

BEFORE THE BOARD OF COMMISSIONERS OF LANE COUNTY, OREGON

ORDER NO:
13-06-11-03

IN THE MATTER OF ELECTING WHETHER OR NOT TO HEAR AN APPEAL OF A HEARINGS OFFICIAL'S DECISION DENYING A SPECIAL USE PERMIT TO ALLOW THE EXPANSION OF AN EXISTING AGGREGATE EXTRACTION AREA ONTO LAND IN THE EXCLUSIVE FARM USE ZONE (E-30); MAP T17-R04-S12, TAX LOTS 500, 600, 601, 700, 900, 3600, 3601, 3700; MAP T17-R04-S12-20, TAX LOT 3600; AND MAP T17-R04-S12-40, TAX LOTS 300, 400, 600; (FILE NO. PA12-06374/DELTA PROPERTY CO.).

WHEREAS, the Lane County Hearings Official has made a decision denying a special use permit application in File No. PA12-06374 to expand an existing aggregate extraction area onto lands zoned Exclusive Farm Use within the boundary of the Eugene-Springfield Metropolitan Plan; and

WHEREAS, the Lane County Planning Director has an appeal of the Hearings Official's Decision to the Board of County Commissioners pursuant to LC 14.515; and

WHEREAS, the Lane County Hearings Official has affirmed his decision on the application after reviewing the appeal in File No. PA12-06374; and

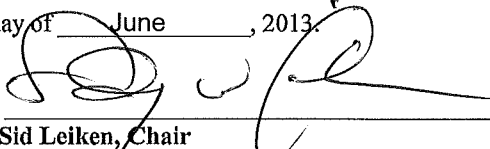
WHEREAS, Lane Code 14.600 provides the procedure and criteria which the Board follows in deciding whether or not to conduct an on the record hearing for an appeal of a decision by the Hearings Official; and

WHEREAS, the Board of County Commissioners has reviewed this matter at a public meeting of the Board.

NOW, THEREFORE, BE IT ORDERED the Board of County Commissioners of Lane County finds and orders as follows:

1. That the appeal does not comply with the criteria of Lane Code 14.600(3) and arguments on the appeal should therefore not be considered. Findings in support of this decision are attached as Exhibit "A."
2. That the Lane County Hearings Official decision dated April 15, 2013, and letter affirming the decision dated May 2, 2013, attached as Exhibit "B," is affirmed and adopted by the Board of County Commissioners as the County's final decision. The Board of County Commissioners has reviewed the appeal and the Hearings Official decision and expressly agrees with and adopts the interpretations of the Eugene-Springfield Metropolitan Area General Plan policies and implementing ordinances made by the Hearings Official in the decision.

ADOPTED this 11th day of June, 2013.



Sid Leiken, Chair
Lane County Board of Commissioners

APPROVED AS TO FORM

Date 6-4-2013 Lane County



OFFICE OF LEGAL COUNSEL

Order Exhibit "A"

FINDINGS IN SUPPORT OF THE ORDER

1. The subject property can be identified as tax lots 500, 600, 601, 700, 900, 3600, 3601, and 3700, assessor's map 17-04-12; tax lot 3600, assessor's map 17-04-12-20; and tax lots 300, 400, and 600, assessor's map 17-04-12-40. These 12 lots include 111.67 acres, only 70 of which are subject to the special use permit. There are seven dwellings on the 12 tax lots; six of which are within the expansion area boundary. All of the subject property is designated Agricultural in the Eugene-Springfield Metropolitan Area General Plan and zoned Exclusive Farm Use (E-30).
2. The existing operation for Delta Sand and Gravel exists to the east and south of the subject property, covers roughly 400 acres, and has been in continuous operation since 1927. The existing operation is designated Sand and Gravel in the Eugene-Springfield Metropolitan Area General Plan and is zoned Sand and Gravel (SG). The current request amounts to an expansion of the existing extraction area.
3. On December 10, 2012, the Land Management Division received an application for an expansion of the existing Delta Sand and Gravel extraction area onto land in the Exclusive Farm Use Zone (E-30). The application was deemed incomplete on January 9, 2013.
4. On February 1, 2013, the applicant submitted supplemental information and requested that the application be deemed complete for processing.
5. On February 8, 2013, the Planning Director elected to hold an evidentiary hearing with the Hearings Official, in accordance with Lane Code 140110(3)(a). Notice of a March 8, 2013 hearing was promptly mailed to nearby property owners and interested parties.
6. On March 8, 2013, the Hearings Official held an evidentiary hearing. The record was held open until March 18, 2013, for new information, until March 25, 2013, for responses to new information, and until April 1, 2013, for applicant's final rebuttal.
7. The Hearings Official issued his decision denying the application on April 15, 2013.
8. On April 29, 2013, Bill Kloos, representing the applicant, Delta Property Co., submitted an appeal of the Hearings Official's decision to the Land Management Division.
9. In order for the Board to hear arguments on either appeal, Lane Code 14.600(3) requires one or more of the following criteria to be found by the Board to apply to the appeals:
 - *The issue is of Countywide significance.*
 - *The issue will reoccur with frequency and there is a need for policy guidance.*
 - *The issue involves a unique environmental resource.*
 - *The Planning Director or Hearings Official recommends review.*
11. The issues in this appeal are limited to the area within the Metro Plan boundary, outside of the Eugene and Springfield Urban Growth boundaries, do not affect the Goal 5 resources outside the Metro Plan boundary, and are not of county-wide significance.
12. The Hearings Official decision addresses the issues in this appeal in a reasonable and clear way that is consistent with the plain language of Lane Code and the policies and plan designations of the Metro Plan. These issues are not anticipated to occur with frequency and there is not a need for policy guidance beyond the Hearings Official's decision.
13. Within the context of the approximate 2,600 to 2,800 acres of land within the Metro Plan boundary currently designated Sand and Gravel, the subject 70-acre site does not constitute a unique environmental resource. The Hearings Official's decision does not limit mining beyond the degree to

which Lane Code already limits sand and gravel mining within the Metro Plan. The process to allow aggregate mining on agriculturally designated and zoned land within the Metro Plan Boundary is to complete the Goal 5 process through a post acknowledgement plan amendment.

14. The Planning Director does not recommend review of the appeals for the reasons cited above.
15. To meet the requirements of Lane Code 14.600(2)(b), the Board is required to adopt a written decision and order electing to have a hearing on the record for the appeals or declining to further review the appeals.
16. The Board has reviewed this matter at its meeting of June 11, 2013, finds that the appeals do not comply with the criteria of Lane Code Chapter 14.600(3), declines further review, and elects not to hold an on the record hearing for the appeals.
17. The Board affirms and adopts the Hearings Official decision of April 15, 2013, as the County's final decision in this matter, has reviewed that decision, and expressly agrees with and adopts the interpretations of the Eugene-Springfield Metropolitan Area General Plan policies and implementing ordinances made by the Hearings Official in the decision.



