Case File L2400001-D(IND) – Rebuttal

https://www.dropbox.com/scl/fo/jlad6eyv8ia7ab4ho8s72/ACXsgy49FWHcV2z6BQFlI3M?rlkey=qb3jajgfoersqxcubkhpdwfoi&st=v2ewymvl&dl=0

This time I included the Dropbox link directly into my remarks. Apologies for the last go-around.

My name is Eric McClendon. I own and reside on the property at 24415 SW Boones Ferry Road. I submitted initial comments on this case file but wish to address some additional concerns based on Mr. Stamp's written comments. I would first like to address contested condition II(A) (limiting grading area) and then discuss some concerns with fire and water protection in our neighborhood. Finally, a few words on traffic. **We continue to be concerned about the scope of this proposed expansion and once again request the permit be denied.**

As a preliminary matter, we still have not been provided access to the data from the "sound study" summarized at the May 16th hearing. If this "study" will be considered as part of the record (which I object to based on my previous comments), we would like an opportunity to have it evaluated by an independent expert.

1) **If the permit is granted, condition II(A) must be imposed. The hearings officer has the authority to impose this condition.**
    a. **CDC 207-5.1 is not a limitation on the hearings officer's authority as suggested by Mr. Stamp.**
        i. **The language of CDC 207-5.1 provides no requirement that a condition imposed to "protect the public from potential adverse impacts of the proposed use" must be tied to another section of the CDC – it is a clear delegation of independent authority**. If the drafter intended 207-5.1 to be a limitation, they would have added the caveat "however, any condition must be tied to separate section of the CDC." The fact that there is no such caveat proves that 207-5.1 is an independent authority upon which the hearings officer can impose conditions they deem necessary to protect neighboring properties from development based on the facts of the current situation before them. Also, as described below, no case law directly holds that 207-5.1 must be tied to the CDC.
        ii. **WACO Staff *did* tie the condition to the CDC, namely section 422.** Staff spent much time analyzing section 422 and providing the needed findings for the hearings officer to conclude that II(A) is necessary. Disagreeing with that analysis is one thing but stating that WACO did not provide a relevant CDC section is false. Brown also provides no scientific analysis rebutting WACO staff's detailed findings.
        iii. **Protecting neighboring properties is enough justification to impose II(A) even without 422.** After all, the purpose of the CDC is to "implement the Washington County Comprehensive Plan through the adoption and coordination of planning and development regulations which provide for the health, safety

and general welfare of the citizens of Washington County." It is clear from the neighbor's testimony that Brown Contracting is causing problems with noise and vibration, including to properties much further away than mine. Limiting the operation to the proposed boundary would not only protect the riparian areas to our west, but it would also create a buffer between Brown and the residential properties to the north.

iv. **CDC 423-6 is an independent condition justifying II(A). "**All development shall comply with Chapter 8.24 of the Washington County Code of Ordinances relating to noise control." Noise is one of the key issues in this case and II(A) will address it by limiting how close the operation will be to neighboring residences.

v. **CDC 423-7 is another independent justification for II(A). "**No development shall generate ground vibration which is perceptible by the Director beyond the property line of origin without use of instruments." Again, ground vibration is perceptible on neighboring properties with the current operation. Restricting the development area will address this issue going forward.

vi. **There are countless other CDC provisions to tie this condition to.** I will not provide an exhaustive list. There are many, many provisions this condition could be tied to, including most of CDC Article IV.

vii. **The statute cited by Mr. Stamp as authority does not address 207-5.1.** Mr. Stamp states "Where a problem arises is if the review authority tries to use CDC 207-5.1 to create what amounts to a new approval standard or a modification of an existing standard. For example, if the code sets forth a 10-foot setback, CDC 207-5.1 cannot be used as authority to impose a 20- foot setback under the guise of "protect[ing] the public from potential adverse impacts of the proposed use." ORS 215.427(1)-(3)"

    1. **ORS 215.427(1)-(3) does not mention CDC 207-5.1, contain the quote offered by Mr. Stamp, or back his assertion.** Section 1 gives a time limit for approving a permit, section 2 sets out the process for addressing missing information, and section 3 simply states that the application is based on the law at the time of filing. Citing this statue in such a manner seems like it was intended to mislead the hearings officer into believing Mr. Stamp's assertion about 207-5.1 is codified.

