

IN THE BOARD OF COMMISSIONERS OF THE STATE OF OREGON

FOR THE COUNTY OF YAMHILL

SITTING FOR THE TRANSACTION OF COUNTY BUSINESS

In the Matter of Upholding the)	
Planning Commission's Approval and)	
Denying the Appeal of Docket FP-07-16;)	
Approval of a Floodplain Development)	BOARD ORDER 17-64
Permit on Approximately 175 Acres Within)	
The Floodplain Overlay District;)	
Applicant: Baker Rock Resources, Inc.)	

THE BOARD OF COMMISSIONERS OF YAMHILL COUNTY, OREGON (the Board) sat for the transaction of county business on March 2, 2017, Commissioners Mary Starrett, and Richard "Rick" L. Olson being present; Commissioner Stan Primozych being excused.

IT APPEARING TO THE BOARD as follows:

A. By application dated September 16, 2016, Baker Rock Resources, Inc. requested that the County approve and issue a flood plain development permit on approximately 175 acres within the Floodplain Overlay District.

B. This matter came before the Planning Commission for public hearing on November 3, 2016 and, following a period in which the record remained open for additional written evidence and testimony, on December 1, 2016, the Planning Commission, by a 4-1 vote (with one abstention), approved the application, with conditions. On December 15, 2016, the Planning Commission's decision was appealed by Protect Grand Island Farms, 18695 SE Upper Island Rd. Dayton; and

C. On February 2, 2017, the appeal was heard *de novo* by the Board of Commissioners. Following the hearing, the Board voted 3-0 to deny the appeal and to uphold the Planning Commission's approval of the application, with conditions as recommended by staff, with staff directed to prepare written findings and conditions for final adoption on March 2, 2017; NOW THEREFORE,

IT IS HEREBY ORDERED BY THE BOARD AS FOLLOWS:

Section 1. The Planning Commission's decision to approve Docket FP-07-16 is hereby upheld, and the appeal filed by Protect Grand Island Farms is denied.

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Section 2. The findings and conditions attached as Exhibit A, and incorporated herein by reference, are hereby adopted in support of this order.

DONE this 2nd day of March, 2017 at McMinnville, Oregon.

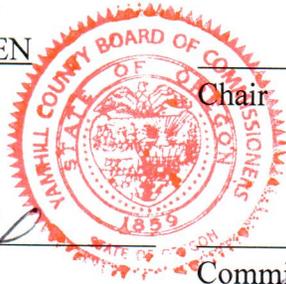
ATTEST:

YAMHILL COUNTY BOARD OF COMMISSIONERS

Unavailable for signature

BRIAN VAN BERGEN

County Clerk



Chair

STAN PRIMOZICH

By: Crystal Cox

Deputy Crystal Cox

Mary Starrett
Commissioner

MARY STARRETT

FORM APPROVED BY:

Christian Boenisch

Christian Boenisch
County Counsel

Richard L. Olson
Commissioner

RICHARD L. "RICK" OLSON

Accepted by Yamhill County
Board of Commissioners on

3-2-17 by Board Order

17-64

**Exhibit A – Board Order 17-
Findings in Support of Decision to
Uphold the Planning Commission’s Approval
Of Docket No. FP-07-16
And Conditions of Approval**

DOCKET NO.: FP-07-16

REQUEST: A flood plain development permit on approximately 175 acres within the Floodplain Overlay District

APPLICANT: Baker Rock Resources

APPELLANT: Protect Grand Island Farms

TAX LOTS: 5326-600

LOCATION: North of, and adjacent to, the southernmost point of Upper Island Road, Dayton, Oregon

ZONE: MR-2, Mineral Resource District

CRITERIA: Sections 404 and 901 of the *Yamhill County Zoning Ordinance*

FINDINGS:

A. Background Facts on the proposed development

- a. Lot Size: Approximately 224.5 acres.*
- b. Access: Upper Island Road, a paved County road*
- c. On-site Land Use and Zoning: The property is zoned MR-2 Mineral Resource and contains a flood hazard overlay zone. The floodplain and floodway zones are identified on the FEMA map noted on Finding A.12. The property consists of open fields that have been in farm use. The property does not contain any dwellings or farm buildings. While not adjacent, the site is near to the Willamette River.*