May 2, 2013

Mr. Matt Laird, Manager
Land Management Division
3050 N. Delta Highway
Eugene, OR 97408


Re: *Appeal of Hearings Official decision to deny a special use permit (PA 12-6374) submitted by the Delta Property Company that would allow the expansion of an existing aggregate extraction area on tax lots 500, 600, 601, 700, 900, 3600, 3601, and 3700, assessor's map 17-04-12; tax lot 3600, assessor's map 17-04-12-20; and tax lots 300, 400, and 600, assessor's map 17-04-12-40.*

Dear Mr. Laird:

On April 15, 2013, I issued a decision denying the Delta Property Company's request (PA 12-6374) to allow the expansion of an existing aggregate extraction area within an E-30 zone. On April 29, 2013 the applicant appealed my decision. Upon a review of this appeal, I find that the allegations of error have been adequately addressed in my decision and that a reconsideration of that decision is not warranted.

Accordingly, on the authority of Lane Code 14.535(1), I shall affirm my April 15, 2013 decision without further consideration. Please advise interested parties of this decision.

Sincerely,


Gary L. Darnielle
Lane County Hearings Official

cc: Rafael Sebba (file)

**LANE COUNTY HEARINGS OFFICIAL
REQUEST FOR A SPECIAL USE PERMIT TO ALLOW THE EXPANSION OF
AN EXISTING AGGREGATE EXTRACTION AREA
WITHIN AN EFU-30 ZONE**

Application Summary

Hearings Official review of a special use permit request by Delta Property Company to allow the expansion of an existing aggregate extraction area on tax lots 500, 600, 601, 700, 900, 3600, 3601, and 3700, assessor's map 17-04-12; tax lot 3600, assessor's map 17-04-12-20; and tax lots 300, 400; and 600, assessor's map 17-04-12-40.

Parties of Record

Delta Property Company	Paula Babb	Bill Kloos
Joel & Terese Narva	Kate Perle	Matt Stiffler
Mark & Wendy McGowan	Catherine Martini	Sean Malone
LandWatch Lane County	Scott Elsasser	Thomas Gregg
Rachael DeBuse	Clyde Beat	Diana Kahapea
Glenn Kreiss	Margaret MacDonald	Tom Lively
Mark & Karen Reed	David Mulkey	Dan Revell
Loretta Wallace	Kim Whiteman	Gladys O'Donnely
Lark Lambard	Rod & Cindy Graves	Gordon Lotion
Stan Pickett	Ed Moore	Amanda Punton

Application History

Hearing Date: March 8, 2013
(Record Held Open Until April 1, 2013)

Decision Date: April 15, 2013

Appeal Deadline

An appeal must be filed within 12 days of the issuance of this decision, using the form provided by the Lane County Land Management Division. The appeal will be considered by the Lane County Board of Commissioners.

Statement of Criteria

Lane Code 16.212(4)(y), (10)(a) through (d), and (f) through (g)
ORS 215.213(2)(d)(B)
ORS 215.296
ORS 215.298

Findings of Fact

1. The property subject to this application, hereinafter referred to as the "subject property," can be identified as tax lots 500, 600, 601, 700, 900, 3600, 3601, and 3700, assessor's map 17-04-12; tax lot 3600, assessor's map 17-04-12-20; and tax lots 300, 400, and 600, assessor's map 17-04-12-40. These 12 lots include 111.67 acres, only 70 of which are subject to this conditional use permit request. There are seven dwellings on the 12 tax lots; six of those dwellings are within the expansion area boundary. A more detailed description of these tax lots, which is found on page three of the applicant's February 1, 2013 submission, is incorporated into these findings by reference.
2. The proposal is for mining of the expansion area and hauling of that material to the existing facility. The expansion request does not propose any additional ingress or egress points. Trucks will travel internally to the existing operation, entering and exiting at the existing facility. The exact location of that travel will change as the operation moves.

The existing operation for Delta Sand and Gravel lies to the east and south of the subject property and has been in continuous operation since 1927. It is zoned SG and is on the Sand and Gravel inventory. The existing operation covers roughly 400 acres. The current proposal is for about 70 acres and represents an expansion of the existing extraction area. The externalities associated with the proposed use will be less than for the current operation because no processing will be done on site.

3. The applicant proposes to mine to a depth of 80 feet using a multiple-bench system. No on-site blasting is proposed and the applicant intends to excavate the aggregate using track hoes, front-end loaders, and off road trucks. Noise mitigation measures include construction of a sound berm and the planting of trees around the perimeter of the subject property, except where such already exist. Dust control measures include watering of the subject property per an existing LRAPA permit.
4. There was a previous and unsuccessful attempt to amend the sand and gravel inventory via a post acknowledgment plan amendment. (PA 05-6151) This 2005 application by Delta proposed to add to the aggregate resources inventory about 72 acres of EFU property owned by Delta in the general vicinity of the property subject to this application. That 2005 application included some of the property at issue here, and well as other acreage that is not involved here. Besides requesting that the land be added to the Goal 5 inventory of significant sand and gravel resources the application requested that the property be redesignated and rezoned for sand and gravel extraction. Because the text and the diagram of the Metro Plan were being changed the City of Eugene became a party to the proceeding and the

changes could not be made without approval by both the county and the city. The county initially approved the requested changes in early 2008. The matter then went to the city, and the city denied the application about five months later. The matter was then referred to Metropolitan Policy Committee for an unsuccessful attempted resolution. At that point the county was required to deny the application, and the county did so, based on findings made by the city. The denial was then challenged by Delta at LUBA, but LUBA affirmed the denial. See *Delta Property Company v. Lane County*, 58 Or LUBA 409 (Feb. 24, 2009).

5. About a dozen and one half people testified at the March 8, 2013 hearing on this application. A number of these individuals testified that they were actively farming their property in the area. As required, the applicant has shouldered the burden of identifying parcels that qualify for protection under Lane Code 16.212(10)(f) and (g), and has identified five presumed farming operations by narrative and map. (Applicant's Exhibit YY to its March 18, 2013 filing.) Some of the information supplied by the applicant has been modified through testimony offered at and subsequent to the hearing. Added to this list should be Margaret MacDonald & Tom Lively, David Mulkey, and Clyde Beat. I will address the testimony of these individuals separately, as follows:

Kim Whitman. Mr. Whitman testified that he raised trees bearing apples, walnuts and cherries on tax lot 200, assessor's map 17-04-12. This almost 6-acre, EFU-zoned parcel is located adjacent to the subject property to the north. The property has no farm deferral assessment and according to Lane County's Regional Land Information Database (RLID) its primary land use is single family residential. No farming is apparent from RLID's aerial photograph of the property and the applicant's claim that there are no accepted farm practices on this property has not been refuted.