    2. **Mr. Stamp cites no new approval standard or existing standard that would be modified by condition II(A).** This is a straw man argument meant to imply that somehow imposing condition II(A) would violate the CDC, without giving any examples in the present situation.

viii. **The case law cited by Mr. Stamp addressing his contention that 207-5.1 must be tied to a condition of approval is tenuous.**

a. Mr. Stamp first states: “LUBA and the courts have often stated that a local government cannot interpret its code in a manner that amounts to a de-facto amendment of its language1000 Friends of Oregon v. Wasco County Court, 299 Or 344, 703 P2d 207 (1985) (LCDC interpretation overturned as de facto amendment of its own rule). “To amend legislation de facto or to subvert its meaning in the guise of interpreting it is not a permissible exercise.” Goose Hollow Foothills League v. City of Portland, 117 Or App 211, 843 P2d 992, 995 (1992); May 30, 2024, Brown Contracting Contractor Establishment Application Page 35 Von Lubken v. Hood River County, 104 Or App 683, 803 P2d 750 (1990), on recons, 106 Or App 226, rev den, 311 Or 349 (1991). The same holds true for conditions of approval.”

   i. **These cases do not mention conditions of approval** as an example of a local government interpreting its own code as a de-facto amendment of language. Trying to tie that proposition to the current situation is a stretch. Likewise, condition II(A) does not subvert the meaning of the CDC or 207-5.1 specifically. As stated above the purpose (meaning) of the CDC is to protect the general public, which this condition is designed to do.

b. ***Applebee*** only states that 207-5.1 cannot be used to implement conditions on an unrelated land use permit. That is clearly not the situation here where the requested condition is for the actual permit in controversy. It clearly does not back up Mr. Stamp’s assertion after citing this case that “A condition needs to be tied to an actual approval standard independent of CDC 207-5.1."

c. ***KB Trees*** was a case wherein petitioners appealed because a condition imposed under 207-5.1 was, in their opinion, not strong enough to protect the public from “adverse potential impacts of the proposed development.” LUBA found the condition satisfied 207-5.1 because the decision did impose a less-drastic condition to address the “adverse impacts” concerns raised by petitioners. The court did not require the condition to be tied to any other code. This case in fact, stands for the opposite of what Mr. Stamp claims. When reviewing the decision’s justification under 207-5.1 the court cited two LUBA cases and stated: “Both of those cases stand for the unremarkable proposition that when a local code provision provides a decision maker with the discretion to impose a condition of approval on a development proposal, the decision maker has the authority to impose conditions.” *KB Trees at 13.*

Again, 207-5.1 is an independent authority to impose conditions of approval.

b. **"Screening" is not an effective mechanism to "reduce impacts" in the proposed grading area.** No amount of screening would protect us from noise and vibration in this area. Instead, the new northern boundary of operations should be completely screened and buffered after the revised grading permit is imposed.

    i. **Noise on the proposed grading area does indeed travel directly up to us.** This past Saturday night around 9:30pm, Brown's employees or tenants fired up some sort of mower down on the new lot they are trying to grade directly to our west. Not only was the time unreasonable, but the video shows how sound will travel up from that lot to our lot and neighboring lots if it is allowed to be utilized by Brown. (Dropbox)

c. **We cannot trust that this new area would only be used for "items needed less frequently."** Likewise, we cannot trust that "the applicant is making great effort to place the noisier aspects of its operations as far south as possible." If this is true, they would have proposed a condition of approval that adds these provisions into their permit. Also, they've had five years to make these changes. If they were earnest about moving noise away, they would have already done so. We have submitted some videos showing continued activity right at the fence line. (Dropbox)

d. **The rest of Mr. Stamp's arguments regarding II(A) are irrelevant.** Mr. Stamp "sheds crocodile tears" over the fact that most locales forbid contractor's establishments, although he interestingly admits that "contractors usually outgrow the conditions of the permit in short order" - hence the problems we are experiencing caused by his clients. The bottom line is that Brown should be in an industrial use district, not an interim zone near residences. There are plenty of these areas in and around Washington County.

2) **We disagree that the applicant has taken "extraordinary steps to reduce conflicts with neighbors."**

a. **Early in 2020, Brown did construct a fence along a portion of our mutual property line, and we are grateful for that.** However, they also agreed that if we stopped complaining about noise, they would not expand their business or create unreasonable noise going forward (Dropbox). Looking back, they knew at the time they had already purchased additional lots to do just that but did not tell us. Since we felt secure with their current permit and the promise not to expand, we invested a ton of money into our house and property. Brown immediately began adding heavy vehicles and equipment that had never existed on the property. (Brown Depo) They began working longer and longer hours and working weekends (Emrick Depo). They expanded the number and types of employees at the 9675 location (Both Depos). The noise, even during the day, became unbearable to the point where we finally had to complain to the County and eventually file a lawsuit.

i. **The fence only covers around 35-40% of the mutual fence line and should be extended.** AKS submitted a video showing the west boundary of the fence and traveled east. It should be noted that the fence ends halfway through the video and is replaced with a black tarp for the remainder of the video, which does nothing for sound. Also, the west corner shows that there is nothing between Brown's yard and my residence going west from the edge of the fence. This should be completed and tied into the new northern boundary after the revised grading plan is imposed.

ii. **We cannot allow Mr. Stamp to downplay the severity of what we live next to.** I have been yelled at and mocked by their employees (Dropbox – Aug 23), they have intentionally slammed signs and laughed about it and revved vehicles back and forth at the fence line (Aug 23). Their employee yelled at my wife shortly after our initial noise complaint, and their employees have even launched golf balls into our yard on one occasion. The owners admitted in their depositions that no employee has ever received discipline for these actions or for noise creation. The only written policy regarding noise is a sign, and their employees have unrestricted access to the lot, even on weekends. The owners also conceded that when there is a big job, employees from other Brown yards work out of this one. The owners also believe that "active construction" is the only activity that violates the WACO noise ordinance. They also admit that some jobs require employees to load materials in the early mornings, although they claim this is "unusual." (Both Depos) The sound disturbances we face are constant, from idling, revving, honking, beeping, power tools, generators, large booms, screeching, etc. This is not even close to the Brown Contracting we moved next to. If so, we would not be here complaining, and Brown would not have been forced into a Type III proceeding.

