

MULTNOMAH COUNTY, OREGON

DECISION OF LAND USE HEARINGS OFFICER

Case File: CU 6-96, SEC 18-96

Proposed Action(s) and Use(s): Conditional Use approval for mineral extraction in a Commercial Forest Use (CFU) district on property described below.

Location of Proposal: 14545 N.W. St. Helens Road

Legal Description of Property: Tax Lot '12', in the NW ¼ of Section 28, T2N, 1W, Willamette Meridian; and Tax Lots '2', '6', '8', and '11' in the E ½ of Section 29, T2N, R1W, Willamette Meridian.

Plan Designation: Commercial Forest

Zoning Designation: Commercial Forest Use (CFU); Significant Environmental Concern (SEC) Zone, subdistricts v (Scenic Views), h (Wildlife Habitat) and s (streams), and Protected Aggregate & Mineral (PAM) overlay.

Applicant: Angell Bros., Inc.
P.O. Box 83449
Portland, OR 97283-0449

Property Owner: Linnton Rock, Inc.
PO Box 2183
Grand Junction, CO 81502

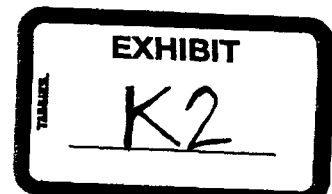
Applicants' Counsel: Frank M. Parisi
Parisi & Parisi
1 S.W. Columbia
Portland, OR 97258

Hearings Officer: Liz Fancher

Hearings Officer's Decision: **Approval**, subject to conditions, of a Conditional Use Permit and SEC permit for the mining of approximately 250 acres to include the area of land previously approved for mining under CU 17-90, based on the findings and conclusions, contained herein.

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Multnomah County
Zoning Division



Denial of the Applicant's request for expanded hours of operation.

OVERVIEW

The Hearings Officer was persuaded by the Applicant that the scope of review for its conditional use permit was narrow and confined, primarily, to the County's conditional use ordinances for mining activities and the West Hills Reconciliation Report, the section of County's comprehensive plan that addresses Goal 5 resources in the West Hills of Portland. This narrow scope, however, prevented the Hearings Officer from crafting conditions of approval to address all possible impacts of mine operations and from allowing the Applicant to use a different approach to mining than contemplated in the Report. The Hearings Officer required the Applicant to follow the reclamation approach it told the County it would implement and that is described in the Report. The Hearings Officer imposed this requirement to assure compliance with the comprehensive plan. The Hearings Officer did not impose the requirement because the Report plan is superior to the plan submitted by the Applicant.

BACKGROUND

1. **Applicant's Proposal:** The Applicant requests approval for a Conditional Use Permit for mineral extraction on the Angell Bros. site. The site, as currently permitted, comprises approximately 113 acres. This Conditional Use Permit would bring the total area available for mining to approximately 250 acres. The Applicant also requested that the mine be allowed to operate 20 hours per day, from 6 AM to 2AM.
2. **Site and Vicinity Characteristics:** About 25% of the total site is used for aggregate quarrying and processing. Most of the remaining area has been used for commercial forestry. The property that Angell Brothers intends to mine was formerly owned by Crown Pacific. Slopes in the central portion of the property were clear-cut in 1991. The entire site is zoned for Commercial Forest Use. The neighboring parcels are zoned CFU. Small scale forestry uses and rural residences are common in the neighborhood.
3. **Notification and Public Participation:** Notice of the September 18, 1996 hearing and a detailed listing of the applicable criteria were sent to 53 neighboring property owners, interested parties, and affected agencies on August 28, 1996. On September 25, 1996, Multnomah County received a letter from Jody Scheer. Ms. Scheer indicated that she lives close to the quarry but did not receive notice of the September 18, 1996 hearing. Ms. Scheer requested that she be sent notices of future hearings regarding the Angell Brothers mine. Ms. Scheer did not request additional time to comment on the pending application, a request that the Hearings Officer would have granted if it had been requested. The Hearings Officer also finds that Ms. Scheer was entitled to submit written comments regarding the project, based upon the record and tape of hearing, with her September 25, 1996 letter. No such comments

were filed. The Scheer letter does not explain when Ms. Scheer obtained actual notice nor does it explain why comments regarding the pending applications were not submitted.

4. **Timing of Decision:** ORS 215.428 requires a final decision on this permit by the County, including resolution of all appeals under ORS 215.422, within 120 days after the application is deemed complete. The application was deemed complete on July 31, 1996. The September 18, 1996 Public Hearing took place on **Day 49** of the **120 day clock**.

At the September 18, 1996 hearing, the Applicant submitted new information into the record in support of its application. The Opponents requested and were given seven days to submit additional evidence into the record, until September 25, 1996 at 4:30 p.m. at the offices of the Multnomah County Transportation and Land Use Planning Division. No additional comment period was granted. Parties were given an opportunity to object to the procedure for filing post-hearing comments. No objections were raised. The Applicant did, however, submit a document entitled "Angell Bros. Rebuttal" into the record after the close of the record on October 2, 1996. ORS 197.763 (e) gives the Applicant the right to file final written arguments for a period of seven days following the close of the record of a land use hearing. New evidence may not be included with the written argument.

5. **Staff Report:** The Staff Report for this application was completed on September 10, 1996 and was made available to the public on September 11, 1996, seven days prior to the hearing.

CONDITIONAL USE ORDINANCE CONSIDERATIONS AND FINDINGS

1. **CFU Zone & PAM-EA Subdistrict:** Multnomah County Code (MCC) Sections 11.15.2042 through 11.15.2074 relating to the CFU zone are applicable to the site and the land use applications reviewed by the Hearings Officer. Section 11.15.2050 (D)(1) identifies mining and processing of aggregate as a conditional use, "pursuant to MCC.2053, 2074, .7105 through .7120, .7125 through .7135, .7305 through .7335 and .7605 through .7640. Multnomah County Ordinance No. 804, **Exhibit C-1**, however, adopted Section 11.15.7107 which provides that mineral extraction conditional uses are exempted from the provisions of MCC .7110(C), .7110(E), .7115, .7120, .7122 and .7125. Further, Ordinance No. 804 adopted MCC 11.15.6780 which provides that processing and mining are permitted uses in a PAM-EA subdistrict "subject to a finding by the Hearings Authority that all standards adopted as part of the *Goal 5 process* and the provisions of MCC.7305 through .7335 are met." MCC 11.15.6780 also states that "[r]eview by the Hearing Authority shall be under the procedural provisions of MCC .7105, .7107, .7110(A), .7110(B), .7110(D), .7130 and .7135."

The property is a Goal 5 protected aggregate resource site with a primary zoning of Commercial Forest Use. Uses allowed in the CFU zone pursuant to Statewide Planning Goal 4 and MCC 11.15.2048 include farm use, dwellings (under limited circumstances), forest operations or forest practices including, but not limited to, reforestation of forest land, road construction and maintenance. [MCC 11.15.2048]

2. **Farm & Forest Use Compatibility Standards:**

MCC 11.15.2053 - Specified uses of MCC .2050 . . . (D) . . . may be allowed upon a finding that:

The use will:

1. **Not force a significant change in, or significantly increase the cost of, accepted forestry or farming practices on surrounding forest or agricultural lands;**

FINDING: The West Hill Reconciliation Report contains Multnomah County's determination that "there is no indication that expanded mining at this site would force a significant change in, or significantly increase the cost of, accepted farming or forest practices on agriculture or forest lands." [p. IV-37] The Report also contains a wealth of information that, in combination with the facts in the record of this application, establish that mining at this site will not violate the above-cited approval criterion.

Item number 1 imposes requirements that are the same as the requirements found in ORS 215.296(1). The requirements of ORS 215.296(1) have been interpreted by the Land Use Board of Appeals in the cases of *Schellenberg v. Polk County*, 22 Or LUBA 673 (1992) and *Schellenberg v. Polk County*, 21 Or LUBA 425 (1991). The requirements of ORS 215.296(1) were recently applied to a mineral and aggregate and extraction operation in an EFU zone that was designated on the local government's Goal 5 inventory of mineral and aggregate sites in the case of *Mission Bottom Association, Inc. v. Marion County*, 29 Or LUBA ____ (1995).

In *Schellenberg I*, 21 Or LUBA at 440, LUBA held that to demonstrate compliance with ORS 215.296(1), findings must:

"* * * (1) describe the farm and forest practices on surrounding lands devoted to farm or forest use, (2) explain why the proposed use will not force a significant change in those practices, and (3) explain why the proposed use will not significantly increase the cost of those practices."

LUBA also found that the County's finding must identify the "surrounding lands devoted to farm and forest use" and describe the "accepted farming practices" occurring on such lands * * *." *Schellenberg I*, 21 Or LUBA at 441.

The Hearings Officer makes the following findings to demonstrate compliance with the requirements of the *Schellenberg* case:

- (1) **Identification of a "study area."**

FINDING: The Hearings Officer finds that the appropriate study area for purposes of determining compliance with MCC 11.15.2053 is the impact area adopted by the Board of County Commissioners in Multnomah County Ordinance No. 858, **Exhibit C-3** of the record of the pending Angell Brothers application (Sectional Zoning Maps ZC 1-96). **Exhibit C-3** is based upon **Exhibit C-4**, the West Hills Reconciliation Report, which contains the County's determination that the impact area is that area that includes uses which could be affected by the Angell Brothers mineral and aggregate operation.

(2) Identification of land within the study area devoted to farm or forest use.

FINDING: The West Hills Reconciliation Report, **Exhibit C-4**, identifies all of the land within the impact area (study area) that is devoted to farm and forest use and studies all of the lots in the area to determine the uses on the lot and potential impacts. This analysis includes an identification of farm and forest lands. The majority of the land in the impact area is zoned Commercial Forest Use, CFU, land designed for forestry. A small area is zoned Multiple Use Agriculture (MUA-20). An area on the westerly edge of Sauvie Island is zoned Exclusive Farm Use, EFU but is not used for farm use as it is developed with a dam. One lot in the impact area is zoned Rural Residential (RR) and is developed with a single family residences.

(3) Identification of timber, crops or livestock grown on those lands and the accepted farm or forest practices associated with each type of operation.

FINDING: The County studied the entire impact area during the Goal 5 ESEE analysis process as well as all agricultural uses allowed or occurring in the impact area and determined that the mining operations would not conflict with the agricultural uses allowed in the impact areas. **Exhibit C-3**. The County found on page IV-17 of the Report that the conflict with forestry uses was limited to the mine site property and that the identified forest uses and practices would not conflict with or be harmed by the operation of the Angell Brothers mine.

(4) Identification of operating characteristics of the proposed mining operation.

FINDING: The County identified the operating characteristics of the proposed mining operation in the West Hills Reconciliation Report, **Exhibit C-3**. Those characteristics include, but are not limited to, the generation of dust, noise, and traffic, the blasting of rock, the operation of heavy equipment on-site and the destruction of a hillside and two stream beds.