Kate Perle/Kevin Jones. Ms. Perle and Mr. Jones are associated with tax lot 2000, assessor's map 16-04-35-44, a .26 acre parcel located inside the Eugene Urban Growth Boundary and zoned R-1; and tax lot 800, assessor's map 16-04-36, a 14.6 acre parcel zoned E-30 and located more than a mile from the subject property. Tax lot 800 is located more than a mile from the subject property.

Ms. Perle has responded by pointing out that she farms 23 acres adjacent to 1225 E. Beacon Drive and an additional 3 acres on E. Beacon Drive. Unfortunately, Ms. Perle did not recount what are her farm practices, except to say that she has a wholesale nursery, or explain how those practices would be significantly affected by the proposed use.

Rachael DeBuse. Ms. DeBuse has stated that she farms about 20 acres with Keith Walton around the area of 1640 E. Beacon Drive (tax lot 8300, assessor's map 17-04-01). (Ms. Perle suggests that she actually farms 80 acres.) Tax lot 8300 has a farm deferral but it is not known which other properties comprise the 20 acres or what their assessment status is. It is assumed for purposes of this review,

however, that Ms. DeBuse farms this acreage but it is not known what current farming practices are occurring.

Margaret MacDonald & Tom Lively. The applicant's RLID records show that they are associated with three small parcels located within the Eugene Urban Growth Boundary and zoned R-1. (Tax lots 2700, 2701 and 6600, assessor's map 17-04-01-32) Ms. Perle, however, claims that the two intensively farm these lots and rent acreage from Kevin Beat at the corner of River Loop 1 and River Loop 1. Tax lot 6600 is zoned RR-5, is less than 5 acres in size, and is occupied with a dwelling. Testimony in the record indicates that berries, cherries and an orchard are present on tax lot 6600.

Loretta Wallace. Ms. Wallace apparently farms tax lots 2300 and 2401, assessor's map 17-04-12-20, located about 1200 feet to the west of the subject property. These tax lots are zoned AG and have a farm deferral. The record does not indicate what farm crops or farm practices are conducted.

Matt Stiffler. Mr. Stiffler farms tax lot 300, assessor's map 17-04-12, located adjacent to the subject property. Tax lot 300 is about 7 acres in size, is zoned E-30 and has a farm deferral. The record does not indicate what farm crops or farm practices are conducted.

Katherine Martini Lesiak. Ms. Lesiak farms tax lot 4100, assessor's map 17-04-01-22, a 14.57 acre parcel zoned E-30. The property has a farm deferral and is over 3,900 feet from the subject property. The record does not indicate what farm crops or farm practices are conducted.

David Mulkey. Mr. Mulkey testified that he farms about 5 acres at 501 Delay Drive (Tax lot 7000, assessor's map 17-04-01). The property is zoned RR-5 and is located several hundred feet to the west of a current Delta mining operation across a channel of the Willamette River. Delta's current mining operations also occur about 1,200 feet to the south. Mr. Mulkey noted that he has raised apples, peaches, pears, cherries, grapes, strawberries, and raspberries, among other produce, and had a successful peach orchard for about 20 years. He stated that he never experienced adverse dust impacts on his most sensitive crops, which were the peaches and the raspberries.

Clyde Beat. Mr. Beat earlier had testified in opposition to the post acknowledgment plan amendment that included some of the subject property. His testimony then was associated with perceived negative impacts on wells that he and his neighbors were using. He has since recanted that testimony after determining that the failure of the wells were caused by the concurrent installation of the River Road - Santa Clara trunk sewer. This was not an isolated occurrence as a number of people with shallow wells reported problems when the trunk lines went in. Mr. Beat's four wells were shallow, suction-type wells and were closer to the trunk line than they were to Delta excavations.

Tax lot 6702, assessor's map 17-04-01. The owner of this property produces cherries.

6. Dust is one concern regarding the impact of the proposed aggregate extraction extension on surrounding farm practices. There is sufficient evidence in the record, primarily from the previous post acknowledgment plan amendment (PA 05-6151), that dust can have significant adverse impacts on farm practices. (e.g. December 25, 2005 letter from Ross Penhallegon, OSU/Lane County Extension Horticulture Agent) Mr. Penhallegon noted that dust can increase the cost of accepted farming practices by increasing labor costs to remove dust from crops that currently isn't necessary, increase the damage cause by mites, increase the pesticide applications to control the increase in mites, additional soil testing on organic farms, reduced pollination that reduces crop yield, mechanical damage to crops due to additional washing and reduced shelf life of crops due to additional washing. In addition, dust can cause the increased use of groundwater to clean crops. Mr. Penhallegon was able to quantify the additional costs to about \$177 per acre.

Wind in the area around the subject property is predominately from the north during the drier months (May through October) and predominately from the south during wetter months (November through April). However, there can be quite a bit of deviation from this pattern during the year. Accepted farming practices identified within the surrounding area are generally located to the west and northwest of subject property. Thus, wind from the east, southeast, south, south-southeast, and east-southeast will affect them. During the years 2001 through 2005, the wind blew in these directions (cumulative) 34 percent of the time. During the months of June through October 2005, for instance, the wind blew in these directions 26 percent of the time.¹

The applicant primarily proposes to provide dust mitigation through the watering of the access road, haul road, and other vehicle traffic areas. Dust mitigation through the watering of unpaved roads, however, is only about 50 percent efficient.² Other mitigation measures are to keep the location of the main internal roadways (haul roads) used for onsite truck traffic away from the property lines as far as practicable; comply with a Fugitive Dust Control Program, required by the now in effect LRAPA air permit; and to vegetate reclaimed areas to minimize erosion and dust generation. Sources of dust include overburden removal, aggregate extraction, haul road truck traffic, and site reclamation.

¹ Camille Sears, "Comments on the Potential Air Pollution and Dust Fallout Impacts from the Proposed Delta Sand & Gravel Project Expansion" (January 17, 2006), (Meteorological Wind Rose Summary)

² Camille Sears, "Evaluation of Air Pollution and Dust Impacts From the Proposed Eugene Sand & Gravel Project"(October 8, 2001)

A February 25, 2013 Air Quality Evaluation (Updated) of the proposed expansion was done by Bridgewater Group, Inc. The study pointed out that aggregate mining activities will generate dust and could create a conflict with nearby farming to the north and west of the expansion site and noted that the potential conflict created could be a nuisance condition due to unusual or annoying amounts of dust present in the ambient air. After identifying a series of dust mitigation measures, the study essentially concluded that if these measures were employed they would minimize dust-related conflicts to LRAPA standards. The study did not analyze impacts to accepted farming practices in the area.

7. Surrounding farm uses heavily depend upon wells for irrigation of their crops and orchards. Concern regarding the impact of the extension of the existing aggregate extraction operation has been voiced by many. Evidence in the record demonstrates that aggregate excavation can lower a shallow groundwater table in areas that surround the excavation. Evidence also substantiates that farmers do utilize shallow groundwater tables for irrigation purposes.