3) **The applicant should be required to connect to city water for fire protection and to protect residential wells. They do not qualify for an exception.**

a. **CDC 501-8.1(A) states "An applicant for development shall provide documentation from the appropriate non-county service provider that adequate water, sewer and fire protection can be provided to the proposed development prior to occupancy."** This applies to the entire permit, not just the new storage building proposed by Brown. This is a thirty-person operation at minimum, with dozens of work vehicles and multiple large residences and shops. As noted in my previous submission, Brown has installed three large fuel tanks next to our mutual fence- a fact conveniently left out of this permit. We can observe many other fuel cannisters and other flammable liquids being stored by piles of flammable construction materials, next to the wooden fence that separates our properties. If a fire breaks out at 2:00am, we must rely on TVFR having sufficient wildfire trucks available to extinguish thousands of gallons of fuel across an almost ten-acre facility. **This is an unacceptable risk for our neighborhood and admittedly a calculated move by Brown to avoid annexation at the expense of safety.** I have uploaded a video of a wildfire that broke out near Brown's furthest west lot back in

September of 2020. (Dropbox) We are afraid of what could happen if another fire reaches the fuels and chemicals at Brown's without adequate fire protection.

i. **Brown's resistance to annexation makes it impossible for neighboring properties to annex to our detriment.** Per the City of Wilsonville, we cannot annex unless we share a border with an annexed property. That means we cannot hook up to city water, fire or sewer until Brown does. This is holding up the neighborhood's plans to become part of Wilsonville and cutting us off from desired services. Since we are in unincorporated Washington County, we also must rely on the sheriff, hence the massive response times.

b. **Brown does not qualify for an exception under 501-6.1(A).** It's almost impossible to understand how Mr. Stamp can argue with a straight face that this operation uses the same amount of water, or "slightly more" than a typical residence. Brown has several large tanker trucks they fill with their well water (Dropbox). These are filled near the fence line, along with the 200-gallon water buffaloes and other, smaller water tanks. Water is also used to pressure wash their fleet of vehicles, including concrete trucks and other equipment. Brown employees pressure wash personal vehicles on the weekends. Thirty people flushing toilets daily alone would greatly exceed a normal residence. Let's not forget that this new permit will also include three additional residences on wells drawing from the same water source that all the neighbors rely on. Brown should either be required to connect to City water, or have an independent study conducted on each well head to prove they qualify for an exception.

c. **As stated in my original submission, water quality is not sufficiently addressed by Brown.** While going on in detail about the *quantity* of water headed downstream, there is little mention of the *quality.* This is an important distinction. We have valid concerns about the chemicals entering our water table. As previously mentioned, the stormwater drain is being utilized as a washout area for all types of vehicles, including concrete trucks. There are many gallons of hazardous materials stored on the ground near this drain as seen in my previous submission. The applicant should be either forbidden from using the storm drains as washouts and chemical disposals or connect to city water and sewage.

4) **The traffic count submitted by Wilsonville backs up our observations.** Some days Brown Contracting is like the Indianapolis 500. DKS did an objective job of measuring the ADT and their findings should be given deference. As with the sound study, the traffic study submitted by Brown was conducted over a short period of time, at a time and date known to Brown. It should be rejected in favor of the DKS report. Additionally, the DKS report shows some interesting data. On the date of the study a vehicle entered the main lot around 3:45am. At 4:45am, a vehicle departed from one of the new lots. 25 additional vehicles entered and exited before 6:45am. The last vehicles departed at 8:00pm after 138 total daily trips. This is just an average day at Brown Contracting, with vehicles arriving and departing at any given hour, but especially clustered early in the morning.

5) **Finally, we object to revised condition VIII(C).** There should be no idling, revving or release of airbrakes north of the office building on 9675 SW Day. The majority of noise and vibration are

created between the two shops on our mutual property line and should not be allowed in that area. We don't understand why the county has changed its position from their original proposed condition of "**No idling of construction vehicles or revving of engines shall occur north of the existing dwelling units on tax lot 309 or north of the existing dwelling units on tax lot 311 and 303. No parking of construction vehicles or construction machinery north of the main office building on tax lot 309.** We request the bolded original condition be imposed to protect from noise, lights and vibration.

a. **The new proposed condition is unenforceable and will lead to future problems:** "Idling of construction vehicles shall be kept to a minimum within 50 feet of adjacent residential uses on Lots 306 and 312." How one defines what "a minimum" amount of acceptable idling is highly subjective and will cause problems down the road.