- d. *Surrounding Land Use: The general area contains high-value soils. The area is generally in large scale, intensive, farm operations of 100 or more acres. Farm uses on Grand Island typically include pumpkins, filberts, sweet corn, raspberries, Marion berries, beans and vegetable crops. The Marion County side of the river also includes farming for grass seed, bush beans, wheat, sweet corn, hops, red clover and vegetable row crops. A small, day-use park with a picnic area is along the southwest of the project site.*
- e. *Surrounding Zoning: Adjacent property is zoned for Exclusive Farm Use, EF-80 and PRO Parks, Recreation and Open Space. The EF-80 zone contains farmland. The PRO zone is owned and managed by the Oregon State Parks Department. As noted above, the PRO zone contains a small, day-use park with a picnic area.*
- f. *Water: A water source is not needed for the proposed use.*
- g. *Sewage Disposal: None.*
- h. *Construction: None. No structures requiring a building permit are proposed.*
- i. *Fire Protection: Dayton Rural Fire District*
- j. *Soils: The entire property is composed of Class II, high-value farmland. However, as noted in the following Finding A.13, the property has been rezoned to MR-2 Mineral Resource.*
- k. *Taxes: The entire property is receiving farm deferral.*
- l. *Fish and Wildlife: The Willamette River is identified as Fish Habitat. The property is not identified on any County adopted map as being in the big game winter range.*
- m. *Flood plain: FIRM 41071C 0635D shows that all of the property is within the 100-year flood plain. Additionally, the same FIRM map shows nearly the entire parcel is within the 100-year floodway. The small area that is out of the floodway is approximately 11 acres, located adjacent to Upper Island Road at the southern end of the property.*
- n. *Previous Actions: A determination that the property was a significant Goal 5 resource; Comprehensive Plan Amendment from Agriculture Forestry Large Holding to Quarry; a zone change from EF-80 Exclusive Farm use to MR-2 Mineral Resource District; and a Willamette River Greenway permit have been approved through Docket PAZ-01-10/ WRG-01-10. In that process a Limited Use Overlay zone was adopted on the property which eventually identified 30 conditions applied to the proposed mining operation. As noted elsewhere in the record, three separate ordinances have been adopted to effect the above changes. Each ordinance was appealed and reviewed at the Land Use Board of Appeals. Ordinance 865 was even appealed to the Court of Appeals, which upheld the County's decision to find the site was a significant Goal 5 resource. In these appeals and review*

by the Land Use Board of Appeals and Court of Appeals, issues such as traffic, dust, noise, agricultural conflicts, etc., have all been previously reviewed and the sand and gravel activity allowed within the parameters of the previous decision. These issues are not part of this application or the review criteria.

B. Mineral Resource District (MR) Analysis (YCZO Chapter 404)

- A. Pursuant to Section 404.01 of the YCZO, the purpose of the MR zone is to provide for development and utilization of identified deposits of mineral aggregate resources.
- B. Section 404.03 provides that quarry or mining operations for the extraction of rock are permitted in the MR-2 District.

We find that the application requests approval of a floodplain development permit associated with previously approved gravel mining which is an activity that is permitted under YCZO Section 404, as specifically set out and as approved in Yamhill County Ordinances 865, 873 and 879, each of which is expressly incorporated herein by this reference together with the findings, conditions and conclusions included with each of Ordinances 865, 873 and 879.

C. Floodplain Development Provisions and Analysis (YCZO Chapter 901)

- 1. Section 901.01 sets forth the purpose of Chapter 901 of the YCZO.
- 2. Section 901.02 sets forth that the provisions of Chapter 901 apply to all areas of special flood hazard in Yamhill County.

We find that the application is to conduct an activity within the special flood hazard area and that Chapter 901 of the YCZO applies to the application. We additionally find that FIRM 41071C 0635D shows that all of the property is within the 100-year flood plain. Additionally, the same FIRM map shows nearly the entire parcel is within the 100-year floodway. The small area that is out of the floodway is approximately 11 acres, located adjacent to Upper Island Road at the southern end of the property. We find that the proposed development does not include any activity other than gravel mining on that 11 acres (i.e. no berms, fill, or levees).

- 3. Section 901.04 of the YCZO states that all uses of land and water provided for in the underlying zoning district may be in the Floodplain Overlay District, provided that those uses require a floodplain development permit and that each permit shall be subject to the provisions set forth in YCZO 901.05 through 901.14.

We find that the proposed development, gravel mining, is permitted in the MR-2 Zone and that such activity has been previously approved by Yamhill County. Therefore, a floodplain development permit may be granted, provided that YCZO 901.05 through 901.14 are satisfied.

- 4. Section 901.05 of the Yamhill County Zoning Ordinance (YCZO) states that a floodplain development permit shall be obtained before the start of any construction or

development within the FP Overlay District. Section 202 defines development for the purpose of Section 901 of the YCZO as:

DEVELOPMENT: For purposes of Section 901, any man-made change to improved or unimproved real estate, including but not limited to buildings or other structures, mining, dredging, filling, grading, paving, excavation, or drilling operations or storage of equipment or materials located within the area of special flood hazard.

We find that the request is related to mining in the area of special flood hazard, that mining is development and, therefore, that a floodplain development permit is required for the proposed development. We further find that no mining or other development activity has been conducted on the site prior to issuance of a floodplain development permit.