A well may only have to be 20 feet deep to access a shallow water table. If that water table is compromised, however, it is possible that a replacement well might have to be five or more times as deep. The costs associated with drilling a replacement well include the cost of drilling, the cost of new pumps, the cost of bringing power to the new well site, the cost of a new pump house, and costs associated with loss of crop revenue due to lack of irrigation. A 100-foot deep replacement well could easily cost more than \$6,000, without accounting for crop loss. (See January 14, 2005 document from Kate Perle and Kevin Jones titled "Estimate for Cost of Change in Agricultural Practices at Full Circle Community Farm.")

The Delta excavation is dewatered by means of a pumping system that delivers water to a series of percolation ponds that allow water to seep back to the Willamette River. In effect, the existing mining site acts as a large well. This has the effect of lowering the local water table in the vicinity of the excavation. There are numerous shallow irrigation wells in the area and irrigation rights can be found primarily to the north and west of the site. Based upon a study prepared for the previous plan amendment, the applicant has anticipated that changes to groundwater levels extend out to just beyond 1,500 feet from the excavation.³ A 5-foot change in head is about half that distance from the excavation and a 10-foot change of head is within a few 100 feet of the excavation. Therefore if the excavation location moves, then the effected area will also move

A March 1, 2013 letter from EGR & Associates cites an earlier report by the same company, titled "Digital Model of Existing Excavation Site and New Expansion Area" to discuss the use of a "low permeability barrier" in conjunction with an

³ EGR & Associates, Inc., "Digital Model of Existing Excavation Site and New Expansion Area" (June 2005)

infiltration trench, termed an “aquaclude,” that could be installed between the excavation area and property lines. This device would reduce the impact of the excavation on aquifer levels and the water table. In findings associated with Ordinance 20413, the Eugene City Council found that the aquaclude was sufficient to minimize groundwater conflicts created by the expansion of the applicant’s aggregate extraction operation.

8. Most of the proposed expansion area is located immediately west of a Flood Insurance Study (FIS) area that has defined floodways and base flood elevations of the Willamette River. The most easterly and northerly part of the proposed expansion area is located within this FIS study area but outside of the floodway. Base flood elevations have been established across those areas within the FIS study boundary (most of the Delta site and the northerly portion of the expansion area), but not for the southerly portion of the proposed expansion area (evaluated in the above referenced 2005 EGR report). It is reasonable to expect base flood elevations across the site to closely mimic the base flood river surface profile in those areas west of the FIS study area. Typical inundation levels across the site are expected to be between 2 and 5 feet deep during base flood events.

Mining activity proposed for this expansion area will occur as excavation taking place below existing ground surfaces. Overburden will be removed and stockpiled in areas higher in elevation than base flood elevations and/or stockpiled at locations on the site that are below currently existing ground elevations. No activity will occur on the proposed expansion area that would have the potential to impede flood flow, to reduce flood storage volume within the flood plain, or to increase the velocity of water flowing across the site. Sound berms, if required, will be oriented and constructed in a manner that allows the passage of anticipated Base flood flows across the site.

9. The existing Delta Sand & Gravel mining area borders land that has been actively in farm use for well over 30 years and there has never been any indication from farmers in the area that the noise generated in the existing mining area has impacted their farming practices or cost them more money than it would have if they had been located farther from the mining area. Based upon testimony and land use information it appears that the vast majority of farmland adjacent to the proposed mining expansion area is used for crop production and not livestock. One parcel that is known to support livestock has a milling operation that produces its own noise without apparent impact on the farm animals. Noise levels expected to radiate to known farming parcels would generally be considered acceptable on properties where human sleeping would normally occur.

Decision

THE DELTA PROPERTY COMPANY REQUEST (PA 12-6374) FOR A SPECIAL USE PERMIT TO ALLOW THE EXPANSION OF AN EXISTING AGGREGATE EXTRACTION AREA ON TAX LOTS 500, 600, 601, 700, 900, 3600, 3601, AND

3700, ASSESSOR'S MAP 17-04-12; TAX LOT 3600, ASSESSOR'S MAP 17-04-12-20; AND TAX LOTS 300, 400, AND 600, ASSESSOR'S MAP 17-04-12-40 IS DENIED.

Justification for the Decision (Conclusion)

Preliminary Issues

1. **Issue Preclusion**

Opponents of this special use permit have argued that this application should not be considered by Lane County because it represents a collateral attack on the County's decision in PA 05-6151, an August, 2008 application that was made to Lane County for a Type II Metro Plan Amendment. That application requested that property, located outside of the Metro Plan UGB but within the Metro Plan Boundary, be added to the Metro Plan Goal 5 Inventory of Significant Mineral & Aggregate Sites and that the Metro Plan designation of that property be changed from of "Agriculture" to "Sand & Gravel." As mentioned above, some of the property subject to the 2008 application is included in this application for a special use permit.

Lane County approved the application with its adoption of Ordinance PA No. 1238 but the City of Eugene denied the proposal with its adoption of Ordinance No. 20412. Because the two jurisdictions could not resolve the disagreement through Metro Plan conflict resolution procedures, Lane County, through its Planning Director, adopted the findings and conclusions adopted by the City of Eugene in Ordinance No. 20413. Addressing OAR 660-023-0180(3)(c), a finding adopted by the City of Eugene, and subsequently by Lane County, was that the expansion area was not on an inventory of significant aggregate sites on September 1, 1996.

I do not believe that this application constitutes a collateral attack on the earlier decision. The current application is not dependent or necessary to carry out the earlier decision. This application is not part of a continuous land use proceeding because the former proceeding concerned a plan amendment, which was denied, and this proceeding concerns a special use permit. *Beck v. City of Tillamook*, 105 Or App 276 (1991) *aff'd in part, rev'd in part*, 313 Or 148 (1992). Nor is this a nondiscretionary review for compliance with conditions imposed in an earlier final decision. *Safeway, Inc. v. City of North Bend*, 47 Or LUBA 489 (2004). Finally, while the prior proceeding was appealed to LUBA⁴, the question of whether the property was already on an inventory of significant aggregate sites was not an issue that was before the Board.

⁴ *Delta Property Company v. Lane County*, 58 Or LUBA 409 (2009).

2. Transportation Impact Study

Lane Code 15.697(1)(d) requires that a TIA may be required as part of a complete land use application if the proposed development will generate or receive traffic by single or a combination of vehicles with gross weights greater than 26,000 pounds as part of their daily operations. The January 9, 2013 "Notice of Incomplete Land Use Application" did not list this omission as a completeness deficiency. Nevertheless, this does not alleviate the applicant from a requirement that is otherwise mandated by the Code.

Lane Code 15.697(1)(d), on its face, is discretionary. Lane County interprets the provision as saying that a TIA is necessary if additional or new traffic is generated by the expansion of an existing use. The applicant is saying that no new traffic will be generated and staff is requiring that proof of that statement be provided. As neither party seems to dispute the correctness of the standard (i.e., the question of whether new traffic is generated) I will assume that it is stipulated.