Conclusion

Based on the record and the rebuttals, the permit should be denied. At the least, the requested conditions from Wilsonville and the neighbors should be added as necessary protections for the public. Thank you for your time and consideration.

Eric McClendon

Lindsey McClendon

24415 SW Boones Ferry Rd

RE: Responding to Mr. Stamp's "made extraordinary steps to accommodate neighbors" statement.

When we started waking up at 4am back in early 2020 from this operation, we made a written agreement (Eric's Dropbox) that if Brown built a fence, stopped making unreasonable noise and DIDN'T expand their operation we wouldn't complain anymore, caveat being "didn't expand."
We continued to put money into our property and have made it our forever home based on that contract. So now here we are, completely trapped by this company that said they wouldn't be expanding, yet are trying hard to expand directly in front of us, knowing how upset we all are. And they said they have made accommodations? If so, why haven't they been communicated to us or had any impact on the noise?

It's again not a hard concept….

We live next to an operation that grew to this massive operation without the proper permits and have been dealing with the extra noise of extra vehicles, for years. A full time mechanic works on industrial trucks and equipment all day in the shop abutting my property. They back their trucks up to the shop causing back up beeping all day. They make tons of different noises there, Monday-Friday and some weekends. We deal with a lot of noise all day M-F. Anyone would be annoyed by this operation, especially us being so close.

I do not think it is much to ask them to cover up their annoying noise with tree buffering and continuing the fence throughout the property line. To hear them say they have accommodated us is what should have been expected from the start, not now, five years later. They absolutely should have been protecting us the entire time. We should have never had to complain or enforce a fence. It was in their permit to have done that. It's a weird narrative they seemed to have flipped assuming others are the problem. Why did this company put themselves next to a large lot of residents and expect to do whatever they want whenever? How does a company who is noncompliant with the county and City of Wilsonville, come to being able to expand their operations with major critical conditions not being met?

The city of Wilsonville is correct with this, deny their permit if they can't meet the conditions. They certainly don't meet the noise ordinance or vibration standards. I thought I heard you say that you can't change the law. Well, it seems the scale of operations has increased too much for them to follow the noise law, so they need to move to a fully industrial area.

My family's safety is at risk if they don't hook up to city water. That is completely unacceptable for us and the entire neighborhood. They added fueling tanks very close to my fence and now are asking for an exception, at the risk of my safety. Day road commuters are also put at risk, in more ways than one, and they don't even know it yet.

I therefore reiterate my opposition to this permit. It should be denied in full.

June 10, 2024

Paul Schaefer
Senior Planner
Washington County Department of Land Use & Transportation
Planning and Development Services
Current Planning
155 N. First Avenue, #350-13
Hillsboro, OR 97124- 3072

Subject: **Casefile L240001-D(IND)**
9675, 9775, 9779, and 9805 SW Day Road

Dear Mr. Schaefer:

The City of Wilsonville appreciates the opportunity to provide additional argument in the above-referenced Casefile as allowed by the Hearings Officer at the May 16, 2024 hearing. Please provide this letter to the Hearings Officer for inclusion in the hearings record. Please additionally note, not all the City's prior arguments and testimony are addressed in this brief letter. However, the City reiterates that prior testimony remains fully supported and valid regardless of mention and reference in this letter.

Request

At the May 16, 2024 hearing, the Hearings Officer held the record open until May 23, 2024 at 4pm for the County staff and applicant to provide agreed upon revised conditions of approval. Additionally, the record was held open for other parties to provide new testimony until May 30, 2024 at 4pm. The record was held open until June 6, 2024 at 4pm for anyone to respond to the testimony received by May 30, 2024. This was subsequently extended by the Hearings Officer to June 10, 2024 at 4 pm.

The City continues to request the Hearings Officer deny the application due to lack of evidence the applicant can meet all standards and regulations that apply to this site and inadequacy of service provider letters needed to ensure proper standards can be met and services provided. The additional information and argument provided to date do not provide compelling information to counter the City's position as a key service provider of transportation, water, and storm infrastructure. Indeed, there is no reasonable argument presented that would make the treatment of this application significantly different than other similarly situated contractors establishments that are in unincorporated Washington County, but take access of City of Wilsonville streets and have been required by the City and County to do improvements to City infrastructure as a condition of development approval.

Argument in Response in May 30 Material

The Applicant goes on at length that, in short summary, the City is not the land use authority and that the City's interest is tied to the 2018 Basalt Creek Concept Plan. The Concept Plan covers an area added to the Metro Urban Growth Boundary in 2004. What is missing from the whole argument from the Applicant, or is at least well hidden in the written material, is the fact that subject City infrastructure predates both the 2004 UGB expansion and the 2018 Basalt Creek Planning. The subject water and transportation infrastructure, as well as annexation of the Day Road right-of-way into the City occurred in approximately 2001 in conjunction with the development of Coffee Creek Correctional Facility. Even if the 2004 UGB expansion did not occur, and the City did not adopt a Concept Plan for this area in 2018, the key issues as a service provider would still exist. The Applicant's over focus on the City as a land use planning and regulatory agency attempts to distort and confuse the City's primary role in this case. While, based on the City's adopted policy such as the Concept Plan, the City has planned for the subject land to annex and be developed as high-quality industrial development, the City recognizes that the current land use authority is Washington County. The City thus recognizes, in this case, it is foremost a service provider akin to ODOT, Clean Water Services, and a water district.