5. Section 901.06 of the YCZO states that prior to issuance of a floodplain development permit, the applicant must demonstrate that:
 - A. The proposed development conforms with the permit requirements and conditions of this section and the use provisions, standards and limitations of the underlying zoning district and other overlay district.
 - B. The proposed development, if located within the floodway, satisfies the provisions of subsection 901.09.
 - C. The proposed development will not increase the water surface elevation of the base flood more than one (1) foot at any point.
 - D. All applicable permits have been obtained from federal, state or local governmental agencies, and all applicable National Flood Insurance Program requirements have been satisfied.
 - E. The proposed development is consistent with policies j. and k. of the Comprehensive Plan, as amended by ordinance 471. These policies are:
 - j. It is the policy of Yamhill County to protect riparian vegetation from damage that may result from land use applications for development that is otherwise permitted outright or conditionally under county zoning regulations. To achieve this goal, Yamhill County will review land use applications for development in riparian areas in an effort to mitigate or prevent damage to riparian vegetation that might result from the development. For purposes of this policy, "riparian areas" refers to areas within 100 feet measured horizontally from the ordinary high water line of streams identified as "Fish Habitat" in the comprehensive plan inventory (National Resource Conservation Plan, Yamhill County, Oregon, May 1979 - USDA - Soil Conservation Service), that are not regulated under the Forest Practices Act.
 - k. It is county policy that land use management practices and nonstructural solutions to problems of erosion and flooding are preferred to structural solutions. Water erosion control structures, including rip-rap and fill, should be reviewed by the appropriate state permitting authority to insure that they are necessary, are designed to incorporate vegetation where possible, and designed to minimize adverse impacts on water currents, erosion and accretion patterns.

- A. Regarding criterion 901.06(A) we find that, the application describes that the proposed development is for mining of approximately 175 acres of the 224.5 acre parcel; the remaining portion of the site will be maintained as buffer areas, leave strips, wetlands and riparian zones. Figure 2 of the application shows the “Harney Site Mine Plan.” The underlying zoning of the property is MR-2, Mineral Resources with a Limited Use Overlay imposed through Docket PAZ-01-10. Specific conditions applied through Docket PAZ-01-10/WRG-01-10 and ordinances 873 and 879 continue to apply to the proposed development in conformance with the standards and limitations of the underlying zoning district.

We find that, as set forth herein, the proposed development must be conducted pursuant to the permit requirements set forth in Ordinances 873 and 879, and also in compliance with the terms and conditions of this Section 901 YCZO and the use provisions, standards and limitations of the underlying MR-2 zoning district. Because nothing in this approval alters or removes any prior approval or approval conditions (which have previously been determined to be feasible) placed on the proposed development, we conclude that the standard is met.

We find that, as explained in more detail below, the proposed development conforms to the permit requirements of this section. We expressly incorporate the findings below herein by this reference.

- B. Criterion 901.06 (B) requires the proposed development, if located within the floodway, satisfies the provisions of subsection 901.09.

We find, as set forth below in detail in the section of these findings addressing YCZO Section 901.09 and 901.07 that the proposed development satisfies the provisions of subsection 901.09. We expressly incorporate the findings below herein by this reference.

- C. Criterion 901.06(C) requires that the proposed development will not increase the water surface elevation of the base flood more than one (1) foot at any point.

We find, as set forth below in more detail in the section of these findings addressing YCZO Chapter 901.09 that the proposed development will cause no net rise of the base flood discharge and therefore satisfies the provisions of subsection 901.09. We expressly incorporate the findings below herein by this reference.

- D. Criterion 901.06(D) requires that the proposed development establish that all applicable permits have been obtained from federal, state or local governmental agencies, and all applicable National Flood Insurance Program requirements have been satisfied.

We find as follows:

- a. *Under Oregon law, the Applicant may satisfy the YCZO 901.06(D) requirement that all applicable permits have been obtained from federal, state and local agencies prior to*

issuance of the floodplain permit with a condition imposed on the floodplain permit that all such local, state and federal permits shall be obtained before any development activity commences at the project site.

- b. Oregon's Land Use Board of Appeals has ruled that where a local government finds that approval criteria will be met if certain conditions are imposed, and those conditions are requirements to obtain state agency permits, a decision approving the application will be sustained as long as there is no legal bar to the applicant obtaining those permits.*
- c. There need not be substantial evidence in the record to support or establish that the applicant can comply with all of the discretionary approval criteria for any such permit, only that there is no legal bar to obtaining such a permit. The County recognizes and regularly applies this standard, as it has even for Baker Rock's approved development in Ordinance 873, Finding 14.1.4, which states "the applicant need only demonstrate the feasibility of applying for and obtaining the necessary permits."*
- d. Here, approval includes a proposed condition number "1" requiring the applicant obtain all applicable permits from federal, state or local government agencies.*
- e. Moreover, Ordinance 879, which approved the Baker Rock site for gravel mining, already includes a condition (#18) that Baker Rock obtain and comply with a DOGAMI operating permit which in turn will require compliance with federal, state and local permit requirements.*
- f. The Board has considered the evidence in the record and finds that there is no legal bar preventing the applicant from obtaining all necessary approvals from federal, state or local governmental agencies.*
- g. Chapter 901 of the YCZO implements the requirements of the National Flood Insurance Program in Yamhill County.*
- h. The application was complete as submitted to Yamhill County on September 13, 2016.*
- i. Yamhill County need not consider the June 2016 FEMA BiOp (the "FEMA BiOp") relating to the National Flood Insurance Program in rendering a decision on the Baker Rock floodplain development permit application.*
- j. Even if Yamhill County must consider the June 2016 FEMA BiOp, we find that the proposed development may be conducted in compliance with presently applicable findings and requirements from the FEMA BiOp.*
- k. ORS 215.247(3) requires Yamhill County to render a decision based on the regulation in place at the time of the permit application on September 13, 2016.*

