



Jennifer Orozco

From: Tony Krau <tony.krau@gmail.com>
Sent: Monday, November 4, 2024 6:36 PM
To: Plan
Subject: Application 217-24-000070-PLNG – Greenbar Comprehensive Plan Amendment
Attachments: 2017 Dec - Non-Conforming Use Decision.pdf

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Crook County
Community Development

Additional questions for Application 217-24-000070-PLNG – Greenbar Comprehensive Plan Amendment

- The latest staff report and response from the applicant still hasn't addressed the Crook County code of 100 ft. setbacks from property boundaries, not structures. The application is still using 50ft setbacks that are clearly against the code. Why has this not been confirmed by the staff? Having the 100ft setbacks will change the amount of estimated basalt which we already feel should not be considered significant to be added to the inventory.

- The applicant has stated that the property line directly adjacent to the existing mine will be absorbed into the existing mine allowing them to mine over the property line. Do property lines just disappear because both properties are owned by the same party? Are they planning to un-divide the property and make Lot 15 be legally considered part of the existing mine?

- If they do make Lot 15 a part of the existing mine, what stops them from using the existing Non-Conforming Use Permit on Lot 15? In 2017, the mine was able to receive a Non-Conforming Permit circumventing any public input and not be held to current county codes. They stated that the mine had been in use without being inactive for 12 years and always maintained some kind of permit. That is not the case with Lot 15. In 2007, the lot was divided and made a part of Cimarron Hills Phase 2 as a residential property and according to County records, is still a part of the subdivision, although removed from the CCRs. That is over 17 years of being inactive on paper. Our fear is that the applicant has no intention of applying for a Conditional Use Permit that would require the compliance of county code and require them to have 100 ft setbacks. Instead, by "absorbing" it into the existing mine, would they be allowed to extend that Non-Conforming Use Permit?

(7)(a) Any use described in subsection (5) of this section may not be resumed after a period of interruption or abandonment unless the resumed use conforms with the requirements of zoning ordinances or regulations applicable at the time of the proposed resumption. (see (b)).

(b) Notwithstanding any local ordinance, a surface mining use (emphasis added) continued under subsection (5) of this section shall not be deemed to be interrupted or abandoned for any period after July 1, 1972, provided:

(A) The owner or operator was issued and continuously renewed a state or local surface mining permit, or received and maintained a state or local exemption from surface mining regulation; and

(B) The surface mining use was not inactive for a period of 12 consecutive years or more.

- If it does then get to be included in the existing Non-Conforming Use Permit, would they need to apply for that Non-Conforming permit again (without public input) or will they be required to get a Conditional Use Permit (with public input)? I would think adding 5 acres to the existing mine would be a change that has "greater adverse impact to the neighborhood", especially now that there are substantially more homes in the area than were in 2017. Which should be noted was progressed by the previous owner

when he created Cimarron Hills. If he wanted to mine this entire mountain, including Lot 15, he shouldn't have built a subdivision on it.

(9) As used in this section, "alteration" of a nonconforming use includes:

(a) A change in the use of no greater adverse impact to the neighborhood; and

(b) A change in the structure or physical improvements of no greater adverse impact to the neighborhood.

It is also concerning that there have been multiple meetings about this and research done by your own staff that has never mentioned how they circumvented the public hearings in 2017, although the question was brought up multiple times. We had to finally scour the county's permits to get this information on our own.

Anthony and Michelle Krau

Lot 13, Cimarron Hills Phase 2

6401 SE Riverdance Rd., Prineville, OR 97754

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Crook County Community Development
Planning Division
300 NE 3rd Street, Prineville, OR 97754
(541)447-3211

FINDINGS AND DECISION
Non-Conforming Use Application
DECEMBER 11, 2017

APPLICANT/OWNER: Richard Bartels
12909 SW Highway 126
Powell Butte, Oregon 97753

APPLICANT'S ATTORNEY: Lisa Klemp
Bryant, Emerson, LLP
P.O. Box 457
Redmond, OR 97756

REQUEST: The applicant requests approval of a non-conforming use to mine an existing quarry located at T16S, R16 E WM, Section 12, Tax lot 400.

II. BASIC FINDINGS

LOCATION: The subject property is located approximately 7 miles south of Prineville on the west side of Juniper Canyon Road and is identified as T16S, R16E WM, Section 12, Tax lot 400. (See Attachment A).

ZONING: The property is currently zoned RR(M)-5 (Recreational Residential Mobile Zone).

SITE DESCRIPTION: The subject property is approximately 10 acres. The existing mined area is about two (2) acres in size and is characterized by an approximately 30 foot cut into the toe of the sloped hillside. There are stockpiles of previously quarried aggregate on the property. The existing quarry is located approximately 200 feet from Juniper Canyon Road on the east side of the subject property and approximately 300 feet from the northern boundary of the Cimarron Hills subdivision, developed by the applicant.¹

The site has gentle to moderate terrain, sloping from south-southeast to north-northwest. The property is fenced on all four sides. The property is not irrigated and has no water rights.

The applicant states that the quarry predates the surrounding land uses. The property is bounded on the east by Juniper Canyon Road. A large ranch property is just east of Juniper Canyon Road. The ranch house is located more than ¼ mile east of the subject property. Residential areas to the north and northwest are at higher elevations than the existing operation. Three parcels to the north and west of the subject property have existing dwellings, although the applicant states that these dwellings were built after the quarry had been in operation. Properties to the south and east are part of the applicant's Cimarron Hills subdivision. These do not currently have dwellings on them

¹ The applicant recorded an "Easement: Release of Claims and Waiver of Remonstrances" against all lots in the subdivision. Purchasers of subdivision lots signed waivers of remonstrance concerning the quarry and mining operations). The Easement was recorded and made a part of the Title Records of each subdivision lot.

and as discussed above, there is a recorded release of claims regarding operation of the quarry. Portions of the four parcels directly south of the quarry are in a mapped flood hazard area and this may limit development of those parcels. (Attachment B).

The subject property is accessed from Juniper Canyon Road on the south eastern side. This gated access was approved by the Crook County Roadmaster in 2004 (C-RP-197-04).

BACKGROUND

The applicant has provided information to demonstrate that there has been a quarry on the site since the 1960s. The applicant provided an agreement dated May 1961 between Crook County and Cinder Hill Company that refers to materials being stockpiled at the "Yancey Quarry." The applicant provided a written statement describing his conversation with former County Roadmaster, Norm Thompson, discussing historic use of the quarry site and suggesting that the Yancey Quarry was the former name of the quarry on the subject property. At that time, no land use regulations applied in Crook County. The County did not adopt its zoning code until 1973 (Ordinance 5). This was updated in 1978 (Ordinance 18) when the subject property was zoned for agricultural use. Zoning on the subject property was changed to RR(M)-2 and then to its current zoning designation (RR(M)-5).

According to the applicant, the quarry was mined for base rock for road construction and other activities in the 1960s and 1970s. A letter from Ben Mundie, Oregon Department of Geology and Mineral Industries, dated February 25, 2004 described aerial photos from the University of Oregon library. (Attachment C). Mr. Mundie stated that, based on the photos, the mine was opened after 1966 and before 1974.

The applicant stated that the mine was open when he purchased the property in 2003 (MF 2003-186442, recorded 12/17/2003). The applicant did not provide any information on the extent of aggregate mining on the site at that time. The applicant applied for and obtained a permit in 2004 to excavate 10,000 cubic yards of material to be used for on-site road construction for the Cimarron Hills Subdivision. (Permit C-SR-1663-04). At that time, the quarry site was not on the County's Goal 5 inventory of mineral and aggregate sites in the County's comprehensive plan.

The applicant submitted an application to the Crook County Planning Department to have the quarry placed on the County's inventory of Goal 5 mineral and aggregate sites. The applicant demonstrated that the site would meet requirements to place the site on the inventory. Based on findings in a geotechnical report, the basalt from the quarry meets/exceeds the Oregon Department of Transportation's specifications for base rock. The Planning Commission recommended this inventory addition to the County Court and the Court approved placing the site on the inventory based upon the location, quantity and quality of the aggregate material on the property (Ordinance 179, August 17, 2006). The applicant also applied for a conditional use permit to allow surface mining on the project and sale of the materials for off-site use (Surface mining is a conditional use in the County's RR(M)-5 zone). The County denied the application because it found that the proposed use "was not related to or sufficiently dependent upon the recreational resources of the area, and the location of the use was not essential to the development of the recreation resource" as required in the County's recreational resources zone. (Crook County Code 18.40).

The applicant has continued to operate the aggregate site for use on his projects and stores aggregate material on site. He has maintained an "Exclusion Certificate" with the Oregon Department of Geology and Mineral Industries (DOGAMI). According to DOGAMI, as long as the applicant does not remove more than 5,000 cubic yards of material during any consecutive 12 month period and the mining operation disturbs less than 5 acres, the mining operation is not subject to DOGAMI's operating permit or reclamation requirements.

The applicant is requesting that on-going mining operations be approved as a non-conforming use that has been occurring since prior to adoption of the County's comprehensive plan and zoning ordinances.

III. APPLICABLE CRITERIA

A "nonconforming use" is defined as "one which lawfully existed prior to the enactment of a zoning ordinance and which may be maintained after the effective date of the ordinance although it does not comply with the use restrictions applicable to the area." (*Clackamas County v. Holmes*, 265 OR 193, 196-197, 508 P2d 190 (1973)).

The applicant states that the materials on record with the County clearly establish that the quarry mining began on the subject property in the 1960s, long before the County adopted its zoning and development code in 1973.

Oregon Revised Statute 215.130(5) – Application of ordinances and comprehensive plans; alteration of nonconforming use (Statutory Language is in standard font. The applicant's responses are in ***bold/italics***).