(5) Determination of impacts of proposed mining and aggregate operations on identified accepted farm and forest practices.

FINDING: The West Hills Reconciliation Report contains a determination that there are no adverse impacts of the proposed mining upon accepted farm and forest practices in the surrounding area. No conflicting potential or actual farm uses were identified by the ESEE study of the impact area. Additionally, no conflicts were found between surrounding lands used for forestry as the report concluded that the only area of conflict with forestry occurred on the subject property.

2. Not significantly increase fire suppression costs, or significantly increase risks to fire suppression personnel; and

FINDING: The Hearings Officer accepts the Applicant's argument that mining activities will decrease wildfire hazards and fire suppression costs by creating a fire break in the forest. The Hearings Officer finds that trucks and heavy equipment associated with mining operations increase risks of injury to fire personnel and are a potential source of fire hazard. The Hearings Officer finds, however, that the increase in risk is typical of all mining operations and, therefore is not significant. Additionally, Multnomah County has already determined, in its West Hill Reconciliation Report that "there is no indication that an expanded mining operation would increase fire hazard or costs and risks associated with fire suppression." [p. IV-37]

B. A statement has been recorded with the Division of Records that the owner and the successors in interest acknowledge the rights of owners of nearby property to conduct forest operations consistent with Forest Practices Act and Rules, and to conduct accepted farming practices.

FINDING: The Applicant has stated that it will record such a statement with the Division of Records and such recording has been included as a condition of approval of this application.

3. PAM Overlay Conditional Use Permit Standards:

MCC 11.15.7105 - Purposes: Conditional uses as specified in a district or described herein, because of their public convenience, necessity, unique nature, or their effect on the Comprehensive Plan, may be permitted as specified in the district or described herein, provided that any such conditional use would not be detrimental to the adjoining properties or to the purpose and intent of the Comprehensive Plan. Certain conditional use provisions of time limits, conditions, restrictions, and approval criteria shall not apply to Mineral Extraction conditional uses.

MCC 11.15.7107 - Mineral Extraction Exemptions from Standards

Mineral Extraction conditional uses are exempted from the provisions of MCC .7110(C), .7110 (E), .7115, .7120, .7122 and .7125.

FINDING: The Hearings Officer has applied these exemptions in reviewing this application, as noted below.

MCC 11.15.7110 - General Provisions:

- A. Application for approval of a Conditional Use shall be made in a manner provided in MCC .8205 through .8280.**

FINDING: The Applicant has applied for approval of this conditional use in the manner provided in MCC 11.15.8205 through .8280.

- B. The Approval Authority shall hold a public hearing on each application for a Conditional Use, modification thereof, time extension or reinstatement of a revoked permit.**

FINDING: The Hearings Officer held a public hearing on this conditional use permit on September 18, 1996.

- C. Except as provided in MCC .7330, the approval of a Conditional Use shall expire two years from the date of issuance of the Board Order in the matter, or two years from the date of final resolution of subsequent appeals, unless: . . .**

FINDING: MCC 11.15.7107 states that MCC 11.15.7110 (C) does not apply to mineral extraction conditional use applications like the one filed in this case.

- D. A Conditional Use permit shall be issued only for the specific use or uses, together with the limitations or conditions as determined by the Approval Authority. Any change of use or modification of limitations or conditions shall be subject to approval authority approval after a public hearing.**

FINDING: The conditional use permit issued in this case is issued for the specific use sought by the Applicant. Any change of use or modification of limitations or conditions shall be subject to approval authority approval after a public hearing.

- E. The findings and conclusions made by the approval authority and the conditions, modifications or restrictions of approval, if any, shall specifically address the relationships between the proposal and the approval criteria listed in MCC .7120 and in the district provisions.**

FINDING: MCC 11.15.7107 states that MCC 11.15.7110 (E) does not apply to mineral extraction conditional use applications.

MCC.7115 - Conditions and Restrictions: The approval authority may attach conditions and restrictions to any conditional use approved. Conditions and restrictions may include a definite time limit, a specific limitation of use, landscaping requirements, off-street parking, performance standards, performance bonds, and any other reasonable conditions, restrictions or safeguards that would uphold the purpose and intent of this chapter and mitigate any adverse effect upon the adjoining properties which may result by reason of the conditional use allowed.

FINDING: During the hearing of this application the Hearings Officer asked the Applicant and Opponents to comment on the meaning of MCC .7115. The version of MCC .7115 discussed and included in the County's listing of applicable criteria, however, contained the following language at the beginning of the section, which was the cause of the discussion and ambiguity in the meaning of the section: "Except as provided for Mineral Extraction and Processing activities approved under MCC .7305 through .7325 and .7332 through .7335." The quoted language was, however, repealed by Multnomah County Ordinance No. 804 and the section is now unambiguous. The Hearings Officer finds, however, that the section does not apply to the pending application as MCC 11.15.7107 provides that mineral extraction conditional uses are exempted from the provisions of this code section.

Conditional Use Approval Criteria: MCC 11.15.7120 (General): (A) A Conditional Use shall be governed by the approval criteria listed in the district under which the conditional use is allowed. If no such criteria are provided, the approval criteria listed in this section shall apply."

(B) "... Proposals for mineral extraction and processing shall satisfy the criteria of MCC .7325."

FINDING: Subsection (B) of MCC .7120 was repealed by Multnomah County Ordinance No. 804. MCC .7107 also provides that no portion of MCC .7120 applies to review of mineral extraction conditional use applications.

MCC 11.15.7315 - Purposes

The purposes of the Mineral Extraction section are to promote the public health, safety and general welfare through the protection of mineral and aggregate resources in accordance with LCDC Statewide Planning Goal #5 and the Multnomah County Comprehensive Plan. The regulations are designed to:

- (A) Recognize mineral and aggregate resource extraction as a land use influenced largely by the location of the natural resource and the location of the market;

- (B) Provide maximum flexibility for location of the extraction process within a variety of underlying zones, while at the same time minimizing potentially adverse effects on the public and property surrounding the extraction site;
- (C) Recognize mineral and aggregate resource sites which receive an ESEE designation for protection as being appropriate for extraction operations when in compliance with MCC .7325 - .7332.
- (D) Recognize mineral extraction as a temporary use dependent to a large degree upon market conditions and resource size and that reclamation and the potential for future use of the land for other activities must also be considered.

FINDING: The Hearings Officer has reviewed this application with the purposes stated in this section in mind. The Angell Brothers site has been determined to be an appropriate site for mining activity by the County subject to compliance with the following criteria.

Mineral Extraction (CU): MCC .7325 - Criteria for Approval: The approval authority shall find that:

- A. **MCC 11.15.7325(A):** The site is included on the inventory of protected aggregate and mineral resource sites in the Comprehensive Plan.

FINDING: This criterion is satisfied because the Angell Bros. site is included on the PAM inventory in the Comprehensive Plan. The West Hills Reconciliation Report concludes the entire 397 acre Angell Brothers property is a significant Goal 5 Mineral and Aggregate site based upon location, quality and quantity [pg IV-7, Reconciliation Report].

- B. **MCC 11.15.7325 (B):** There is a proposed reclamation plan which will allow the property to be utilized as provided in the Comprehensive Plan and underlying district.

FINDING: The Applicant has provided a proposed Reclamation Report as Chapter IV of the Operating and Reclamation Plans for Angell Bros. Quarry: Multnomah County, Oregon (Exhibit G, Appendix). The Reclamation Plan (Applicant Exhibit G-1) requires the site to be reclaimed to a condition that will support forest uses, consistent with the CFU zone. The Reclamation Plan was approved by DOGAMI by issuance of an Operating Permit (Applicant Exhibit H) in March of 1996 with thirteen conditions. Conditions 4, 9, 10, 11 and 12 require specific measures for successful reforestation. The Conservation Easement granted to The Friends of Forest Park requires that Western Oregon old growth conditions be maintained in Scenic Buffer Areas and in the Preserves, which is consistent with the CFU zone. The West Hills Reconciliation Report, the comprehensive plan document that governs this mineral and aggregate extraction application indicates that the property should be reclaimed so that it will enhance wildlife values and support forest vegetation. The Applicant has committed to conduct a reclamation plan which DOGAMI

has determined will allow for revegetation with forest vegetation. This fact is not particularly remarkable, however, as DOGAMI representative Frank Schnitzer opined that even mines that are not reclaimed support forest vegetation. The return of forest vegetation to the site will, thereafter, enhance wildlife values. Further, the grasses and open areas that will exist on the site prior to reforestation will provide food for deer and other wildlife.

C. MCC 11.15.7325 (C): The applicant has shown that the standards of this section, or site-specific requirements adopted as part of a comprehensive plan amendment, can or will be met by a specified date.

FINDING: MCC 11.15.7325 (C) allows the Applicant to choose how to demonstrate compliance with this code section. The Applicant may establish that the standards of MCC 11.15.7325 (C) are met *or* that the site-specific requirements adopted as part of a comprehensive plan amendment can or will be met by the Applicant by a specified date.¹

Site-Specific Requirements: The Hearings Officer finds that the Applicant has not met its burden of proving that all of the site-specific requirements adopted as part of the comprehensive plan amendment which applies to the Angell Brothers site can or will be met by the Applicant by a specified date. This conclusion is supported by the following findings of fact and conclusions of law:

The comprehensive plan amendment relevant to this review is the West Hill Reconciliation Report, Revised May 1996, Exhibit C-4 of this application. The Applicant argues that MCC 11.15.7325 (C) is satisfied because the requirements of the Program to Achieve the Goal contained under the Angell Brothers Aggregate

¹It appears to the Hearings Officer that the County may have intended to require compliance with the Report *and* the subsections of Section C because the Section C contains code provisions, such as limitations upon hours of operation, which state that they apply any time there is no provision in the Report relating to the same matter. Further, it seems unlikely to the Hearings Officer that the County intended to provide no limitation upon mining hours for the Angell Brothers mine site. The Hearings Officer does not, however, have the ability to strike the word "or" and substitute the word "and" in this section so has applied the section as written. Goosehollow Foothills League v. City of Portland, 117 Or App 211, 843 P2d 992 (1992); 1000 Friends of Oregon v. Wasco County Court, 299 Or 344, 703 P2d 207 (1985); West Hills & Island Neighbors v. Multnomah County, 68 Or App 782, 683 P2d 1032, rev. den. 298 Or 150 (1984). The provisions of this section must, however, be disregarded where they cause a violation of requirements of the comprehensive plan (Reconciliation Report), which could be the case if the zoning ordinance is allowed to authorize operations that violate Report requirements. In such instances, relevant plan policies must take precedence. Reeves v. Yamhill Co., 132 Or App 263, 888 P2d 79 (1995); Baker v. City of Milwaukie, 271 Or 500, 533 P2d 772 (1975).

heading are legally enforceable obligations. The Applicant claims that these site-specific requirements include the 200 foot setbacks, the restriction on mining in the North Angell Brother Stream watershed, and the directives to minimize impacts on scenic views, watersheds and wildlife habitat and to minimize the amount of disturbed area at any one time. The Hearings Officer agrees that the requirements listed by the Applicant are site specific requirement but finds that there are other site-specific requirements in the Reconciliation Report that were not addressed by the Applicant which further define what is meant by the vague directives cited by the Applicant from the program to meet the goal section of the Report.