- l. *The FEMA BiOp, by its express terms (pp. 277-278), is currently in the RPA Element 1 period. Element 1 consists of notice, education and outreach only, along with a recommendation that communities implement RPA Element 2 measures at the earliest possible time. The deadline for communities to implement RPA Element 2 is March 12, 2018.*
 - m. *Implementation of the RPA measures requires communities to go through a legislative process to modify current floodplain ordinances. That process has not started in Yamhill County. Governor Brown's June 17, 2016 letter to Mr. Fugate of FEMA, included in the record before the Planning Commission, makes clear that Oregon and its many communities are at the very beginning of the process to develop new implementing regulations for the National Flood Insurance Program and that local governments are not under any obligation to immediately take action in direct response to the RPA.*
 - n. *At this time, YCZO Chapter 901 is the applicable regulation and Yamhill County's decision in this matter is based on that regulation.*
 - o. *With inclusion of condition #18 in Ordinance 879 and condition #1 imposed through the current permit, and upon finding that the applicant is in compliance with Chapter 901 YCZO, as set forth in detail herein, we find and conclude that YCZO 901.06(D) is satisfied.*
- E.** *YCZO 901.06(E) requires that the proposed development is consistent with policies j. and k. of the Comprehensive Plan, as amended by Ordinance 471.*

We find that the application satisfies policy j because the site will be setback a minimum of 350-feet along the southern portion of the site between the mine boundary and the side channel of the Willamette River. The setback is designed to protect riparian vegetation and provide additional insurance against a pit capture associated with bank-line changes in the Willamette River. Setbacks around the remainder of the property will protect riparian areas on all areas and we conclude that such setbacks are reasonable and prudent steps to mitigation or prevent any damage to riparian vegetation which might result from the development. The requirement for that setback is included as a condition of approval in the prior approval for the proposed development activity as set forth in Ordinances 873 and 879.

We find that the application satisfies policy k because, as set forth in the application and the testimony of Mr. Lidstone, only nonstructural solutions to potential erosion and flooding issues are incorporated into the proposal and the site design and mining and proposed reclamation plan incorporates vegetation where possible, and is designed to minimize adverse impacts on water currents, erosion and accretion patterns. We further find that the applicant satisfies policy k because the applicant is required to obtain all necessary permits before conducting any development activity and that condition will ensure appropriate state permitting review if any is required.

We therefore find that the application satisfies YCZO 901.06(E).

6. YCZO 901.07 sets forth the general standards for the Floodplain Overlay District and consist of subsection A through F.

We find that subsection A through E of YCZO 901.07 do not apply to the application because:

- a. *Subsection "A" addresses manufactured homes and no manufactured home is proposed as part of the development.*
- b. *Subsection "B" addresses anchoring for construction, substantial improvements and manufactured homes. The application does not propose construction, substantial improvements or manufactured homes.*
- c. *Subsection "C" addresses construction methods and certification. The application does not propose construction of any structures.*
- d. *Subsection "D" addresses utilities such as water and sewer systems. No such systems are proposed as part of the development application.*
- e. *Subsection "E" addresses subdivision proposals. The application does not propose any land subdivision.*

We find that Yamhill County previously interpreted YCZO 901.07(F) as inapplicable to the proposed development through ordinance 879 which was adopted in response to remand and which was not appealed, and which findings are expressly incorporated herein by this reference.

Consistent with Ordinance 879, we find that Subsection F of YCZO 901.07(F) is satisfied because:

- a. *There is no express prohibition on placement of fill or levees in the floodway.*
- b. *Under YCZO 901.04 "All uses of land ... provided for in the underlying zoning district may be permitted in the FP Overlay District..." This issue was specifically previously litigated in an appeal of Yamhill County Ordinance 873 which approved Baker Rock's Harney Site for gravel mining. Yamhill County Ordinance 879, which was not appealed and which is included here in the record, includes findings interpreting YCZO 901.07(F) and explains why it is inapplicable to the proposed activity. That reasoning is incorporated herein and reiterated here.*
- c. *YCZO 901.07(F) governs development in flood fringe areas, not in the floodway. Development within the floodway is not prohibited but is governed by YCZO 901.09 and is allowed subject to compliance with the "no net rise" standard set forth in YCZO 901.09.*
- d. *YCZO Section 901.02 is entitled "Area of Application." Subsection A states: "The provisions of this section shall apply to all areas of special flood hazards in the county identified as the FP Overlay District..." The proposal is in the FP Overlay District. YCZO 901.03 governs areas in the FP Overlay District for which "flood elevation data" has not been provided by FEMA. Base Flood data is available for the subject property, and both the floodplain and floodway are mapped.*

