

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 a Comprehensive Plan Amendment)
From Agriculture Forestry Large Holding to)
Quarry; a zone change from EF-80 Exclusive Farm)
Use to MR-2 Mineral Resource, for Tax Lot)
5326-600 and a Portion of an Undesignated Tax Lot)
Totaling Approximately 224.5 acres with 175 acres)
to be mined; a Greenway Permit, and Imposition)
of a Limited Use Overlay, PAZ-01-10 and)
and WRG-01-10; Applicant Baker Rock Resources)
Inc.)

ORDINANCE 879

THE BOARD OF COMMISSIONERS OF YAMHILL COUNTY, OREGON (the Board) sat for the transaction of county business on December 6, 2012, Commissioners Leslie Lewis, Kathy George and Mary P. Stern being present.

IT APPEARING TO THE BOARD that, on January 19, 2010, Baker Rock Resources, Inc. (the “applicant”) submitted an application to the Department of Planning and Development for an alluvial sand and gravel mining operation on Grand Island, within the Willamette River floodplain; and

IT APPEARING TO THE BOARD, that on May 6, 2010, and June 3, 2010, the Yamhill County Planning Commission held duly noticed public hearings to consider the application, and that the application was considered by the Board in hearings held on November 10, 2010 and on December 2, 2010; and

IT APPEARING TO THE BOARD that on March 17, 2011, the Board voted two-to-one in favor of accepting the recommendation of the Planning Commission regarding the significance of the resource, (Commissioner Stern voting no) and in favor of adopting an Ordinance (No. 865) adding the site to the County’s Goal 5 aggregate inventory as a significant aggregate resource, which decision has been affirmed by the Land Use Board of Appeals and Oregon Court of Appeals; and

IT APPEARING TO THE BOARD that, completion of the Goal 5 process for the subject property was continued to May 17, 2012, when the hearing was reopened at the point of staff recommendation; and

IT APPEARING TO THE BOARD that, based on the record of proceedings as settled by order of LUBA (No. 2011-035), and based on the recommendation of staff and deliberation of the Board on May 17, 2012, the Board voted two-to-one (Commissioner

Stern voting no) to approve the applications, and on June 7, 2012, adopted Ordinance 873, including Findings and Conditions of Approval; and

IT APPEARING TO THE BOARD that, by Order dated October 9, 2012, LUBA remanded the County's decision, as described and addressed in the attached findings; and

IT APPEARING TO THE BOARD that, on November 8, 2012, the Board held a duly-noticed limited remand hearing to consider the meaning of LUBA's Order and what it requires the County to address, establish, or modify on remand; and

IT APPEARING TO THE BOARD that, based on the record of proceedings in this matter and previous records settled by LUBA, and based on the recommendation of staff and deliberation of the Board on December 6, 2012, the Board voted 2-1, Commissioner Stern voting no to reaffirm Ordinance 873; to adopt additional findings in support of the earlier decision; and to modify the Conditions of Approval of Ordinance 873 as specified in the attached Exhibit "A". NOW THEREFORE;

IT IS HEREBY ORDAINED BY THE BOARD AS FOLLOWS:

Section 1. The findings and Conditions of Approval adopted as part of Ordinance 873 are reaffirmed by this Ordinance, except as modified by the findings and conditions attached as Exhibit "A" to this Ordinance and incorporated herein by reference.

Section 2. The findings attached as Exhibit "A" are hereby adopted in support of this Ordinance.

DONE at McMinnville, Oregon, this 6th day of December, 2012.

ATTEST YAMHILL COUNTY BOARD OF COMMISSIONERS

REBEKAH STERN DOLL
County Clerk


Chair
LESLIE LEWIS

By:


Deputy ANNE BRINK


Commissioner

KATHY GEORGE

FORM APPROVED BY


RICK SANAI
County Counsel


Commissioner

MARY P. STERN



ORDINANCE NO. 879 – EXHIBIT A

FINDINGS IN SUPPORT OF APPROVAL ON REMAND

Planning Docket: PAZ-01-10 and WRG-01-10

Applicant and Owner: Baker Rock Resources, Inc.

Tax lot: Township 5S, Range 3W, Section 26, Tax Lot 600 (TL 5326-600), and a portion of an undesignated lot north of, and adjacent to, Tax Lot 600.

These Findings in Support of Approval are based on the record developed by the Board and submitted to the Land Use Board of Appeals in LUBA No. 2011-035 and the record submitted in LUBA No. 2012-047. To correct errors identified by LUBA in County adoption of Ordinance 873, the Board held a remand hearing on November 8, 2012, to accept testimony and argument regarding the meaning of LUBA’s Order and what it requires the County to do. In consideration of the record in the two LUBA cases cited above and the testimony and argument received, the Board of Commissioners of Yamhill County finds as follows:

1. Scope of this approval and connection to Ordinance Nos. 865 and 873

1.1 The purpose of these findings is to address the Opinion and Order of the Land Use Board of Appeals in Protect Grand Island Farms v. Yamhill County and Baker Rock Resources, LUBA No. 2012-047 (October 9, 2012).