The applicant argues that no new traffic will be generated since traffic is dependent upon demand limited to its LRAPA air quality permit, which limits it to 2 million tons of aggregate a year. A typical good year is in the range of 1.4 million tons.⁵ It seems to me that one easy way to address the issue is to treat the existing use as if it were nonconforming. That is, the applicant would identify the maximum amount of extraction, with commensurate number of associated vehicle trips, that has annually occurred on the site. Any amount of traffic in excess of that number would constitute an increase in intensity. The applicant can stipulate that this amount of traffic will be a limiting number and if it appears in the future that it may exceed that amount by anything but a negligible amount then it would be required to submit a TIA.

ZONING CONFORMITY

Ordinance No. PA 886, adopted February 29, 1984, applies the Rural Comprehensive Plan Zone, Chapter 16 of the Lane Code, to the "Metropolitan Area of Influence," the area between the Eugene Urban Growth Boundary and the Metro Plan Boundary. This area is often referred to as the "doughnut area." Map #1005, attached to Ordinance No. PA 886, shows that the subject property as being zoned E-30, its current zoning. Ordinance No. PA 886 was subsequently acknowledged by LCDC to be consistent with the Statewide Planning Goals.

Lane Code 16.212(4) lists uses for which approval by the Planning Director is required on EFU-zoned land. In this respect, Lane Code 16.212(4)(y) provides that operations conducted for mining of more than 1,000 cubic yards of material or the excavation of a surface area greater than one acre requires a special use permit.

⁵ March 18, 2013 letter to the Lane County Hearings Official from Stan Pickett, President of Delta Sand and Gravel Co.

Lane Code 16.212(4)(y)(i)

This provision defines "mining" to include all or part of the process of mining by the removal of overburden and the extraction of natural mineral deposits thereby exposed by any method including open-pit mining. The definition does not include excavations of sand, gravel, clay, rock or similar materials conducted by the landowner to reconstruct or maintain access roads, excavation or grading operations conducted in the process of farming or cemetery operations, on-site road construction or other on-site construction or non-surface impacts of underground mines.

In the present case, the applicant proposes to conduct open-pit removal of aggregate for commercial purposes. The applicant proposes to removed more than 1,000 cubic yards of aggregate material from an area having an estimated volume of 4 million cubic yards of aggregate material.

Lane Code 16.212(4)(y)(ii)

Section (4)(y)(ii) requires that the site for the mining of aggregate must be included on an inventory in the acknowledged Lane County Rural Comprehensive Plan even though the site is located within the Metro Plan jurisdictional boundary. The subject property is not included on an inventory in the acknowledged Lane County Rural Comprehensive Plan.

In addressing this discrepancy, the applicant makes two arguments. First, it argues that the requirement of Lane Code 16.212(4)(y)(ii) that the site be on an inventory in the acknowledged Lane County Rural Comprehensive Plan (RCP) must be a scrivener's error as the LCRCP has no aggregate inventory for the land between the urban growth boundaries of Eugene and Springfield and the jurisdictional boundary of the Metro Plan. The applicant asks the hearings official to read the provision as requiring that the site be on an acknowledged inventory of the Metro Plan. Second, the applicant argues that ORS 215.298 only requires that a site be on an inventory of an acknowledged comprehensive plan and that the site is on the Metro Plan's inventory of significant sand and gravel resources that has been acknowledged by LCDC as being in compliance with Statewide Planning Goal #5.

1. Whether required compliance with the RCP inventory is a scrivener's error.

The RCP does not have jurisdiction over land located within the Metro Plan boundary and this fact is recognized by the RCP. Further, the RCP's inventory of aggregate resources does not include land within the Metro Plan boundary. The Board of County Commissioners, through the RCP, does not have the unilateral authority to determine that property within the Metro Plan boundary is compliant with Goal #5 and its attendant administrative rules but it does have the authority to recognize property that has been so designated by the jurisdictions that do have that authority. Thus, there is no reason that the RCP sand and gravel inventory could not include the adopted Metro Plan inventory for that area by reference.

The Metro Plan is the only comprehensive plan in Lane County where the plan has a jurisdictional boundary that extends beyond the urban growth boundary. To avoid a plethora of zoning provisions, Lane County developed Lane Code Chapter 16 to provide zoning regulations applicable to rural Lane County and to the Metro Plan doughnut area.⁶

The contested language of Lane Code 16.212(4)(y)(ii) was in all versions of Ordinance No. 5-02 (then numbered 16.212(4)(b-b)(ii)), which the Board of Commissioners adopted on August 28, 2002. Prior to that time, the Board held public meetings on the adoption of that ordinance on April 3, 2002, April 17, 2002, and August 14, 2002.

Metro Plan designation changes occurring within the Metropolitan Area of Influence require concurrence by both Lane County and the affected city. That is not true for the zoning in that area. All that is required is that LCDC acknowledge that the zoning applied to that area conforms to the Statewide Planning Goals and is consistent with the applicable Metro Plan policies and designations.

A perusal of Lane Code 16.212 demonstrates that Lane Code 16.212(4)(y) is not the only example where the Rural Comprehensive Plan is the touchstone for satisfying a provision in Lane Code 16.212. Thus, Lane Code 16.212(9) requires that land within the Exclusive Farm Use District be zoned consistent with Agricultural Lands Policy #10 of the Rural Comprehensive Plan. Arguably, EFU land located within the doughnut area must be consistent with both RCP Agricultural Lands Policy #10 as well as any applicable agricultural policies in the Metro Plan.

Another example is LC 16.212(4)(o)(xiii), which requires that a transportation facility, service or improvement located on EFU-zoned land that serves local travel needs must be either listed in LC 16.212, is necessary to support rural land uses identified in the Rural Comprehensive Plan, or is necessary to provide emergency services. EFU-zoned land within the Metro Plan's doughnut area must meet this standard. Finally, Lane Code 16.212(10)(c) specifically acknowledges the differences between riparian setbacks on EFU-zoned land outside the Metro Plan doughnut area and similarly zoned land within. The latter being subject to the setback standards of Lane Code 16.253(6).

The point to be made is twofold. First, Lane Code 16.212 was acknowledged in substance, as complying with the Statewide Planning Goals, and in applicability to the doughnut area, by LCDC. Second, the application of policies or inventory material in the Rural Comprehensive Plan to land within the doughnut area does not, on its face, imply a scrivener's error on the part of the County.

⁶ Lane Code Chapter 10 provides zoning provisions that apply to land within urban growth boundaries but outside city limits.