- e. YCZO 901.04, the Floodplain Overlay District Use Provisions, states: “All uses of land and water provided for in the underlying zoning district may be permitted in the FP Overlay District, with the provisions that those uses shall require a floodplain development permit, and shall be subject to the provisions set forth in subsections 901.05 through 901.14.”
- f. YCZO Section 901.06, the Floodplain Development Permit Criteria, states: “Prior to issuance of a floodplain development permit, the applicant must demonstrate that:
- i. The proposed development conforms with the permit requirements and conditions of this section and the use provisions, standards and limitations of the underlying zoning district and other overlay district.
 - ii. The proposed development, if located within the floodway, satisfies the provisions of subsection 901.09. (*emphasis added*).
 - iii. The proposed development will not increase the water surface elevation of the base flood more than one (1) foot at any point.
 - iv. All applicable permits have been obtained from federal, state or local governmental agencies, and all applicable National Flood Insurance Program requirements have been satisfied.
 - v. The proposed development is consistent with policies j. and k. of the Comprehensive Plan, as amended by Ordinance 471.
- g. YCZO Section 901.06(B) supports the conclusion that development in a floodway is subject to subsection 901.09, not 901.07. First, it states that any proposed development in the floodway shall be subject to the “no net rise” standard. 901.06(B) does not outright prohibit any development in the floodway, which is entirely consistent with 901.04 which provides that any allowed use in the underlying zone may be undertaken in the FP Overlay District so long as it can meet the applicable standard. For development in the floodway, the applicable standard is “no net rise.”
- h. YCZO Section 901.07, Floodplain Overlay District General Standards, applies in all areas within the FP Overlay District, but most of the standards govern construction of structures, i.e., buildings, within the Floodplain Overlay District and are clearly inapplicable in the present context. YCZO 901.07(F) states: “Except for approved relocation of a water course, no fill or levee shall extend into a floodway area. Fills or levees in a flood fringe area shall be subject to the following...”
- i. YCZO 901.07(F) does not govern proposed “fill” or “development” within the floodway. It prohibits fill or levees approved in the flood fringe from extending into the floodway area. This is because activities regulated under 901.07(F) are not subject to the restrictive “no net rise” standard applicable to floodway development pursuant to 901.09(B) as set forth in 901.06(B). Under YCZO 901.06(C), a fill or levee in the flood fringe need only show that: “The proposed development will not increase the water surface elevation of the base flood more than one (1) foot at any point,” a lesser standard.

- j. *A fill or levee or other development that extends into or otherwise takes place within the floodway must be governed by the "no net rise" standard of YCZO 901.09 for development in a floodway, not the lesser no rise greater than one (1) foot which is applicable in the flood fringe area.*
- k. *Use of the term "extend" in YCZO 901.07(F) supports the conclusion that the focus of this provision is on earthen structures that start in an upland area or within the flood fringe, but do not extend into a floodway identified on a FEMA map or otherwise. When a structure is proposed that extends into the flood way, it is governed by the "no net rise" standard in YCZO 901.09(B).*
- l. *Section 901.09, entitled "Floodway or Watercourse Development Provisions," applies to development within a "floodway or watercourse." Section 901.09 states:
 - i. *The placement of any dwelling in the floodway shall be prohibited.*
 - ii. *Except those uses provided for in subsection 901.04, all development in the floodway shall be prohibited unless certification is provided by a registered professional engineer demonstrating through hydrologic and hydraulic analyses performed in conformance with standard engineering practice that the proposal will not result in any increase in the flood levels during the occurrence of the base flood discharge.*
 - iii. *For any proposed relocation of a floodway or watercourse a floodplain development permit shall be required, and approval of the permit shall be subject to the following additional requirements..."**
- m. *The applicant does not propose building any dwelling, and there is no proposal to relocate any waterway. As a result, only 901.09(B) is the standard applicable to the current application. In this case, the applicant has provided certification by a registered professional engineer demonstrating through hydrologic and hydraulic analyses performed in conformance with standard engineering practice that the proposal will not result in any increase in flood levels during the occurrence of the base flood discharge. This meets the requirements of Section 901.09(B), and, consequently, the permit should be approved.*
- n. *The County's Overlay Zone has been adopted to be in conformance with federal law to allow County residents to obtain flood insurance. Analysis of the federal law and implementing regulations supports the County's interpretation of YCZO Chapter 901.*
- o. *44 CFR Section 60.3, entitled "Flood plain management criteria for flood-prone areas," is the source of the County's floodway development regulations, including the "no net rise" standard. 44 CFR 60.3(d) states: "When the Federal Insurance Administrator has provided a notice of final base flood elevations within Zones A1-30 and/or AE on the community's FIRM and, if appropriate, has designated AO zones, AH zones, A99 zones, and A zones on the community's FIRM, and has provided data from which the community shall designate its regulatory floodway, the community shall:
 - i. *Meet the requirements of paragraphs (c) (1) through (14) of this section;**