1.2 By application filed on January 19, 2010, the applicant requested that the County amend the County Comprehensive Plan inventory of significant mineral and aggregate resource sites to list the subject property, and allow limited mining of the site under binding Conditions of Approval.

1.3 The County adopted Ordinance 865 on March 31, 2011, establishing the significance of the resource identified to be present at the site. Ordinance 865 was subsequently appealed to and affirmed by LUBA and the Court of Appeals. A petition for discretionary review filed by project opponents with the Oregon Supreme Court, was denied.

1.4 On June 7, 2012, the County adopted Ordinance 873, granting permission to mine the site under limiting conditions. Ordinance 873 amended the site’s Comprehensive Plan designation from AFLH to Quarry; changed the zoning of the property from Exclusive Farm Use (EF-80) to Mineral Resource (MR-2); and included a Willamette River Greenway development permit, to facilitate the applicant’s plans for providing seasonal fish passage from the site to the Willamette River.

1.5 These findings support adoption of an ordinance reaffirming Ordinance 873, adopting three additional Conditions of Approval, and justifying correction of Ordinance 873 on remand.

1.6 As detailed in the findings adopted as part of Ordinance 873, the applicant has demonstrated compliance with Goal 5 and the Goal 5 Rule for Aggregate, OAR 660-023-0180. The maps, studies and other materials submitted by the applicant, and testimony and evidence received through the hearing process, support the Board's decision and its adoption of these findings. The Board has considered and weighed the evidence, arguments and testimony received by the Planning Commission and the Board in these proceedings, and a majority of the Board has voted to allow mining of the site as proposed by the applicant and as limited by the Conditions of Approval. No new evidence has been accepted on remand. This Ordinance is based on evidence and testimony in the existing record of these proceedings (consideration of Planning Docket PAZ-01-10 and WRG-01-10), and on testimony received by the Board on remand. Based on the record and in consideration of the proposed additional limiting conditions, the Board concludes that all potential conflicts between the proposed uses and other identified uses in the area can be minimized as required by the Goal 5 rule, and permission is granted to the applicant to mine the site substantially as proposed.

2. The scope of the remand hearing

2.1 As stated in the County's Notice of Public hearing in this matter, LUBA's Opinion and Order required that:

“On remand, the county must determine how YCZO 901.07(F) and 901.09(B) apply to the proposed berms.” (second subassignment of third assignment of error, LUBA Opinion, p. 20); and

2.2 Secondly, the County is required to address LUBA's conclusion that:

“where the county relied on the recharge trench method to find that impacts to groundwater levels would be minimized, we agree with petitioner that the county should have conditioned approval of the application on use of that recharge trench method.” (fifth assignment of error, as sustained in part, Opinion p. 15)

2.3 All other assignments and subassignments of error were denied.

3. Project elements questioned by LUBA include:

3.1 The proposed process water pond berm. The applicant proposed a berm, one to three feet in height (to an elevation of 100.9 ft MSL), to separate the process water pond from floodwaters entering the site;

3.2 A proposed segmented noise attenuation berm, 6 to 18 feet high, which would not be built for approximately 15 years, if ever, and only if necessary to minimize potential noise impacts to a residence or residences located north/northwest of the site; and

3.3 A proposed infiltration trench.

All of the project features at issue in this remand are identified in Lidstone Figure 6, (revised 5/2010 R 2019).

4. **Findings addressing LUBA’s requirement that: “On remand, the county must determine how YCZO 901.07(F) and 901.09(B) apply to the proposed berms.”**

4.1 Before LUBA, the petitioner argued that the County should have adopted findings to explain why the proposed noise attenuation berm and one to three-foot high berm around the process water pond are not prohibited by YCZO 901.07(F) in the floodway. As explained below, YCZO 901.07(F) governs development in flood fringe areas, not in the floodway. Development within the floodway is not prohibited—it is governed by YCZO 901.09 and is allowed, subject to compliance with the “no net rise” standard.

4.2 As noted by LUBA: “The county adopted findings that YCZO 901.09(B) applies to the proposed mining operation.” LUBA remanded on the second subassignment of the third assignment of error, because the County failed to explain its interpretation of YCZO 901.07 and 901.09, and its conclusion that of the two, only 901.09 applies to proposed berm construction on the site.

4.3 To ‘cure’ an element of the error that LUBA found in the County’s decision, the Conditions of Approval adopted in Ordinance 873 is supplemented with new Conditions #28 and #29, located at the end of these findings.