Oregon Revised Statutes authorize local governments to allow lawful use of structures or lands that were in place at the time zoning ordinances were adopted to continue. The intent of the non-conforming use provision is to not penalize property owners for lawful activities that are impacted by adoption of more restrictive zoning regulations. Specifically, ORS 215.130(5) states:

(5) The lawful use of any building, structure or land at the time of the enactment or amendment of any zoning ordinance or regulation may be continued. Alteration of any such use may be permitted subject to subsection (9) of this section. Alteration of any such use shall be permitted when necessary to comply with any lawful requirement for alteration in the use. Except as provided in ORS 215.215, a county shall not place conditions upon the continuation or alteration of a use described under this subsection when necessary to comply with state or local health or safety requirements, or to maintain in good repair the existing structures associated with the use. A change of ownership or occupancy shall be permitted.

The applicant is seeking approval of mining operations as a nonconforming use. The use of the subject property as an aggregate quarry predates the County's 1973 zoning ordinance and therefore, as a use existing prior to the adoption of the Code, the use is statutorily authorized to continue. The statute allows for a change in ownership when reviewing non-conforming uses, so although the applicant was not the original operator of the quarry, the non-conforming use provisions still apply to the subject property.

(7)(a) Any use described in subsection (5) of this section may not be resumed after a period of interruption or abandonment unless the resumed use conforms with the requirements of zoning ordinances or regulations applicable at the time of the proposed resumption. (see (b)).

(b) Notwithstanding any local ordinance, a surface mining use (emphasis added) continued under subsection (5) of this section shall not be deemed to be interrupted or abandoned for any period after July 1, 1972, provided:

(A) The owner or operator was issued and continuously renewed a state or local surface mining permit, or received and maintained a state or local exemption from surface mining regulation; and

(B) The surface mining use was not inactive for a period of 12 consecutive years or more.

(c) For purposes of this subsection, "inactive" means no aggregate materials were excavated, crushed, removed, stockpiled or sold by the owner or operator of the surface mine.

The applicant purchased the subject property and has continuously maintained an Exclusion Certificate issued by DOGAMI. The applicant has processed aggregate and maintained stockpiles of quarried aggregate on site. He has used materials from the site for his development (Cimarron Hills). According to the applicant, he has always used and maintained the stockpiles at the quarry and has continuously used the aggregate for his developments over the last 12 years. The County's 2004 decision (C-SR-1664-04) limited the use of the quarry and aggregate to the applicant's personal use. The applicant desires to operate the quarry to mine and sell product to outside users, as it was historically operated.

(8) Any proposal for the verification or alteration of a use under subsection (5) of this section, except an alteration necessary to comply with a lawful requirement, for the restoration or replacement of a use under subsection (6) of this section or for the resumption of a use under subsection (7) of this section shall be subject to the provisions of ORS 215.416. An initial decision by the county or its designate on a proposal for the alteration of a use described in subsection (5) of this section shall be made as an administrative decision without public hearing in the manner provided in ORS 215.416 (11).

The County will provide notice as required under ORS 215.416.

(9) As used in this section, "alteration" of a nonconforming use includes:
(a) A change in the use of no greater adverse impact to the neighborhood; and
(b) A change in the structure or physical improvements of no greater adverse impact to the neighborhood.

The applicant is not requesting an alteration of a nonconforming use but rather a verification of the use the existed at the time the mining operation began in the 1960s. The use involved mining and processing materials for sale and use off site. Although some development has occurred in the area of the subject property, the overall intensity of the use will be mitigated by limited hours of operations and restrictions on blasting and crushing activities. This will minimize potential adverse impacts to the neighborhood.

(10) A local government may adopt standards and procedures to implement the provisions of this section. The standards and procedures may include but are not limited to the following:

(a) For purposes of verifying a use under subsection (5) of this section, a county may adopt procedures that allow an applicant for verification to prove the existence, continuity, nature and extent of the use only for the 10-year period immediately preceding the date of application. Evidence proving the existence, continuity, nature and extent of the use for the 10-year period preceding application creates a rebuttable presumption that the use, as proven, lawfully existed at the time the applicable zoning ordinance or regulation was adopted and has continued uninterrupted until the date of application;

(b) Establishing criteria to determine when a use has been interrupted or abandoned under subsection (7) of this section; or

(c) Conditioning approval of the alteration of a use in a manner calculated to ensure mitigation of adverse impacts as described in subsection (9) of this section.

Crook County Code 18.156.010 authorizes nonconforming uses to be altered or expanded if the Planning Commission finds that the nonconforming use or structure will not cause a greater deviation from the applicable standards of this title and the expanded use or altered structure will

not result in a greater adverse impact to the neighborhood. Potential adverse impacts to the neighborhood may be mitigated by requirements related to lighting the site, hours of operation and limitations on blasting and crushing. The applicant will also be required to obtain operating and reclamation permits from the Oregon Department of Geology and Mineral Industries and necessary Department of Environmental Quality permits (e.g., for stormwater management and air quality related to rock crushing) administered by DOGAMI.

According to the applicant, the operation should generate no more than 5-15 truck trips per day during average mining operations. Mining operations will be driven by market demand. In general, there will be less than 5-15 trips per day. According to conversations with Bob O'Neal, County Roadmaster, this amount of truck traffic will not significantly impact traffic on Juniper Canyon Road.

(11) For purposes of verifying a use under subsection (5) of this section, a county may not require an applicant for verification to prove the existence, continuity, nature and extent of the use for a period exceeding 20 years immediately preceding the date of application. [

The applicant has provided evidence that the site has been used as a mining operation since the 1960s including both active mining and stockpiling of aggregate materials.

IV. FINDINGS AND CONCLUSIONS

Based on evidence in the record and consideration of the applicable criteria, mining of the subject property is a non-conforming use that has been occurring on the subject property since the 1960s, well before adoption of the County's zoning ordinance in 1973. The use could be authorized and continued subject to the following conditions:

1. The applicant shall limit operations (mining, extraction, processing, including rock crushing, equipment operation, and transportation off site) to the following hours:
 - (a) June 1st through October 31st: 6:00 a.m. to 9:00 p.m., or sunrise to sunset, whichever is less Monday through Friday and 8:00 a.m. to 5:00 p.m., Saturday.
 - (b) November 1st through May 31st: 7:00 a.m. to 6:00 p.m., Monday through Friday. 8:00 a.m. to 5:00 p.m., Saturday.
 - (c) No operations shall be conducted on Sundays or the following legal holidays: New Year's Day, Memorial Day, July 4th, Labor Day, Thanksgiving Day, Christmas Day.
2. Blasting shall occur no more than twice a year and shall be restricted to the hours of 9:00 a.m. to 5:00 p.m. Monday through Friday. No blasting shall occur on Saturdays, Sundays or legal holidays. The operator shall provide written notice to adjacent property owners, within 2,000 feet of the subject property, and to Crook County Community Development at least 72 hours prior to the time of blasting.
3. No lighting will be allowed on the site without the approval of the Crook County Community Development Department.
4. There will be no surface water discharges from the mining site. Surface water on the site will be managed in accordance with Oregon Department of Environmental Quality permit requirements, administered through the Department of Geology and Mineral Industries. The applicant is responsible for acquiring all necessary air quality and water quality permits.
5. The applicant is responsible for meeting all stream setback requirements established by DOGAMI to prevent impacts to Dry Creek.

6. Operations shall be setback 100 feet from Juniper Canyon Road.
7. The applicant must apply for and receive all necessary Department of Geology and Mineral Industries operation and reclamation permits.

APPEALS: Within 12 days following notice to adjoining property owners on December 11, 2017, the application shall be considered for approval by the planning director. An objection by an adjoining property owner shall result in a review of the application by the planning commission. **Appeals of this decision must be made by December 22, 2017 at 4 p.m.**

Respectfully submitted,



Ann Beier
Director

cc: Applicant/Applicant's Attorney
Neighbors within 250' of subject property
Crook County Roadmaster
Crook County Assessor's Office

Attachment A – Map of Subject Property
Attachment B – Flood Hazard Map
Attachment C – January 26, 2007 Letter from Ben Mundie, Oregon Department of Geology and Mineral Industries

Attachment A
 217-17-000374-PLUG



Crook county GIS

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Attachment A
217-17-000374-
PLNG

CIMARRON HILLS SUBDIVISION



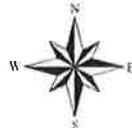
CIMARRON HILLS SUBDIVISION



BARTELS LOTS



BARTELS AGGREGATE SITE



T16S, R16E, Sec. 21 TL 400 • 10.01 acres







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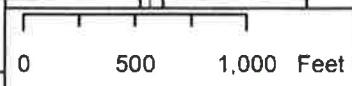
EXHIBIT 6
PAGE 1 OF 1

Flood Plain near MTL1616120000400

Attachment B

217-17-000374-PLNG

-  500 yr (0.2% annual chance)
-  A (100 yr - no depth data)
-  AE (100 yr - full BFE data)
-  AEFW (Floodway)
-  AH (100 yr - Ponding Zone)
-  AO (100 yr 1 to 3 ft flowing)



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Oregon

Theodore R. Kulongoski, Governor

Attachment C 217-17-000374 -
PLNG

Department of Geology & Mineral Industries
Mineral Land Regulation and Reclamation
229 Broadalbin Street SW
Albany, OR 97321-2246
541-967-2039
FAX 541-967-2075

January 26, 2007



Richard Bartels
12909 SW Highway 126
Powell Butte, OR 97753

FAX: 541-923-3223

RE: Conditional Use Permit C-CU-2266-05

Dear Mr. Bartels:

It is understood you are seeking conditional use approval to permit an existing upland quarry located in tax lot 400 section 12 T16S R16E Crook County.