- ii. *Select and adopt a regulatory floodway based on the principle that the area chosen for the regulatory floodway must be designed to carry the waters of the base flood, without increasing the water surface elevation of that flood more than one foot at any point;*
 - iii. *Prohibit encroachments, including fill, new construction, substantial improvements, and other development within the adopted regulatory floodway unless it has been demonstrated through hydrologic and hydraulic analyses performed in accordance with standard engineering practice that the proposed encroachment would not result in any increase in flood levels within the community during the occurrence of the base flood discharge.*
- p. *Mr. Lidstone's testimony and the Lidstone Report establish that the hydrologic and hydraulic analysis submitted with the application was performed in accordance with standard engineering practice and this satisfies the requirement set forth in YCZO 901.09.*
 - q. *As set forth above, the federal law and regulation on which Yamhill County's Flood Plain Development Ordinance is modeled, and which it is intended to implement, does not prohibit fill in floodways. It simply provides that no fill may be placed unless it is demonstrated that the fill will result in no net rise. The application establishes that the proposed development will result in no net rise.*
 - r. *44 CFR Section 59.1 defines "Development" as follows: "'Development' means any man-made change to improved or unimproved real estate, including but not limited to buildings or other structures, mining, dredging, filling, grading, paving, excavation or drilling operations or storage of equipment or materials." The YCZO Chapter 202 definition is identical.*
 - s. *The applicant has demonstrated in its application that the one- to three-foot high process water pond berm and the six- to eighteen-foot high noise attenuation berm meet the "no net rise" standard during a flood event, and that no temporary stockpiles will be in the floodway during a flood event and therefore a) cannot be modeled and b) will have zero effect on the flood level during a flood event because there will not be any temporary stockpiles.*
 - t. *The applicant has presented evidence and expert testimony, including certification by a professional engineer registered in the State of Oregon, more than sufficient to establish that the worst case scenario was modeled, and that even under those conditions, the proposal results in no net rise of floodwaters.*
 - u. *The Applicant has satisfied the requirement for a floodplain development permit under Chapter 901 and particularly Section 901.09, which sets forth the applicable standard for development proposals in the floodway.*
7. YCZO 901.08 sets forth specific standards for areas where base flood elevation data are available. 901.08(A) applies to residential construction. 901.08(B) applies to the

placement of a manufactured home. 901.08(C) applies to placement or construction of nonresidential structures. 901.08(D) applies to the placement of recreational vehicles.

We find that YCZO 901.08 does not apply to the application because the proposal does not include residential construction, placement of a manufactured home, placement or construction of any nonresidential structure, or placement of any recreational vehicle.

8. YCZO 901.09 sets for the requirements for development in the floodway. Subsection “A” prohibits placement of any dwelling in the floodway. Subsection “C” applies to applications which proposed to alter a watercourse. Subsection “B” requires that all development in the floodway be prohibited unless certification is provided by a registered professional engineer demonstrating through hydrologic and hydraulic analyses performed in conformance with standard engineering practice that the proposal will not result in any increase in flood levels during the occurrence of a base flood discharge.

We find that YCZO 901.09 “A” and “C” do not apply to the current application because the applicant does not propose to place any dwelling in the floodway and does not propose to alter any watercourse.

We find that the Noise Berm proposed as part of the development is addressed in Ordinance 873, Approval Findings and Conditions, Conditions 20 and 21. These condition specifically state that “any sound attenuation berm shall be designed to prevent rerouting of floodwaters and shall be segmented and not continuous”.

We further find that, based on review of the materials in the record and the testimony present to the Board and to the Planning Commission, including the Lidstone Report dated September of 2016 and Ordinances 873 and 879, that the proposed activity will not alter any watercourse.

We further find that the Lidstone Report dated September 2016 includes a stamp by Charles M. Jones a Professional Engineer registered in the State of Oregon.

We further find that Mr. Jones certifies that the proposed development will result in no net rise in water surface elevations during the 100-year flood event resulting from the proposed development.

We further find that there is no evidence in the record by any geologist, engineer or other qualified professional concluding that the proposed development would result in an increase in flood levels during the occurrence of a base flood discharge.

We further find the HEC-RAS model used in the Lidstone Report and Mr. Jones’s analysis was developed by the Army Corps of Engineers as a sequel to its predecessor HEC-2 for the primary purpose of modeling rivers, river hydraulics and the interaction of rivers with their floodplain and that this model was adopted by FEMA.

We further find that the original and all updated Yamhill County Flood Insurance Rate Maps have used either HEC-2 or more recently HEC-RAS. The 100-year floodplain defined in the Flood

Insurance Rate Map (FIRM) community panel for the site area (Area of the application; Map Number: 41071C0635D), effective date March 2, 2010 was developed by this same series of computer models including HEC-2 and its sequel, HEC-RAS.

We further find that Mr. Jones used the publically available, FEMA approved hydraulic model HEC-RAS version 4.1

We further find that when developing a model to evaluate the impacts of a proposed development on the 100-year water surface elevation, it is essential to use the same model and modeling approach as that which defined the regulatory water surface in the first place.

We further find that the Lidstone Report utilized a scientific and engineering procedure, which is acceptable by FEMA and has been previously accepted by those Oregon counties under the provisions of floodplain development. Those procedures were defined in the Lidstone Report, were explained by Mr. Lidstone in testimony before the Yamhill County Board and Planning Commission, all of which is included in the record.