4.4 Interpretation of Yamhill County Zoning Ordinance Section 901

4.4.1 YCZO Section 901.01 states the purpose of the Floodplain Overlay District as follows:

“The purpose of the FP Overlay District is to promote the public health, safety and general welfare, and to minimize public and private losses due to flood damage by establishing methods and provisions designed to recognize such hazards.

4.4.2 The County Zoning Ordinance also contains the following definitions that may or may not be relevant to this discussion:

Flood or Flooding: A general and temporary condition of partial or complete inundation of normally dry land areas from the overflow of inland or tidal waters and/or the unusual and rapid accumulation of runoff of surface waters from any source.

Flood Base: A flood, the level of which has a one percent chance of being equaled or exceeded in any given year. Commonly referred to as a 100-year flood. Designation on maps always includes the letters A or V.

Flood Fringe: The area of the floodplain lying outside of the floodway.

Flood Insurance Rate Map (FIRM): The official map on which the Federal Insurance Administration has delineated both the areas of special flood hazards (floodplain) and the risk premium zones.

Flood Insurance Study: The official report provided by the Federal Insurance Administration that includes flood profiles, the Flood Boundary-Floodway Map, and the water surface elevation of the base flood.

Flood Levee: Earthen embankment or other manmade structure designed and constructed to contain, control or divert the flow of water so as to provide protection from temporary flooding.

Flood Obstruction: Any dam, wall, wharf, embankment, levee, dike, pile, abutment, projection, excavation, channel rectification, culvert, structure, or matter which is in, along, across, or projecting into any channel, watercourse, or floodplain area; which may impede, retard, or change direction of the flow of water, either in itself or by catching or collecting debris carried by such water, or which is placed where the flow of water might carry the same downstream to the damage of life or property.

Floodplain: The area adjoining a river, stream, or watercourse which may be subject to periodic inundation of floodwaters and is subject to a one percent or greater chance of flooding in any give year. Also called the area of special flood hazard.

Floodproofing: Any combination of structural and nonstructural additions, changes, or adjustments to properties and structures primarily for the reduction or elimination of flood damage potential to lands, water and sanitary facilities, structures and contents of buildings.

Floodway: The channel of a river or other watercourse and the adjacent land areas that must remain unobstructed in order to discharge the base flood without cumulatively increasing the water surface elevation more than one foot.”

4.4.3 In addition, Section 201.01 states:

“201.01 Interpretations. For the purposes of this ordinance, all words, terms and expressions contained herein shall be interpreted in accordance with the following rules of construction, unless the context requires otherwise:

* * *

F. Any word or term not defined herein shall be used with a meaning of common standard use. Any words, terms or phrases not defined herein, shall be construed according to their common, ordinary and accepted meaning.”

4.4.4 YCZO Section 901.02 is entitled “Area of Application.” Subsection A. states:

“A. The provisions of this section shall apply to all areas of special flood hazards in the county identified as the FP Overlay District, and includes those areas of special flood hazard identified by the Federal Insurance Administration in a scientific and engineering report entitled “The Flood Insurance Study for Yamhill County, Oregon” dated March 2, 2010, with accompanying Flood Insurance Rate Map (FIRM), which study and map are hereby adopted by reference and declared to be a part of this ordinance. The Flood Insurance Study and FIRM are on file at the Yamhill County Department of Planning and Development, McMinnville, Oregon.”

4.4.5 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.

4.4.6 YCZO 901.04, entitled “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. The following uses shall not require a floodplain development permit unless the uses involve fill or are otherwise determined to constitute construction or development:

- A. Residential uses such as lawns, gardens, parking areas and play areas.
- B. Agricultural uses such as farming, pasture, grazing, outdoor plant nurseries, horticulture, viticulture, truck farming, forestry sod farming and wild crop harvesting.”

Uses proposed by the applicant in this matter are not exempt from Floodplain Development Permit requirements.

4.4.7 YCZO Section 901.05 contains “Floodplain Development Permit Application” requirements. Notably, it provides that:

“a floodplain development permit shall be obtained before the start of any construction or development within the FP Overlay District.”

There is no requirement in Section 901.05 that an application for a Floodplain Development Permit be submitted as part of a plan amendment, zone change or other land use approval, only that the permit be obtained “before the start of any construction or development.” Section 901.05 allows the Planning Director to issue a Floodplain Development Permit pursuant to Type B review procedures, “subject to compliance with the review criteria listed in subsections 901.06 through 901.10.” In approving an application for a Floodplain Development Permit, the decision maker can impose appropriate conditions (YCZO Section 901.11), and may issue variances to the requirements of the Floodplain Overlay District (YCZO Section 901.18).

4.4.8 YCZO Section 901.06 states:

“901.06 Floodplain Development Permit Criteria.

