

**UMATILLA COUNTY BOARD OF COMMISSIONERS**  
**Meeting of Thursday, January 7, 2010**  
**1:30 p.m., Stafford Hansell Government Center, 915 SE Columbia**  
**Hermiston, Oregon**

\*\* \*\*\*\*

**COMMISSIONERS PRESENT:** Dennis Doherty, Larry Givens.  
**ABSENT:** Bill Hansell.  
**COUNTY COUNSEL:** Doug Olsen  
**STAFF:** Tamra Mabbott, Heather Haueter, Oliver Pahl

\*\* \*\* \*\* \*\* \*\* \*\* \*\* \*\* \*\* \*\* \*\* \*\* \*\* \*\* \*\*\*\*

**NOTE: THE FOLLOWING IS A SUMMARY OF THE MEETING. HOWEVER, A RECORDING OF THE MEETING IS AVAILABLE AT THE PLANNING DEPARTMENT OFFICE.**

**CALL TO ORDER:**

Chairman Doherty called the meeting to order at 1:38 p.m.

**NEW HEARING:**

- The Board will consider the issues remanded by the Land Use Board of Appeals and consider the adoption of additional findings to support approval of Conditional Use Permit #C-1103-06.

The public hearing shall be limited to argument and evidence on the following issues:

- A. Whether the application complies with UCDC 152.304(A) by placing the truck scales more than 500' from a public road.
- B. Whether the application used the correct ITE manual categories for its traffic analysis, whether the application can rely on the ITE manual for its traffic analysis and whether the application complies with UCDC 152.017(A) by not imposing an undue burden on, and by not creating a traffic hazard under UCDC 152.616(BBB)(2) at, the intersection of Lamb/Walker/Westland Roads.

Chairman Doherty called for abstentions, or declarations of bias or conflict, ex parte contact, or objection to the jurisdiction of the Board of Commissioners. There were none.

**Staff Report:**

Planning Director, Tamra Mabbott summarized her memo to the Board and explained the timeline of the application. The County's decision was sent to the Land Use Board of Appeals (LUBA) in 2008. LUBA issued a Final Opinion and Order, and remanded it on

February 4, 2009. The LUBA decision was appealed to the State Court of Appeals, who affirmed LUBA's decision on August 5, 2009. The applicant's attorney then filed a request with the County for final action to address just the issues that were remand.

This is a Conditional Use Permit allowing a multipurpose travel plaza. It is located at the intersection of Interstate 84, Lamb Road and Westland Road.

The decision before the Board is not approval of the CUP because that was approved and that decision upheld by LUBA. LUBA remand two matters to the County. First, LUBA found that the County's decision did not comply with section 152.304 (A) of the Development Code, which requires that all development in a light industrial zone, within 500 feet of a road, be screened. The revised site plan submitted by the applicant shows a redesign to relocate one small part of the development so that it would comply with that standard.

The second matter had to do with the Traffic Impact Analysis (TIA). The two specific components were related to the comparables, and the analysis of safety impacts to the Lamb and Walker Road intersection.

On the matter of the comparables, LUBA concluded that the remand was necessary for the County to address the issue of which Institute of Transportation Equivalent (ITE) categories are appropriate. LUBA also agreed that since the ITE manual did not include a specific category for the proposed use, the only reliable source of information would be an empirical study of comparable facilities, which the applicant has provided in a revised traffic study.

On the issue of safety impacts, LUBA recognized the need for substantial evidence that additional traffic from the facility would not significantly impact the safety of the intersection. The revised traffic study provided by the applicant addresses that issue.

Ms. Mabbott repeated that the decision before the Board relates only to the setback and traffic study. The rest of the decision is firm. She went through the list of materials provided to the Board for this hearing.

Ms. Mabbott explained that the specific terms of what impact the project will have on the intersection is not disputed, and exactly how much the developer would pay to improve the intersection is not part of this hearing. There will be a later public hearing on a draft Development Agreement.

Chairman Doherty commented on the term "substantial evidence". He asked for clarification of standards. County Counsel, Doug Olsen explained that there was no evidence provided in the first hearing, which was part of LUBA's issue. If there is conflicting evidence, then whichever is predominant would be considered "substantial".

Chairman Doherty asked for a motion to approve and add Exhibits #1-8, and the letter dated January 6, 2010 from Jim Pliska (Exhibit #9) to the record. The minutes of the December 8, 2009 Board meeting must also be approved.

