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Hand Delivered

4371-005

Mike McCallister
Planning Director
Planning and Zoning Division, Clackamas County
150 Beavercreek Road
Oregon City, OR 97045
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Re: *Remand Statement – LUBA No. 2014-069; Hal's Construction Rezone*

Dear Mr. McCalister and the Clackamas County Board of Commissioners:

As you know, our office represents Bruce D. Goldson, Intervenor-Respondent and Hal's Construction, Inc. in the above referenced matter. This letter is a remand statement, which frames the issues remanded by the Land Use Board of Appeals ("LUBA") and the means by which the remands can be complied with. We suggest that these arguments be incorporated in your Staff Report and Recommendation to the Commission where necessary. Please note that attached hereto is an updated Transportation Impacts Report with subsequent analysis by Lancaster Engineering as directed by LUBA. The attached report is the only new evidence to be added to the voluminous record for this matter.

There were 10 total assignments of errors raised in the 2014 appeal before LUBA. Assignments four, five, and six were denied, and the remaining seven were sustained. I will not address the assignments of error LUBA denied in the previous appeal. As further background, after the LUBA decision there was a subsequent appeal to the Oregon Court of Appeals as well as a legislative change which directly addressed the outcome of this matter. As discussed below, some of

the Assignments of Error can be effectively addressed with updated findings and others can be addressed by complying with new rules pursuant to House Bill 3214 and amendments to ORS 197.732 which modified Oregon's Land Use Goal exception process.

First Assignment of Error

The County must establish the uses which justified the 1980 exception, and show they are the same as the existing land uses, otherwise it must create a reasons exception for Goals 3 and 4.

The County originally determined that exceptions to Goals 3 and 4 were unnecessary based on the 1980 exception that designated the property Rural and zoned RRFF-5. The 1980 exception, however, took exception to Goals 3 and 4 only for the uses justified in the exception. On appeal before LUBA the Board, in a decision where all three Board members wrote separately, found that an exception was necessary nonetheless. See *Ooten v. Clackamas County*, OR LUBA 2014-069 at 5-11 (with concurrence by Bassham at p. 27 and Holstun at p. 33).

Although three members of the Board interpreted OAR 660-004-0018 differently, no new reasons exception is needed if the proposed plan and zone designation satisfies OAR 660-004-0028(2)(a) <u>and</u> (2)(b) because House Bill 3214 amended ORS 197.732 in part as follows:

> **(8) A local government is not required to take an exception to a goal related to agricultural use or forest use to change the zoning of a lot or parcel that has never been zoned, pursuant to the goal and comprehensive plan designation, for the protection of agricultural use or forest use.**

It is clear from this record that the subject area was never zoned for agricultural or forest use because Clackamas County zoned the subject property RRFF-5 and designated the property Rural in 1980.

Revising the findings to reflect these facts will adequately address LUBA's First Assignment of Error.

Second Assignment of Error

Where the County's decision redesignates the new driveway, it must explain how that portion of the property has a historical commitment to industrial uses.

The majority of the Second Assignment of Error was denied. The sole part which was remanded was due to the inclusion of the driveway in the redesignated area. See *Ooten v. Clackamas County*, OR LUBA 2014-069, at 11-14. Based on a comprehensive review of Oregon land use and real estate law, we believe it is not necessary to rezone the *area* under the relocated driveway on the northern lot in the present case where the relocation of the driveway is required by the Oregon Department of Transportation, lies on the Applicant's own property and is used for ingress and egress for varied uses in the RI and RRFF-5 zones. The Second Assignment of Error will be addressed thereby.

Third Assignment of Error

a. **The County should revise its findings to show the consistency of the proposed RI designation with the rural character of the area, including the adjacent RRFF-5 zoned properties.**

According to LUBA, the original findings did not adequately address the issues regarding the inconsistency of the RI designation with the rural character of the area. The findings must focus particularly on the adjacent RRFF-5 zoned properties. The remand provided that because some historic types of use are part of the area's rural character, it does not mean that the existing industrial uses allowed under the RI are as a result consistent with the rural character of the area. Revised findings which show the existing industrial uses are consistent with the character of the area will address this Assignment of Error.

b. **The County should to revise its findings to show that the RI designation is "not labor intensive"**

The County will need to revise its findings to show that Hal's Construction *onsite* work is not labor intensive. This record is replete with facts that show that Hal's Construction is a paving contractor and that the company's work occurs offsite at various locations where paving preparation and asphalt paving materials are installed at sites all over the region by up to 40 employees. The onsite labor consisting of clerical and equipment servicing is support only and ancillary to the offsite paving construction work. Revised findings including this information from the record together with reference to the use restriction imposed will be sufficient to satisfy this Assignment of Error.

Seventh Assignment of Error

The County should allow adequate opportunity to respond to the driveway location attached as Exhibit B to the Order.

The driveway location which is set out in Exhibit B to the Order was included for the first time as an attachment to Clackamas County's final decision. Exhibit B is a depiction of compliance with the Oregon Department of Transportation requirement to relocate the access for the site. As such, the County should permit adequate opportunity to respond to Exhibit B prior to the remand hearing.

Eighth Assignment of Error

The County should revise Condition 1 of the Order to clarify site use limits.

The County must determine which uses specifically are permitted so that they comply with the decision to limited uses to those that currently exist on the property. CCZO Table 604-1 is more expansive than those uses currently existing on the property. The county should revise Condition 1 showing the limitation to those currently existing uses for consistency and compliance with the LUBA order to address the Eighth Assignment of Error.

Ninth Assignment of Error

a. **The County must determine mitigation based on a revised Traffic Impact Study which compares the most traffic generative uses in the RRFF-5 and RI zones.**

As directed by LUBA (See *Ooten v. Clackamas County*, OR LUBA 2014-069 at 25) the County should to review a Traffic Impact Study which compares "the most traffic-generative use reasonably allowed in the RRFF-5 zone with the most traffic-generative use reasonably allowed in the RI zone." The County does not necessarily need to increase the mitigation efforts (although they will need to be revised as explained in subpart b, below); however, the attached, revised Traffic Impact Study prepared by Lancaster Engineering was prepared as directed by LUBA. See *Ooten v. Clackamas County*, OR LUBA 2014-069, at 25.

b. **Conditions 4, 5, and 6 must be revised so that mitigation triggers are certain to occur.**

The 4th, 5th, and 6th conditions are there to mitigate the effects of the plan amendment. The conditions do not specifically explain the circumstances which would trigger the new traffic study and improvements. The County is permitted to include conditions with timing elements; however, the ones currently in place may never be triggered if there is never a future proposed phase of development. In order to correct this, the County should revise these conditions to include specific timing elements which trigger the mitigation efforts. These revisions, in conjunction with integrating the revised Traffic Impact Report into the conditions of approval, will properly address the Ninth Assignment of Error.

Tenth Assignment of Error

The County should expand on why proposal for new driveway to the north satisfies CCZO 1202.01(E)

The County may not have adequately make findings as to whether a new driveway to the north complies with CCZO 1202.01(E). The record contains evidence which addresses whether a new

access point at the north end of the property could cause safety issues for properties to the north and across the highway. The findings should be revised to show that the new location for the access point on the north of the driveway complies with CCZO 1202.01.

Very truly yours,

VIAL FOTHERINGHAM LLP

David M. Phillips

DMP\NAB

Enclosure (Lancaster Engineering revised report)
cc : Client