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. (emphasis added)

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.” (emphasis added)

[Note: policies j. and k. promote the protection of riparian vegetation and state a preference for the use of “land use management practices and nonstructural solutions to problems of erosion and flooding * * *.”]

YCZO Section 901.06(B) supports the Board’s conclusion that development in a floodway is subject to subsection 901.09, not 901.07.

4.4.9 YCZO section 901.07 is entitled “Floodplain Overlay District General Standards,” and it purports to apply “in all areas within the FP Overlay District.” Most of the standards govern construction of structures, i.e. buildings, within the Floodplain Overlay District, and are clearly inapplicable in this context. However, YCZO 901.07(F) states:

“F. Fills and Levees.

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:

1. Fills shall consist only of natural materials such as earth or soil aggregate and including sand, gravel and rock, concrete and metal.
2. Any fill or levee must be shown to have a beneficial purpose and therefore to be no greater than is necessary to achieve that purpose, as demonstrated by a plan submitted by the owner showing the uses to which the filled or diked land will be put and the final dimensions of the proposed fill.

3. Such fill or levee shall be protected against erosion by vegetative cover, rip-rap, bulkheading or similar provisions.”

4.4.10 The proposed “berms” can also be construed as “fills” or “levees.” By its terms, YCZO 901.07(F) governs only fills and levees to be constructed in a flood fringe area, that do not “extend into a floodway area.” The code defines “flood fringe area” as being: “the area of the floodplain lying outside of the floodway.” YCZO 901.07(F) does not govern proposed “fill” or “development” within the floodway.

4.4.11 As support for the County’s conclusion that approval under YCZO section 901.07(F) is of a fill or levee that does not extend into the floodway, approval under that section is not subject to the “no net rise” standard applicable to floodway development. Instead, under YCZO 901.06(C), an applicant for 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. A fill or levee or other development that extends into, or otherwise takes place within the floodway, is governed by the “no net rise” standard of YCZO 901.09.

4.4.12 As noted, “levee” is a term defined in YCZO 202. “Fill” is a word of general usage that is not defined in the Section 202. ORS 196.800 defines “fill” for the purposes of the Oregon Fill and Removal Law as follows:

“(3) ‘Fill’ means the total of deposits by artificial means equal to or exceeding 50 cubic yards or more of material at one location in any waters of this state.”

4.4.13 Use of the term “extend” in YCZO 901.07(F) supports the Board’s 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 floodway, it is governed by the “no net rise” standard in YCZO 901.09(B).

4.4.14 The Board concludes that YCZO section 901.07(F) governs fills or levees in the flood fringe area that do not extend into the floodway. An applicant for permission to construct a fill or levee in the flood fringe must demonstrate that: the fill or levee will not extend into the floodway; the fill or levee will consist of natural materials; the fill or levee has a “beneficial purpose” and is “no greater than is necessary to achieve that purpose.” Because the fills or levees contemplated by Section 901.07(F) do not extend into the floodway, they can be constructed by meeting the 901.06(C) requirement (“The proposed development will not increase the water surface elevation of the base flood more than one (1) foot at any point”) and need not meet the more stringent “no net rise” standard. Compliance with these requirements must be demonstrated by a plan “showing the uses to which the filled or diked land will be put and the final dimensions of the proposed fill.” Finally, under subsection (3), the “fill or levee shall be protected against erosion by vegetative cover, rip-rap, bulkheading or similar provisions.”

4.4.15 YCZO Section 901.08 is entitled: “Specific Standards for Areas Where Base Flood Elevation Data Are Available.” This section concerns structures, i.e. buildings, and is not relevant to this discussion.

4.4.16 Section 901.09, entitled “Floodway or Watercourse Development Provisions,” applies to development within a “floodway or watercourse.” Section 901.09 states:

“901.09 Floodway or Watercourse Development Provisions.

A. The placement of any dwelling in the floodway shall be prohibited.

B. 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. (emphasis added)

C. 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:

1. Adjacent communities and the State Department of Land Conservation and Development shall be notified by the Director of any proposed alteration or relocation of a watercourse, and evidence of such notification shall be submitted to the Federal Insurance Administration.

2. All appropriate state and federal permits shall be obtained.

3. It shall be the applicant’s responsibility to maintain the altered or relocated portion of said watercourse so that its flood carrying capacity is not diminished.”

4.4.17 Yamhill County Zoning Ordinance Section 901.09 governs development within FEMA-mapped floodways in Yamhill County. Section 901.09(B) prohibits development in the floodway:

“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 the base flood discharge.” (emphasis added)

4.4.18 The applicant has consistently asserted that Floodplain Development Permits are not required in order to obtain the requested plan amendment, zone change and permission to mine. The applicant provided a stamped engineering report meeting the requirements of Section 901.09(B) as part of its proof of flooding conflict minimization and proof of the feasibility of the applicant obtaining all necessary permits to complete the project as proposed. The original findings to Ordinance 873 conclude that it is

reasonable to expect that the applicant can obtain a floodplain permit to construct the noise attenuation berm (2012 R 98).

