

**Curry County Community Development Department
PLANNING COMMISSION STAFF REPORT**

Application AD-1907 is a request for conditional use approval for the mining and processing of aggregate along the Pistol River in the Forestry Grazing (FG) Zoning District. This is a revised and updated staff report that supersedes the original March 28, 2019 staff report to the Planning Commission. It has been revised to reflect and address the issues and information that has been presented in the record. The new information (revisions) are noted in this staff report with underlines in the text.

Guidance has been provided from County Counsel's office for the Planning Commission's consideration in reaching a decision on this proposed use (attached).

1. Background Information

Owner: Ronald Adams
26000 Myers Creek Road
Gold Beach, OR 97444

Applicant: Ronald Adams
26000 Myers Creek Road
Gold Beach, OR 97444

Land Use Review: Administrative Conditional Use Review Referred to the Planning Commission by Planning Director.

Property Description: Assessor's Map 38-14-00, Tax Lot 4900;
Assessor's Map 38-14-19D TL 200

Location Located above the Pistol River Bridge on Pistol River Loop Road, approximately .20 miles east from its intersection with US Hwy 101 and outside the Gold Beach Urban Growth Boundary (UGB).

Existing Development: None. Property is river/gravel resource with cattle grazing on adjacent lands. Gravel mining has occurred in the area previously.

Proposed Development: Proposed gravel extraction primarily on the gravel bar which may include some processing.

Zone: Forestry Grazing (FG) Zoning District

II. Applicable Review Criteria

To approve this application, the Planning Commission must determine that it is in conformance with the following sections of the Curry County Zoning Ordinance (CCZO):

Curry County Comprehensive Plan

Goal 5 – Natural Resources b. mineral and aggregate resources

Curry County Zoning Ordinance (CCZO)

Section 3.050	Forestry Grazing
Section 3.052	Conditional Uses Subject to Administrative Approval by the Director
	24. Land Based Mining (1, 10, 17)
Section 2.090	Procedure for Conditional and Permitted Uses
Section 7.010	Authorization to Grant or Deny Conditional Uses
Section 7.040	Standards Governing Conditional Uses
	1. Conditional Uses Generally
	10. Mining, quarrying, or other extractive activity
	17. Uses on Resource Land
Section 7.050	Time Limit on a Permit for Conditional Uses

III. Findings

Goal 5 – Natural Resources b. mineral and aggregate resources – As was identified and explained at the June 20th, 2019 Planning Commission meeting, the Curry County Comprehensive Plan identifies the proposed gravel extraction area as a mineral and aggregate Natural Resource. The Comprehensive Plan sets forth the following policies with regard Mineral and Aggregate Resources:

1. Curry County recognizes the value of the mineral resources present in the county and seeks their development wherever possible to the benefit of the people and other resources of the county with protection for fish and wildlife habitat.
2. Sand, gravel and quarry rock deposits identified in the comprehensive plan are currently the most productive mineral resources in Curry County and the continued utilization of these mineral resources is important to the local economy.

Facts: The area for the proposed gravel bar scalping operation has a long history of gravel extraction. Gravel has been extracted at the site for the construction of highway 101 as well as multiple County road projects. The site was approved for 50,000 cubic yards to be extracted annually in 2003 (AD-3030). However, the County approval was revoked in 2005 because not all of the federal and state agency permits were able to be obtained. The prior approvals and utilization of the site to provide gravel for projects within the county is consistent with the policies set forth in the Comprehensive Plan. The protection of fish and wildlife is within the jurisdiction of the Federal National Marine Fisheries Services (NMFS) and the Oregon Department of Fish and Wildlife (ODFW).

Finding: The County utilizes the fish and wildlife technical staff of these agencies to determine and incorporate their criteria and conclusions into review of the County's decision by requiring the applicant to satisfy these agency requirements. Both agencies will review and provide documentation on impacts and required mitigation for fish and wildlife resources for this project that can satisfy the County's policy of protection for fish and wildlife. If the applicant is unable to comply with the requirements of the NMFS and the ODFW, then the County's conditions cannot be met and the County permit will be revoked as was the case for AD-3030. The NMFS will review the project through Section 7 of the Endangered Species Act (ESA) as required by the Corp of Engineers Section 404 and Rivers and Harbors Act Section 10 permitting processes and the ODFW will review the project through the Oregon Division of State Lands Fill Removal permit process. This finding can be met with the applicant's compliance and subsequent submittal of documentation of compliance to the County of the requirements of both the NMFS and the ODFW through permits that will be required to be issued for the project by the Corp of Engineers and the Division of State Lands.

