is, "*likely and reasonably certain to succeed*." Even if the later process includes a proceeding, there must be evidence in the record that "*compliance with the approval criterion is possible*." *Gould v. Deschutes County*, 227 Or App 601, 612, 206 P3d 1106 (2009). *Northgreen Property LLC v. City of Eugene,* 65 Or LUBA 83 (2012). Neither of these standards have been met.

(Section 1030; APSM) to provide an ESEE process for aggregate sites not yet analyzed; and updates to the existing Section 1040 (SM) for sites already determined to be significant in 1984. Exhibit F.

- The subject property was determined to be significant in 1984. This was affirmed on page 227 of the updated Comp Plan. Exhibit E, page 227.
- CCZO Section 1550 (Site Design Review) was adopted in 1997 (Ordinance 97-4). Exhibit H. It was not adopted as part of the Goal 5 process.
- Based on the above legislative history, only two sections of the County zoning ordinance were adopted as programs to achieve Goal 5 related to mineral and aggregate resources: CCZO 1030 and CCZO 1040. Only CCZO 1040 applies to the subject property.

B. Goal 5 does not permit procedures adopted outside the Goal 5 ESEE process to limit, restrict or prohibit Goal 5 uses. Because Design Review was not adopted through the Goal 5 process, it cannot be applied to mining.

Aggregate is a protected Goal 5 resource. See Goal 5. The Goal 5 process was first codified in OAR Division 16 and later refined in OAR 660, Division 23. Goal 5 required every jurisdiction to address Goal 5 and develop a program to achieve the goal.

The Columbia County Comprehensive Plan was adopted on August 1, 1984 (Ord 84-4). Goal 5 was addressed in Part XVI. Surface Mining was addressed in Article VI or Part XVI. Aggregate was inventoried as part of the 1984 ordinance. Aggregate inventories were updated in April 1998 (Ord 98-1). The subject property was inventoried as an existing significant aggregate resource in 1984. For sites determined to be significant in 1984, the SM (CCZO 1040) was zone applied (updated by Ord 98-1). For new sites, CCZO 1030 was adopted to provide a rezoning process.

The impact mitigating policies of Part XVI, Article VI of the CC Comprehensive Plan were adopted directly into the SM zoning district as Section 1044:

Comp Plan Policy	**Implementing SM criteria**
Policy 8 – Inventory for archaeological significance	1044.10
Policy 10 - Reclamation	1044.13
Policy 11 – DOGAMI compliance, options for barrier isolation, setbacks, operating times, water quality, size limits, noise, dust, erosion, on-site processing restrictions	1044.2, 1044.6, 1044.4, 1044.5, 1044.9, 1044.3, 1044.8, 1044.7, 1044.11, 1044.4.C.
Policy 12, 13 and 14 - Riparian habitat/erosion/water quality	1044.9, 1044.11
Policy 15 - Road access	1044.7

The materials submitted make clear that CCZO 1040 was adopted as the program to achieve Goal 5 compliance for sites acknowledged as significant aggregate sites in 1984 ("1984 sites").

Section 1550 (Site Design Review) was not adopted as part of a program to achieve Goal 5, and, therefore, it cannot be applied to regulate a Goal 5 resource. If Design Review had been adopted at any time to regulate Goal 5 uses, that would be explicit in the ordinance adopting Design Review, in the Goal 5 element of the comprehensive plan, and in the acknowledgement paperwork related to adoption of the Design Review regulations. There is no such documentation because Design Review was not adopted as a part of the Goal 5 program for aggregate.

Because Design Review was not acknowledged as a Goal 5 regulation it may not be applied to regulate Goal 5 uses. This is a very basic proposition. *Rest-Haven Memorial Park v. City of Eugene*, 39 Or LUBA 282, 299, *aff'd* 175 Or App 419, 28 P3d 1229 (2001), is an example of how this works. There the City adopted open waterway regulations for the entire city, but not as land use regulations. LUBA agreed with the appellant, however, that some of the open waterways in the city were already inventoried as significant Goal 5 resources. The new regulations affected those inventoried Goal 5 waterways by changing the degree of regulations. However, because the new regulations had not been adopted and acknowledged via the Goal 5 process, they could not be applied to those resources.