4.4.19 The applicant has never assumed that it was receiving, in this proceeding, Floodplain Development Permits that it did not apply for. Under YCZO 901.06, a Floodplain Development Permit cannot be issued unless an applicant demonstrates that: “All applicable permits have been obtained from federal, state or local governmental agencies * * *.” The applicant is expected to do so at the appropriate time, when all other required permits have been obtained.

4.4.20 The applicant has also consistently acknowledged the requirement that a Floodplain Development Permit be obtained prior to “development” in the floodplain, and has not asserted that such authority is granted in this proceeding. As stated in the proposed supplemental conditions, the applicant will comply with the Floodplain Overlay standards as to all development on the site—for mining, construction of the 1 to 3-foot high berm around the process water pond, or construction of a segmented noise attenuation berm, 6 to 18 feet high. For that reason, it is of diminished importance that the County define “fill” or “development” as those terms are used in the Floodplain Overlay standards—the applicant agrees to obtain the permits prior to mining, construction or development of the site. Nevertheless, and because the County’s Overlay Zone has been adopted to be in conformance with federal law and to allow County residents to obtain flood insurance, federal requirements are reviewed here as additional support for the Board’s interpretation of the County’s Zoning Ordinance.

5. Federal law support for County Floodplain Ordinance interpretation

As a precondition for participation in the National Flood Insurance Program (NFIP), Federal law compels “communities” throughout the country to adopt minimum floodplain management standards.¹

5.1 44 CFR Section 60.3,² 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:

“(d) 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

¹ 42 USC 4001-4128. *See also*, Goal 7, “Areas Subject to Natural Disasters and Hazards.” Goal 7 Guideline C., “implementation,” states: “4. Local governments will be deemed to comply with Goal 7 for coastal and riverine flood hazards by adopting and implementing local floodplain regulations that meet the minimum National Flood Insurance Program (NFIP) requirements.” The County’s Goal findings in Ordinance 873 (2012 R 70) were not appealed, and no additional goal findings are required on remand.

² Chapter 1, Subchapter B, “Insurance and Hazard Mitigation: National Flood Insurance Program,” Part 60, “Criteria for Land Management and Use,” Subpart A, “Requirements for Flood Plain Management Regulations,”

provided data from which the community shall designate its regulatory floodway, the community shall:

(1) Meet the requirements of paragraphs (c) (1) through (14) of this section;

(2) 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;

(3) 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; (emphasis added)

(4) Notwithstanding any other provisions of § 60.3, a community may permit encroachments within the adopted regulatory floodway that would result in an increase in base flood elevations, provided that the community first applies for a conditional FIRM and Floodway revision, fulfills the requirements for such a revision as established under the provisions of § 65.12, and receives the approval of the Federal Insurance Administrator.”

5.2 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.”³

5.3 YCZO Section 202 does not currently contain a definition of the term “development,” and it is reasonable to interpret the term “development” as used in the YCZO, to be consistent with the Federal law with which it must be consistent in order for the County to participate in the National Flood Insurance Program.

5.4 The above-cited federal regulations are the basis for the county’s “no net rise” standard as applied to “development” proposed to take place in the floodway. The applicant has conceded the necessity of obtaining a Floodplain Permit before mining begins, before construction of the process water pond berm, and before construction of a noise attenuation berm or berms.

5.5 The Board concludes that, as indicated in findings adopted as part of Ordinance 873, the applicant has demonstrated that the one to three-foot high process water pond berm and the six to 18-foot high noise attenuation berm (if it is ever needed) meet the “no

³ Title 44 of the Code of Federal Regulations (CFR), entitled “Emergency Management and Assistance,” Part 59 “General Provisions,” Subpart A, Section 59.1.

net rise” standard. The applicant must apply for Floodplain Permit approval “before the start of any construction or development.” It is feasible for the applicant to obtain the local permits necessary to construct these features as presented in the applicant’s Conceptual Mining Plan.

6. Findings addressing LUBA’s conclusion that: “where the county relied on the recharge trench method to find that impacts to groundwater levels would be minimized, we agree with petitioner that the county should have conditioned approval of the application on use of that recharge trench method.”

6.1 The following analysis addresses LUBA’s conclusion that:

“Where the county relied on the recharge trench method to find that impacts to groundwater levels would be minimized, we agree with petitioner that the county should have conditioned approval of the application on use of that recharge trench method.” (fifth assignment of error, as sustained in part).