Section 3.050 Forestry Grazing (FG) – *The Forestry Grazing Zone is applied to resource areas of the county where the primary land use is commercial forestry with some intermixed agricultural uses for livestock uses.*

Finding: This section of the CCZO states the purpose of the Forestry Grazing zoning district. The primary uses established on the property are a mix of forestry and cattle grazing which are consistent with the purpose of the FG zoning district. Land-based mining and processing of aggregate and mineral resources are allowed as a conditional use in the Forestry Grazing Zone and have historically been established as a compatible use consistent with forestry and grazing activities on this as well as similar properties along the Pistol River. This standard of the CCZO is met.

Section 3.052 Conditional Uses Subject to Administrative Approval by the Director

24. Land-based mining and processing of oil, gas, or other subsurface resources, as defined in ORS Chapter 520 and not otherwise permitted in 3.041 (10), and the mining and processing of aggregate and mineral resources as defined under ORS Chapter 517 but not including support or processing facilities for offshore oil, gas or marine mineral activities (1,10,17).

Facts: The mining of aggregate and mineral resources, as defined under ORS Chapter 517, is allowed in the Forestry Grazing zone provided that a prospective applicant submits a land use application and the County approves the proposed use based upon relevant standards for review. ORS Chapter 517 reads as follows:

ORS 517.750(15)(a): Subsurface mining means “all or any part of the process of mining minerals by the removal of the overburden and the extraction of natural mineral deposits thereby exposed by any method by which more than 5,000 cubic yards of mineral are extracted or by which at least one acre of land is affected within a period of 12 consecutive calendar months..”

Finding: The applicant is proposing to develop an aggregate and mineral mining and processing site on a portion of the subject property on more than one acre of land. The estimated quantity of material to be extracted from the river gravel bar is approximately 10,000 cubic yards. The proposed aggregate project meets the definition of mining as stated above and the applicant has submitted an application for a conditional use permit addressing the criteria set forth as required in the CCZO.

Section 2.090 – Procedure for Conditional and Permitted Use Permits – *After accepting a completed application for Administrative Action pursuant to Section 2.060, the Director shall act on or cause a hearing to be held on the application pursuant to Section 2.062*

Finding: The proposed request for an aggregate mining activity in the FG zone is an administrative decision. However, it is being referred to the Planning Commission for a public hearing.

Section 7.010 Authorization to Grant or Deny Conditional Uses – *In permitting a conditional or permitted use the County may impose conditions in addition to the provisions set for uses within each zone in order to protect the best interests of the surrounding property, the neighborhood, or the County as a whole.*

Finding: After review of this application, information provided by the applicant and interested parties during the hearings process, the Planning Commission may impose additional conditions as appropriate to insure that the proposed use fits the interests of the County.

Section 7.040 Standards Governing Conditional Uses – *In addition to the standards of the zone in which the conditional use is located and the other standards in this ordinance, conditional uses must meet the following standards:*

Conditional Uses Generally

- a. *The County may require property line set-backs or building height restrictions other than those specified in Article IV in order to render the proposed conditional use compatible with surrounding land use.*

Finding: Since there are no buildings proposed, there is no need for any property line setbacks or height restrictions in order for the proposed use to be compatible with the surrounding land uses.

- b. *The County may require access to the property, off-street parking, additional lot area, or buffering requirements other than those specified in Article IV in order to render the proposed conditional use compatible with surrounding land uses.*

Finding: Access to the gravel bar is proposed to be a private access on property owned by the applicant. There is no need for public access, off-street parking or additional lot area or buffering requirements for the proposed use.

- c. *The County may require that the development be constructed to standards more restrictive than the Uniform Building Code or the general codes in order to comply with the specific standards established and conditions imposed in granting the conditional use permit for the proposed use.*

Finding: No permanent buildings are being proposed for construction. Therefore, this standard does not apply.