This is the same situation. The County is attempting to apply Design Review standards to regulate a Goal 5 resource; however, the Design Review regulations have not been adopted through the Goal 5 process. Therefore, they may not be applied.

C. Aggregate extraction is either a "resource use," or an "aggregate use." It is not an "industrial use."

The Director seeks to apply Design Review by recharacterizing aggregate operations as an "industrial use." It is not. Under the plan and code any Goal 5 is an resource use, not an industrial use.

Google can lead you astray. The courts give weight only to "Websters 3rd," and even then very little weight is given in cases of statutory interpretation. In land use, "use" is a term of art. The term can be found through Goal 5, ORS 215, ORS 197, and the Oregon Administrative Rules implementing those land use statutes. The Statewide Planning Goals are most instructive, providing for forest uses under Goal 3, farm uses for Goal 4 and resources uses under Goal 5. Aggregate mining is a resource use under Goal 5. Further, as stated in my appeal letter, there is no place in the CCZO where mining is listed as an "industrial use." It is sometimes listed as a "conditional use," meaning a use allowed conditionally in a zone, but that does not undermine the fact that mining is a resource use.

In addition, there is no evidence in the record to support the definition provided by staff in the staff report.

Ultimately, it is unnecessary to resolve the interpretation because CCZO 1550 (Site Design Review) was not adopted as part of the County program to achieve Goal 5, and therefore cannot be applied to the application.

VI. Imposing Design Review on this permitted use would be arbitrary act beyond the discretion of the County and would also constitute a temporary taking of the property without just compensation in violation of the Fifth Amendment.

The County should proceed very carefully before it determines that Design Review is needed. The applicant has a protected property interest in its right to use the property consistent with the code's list of outright permitted uses. If the county refuses to allow the use, based on its arbitrary and erroneous demand for Design Review, then the County would be denying any reasonable use of the property, at least until the applicant can get that determination reversed on appeal. Temporary takings, of course, can be the basis for relief in state and federal court. See *Perkins v. City of West Covina*, 113 F3d 1004, 1010 (9th Cir 1997)("a temporary, nonfinal deprivation of property is nonetheless a 'deprivation' in the terms of the Fourteenth Amendment.")

VII. The County is applying SDR inconsistently, which is improper.

The definition put forth by staff would include forest operations and farm operations as "industrial" uses. There is no history of the SDR process being applied to those uses. Further, staff inquired, and no evidence was found that the SDR process has ever been applied to a mining operation in the SM zone. See email from Matt Laird to Karen Schminke dated October 28, 2020, attached to the Planning Director decision.

VIII. Response to Staff Report

"It should be noted that there is no record of this site ever having an approved operating permit from [DOGAMI]" Decision Staff Report, Pages 2 and 4 at Finding 1.

Response: Staff has failed to explain why this is relevant. Further, the record shows otherwise. The subject property is a protected Goal 5 resource identified in the Comprehensive Plan. The site is listed in Table XVI-1 of the Comp Plan. As such, the site is "significant." See page 225 of the Comp Plan. The site was found to have an operating permit. See page 225 of the current Comp Plan. Also see page 216 of the 1984 Comp Plan. Staff cannot challenge those findings. That would be an impermissible collateral attack.

[All the uses proposed] are specifically listed as permitted in the SM zone. Page 4, Finding 1.

Response: The applicant concurs.

*"*** the application meets the standards of Section 1044."* Decision staff report, Page 13.

Response: The application requested confirmation that the requirements of Section 1044 were met. On pages 4 through 8, Staff addresses all the applicable criteria of 1044. Associated findings show that each criterion has been met. Staff's analysis was required to end there. The application should have been approved without conditions.

Sincerely,
/s/ *Kimberly JR O'Dea*
Kimberly J.R. O'Dea

Exhibits:
A: Goal 5
B: Ordinance 84-4
C: 1985 LCDC Acknowledgment Order
D: 1984 (with 1985 updates) Comprehensive Plan excerpt
E: Current Comprehensive Plan excerpt
F: Ordinance 98-01
G: Current Zoning Ordinance excerpt
H: Ordinance 92-7
I: Ordinance 97-04 and Ordinance 98-9 relating to Site Design Review
J: Email