Mr. Robinson asked that the last paragraph of Exhibit #9 be stricken because it is irrelevant to the issue today. Chairman Doherty noted that because no one is present to object to Mr. Robinson's request, he had no problem with striking the last paragraph. Commissioner Givens agreed.

Mr. Robinson clarified the grounds for striking the last paragraph was that he did not want to allow materials into the record that are beyond the scope of the remand. Mr. Robinson agreed.

Commissioner Givens moved to enter Exhibits #1-8 into the record. Chairman Doherty seconded. Motion carried.

Commissioner Givens moved approval of the minutes of December 8, 2009. Chairman Doherty seconded. Motion carried.

Commissioner Givens moved to strike the last paragraph of the letter from Jim Pliska and enter the letter into the record as Exhibit #9. Chairman Doherty seconded. Motion carried.

Chairman Doherty noted that the request of Exhibit #9 was that the hearing be continued, and if not continued, that the record be left open for 14 days to allow for additional evidence to be provided. He asked if Mr. Pliska was on the notice list. Ms. Mabbott replied that he was noticed, and the Affidavit of Mailing and notice list were available to confirm that. The notice was mailed December 18, 2009. Chairman Doherty noted that the letter was dated January 6, 2010, but does not advise the Board of any relevant facts from which the Board could make an informed decision as to the why the letter was not received by the applicant.

It was Commissioner Givens' inclination to deny the request to continue. Chairman Doherty agreed. Commissioner Givens moved to deny the request by Jim Pliska to continue the hearing and/or keep the record open for 14 days. Chairman Doherty seconded. Motion carried.

**Applicant Testimony:**

Michael Robinson, attorney representing Flying J, testified on their behalf. He noted that the entire LUBA record was before the Board and part of the record.

Mr. Robinson agreed with Mr. Olsen's definition of "substantial evidence". Chairman Doherty noted that it is a jury's role to weigh evidence and asked if that principal would apply here? Mr. Robinson replied that it would.

Mr. Robinson noted that, because the issue of a continuance was raised, he would add a couple of facts to support the Board's action. First he pointed out that that the Affidavit of Mailing was before the Board, and there is a statutory provision that says, if there is an Affidavit of Mailing, errors related to receipt of notice are not a basis for remand.

Second, when the hearing was originally scheduled, Mr. Robinson called Mr. Connors, who was counsel for Mr. Pliska. He left a voicemail at his business address at Davis Wright Tremaine, advising him of the hearing date and asking if it was acceptable, and asking him to return the call. Well before the mailing date for the notice Mr. Connor was made aware of the hearing date, although Mr. Robinson never heard back from Mr. Connor. Mr. Robinson noted that, even if Mr. Connors is not representing Mr. Pliska any longer, any attorney in good standing with the bar would have passed on that information. It would be malpractice not to.

Lastly, this is not the first evidentiary hearing, and it is only the initial evidentiary hearing that an open record or continuance request must be granted.

Mr. Robinson explained that the first remand issue had to do with the criterion in UCDO 152.154 (A), which requires that activities in the LI zone be screened from view unless they are conducted more than 500 feet from adjacent properties or roads. The activity in question was the truck scales, and prior to this hearing the applicant revised the configuration of their parking lot, moving the scales to the far west of the parking lot and the scales have been dimensioned so that they are more than 500 feet from all roads. Mr. Robinson asked that if approved, the Board impose a condition of approval requiring the applicant to construct its plans consistent with Exhibit #3.

Mr. Robinson went on to explain that Flying J consciously chose not to appeal Condition of Approval #9, which requires the applicant to coordinate and execute a Development Agreement outlining improvements and responsibilities to mitigate impacts of the development on adjacent roads, and to pay a proportionate share of improvements. He reminded the Board that the condition is still binding and Flying J has the obligation to have a Development Agreement that explains how the Lamb/Walker/Westland intersection will be improved prior to receiving final approval.

The LUBA remand requires that it be determined whether the correct ITE category was used for trip generation. The applicant asked Chris Clemow of Group Mackenzie to provide a report. Mr. Clemow felt the best way was to compare trip generations from three similarly situated and sized truck stops, and compare that to the trip generations one would get by using ITE category #945. The conclusion was that the ITE category comes up with more trips than the comparatives. That means that there is substantial evidence for the Board to find that the original traffic analysis is appropriate.