The County erred and did the City harm in its due process and rights as a service provider by failing to appropriately seek input from a very relevant service provider prior to deeming the application complete. The City has unfairly been forced to play catchup ever since. This has been exacerbated by the fact that the case involves an applicant that has historically shown little to no appetite of following rules in regards to the property or doing their reasonable, connected, and proportionate part to support public infrastructure, as laid out in the history portion of the staff report from County staff.

Per the City request and response from County Staff, all Notices of incompleteness, completeness, and notices to service provides, public notices, and related correspondence between the City and County are included in the record. In the Notice of Incomplete Application dated September 5, 2023 the County lists a missing Service Provider Letter from Tualatin Valley Fire and Rescue as a missing item. Of note, there is no mention of missing service provider letter from the City of Wilsonville.

The City of Wilsonville did receive a UPAA notice on January 10, 2024 (postmarked January 9, 2024), dated December 28, 2023, requesting comments by January 25, 2024. This notice was more geared towards the City as a planning and land use authority than as an infrastructure service provider. The comment period allowed was not sufficient time to conduct a full traffic analysis, develop takings findings, or anything of that type. Even if actually mailed punctually on December 28, 2023 it would have been inadequate timing. The City's service provider analysis should have been an initial incompleteness item. The City made a reasonable effort to rush and provide the traffic analysis and adequate taking findings, but it was rushed due to County missteps. While the City is not sure what the County can do to correct this error at this point, we expect that this may be grounds for a LUBA remand and we expect any remanded application to allow adequate time for further traffic analysis and additional takings analysis.

The City is not just an interested party, likely future land use authority, or neighboring property owner, as treated by the County through this process. The City owns and controls key infrastructure that is necessary to serve this subject property. Without City-owned infrastructure, the applicant would not have street access, would not have access to a fire hydrant, and would not have anywhere for stormwater to discharge.

The applicant errantly argues that the City's standards do not apply to right-of-way dedication, access control and right-of-way improvements along SW Day Road. In this instance, even if the Hearings Officer found that the City's standards do not apply, the Washington County Transportation System Plan (TSP) classifies SW Day Road as an arterial freight route to be 5 lanes in width, identical to the City's TSP. Section 501-8.4 of the Washington County Code requires adequate right-of-way dedication pursuant to the classification of the road in the Washington County TSP. Additionally, similar to transportation funding of City projects, the applicant is required to pay the Washington County TDT in addition to constructing the required frontage improvements. Part 4: Implementation and Funding of the Washington County TSP states: "New development not only pays the TDT, but also is responsible for improvements that serve the development. Such improvements often include new connections within and/or adjacent to the development, the frontage improvements along major roadways and safety improvements within the vicinity". The City's prior testimony provided Nollan/Dolan proportionality analysis supporting the required frontage improvements along SW Day Road.

Section 501-8.5 of the Washington County Code states that access to a public road shall only occur upon issuance of an access permit. In this instance, the City has the permitting authority to grant or deny access permits along SW Day Road.

The Applicant argues that it has "abutment rights" to access SW Day Road. However, the Applicant fails to acknowledge that the City, as the road authority, may limit some access for safety reasons without constituting a taking. The Oregon Supreme Court explains the three principles regarding abutment rights:

> "First, it is well established that a common-law right of access by property owners attaches to property as an interest in land. Specifically, an abutting property owner holds an easement of access, appurtenant to the abutting land, for the limited purpose of providing a means of ingress and egress to and from the owner's property by means of the abutting public road. Second, the right of access to an abutting road is limited in scope. An abutting property owner does not have an absolute right to access an abutting road at the most direct or convenient location. Rather, the owner has a qualified right that is subject to the government's interest in regulating the safe use of public thoroughfares. Third, the owner's right of access ensures only reasonable access to and from the owner's property by means of the abutting road. Those three principles, in combination, reduce to this central proposition: <u>When governmental action interferes with an abutting landowner's right of access for the purpose of ensuring the safe use of a public road, and the abutting landowner retains reasonable access to its property, no compensable taking of the property owner's right of access occurs</u>." *State ex rel. Dep't of Transp. v. Alderwoods (Oregon), Inc.*, 358 Or 501, 517 (2015) (emphasis added).

As noted by the Oregon Supreme Court, if some access still exists, restricting an abutting owner's right to access is permissible without effecting a taking so long as reasonable access remains. *Id*. at 526. Importantly here, all five properties are owned by the same owner. Access can occur at any one or more approved driveways along SW Day Road because each property can be accessed through another – no

easement is needed (or allowed). *See Partney v. Russell*, 304 Or App 679, 689-90 (2020) (any easement between two properties is destroyed when there is common ownership).