Based on aerial photography this quarry was opened after 1966 and before 1974. I visited this site on February 11, 2004, to familiarize myself with current conditions at the quarry. This is an upland quarry, mining a competent basalt. Off-site impacts from past mining were not evident.

An operating permit from the Department of Geology and Mineral Industries (DOGAMI) will be required before production exceeds 5,000 cubic yards in any 12-month period. An operating and reclamation plan must be compiled and will be reviewed for completeness by DOGAMI, DEQ, ODFW, WRD, and Natural Resources. Concerns any other agency may have with the proposed mine operation will be addressed through permit conditions and made a part of the DOGAMI operating permit.

Reclamation will be required and reclamation security must be posted with DOGAMI. Final reclamation must return the mine site to a secondary beneficial use that is consistent with the zoning designation.

To protect surface water resources, an adequate undisturbed setback from the mine operation and Dry Creek will be established. The setback will be site specific and may vary in width. Best management practices will be required to insure this drainage is protected. Based on the current configuration of the quarry, internal drainage of stormwater appears to be possible. If stormwater must be discharged off-site, a DEQ NPDES 1200A permit will be required. Through agreement with DEQ, the NPDES 1200A and the WPCF 1000 permits are administered through DOGAMI.

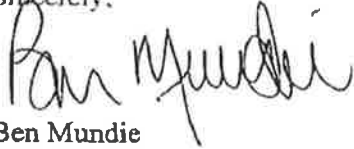
Processing equipment must have a DEQ air quality permit. The individual processing plant receives the permit, not the mine site. Air quality permits are administered through DEQ.

Bartels
01/26/07
page 2

To protect groundwater resources, depth of excavation will be restricted. Monitoring of production blasts may be required to protect adjacent water wells. After review of the proposed operating and reclamation plan by multi-discipline natural resource specialists, site specific permit conditions will be developed.

Please contact me at 541-967-2149 with any questions.

Sincerely,



Ben Mundie
Reclamationist
Mineral Land Regulation and Reclamation

C: Crook County

ADAMS CARL & JENNIFER
10743 SE JUNIPER CANYON RD
PRINEVILLE, OR 97754

GRIFFIN ROBERT JAMES & FAWN
PO BOX 1776
PRINEVILLE, OR 97754

ADKINS BRANDON
1639 TENNINGER DRIVE
BOISE, ID 83709

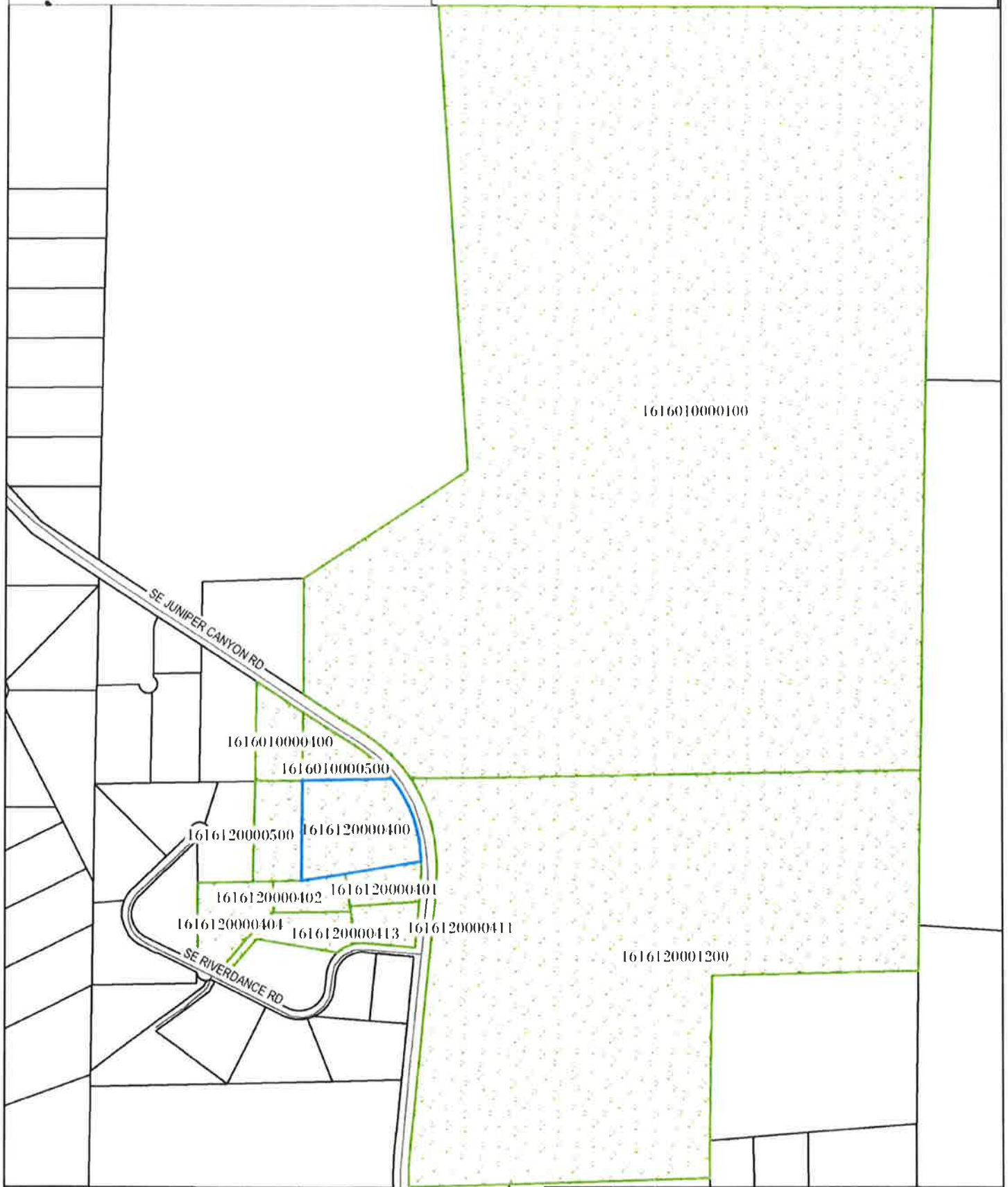
PEREZ FAMILY TRUST
6915 S ROBERTSDALE WAY
AURORA, CO 80016

BARTELS RICHARD L
12909 SW HWY 126
POWELL BUTTE, OR 97753

READE RUSSEL L
10970 SE JUNIPER CANYON RD
PRINEVILLE, OR 97754

Mailed 12/11/17

Property within 250' of MTL161620000400



 Within 250ft

0 500 1,000 Feet










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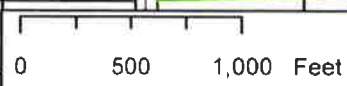
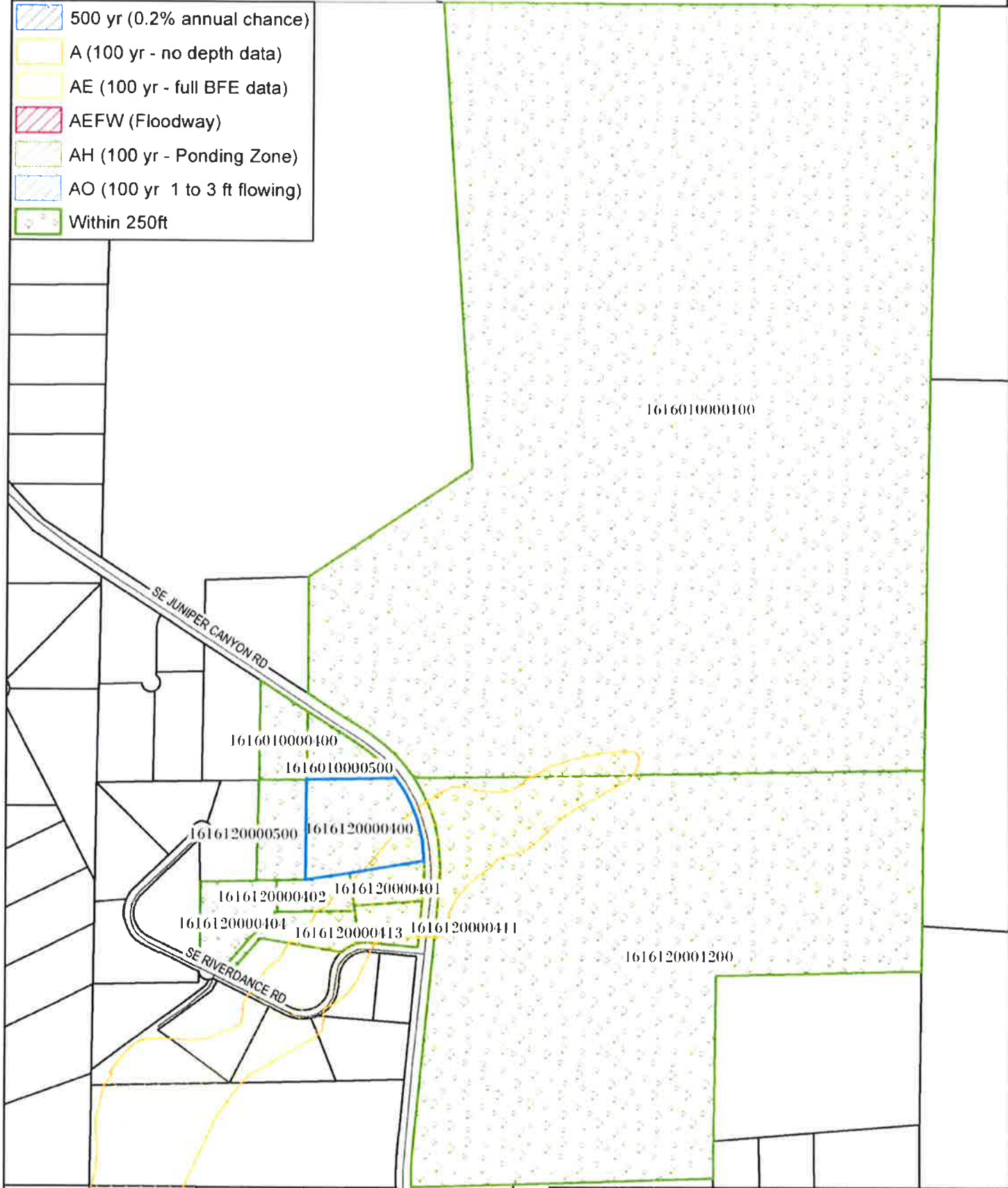
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Property info within 250ft of MTL 1616120000400