The second issue remanded by LUBA had to do with whether the Lamb/Walker/Westland intersection was already unsafe, or if it would be made unsafe or more unsafe by the proposal. They addressed that issue by looking at trip generations at peak hours, and looking at the objective standard of whether it is unsafe now, which

would be 1.0 crashes per million entering vehicles. Evidence shows that they have not hit that threshold, so it is not currently unsafe according to that standard. The relevant criterion under County Code is 152.616 BBB (2), which says the request cannot create a traffic hazard. Mr. Robinson believed there was substantial evidence that it won't, but he also noted Condition #9, which requires participation in a road improvement agreement. The Board could even find that the intersection was unsafe, but that the unsafe condition can be mitigated by the improvement agreement.

The last remand issue had to do with whether the proposal would create an undue burden on the public transportation system. The applicant believes the intersection is capable of handling the trips generated by the proposal, but the obligation of participation in the financing of reconstruction of the intersection is still there.

Mr. Robinson summarized that they have addressed the screening issue by moving the truck scales. They have provided substantial evidence demonstrating why ITE category 945 could be relied on, and they addressed the issue of whether the intersection is or would be made to be unsafe, or whether the application would impose undue burden on the County. They concluded that there is substantial evidence demonstrating that none of those things would occur. Even if they would occur, there is still Condition #9, requiring the applicant to assist the County in improving the intersection.

Mr. Robinson responded to Mr. Pliska's letter with respect to the comment about the ITE trip category. They looked at actual truck stops, and there is nothing in the letter to respond to why the comparables are not appropriate. They also do not agree that there is an existing traffic hazard at the intersection, but Condition #9 addresses that, and objective evidence is that the normal standard used to determine an unsafe condition is not met here.

Commissioner Givens asked where the scales were proposed to be moved to. Mr. Robinson referred to the original site plan and the new proposed site plan. They would be moved further south and west.

Chairman Doherty asked what it is about the screening requirement that makes it worth moving the scales rather than just screening them. Mr. Robinson explained that they could address the issue by just moving the activity, which is the clear and conservative way. Also, there is still a condition of approval in the subsequent conditions that requires outside storage areas be screened, which they are still bound to meet. LUBA was not sure that this condition met the UCDC requirement, so to eliminate any doubt they chose to just move the scales.

Chairman Doherty referred to the question of whether the intersection is unsafe now, wondering by what standard they believe that isn't unsafe. Mr. Robinson responded that they believe that objective evidence shows the road isn't unsafe, but referred back to Condition #9, which obligates the client to fix the intersection.

Regarding the screening, Chairman Doherty noted a reference to Mr. Robinson's December 22, 2009 letter. Mr. Robinson explained that the letter suggested a condition binding the applicant to develop the site plan consistent with the revised site plan.

**Opponent Testimony:**

None

**Agency Testimony:**

Chairman Doherty called upon Umatilla County Public Works Director, Tom Fellows and asked if he had a chance to review the TIA. If he had, and assuming that the current condition of the intersection is unsafe or questionable, did he think that what was proposed in the TIA was agreeable or was there anything that would make it unsafe? Mr. Fellows replied that it was his opinion that there was room to believe there is a generous impact on the safety of the intersection, given the additional traffic load.

Chairman Doherty asked if Mr. Fellow's concern was subject to mitigation of the Development Agreement. Mr. Fellows agreed. He believed that the applicant is heading in the right direction to make it manageable.

Chairman Doherty noted that Mr. Pliska's letter raised the question of whether the traffic count methodology was adequate. Mr. Fellows replied that his opinion was that the comparables were good choices, but he is not a traffic engineer and is not familiar enough with the ITE mechanism to give an opinion on that part of it.

Chairman Doherty noted that Mr. Pliska also asserted that the traffic counts were not reliable because there was not enough evidence that the studies were conducted during peak traffic hours. Mr. Fellows replied that it appeared to him that they took a good sampling of hours. Ms. Mabbott added that she and Hal Phillips, Mr. Fellows' predecessor, had consulted with Mackenzie Group about the comparables, but she had not disclosed that to Mr. Fellows. They had concurred with the comparables that were selected and that they were appropriate. She noted that their traffic count was taken on October 14, 2009, which also tends to be a higher traffic time because of harvest.

Chairman Doherty asked if it was Mr. Fellows' judgment that the proposal would not make the intersection worse. Mr. Fellows replied that, given the layout of the intersection right now, no.