The Hearings Officer did not find a definition for the term "site-specific requirements" in the County's land use regulations or in the Goal 5 regulations adopted by LCDC.² Lacking such a definition, the Hearings Officer applied a dictionary definition of the term and reviewed the Reconciliation Report to locate provisions of the Report that were stated as requirements for the mine mentioned in the report. These requirements were found in Chapters IV and VI of the Report. Chapter VI contains broad, sweeping requirements and Chapter IV contains the mine operator's commitments to operate in a manner that will achieve these broad objectives. Chapter IV also contains provisions that were written as prohibitions and directives to the mine operator. For instance, Chapter VI requires that the mine operator "best enhance wildlife values" and "minimize the area mined at any given time." If the Hearings Officer were to apply these goals without regard for the details found in Chapter IV, the Hearings Officer could impose *whatever measures* she believes best enhance wildlife values, preserve views and minimize the area mined. This is not, however, what is envisioned by the Goal 5 program nor by the Applicant.³ Further, OAR 660-16-010(3) requires that the mechanisms used by the County to limit conflicting uses, as done for the Angell Brothers site, "must designate with certainty . . . what specific standards or limitations are permitted on the permitted and conditional uses and activities for each resource site." This administrative rule also requires that "[w]hatever mechanisms are used, they must be specific enough so that affected property owners are able to determine what uses

²The Hearings Officer referred to the Goal 5 rules in effect when the Angell Brothers application was approved by the County, not the current Goal 5 rules.

³At numerous times throughout the record of this matter, the Applicant has correctly claimed that the Hearings Officer must allow the Applicant to proceed with mining if the conditions of the Report are satisfied and County ordinance requirements are met by the mine plan. The Applicant has also correctly stated that the Hearings Officer may not impose more rigorous standards upon the mine operator than contemplated by the Report and mining ordinance, even where documented public problems exist. The "flip side" of this argument is, however, that the Hearings Officer also lacks the authority to excuse the Applicant from Plan and ordinance requirements.

and activities are . . . allow conditionally and under what clear and objective conditions or standards.” Based upon the foregoing findings, the Hearings Officer finds that the site-specific details relied upon by the County in Chapter IV in assessing the impacts of the mining operation upon conflicting resource uses are site-specific requirements which, if and when met by the Applicant, entitle the Applicant to mine the expansion area of the subject property.

Further, the Hearings Officer is bound by Oregon law to require that the mitigation measures described in the Report are undertaken as promised by the Applicant. Chapter IV lists commitments made by Angell Brothers with respect to mining operations in the land use approval process. These commitments were made in order to demonstrate compliance with the approval criteria for a site-specific land use application to obtain designation of the expansion area of the Angell Brothers site as a Goal 5 resource site. The Land Use Board of Appeals has determined that such applicant commitments are binding upon applicant's once the land use approval is granted even if not specifically required by conditions of approval. Wilson Park Neighborhood Assn. v. City of Portland, 27 Or LUBA 106, remanded on other grounds, 129 Or App 33 (1994); Perry v. Yamhill County, 26 Or LUBA 73, aff'd 125 Or App 588 (1993); Friends of the Metolius v. Jefferson County, 25 Or LUBA 411 (1993). In this case, the Applicant made a commitment to mine and reclaim the site in a specific manner which would minimize impacts upon other protected resources, primarily by early reclamation of the site. Since that time, the mining plan has been changed to a plan that leaves large mined areas open and unreclaimed beyond County ordinance time frames. While the Hearings Officer understands that DOGAMI and the Applicant have determined that the prior plan was not practicable, the Hearings Officer cannot find, on this record, that the new plan complies with the site-specific requirements listed in Chapters VI and IV of the Report.

The Hearings Officer reviewed the West Hills Reconciliation Report to determine what site-specific requirements are contained in the Report. A listing of a number of the requirements found in the Report is found in **Appendix A**⁴ of this decision and is included for possible use by the County Board in its review of this application. The Hearings Officer then reviewed the pending land use application to determine whether it complies with the Report or whether it can comply with the Report by a specified date.

⁴This list is not exhaustive. It was developed to aid the Hearings Officer in reviewing the application for compliance with ordinance provisions that require compliance with site-specific requirements.

This review revealed that the following differences between the requirements of the Report and the plan proposed by the Applicant:⁵

- A. The application calls for the movement of the primary crusher uphill from its present location and for the continued movement of the crusher up the valley as mining progresses. [p. 19, Response to Approval Criteria] The Report, however, states that the "principal processing, weighing and loading facilities will remain at their present location and will be screened from public view by the Block 4 vegetated buffer strip." [p.IV-15]
- B. The application abandons the concept of concurrent reclamation and the reclamation of each bench as mined. This is clear from the Applicant's Response to Approval Criteria which indicates that "[a]lthough certain benches within Phase 1 will be reclaimed concurrently with mining, the majority of the benches will have to be left open to accommodate haul road and overburden stockpiles from Phase 3. As explained above, mining occurs in a similar fashion in Phase 2, to accommodate later mining in Phase 4." [p. 19, Response to Approval Criteria] The Applicant also states that "[t]otally sequential reclamation will not begin until mining commences in Phase 3." [p. 20, Response to Approval Criteria]

The goal reconciliation portion of the Reconciliation Report requires that the reclamation plan be a sequential mining plan which minimizes the amount of disturbed area at any one time and includes simultaneous reclamation [p.VI-17, 18, 25]. The site-specific analysis of the Angell Brothers mine further explains that the Applicant committed to begin reclamation upon the completion of mining on any given bench by recontouring and ripping the bench and adjacent sidewall [p.IV-13] and to provide "early visual screening" of the upper benches "immediately" following mining of the upper benches [p. IV-14]. The Applicant has not convincingly demonstrated that its plan will or can meet these standards by a specified date.

- C. The Conflict Resolution portion of the Reconciliation Report states that "[m]ining on the Angell Brothers site should not take place within the

⁵The Hearings Officer viewed the statement provided by Mr. Parisi in his discussion as the reclamation plan as the final word regarding the Applicant's plans regarding the timing of reclamation and phasing. This was because the Hearings Officer found little, if any information on this point in the Reclamation Plan document that the Applicant identified as Exhibit G of its application and the December 1995 plan conflicts with Mr. Parisi's recent discussion of the plan.

North Angell Brothers Creek watershed" [p. VI-16] and that expansion "should be allowed except for . . . the North Angell Brothers creek watershed." [p. VI-17] Further, the Stream Resources section of the Report, Section III, states that the North Angell Brothers Creek could be impacted by expansion of the mine operation into the creek's watershed. The program to achieve the goal, on p. VI-22 & 23 also indicates that Preserves encompass the North Angell Brothers stream drainage and that the preserves will not be mined by the Applicant. [p. VI-23] The locations of the preserves are not detailed in the Report. The map on Page III-143 of the Report, however, delineates the boundaries of the North Angell Brothers watershed and the location of the North Angell Brothers Creek. The North Angell Brothers creek does not include the tributary of that creek which was identified by the Opponents of this application as a part of the creek. The map on Page III-143, however, shows that the North Angell Brothers watershed includes lands that will be mined by the Applicant if this application is approved as proposed on Sheets 1 -4 of the Applicant's Operating Plan. Further, the photographs submitted by Opponent Seth Tane confirm that the Applicant proposes to mine inside the watershed boundary of the North Angell Brothers Creek shown on the Report map.⁶

The Applicant claims that the site-specific requirements of the comprehensive plan amendment (the Report) have been "developed further" in the reclamation plan submitted with this application, DOGAMI Operating Permit and the Conservation Easement. The Applicant has not demonstrated, however, that it is permissible for it to amend a comprehensive plan in this manner and to do so would violate basic tenets of Oregon land use law. As a result, these further developments are irrelevant to determining compliance with MCC 11.15.7325 (C).⁷ Changes authorized in approvals obtained from governmental agencies that do not have responsibility for land use planning do not amend the comprehensive plan (the Reconciliation Report)

⁶The Hearings Officer notes that the program to achieve the goal for significant streams requires the County to adopt laws to create SEC overlay zones of 600 feet in width, based upon the centerline of significant streams, in order to protect the stream resource. No section of the stream resource program to achieve the goal, however, includes any limitations on mining of the Angell Brothers site. The mining program to achieve the goal, however, states that the Preserve areas will include the North Angell Brothers stream drainage. [p. VI-23]

⁷The Report references some of the cited documents, particularly the Conservation Easements, as a means of complying with Report requirements. To the extent these documents are incorporated into the Report, they were considered in determining compliance with the Report.

nor alter the land use review requirements of MCC 11.15.7325 (C). A comprehensive plan amendment is required to effectuate such a change. Further, the DOGAMI permit indicates states that “[i]ssuance of this permit is not a finding of compliance with state-wide planning goals or the acknowledged comprehensive plan.” The permit further cautions that “[the applicant must receive land-use approval from local governments before using this permit.]”

Based upon the foregoing findings, the Hearings Officer finds that the Applicant has not met its burden, under MCC 11.15.7325(C), of showing that the mining operations plan and revised reclamation plan can or will meet the requirements of the Report. The Hearings Officer therefore, must review the subsections of MCC 11.15.7325 (C) listed and discussed below.

Compliance with Requirements of MCC 11.15.7325 (C)

5. Access and traffic.

- a. **“Prior to any surface mining activity, all on-site roads used in the mining operation and all roads from the site to a public right-of-way shall be designed to accommodate the vehicles and equipment which will use them.”[MCC 11.15.7325 (C)(1)(a)]**

FINDING: This criterion is satisfied. All new on-site roads will be cut out of basalt benches and will be at least 40 feet wide to accommodate the largest piece of equipment used on the site, a D-9 Caterpillar (see Operating and Reclamation Plan, Applicant Exhibit G-2, pp. 13 - 15). Further, the record shows establishes that the soils and rock in the area are sturdy enough to prevent significant rock and soil slides and to provide a stable surface for heavy equipment traffic.

No changes to any public right-of-way are planned as a result of this application. There are no roads between the site and Highway 30, the road that provides access to the site. The mine operator holds an easement across property owned by Ray Adams. The Applicant does not plan to develop this road for site access and has agreed that it will not use the easement for mine-related traffic is not authorized by this approval. As a result, the Hearings Officer did not review the adequacy of this easement for mining traffic use. Use of this road will be prohibited by the conditions of approval of this application to assure that this access will not be used unless and until such time as a new land use approval is obtained which reviews and authorizes the use.