DLCD staff recognized that Appendix E of Lane County's February, 1982 Working Paper on Mineral and Aggregate Resources contained the County's 1B inventory for lands inside of the Metro Planning Area. A '1B' designation is a reference to OAR 660-015-015(5)(b), where some inventory information is available but not enough to complete the Goal 5 process. This provision requires the local government to express its intent to address the resource site through the Goal 5 process in the post-acknowledgment period. In this regard, RCP Mineral and Aggregate Resources Policy #10, proposed in a November, 1983 addendum to the working paper, mandated the evaluation of all of the '1B' sites on its mineral and aggregate inventory within five years of that policy's adoption. However on September 12, 1984, Lane County removed the '1B' inventory for lands inside of the Metro Planning Area with the adoption of Ordinance No. PA 892.

Much importance has been placed upon the language used by DLCD staff in its July 19, 1984 review of Lane County's compliance with the rural portion of Lane County and the Metro "doughnut" area. Indeed, while the report was divided up into two "parts," one for each geographical area, there was quite a bit of overlap in the staffs' discussion of goal compliance. For instance, Lane County's working paper on Mineral & Aggregate Resources was recognized as the inventory that applied both to the rural portion of Lane County as well as to the Metro "doughnut" area. Thus, when DLCD staff was discussing Lane County's procedures for protecting '1C' sites⁷, it was generalizing to both geographical areas. This was because both areas were to be subject to the same implementation measure; Lane Code Chapter 16. DLCD staff noted that either a QM/Quarry and Mine Operations Combining Zone or an SG/Sand, Gravel, and Rock Products Zone was applied to those sites that had been evaluated with Statewide Planning Goal No. 5 Administrative Rule conflict resolution process. DLCD staff further noted that for "any property designated in the Eugene-Springfield Metropolitan Plan as significant in terms of OAR 660-016-000/025 and designated as '1B', a Goal 5 ESEE consequences analysis per the Goal No. 5 Administrative Rule must first be completed."⁸

There could be many reasons that the RCP does not have an inventory of aggregate resources within the "doughnut" area and one reason is that it is an admission by the County that during its acknowledgment of compliance review by DLCD it realized that it did not have sufficient information regarding non-operational aggregate resource sites to finish the Goal #5 inventory process. Being on a Goal #5 inventory and completing the Goal #5 process are two different things entirely and are contemplated by OAR Chapter 660, Division 16.

⁷ Sites that meet the requirements of OAR 660-015-0000(5)(c) for inclusion on the plan inventory as significant.

⁸ July 19, 1984 DLCD staff report reviewed by LCDC at its August 17, 1984 meeting, p. 12.

While I can understand the applicant's frustration about the RCP not having the subject property on an inventory, I believe the reason is less likely a scrivener's error than that the County has neglected to implement its Goal #5, Mineral and Aggregate Resources Policy #10 in regard to the Metro Plan's doughnut area.

2.a. By statute, an EFU-zoned property subject to aggregate mining may be on any inventory of any acknowledged comprehensive plan.

The applicant notes that while Lane Code 16.212(4)(y)(ii) requires that the property be on the Rural Comprehensive Plan inventory, ORS 215.298 only requires that the property be on "an inventory in an acknowledged comprehensive plan." The applicant then posits that the subject property is on the Metro Plan inventory, that the statute trumps the code provision, and that therefore the issue is settled.

ORS 215.213(2) lists uses that "may" be established by a marginal lands county on land zoned for exclusive farm use. Although counties may not adopt EFU zones that are less restrictive than statutory zoning requirements, they may adopt EFU zones that are more restrictive (except for uses allowed outright by the statute). *Kenagy v. Benton County*, 112 Or App17 (1992); *Bechtold v. Jackson County*, 42 Or LUBA 204 (2002) ORS 215.213 (2)(b)(B) allows mining of aggregate, subject to ORS 215.298. Lane Code 16.212(4)(y)(ii) restricts the universe of acknowledged comprehensive plans to one, the Lane County Rural Comprehensive Plan.

2.b. The issue of whether the subject property is on the Metro Plan's Mineral and Aggregate Inventory of significant resources.

The update of the 1990 Plan in regard to Statewide Planning Goal #5 primarily relied upon two working papers published on April 12, 1978; Natural Assets and Constraints and Sand and Gravel Resources. The former described the methodology and process of identifying assets and constraints in the metropolitan area and determined that sand and gravel resource areas were to be deemed a significant natural resource in the metropolitan area. (Pg. 6) The applicant asserts that Figure E-1 of this working paper constitutes the Metro Plan Goal 5 inventory of significant mineral and aggregate resources. However, this map of aggregate resources was compiled, not on the basis of a supply and demand analysis, but rather in recognition that the resource was (1) necessary for construction; (2) was nonrenewable; and (3) had proximity to the metropolitan area, which had a bearing on associated transportation costs for the product. The map basically represents a 1967 study by the Lane County Public Works Department. Thus, Table 1 of the working paper (Pg. E-3), which is displayed on Figure 1-1, shows the total amount of aggregate resource identified in the 1967 study.

The supply of and demand for aggregate resources in the metropolitan area was reviewed in more detail in the Sand & Gravel Resources working paper. This working paper recognized that the best available data on aggregate resources in the metropolitan area came from a 1967 study done by Lane County Public Works and that because that study did not make a determination about the appropriateness of aggregate resource management as opposed to other uses, such as agriculture, open space, recreation, etc., the resource areas were quite large⁹ and were not all designated as resource areas in related land use plans.

The Sand & Gravel Resources working paper (Finding #1) stated that there was insufficient data to determine the actual amount of land necessary to meet the metropolitan area's sand and gravel needs for the 20-year planning horizon but concluded that there was sufficient land designated and zoned to meet the area's aggregate resource needs to the end of the century. Finding #3 noted that a major issue was designating and protecting sand and gravel resource from development and zoning an adequate amount of resource areas for extraction while maintaining the balance of the resource lands in less intensive use such as agriculture, greenway and open space. In specific, the working paper stated:

"The actual amount of land necessary to meet the metropolitan area's sand and gravel needs between 1980-2000 cannot be determined without a detailed sand and gravel analysis of each of the identified resource areas. Such a study would have to determine (among other things) the resources available at certain depths and the potential for extraction, and the amount of usable material remaining in sites already mined but perhaps prematurely abandoned.

From the estimates of supply and demand, it would appear that sufficient land has been identified, designated, and zoned to meet this area's aggregate resource needs to the end of the century.