Map Tax Lot	Owner	Address	City	State	Zip
1616010000500	ADAMS CARL & JENNIFER	10743 SE JUNIPER CANYON RD	PRINEVILLE	OR	97754
1616010000400	ADKINS BRANDON	1639 TENNINGER DRIVE	BOISE	ID	83709
1616120000500	BARTELS RICHARD L	12909 SW HWY 126	POWELL BUTTE	OR	97753
1616120000402	BARTELS RICHARD L	12909 SW HWY 126	POWELL BUTTE	OR	97753
1616120000401	BARTELS RICHARD L	12909 SW HWY 126	POWELL BUTTE	OR	97753
1616120000400	BARTELS RICHARD L	12909 SW HWY 126	POWELL BUTTE	OR	97753
1616120000413	BARTELS RICHARD L	12909 SW HWY 126	POWELL BUTTE	OR	97753
1616120000411	GRIFFIN ROBERT JAMES & FAWN	PO BOX 1776	PRINEVILLE	OR	97754
1616120000404	PEREZ FAMILY TRUST	6915 S ROBERTSDALE WAY	AURORA	CO	80016
1616120001200	READE RUSSEL L	10970 SE JUNIPER CANYON RD	PRINEVILLE	OR	97754
1616010000100	READE RUSSEL L	10970 SE JUNIPER CANYON RD	PRINEVILLE	OR	97754

Property within 250' of MTL1616120000400

-  500 yr (0.2% annual chance)
-  A (100 yr - no depth data)
-  AE (100 yr - full BFE data)
-  AEFW (Floodway)
-  AH (100 yr - Ponding Zone)
-  AO (100 yr 1 to 3 ft flowing)
-  Within 250ft



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Memorandum in Support of Non-Conforming Use

Re: Richard Bartels

1. Incorporation by reference: Vested Rights Application materials

The applicant submits this Memorandum in Support of his non-conforming use application, and incorporates by this reference all of the application materials that he has previously submitted to the County as part of his Vested Right application.

2. ORS 215.130 establishes the non-conforming use criteria

a. A non-conforming use defined:

Legal non-conforming uses are those uses that were lawfully established under all applicable regulations at the time, but no longer conform to the requirements of the zone in which it is located.

FINDING: The materials on record with the County as part of the Vested Rights Application clearly establish that the quarry mining began on the property in the 1960's - long before the County adopted its zoning and development Code in 1973.

b. ORS 215.130(5)

The lawful use of any building, structure or land at the time of the enactment or amendment of any zoning ordinance or regulation may be continued. Alteration of any such use may be permitted subject to subsection (9) of this section. Alteration of any such use shall be permitted when necessary to comply with any lawful requirement for alteration in the use. Except as provided in ORS 215.215, a county shall not place conditions upon the continuation or alteration of a use described under this subsection when necessary to comply with state or local health or safety requirements, or to maintain in good repair the existing structures associated with the use. A change of ownership or occupancy shall be permitted.

FINDING: The applicant is seeking designation as a non-conforming use. The use of the subject property as an aggregate quarry predates the County enactment of its zoning ordinance in 1973, and therefore as a use existing prior to the adoption of the Code, the use is statutorily authorized to continue. The applicant agrees to the imposition of the hours of operation as the applicant proposed in the Vested Rights application which is incorporated herein.

c. ORS 215.130(7)(b)

Notwithstanding any local ordinance, a surface mining use continued under subsection (5) of this section shall not be deemed to be interrupted or abandoned for any period after July 1, 1972, provided:

(A) The owner or operator was issued and continuously renewed a state or local surface mining permit, or received and maintained a state or local exemption from surface mining regulations; and

(B) The surface mining use was not inactive for a period of 12 consecutive years or more.

(c) For purposes of this subsection, "inactive" means no aggregate materials were excavated, crushed, removed, stockpiled or sold by the owner or operator of the surface mine.

FINDING: (A) The applicant purchased the subject property in 2003. He has continuously maintained an Exclusion Certificate issued by DOGAMI since acquisition of the property. (Exhibit Q of V.R. Application documents) The Permit provides that "Pursuant to ORS 517.753 as amended, the mining operation is subject to a valid exclusion certificate, and is therefore not subject to the operating permit or reclamation requirements set forth in ORS 517.702 to 517.989." Therefore, this criteria is satisfied.

(B) As the photographs in the record depict, the applicant has processed aggregate and maintained stockpiles of quarried aggregate on site. After his purchase of the property in 2003, Mr. Bartels obtained a conditional use approval to use the quarry to supply aggregate for the subdivision adjacent to the quarry, and successfully had the site added to the County's Goal 5 inventory in 2007. The CUP permitted excavation of approximately 10,000 cubic yards of material. He also used the aggregate for the store that he owns nearby. The applicant has been in the construction business in central Oregon for decades, and has continued to utilize the aggregate for his developments. Over the last 12 years, the applicant has always used and maintained the stockpiles at the quarry, and has continuously used the aggregate for all of his developments.

The County found that:

The applicant states that the property is to be rehabilitated in accordance with a reclamation plan to be reviewed and approved by DOGAMI. Live topsoil salvage is to be employed where possible. Each mining phase is to be re-seeded with pasture grasses or other vegetation as specified by DOGAMI."

This remains the same today.

The County limited the use of the quarry and its aggregate to the applicant's personal use. Accordingly, the applicant has always operated the quarry as a quarry, which operates to provide his supply of aggregate from the stockpiles he made. However, he has always maintained an intent and desire to operate the quarry as it historically existed.

The Oregon Supreme Court made clear in the case of *Polk County v. Martin* that "quarry operations are by their nature sporadic, and a discontinuance or abandonment cannot be inferred from the mere fact blasting and crushing cease***, or from fluctuations in the volume of extractions or sales****" 292 Or. 69, 76 (1981)(quoting from *Lane County v. Bessett*, 46 Or.App. 319, 326 (1980)) The Court has found that when there is evidence that the applicant has always had the intention of continuing the operation of the quarry, the fact that rock crushing ceases for a substantial period of time was not enough to find an abandonment or discontinuance of the use.

Here, since his acquisition of the property in 2003, the applicant has maintained the DOGAMI permit, and has continuously used the stockpiled aggregate to the extent permitted. The Courts have found it an important finding that the product was always available, and that there was continuous use in the sense that stockpiling existed, and the owner had committed the property to that use.

The use was lawful when established and the applicant has continued to use and maintain the subject property as a quarry since his purchase in 2003, in satisfaction of the applicable criteria. Therefore, this criteria is satisfied, and this application must be approved.

215.130 Application of ordinances and comprehensive plan; alteration of nonconforming use. (1) Any legislative ordinance relating to land use planning or zoning shall be a local law within the meaning of, and subject to, ORS 250.155 to 250.235.

(2) An ordinance designed to carry out a county comprehensive plan and a county comprehensive plan shall apply to:

(a) The area within the county also within the boundaries of a city as a result of extending the boundaries of the city or creating a new city unless, or until the city has by ordinance or other provision provided otherwise; and

(b) The area within the county also within the boundaries of a city if the governing body of such city adopts an ordinance declaring the area within its boundaries subject to the county's land use planning and regulatory ordinances, officers and procedures and the county governing body consents to the conferral of jurisdiction.

(3) An area within the jurisdiction of city land use planning and regulatory provisions that is withdrawn from the city or an area within a city that disincorporates shall remain subject to such plans and regulations which shall be administered by the county until the county provides otherwise.

(4) County ordinances designed to implement a county comprehensive plan shall apply to publicly owned property.

(5) The lawful use of any building, structure or land at the time of the enactment or amendment of any zoning ordinance or regulation may be continued. Alteration of any such use may be permitted subject to subsection (9) of this section. Alteration of any such use shall be permitted when necessary to comply with any lawful requirement for alteration in the use. Except as provided in ORS 215.215, a county shall not place conditions upon the continuation or alteration of a use described under this subsection when necessary to comply with state or local health or safety requirements, or to maintain in good repair the existing structures associated with the use. A change of ownership or occupancy shall be permitted.

(6) Restoration or replacement of any use described in subsection (5) of this section may be permitted when the restoration is made necessary by fire, other casualty or natural disaster. Restoration or replacement shall be commenced within one year from the occurrence of the fire, casualty or natural disaster. If restoration or replacement is necessary under this subsection, restoration or replacement shall be done in compliance with ORS 195.260 (1)(c).

(7)(a) Any use described in subsection (5) of this section may not be resumed after a period of interruption or abandonment unless the resumed use conforms with the requirements of zoning ordinances or regulations applicable at the time of the proposed resumption.

(b) Notwithstanding any local ordinance, a surface mining use continued under subsection (5) of this section shall not be deemed to be interrupted or abandoned for any period after July 1, 1972, provided:

(A) The owner or operator was issued and continuously renewed a state or local surface mining permit, or received and maintained a state or local exemption from surface mining regulation; and

(B) The surface mining use was not inactive for a period of 12 consecutive years or more.

(c) For purposes of this subsection, "inactive" means no aggregate materials were excavated, crushed, removed, stockpiled or sold by the owner or operator of the surface mine.