6.2 In its Fifth Assignment of Error, petitioner challenged “the County’s conclusion that the proposed mining operation will not conflict with agricultural irrigation practices.” (Opinion, p. 12) The County concluded that there were no identified traffic, dust, noise, surface water, groundwater or other potential impacts to agricultural practices that could not be minimized using reasonable and practicable measures. The applicant’s proposal for minimizing potential groundwater impacts to agriculture included:

1. Dewatering seasonally to avoid periods when neighboring farm operations are more likely to be using groundwater instead of surface water to irrigate crops;
2. Using relatively small mining cells, and reintroducing all water temporarily removed from a mining cell back into the unconfined aquifer, on-site (recharge trench);
3. Installing two on-site monitoring wells and requiring a monitoring program to establish baseline quality and quantity of groundwater on-site;
4. Requiring transparency of recordkeeping, so that the neighbors and community will have access to accurate information regarding groundwater quality and quantity over time; and
5. Requiring free quantity and quality testing for all wells within 1500 feet of the mining area.

6.3 The applicant’s plan is to dewater a 3 to 9-acre operating cell and to immediately reintroduce the pumped water back into the unconfined aquifer on site. Testimony received by the Board indicated that other floodplain sand and gravel operations in Oregon regulated by the Department of Geology and Mineral Industries have used infiltration trenches successfully to ensure that mining operations are having no impact on off-site domestic and irrigation water wells.

6.4 LUBA is correct in concluding that the infiltration trench proposed by the applicant is part of the program approved in Ordinance 873 for minimizing potential impacts to agriculture. The standard governing potential impacts to agriculture is whether the applicant's proposal to mine will "force a significant change in accepted farm or forest practices" or "significantly increase the cost of accepted farm or forest practices" on surrounding farmland.

6.5 The applicant demonstrated that proposed dewatering operations could be managed in a manner that would ensure that there are no changes in the quantity or quality of water available for irrigation of surrounding farmland. That means that no farmers in the surrounding area will be forced to change agricultural practices or will experience any increased costs to irrigate their crops, if the site is mined as proposed and in conformance with the Conditions of Approval. On-site reintroduction of water generated by temporary and seasonal dewatering operations is part of the program adopted by the County to minimize potential impacts to agricultural irrigation practices to the point where they can no longer be considered significant.

6.6 The use of an infiltration trench was first proposed in the application for approval, in January, 2010. Under existing State law regarding interagency and intergovernmental coordination, DOGAMI will not issue an operating permit to an applicant who does not have land use approval from the local government with jurisdiction over the site. The record establishes that the applicant applied to DOGAMI in 2010 (2011 R 1778), for approval of an application that included on-site reintroduction of groundwater temporarily removed from the operating cell. (2011 R 2182)

6.7 The first conceptual mine plan showed an infiltration trench along the northwestern end of the site. With regard to the initial trench location, the County heard testimony that a trench at the proposed location might affect (increase) the level of surface water in the nearby slough. According to the testimony received, if the summertime surface level of water in the slough were to rise due to the recharge trench, it might negatively impact existing access across the slough to a three-acre agricultural field.

6.8 In response to the testimony received, in May, 2010, the applicant submitted a revised Conceptual Operating Plan that showed the infiltration trench away from the slough, in a central location, with two monitoring wells to be located between the trench and the closest neighboring domestic wells.

6.9 The two monitoring wells (and transparent reporting requirements) are intended to prove to regulators, neighbors and the local community that on-site water quality and quantity are not being affected by mining, to the logical conclusion that off-site wells are not being affected. As noted, the Conditions of Approval also require the applicant to provide free well testing services to the owners of all wells within 1500 feet of the mining area, to further ensure that there is zero impact to off-site water quality and quantity attributable to mining operations.

6.10 As noted, the applicant agreed to utilize an on-site infiltration trench to ensure minimization of potential impacts to nearby domestic and irrigation wells. In its Opinion, LUBA indicated that it agreed with the petitioner “that the county should have conditioned approval of the application on use of [the] recharge trench method.” (Opinion, p. 15)

6.11 The County twice conditioned approval of the application on use of the recharge trench method, first in Condition #24 A., and again in Condition #26. (“the trench * * * shall be located * * *specifically, within or in the vicinity of mining cells 13, 14, 21 and 25.”