- b. **All on-site and private access roads shall be paved or adequately maintained to minimize dust and mud within 100 feet of a public**

right-of-way or 250 feet of dust sensitive land use. [MCC 11.15.7325 (C)(1)(b)]

FINDING: The only access road to the site is paved for approximately 1,200 feet from the intersection of Highway 30. As shown on the water rights map in of the Operating and Reclamation Plan, no mining activity will occur within 100 feet of a public right-of-way, and there are no dust sensitive land uses within 250 feet of the site.

- c. **"No material which creates a safety or maintenance problem shall be tracked or discharged in any manner onto any public right-of-way." [MCC 11.15.7325 (C)(1)(c)]**

FINDING: Opponents and the Applicant presented evidence that rocks, dirt and clay from the mine site find their way onto Highway 30. Opponents testified that the mine operator has refused to clean up mined materials dropped onto the highway or to take measures to prevent the discharge of materials onto the highway. The Opponents submitted testimony which indicates that the clay is slippery and creates hazardous driving conditions on the highway. The Applicant claims that these problems have been remedied by the construction of dry well on the property, construction of a new entrance which drains the haul road better, paving of 1,200 feet of the haul road, installation of a cattle guard at the entrance to collect rocks and mud from truck wheels and the purchase of a new water truck and mechanical sweeper truck. The Hearings Officer is not convinced that these measures will prove efficacious given the fact that none of the control measures involve containment of loads within the trucks by the truck operators. As a result, the Hearings Officer has required continued compliance with this section of the zoning ordinance throughout the life of the mine and has written a provision which authorizes the County to require the covering of loads if the County documents the existence of a problem through code or conditional use permit enforcement proceedings.

- d. **"The applicant shall submit all traffic information and traffic management plans required in any site specific Comprehensive Plan Program. The County Engineer shall review the submitted plans and shall certify, based on findings relating to the Multnomah County Rules for Street Standards, that the roads appropriately identified in the Plan:**

FINDING: This section does not apply to this application as the site specific comprehensive plan program for the Angell Brothers site does not require that traffic information and traffic management plans be submitted by the Applicant.

- e. **If there are no traffic management requirements in the site-specific Comprehensive Plan Program requirements, the applicant shall identify the most commonly used routes of travel from the site.**

FINDING: There are no traffic management requirements in the site-specific Comprehensive Plan Program requirements related to the Angell Brothers mine site. The Applicant claims that subsection (e) does not apply to the Angell Brothers site because subsection (e) applies only to situation where traffic issues exist. This argument is not supported by the text of this code section. Further, the quoted language is clear and unambiguous and requires the Applicant to identify the most commonly used routes of travel from the site. The Hearings Officer lacks the authority to interpret an unambiguous code provision to add limitations and qualifications that do not exist in the text. *Goosehollow Foothills League v. City of Portland*, 117 Or App 211, 843 P2d 992 (1992); *1000 Friends of Oregon v. Wasco County Court*, 299 Or 344, 703 P2d 207 (1985); *West Hills & Island Neighbors v. Multnomah County*, 68 Or App 782, 683 P2d 1032, rev. den. 298 Or 150 (1984). The Applicant identified Highway 30 and no other area road as the most commonly used route.

The Applicant argues that a traffic management decision was made in the Reconciliation Report and that, therefore, the Applicant does not need to comply with the requirements of this section. This is not, however, what this section says. MCC 11.15.7325(C) allows the Applicant to avoid proving compliance with the traffic standards of this subsection if the Applicant's mine operations are conducted in compliance with the terms of the Reconciliation Report, but a similar waiver does not apply when, as here, the Applicant seeks to justify mine operations by showing that its plan complies with the subsection requirements of MCC 11.15.7325(C).

The Hearings Officer also reviewed Policy 16-B, Section M of the County's Comprehensive Plan to determine whether the policy would excuse the Applicant from complying with the requirements of the PAM district. The section states that "[t]he County shall impose conditions on surface mining when necessary to lessen conflicts identified as part of a site-specific Goal 5 analysis. Where such conditions conflict with criteria and standards in the Protected Aggregate and Mineral Resources Overlay, the conditions developed through the Goal 5 process shall control. In the case of traffic, there is no need to impose conditions on the surface mining to lessen conflicts identified in the site-specific Goal 5 analysis, so there is no conflict with this section of the PAM overlay zone.

The County Engineer shall certify, based on findings relating to the Multnomah County Rules for Street Standards, that the applicant has identified the appropriate roads, and those roads:

- i) **Are adequate to safely accommodate any additional traffic created by the extraction operation for the duration of the activity, or**

FINDING: The County Engineer has not certified that the Applicant has identified the appropriate roads. Instead, the County Engineer has indicated that he believes that the Applicant should address traffic impacts on Newberry Road as a part of this application. **Exhibit H-1.** A portion of Newberry Road is located within the impact area for the Angell Brothers mine, as shown on Map 84, Ordinance No. 858, **Exhibit C-3** of the record and, therefore, is a relevant matter for consideration in the review. Further, there is overwhelming evidence in the record, from the Applicant and the Opponents, that Newberry Road is one of the most commonly used roads for mine-related traffic. This is because the road provides a major shortcut to areas of the community that are undergoing extensive growth and development.

The Applicant has argued that approval of this application will not generate "additional traffic" because there is an existing mining operation on the site. The Hearings Officer notes, however, that the approval of this application will create additional truck and vehicle traffic directly related to the mining operation over the life of the mine when compared to the amount of traffic that would be generated over the life of a mine on the existing site. Further, evidence in the record indicates that the Applicant may already be mining in the expansion area. Of particular note is the fact that Skip Anderson pointed to the expansion area when asked to show where the principal crusher and mining operations are presently occurring. If such is the case, the traffic that is presently occurring on area roads should be attributed to the proposed extraction operation.

- ii) **If the roads are inadequate to safely accommodate any additional traffic created by the extraction operation for the duration of the activity that:**

- **The applicant has submitted a traffic management plan that is sufficient for the County Engineer to make relevant findings regarding necessary road improvements;**
- **The applicant has committed to financial installation of the necessary improvements under the provisions of 02.200 (a) or (b) of the Multnomah County Rules for Street Standards; and**
- **A program has been developed for the numbers and weight of trucks from the site that can safely be accommodated at specific levels of road improvement. Based upon those findings, the Hearing Authority may attach related conditions and restrictions to the conditional use approval. [MCC 11.15.7325 (C)(1)(e)]**

FINDING: The County Engineer's comments indicate that Newberry Road, a County road located within the impact area of the mine site, is inadequate to

safely accommodate additional traffic created by the extraction operation. This conclusion is supported by the substantial evidence (written and verbal testimony, videotapes and photographs) submitted by the Opponents which indicates that Newberry Road is of inadequate width and design to safely accommodate heavy truck traffic. Trucks must cross over the center line of the road to negotiate turns and numerous, documented grave truck accidents have occurred on the road. Applicant claims that it is not required to comply with MCC 11.15.7325(C)(1)(e) for a number of reasons, including the fact that no County roads are used for access to the site. A road does not, however, need to be a County road in order to be considered under MCC 11.15.7325(C)(1)(e). While the road must be reviewed for adequacy under County street standards, the road itself does not need to be a County road.

The Applicant has not submitted a traffic management plan to address these legitimate concerns. This must be accomplished prior to commencement of mining operations⁸ and has been required as a condition of approval. As a determination whether the Applicant has complied with this condition of approval will require the exercise of discretion, it is a land use decision which must be handled as such by the County and Applicant, with notice and an opportunity for a hearing.⁹

The Applicant's September 25, 1996 submittal claims that "some condition to mitigate perceived traffic problems will be drafted in a form that will violate the "rough proportionality" standard of Dolan v. City of Tigard." The Applicant then states that "it must be obvious that an attempt to impose a condition . . . along the lines that Angell Bros.' trucks are prohibited from using one or more of the commonly used routes would create a serious Dolan problem." Quite to the contrary, however, local governmental traffic regulations are not subject to the Dolan decision's "rough proportionality" test. In order to be subject to scrutiny under Dolan, an condition of approval must impose a taking of a property interest as the Dolan case is based upon the Takings Clause of the Fifth Amendment of the US Constitution. The case of Clark v. City of Albany, 137 Or App 293, 904 P2d 185 (1995) cited by the Applicant settles the matter *against* the Applicant. In that case, the Oregon Court of Appeals held that "not all conditions of approval

⁸If the Applicant has, in fact, already commenced mining operations, those operations should be halted until such time as all conditions of approval that are a precondition of mining approval in the expansion area are satisfied.

⁹It is hoped that if this decision is appealed, as anticipated, the Applicant may choose to comply with the requirements of the section by supplying the needed plan and information, in which case the condition of approval developed to assure compliance with this section should be deleted.

come within the ambit of the Dolan test” and that matters that are essentially traffic regulations are not exactions and are not subject to the Dolan test. Clark, 137 Or App at 300-301.

Further, the Hearings Officer has not yet imposed any conditions that require road improvements or the dedication of road right-of-way, conditions that would be subject to Dolan review. It is possible that the County’s review and the Applicant’s study will determine that no exactions are needed to assure compliance with the standards of MCC 11.15.7325 (C)(1)(e). If and when the County determines that exactions must be imposed to assure compliance with this subsection, Multnomah County will bear the burden of demonstrating that the conditions are “roughly proportional” to the impact of the mining operation’s traffic on County roads. Given the significant and documented impact of the operation on area roads, including Newberry Road, it seems likely that the County will be able to justify some road system related exactions under this section. The Hearings Officer also notes that the Applicant may choose to avoid the requirements of this section and any potential exaction for road improvements by demonstrating compliance with the Report, as the Report does not require road improvements to any area road.

2. Screening, landscaping and visual appearance. [MCC 11.15.7325 (C)(2)]

- a. All existing vegetation and topographic features which would provide screening and which are within 100 feet of the boundary of the proposed area of extraction shall be preserved.**

FINDING: The screening criteria in Subsection (a) are satisfied because all existing vegetation and topographic features within 200 feet of the extraction boundary will be preserved. This is twice the required minimum of 100 feet. There will be no logging or extraction in the Scenic Buffer Areas, in the Preserves or in any of the setbacks.

- b. If the site-specific Goal 5 analysis determines that existing vegetation and topography is insufficient to obscure the site from any key viewing areas and corridors, then measures as identified in the Goal 5 analysis to reduce or eliminate conflicts shall be implemented. Methods of screening may include landscape berms, hedges, trees, walls, fences or similar features. Any required screening shall be in place prior to commencement of the extraction activities.**

FINDING: The site-specific Goal 5 analysis, contained in Chapter IV of the Report,¹⁰ determines that existing vegetation and topography is insufficient to obscure the site from all key viewing areas and corridors. The Goal 5 measures needed to reduce the conflict with scenic resources include contemporaneous reclamation to promote early visual screening of benches immediately following mining of the upper benches [p. IV-14]; retention of all vegetation along Highway 30 [p. IV-14]; significantly increasing the length of a lower gradient reclaimed channel and increasing in acreage the final pit floor to allow construction of riparian habitat and wetlands along the pit floor; direct haul back of reclamation materials to retain maximum viability of topsoil and establishing the third type of typical bench configuration "wherever possible." The Report also indicates that the existing land contours will be retained and that the principal processing, weighing and loading facilities will remain at their present location. [p. IV-15].