The most important tasks are: (1) to insure that resource areas are not committed to uses that would preclude future aggregate extraction and (2) protect environmental quality." (Page E-7)"

Following completion of the working papers, the next phases in the 1990 Plan update project involved revising the text and diagram of the plan. These phases involved public review of preliminary text changes and plan diagram alternatives. The Plan Diagrams Update Alternatives Technical Report and Plan Diagrams Update Alternatives Summary Report were prepared in 1979 as a part of the initial public review process. The data from the working papers, as well as a number of other sources, were then taken into consideration and evaluated in the Plan Diagrams Update Alternatives Technical Report. Three alternative plan

⁹ 5,170 acres in the area of the confluence of the Willamette and McKenzie Rivers.

diagrams were presented in these reports and were the subject of public review in early 1979. (Draft Metro Area General Plan Background Report, 1979, Page 4)

The preliminary land allocation process occurred during the preparation of the Plan Diagrams Update Alternatives Technical Report. The report identified prohibitions to development, limitations to development, areas that could be eliminated from further consideration for urbanization, and the available vacant land supply for use categories. Actual allocation for each of the three alternatives required determinations as to where future development would occur on the available vacant land supply for each category of land use, based on projected demand. (Plan Diagrams Update Alternatives Summary Report, Page 4)

In allocating sand and gravel use, known sand and gravel areas were treated as a prohibition to development. (Plan Diagrams Update Alternatives Technical Report, Map No 5: Metro Plan Update Private Vacant Land, page III-8) The urban growth boundary was drawn to exclude the larger known sand and gravel resource area in order to exclude it from development.¹⁰ The preliminary conflict analysis identified potential long-term conflicts in areas of agricultural productivity and certain known sand and gravel resource areas were excluded from the plan diagrams.

The Plan Diagrams Update Alternatives Technical Report and the input received during the public review process in early 1979 were considered by the Metropolitan Area Planning Advisory Committee and the Metropolitan Plan Policy Committee. In September, 1979, the Metropolitan Plan Policy Committee forwarded a draft Metropolitan Area General Plan to the elected officials of Eugene, Springfield, and Lane County. (Draft Metro Area General Plan Background Report, 1979, Page 4)

Joint public hearings were conducted in December 1979 and May 1980. These hearings are relevant in identifying which sand and gravel resource areas actually underwent a Goal 5 analysis for the purposes of determining significance, because it was during these review processes that landowners were provided opportunities to review the specific areas proposed for Goal 5 designation and protection, namely, those areas designated as the sand and gravel inventory as depicted on the proposed plan diagram.

LCDC adopted Division 16, Chapter 660 of its administrative rules in May of 1981 and this rule was applied to the Metro Area Plan's acknowledgment of compliance review. OAR 660-016-0000(5) set out the three options for local governments to address its treatment of a Statewide Planning Goal #5 resource with the Goal. First, a local government might determine that a resource site is not important enough to include on the plan inventory. Second, when some

¹⁰ See Technical Supplement to the Metro Area Plan (June, 1982), Pg. 52.

information is available, but is not adequate to identify the location, quality and quantity of the resource site, the local government may include the site on the plan inventory as a special category and express its intent through plan policy to address the resource site and proceed through the Goal 5 process in the future. Special implementation measures were not required for Goal 5 compliance until adequate information was available for further review. Finally, resources sites for which there was sufficient information and which had been deemed to be significant, must proceed through the remainder of the Goal 5 process, which includes identifying conflicting uses, applying an ESEE analysis if conflicting uses are found, and then either (1) protect the site; (2) allow conflicting uses fully; or (3) limit conflicting uses. The administrative rule requires that the plan contain reasons supporting the local government's choice of the latter three options.

The Metro Plan's (2004 Update) treatment of sand and gravel resource is brief but does note that the Sand and Gravel Plan designation includes existing and future aggregate processing and extraction sites.

The Metro Area Plan's consistency with Goal 5 was first reviewed by LCDC at its September 1981 meeting. The DLCD staff report for this meeting, dated August 14, 1981, specifically examined the Plan's treatment of sand and gravel resources. In regard to sand and gravel, DLCD staff noted that many Goal 5 resource conflicts were resolved by excluding sites from the UGB and that most sites were protected by either the "Open Space and Parks" or "Sand and Gravel" plan designations. DLCD staff further noted that the Metro Area Plan provided policy guidance to protect the sand and gravel resource from premature urban development and also mandated that Lane County conduct studies to determine "the location, quality, and quantity of sand and gravel resources within the resource areas in the technical supplement."

The applicant has done a tremendous job of collecting documents that are relevant to the Metro Plan update process and in organizing those documents in a very logical way. In summary, the applicant's argument largely is comprised of two factors: a large map showing "sand and gravel" resources and a general discussion during the DLCD review of other aggregate sites, concluding that therefore the subject property as well as the rest of the 5,100 acres within this area, are on the inventory. Actually, I believe that this could be considered as an equivalent to a '1B' inventory and that by locating them outside the UGB and giving them an Agricultural designation they were being "protected." However, under the Goal 5 process, this is not enough...the definition of "comprehensive plan inventory" must be read to mean an inventory of sites that have completed the Goal 5 process, including identification of conflicts and conflict resolution. Otherwise, a special use permit approval would violate Goal #5 by allowing the extraction without finishing the Goal #5 process.

For the following reasons, I find that the subject property is not on an inventory of significant aggregate resources that has completed the Goal #5 process:

1. As demonstrated in the language of the working papers, and by acknowledgment by DLCD staff, aggregate sites that were not subject to current extraction were excluded from the urban growth boundary to allow for the postponement of a conflict analysis.
2. Six of the 11 lots comprising this application were included in the previous application for a plan amendment. The City of Eugene made an explicit finding that the property subject to that application was not on an inventory of significant aggregate sites in an acknowledged plan on September 1, 1996.
3. OAR 660-016 provides that sites can be put on an inventory but must complete the Goal 5 process at a later date. This equates to Lane County's definition of a '1B' site. Lane County's Aggregate and Mineral Policy #10 requires that for '1B' sites be evaluated within 5 years. Unfortunately, there is no Metro Plan Policy that express its intent to address the undesignated resource sites and proceed through the Goal 5 process in the future.

Lane County's Mineral & Aggregate Resources Working Paper (Feb, 1982) determined that only existing aggregate sites deemed of sufficient importance would be retained on the RCP inventory. Appendix D listed those sites. Appendix E contained a generalized list of aggregate resource sites inside the projected metropolitan area. Only about half of the sites listed were identified by tax lot, including the township/range/section number that includes the subject property. This inventory, however, is more precise than mere reliance on Map 3 of the Metro Plan Technical Supplement.

4. Using the analysis provided by Steve Gordon in his March 29, 1984 memo to the metropolitan planning directors, some 7, 450 acres of aggregate resource land are undesignated or zoned for aggregate resource. Yet no documentation exists indicating that a Goal #5 conflict analysis was conducted for this property despite exhaustive documentation of the Metro Plan's update process, public involvement, and resource inventory. The only discussion is that active sites will be zoned and designated for S&G and specific sites (e.g. Pudding Creek Heronry) be evaluated because there were identified Goal #5 resource conflicts with the existing sand and gravel designation.

Lane Code 16.212(4)(y)(iii)

The application must comply with Lane Code 16.212(10)(f) through (g). These criteria are addressed immediately below.

Lane Code 16.212(10)(f): Will not force a significant change in accepted farm or forest practices on surrounding lands devoted to farm and forest use.