(8) Any proposal for the verification or alteration of a use under subsection (5) of this section, except an alteration necessary to comply with a lawful requirement, for the restoration or replacement of a use under subsection (6) of this section or for the resumption of a use under

subsection (7) of this section shall be subject to the provisions of ORS 215.416. An initial decision by the county or its designate on a proposal for the alteration of a use described in subsection (5) of this section shall be made as an administrative decision without public hearing in the manner provided in ORS 215.416 (11).

(9) As used in this section, "alteration" of a nonconforming use includes:

(a) A change in the use of no greater adverse impact to the neighborhood; and

(b) A change in the structure or physical improvements of no greater adverse impact to the neighborhood.

(10) A local government may adopt standards and procedures to implement the provisions of this section. The standards and procedures may include but are not limited to the following:

(a) For purposes of verifying a use under subsection (5) of this section, a county may adopt procedures that allow an applicant for verification to prove the existence, continuity, nature and extent of the use only for the 10-year period immediately preceding the date of application. Evidence proving the existence, continuity, nature and extent of the use for the 10-year period preceding application creates a rebuttable presumption that the use, as proven, lawfully existed at the time the applicable zoning ordinance or regulation was adopted and has continued uninterrupted until the date of application;

(b) Establishing criteria to determine when a use has been interrupted or abandoned under subsection (7) of this section; or

(c) Conditioning approval of the alteration of a use in a manner calculated to ensure mitigation of adverse impacts as described in subsection (9) of this section.

(11) For purposes of verifying a use under subsection (5) of this section, a county may not require an applicant for verification to prove the existence, continuity, nature and extent of the use for a period exceeding 20 years immediately preceding the date of application. [Amended by 1961 c.607 §2; 1963 c.577 §4; 1963 c.619 §9; 1969 c.460 §1; 1973 c.503 §2; 1977 c.766 §5; 1979 c.190 §406; 1979 c.610 §1; 1993 c.792 §52; 1997 c.394 §1; 1999 c.353 §1; 1999 c.458 §1; 1999 c.1103 §10]

215.135 Expansion of nonconforming school use in exclusive farm use zone. (1) In addition to and not in lieu of the authority in ORS 215.130 to continue, alter, restore or replace a use that has been disallowed by the enactment or amendment of a zoning ordinance or regulation, a use formerly allowed pursuant to ORS 215.213 (1)(a) or 215.283 (1)(a), as in effect before January 1, 2010, may be expanded subject to:

(a) The requirements of subsection (2) of this section; and

(b) Conditional approval of the county in the manner provided in ORS 215.296.

(2) A nonconforming use described in subsection (1) of this section may be expanded under this section if:

(a) The use was established on or before January 1, 2009; and

(b) The expansion occurs on:

(A) The tax lot on which the use was established on or before January 1, 2009; or

(B) A tax lot that is contiguous to the tax lot described in subparagraph (A) of this paragraph and that was owned by the applicant on January 1, 2009. [2009 c.850 §14]

Note: 215.135 was enacted into law by the Legislative Assembly but was not added to or made a part of ORS chapter 215 or any series therein by legislative action. See Preface to Oregon Revised Statutes for further explanation.


Ann Beier

From: Lisa Klemp <lisa@redmond-lawyers.com>
Sent: Wednesday, November 15, 2017 10:02 AM
To: Ann Beier
Subject: non-conforming use application
Attachments: Non-Conforming Use statement.pdf; 20171114152657.pdf

Please see attached.

LK

Lisa Klemp
Bryant Emerson, LLP
888 S.W. Evergreen Avenue, P.O. Box 457
Redmond, OR 97756
lisa@redmond-lawyers.com
Phone 541-548-2151, Fax 541-548-1895

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Ronald L. Bryant*
Craig P. Emerson**
Steven D. Bryant
Alison M. Emerson***
Lonn T. W. Johnston
Lisa Klemp
Ricky Nelson
Collin T. Edmonds

*Also admitted in Washington
**Retired
***Also admitted in California Inactive

Via email and regular mail

Ann Beier
Crook County Planning Department
300 NE 3rd Street, Room 12
Prineville, OR 97754

Re: Non-Conforming Use application (Bartels)

Dear Ann:

Enclosed please find an application form and Memorandum in Support of a Non-Conforming Use application for Richard Bartels. As we discussed, the Vested Rights application materials also support the non-conforming use application and will be incorporated into the application for a non-conforming use. I have specifically incorporated those materials by reference in the Memorandum.

Pursuant to our discussion, I believe that Mr. Bartels has clearly established that the use as a quarry predates the County's zoning in 1973, and was accordingly a lawfully established use at the time the County adopted its zoning and comprehensive plan in 1973.

Mr. Bartels has always desired and intended to operate the quarry. The County issued him a CUP to do so, but unexplainably limited his use of the aggregate to his own developments. Consistent with that approval, Mr. Bartels quarried aggregate and has maintained stock piles of it at the quarry, and used the aggregate for his developments. He has always maintained a DOGAMI permit for the quarry.

Based upon the statutory criteria for a non-conforming use, and the applicable case law, the quarry was lawfully established and has been used as a quarry with the proper DOGAMI permit during the last 12 years.

Accordingly, I ask that you approve the non-conforming use. Please advise if you need anything further.

Sincerely,

Lisa Klemp
Attorney

Enclosures
Cc: Client



replace vested right application
 → 217-17-90374-PUR
 For Office Use Only
 Permit No. 217-17-90374-PUR
 Fee: \$400.00
 AN ADDITIONAL 10% CODE COMPLIANCE FEE WILL BE CHARGED

Crook County Planning Department
 300 NE 3rd Street, Room 12, Prineville Oregon 97754
 Phone: 541-447-8156 / Fax: 541-416-3905

Non-Conforming Use Received 11/15/2017
 (Incomplete applications will not be accepted)

Legal Non-Conforming structures or uses were lawfully established under all applicable regulations at the time, but no longer conform to the requirements of the zone in which it is located. Using a preponderance of evidence, the petitioner must prove the use was established either prior to zoning ordinances or it was consistent with the applicable ordinance criteria at the time.

NOTICE TO ALL APPLICANTS

The Crook County Planning Department is required to review all applications for accuracy and to determine whether the staff and/or Planning Commission have the information needed to make a decision. County Ordinances allow the County 30 days to determine whether the application is complete. If the Planning Department determines that your application is incomplete, you will be requested, in writing, to provide the necessary missing information, and a decision on your application will be postponed until the information is received. State Law requires that information to support an application be available for public inspection at our office 20-days before a public hearing. Any information submitted after this date may require a postponement of the hearing date if necessary. **Please make sure your application is complete. The burden of proof lies with the applicant.**

PROPERTY OWNER

Last Name: Bartels First Name: Richard
 Mailing Address: 12909 SW HWY 126
 City: Powder Butte State: OR Zip: 97753
 Day-time phone: (541) 548-0524 Cell Phone: (541) 410-8452
 Email: N/A

AGENT / REPRESENTATIVE

Name: Lisa Klomp BRYANT, EMERSON LLP
 First Name: _____
 Mailing Address: PO Box 457
 City: Redmond State: OR Zip: 97756
 Day-time phone: (541) 548-2151 Cell Phone: () - -
 Email: lisa@redmond-lawyers.com

PROPERTY LOCATION

Township 16 South, Range 16 East WM, Section 12, Tax lot 400
 Size of property: _____ acres Zoning: _____
 Physical address: N/A

Subdivision name, if applicable: N/A

STEP 1: Describe the nature and extent of use (be as specific as possible)

The subject property has been used as a quarry

Since 1960

SEE ATTACHED Memorandum

STEP 2: Required Information

1. What is the date the Non-Conforming use was established? 1960

2. What was the property zoned at the time? NO ZONING

3. If the property was zoned, specify the ordinance criteria that allowed the use.
N/A

4. **Continuity of Use:** Pursuant to **ORS 215.130 Application of ordinances and comprehensive plan; alteration of nonconforming use.** (5) The lawful use of any building, structure or land at the time of the enactment or amendment of any zoning ordinance or regulation may be continued. Alteration of any such use may be permitted subject to subsection (9) of this section. Alteration of any such use shall be permitted when necessary to comply with any lawful requirement for alteration in the use. Except as provided in ORS 215.215, a county shall not place conditions upon the continuation or alteration of a use described under this subsection when necessary to comply with state or local health or safety requirements, or to maintain in good repair the existing structures associated with the use. A change of ownership or occupancy shall be permitted. (11) For purposes of verifying a use under subsection (5) of this section, a county may not require an applicant for verification to prove the existence, continuity, nature and extent of the use for a period exceeding 20 years immediately preceding the date of application. Crook County has not passed any ordinances or developed any particular policy on this issue. Until such time as the ordinances are updated or a policy is created to include a specific number of years of records to prove the use has not been discontinued, Crook County will review these on a case by case basis subject to the statutory limitation.

5. Additional Information: The following list includes documentation that may assist in determining the use or structure meets the standards of a pre-existing non-conforming use.

Phone Records, Electrical Records, Dated Aerial Photographs, Dated Photographs, Septic/Building Permits, Construction Contracts, Notarized Statements etc.

SIGNATURES

I agree to meet the standards governing the laws for "Non-Conforming Use Determinations" as outlined in the State of Oregon's OAR, ORS, Crook County Code, and Crook County - Prineville Comprehensive Plan. I agree that all the information contained in this application is true to the best of my knowledge.