6.12 Condition #24 identifies the existing wells within 1500 feet of the mining area, including two domestic water wells and 13 irrigation wells. 2012 R 118. Condition #24 then states:

“To ensure that the operator will not adversely impact these wells or otherwise affect the groundwater resources of Grand Island, the operator shall implement the following groundwater conflict minimization measures:

A. Prior to mining, the operator shall establish two monitoring wells within the mining area (see revised Figure 6, Lidstone report). These wells will be located within mining cells 21 and 16, and will monitor water levels within the shallow aquifer and be used to obtain water samples. An infiltration trench will be constructed between the active, initial mining area (mining cells 1-12) and the monitoring wells. The location of this trench and monitoring wells will also allow the operator and the public to evaluate and address potential groundwater impacts in the early stages of mining.” (emphasis added)

6.13 Condition #26 also requires on-site reintroduction of groundwater temporarily pumped from the operating cell, stating:

“Prior to mining and throughout the life of the project, the operator shall examine the water elevations in the slough adjacent to the mining area. To ensure that water levels in the slough are not increased due to the location of the infiltration trench originally proposed by the applicant, the trench shall instead be located farther from the slough and in greater proximity to the initial mining cells (specifically, within or in the vicinity of mining cells 13, 14, 21 and 25). (See Lidstone Figure 6). Prior to mining through or north of the trench or through a monitoring well, all previously collected groundwater data will be reviewed by a licensed professional engineer or registered geologist. This data analysis shall consider the effects of relocating the trench. If data and analyses indicate potentially adverse groundwater impacts to surrounding properties or surface water impacts to the slough, the operator shall adjust the mining plan or take other steps as necessary to minimize potential, mine-related ground or

surface water impacts. The results of all studies and data collection shall be maintained by the operator for review by island residents and property owners, upon request and/or by internet posting in a manner reasonably accessible to island residents and property owners. To the extent mitigation is identified by the operator or by DOGAMI that may reduce existing flood impacts or minimize potential impacts related to mining operations, the operator shall implement such mitigation at its own expense.” (emphasis added)

6.14 This condition also outlines conceptual mining once the operation reaches the infiltration trench. As is clear from the above Conditions, the County “conditioned approval of the application on use of [the] recharge method,” and LUBA erred in concluding otherwise. However, and to make perfectly clear the intent of the County in adopting these conditions, an additional condition (Condition #30, below) has been adopted as part of this Ordinance.

7. Findings addressing remand testimony

7.1 The remand hearing was limited as specified in the Notice of Public Hearing. No new evidence was accepted. The applicant and opponents testified regarding the remand, and the Board duly weighed all of the testimony received. The public hearing was then closed, and the matter was continued to December 6, 2012 at the point of staff recommendation.

7.2 A copy of the applicant’s proposed findings and conditions on remand was provided to the Board and to the organized opposition prior to the November 8, 2012 hearing.

7.3 To the extent applicant or opponent testimony constituted new evidence, the Board received such evidence, but does not accept it, and has given such evidence no weight in making this decision. Most of the testimony received addressed the remand Order and what it required the County to do, as outlined in the notice of hearing. The Board’s decision in this matter is based on all of the testimony received, the existing record, and the advice of staff. The County has chosen not to expand the scope of its remand hearing beyond the scope required by LUBA’s Order.

7.4 Opponents have requested that the county “review Baker Rock’s current DOGAMI permit application as part of the record to ensure that the mine plan and configuration are consistent with the previously proposed plans.” Opponents do not explain how this request relates to an approval standard, nor do they identify where in its Order, LUBA required additional review of the DOGAMI application. The record demonstrates that DOGAMI is aware of the applicant’s mining proposal, including the

use of berms and on-site reintroduction of groundwater. Nothing more is legally required.

7.5 The applicant is required to comply with the Conditions of Approval adopted by the County. Under Condition 18 of Ordinance 873, the applicant is required to obtain and maintain a DOGAMI permit. The record was not reopened to allow additional testimony regarding DOGAMI permit application status, and such testimony is not needed in order for the County to approve the requested Post-Acknowledgment Plan Amendment.

7.6 The County did not “rely heavily” on the DOGAMI application as claimed by opponents, but did rely heavily on the conceptual mining and reclamation plans submitted to the County by the applicant. The record demonstrates that “DOGAMI has been consulted.” The opponents have provided no evidence that the portion of finding 10.4 of Ordinance 873 quoted by opponents is incorrect. The hearing was not open to the receipt of any new evidence, as the opponents were advised through the Notice of Hearing. The conceptual mining plan is “conceptual.” The finding cited by opponents (the whole of finding 10.4 and the portion referenced by opponents) is a correct statement of the facts and law in this case regarding DOGAMI authority over sand and gravel mining and reclamation. The County rejects the opponents’ request to reopen the record to accept its proffered evidence and does not accept its new evidence.

7.7 The opponents ask that a limitation or clarification be added to the conditions, substantially as follows: “The recharge trench shall not be placed opposite or terminated into low permeability silt or clay materials.” That limitation has been added to Condition #30, located at the end of these findings. As stated correctly in the original findings, DOGAMI is responsible for approving, and monitoring the implementation of, mining and reclamation plans. Significant conditions have been imposed in this case to minimize all potential impacts to sensitive and agricultural uses, including the requirement for on-site reintroduction of groundwater pumped out of the operating cell. The Board continues to conclude that reintroduction of groundwater on-site, as presented in the applicant’s conceptual plans and discussed in the Conditions of Approval, is feasible, and will help to ensure that there are no off-site groundwater quantity impacts associated with the project.