We further find that the Lidstone Report presents certification together with supporting data that no increase in flood level during the occurrence of the base flood discharge will occur as a result of the proposed development.

We further find that the applicant satisfies Section 901.09 of the YCZO by providing certification by a registered professional engineer demonstrating through hydrologic and hydraulic analyses performed in conformance with standard engineering practice that the proposal will not result in any increase in flood levels during the occurrence of a base flood discharge.

Based on these findings, we conclude that the proposed development, including the noise berm, is not prohibited because hydrologic and hydraulic analyses performed by a professional engineer registered in the State of Oregon, and in conformance with standard engineering practice, will not result in any increase in flood levels during the occurrence of a base flood discharge

9. YCZO 901.10 sets forth standards for review of permit applications in generalized floodplain areas where specific flood elevation data are not available.

We find that YCZO 901.10 does not apply to the application because, as set forth above, specific flood elevation data are available in the area of the proposed development.

10. YCZO 901.11 provides that Yamhill County may impose conditions on development to ensure that the intent of Section 901 is carried out.

We find that Ordinances 873 and 879 include 30 conditions of development on the proposed development which will ensure that the intent of Section 901 is carried out.

We further find that the three conditions imposed as set forth in the approval for the current floodplain development permit, and as presented below, will ensure that the intent and requirements of Section 901 are carried out.

11. YCZO 901.12 sets forth general requirements for floodplain development as follows:
 - A. Floodplain development permits are not personal to applicant but run with the land.
 - B. Floodplain development permits involving construction expire and become null and void within 180 days unless extended by the director.
 - C. Where base flood data are provided, the actual elevation of the lowest floor of structures must be obtained and the applicant must provide a Flood Elevation Certificate for the finished structure.
 - D. For new or substantially improved flood-proofed structures, the Director must verify and record the actual elevation of the structure and maintain records thereof.
 - E. All records maintained pursuant to this section must be available for public inspection.

We find and conclude that the provisions of Section 901.12 are not conditions of approval, but speak to and set forth certain rights and limitations of a floodplain development permit issued by Yamhill County.

12. YCZO 901.14 is a warning and disclaimer regarding flood events.

We find and conclude that YCZO 901.14 speaks for itself and has no regulatory effect on the proposed development application.

D. FLOOD VELOCITIES. Testimony was introduced regarding flood velocities on Grand Island.

We find and conclude as follows:

- a. *Flood velocities are not relevant to the decision before Yamhill County on an application for a floodplain development permit under YCZO Chapter 901. The applicable criterion, the “no net rise” standard, is set forth in Section 901.09.*
- b. *Nonetheless, substantial evidence in the record in the form of testimony and certification provided by a registered professional engineer demonstrates through hydrologic and hydraulic analyses performed in conformance with standard engineering practice that the proposal will not result in any meaningful increase in flood velocities during the occurrence of the base flood discharge.*
- c. *Yamhill County has already considered and decided on whether the proposed use will have any adverse effect in Ordinances 865, 873 and 879, and change in flood velocities, if any, was evaluated in those processes and provide no basis for denial of the floodplain development permit application.*

- d. Tables 4, 6 and 8 in the Baker Rock Floodplain Land Development Permit Report tabulate the average velocity across the proposed development site. With respect to the proposed development, the velocity increase is generally insignificant with increases in the magnitude of 0.2 to 0.4 fps. At one location, there is an increase of 1.1 fps where the velocity increased from the 1.3 fps to 2.4 fps. Even though there is an increase of magnitude, the absolute velocity change as reflected in the model remains within acceptable tolerances.

E. FISH CHANNEL. Testimony was introduced regarding the location and effect of the fish channel proposed as part of the development.

We find and conclude as follows:

- a. *Although off-site activities and impacts were discussed at length in testimony, including discussion of fish channel options that are not part of the current proposal, there are no proposed off-site activities or impacts that a) have not already been considered under prior project permitting processes¹ and b) are applicable to the current decision.*
- b. *The fish channel proposed as part of the current permit application will result in no net rise of the base flood discharge.*
- c. *No changes to the slough/Skeeter Creek are proposed as part of this application and no work is proposed off of the project site. Any floodplain development permit approval issued by Yamhill County on this application would not cover off-site work because it is not proposed or contemplated by this application.*
- d. *The February 2016 DOGAMI application packet, included in the record in this matter, establishes that no off-site changes are proposed. Baker Rock will make no changes to that natural system; fish access to the interior of the site and their ability to return to the mainstream of the river will remain as before. Existing vegetation and overstory within the slough channel will remain undisturbed. Baker Rock will establish reclamation vegetation in the vicinity of the constructed portion of the fish channel which will provide cover and shading as well as organic matter and wood habitat features.*
- e. *The details and engineering design of the fish channel are part of the DOGAMI permit application, which was submitted to DOGAMI in February 2016 and circulated to other agencies in September 2016. Design information can be found in Section 7.3 of that document which is also included in the record before Yamhill County. The fish passage plan (per Section 7.3) will allow fish access to the interior of the site (Baker Rock reclamation ponds) and will allow these same fish to return to the river in the same manner*

¹ See, for example, findings 14.2.5 and 14.2.6 of Ordinance 873, which are based on evidence in the current record from the Lidstone Harney Site Goal 5 Resource Evaluation dated October 2009, and other rebuttal evidence such as the January 27, 2011 Lidstone letter rebutting testimony by Tom Grindland et al.

that exists now. The existing grade/channel bottom, vegetation and overstory within Skeeter Creek will remain undisturbed.