Not only does the Applicant argue it should have full and unrestricted access to SW Day Road, the Applicant further argues that the City's requirement to close some of Applicant's driveways due to safety concerns constitutes a taking. However, Oregon courts have repeatedly held that a requirement to close a driveway, when others are available, is not a taking. Instead, courts have held that such action is a valid use of a government's police power to regulate the health, safety, and welfare of the community. In *City of Salem v. Merritt Truax, Inc.*, 70 Or App 138 (1984), the city of Salem sought to close one of three of the defendants' driveways, and the defendants alleged that their access had been inversely condemned. *Id*. at 140. The Court of Appeals held that the trial court correctly determined that no inverse condemnation occurred. It explained:

> "An owner of land abutting a street has a common law right to access his property from the road. However, the rights of abutting proprietors to access their premises are subservient to the public's right to free use of the streets. That right is protected by the state's exercise of its police power. An interference with access rights that is an exercise of the city's police power is not a compensable taking." *Id*. (internal citation and quotation omitted).

The Court of Appeals has also explained that, even if closure of certain access makes access less convenient, that inconvenience is not compensable. *Boese v. City of Salem*, 40 Or App 381, 385 (1979). Boese, as here, had other access points that could be utilized. *Id*. Such holdings are consistent with other Oregon cases affirming the government's police power to limit or close access points without requiring compensation to property owners. *See, e.g.*, *Deupree v. State ex rel Dept of Transp.*, 173 Or App 623, 629 (2001).

In the 2014 Hearings Officer decision regarding a portion of the subject site, Conditions of Approval II A. 3. and 4. Pertain to driveway safety on SW Day Road. The City's driveway requests now are along the same vein, ensuring driveways that support the safety on SW Day Road.

In the voluminous package submitted by the Applicant on May 30, which included the Basalt Creek Concept Plan, it is reasserted and confirmed, that development draining to Tapman Creek "aka Basalt Creek" "will require evaluation of the conveyance systems at time of development"(see page 23 of Basalt Creek Concept Plan, page 145 of the May 30 PDF). The storm system does not care if stormwater runoff is interim or even temporary; it has real and immediate potential impact to immediate downstream infrastructure that needs to be evaluated and, as necessary, mitigated.

Applicant alleges that it will not impact or utilize the City public stormwater system because evidence shows that runoff will decrease, when compared to pre-development flows (*see* Table 5-1 of the AKS Preliminary Drainage Analysis & Stormwater Report). The AKS Report discusses flows prior to the proposed new building and additional graveled storage area and compares this post-development flow to the pre-development flows. *Id*. However, the AKS Report fails to account for the flows that existed before Applicant impermissibly paved its prior graveled area. The unapproved paved area allowed for any rainfall that would have previously been absorbed into the ground to run into the City public stormwater system. Since that paved area is not accounted for, AKS's analysis cannot be relied upon.

Applicant also argues that it is entitled, under Oregon drainage law, to accelerate historical flows. However, there are limits to the acceleration principle (*see, e.g., Levene v. City of Salem*, 191 Or 182, 191-92 (1951) (must act with "reasonable consideration" of rights of lower property owner). Moreover, Applicant has no evidence of historic flows because the AKS analysis discussed above does not analyze the effect of the illegal paving that Applicant placed on the property. Applicant has failed to provide accurate evidence that stormwater runoff is not entering the City's public stormwater system.

The Applicant also extensively argues that the use is interim. While the term may be used in Washington County Code, there is, in reality, no duration limitation on the use. Land values would need to raise enough to make it financially sensible to redevelop an income producing property such as a contractors establishment. It is not reasonable to assume that this is a short-term use as justification for postponement of necessary infrastructure improvements. The impacts are now and permanent for the foreseeable future.

The City appreciates the additional opportunity to be part of this important decision. As previously stated, the City requests to receive the Notice of Decision and any conditions of approval rendered on this application.

Respectfully submitted,

Daniel Pauly, AICP
Planning Manager

cc: Chris Neamtzu, Community Development Director
Zach Weigel, City Engineer
Miranda Bateschell, Planning Director
Amy Pepper, Development Engineering Manager
Amanda Guile-Hinman, City Attorney

a. Mr. Stamp first states: “LUBA and the courts have often stated that a local government cannot interpret its code in a manner that amounts to a de-facto amendment of its language1000 Friends of Oregon v. Wasco County Court, 299 Or 344, 703 P2d 207 (1985) (LCDC interpretation overturned as de facto amendment of its own rule). “To amend legislation de facto or to subvert its meaning in the guise of interpreting it is not a permissible exercise.” Goose Hollow Foothills League v. City of Portland, 117 Or App 211, 843 P2d 992, 995 (1992); May 30, 2024, Brown Contracting Contractor Establishment Application Page 35 Von Lubken v. Hood River County, 104 Or App 683, 803 P2d 750 (1990), on recons, 106 Or App 226, rev den, 311 Or 349 (1991). The same holds true for conditions of approval.”