The Applicant's operating plan complies with the requirement that all vegetation along Highway 30 be retained. There is, however, evidence to indicate that the upper benches may not be reclaimed immediately upon conclusion of mining the upper benches and compliance with the other listed requirements was not addressed by the Applicant. This subsection, therefore, requires the Applicant to comply with the requirements of the Goal 5 analysis relating to Scenic Views found on page IV-14 through IV-16 of the Report, including its requirements for immediate reclamation. Such compliance has been required as a condition of approval. As determination of compliance with this standard involves the exercise of discretion, it is a land use decision which must be made in compliance with notice and hearing opportunity requirements.

The McNamee Neighbors requested that the Hearings Officer require the Applicant to provide screening for the McGrew, Wruble, Adams, Rugh, Long and McCurdy residences. The Hearing Officer lacks authority to require this screening under this section of the County's ordinance as these residences are not identified in the Reconciliation Report as key viewing areas or corridors.

¹⁰Section IV contains the analysis required by Goal 5. This is particularly evident from the fact that the Scenic Views section referenced by the Hearings Officer is found in a section entitled "Resource Analysis." Section VI contains the County's program to meet the goal, a program required as a result of the analysis which balances and reconciles conflicting resource values. This section might also be viewed as a part of the analysis but its provisions do not contain measures to protect scenic views not listed in Section IV.

- c. **The Approval Authority shall grant exceptions to the screening requirements if :**
- i) **The proposed extraction area is not visible from any key viewing areas and corridors identified in (b) above, or**
 - ii) **Screening will be ineffective because of the topographic location the site with respect to surrounding properties, or**
 - iii) **The area is part of the completed portion of a reclamation plan.**

FINDING: The Applicant has demonstrated that screening of the type described in subsection (b) of MCC 11.15.7325(C)(2) (landscape berms, hedges, trees, walls, fences or similar features which may be in place prior to commencement of extraction activities) will be ineffective because of the topographic location of the site with respect to surrounding properties. The Hearings Officer is, therefore, required to grant an exception to these screening requirements. The screening measures identified in the Report, however, will not be ineffective and, therefore, must be provided as required by the Report.

3. **Signing:** Signing shall be controlled by the standards of MCC .7932 (A)-(D), except that only one sign for each point of access to each differently named improved street may be allowed for any operation not in a GC, EC, LM, GM , HM, C-2, M-4, M-3, M-2, and M-1 district.
[MCC 11.15.7325(C)(3)]

FINDING: The Applicant has not proposed any new signing for the mineral extraction operation.

4. **If no hours and days of operation are contained in the site-specific Comprehensive Plan Program, the following shall apply:**
- a. **Operating hours shall be allowed from 7:00 am to 6:00 PM. No operations shall be allowed on Sundays or on New Year's Day, Memorial Day, July 4th, Labor Day, Thanksgiving Day, and Christmas Day.**

FINDING: The Applicant's operating hours in the expansion area must comply with the limitations of this section. The Applicant has requested that the Hearings Officer allow it to operate 20 hours per day but has not cited any legal authority to support its request to a blanket variance from the standards of this ordinance. In the absence of any such legal authority, the Hearings Officer must decline to approve the Applicant's request.

- b. **Blasting shall be restricted to the hours of 9:00 am to 5:00 PM. No blasting shall be allowed on Saturdays, Sundays or on New Year's**

Day, Memorial Day, July 4th, Labor Day, Thanksgiving Day, and Christmas Day.

FINDING: The Applicant must comply with the blasting hours & days restrictions contained in this section.

- c. **Short-term exceptions to the hours and days of operation may be approved pursuant to the provisions of MCC .8705. [MCC 11.15.7325 (C)(4)]**

FINDING: The Applicant has requested a blanket exception to operating hours, not a short-term exception. If the Applicant requires a short-term exception, it may seek one by following the provisions of MCC 11.15.8705.

5. Air, water, and noise quality.

- a. **The applicant shall obtain and comply with the standards of all applicable emission discharge permits from the Department of Environmental Quality. Copies of all required permits shall be provided to the county prior to beginning mining.**

FINDING: The Applicant has obtained a DEQ Air Contaminant Discharge Permit. The Applicant has provided the County with a copy of the required permit and the permit is included in the record of this matter.

The DEQ Air Contamination Discharge Permit expires May 1, 2001. Compliance with the Air and Water requirements of this section will be met as long as the necessary DEQ permits remain valid and the Applicant complies with permit requirements. Therefore, prior to commencing expansion of mining activities and prior to the expiration date of the existing or subsequent air contamination permits, the Applicant shall submit copies of approved permits for continued operation to the County to ensure the expansion area continues to be permitted and so that the County may verify that mine operations comply with applicable emission discharge permits.

- b. **The applicant shall obtain and comply with the standards of all applicable waste water discharge permits from the Department of Environmental Quality. Copies of all required permits shall be provided to the county prior to beginning mining.**

FINDING: The Applicant has obtained a DEQ Storm Water Discharge Permit. A copy of the permit is included in the record of this

application. According to Paul Kieran of DEQ, the Applicant will need to obtain DEQ approval of an amendment to this permit to authorize mining in the expansion area. Additionally, the Stormwater Discharge Permit expires December 31, 1996. Compliance with the waste water requirements of this section will be met as long as the necessary DEQ permits remain valid and the Applicant complies with permit requirements. Therefore, prior to commencing expansion of mining activities and prior to the expiration date of the existing or subsequent waste water permits, the Applicant shall submit copies of approved waste water permits for continued operation of mining in the expansion area to the County to ensure the expansion area continues to be permitted and so that the County may verify that mine operations comply with the waste water permits.

- c. **Sound generated by an operation shall comply with the noise control standards of the Department of Environmental Quality. Compliance with the standards can be demonstrated by the report of a certified engineer. Methods to control and minimize the effects of sound generated by the operation on noise sensitive uses existing or approved (valid action or administrative decision) on the date of application may include, but not be limited to, the installation of earth berms, equipment location, limitations on the hours of operation, and relocation of access roads.**

[MCC 11.15.7325 (C)(5)]

FINDING: The noise control criteria in (c) above is satisfied by virtue of the September 25, 1992 Report of Daly Standlee & Associates (Exhibit K of the Application) and the supplemental letter dated June 10, 1994 (Exhibit L of the Application). The report measured actual sound pressure levels at each of the four residences closest to the quarry. During this test, sound from the quarry was not audible at any of the residences. However, the engineer derived projections of future sound levels that might be present during expansion using worst-case assumptions. The Report concluded that no violations would occur during Phases 1 and 2, even if no protective measures were employed. The Report also concluded that if the existing excavator proceeded to a location that was in a direct line of sight with the residences and at the closest possible location to the residences, extremely minor violations (i.e., 1 dBA above DEQ standards) would occur at residence No. 2 during Phase 3 and at residences No. 1, No. 3 and No. 4 during Phase 4 unless the excavator exhaust was muffled. Replacing the factory-installed industrial grade muffler with a residential-grade muffler would reduce the sound pressure level to meet DEQ standards. In the meantime, Angell Bros. has replaced the excavator with a new Komatsu excavator which has a factory certified sound pressure level that qualifies under DEQ standards with no equipment modifications. The Supplemental Kerrie Standlee letter report and

hearings testimony (Exhibit L) confirms that no further equipment modifications are needed.

The Opponents raised concerns that Mr. Standlee had not considered the exact, current locations of existing homes in his noise study. This is true, but the evidence indicates that the home locations were moved a short distance. Mr. Standlee considered this movement and then testified that movement of the homes would not affect the conclusion of his noise study. The Hearings Officer finds this testimony persuasive. Further, the Hearings Officer finds that Mr. Standlee's evidence in this matter appears to be objective, given the fact that he initially determined that the mining operation did not comply with DEQ noise standards. This determination caused the mine to change its operations to then comply with DEQ standards.

The Opponents also noted that the location of the present mining operation is further from noise sensitive uses in the impact area. While this is true, Mr. Standlee's testimony and evidence also studied the impact of mine noise when the mine is closest to these uses and determined that the mine noise would not violate DEQ standards. The Hearings Officer accepts this determination.

Noise control measures are not needed to control or minimize the effects of sound generated by the operation under subsection (c) as the Hearings Officer is satisfied that DEQ noise standards will be met by the Applicant. A condition of approval requiring compliance with DEQ noise standards over the life of the mining operation has been included in this decision, however, to give the County the clear ability to revoke the Applicant's conditional use permit if its mine operations exceed DEQ standards.

(1) Fish and wildlife protection: Fish and wildlife habitat, water bodies, streams, and wetlands inventoried in the Comprehensive Plan shall be protected according to the program contained in the Comprehensive Plan. [MCC 11.15.7325 (C)(6)]

FINDING: These criteria are not satisfied as the program contained in the comprehensive Plan is not met by the Applicant's mining and reclamation plan. The Resource Protection Plan for Wildlife contains four elements:

- Minimization of the area mined at any given time.
- Demonstration that reclaimed areas are capable of supporting forest vegetation.
- Simultaneous reclamation along with mining to minimize non-vegetated areas.
- Reclamation of the site so as to best enhance wildlife habitat values. Reconciliation Report, p. VI-25.

The first directive, to minimize the area mined at any given time, is not satisfied by the Operating Plan for reasons explained above in the Hearings Officer's discussion of the differences between the Operating Plan & Reclamation Plan and the reclamation plan envisioned by the West Hills Reconciliation Report. The second directive, to demonstrate that reclaimed areas are capable of supporting forest vegetation, is satisfied by the testimony of Frank Schnitzer at the land use hearing that abandoned mine sites are capable of supporting forest vegetation without reclamation and by the reclamation requirements imposed upon the Applicant by its DOGAMI Operating Permit. The third directive, to achieve a simultaneous reclamation along with mining to minimize non-vegetated areas, is not satisfied by the current Reclamation Plan which calls for leaving large areas of the mine open and exposed for long periods of time following mining.

The discussion of the mine operations found in Chapter IV of the Report indicates that prompt reclamation of the upper benches was to occur immediately after mining to facilitate screening of the operations from key viewing areas and to provide wildlife corridors on the property. While the Hearings Officer sees merit in approaching the mine plan as currently proposed, it is not the method contemplated by the Reconciliation Report. The Hearings Officer, therefore, has required the Applicant to revise its plan to comply with this requirement.¹¹ The Applicant claims that the fourth directive, to reclaim the site so as best to enhance wildlife habitat values, is satisfied by the provisions in the Conservation Easement that exclude various portions of the property from mining and logging, by the agreement in the Conservation Easement to exclude residences in perpetuity and to turn the entire site into wildlife habitat at the conclusion of mining, and by conditions 5, 9 and 12 in the Operating Permit which minimize the environmental impacts of mining as it occurs on the site. The Applicant also notes that the Reclamation Plan proposes to create two new wetlands on the quarry floor, which will add some habitat value to the site. The Hearings Officer agrees with the Applicant's assessment of this issue but adds that prompt reclamation of the site, as required in the conditions of approval, will also assure that the Applicant's mining plan furthers wildlife habitat.