- f. *The proposed development will maintain a minimum setback of 350 feet from the river and avoids impact to all non-project properties.*
- g. *The Flood Development Permit Application addresses the impact of the proposed development on the Base Flood water surface elevation as established by the FIRM panel even though the proposed fish channel was not expressly modeled. The Base Flood of the Willamette River is 255,000 cfs, the 1996 flood was 200,000 cfs and the 1964 flood was estimated at 300,000 cfs. The return flow of water through the fish channel is controlled by the existing topography and vegetation of Skeeter Creek and the elevation where it crosses Upper Island Road and enters the Willamette. Baker Rock is not proposing to modify this area and therefore the proposed development will not affect outflow.*
- h. *In addition and to including a flow comparison, the flow associated with the fish channel opening (a cross section 60 feet wide and 2 to 4 feet deep with 0% slope) is 124 cfs or approximately 0.05% of the Base Flood, which is insignificant in the development of the certifying engineer's model.*
- i. *Flooding characteristics across the undisturbed area (all setbacks) will remain unchanged. Under Ordinance 873 Approval Findings and Conditions 12A(3) and 12F, the Applicant is specifically required to address any changes to Skeeter or Sutter Creek, including the road crossing, should such changes be proposed. No changes are proposed.*
- j. *Ordinance 873, Condition 26, requires continuous monitoring of slough water elevation.*
- k. *There are no impacts from the proposed fish channel and there is no off-site activity or impact proposed or expected from the activities included in the floodplain development permit application.*
- l. *The proposed fish channel will have no impact on the Base Flood and does not affect the "no net rise" conclusion.*

F. PIT CAPTURE. Testimony was introduced regarding the possibility of the proposed gravel mine being "captured" by the Willamette River and the Willamette being redirected by said capture.

We find as follows:

- a. *The possibility of pit capture was extensively discussed and litigated in the previous zone change application and is not relevant to the decision before Yamhill County on this floodplain development permit application.*

- b. *An extensive geomorphic stability assessment was conducted for this proposed development that must also be approved by DOGAMI prior to mining, and will be monitored for the life of the project, by the State, until reclamation is complete. The ponds completed as part of the project reclamation will improve the flood storage capacity of the site, and proposed revegetation will further impede flood velocities. Significant setbacks, (a minimum 350 feet from a primary slough of the river), along with the applicant's planting program and predicted, continued low velocity backwater flooding, make accelerated channel change and 'capture' unlikely. Erosion control practices required by DOGAMI, mining cells of only 3.8 to 8.7 acres at a time, and continuous, sequential reclamation, will minimize the risk of turbidity and sediment loading. All areas subject to flooding and erosion will be properly seeded with a cover crop prior to the onset of winter flooding."*
- c. *The letter from Frank Schnitzer (DOGAMI) discounts claims made by opponents, stating reason why "there have been no pit capture of floodplain mines in the mid-Willamette Valley, even though some of the oldest sites are setback from the channel by only 100-150 feet." He also stated: "DOGAMI agrees with the geomorphic conclusions by the applicant that the current geomorphic conditions are the result of gradual accretionary processes. We expect this slow migration of river banks to continue, with or without the presence of the proposed floodplain mine pond on the left bank floodplain."*
- d. *We find that the risk of pit capture has been adequately addressed through review procedures culminating in Ordinances 873 and 879, and further find that any risk of pit capture is not relevant to the decision on a floodplain development permit under Section 901 YCZO.*

EXISTING CONDITIONS OF APPROVAL

The following two conditions already exist as part of the Limited Use Overlay zone and are repeated here for convenience.

1. Material stockpiles shall be removed from the site prior to November 1 of each year and shall not be maintained on the site until April 1 of the following year.
(The above condition is the last sentence of Condition No. 2 of Ordinance 873, found in the current record).
2. Fill imported for the noise/visual berms shall be "clean fill" within the meaning of Oregon DEQ regulation OAR 340-93-030(11). *(The above condition is found in Condition No. 19 of Ordinance 873, found in the current record).*

CONDITIONS OF APPROVAL:

1. All applicable permits shall be obtained from Federal, State or Local governmental agencies, and all applicable National Flood Insurance Program requirements shall be satisfied.

2. The mining boundary shall be setback a minimum of 350 feet from the side channel of the Willamette River, as identified on the site map labeled Figure 2 in the application.
3. A floodplain development permit involving construction shall become null and void 180 days from the date it is granted unless substantial construction has taken place. The Director may extend the permit for an additional 180 days if there have been no revisions to the FIRM or FIS, upon receipt of a written request for extension from the applicant demonstrating good cause for the delay and provided that the request to extend the permit is received by the Director prior to the expiration date of the permit.