- d. *If the proposed conditional use involves development that will use utility services; the applicant shall provide statements from the affected utilities that they have reviewed the applicant's proposed plans. These statements shall explicitly set forth the utilities' requirements, terms and conditions providing or expanding service to the proposed development and shall be adopted by the Commission or Director as part of the conditional use permit.*

Finding: The proposed conditional use does not involve development that will use utility services. Therefore, this standard is not applicable.

- e. *If the proposed conditional use involves the development or expansion of a community or non-community public water system, the applicant shall submit a water right permit(s) or documentation that a permit is not required from the Oregon Water Resources Department which indicates that the applicant has the right to divert a sufficient quantity of water from the proposed source to meet the projected need for the proposed use for the next twenty year planning period.*

Finding: The proposed development of the subject property for aggregate and mineral extraction does not involve the development or expansion of a community or non-community public water system. Therefore, this standard is not applicable.

- f. *If the proposed conditional use involves the development or expansion of a community or non-community public water system, the applicant shall install a raw water supply flow monitoring device (flow meter) on the water system and shall record the quantity of water used in the system on a monthly basis. The monthly record of water usage shall be reported to the Curry County Department of Public Services-Planning Division and Health Department Sanitarian on an annual basis.*

Finding: The proposed development of the subject property for aggregate and mineral extraction does not involve the development or expansion of a community or non-community public water system. Therefore, this standard is not applicable.

- g. *If the proposed conditional use included the development or expansion of a community or non-community public water system and the use is located within the service area of a city or special district water system the applicant shall utilize the city or special district water system rather than developing an independent public water system. An independent community or non-community public water system can be developed for the use if the applicant can prove that it would be physically or economically not feasible to connect to the city or special district water system. The city or special district must concur in the conclusion that connection of the proposed use is not feasible.*

Finding: The proposed development of the subject property for aggregate and extraction does not involve the development or expansion of a community or non-community public water system. Therefore, this standard is not applicable.

Section 7.040 (10.) Mining, quarrying, or other extractive activity –Plans and specifications submitted to the Commission for approval must contain sufficient information to allow the Commission to review and set siting standards related to the following standards:

(1.) *Impact of the proposed use on surrounding land uses in terms of Department of Environmental Quality standards for noise, dust, or other environmental factors;*

Facts: The applicant has stated that:

“The gravel operation will be through a scalping process on the upland river bar. Dust will be minimal but if it becomes an issue, we will water the area down. Noise should not be an issue, reason being there are not any buildings of any kind within 500 feet”.

Finding: The DEQ will be required to review the project through the Clean Waters Act 401 Certification process and will address issues of environmental factors within their jurisdiction including water quality. The County will rely on the technical expertise of the DEQ staff to ascertain impacts, mitigation and conditions appropriate for addressing water quality related to the project and require the documentation and compliance with DEQ’s 401 Certification process as a condition of this conditional use if approved. In regards to the issues of noise, dust or other environmental factors it cannot be determined what the extent of potential impacts will be unless and until a specific defined extraction area has been determined by the applicant and approved by the Corp of Engineers and Division of State Lands.

The County is required to determine whether there is enough information contained in the application to apply the criteria and conclude that based on the review of outside federal and state agency technical expertise whether the County’s criteria can be met. This considers the applicability of the federal and state requirements as directly related to the CCZO criteria. Based on information in the application, including the new information submitted, which identifies the gravel operation to be bar scalping, the impact of the proposed use on surrounding land uses in terms of DEQ standards for noise, dust, or other environmental factors cannot be determined and therefore this criteria cannot be met.

(2.) *The impact of the proposed use on water quality, water flow, or fish habitat on affected rivers or streams;*

Facts: The applicant has stated that:

“The impact of this proposed operation should be mostly positive. The waterway of this area of Pistol River has been in disarray for many years. The river has eroded hundreds of feet of river bottom away on the south side of the river causing it to fan out, many times its natural width, that’s causing water temperatures to rise, which kills fish, algae

growth which lowers oxygen levels in the water and removes safe fish habitat. We will work with fish and wildlife to make improvements whenever possible. Anything we do will be an improvement over the way it is now.”