With respect to habitat, water bodies and wetlands off-site, these are primarily located within Burlington Bottoms, the east bank of the Multnomah Channel and the North Angell Bros. stream. The North Angell Brothers stream has been designated as being a significant Goal 5 resource and designated "1C" and is considered a potential conflicting use. The Rafton/Burlington Bottoms and the east bank of Multnomah Channel are also considered potential conflicting uses. [pg IV-28, West Hills Reconciliation Report, Revised -- May 1996] These resources are protected by the restriction that no mining will occur in the

¹¹The Applicant could also seek amendment of the Reconciliation Report to authorize the new approach to mining the site. This approach will require a demonstration that the new plan provides adequate safeguards for the Goal 5 protected scenic, wildlife and water resources that are affected by mine operations.

watershed of North Angell Bros. Stream and by the condition that Angell Bros. must remain in compliance with the DEQ Storm Water Permit. The Applicant has been required to comply with these restrictions as a condition of approval of this application.

(7) Setbacks:

(a) For mineral and aggregate processing activities:

- i) 200 feet to a property line, or
- ii) 400 feet to a noise and dust sensitive land use existing or approved (valid action or administrative decision) on the date of application;

(b) For access roads and residences located on the same parcel as the mining or processing activity, setbacks shall be as required by the underlying district; and

(c) For mineral extraction and all other activities:

- i) 100 feet to a property line, or
- ii) 400 feet to a noise and sensitive land use existing or approved (valid action or administrative decision) on the date of application.

[MCC 11.15.7325 (C)(7)]

Applicant: These criteria are satisfied. As shown on Exhibit G, Sheet 1, Figure 2, the setback from extraction activity is at least 200 feet to the property line, and the setback between the new location of the primary crusher (i.e. "processing activities" in MCC) and the Wruble residence, (which is the closest residence) is at least 1800 feet, over four times the required minimum of 400 feet. There are no new access roads or temporary residences in the present application, and the Conservation Easement prohibits permanent new residences.

FINDING: The Hearings Officer concurs with the Applicant's response. In addition, the criteria are clear and objective. The criteria include no provisions for requiring additional setbacks. The Mine Sequence Map (Sheet 4) submitted by the Applicant (back pocket of Operating and Reclamation Plan Document) clearly identifies the mining area and processing areas in compliance with the setbacks required by this code section. The nearest residences (Wruble, McGrew and Adams) based on the Mined Sequence Map will be a minimum of 600 feet from a proposed extraction area and well over 1,700 feet from the nearest crusher. While residential lots are located within 200 feet of the mine site, the lots themselves are not noise and dust sensitive uses. The County considers residences, but not residential yards, to be noise and dust sensitive uses and the Hearings Officer will defer to that interpretation.

1. Reclaimed Topography.

All final reclaimed surfaces shall be stabilized by sloping, benching, or other ground control methods. Reclaimed surfaces shall blend into the

natural landforms of the immediately surrounding terrain. These reclamation standards shall not apply where the Approval Authority finds that the standards conflict with the reclamation plan provided in the Comprehensive Plan or where DOGAMI finds that the standards are less restrictive than DOGAMI reclamation standards. [MCC 11.15.7325 (C)(8)]

Applicant: These criteria are satisfied by the Reclamation Plan (Exhibit G-1). The schematic version of reclaimed benches is set forth on Sheet 2 for purposes of demonstrating general slope stability, volume calculations, location of setbacks, etc. The actual appearance of the reclaimed benches is set forth in Figures 13 through 15, which demonstrate how these areas can be given random shapes, complex features, talus slopes, accelerated weathering, etc., and how they will look during reforestation.

Harmony with the "natural landforms" is shown by the comparison of overall pre-mine contours with post-mine contours, set forth in Figures 16 and 17. The overall shape of the reclaimed slopes blend in with the existing landform of the Tualatin ridge.

Sloping, benching and stability is set forth in Appendix A, The Engineering Geological Investigation. Essentially, the Investigation concluded that (1) no mass stability problems were encountered at the site; (2) the maximum final cut slopes of basalt would be 1.5:1, as required by DOGAMI regulations, and that the final cut slopes would be "unloaded," thus assuring slope stability at least as great as the existing landforms.

FINDING: The Hearings Officer concurs with and adopts these findings in support of this decision.

2. Safety and security.

Safety and security measures, including fencing, gates, lighting, or similar features, shall be provided to prevent public trespass to identified hazardous areas such as steep slopes, water impoundments, or other similar hazard where it is found that such trespass is probable and not otherwise preventable. [MCC 11.15.7325 (C)(9)]

FINDING: This criterion is satisfied by virtue of the existing fencing, gates, signage, and lighting on the northern boundary of the site, which borders Highway 30. With respect to the remainder of the site, public access is virtually impossible due to the steep terrain and the complete absence of roads connecting the site to adjacent parcels. The hiking trail recited in the Conservation Easement will not be placed on the site until mining is completed, for safety and security reasons.

3. Phasing program.

All phases of an extraction operation shall be reclaimed before beginning the next, except where the Approval Authority or DOGAMI finds that the different phases cannot be operated and reclaimed separately. [MCC 11.15.7325 (C)(10)]

FINDING: Testimony at the September 18, 1996 hearing from Frank Schnitzer of DOGAMI establishes that DOGAMI found that the different phases proposed by the Applicant cannot be operated and reclaimed separately. As a result, all phases of the extraction operation do not need to be reclaimed before beginning the next phase to satisfy this code section. The Hearings Officer's opinion on this matter is irrelevant as this section allows *either* DOGAMI or the Hearings Officer to relieve the Applicant of the phasing requirement imposed by this section. This section does not, however, relieve the Applicant of reclamation requirements imposed by the Reconciliation Report that are applicable to the mine operation and required to demonstrate compliance with other relevant land use criteria.

4. Reclamation Schedule.

The reclamation plan shall include a timetable for continually reclaiming the land. The timetable shall provide for beginning reclamation within twelve (12) months after extraction activity ceases on any segment of the mined area and for completing reclamation within three (3) years after all mining ceases, except where Approval Authority or DOGAMI finds that these time standards cannot be met. [MCC 11.15.7325 (C)(11)]

FINDING: The Applicant claimed an exception to the time standards contained in MCC 11.15.7325 (C)(11). DOGAMI supported this claim that the twelve month time standard cannot be met through their approval of the plan and evidence in the record of this case. The Applicant will, however, be required to complete reclamation within three years as the record does not establish DOGAMI determined that this time standard could not be met. Further, the Hearings Officer did not find a detailed time table in the Applicant's Reclamation Plan or Operating Plan. While the DOGAMI requires reclamation monitoring every five years, the permit allows great flexibility to the Applicant to justify areas of incomplete reclamation.

MCC 11.15.7325 (D): The proposed operation will not result in the creation of a geologic hazard to surrounding properties, such as through slumping, sliding, or drainage modifications, and have been certified by a registered soils or mining engineer, or engineering geologist as meeting this requirement.

Applicant: This criterion is satisfied for the reasons set forth [in Section 3.3.12, Applicants submittal] above (which deals with slope stability), and because any geologic hazard that might occur on the site would be contained on the Angell Bros. site itself, rather than on "surrounding properties." Also, Condition No. 10 of the DOGAMI Operating Permit requires that at the conclusion of mining in Phase 2 (which completes mining in the central core of the site and permits the greatest examination of slope stability), a slope stability investigation will have to be performed to DOGAMI's satisfaction before DOGAMI extends the Operating Permit for mining in Phases 3 and 4.

FINDING: The Applicant has submitted an "Engineering Geologic Investigation of the Angell Brothers Rock Quarry Multnomah County" revised in 1995 by Lidstone & Anderson (Registered Geologist and Registered Engineer) [Operating and Reclamation Plan, Appendix 'A']. The report concludes, "[a]lthough the probability of slope failure, other than rock topple and slope raveling, is very limited, the run out of any conceivable failure would be contained within the quarry itself due to cut slope orientation." Additionally, DOGAMI has required as a condition (Condition 10) of the June 11, 1996 Operating Permit, "[a] formal report and recommendations summarizing the data collected and geotechnical stability of the mine and reclamation area is required for the first three years. The report shall include a geologic map showing the location of the quarry faces at the time of the inspection and the faces with geology from previous inspections. Additional reports may be required at specific intervals during the life of mine and will be dependent on annual production and other factors such as apparent highwall stability."

The Hearings Officer finds that the Engineering Geologic Investigation certified by a registered professional engineer and geologist, along with the monitoring and condition(s) set forth under the June 11, 1996 DOGAMI Operating Permit, are adequate to conclude the proposed operation will not result in the creation of a geologic hazard to surrounding properties.

The Opponents have asked that the Hearings Officer require the Applicant to sponsor ongoing, continuous vibration monitoring by an independent, certified geophysicist. The Hearings Officer has not imposed such a requirement, however, as the record does not establish that there is a reasonably likelihood that the Applicant's mining operations will cause the geologic hazards envisioned by this section. The Applicant provided convincing evidence that the levels of dynamite used for blasting operations would be small and that the chance of such problems occurring is relatively small. Further, a monitoring program would not prevent the geological problems from occurring. Also, the County may institute a ground vibration monitoring program on adjacent lands, with the consent of landowners, if it determines that such monitoring is needed when mine operations advance toward area residences.

- E. **MCC 11.15.7325 (E):** Proposed blasting activities will not adversely affect the quality or quantity of groundwater within wells in the vicinity of the operation.

Applicant: This criterion is satisfied by the design of Mine Plan, which has the final quarry floor at an elevation of approximately 130 feet mean sea level, which is at least 50 feet and possibly as much as 370 feet above the confining layer of the regional aquifer. Also, conditions 7, 9 and 10 in the Operating Permit require extensive data collection during mining, thus continuously improving knowledge about the depth and location of aquifers.

Staff: The Lidstone and Anderson, Inc. Engineering Geologic Investigation Report [Applicant Operating Plan; Appendix A-4] identifies the location and well logs of the most proximate wells to the Angell Bros. site, identifies geographic features and proposed quarry depth, and concludes, "it is anticipated that no significant groundwater flows will be encountered during the proposed mining plan. As the mine pit advances, Angell Brothers will continuously monitor the pit floor and pit walls for ground water. In the event that groundwater is encountered, Angell Brothers will notify DOGAMI and the operational plan will be modified in accordance with DOGAMI requirements.