   i. **These cases do not mention conditions of approval** as an example of a local government interpreting its own code as a de-facto amendment of language. Trying to tie that proposition to the current situation is a stretch. Likewise, condition II(A) does not subvert the meaning of the CDC or 207-5.1 specifically. As stated above the purpose (meaning) of the CDC is to protect the general public, which this condition is designed to do.

b. ***Applebee*** only states that 207-5.1 cannot be used to implement conditions on an unrelated land use permit. That is clearly not the situation here where the requested condition is for the actual permit in controversy. It clearly does not back up Mr. Stamp’s assertion after citing this case that “A condition needs to be tied to an actual approval standard independent of CDC 207-5.1."

c. ***KB Trees*** was a case wherein petitioners appealed because a condition imposed under 207-5.1 was, in their opinion, not strong enough to protect the public from “adverse potential impacts of the proposed development.” LUBA found the condition satisfied 207-5.1 because the decision did impose a less-drastic condition to address the “adverse impacts” concerns raised by petitioners. The court did not require the condition to be tied to any other code. This case in fact, stands for the opposite of what Mr. Stamp claims. When reviewing the decision’s justification under 207-5.1 the court cited two LUBA cases and stated: “Both of those cases stand for the unremarkable proposition that when a local code provision provides a decision maker with the discretion to impose a condition of approval on a development proposal, the decision maker has the authority to impose conditions.” *KB Trees at 13.*

Again, 207-5.1 is an independent authority to impose conditions of approval.

b. **"Screening" is not an effective mechanism to "reduce impacts" in the proposed grading area.** No amount of screening would protect us from noise and vibration in this area. Instead, the new northern boundary of operations should be completely screened and buffered after the revised grading permit is imposed.

    i. **Noise on the proposed grading area does indeed travel directly up to us.** This past Saturday night around 9:30pm, Brown's employees or tenants fired up some sort of mower down on the new lot they are trying to grade directly to our west. Not only was the time unreasonable, but the video shows how sound will travel up from that lot to our lot and neighboring lots if it is allowed to be utilized by Brown. (Dropbox)

c. **We cannot trust that this new area would only be used for "items needed less frequently."** Likewise, we cannot trust that "the applicant is making great effort to place the noisier aspects of its operations as far south as possible." If this is true, they would have proposed a condition of approval that adds these provisions into their permit. Also, they've had five years to make these changes. If they were earnest about moving noise away, they would have already done so. We have submitted some videos showing continued activity right at the fence line. (Dropbox)

d. **The rest of Mr. Stamp's arguments regarding II(A) are irrelevant.** Mr. Stamp "sheds crocodile tears" over the fact that most locales forbid contractor's establishments, although he interestingly admits that "contractors usually outgrow the conditions of the permit in short order" - hence the problems we are experiencing caused by his clients. The bottom line is that Brown should be in an industrial use district, not an interim zone near residences. There are plenty of these areas in and around Washington County.

2) **We disagree that the applicant has taken "extraordinary steps to reduce conflicts with neighbors."**

a. **Early in 2020, Brown did construct a fence along a portion of our mutual property line, and we are grateful for that.** However, they also agreed that if we stopped complaining about noise, they would not expand their business or create unreasonable noise going forward (Dropbox). Looking back, they knew at the time they had already purchased additional lots to do just that but did not tell us. Since we felt secure with their current permit and the promise not to expand, we invested a ton of money into our house and property. Brown immediately began adding heavy vehicles and equipment that had never existed on the property. (Brown Depo) They began working longer and longer hours and working weekends (Emrick Depo). They expanded the number and types of employees at the 9675 location (Both Depos). The noise, even during the day, became unbearable to the point where we finally had to complain to the County and eventually file a lawsuit.

i. **The fence only covers around 35-40% of the mutual fence line and should be extended.** AKS submitted a video showing the west boundary of the fence and traveled east. It should be noted that the fence ends halfway through the video and is replaced with a black tarp for the remainder of the video, which does nothing for sound. Also, the west corner shows that there is nothing between Brown's yard and my residence going west from the edge of the fence. This should be completed and tied into the new northern boundary after the revised grading plan is imposed.

ii. **We cannot allow Mr. Stamp to downplay the severity of what we live next to.** I have been yelled at and mocked by their employees (Dropbox – Aug 23), they have intentionally slammed signs and laughed about it and revved vehicles back and forth at the fence line (Aug 23). Their employee yelled at my wife shortly after our initial noise complaint, and their employees have even launched golf balls into our yard on one occasion. The owners admitted in their depositions that no employee has ever received discipline for these actions or for noise creation. The only written policy regarding noise is a sign, and their employees have unrestricted access to the lot, even on weekends. The owners also conceded that when there is a big job, employees from other Brown yards work out of this one. The owners also believe that "active construction" is the only activity that violates the WACO noise ordinance. They also admit that some jobs require employees to load materials in the early mornings, although they claim this is "unusual." (Both Depos) The sound disturbances we face are constant, from idling, revving, honking, beeping, power tools, generators, large booms, screeching, etc. This is not even close to the Brown Contracting we moved next to. If so, we would not be here complaining, and Brown would not have been forced into a Type III proceeding.