The main stem Pistol River, which is where the gravel mining operation is proposed, contains an abundance of aquatic habitat including both resident and anadromous fish species (chinook and coho). The proposed gravel mining activities will require coordination with the National Marine Fisheries Service (NMFS) and the Oregon Department of Fish and Wildlife (ODFW) through Section 404 of the Clean Waters Act for removal of gravel within the jurisdiction of the Corp of Engineers (COE) and the Oregon Department of State Lands (DSL) Fill Removal Permit. As was discussed at the June 20th Planning Commission meeting, the site is also within an area of estuarine influence and includes fish species protected under the Endangered Species Act (ESA).

Finding: The County is required to determine whether there is enough information contained in the application to apply the criteria and conclude that based on the review of outside federal and state agency technical expertise whether the County’s criteria can be met. This considers the applicability of the federal and state requirements as directly related to the CCZO criteria. Based on information in the application, including the new information submitted, which identifies the gravel operation to be bar scalping, the impact of the proposed use on water quality, water flow, or fish habitat on the affected Pistol River cannot be determined and therefore this criteria cannot be met.

(3.)The impact of the proposed use on overall land stability, vegetation, wildlife habitat and land or soil erosion;

Facts: The applicant has stated:

“The waterway of this area of Pistol River has been in disarray for many years. The river has eroded hundreds of feet of river bottom away on the south side of the river causing it to fan out, many times its natural width, that’s causing water temperatures to rise, which kills fish, algae growth which lowers oxygen levels in the water and removes safe fish habitat. Rehabilitation will be to comply with ODFW and doing what is necessary to make it better than prior to commencing gravel extraction operations.”

Through the federal and state permitting process noted above, the agencies will require that the applicant prepare an extraction plan with proposed extraction quantities and locations along the river bar. This will include a determination of overall land stability to decrease the potential for land and/or soil erosion and assessing impacts to vegetation and wildlife habitat. It is

recommended that this application, if approved, include a requirement to submit the detailed extraction plans for County review to insure compliance with this provision of the CCZO.

Finding: The County is required to determine whether there is enough information contained in the application to apply the criteria and conclude that based on the review of outside federal and state agency technical expertise whether the County’s criteria can be met. This considers the applicability of the federal and state requirements as directly related to the CCZO criteria. Based on information in the application, including the new information submitted, which identifies the gravel operation to be bar scalping, the impact of the proposed use on overall land stability, vegetation, wildlife habitat and land or soil erosion cannot be determined and therefore this criteria cannot be met.

(4.) The adequacy of protection for people residing or working in the area from the proposed mining activity through fencing of the site;

Facts: The applicant owns all of the land including and surrounding the proposed gravel extraction location and most of the land within 500 feet of the proposed operation. The proposed use is in a rural area and no residences are nearby.

Finding: The surrounding area of the gravel operation is the private land of the applicant and is not open to the public. It is recommended, if approved, that the road to the extraction operation be gated and locked for the protection of people when not in use to insure compliance with this section of the CCZO. This criteria is met.

(5.) The rehabilitation of the land upon termination of the mining activity. The proposed rehabilitation must at least meet the requirements of state surface mining or gravel removal permits.

Facts: In regards to rehabilitation of the land, the applicant has stated:

“Rehabilitation will be to comply with ODF&W and doing what is necessary to make it better than when we started.”

Finding: To meet this standard, it is recommended that the applicant be required, as a condition of approval, to obtain all required permits and licenses from all federal and state agencies including but not limited to COE, DOGAMI, DEQ, NMFS, ODFW, DEQ and DSL that are necessary for aggregate mining activities including the rehabilitation of the land and equipment used in these operations prior to initiating any activity approved herein and shall be kept current with those permits and requirements as necessary. Copies of all current permits and licenses shall be submitted to the Planning Department prior to commencement of operations. All operations shall be conducted as required by these permits. This CCZO standard can be met for

the rehabilitation of the land if the applicant obtains and meets the conditions of all required federal, state and local permits as stated pursuant to CCZO Section 7.040(10.)(5.).

(6.) If the proposed extractive activity involves the removal of rock, gravel, or sediment from a river or stream, the proposal shall be reviewed by the Oregon Department of Fish and Wildlife and it may provide a written statement to the county regarding the possible impact on fish habitat associated with the affected river or stream.