There is no absolute, unarguable scientific or other method to demonstrate proposed blasting activities will not adversely affect the quality or quantity of groundwater within wells in the vicinity of the operation. The intent of this section is, however, to require mine operators to present reasonable evidence identifying the potential for adverse impacts. The intent is to provide for "good planning," if negative or adverse impacts are identified, directing mining operations away from these areas would be beneficial to both the neighboring property owners wells and the Applicants liability. Thus, staff concludes the Applicant has demonstrated based on reasonable and substantial evidence, neighboring wells will not be effected.

FINDING: The Hearings Officer concurs with the findings proposed by the Applicant and by Staff but finds that it is necessary to include a condition of approval in the decision of this matter to assure compliance with the requirements of this code section during mining operations. That condition allows blasting in the expansion area only so long as proposed blasting activities do not adversely affect the quality or quantity of groundwater within wells in the vicinity of the operation.

- F. **MCC 11.15.7325 (F):** If the site is zoned Exclusive Farm Use . . .

FINDING: The site includes no land designated Exclusive Farm Use, therefore MCC 11.15.7325 (F) is not applicable to review of this application.

G. If the site is zoned Commercial Forest Use (CFU):

- (1) The proposed operations will not force a significant change in, or significantly increase the cost of, accepted farming or forest practices on agricultural or forest lands;**
- (2) The proposed operation will not significantly increase fire hazard or significantly increase fire suppression costs or significantly increase risks to fire suppression personnel; and**
- (3) A written statement recognizing the rights of adjacent and nearby property owners to conduct accepted forest practices has been recorded with the property deed in accordance with OAR 660-06-025 (1994).**

[MCC 11.15.7235 (G)]

FINDING: Compliance with the criteria contained in this section is satisfied by the Hearings Officer's findings regarding MCC 11.15.2053, which imposes the same requirements as found in this code section.

D. MCC 11.15.7331 - Site Reclamation:

- A. No mining shall begin without the operator providing the county a copy of a DOGAMI operating permit or exemption certificate.**
- B. When approving an application under this section the county shall determine the post-mining use of the property. The determination of post-mining use shall be coordinated with DOGAMI to ensure technical feasibility. The designated post-mining use shall conform to the Comprehensive Plan.**

FINDING: The Applicant has provided the County with a copy of its DOGAMI permit with its application. The post-mining use of the property is Commercial Forest Use, which is consistent with the plan and zone designations in the Comprehensive Plan. The Conservation Easement imposes the additional restrictions that Western Oregon old growth forest habitat be maintained, that no logging occur in certain areas at all, and that no residences be built on the site. All these restrictions are consistent with the plan and zone designations in the Comprehensive Plan. The reclamation sequence approved by DOGAMI (discussed above) and the numerous conditions imposed in the Operating Permit were designed "to ensure technical feasibility."

- E. MCC 11.15.7332 - Monitoring: The Planning Director shall periodically monitor all extraction operations. The beginning dates and frequency of monitoring shall be determined by the Approval Authority based upon any such requirement in the Comprehensive Plan Program and upon the number and type of *noise and dust sensitive* land uses, and other Goal 5 resources identified in the ESEE Analysis. If the Director determines that an extraction operation is not in compliance with MCC**

.7325 or site-specific requirements of the Comprehensive Plan Program, such enforcement proceedings deemed appropriate by the Multnomah County Legal Counsel shall be instituted to require compliance.

FINDING: The Applicant will be required to allow the Planning Director or her designee to periodically monitor the extraction operation. The Hearings Officer finds that site monitoring should occur within the first month of operations and should continue at least four times per year, in order to assure protection of the many conflicting Goal 5 resources that exist on the subject property. If the Report requires more frequent monitoring, the Report's requirements shall be followed by the Director.

Compliance with Significant Environmental Concern Requirements

MCC 11.15.6400 - Purposes: The purposes of the Significant Environmental Concern subdistrict are to protect, conserve, enhance, restore, and maintain significant natural and man-made features which are of public value, including among other things, river corridors, streams, lakes and islands, domestic water supply watersheds, flood water storage areas, natural shorelines and unique vegetation, wetlands, wildlife and fish habitats, significant geological features, tourist attractions, archaeological features, tourist attractions, archaeological features and sites, and scenic views and vistas, and to establish criteria, standards, and procedures for the development, change of use, or alteration of such features or of the land adjacent thereto.

Significant Scenic Views - MCC 11.15.6424 (C): Mining of a protected aggregate and mineral resource within a PAM subdistrict shall be done in accordance with any standards for mining identified in the protection program approved during the Goal 5 process. The SEC Application for Significant Scenic Views must comply only with measures to protect scenic views identified in the Goal 5 protection program that has been designated for the site.

FINDING: The applicable protection program is found in the West Hills Reconciliation Report at page VI-18, VI-22 and VI-23 and as follows:

Regulatory

- Minimization of the area mined at any given time.
- Demonstration that reclaimed areas are capable of supporting forest vegetation.
- Simultaneous reclamation along with mining to minimize non-vegetated areas.

- Screening of the operating face from key viewing areas as much as practicable through techniques such as landscaping, berming, and maintenance of intervening topography.

Non-Regulatory

- Multnomah County accepts, encourages, and will honor to the extent allowed by law, third party agreements to protect significant scenic views through private sales, dedications, donations, easements, or other use restrictions.

The Plan submitted by the Applicant does not minimize the area mined, as discussed earlier in this decision. Neither does the Plan provide any assure of simultaneous reclamation that minimizes non-vegetated areas. Instead, the Plan leaves large areas of the mine exposed and unclaimed for many years. As stated by the Applicant's attorney in the application: "[a]lthough certain benches within Phase 1 will be reclaimed concurrently with mining, *the majority of the benches will have to be left open* to accommodate haul roads and overburden stockpiles from Phase 3." The application further states that this same approach will be used in Phase 2. Basically, the mine plan proposed by the Applicant is a plan to mine in two areas and to begin reclamation when approximately 75% of each area has been mined.

The Hearings Officer has required the Applicant to revise its reclamation plan to provide for simultaneous reclamation which minimizes non-vegetated areas and which minimizes the area mined at any given time, in the manner specified in the Reconciliation Report, as a condition of approval of this application. If this application is revised as required by other sections of this decision, the application will comply with the requirements of this code section.

MCC 11.15.6426 (4) - Wildlife Habitat/Wildlife Conservation Plan: For Protected Aggregate and Mineral (PAM) resources within a PAM subdistrict, the applicant shall submit a Wildlife Conservation Plan which must comply only with measures identified in the Goal 5 protection program that has been adopted by Multnomah County for the site as part of the program to achieve the goal.

FINDING: The applicable measures to assure long-term protection of significant wildlife habitat in the West Hills are found in the West Hills Reconciliation Report at page VI-18, VI-22 and VI-23 and as follows:

Regulatory

- Multnomah County shall require the Angell Brothers expanded quarry site to take the following measures as part of its operation and reclamation plan:

- **Minimization of the area mined at any given time.**
- **Demonstration that reclaimed areas are capable of supporting forest vegetation.**
- **Simultaneous reclamation along with mining to minimize non-vegetated areas.**
- **Reclamation of the site so as to best enhance wildlife habitat values.**

Non-Regulatory

- **Multnomah County accepts, encourages, and will honor to the extent allowed by law, third-party agreements to protect significant wildlife habitat through private sales, dedications, donations, easements, or other use restrictions.**
- **Multnomah County will rely on state agency administration of state regulations that affect the protection of significant wildlife habitat in the West Hills, and will review and comment on state agencies' programs affecting protection of significant wildlife habitat in the West Hills.**

FINDING: The first three requirements listed for the protection of wildlife mirror the requirements for protecting scenic views. The findings of this decision establish that if the Applicant complies with the conditions of approval of this application, that these three requirements will be met. Further, the Hearings Officer finds that reclamation of the site, as required by this decision and the West Hills Reconciliation Report will serve to best enhance wildlife habitat values, as required by the fourth requirement of this program to meet Goal 5 for wildlife resources.

MCC 11.15.6428 (E) - Streams: For Protected Aggregate and Mineral (PAM) resources within a PAM subdistrict, the Mitigation Plan must comply only with measures identified in the Goal 5 protection program that has been designated for the site.

FINDING: The Hearings Officer finds that the Goal 5 protection program for the Angell Brothers site is found in the Program to Achieve the Goal section of the Angell Brothers Aggregate section of Chapter VI. The program to achieve the goal for the Angell Brothers mine calls for portions of the Angell Brothers site to be placed in areas called "Preserves" and to be protected from mining. The Report states that the Preserves encompass the North Angell Brothers "stream drainage," a term that, apparently, is not defined in the Report. The Preserves do not, however, include the entire North Angell Brothers watershed, as depicted in the Reconciliation Report. Further, the Conflict Resolution section of Chapter IV of the Report provides that "[m]ining on the Angell Brothers site should not take place within the North Angell Brothers Creek

watershed" [p. VI-16] and that expansion "should be allowed except for . . . the North Angell Brothers creek watershed." [p. VI-17] This language indicates that the term "stream drainage" found in the Program to Achieve the Goal is referring to the watershed of the creek.

The watershed of the North Angell Brothers Creek is shown on the stream map found at page III-143 of the Reconciliation Report. This watershed map, however, far exceeds the "impact area" identified under Goal 5 as meriting Goal 5 protection. It is the impact area which must be studied by the County and protected, where appropriate, during its Goal 5 analysis of resources and conflicting uses. The impact area for a stream is the riparian area of the creek. The riparian area for North Angell Brothers stream is identified on page III-16 of the Report as being from 55 to 150 feet in width for the North Angell Brothers stream. The riparian area for the entire creek covers a maximum area of 16.36 acres.¹² This area is much smaller than the drainage area which is inventoried as including 350 acres [see p. III-5].

The Report's Program to Achieve the Goal for streams protects a stream's impact area by providing protection to an area of 600 feet centered on the middle of the stream, thereby protecting lands beyond the impact area. For the North Angell Brothers stream, this is an area of 65.45 acres in size, including land located beyond the boundaries of the Angell Brothers site.¹³ Mr. Parisi claims that the riparian area is the maximum area that can be protected under Goal 5 and the maximum area that should have been protected by the Program to Achieve the Goal for the Angell Brothers Aggregate site.¹⁴ As a practical matter, he is wrong as the County obtained approval to protect a broader area in its Program to Achieve the Goal for streams from LCDRC and that issue is now closed and applied a broader protection area in its Program to Achieve the Goal for the Angell Brothers site by protecting the stream drainage rather than the riparian area (350 acres vs. 16.36 acres).

¹²This figure was calculated by using a length of .9 mile for the creek length (4752 feet) and multiplying it by 150 feet in width, the maximum width of the riparian area. This resulted in an area of 712,800 square feet or 16.36 acres.

¹³It is four times wider than the 150 foot wide riparian area calculated in footnote 12, so is also four times larger than the maximum riparian area.