**Rebuttal Testimony:**

Mr. Robinson called on Chris Clemow with Group Mackenzie to testify. Mr. Clemow addressed trip generation and safety, noting that both issues were covered in depth in the analysis.

Mr. Clemow began with trip generation, explaining that the ITE has specific criteria to determine trip generation rates for facilities. They suggest using the body of data provided in the ITE manual or collecting data from comparable facilities. In this case, there is no specific data for facilities of this nature, so they collected data from three

comparable facilities in a manner consistent with ITE recommendation. They consulted with County Planning staff and the Road Department, and found that the trip generation rate is actually less than, but consistent with, what was previously assumed in the analysis. Therefore, the capacity related items in the original analysis are accurate and actually conservative.

Mr. Clemow then addressed safety, explaining that it is not a clear term. Traffic engineers typically look at capacity, cueing and safety. There are clear and objective standards for capacity and cueing, but not for safety. Mr. Clemow pointed out that, because neither the County nor ODOT have a standard or criteria defining a safe or unsafe intersection they used information in the 2007 ODOT Analysis Procedures Manual, which states that “when an intersection crash rate may be appropriate to report, a rule of thumb is that intersections with a crash rate of 1.0 or greater are generally considered to be an indication that further investigation is warranted.” It does not speak to safe or unsafe, just that further investigation is warranted.

Mr. Clemow further explained that adding or subtracting traffic does not inherently increase a crash rate. The biggest issue is driver expectancy. The original analysis indicated that the crash rate was marginally above the 1.0 threshold, but going back to the most recent five years of data, it found that the crash rate was actually down to 0.66.

Commissioner Givens asked what constitutes a crash. Mr. Clemow replied that it is a crash that has been recorded and documented. The keeper of all crash data in the State of Oregon is ODOT. Ms. Mabbott added that the study used ODOT crash records.

Chairman Doherty asked County Counsel what kind of finding the Board was expected to make. After clarification from Counsel, Chairman Doherty stated that they would make a finding as to whether or not there is substantial evidence to support a conclusion that the additional traffic will not significantly decrease the safety of the intersection or significantly increase the crash rate. Ms. Mabbott suggested the Board could make that finding provisionally; agreeing with the substantial evidence finding in conjunction with Condition #9.

Chairman Doherty understood that in order to approve the request the Board would have to conclude that the change proposed to move the scales would satisfy the 500 foot requirement, and that the additional information provided by the TIA and testimony is acceptable, with sufficient, acceptable comparables. Also, that the additional daily trips generated would add some impact to the nearby intersection, but there is substantial evidence in the record to support the conclusion that the additional traffic would not significantly decrease the safety of the intersection or significantly increase the crash rate. Mr. Olsen added that the Board may also conclude that the facility will function safely with the proposed development because it implies Condition #9 is met. As part of the conditions of the development there will be mitigation of impacts.

Mr. Robinson noted the question in Mr. Pliska’s letter about the hours used in the comparables study. Exhibits to the November 11, 2009 study show that they examined

the three comparable truck stops during both the AM and PM peak hours on October 14, 2009; so there is substantial evidence to demonstrate that they conducted counts at appropriate times.

Mr. Robinson also noted that they recommended an additional condition of approval. He reiterated the testimony of Mr. Fellows and Ms. Mabbott.

Mr. Robinson asked that the Board approve the request based on written and oral testimony, and if approved, the applicant would prepare draft finding for Board approval and adoption.

**Hearing Closed: Deliberation and Decision:**

Commissioner Givens stated that, based on testimony, he would be in favor of moving forward with the request.

Chairman Doherty explained that he continued to have concern about the indications in the record that the intersection is currently safe. He understood that there is apparently no binding definition for safety, and ODOT is the keeper of the record, but he does not believe that database is reliable. In terms of the work he feels needs to be done to make the intersection safe and adequate to accommodate the increased traffic generated, he has a strong interest in assuring that it proceeds. He would conclude that there is substantial evidence to support the findings discussed and he would support a motion to approve the remand and direct staff to prepare findings.

In the matter of approving on remand Flying J Inc. Conditional Use Request #C-1103-05, Commissioner Givens moved approval of Order #BCC2010-006. Commissioner Doherty seconded. Motion carried.

**ADJOURNMENT:**

The meeting was adjourned at 2:58 p.m.

Respectfully submitted,

Heather Haueter  
Secretary