Property Owner Signature: SEE Authorization submitted with V. R. App. **Date** _____

Property Owner Signature: _____ **Date** _____

Print name(S): _____

Agent/Representative Signature: [Signature] **Date** 11/14/17

Print name: Lisa Klomp

(Note: If agent/representative is submitting your application on behalf of the property owner, the "Letter of Authorization" form must be completed and attached to this application)

SUPPLEMENTAL INFORMATION

The information requested in this application is the minimum information necessary. This application requests information that will assist Crook County planners in evaluating whether your proposal meets these criteria. Failure to complete applicable portions of this application form may result in the County **not** accepting your application or denying your application for failure to demonstrate that the criteria have been met. The County can assist you by providing such information from the Crook County Assessor, Crook County Clerk's Office, and the Crook County GIS Department. However, the burden of proof lies on you, the applicant, to demonstrate that the criteria have been met. In many cases, you may wish to provide information in addition to that requested to support your application.



Crook County
Community Development Department
Planning Division
300 NE 3rd Street, Room 12
Prineville, OR 97754
(541)447-3211

September 22, 2017

Ms. Lisa Klemp
Bryant Emerson, LLP
P.O. Box 457
Redmond, Oregon 97756

Re: Vested Right Application

Dear Lisa:

I have reviewed the files for Mr. Bartels' property off Juniper Canyon Road and have consulted with County Counsel regarding your application for a vested right determination. I concur with Bill Zelenka's letter dated November 1, 2016 (attached) that found the application to be incomplete due to the failure to pay an application fee. Order 2007-79 stated that fees could be waived if the property had been rezoned. The property has not been rezoned so the fee waiver provision does not apply.

If you and your client wish to pursue the vested right application, please submit the \$440 application fee.

Please call me if you have any questions.

Regards,


Ann Beier
Planning Director

Ann Beier

From: Ann Beier
Sent: Wednesday, October 18, 2017 2:55 PM
To: 'Lisa Klemp'
Subject: RE: Vested right - Richard Bartel's application

Beethun
Kathy West
Commercial
heap
Mark Mellett
L

Thank you! I just want to make sure we've got everything covered. Thank you!
Ann

From: Lisa Klemp [mailto:lisa@redmond-lawyers.com]
Sent: Wednesday, October 18, 2017 2:46 PM
To: Ann Beier
Subject: RE: Vested right - Richard Bartel's application

Hi Ann – I just wanted to let you know that I received your message, and I am working on a response.
LK

Lisa Klemp
Bryant Emerson, LLP
888 S.W. Evergreen Avenue, P.O. Box 457
Redmond, OR 97756
lisa@redmond-lawyers.com
Phone 541-548-2151, Fax 541-548-1895

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From: Ann Beier [mailto:Ann.Beier@co.crook.or.us]
Sent: Tuesday, October 17, 2017 3:17 PM
To: Lisa Klemp <lisa@redmond-lawyers.com>
Cc: Eric Blaine <Eric.Blaine@co.crook.or.us>; Jeff Wilson <Jeff.Wilson@co.crook.or.us>
Subject: RE: Vested right - Richard Bartel's application

Hi Lisa –

I've reviewed the information you provided on behalf of Mr. Bartels and his proposed vested right for the aggregate mining site. As we've discussed, this proposal is complicated by a number of factors and I want to make sure that I characterize your request and supporting information properly in finalizing my staff report..

I think you have clearly established that quarry mining began on the property in the 1960s before the County adopted the zoning/development code in 1973. As we've discussed, ORS 215.130 allows for recognition of non-conforming uses. As you point out, the Holmes case demonstrated that a non-conforming use can be approved even if a subsequent land use action to allow the use is denied (although Holmes involved a zone change to allow the use and Mr. Bartels was explicitly denied for a conditional use for mining activities).

Unfortunately, I am missing some key information. ORS 215.130 has specific requirements regarding interruption or abandonment of uses. This has not been addressed. Your burden of proof statement describes how mining occurred in the 1960s and maybe 1970s but I don't know what happened on the property between then and when Mr. Bartels acquired the property in 2003. Also, I know Mr. Bartels mined the property around 2006 when he put in subdivision roads but I don't know if the use was abandoned after that. (We do know that he has retained his Department of Geology and Mineral Industries permit for a limited use). As I mentioned, 215.130 has explicit provisions related to mining activity. It would be helpful if you included findings in support of those requirements.

We have discussed treating this as a vested right but the application includes none of the information we consider in issuing a vested right (e.g., expenditures to develop the property). A vested right determination is one way to approve a non-conforming use. It may be better to consider this as an expansion of a non-conforming use per Crook County Code 18.156.010(1). This requires consideration by the Planning Commission.

I appreciate that this has been a long process but want to make sure that we can provide findings to support planning commission approval of Mr. Bartel's request.

I'd be happy to discuss this with you.

Ann

Ann.beier@co.crook.or.us

From: Lisa Klemp [<mailto:lisa@redmond-lawyers.com>]

Sent: Tuesday, October 17, 2017 11:22 AM

To: Ann Beier

Subject: RE: Vested right

Yes, he has obtained and maintained that certification with DOGAMI since his purchase of the property.

He did aggregate mining of the property pursuant to the CUP that CC issued to him for developing the adjacent subdivision. He did blasting, crushing, loading, and all aspects of operation pursuant to the County approval.

I believe that the materials discuss the blasting aspects of the operation. I know that the CUP application in 2007 addressed it as well. Blasting occurs only once a year (or maybe twice if needed) and advance notice is given to all neighbors within a certain radius. The materials address how notice and blasting occur. Blasting is expensive and only needs to be done when there is a need for more aggregate to crush, etc. So, blasting does not occur regularly, but only annually or semiannually.

I hope that answers your questions.

Lisa Klemp


Bryant Emerson, LLP

888 S.W. Evergreen Avenue, P.O. Box 457

Redmond, OR 97756

lisa@redmond-lawyers.com

Phone 541-548-2151, Fax 541-548-1895

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error, please immediately notify us by reply email at BE@redmond-lawyers.com or by telephone at 541.348.2151, and destroy the original transmission and its attachments without reading them or saving them to disk.

From: Ann Beier [<mailto:Ann.Beier@co.crook.or.us>]
Sent: Tuesday, October 17, 2017 11:04 AM
To: Lisa Klemp <lisa@redmond-lawyers.com>
Subject: Vested right

Hi Lisa –

I am working on this decision. Has Mr. Bartels been operating the quarry? I see that he has an exclusion certificate from DOGAMI to remove 5,000 cubic yards and disturb up to 1 acre in a 12 month period. Has he had that since he purchase the property?

What kind of improvements has he made on the property? (Any \$\$ figure?)

Will he be blasting on the property? (You may have addressed this in your materials – I just don't remember seeing it...)

Thanks!

Ann

Ann.beier@co.crook.or.us

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CROOK COUNTY

BEFORE THE PLANNING COMMISSION

IN THE MATTER OF AN APPLICATION
FOR CONDITIONAL USE APPROVAL
IN AN RECREATIONAL RESIDENTIAL
MOBILE ZONE RR(M) -5

NO. C-CU-2266-05

FINAL DECISION

SUMMARY:

APPLICANT/PROPERTY OWNER: Richard Bartels
12909 SW Hwy 126,
Powell Butte, OR 97753

ATTORNEY: Robert S Lovlien
Bryant, Lovlien and Jarvis, PC
PO Box 1151
Bend, OR 97709

GEOTECHNIAL ENGINEER: Curson Geotechnical
PO Box 7918
Bend, OR 97708

PROPERTY LOCATION: Seven miles south of Prineville on the west side of Juniper Canyon Road (T16 S R 16 EWM NE 1/4 Sec 12 TL 400)

REQUEST: Conditional Use approval for an aggregate quarrying and processing operation.

FINAL DECISION: DENIED by a 5-1 vote of the Planning Commission.

DATE OF FINAL DECISION: June 27, 2007

DEADLINE FOR SUBMISISON OF APPEAL: July 9, 2007

THE ABOVE ENTITLED MATTER came before the Crook County Planning Commission at its meetings of December 13, 2006, February 7, 2007, March 7, 2007 and April 25, 2007.

LEGAL CRITERIA

ZONING

An aggregate mining operation is permitted as a conditional use in the RR(M)-5 zone, in accordance with Section 18.40.020(11).

Section 18.40.100 of the County Code imposes limitations on conditional uses in the RR(M)-5 zone, in addition to those imposed by Chapter 18.160. Relevant to this application is Subsection 18.40.100(1):

"An application for a conditional use in the RR(M)-5 zone may be denied if, in the opinion of the planning commission, the proposed use is not related to or sufficiently dependent upon the recreational resource of the area."

Also relevant is Subsection 18.40.100(2):

"An application for a conditional use in the RR(M)-5 zone may be denied if the applicant fails to demonstrate that a location in close proximity to the recreation resource to be served is essential to the public interest and to the full development of the recreation resource."

Relevant as well is 18.40.100(4), which states that the Planning Commission may require establishment and maintenance of fire breaks, the use of fire resistant materials in construction and landscaping or may attach other similar conditions or limitations that will serve to reduce fire hazards or prevent the spread of fire to surrounding areas.

Also relevant is 18.40.100(5), which states that the Commission may limit changes in the natural grade of land, or the alteration, removal or destruction of natural vegetation in order to prevent or minimize erosion or pollution.

Subsection 18.40.100(6) states that compliance with the Comprehensive Plan shall be required for the approval of any application for a conditional use in the RR(M)-5 zone.

Other subsections of Section 18.40.100 refer to recreational, commercial, or residential uses, and are not applicable to the present proposal.

Chapter 18.160 of the Crook County Code sets general criteria for

conditional uses. CCC 18.160.050(9) sets specific criteria for mining, quarrying, and other extraction activities:

(a) Plans and specifications submitted to the planning commission for approval must contain sufficient information to allow the planning commission to consider and set standards pertaining to the following:

(i) The most appropriate use of the land.

(ii) Setback from the property line.

(iii) The protection of pedestrians and vehicles through the use of fencing and screening.