¹⁴To the extent that Mr. Parisi's argument is a claim that the Reconciliation Report violates Goal 5, it is not relevant at this time. The recent case of Friends of Neabeack Hill v. City of Philomath, 139 Or App 39, 911 P2d 350 (1996), rev. den. 323 Or 136, 916 P2d 311 (1996) held that acknowledged comprehensive plan provisions may not be challenged for failure to comply with Statewide Goals in a land use permit application case. Naturally, goal compliance is relevant to applications that propose an amendment to a comprehensive plan.

Evidence in the record of this case indicates that the area included within the Preserves protects all Angell Brothers property found within the SEC overlay zone. The Preserves do not, however, protect the watershed of the North Angell Brothers stream depicted on the Reconciliation Report map.¹⁵ The placement of land into the Preserves and the delineation of their boundaries occurred outside of the land use process. The determination of boundaries by private parties in such a setting is not a land use regulation and does not act to change the description of the North Angell Brothers Creek watershed found in the Report.

The Applicant claims that the compliance with the Goal 5 program for the mine is met by a 600-foot setback, centered on the creek. The Hearings Officer did not find any Report provision, however, that stated that the term "stream drainage" used in the mine's Program to Achieve the Goal is intended to apply to the 600-foot area. Further, the Program to Achieve the Goal for streams does not contain any requirements that apply directly to the Angell Brothers mine site. Instead, the stream section directs the County to take action to adopt a stream protection overlay zone and does not bind the mine operator in any way.

The Hearings Officer reviewed the Report many times in an attempt to harmonize the Plan's statements that no mining should be conducted in the North Angell Brothers watershed and the delineation of the Preserves agreed to by the parties to the negotiated settlement. The Hearings Officer expected that there would be some language in the Plan which would explain that it was ultimately determined that a portion of the watershed shown on the Report map should be not be included in the Preserves, but did not find such language.

The foregoing findings require the Hearings Officer to require the Applicant to remove all areas of the North Angell Brothers stream drainage from its mine operation plan, in order to comply with the Program to Achieve the Goal for the mine site as it relates to stream protection.

¹⁵There is evidence in the record that the tributary of the North Angell Brothers Creek identified by the Opponents does not drain into the Burlington Bottoms area, as does the North Angell Brothers creek. The northern creek is protected because it drains into Burlington Bottoms. The diverted creek is located in the area that is proposed for mining and it may be that the parties to the settlement excluded it from the watershed because it no longer drains to Burlington Bottoms. The Hearings Officer is, however, unable to find sufficient evidence in the record to show that the diverted creek and its watershed is no longer a part of the North Angell Brothers watershed (to contradict the mapped area shown on page III-143 of the Report).

CONDITIONS OF APPROVAL:

The application for conditional use approval sought in this application is approved subject to compliance with the following conditions of approval:

1. Approval is for a Conditional Use Permit and SEC Permit for mineral extraction and processing on 250 acres located at Tax lot '12', in the NW ¼ of Section 28, 2N, 1W, Willamette Meridian; and Tax Lots '2', '6', '8', and '11' in the E ½ of Section 29, T2N, R1W, Willamette Meridian as proposed and conditionally approved in this application.
2. The Applicant shall record a statement with the Division of Records that the owner and the successors in interest acknowledge the rights of owners of nearby property to conduct forest operations consistent with Forest Practices Act and Rules, and to conduct accepted farming practices prior to the commencement of mining in the area covered by the permit.
3. This Conditional Use permit is issued for the specific use or uses specified in the application for Conditional Use approval, together with the limitations or conditions as determined by the Approval Authority in this decision. Any change of use or modification of limitations or conditions shall be subject to Approval Authority approval after a public hearing.
4. Access associated with the mining of the site (transportation of rock, heavy equipment, etc.) shall be limited to a single point of access along Highway 30 in the location shown on the Applicant's application. Further, the Applicant shall not use the easement from the mine site to McNamee Road that crosses the property at 13780 NW McNamee Road presently owned by Ray Adams.
5. No material (rocks, clay or large quantities of dirt) which creates a safety or maintenance problem shall be tracked or discharged in any manner onto any public right-of-way. The Applicant shall maintain the storm water detention dry wells, cattleguard and paved haul road described in the application in good and functional condition throughout the life of the mining operations authorized by this permit. Further, the Applicant shall take whatever other measures are necessary to prevent the discharge of hazardous materials from trucks leaving the mine site.
6. In the event that it is determined in a judicial or quasi-judicial enforcement proceeding brought by Multnomah County against the Applicant or Owner that the Applicant's mining operation is resulting in a violation of MCC 11.15.7325 (C)(1)(c) or Condition #5 of this decision, the Applicant shall thereafter require that all trucks being loaded at the mine site be covered by the driver prior to leaving the mine site and the Applicant shall take whatever corrective actions

directed by the judicial or quasi-judicial officer who has jurisdiction over the enforcement matter.

7. All mineral and aggregate operations shall occur between the hours of 7:00 AM to 6:00 PM. No operations are allowed on any Sunday, New Year's Day, Memorial Day, July 4th, Labor Day, Thanksgiving Day, and Christmas Day.
8. Blasting shall occur between the hours of 9:00 am to 5:00 PM. No blasting shall be allowed on any Saturday, Sunday, New Year's Day, Memorial Day, July 4th, Labor Day, Thanksgiving Day, and Christmas Day.
9. The Applicant shall obtain approval to expand its DEQ issued Stormwater Discharge Permit to include the proposed mine expansion. The Applicant shall also furnish to the County, prior to commencing expansion of mining activities a valid DEQ Air Contamination Discharge Permit. The permits shall clearly identify the mine operations areas approved by DEQ. The Applicant shall maintain on file with Multnomah County throughout the life of the mine, copies of valid DEQ Air Contamination Discharge and Stormwater Discharge Permits. Complaints received by the Planning Department regarding air and water contamination will promptly be forward to DEQ as part of interagency coordination.
10. The Applicant shall comply with the June 11, 1996 Operating Permit authorized by the Department of Geology and Mineral Industries (DOGAMI) and subsequent decisions. A copy of the Applicant's 5 year reclamation and progress report as required by DOGAMI shall be submitted to the County, upon acceptance or approval by DOGAMI.
11. The Applicant shall maintain compliance with DEQ noise regulations. Complaints regarding noise will be forward to DEQ as part of an ongoing interagency coordination effort. In the event DEQ determines its standards are not being met, the Applicant will be subject to enforcement action as determined appropriate by the County.
12. The Applicant shall submit and obtain approval of an amended mineral extraction area map (currently Mine Sequence Map, Sheet 4) which shall identify the location of the south boundary of the North Angell Brothers Stream watershed, as shown on the map of the watershed found on page III-143 of the Reconciliation Report. All mining activities shall be confined to the extraction area shown on the revised map. The primary crusher shall be located, and shall remain, in the location shown on Sheet 4 as the "Existing Location of Primary Crusher."

13. Upon final Land Use Approval of this application and prior to commencement of quarry expansion beyond the existing 114 acres, the Applicant shall record with Multnomah County Records the "Grant of Conservation Easement" between Linnton Rock, Angell Bros. and Friends of Forest Park as agreed to through mediation and acknowledged on August 21, 1996.
14. The Applicant shall submit a traffic management plan to the County Engineer that is sufficient for the County Engineer to make relevant findings regarding road improvements for Newberry Road or to develop a program to assure that the numbers and weights of trucks leaving the mine site can safely be accommodated on Newberry Road prior to commencement of mining in the expansion area covered by this permit. Further, the County shall review the Engineer's recommendations and issue a land use decision determining whether and what related conditions and restrictions to the conditional use approval are needed to comply with MCC 11.15.7325 (C)(1)(e). The issue of whether the Applicant must comply with MCC 11.15.7325 (C)(1)(e) has, however, been determined in this proceeding and may not be revisited during the second review.
15. The Applicant shall revise the operating and mine reclamation plan to comply with all site-specific requirements relating to Scenic Views described on pages IV-14 through IV-15 of the Report and all relevant Programs to Achieve the Goal. Particularly, the Applicant's plan must provide for contemporaneous reclamation that promotes early visual screening of benches *immediately* following mining of upper benches. Additionally, the revised plan shall contain a commitment by the Applicant to maintain the principal processing, weighing and loading facilities at their "present location" as that term is used in the Reconciliation Report. Further, upon final reclamation, all structures, equipment, and refuse will be removed from the site. Excess fill from the waste rock stockpiles will be placed on the quarry floor, graded and covered with loess coversoil. All temporary culverts will be closed and abandoned in place. The quarry floor and operational areas will be shaped, graded, and revegetated to blend with the rest of the area. This area will be left in a condition with the final beneficial use of the property as an area protected by a conservation easement.
16. If a County rendered determination of compliance with any of the above conditions involves the exercise of discretion by the County, the County shall process its determination of compliance or non-compliance as a land use matter subject to County land use procedures regarding notices and opportunities for hearings and appeals.
17. The Applicant may conduct blasting on the subject property so long as the proposed blasting activities shall not adversely affect the quality or quantity of groundwater within wells in the vicinity of the blasting operation.

18. The Planning Director or her designee shall periodically monitor the mine site. Site monitoring should occur within the first month of operation and continue at least four times per year. If the Reclamation Report requires more frequent monitoring, the Director shall comply with the requirements of the Report.
19. This approval is valid for the life of the mine and shall remain valid provided compliance with all conditions and laws is achieved and maintained.

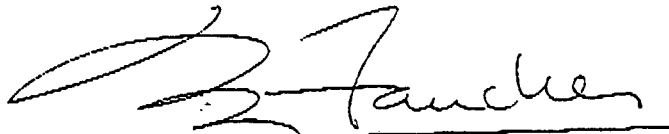
Appeal to the Board of County Commissioners:

The Hearings Officer's Decision may be appealed to the Board of County Commissioners (Board) by any person or organization who appears and testifies at the hearing, or by those who submit written testimony into the record. An appeal must be filed with the County Planning Division within ten days after the Hearings Officer decision is submitted to the Clerk of the Board. An Appeal requires a completed "Notice of Review" for and a fee of \$500.00 plus a \$3.50 - per- minute charge for a transcript of the initial hearing(s). [ref. MCC 11.15.8260(A)(1) and MCC 11.15.9020(B)] Instructions and forms are available at the County Planning Office at 2115 SE Morrison Street (in Portland) or you may call 248-3043, for additional instructions.

Failure to raise an issue prior to the close of the record at the final Board Hearing, (in person or by letter) precludes appeal to the Land Use Board of Appeals (LUBA) based on that issue. Failure to provide specificity on an issue sufficient for the Board to respond, precludes appeal to LUBA on that issue.

SIGNATURE PAGE - ANGELL BROTHERS

Decision dated this 17th day of October, 1996.

A handwritten signature in dark ink, appearing to read "Liz Fancher", written over a horizontal line.

Liz Fancher, Hearings Officer
Multnomah County