Facts: The Oregon Department of Fish and Wildlife (ODFW) was sent notification of this proposed project for gravel extraction along the Pistol River. As noted above, the Pistol River contains both resident and anadromous fish including coho and chinook and is within an estuarine habitat. The applicant has stated a desire to work closely with ODFW to enhance the river system where feasible during the gravel extraction operations. The federal and state permits required for this project will include review, comment and potential conditions based on input from both NMFS as well as ODFW in regards to fish habitat.

Finding: A written statement has not been submitted by ODFW, nor has the applicant provided information that indicates that ODFW has provided input to the proposed project that addresses the possible impacts on fish habitat associated with effects on the Pistol River. Therefore this criteria cannot be met.

(7.) The County will define an area around the specific removal site which includes all lands within 250 feet of the site, based on the site map for a state mining or gravel permit. The applicant shall provide findings which identify the existing uses on those lands included within this area. The Commission shall evaluate the applicant's findings with regard to the potentially conflicting uses identified in the area based on the factors below:

- i.) If the mining activity can be sited on an alternative site; and*
- ii.) Where conflicting uses are identified the economic, social, environmental and energy consequences of the conflicting uses shall be determined and methods developed to resolve the conflict.*

Facts: The applicant has stated:

“I own all the land where this operation will operate and most of the land within 500 feet of it. All residents are at least 500 feet from operations. Those lands are currently being used as part of a cattle ranch operation. The gravel mining proposal would not be in conflict with the ranching activities therefore alternative sites were not considered.”

Finding: County review using the Geographic Information System (GIS) and field verification determined that the lands within 250 feet of the site are dedicated to cattle grazing. A determination of economic, social, environmental and energy consequences was not considered because the activities surrounding the proposed gravel mining are not expected to conflict with cattle grazing. This criteria is met.

(8.) A rock crusher, washer or sorter shall not be located closer than 500 feet to any residential or commercial use. 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 are injurious or substantially annoying to persons living in the vicinity.

Facts: The applicant has stated:

“a rock crusher and/or washer may be on site during the gravel mining operation. There are no residences or commercial uses within 500 feet of the proposed operation.”

Finding: Since there are no residential or commercial uses within the 500-foot buffer, there are no potential conflicts within the immediate project area. This criteria is met.

(9.) No uses are permitted relating to offshore oil, gas or marine mineral exploration or development.

Finding: Offshore oil, gas, or marine mineral exploration or development is not being proposed. Therefore this standard is not applicable.

Section 7.040 (17) Uses on Resource Lands

a) The proposed use will not force a significant change in, or significantly increase the cost of, accepted farming or forest practices on agricultural or forest land.

Finding: The proposed gravel operation includes mining gravel along the Pistol River which has been recruited through a series of winter storms. This gravel bar recruitment area is not used for cattle grazing and therefore will not in any way force a change in or increase the cost of the resource use of the property.

- b) *The proposed use will not significantly increase fire suppression costs or significantly increase the risks to fire suppression personnel.*

Finding: The proposed gravel extraction process will be conducted alongside the Pistol River on a gravel bar. It is not expected that such an operation including the equipment used in the mining process will pose a fire risk to adjacent properties. Therefore, this criteria is not applicable.

- c) *A written statement be recorded with the deed or written contract with the County or its equivalent shall be obtained from the land owner which recognizes the rights of adjacent and nearby land owners to conduct forest operations consistent with the Oregon Forest Practices Act and related Oregon Administrative Rules.*

Finding: To comply with this provision of the CCZO, the applicant will be required to record a statement that recognizes the rights of adjacent and nearby land owners to conduct forest operations consistent with the Oregon Forest Practices Act.

Section 7.045 Conditional and Permitted Uses – Director Periodic Review – *The Director may issue Conditional or Permitted Use permits that must be periodically reviewed to ascertain that the conditions of the permit are being complied with on a continuing basis.*

Finding: There are several gravel mining permits authorized within Curry County consistent with the CCZO provisions outlined above. Most of these permits have been issued and then renewed for periods of 1-5 years provided that they are in continued compliance with all federal, state and county permits. It is recommended that, if this permit is issued, that it be valid for a period of 3 years unless there is a failure of the applicant to comply with all the conditions of approval.