(iv) The protection of fish and wildlife habitat and ecological systems, through control of potential air and water pollutants.

(v) The prevention of the collection and stagnation of water at all stages of the operation.

(vi) The rehabilitation of the land upon termination of the operation.

(b) Surface mining equipment and necessary access roads shall be constructed, maintained, and operated in such a manner as to eliminate, as far as is practicable, noise, vibration, or dust which may be injurious or annoying to persons or other uses in the vicinity.

(c) The comments and recommendations of all appropriate natural resource agencies of the state and federal governments shall be sought.

(d) A rock crusher, washer, or sorter shall not be located closer than 500 feet from a residential or commercial use.

Chapter 18.144 of the Crook County Code sets criteria for mining uses subject to conditional use approval.

CROOK COUNTY COMPREHENSIVE PLAN: Relevant sections of the Crook County - Prineville Area Comprehensive Plan include the Goal 5 Mineral and Aggregate Amendments, Emergency Ordinance No. 51 amending the Comprehensive Plan policies for mineral and aggregate, and pages 25-27, 42-49, 152-164, and 178-200.

FACTS

ACREAGE: The property measures 10.01 acres.

CURRENT USE OF THE PROPERTY: An existing quarry is located in the southeastern quarter of the property, and consists of an approximately 30 foot cut into the toe of a moderately sloping hillside. It is presently being used to supply material for roads in the Cimarron Hills subdivision. There are some stockpiles of previously quarried material to the east of the quarry.

The perimeter of the property is fenced. There are no structures on the property.

CHARACTERISTICS OF THE RESOURCE: An approximately 30 foot high basalt face is exposed in the existing quarry. It consists of fairly uniform material, except that the east wall of the quarry displays basalt which is more vesicular than the remainder. The overburden on the northern one-third of the property is thicker than on the southern two-thirds. Visible basalt outcrops are present on the southern two-thirds, but not on the northern one-third. However, "floating" pieces of basalt are present above the overburden on the northern one-third. The applicant's engineer estimates that the overburden is no more than 30 feet thick in the northern area. He also estimates that the underlying basalt is at least 20 feet thick, and extends throughout the property.

The total amount of crushable basalt, together with topsoil, sand, and gravel on the property is estimated at over 585,000 cubic yards.

AREA LAND USE - GENERAL: The area to the west and south of the property is dominated by small parcels which are either occupied by existing or approved residences, or are available for the construction of residences with site plan approvals. This area includes the Ironwood Estates and Cimarron Hills subdivisions, and the smaller Hood Circle subdivision.

The area to the east of the property is dominated by large parcels which are available for residential subdivision with a minimum lot size of five acres, in accordance with the RR(M)-5 zone. The two parcels on the east side of Juniper Canyon Road to the east and northeast of the property could potentially be

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subdivided into nearly 150 five-acre residential lots. A portion of a larger parcel which is located within one-half mile to the southwest could be subdivided into an additional 30-40 five-acre residential lots. There are a number of other parcels within one-half mile of the property boundaries which could be used for smaller subdivisions of around 5-10 lots.

These assumptions are based on five acre lots. Additional residential lots in the above areas are possible if Juniper Acres transfer credits are purchased by developers, or if smaller lot sizes must be permitted because of Measure 37 claims. The terrain of the area slopes upward from south-southeast to north-northwest. As a result, residential areas to the north and northwest of the property boundaries are at higher elevations than the proposed mining operation.

AREA LAND USE - NOISE AND DUST SENSITIVE USES: There are no existing residences within 100 feet of the property boundaries, in accordance with CCC 18.144.060(1)(a). The closest existing residence is about 200 feet away.

Parts of the Cimarron Hills subdivision are within 100 feet of the property boundary. However, a minimum setback of 100 feet on the subject property can be required between the mining operation and the property boundary, and parts of the subdivision adjacent to the property boundary are presently considered to be unbuildable due to flood hazard. For this reason, it appears that residences can be placed more than 100 feet from the mining operation on the above three lots.

The vacant parcels bordering the property on the north and west have sufficient space for residences to be placed more than 100 feet from the mining operation, in view of the required minimum 50 foot setback on the subject property.

Juniper Canyon County Road adjoins the property on the east. A minimum 100 foot setback must be maintained between the mining operation and the road, in 18.144.060(1)(b).

Aggregate processing may not be carried out within two miles of a planted vineyard, in accordance with CCC 18.144.040(4). This is not a potential conflict, as vineyards are not customarily planted in Crook County, and there are none within two miles of the property.

AREA LAND USES - AIRPORTS: There are no public airports within

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ten miles of the property. A private airport, the Dry Creek Airpark, is located about 2.3 miles to the southwest. Its runway runs east-west.

The concern about proximity to airports stems from the presence at some mining sites of water impoundments, which may attract birds which are a hazard to aircraft.

There is no potential conflict in the present instance, as there are to be no water impoundments in connection with the proposed mining operation.

ACCESS: Access to the proposed mining operation is to be by an existing driveway connecting to Juniper Canyon Road. The applicant states that the driveway is to be graveled and maintained to applicable standards. The applicant states that an average of five truck trips per day, on five days per week, will be generated. No figures have been provided as to the **maximum** number of trips per day expected to be generated, or as to the cumulative impact of the truck traffic generated in combination with other users of the road.

The Crook County Roadmaster states that the applicant has been issued road approach permit #CRP19704 *for personal driveway access only*. The current conditions for approval for the site distance requirements has not been completed.

The Roadmaster states that a new access application will be required in order to use the access for the proposed mining operation.

TERRAIN: The existing quarry is at an elevation of approximately 3,940 feet above sea level. The property has gently to moderately sloping terrain, sloping upward from south-southeast to north-northwest.

SURFACE WATER: Dry Creek traverses the southeast corner of the property, to the southeast of the existing quarry and the proposed mining area.

NATURAL DRAINAGE: The natural drainage of the property is to Dry Creek.

FLOOD ZONE: The greater part of the property is in Flood Zone A,

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a 100 year flood zone for which no minimum elevation has been set, in accordance with the FEMA Flood Insurance Rate Map for Crook County, effective July 17, 1989, Panel 0400.

The existing quarry site and the proposed mining area are at least partially in Flood Zone A, according to the maps provided by the applicants and Panel 0400 of the FEMA Flood Insurance Rate Map, which covers the property.

WETLAND: Designated wetlands may be located in or adjacent to the bed of Dry Creek. The mining operation will not involve the creek bed or banks, and will not be within a designated wetland area.

VEGETATION: The property is covered by native grasses, brush and trees, primarily sagebrush and juniper.

WILDLIFE: The property is in General Deer Winter Range, according to the Goal 5 Element of the Crook County Comprehensive Plan.

IRRIGATION: The property is not irrigated and has no water rights.

FARM DEFERRAL: The property is not under farm deferral.

FIRE: The property is in the Juniper Canyon Fire District.

UTILITIES: Electricity is available from Central Electric Cooperative (CEC) from existing lines on Juniper Canyon Road.

Telephone service is available from US West from existing lines on Juniper Canyon Road.

SECURITY/VEHICLE BARRIERS: The existing perimeter fencing is to be maintained. A lockable gate is to be installed at the entrance to the property on Juniper Canyon Road. Slopes will not exceed one and one-half to one, and there will be no water impoundments. Vehicles and equipment will be stored in the central part of the property, within the perimeter fence.

SCREENING: Existing trees are to be retained, including those in the northeast corner and along the southern boundary of the property. The existing quarry, where processing is to take place, is below grade, which will screen the processing from Juniper Canyon Road and adjoining properties, and will also reduce noise.

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Equipment will also be stored in the existing quarry. Planning staff observed that trucks and other equipment are presently being stored in the quarry, and are not visible from the property boundaries.

DRAINAGE: The applicant's engineer states that the mining operation will produce no additional surface water. However, it is also stated that fugitive dust may be controlled by application of water, as well as by mulching and seeding. The applicant's engineer states that the natural drainage of the property to Dry Creek will not be disrupted by the mining operation.

DUST CONTROL: Dust is to be controlled by mulching, seeding, and/or the application of water.

MINING OPERATIONS: Basalt for aggregate is to be mined by a "drill and shoot" procedure. This will involve blasting, which will take place on a maximum of 1-3 days per year. The applicant states that livestock owners in the area can be give advance notice.

Crushing, washing, and sorting of aggregate will be conducted within the existing quarry. The applicant states that these operations will take place at least 500 feet from property boundaries, in accordance with CCC 18.144.060(1)(b). However, the dimensions of the existing quarry do not appear to make that possible.

Crushing is to be limited to no more than three weeks per year.

Machinery used will include a bulldozer, a loader, a sorter, and a crusher.

HOURS OF OPERATION: The applicant's engineer states that the following hours of operation are to be observed:

(A) June 1 through October 31: 6:00 a.m. to 9:00 p.m. Mon-Fri;
8:00 a.m. to 5:00 p.m. Saturday.

(B) November 1 through May 31: 7:00 a.m. to 6:00 p.m. Mon-Fri;
8:00 a.m. to 5:00 p.m. Saturday.

(C) No operations are to be conducted on Sundays, or on the following legal holidays: New Years Day, Memorial Day, July 4th,

Labor Day, Thanksgiving Day, Christmas Day.

These hours are in accordance with CCC 18.144.060(8).

RECLAMATION: The applicant states that the property is to be rehabilitated in accordance with a reclamation plan to be reviewed and approved by DOGAMI. Live topsoil salvage is to be employed where possible. Each mining phase is to be re-seeded with pasture grasses or other vegetation as specified by DOGAMI.

TESTIMONY

WRITTEN TESTIMONY

PROPONENT TESTIMONY.

The owners of an approved offroad vehicle park in the area have indicated that they propose to use aggregate from the proposed operation in constructing their facilities.