7.8 The Board has considered the legal interpretations proffered by the opponents with regard to the County’s Floodplain Overlay Zone standards, and has concluded that none of those interpretations have merit. The Board’s interpretation is consistent with the express language of the County’s ordinance. The Board’s interpretation does not negate the prohibition on locating subdivisions in the floodway, in YCZO 901.07(E). The County is not ‘ignoring’ any part of its zoning ordinance. The County has not chosen, through the adoption of its zoning ordinance, to impose floodplain or floodway restrictions applicable in this matter that are in addition to or otherwise exceed the minimum required for the County to participate in the Federal flood insurance program.

7.9 With regard to the opponents' claim that the applicant must construct the noise berm, in order to comply with the noise study: the County is not requiring that any berm that is not necessary to meet DEQ noise standards or other legal requirements, be built. To the extent LUBA or any party has concluded otherwise from a reading of the existing findings and conditions, or these additional findings and conditions, the County refutes that conclusion, and corrects the previous findings and conditions in these findings and additional conditions. The noise study established the feasibility of meeting DEQ noise standards. The County's program to minimize noise conflicts requires construction of a noise berm, but only if such a berm is necessary in order to meet noise standards at a sensitive use. The conditions of approval continue to require that the applicant comply with DEQ noise standards as to all sensitive uses in the area.

7.10 The applicant has addressed a "worst case" noise scenario and has demonstrated the feasibility of minimizing potential noise conflicts, even in that "worst case," through the construction of a berm up to 18-feet high. The applicant demonstrated the feasibility of meeting floodplain standards if such a berm, in an estimated 15-years from commencement of mining, becomes necessary in order for the applicant to meet applicable standards. No standard requires construction of a noise berm, and the Board is only requiring that one be built if that is the only way to meet DEQ noise standards at some point in the future. Nevertheless, and as clarified in the findings and conditions adopted with this Ordinance, the applicant must obtain a Floodplain Development Permit prior to any construction or development in the floodplain or floodway including the construction of a noise berm or a berm around the proposed wash water pond. If there are conflicts between previous findings and conditions and findings and conditions adopted on remand, these additional findings control.

Additional Conditions of Approval

The following conditions are added to, modify and amend the Conditions of Approval adopted as part of Ordinance 873:

28. Condition 21 of Ordinance 873 is clarified as follows: Notwithstanding any findings or conditions of Ordinance 873 to the contrary, the operator is not required to construct the noise berm described in this condition and as shown in Figure 6 of the Lidstone Report, if other reasonable and practicable control or attenuation measures are utilized by the operator that achieve consistent compliance with applicable DEQ standards as to all sensitive uses (including, but not limited to, use of smaller, quieter equipment, improved mufflers, portable barriers, or a combination of control and attenuation measures other than a berm). The proposed noise attenuation berm should only be constructed if necessary to meet DEQ standards as to a sensitive use. If the proposed berm is not constructed, the operator shall take whatever alternative steps are necessary to continue meeting applicable noise standards as to all sensitive uses for the life of the project. Mining shall cease in any area of the site if it cannot be conducted in conformance with applicable DEQ noise standards as to existing sensitive uses in the

area. Prior to constructing the proposed noise attenuation berm, the applicant shall obtain a Floodplain Development Permit from the County Department of Planning and Development.

29. The applicant has proposed to use overburden from cell construction to construct the proposed one to three-foot high berm around the process water pond, in the initial stages of mining. Prior to commencement of mining and construction of the proposed berm around the process water pond, the applicant shall obtain a Floodplain Development Permit from the County Department of Planning and Development.

30. As clarification of Conditions #24 and #26, Ordinance 873: Consistent with guidance provided by, and requirements of, the Oregon Department of Geology and Mineral Industries, the applicant shall reintroduce on site, water pumped from the operating cell during dewatering operations. The infiltration trench shall not be placed opposite or terminated into low permeability silt or clay materials. During initial operations the infiltration trench shall be approximately at the location shown in Lidstone Figure 6 (revised 5/2010). Once mining has reached the recharge trench, reintroduction of groundwater from dewatering operations shall be at a suitable on-site location as approved by DOGAMI. Commensurate with the Groundwater Guarantee in Condition 25 of Ordinance 873 and current DOGAMI and Water Resources Department practices, dewatering of the site shall cease, temporarily or permanently, if DOGAMI and/or WRD conclude that dewatering activities associated with mining are negatively impacting nearby domestic or irrigation wells.

END