VI. Staff Recommendation and Conditions of Approval

In order to determine if this proposed project is in compliance with the provisions of the Curry County Comprehensive Plan and the Curry County Zoning Ordinance (CCZO) the findings set forth above must be addressed and met with a level of confidence that the potentially significant environmental issues associated with the project can be mitigated. This will require the reliance of technical staff from multiple federal and state agencies in coordination with County staff addressing the issues. The fundamental concern that is apparent with this application is that it lacks detail on what the operation entails and there has been little or no coordination and discussion regarding the multiple federal and state agencies that will need to be involved in gaining permit compliance with the currently undefined operation. This situation requires staff to make an assumption that the multiple federal and state agencies will work with the applicant

and do their due diligence in addressing the environmental issues to the satisfaction of meeting the County requirements and thus satisfy the findings. In reflecting on the attached legal memorandum from the County Counsel, whereby “the decisions should be based on evidence in the record not assumptions”, staff recommends that the application be denied.

If the Planning Commission approves the conditional use request filed by Ron Adams for the mining and processing of aggregate along the Pistol River in the Forestry Grazing (FG) Zoning District, staff suggests the following conditions of approval:

1. Prior to commencing operations, the gravel extraction area shall be delineated including the estimated quantities of gravel to be removed. This information shall be provided to the Planning Director for review to ascertain consistency with the Conditional Use Permit Conditions.
2. Prior to commencing operations, the access routes for the operation shall be defined from the point of extraction to Hwy 101. This information shall be provided to the Planning Director for review to ascertain consistency with the Conditional Use Permit Conditions.
3. All access routes (roads) shall be maintained to reduce dust and noise caused by equipment and vehicles.
4. Operations shall be limited to daylight hours with no operations on holidays or weekends.
5. Any surface waters used or impacted by the operations shall be managed in accordance with stormwater requirements set forth through the Department of Environmental Quality (DEQ) and contained within Section 401 Clean Water Act.
6. Gravel removal shall be conducted in accordance with permit requirements set forth through the conditions and requirements pertaining to fish and aquatic habitat by the National Marine Fisheries Service (NMFS), Oregon Department of Fish and Wildlife (ODFW), Corp of Engineers (COE), Oregon Department of State Lands (DSL) and the Oregon Department of Environmental Quality (DEQ).
7. The detailed extraction plans required by the COE, the Department of Geology and Mineral Industries (DOGAMI) and DSL shall be submitted to the County for review to insure compliance with the CCZO.
8. The access road to the gravel extraction site shall be gated and locked when not in use.
9. All required federal, state and local permits and licenses for gravel extraction shall be obtained and conditions complied with prior to and during operations. These include but are not limited to: COE, DOGAMI, DEQ, NMFS, ODFW, DSL, and Oregon Water Resources. Copies of all current permits and licenses shall be submitted to the Planning Department prior to commencement of operations. All operations approved herein shall be conducted as required by these permits.

10. A written statement shall be recorded with the County which recognizes the rights of adjacent and nearby land owners to conduct forest operations consistent with the Oregon Practices Act.
11. This Conditional Use Permit shall be valid for a period of three (3) years unless there is a failure of the applicant to comply with all the conditions of approval. Failure to comply with all conditions of approval, or violations concerning the use approved herein, may result in nullification of this approval by the County.

MEMORANDUM

FROM Shala M. Kudlac, Asst. County Counsel
TO Curry County Planning Commission
RE Adams – AD 1907
DATE August 6, 2019

Introduction

This memorandum addresses the legal standards for processing the above referenced application as it pertains to public comment received after the hearing had closed on June 20, 2019 and the record remained open. This is intended to supplement the staff report provided by the Planning Dept.

It will describe the laws and ordinances that govern the Commission’s analysis of the application, and describe possible outcomes given the facts of the application as well as those that developed through submissions of the public and applicant.