A letter dated January 24, 2007 was submitted by the applicant's attorney entitled "Response to Staff Report". The letter states that CCC 18.140.100 is not applicable to the application, and that regardless of the applicant's position on the matter that the "proposed rock quarry operation is directly related to and dependent upon the recreational resource of the area * * *" The letter also states that many homes in the area take advantage of the numerous recreation amenities in the area and that the proposed use will provide a source of material substantially closer than the nearest aggregate resource.

A letter dated February 16, 2007 was submitted by the applicant's attorney entitled "Rebuttal Argument". The letter addresses The CC& R's for Cimmaron Hills, the Waiver of Remonstrance, setbacks, noise, truck numbers, hours of operation and the dependency upon the recreation resource of the area.

OPPONENT TESTIMONY:

Eight persons submitted letters in opposition to the proposal.

The letters were received in opposition to the proposal stated

that the proposal will create traffic hazards in the area, lower their property values, potentially damage their wells, create dust, vibration and noise, interfere with wildlife and have negative visual impacts.

The opposition letters also stated that some property owners had signed an agreement not to object to the existing pit. They stated that they had been led to believe that the pit was only to be used to supply aggregate for construction at Cimarron Hills Subdivision. The letters also cited CC& R's for Cimarron Hills Subdivision. The letters also stated concerns over storage in the flood zone.

VERBAL TESTIMONY

PROPONENT TESTIMONY:

Public Hearing December 13, 2006

A representative of the applicant testified in support of the application at the December 13, 2006 meeting. He stated that the proposal is related to recreation because people move to the area to engage in recreation, and need aggregate to construct homes and driveways.

Another person testified in support. He stated that he owns a large parcel on the other side of Juniper Canyon Road from the quarry, and also owns four lots on the same side of the road. He said that he supports the proposal, because an accessible supply of aggregate is needed in the area.

Public Hearing February 7, 2007

The attorney for the applicant testified in favor of the proposal. He described the proposal and its history and cited a January 24, 2007 letter in the record detailing his argument that a conditional use application for an aggregate operation does not need to comply with the RR(M)5 zone regulations; i.e. CCC 18.40.100.

Six other people testified in support of the proposal. One person testified that the proposal would help traffic in the area because it would decrease trips outside the area for aggregate.

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Another person testified that there was a recreational connection because the proposed use would supply materials for home based recreation in the area.

Another person testified that he supported the proposal and that there was a difference between the perception of vibrations caused by the proposed use and damage from vibrations. He also discussed the protection of wells from blasting.

Another person testified in support and offered testimony regarding rock crushers.

Another person testified in support and stated that the travel time to Prineville Reservoir for delivery of aggregate would be reduced in half and this would result in cost savings to customers as well as a reduction in trip numbers.

Another person testified in support and discussed the demand for rock in the area and stated that the proposed use would save people money.

At the close of opposition testimony detailed below, the applicant's attorney requested that he be given a reasonable time to submit the closing rebuttal in writing due to the amount and nature of the testimony received.

Public Hearing March 7, 2007

The applicant testified regarding a procedural error and what option was open to him. He testified regarding signage, sight distance, hours of operation and other aspects of the operation of the proposed use and its effects on surrounding properties and residents. The applicant asked for a continuation due to a procedural error and to give him the opportunity to discuss the Public Testimony with his attorney/representative.

OPPOSITION TESTIMONY:

Public Hearing December 13, 2006

Four persons testified in opposition. One stated that she and her husband object to the proposed operating hours for the quarry, which she said total 15 hours per day. She said that rock brought

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from other locations to be processed may contain contaminants, which could enter the local groundwater. She said that previous blasting at the pit severely shook her house, and that she was not notified in advance.

She read a letter from a person who purchased a lot in Cimarron Hills, and was made to sign a statement waiving his right to protest use of the quarry. He stated in the letter that he was not told in advance of the present proposal, and that he objects to it.

Another person testified in opposition. He stated that he is not objecting to the proposal as such, but feels that the applicant has made a weak case for approval. He said that all applicants should be treated the same.

Another person testified in opposition stating that he supported the opinion of the first person to testify in opposition. He stated that he did not feel there was demand for this rock quarry.

Another person testified that he purchased a lot in the Cimarron Hills subdivision, and signed an agreement not to object to the existing pit. He said that he was led to believe that it was only to be used to supply aggregate for construction at Cimarron Hills, and was not informed that the applicant intended to apply for a commercial aggregate operation. He stated that he is opposed to the proposal.

Public Hearing February 7, 2007

Four persons testified in opposition to the proposal.

One person testified that she was concerned over the visual impact of the rock quarry and the impact of traffic, a blind corner and dust on the recreational area. She stated that the rock quarry did not fit into the recreational zone.

Another person testified that he was concerned about materials being stored in the flood zone.

Another person testified in opposition stating his concern about impact on the residential area and traffic.

Another person testified that he thought the same set of standards should be applied to all aggregate applications and

that was not the case in this circumstance. He stated that more information was needed concerning a traffic impact study.

Public Hearing March 7, 2007

One person testified in opposition. She discussed her concerns regarding the impact of the proposed use on her home, truck noise, hours of operations, blasting and unpleasant odors.

ANALYSIS

(1) Does CCC 18.40.100 apply to an application for an aggregate quarrying and processing conditional use permit application?

The applicant's attorney in his January 24, 2007 letter states that CCC 18.40.100 is not applicable to the conditional use application. This letter cites CCC 18.144.040(1) which states that

"Notwithstanding any provisions in this title to the contrary an application for a permit for a conditional use listed in CCC 144.030 shall be allowed if it meets the following criteria * * *"

The Commission does not interpret CCC 18.144.40(1) as exclusive. The Commission interprets CCC 18.144.040(1) to mean that additional criteria can be applied to an aggregate conditional use application, such as CCC 18.40.100, if they criteria are not in direct conflict with the provisions in 18.144.040 1(a) through (e). The Commission finds that the criteria in CCC 18.40.100 are not in direct conflict and are therefore not contrary to CCC 18.144.040(1) (a) through (e).

The Commission finds that CCC 18.40.100 applies to an application for an aggregate quarrying and processing conditional use application.

(2) Is the proposal for an aggregate quarrying and processing operation "related to or sufficiently dependent upon the recreational resource of the area" in accordance with CCC 18.40.100(1)?

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The Commission finds that the "recreation resource" is the Prineville Reservoir and surrounding public lands as well as the RR(M)-5 zone. This interpretation is consistent with the Commission's and the County Court's previous interpretation that was affirmed by LUBA in *Guntow Farm v. Crook County*, (LUBA No 2004-052).

The record and testimony indicate that aggregate from the proposed quarrying and processing operation would be used by residents of the zone on their own properties. The record and testimony also indicate that residents carry out recreational activities on their own properties and that the aggregate would be used in aiding those activities including but not limited to constructing driveways.

The record and testimony indicate that the proposed use may reduce traffic congestion in the area by decreasing the distance traveled by commercial trucks and individual vehicles to provide aggregate. The reduction in traffic congestion may benefit residents and recreational users of the area.

The record and testimony indicated that many people have bought properties in the area because they enjoy the abundant recreational activities. The record and testimony also indicate that these property owners may benefit from and use the aggregate from the proposed conditional use.

The Commission weighed the evidence in the record and testimony and is not persuaded that such tenuous associations constitute "related to or sufficiently dependent upon the recreational resource". The Commission interprets the code to require a more direct correlation between the proposed use and the recreation resource. The fact that property owners from the area may use aggregate from the proposed operation is not considered to establish a relationship or sufficient dependency to the recreation resource. The Commission finds that the product of the proposed use is aggregate and that this is not a product or service that one would normally associate with a recreational use or activity.

On the basis of the above, the Commission finds that the proposed use for an aggregate quarrying and processing operation is not related to or sufficiently dependant upon the recreational resource in accordance with CCC 18.40.100(1).

(3) Is the proposal for an aggregate quarrying and processing operation "essential to the public interest and to the full development of the recreation resource" in accordance with 18.40.100(2)?

The Commission finds that the proposed use is considered to be in close proximity to the recreation resource because it is proposed to be located within the RR(M)-5 zone.

The evidence in the record and testimony received indicate that the aggregate, quarrying and processing operation may provide for a need in the area, may be economically beneficial and may have safety and traffic advantages. The Commission finds that while the record and testimony indicate that the proposed use may be advantageous to some of the public, it is not essential. The Commission finds that there is aggregate already available to the area albeit from other sources that are located further away. The Commission evaluated the record and testimony in this regard and finds that the evidence is insufficient to establish that the proposed use is "essential to the public interest"

Furthermore, as indicated above the Commission has determined that there is not a relationship between the proposed use and the recreation resource. As such the Commission determines that the proposed use cannot be essential "to the full development" of the recreation resource where a relationship between the two has not been established.

On the basis of the above, the Commission finds that the proposed use for an aggregate quarrying and processing operation is not "essential to the public interest and to the full development of the recreation resource" in accordance with CCC 18.040.100(2).

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DECISION

The subject application is hereby **DENIED**, without conditions or requirements.

Dated this 27th day of June 2007.

W.R. Gowen, COMMISSION CHAIRMAN

Heidi Bauer, PLANNER

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NOTICE TO APPLICANT AND PERSONS PROVIDING TESTIMONY

The above denial may be appealed in writing to the Crook County Court no later than 5:00 p.m. on Monday, July 9, 2007 on payment of an appeal fee of \$1850.00 + 20% of the initial application fee. The appellant must also provide transcripts of the relevant meeting tapes at the appellant's expense. Cassette tape dubbing is available at \$5.00 per tape.

Appeals must be submitted to the Crook County Planning Department, 300 NE Third Street, Prineville, Oregon; and must be received, together with the appeal fee and advance deposit, by the Planning Department no later than the above time and date.