As there are no identified forest practices identified on surrounding lands, the inquiry required by this criterion will be applied solely to farm uses. The applicant has argued that because farm use, as defined by ORS 215.213(2)(a), means that the property must be currently employed for the primary purpose of obtaining a profit in money, then an “accepted farm practice” must also have that as its primary purpose to be subject to this standard.

The Oregon Court of Appeals in its decision in *Eugene Sand & Gravel v. Lane County*, 189 Or App 21, 31–35 (2003) opined that “agricultural practice” had the same meaning as “accepted farming practice” and that it did not connote “farm use.” ORS 215.203(2)(c) defines “accepted farming practice” as “a mode of operation, commonly used on similar farms, necessary for profitable operation, and customarily used in conjunction with farm use.” LUBA obliquely addressed this issue in *Comden v. Coos County*, 56 Or LUBA 214 (2008), where they agreed that “in the abstract” farming practices that are not intended to generate a profit are not “accepted farming practices.” It seems that this interpretation introduces a factor of intent that isn’t reflected in the statute. Thus, if a farmer employs a common farming practice that does not result in a profit does that mean that the practice is no longer an “accepted farming practice?” Since a reasonable person would not so conclude, one is then left with assumption that the actual intent of the farmer must therefore be discerned. If a person has any crops or agricultural produce on his property then I would think the applicant’s burden of proof would be nearly impossible absent some statement from that person that they had no intention of selling their agricultural product. I believe a more reasonable application of the term would be that an accepted farming practice is a mode of operation occurring on land zoned for farm use that is necessary for profitable operation but doesn’t require that the farming operation itself be profitable or that it be the primary use of the property.

The applicant’s “default” working definition of “surrounding land” is the 1,500 foot standard in Division 23, OAR Chapter 660. While this is a good rule of thumb, I believe that the approval standard must be applied to any farm use in the area that can demonstrate that it would be significantly impacted by the proposed use. I also do not believe that this standard precludes the inclusion of qualifying farms that are located within the Eugene Urban Growth Boundary.

Four issues have been raised regarding the impact of the proposed use on accepted farm practices concern dust and the impact on groundwater. These issues are dust, groundwater quantity, flooding and noise. These issues will be addressed separately, below:

Dust: Whether the proposed use will generate dust that will significantly force a significant change in accepted farm practices on surrounding lands devoted to farm use is a question of fact and is not determined by whether the applicant complies with its

LRAPA air quality permit.¹¹ There is sufficient evidence in the record, primarily from the previous post acknowledgment plan amendment PA 05-6151, that dust can have significant adverse impacts on farm practices by reducing pollination and photosynthesis, by encouraging mite production, and by requiring increased use of groundwater to clean sensitive crops. (e.g. December 25, 2005 letter from Ross Penhallegon, OSU/Lane County Extension Horticulture Agent) These impacts force farming practices to significantly change by requiring, for instance, cleaning of produce when none was previously required; the purchase and use of cleaning machines; the use of pesticides to control mites when no pesticides were previously necessary, etc.

What is missing from the analysis is sufficient information to come to a conclusion on this issue. The applicant has warranted that it applies dust-containment techniques that control dust emissions but air quality experts estimate that the primary tool to dust mitigation, watering, is effective only about 50 percent of the time. Anecdotal information from residents to the west have suffered from dust impacts from the applicant's existing excavation activities although Mr. Mulkey and Mr. Beat, located to the north, have not experienced such impacts. However, the record demonstrates that wind conditions can blow dust toward the other identified accepted farming practices in the area, located west and northwest of the expansion area, at least 26 percent of the time during the dry months. Without the use of air dispersion modeling, one cannot measure the significance of dust fallout or the degree and downwind distance potential where significant impacts could occur.

Groundwater

The applicant relies upon a report by EGR & Associates, titled "Digital Model of Existing Excavation Site and New Expansion Area" to argue that the expanded excavation base will not significantly affect affected farm uses. The calibration of the model used in that study was questioned on several issues¹² and it is unclear whether the conclusions regarding impacts within a 1,500-foot impact study were adequate. However, EGR had proposed the use of a "low permeability barrier" in conjunction with an infiltration trench, termed an "aquaclude," that could be installed between the excavation area and property lines. This device would reduce the impact of the excavation on aquifer levels and the water table to a minimum. In findings associated with Ordinance 20413, the Eugene City Council found that the aquaclude was sufficient to minimize groundwater conflicts created by the operation of the expansion of the applicant's aggregate extraction operation. I concur. I believe that the use of the aquaclude would ensure that impacts on the groundwater from the proposed aggregate expansion will not force a significant change in accepted farm or forest practices on surrounding lands devoted to farm and forest use.

¹¹ *Eugene Sand and Gravel v. Lane County*, 44 Or LUBA 50, 61-64, 69-71 (2003).

¹² Pacific Hydro-Geology, Inc., Memo to Lane County and Eugene Planning Commissions regarding: "Delta Property Company Land Use Application No. PA 05-6151 (January 13, 2006)

Flooding

Based upon the description of the excavation techniques employed by the applicant, it appears that the net flow of surface water ordinarily flowing off the site will remain the same or be reduced. These techniques will ensure that the proposed mining activity will not impede flood flow, reduce flood storage volume within the flood plain, or cause an increase in the velocity of water flowing across the site or adjacent properties during base flood conditions. Therefore, no adverse impacts to nearby farming operations will result from flooding caused by the proposed mining activity.

Lane Code 16.212(10)(g): Will not significantly increase the cost of in accepted farm or forest practices on surrounding lands devoted to farm and forest use.

Literature and testimony from previous attempts to enlarge existing aggregate extraction sites in the metropolitan area have shown that dust can significantly increase the cost of farm practices. Because it has been shown that the proposed expansion would force a significant change in accepted farm practices on surrounding lands devoted to farm use it can also be concluded that it has also not shown that the expansion will not significantly increase the cost of in accepted farm practices on surrounding lands devoted to farm use.

The opposition has also theorized that the cost of purchasing and renting farmland in the surrounding area will increase if the subject property is converted to agricultural use. It is an economic principle that when given a constant demand for a product, as supply of that product decreases its price will rise accordingly. The conclusion that the expansion of the existing aggregate extraction site will increase land prices is purely speculative, however, and there is no evidence that suggests that, given the amount of Class I & II agricultural soils in the surrounding area,¹³ the loss of 68 acres of agricultural land will significantly increase the cost of purchasing or renting the remainder. This proposal is not of the same magnitude as that of the application by Eugene Sand & Gravel where 570 acres of prime agricultural land was being proposed to be replaced by aggregate extraction.

Conclusion

The request for a special use permit to allow aggregate extraction must be denied on the basis that it is not consistent with Lane Code 16.212(4)(y)(ii) and Lane Code 16.212(10)(f) & (g).

Respectfully submitted,



Gary Darnielle
Lane County Hearings Official

¹³ See Metro Area General Plan Background Report (December 1979), Map 4.