Facts

This application is a CUP for a for the mining and processing of aggregate along the Pistol River in the Forestry Grazing (FG) Zoning District

Applicable Law and Issues

The staff report of May 28, 2019 sets out the applicable law for this permit. Comments from the public and applicant received after the hearing closed on June 20, 2019 were predominantly surrounding two areas of discussion:

- 1) Whether the application contained enough information for the Planning Commission to make a decision as required by CCZO 7.040(10)(a) “Mining, quarrying, or other extractive activity – Plans and specification submitted to the Commission for approval must contain sufficient information to allow the Commission to review and set siting standards related to the following standards:
 1. Impact of the proposed use on surrounding land uses in terms of Department of Environment Quality standards for noise, dust, or other environmental factors;
 2. The impact of the proposed use on water quality, water flow, or fish habitat on affect rivers or streams
 3. The impact of the proposed use on overall land stability, vegetation, wildlife habitat and land or soil erosion;
 4. The adequacy of protection for people residing or working in the area from the proposed mining activity through fencing of the site;
 5. The rehabilitation of the land upon termination of the mining activity. The proposed rehabilitation must at least meet the requirements of state surface mining or gravel removal permits.
 6. If the proposed extractive activity involves the removal of rock, gravel, or sediment from a river or stream, the proposal shall be reviewed by the Oregon Department of Fish and

Wildlife and it may provide a written statement to the county regarding the possible impact on fish habitat associated with the affected river or stream.

7. The County will define an area around the specific removal site which includes all lands within 250 feet of the site, based on the site map for a state mining or gravel permit. The applicant shall provide findings which identify the existing uses on those lands included within this area. The Commission shall evaluate the applicant's findings with regard to the potentially conflicting uses identified in the area based on the factors below:
 - i. If the mining activity can be sited on an alternate site; and
 - ii. where conflicting uses are identified the economic, social environmental and energy consequences of the conflicting uses shall be determined and methods developed to resolve the conflict.
8. A rock crusher, washer or sorter shall not be located closer than 500 feet to any residential or commercial use. 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 are injurious or substantially annoying to persons living in the vicinity.
9. No uses are permitted relating to offshore oil, gas or marine mineral exploration or development.”

- 2) Whether the Planning Commission can satisfy the aforementioned code provisions by setting out a requirement that the Applicant comply with all state and federal permitting requirements.

Analysis

The Planning Commission will ultimately need to consider whether it has enough information to apply the code and render a positive or negative decision on this application and how other agencies permitting process can be used to satisfy the required criteria. In making that decision prior court precedent does allow a local jurisdiction “to establish compliance with the challenged definitional criterion with regard to applicable state codes, the city must only establish which, if any, agency codes contain approval criteria, and that as a matter of law, intervenors are not precluded from obtaining such agency permit”. In other words, the County’s findings need to set out what state agencies have applicable codes and whether the applicant is legally precluded from obtaining a permit from those state agencies. *Miller v. City of Joseph*, LUBA No. 96-006 (Or. LUBA 8/21/1996).

The staff report sets out findings applicable to CCZO 7.040(10) for the Planning Commission to either accept, deny or modify during their deliberation process. The Planning Commission can determine from the record before it whether or not it has sufficient information on which to make a decision or whether the application should be denied due to lack of information. In undertaking its analysis the standard which will be used at LUBA should this matter be appealed is whether there was substantial evidence in the record to support the Board’s finding and ultimately its decision. The applicant bears the burden of proof and the decisions should be based on evidence in the records not assumptions. *Wolverton v. Crook County*, LUBA No. 97-233 (Or. LUBA 5/29/1998) (Or. LUBA, 1998). Where there is conflicting evidence the decision must be that which can be reached by a reasonable person presented with the same evidence.

In making a decision based upon the record before it the Board should be mindful that where a local government determines that the approval criterion is met or that feasible solutions to identified problems exist, and impose necessary conditions to deal with those problems—those findings and conditions may be challenged as inadequate or not supported by substantial evidence. *Salo v. City of Oregon City*, 36 Or LUBA 415, 428-29 (1999). The findings should reference evidence found within the record to substantiate the decision.

Summary

The comments received since closing the hearing primarily surrounded a lack of information in the application and object to the County relying upon state and federal agency permits to fulfill the criteria required in CCZO 7.040(10). If the applicant has shown with substantial evidence that his project fulfills the requirements of the code or can do so with conditions, the Commission can approve the application. If the application lacks sufficient evidence on which to base reasonable findings the application is likely subject to attack at LUBA.

Shala M. Kudlac

Asst. County Counsel