3) **The applicant should be required to connect to city water for fire protection and to protect residential wells. They do not qualify for an exception.**

a. **CDC 501-8.1(A) states "An applicant for development shall provide documentation from the appropriate non-county service provider that adequate water, sewer and fire protection can be provided to the proposed development prior to occupancy."** This applies to the entire permit, not just the new storage building proposed by Brown. This is a thirty-person operation at minimum, with dozens of work vehicles and multiple large residences and shops. As noted in my previous submission, Brown has installed three large fuel tanks next to our mutual fence- a fact conveniently left out of this permit. We can observe many other fuel cannisters and other flammable liquids being stored by piles of flammable construction materials, next to the wooden fence that separates our properties. If a fire breaks out at 2:00am, we must rely on TVFR having sufficient wildfire trucks available to extinguish thousands of gallons of fuel across an almost ten-acre facility. **This is an unacceptable risk for our neighborhood and admittedly a calculated move by Brown to avoid annexation at the expense of safety.** I have uploaded a video of a wildfire that broke out near Brown's furthest west lot back in

September of 2020. (Dropbox) We are afraid of what could happen if another fire reaches the fuels and chemicals at Brown's without adequate fire protection.

i. **Brown's resistance to annexation makes it impossible for neighboring properties to annex to our detriment.** Per the City of Wilsonville, we cannot annex unless we share a border with an annexed property. That means we cannot hook up to city water, fire or sewer until Brown does. This is holding up the neighborhood's plans to become part of Wilsonville and cutting us off from desired services. Since we are in unincorporated Washington County, we also must rely on the sheriff, hence the massive response times.

b. **Brown does not qualify for an exception under 501-6.1(A).** It's almost impossible to understand how Mr. Stamp can argue with a straight face that this operation uses the same amount of water, or "slightly more" than a typical residence. Brown has several large tanker trucks they fill with their well water (Dropbox). These are filled near the fence line, along with the 200-gallon water buffaloes and other, smaller water tanks. Water is also used to pressure wash their fleet of vehicles, including concrete trucks and other equipment. Brown employees pressure wash personal vehicles on the weekends. Thirty people flushing toilets daily alone would greatly exceed a normal residence. Let's not forget that this new permit will also include three additional residences on wells drawing from the same water source that all the neighbors rely on. Brown should either be required to connect to City water, or have an independent study conducted on each well head to prove they qualify for an exception.

c. **As stated in my original submission, water quality is not sufficiently addressed by Brown.** While going on in detail about the *quantity* of water headed downstream, there is little mention of the *quality.* This is an important distinction. We have valid concerns about the chemicals entering our water table. As previously mentioned, the stormwater drain is being utilized as a washout area for all types of vehicles, including concrete trucks. There are many gallons of hazardous materials stored on the ground near this drain as seen in my previous submission. The applicant should be either forbidden from using the storm drains as washouts and chemical disposals or connect to city water and sewage.

4) **The traffic count submitted by Wilsonville backs up our observations.** Some days Brown Contracting is like the Indianapolis 500. DKS did an objective job of measuring the ADT and their findings should be given deference. As with the sound study, the traffic study submitted by Brown was conducted over a short period of time, at a time and date known to Brown. It should be rejected in favor of the DKS report. Additionally, the DKS report shows some interesting data. On the date of the study a vehicle entered the main lot around 3:45am. At 4:45am, a vehicle departed from one of the new lots. 25 additional vehicles entered and exited before 6:45am. The last vehicles departed at 8:00pm after 138 total daily trips. This is just an average day at Brown Contracting, with vehicles arriving and departing at any given hour, but especially clustered early in the morning.

5) **Finally, we object to revised condition VIII(C).** There should be no idling, revving or release of airbrakes north of the office building on 9675 SW Day. The majority of noise and vibration are

created between the two shops on our mutual property line and should not be allowed in that area. We don't understand why the county has changed its position from their original proposed condition of "**No idling of construction vehicles or revving of engines shall occur north of the existing dwelling units on tax lot 309 or north of the existing dwelling units on tax lot 311 and 303. No parking of construction vehicles or construction machinery north of the main office building on tax lot 309.** We request the bolded original condition be imposed to protect from noise, lights and vibration.

a. **The new proposed condition is unenforceable and will lead to future problems:** "Idling of construction vehicles shall be kept to a minimum within 50 feet of adjacent residential uses on Lots 306 and 312." How one defines what "a minimum" amount of acceptable idling is highly subjective and will cause problems down the road.

Conclusion

Based on the record and the rebuttals, the permit should be denied. At the least, the requested conditions from Wilsonville and the neighbors should be added as necessary protections for the public. Thank you for your time and consideration.

Eric McClendon