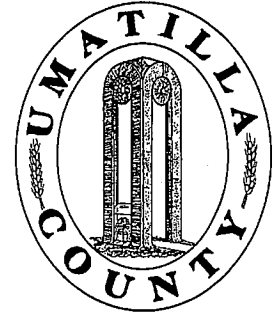


# Umatilla County

Department of Land Use Planning

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## AGENDA

**Umatilla County Planning Commission  
Public Hearing  
Thursday, October 24, 2013, 6:30 p.m.  
Justice Center Media Room  
Pendleton, OR**

### **Members of Planning Commission**

Randy Randall, Chair  
Gary Rhinhart, Vice-Chair  
John Standley  
Tammie Williams  
Don Wysocki  
David Lee  
Don Marlatt  
Suni Danforth

### **Members of Planning Staff**

Tamra Mabbott, Planning Director  
Carol Johnson, Senior Planner  
Richard Jennings, Senior Planner

### **1. Call to Order**

### **2. Approval of Minutes**

Minutes of September 26, 2013

### **3. Public Hearing:**

APPEAL OF CONDITIONAL USE PERMIT, #C-1226-13 Notice of Appeal of a County Planning Director decision has been submitted by ROBERT R. BERRY and HELEN RESER BAKKENSEN TRUST. The original application requests a conditional use permit to establish an Asphalt Batch Plant by HUMBERT ASPHALT on Assessor Map 6N 36 tax lot 4600 with the rural addresses on the parcel being 57445 and 57491 Birch Creek RD, Milton-Freewater, OR 97862. The conditional use permit was APPROVED by the County Planning Director on September 18, 2013. Subsequently, a NOTICE OF APPEAL was received from Robert R. Berry and Helen Reser Bakkensen Trust, John Reser Bakkensen Trustee on October 3, 2013. The reasons for the appeal are outlined in the Notice of Appeal. The standards of review for the conditional use permit are found in the Umatilla County Development Code, Section 152.060 (B) (3), 152.061, 152.615 and 152.617 (I) (A) *Asphalt Plant*.

### **4. Adjourn**

### **Next Scheduled Meeting:**

Thursday, November 14, 2013, 6:30 p.m., Justice Center Media Room, Pendleton, OR – Joint meeting with the Board of Commissioners re: Building Codes

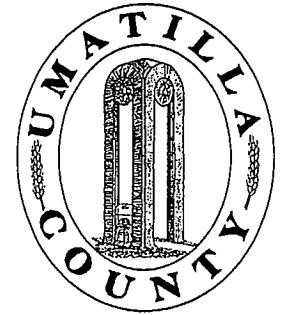


MEMO  
TO  
PLANNING  
COMMISSION



# Umatilla County

Department of Land Use Planning



DIRECTOR  
TAMRA MABBOTT

October 17, 2013


LAND USE  
PLANNING,  
ZONING AND  
PERMITTING

MEMO

CODE  
ENFORCEMENT

TO: County Planning Commission

SOLID WASTE  
COMMITTEE

FROM: Richard H. Jennings, Senior Planner 

SMOKE  
MANAGEMENT

RE: Appeal submitted by Robert Berry and Helen Reser Bakkensen Trust of the Conditional Use Permit, #C-1226-13, Humbert Asphalt, INC. requesting to establish an Asphalt Batch Plant

GIS AND  
MAPPING

RURAL  
ADDRESSING

LIAISON, NATURAL  
RESOURCES &  
ENVIRONMENT

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An application to establish an asphalt batch plant was received from Humbert Asphalt INC. July 31, 2013. The asphalt batch plant is proposed to be placed in an existing rock pit along Birch Creek Road some 6.5 miles east of Milton-Freewater.

The conditional use permit was reviewed administratively and sent out for comment on August 7, 2013 to adjacent property owners and affected governmental agencies. The end of the comment period was August 28, 2013. A comment letter was received from Robert Berry on August 27, 2013. In this comment letter he outlined several points that were concerning to him. At that time, he did not ask for a public hearing. Subsequently, the preliminary decision was made to approve the application.

It is important to understand that the conditions placed on any permit issued by the County have to be connected to either an adopted standard or policy or to reasonable and rational evidence<sup>1</sup>. The appellants (Mr. Berry and Mr. Bakkensen) continuously express their opinion that the planning staff did not provide any evidence to support conclusions or conditions. The findings do show evidence to support the conclusion and conditions with available information. Certainly more data and information could have been utilized, but

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<sup>1</sup> Oregon State Bar Legal Publication, *Land Use 2010 Edition*, (§14.114) Limits on Conditions of Approval

"It has long been held that when the evidentiary basis for a condition is challenged, the reviewing authority must find that "evidence in the record could lead a reasonable person to conclude that considering the impacts of the proposed development there is a need for the condition to further a legitimate planning purpose." *Sherwood Baptist Church v. City of Sherwood*, LUBA No. 92-207, 24 Or LUBA 502, 505 (1993). Similarly, the local government must adopt findings addressing its legal authority to impose a condition if a legitimate issue about such authority is raised. *Commins v. Washington County*, LUBA No. 91-068, 22 Or LUBA 129, 131-133 (1991), *aff'd on other grounds*, 110 Or App 468 (1992); *Pac West II, Inc. v. City of Madras*, LUBA No. 2006-169, 53 Or LUBA 241, 245-246 (2007)."



were not found to be necessary to support the findings.

The Notice of Appeal was then received on October 3, 2013 from Mr. Berry and Mr. Bakkensen outlining their objections. The Appeal lists five main points. Planning staff did not respond to each point, but each will be discussed during the hearing.

The public hearing will mainly include a discussion on the points of their appeal. Representatives from the appellants and the applicant will be in attendance to present their points of view.





PLANNING COMMISSION  
HEARING

*Appeal of Conditional Use Permit*

*#C-1226-13 for*

*Humbert Asphalt*

October 24, 2013



October 2, 2013

Richard Jennings  
Senior Planner  
Department of Land Use Planning  
Umatilla County  
216 S.E. 4<sup>th</sup> Street  
Pendleton, Oregon

Dear Mr. Jennings:

I am writing to enclose the Appeal in the matter of the Conditional Use Permit for an Asphalt Plant Request #C 1226-13 for Map #6N 36 Tax Lot #4600 by Humbert Asphalt.

I have also enclosed a signed "Notice of Appeal" and a check in the amount of \$250.

Sincerely,

*Robert Berry*

Robert Berry  
P.O. Box 335  
Barnstable, MA 02630

RECEIVED

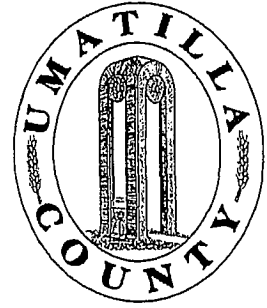
OCT 03 2013

UMATILLA COUNTY  
PLANNING DEPARTMENT

# Umatilla County

Department of Land Use Planning

216 SE 4<sup>th</sup> ST, Pendleton, OR 97801, (541) 278-6252



## Notice of Appeal

Process taken from UCDC 152.766

### APPEALS

(A) An appeal from a ruling of the Planning Director. An appeal of an administrative review decision or a ministerial action on a land use request made by the Planning Director or authorized agent shall be made to the Planning Commission. Such appeals must be made within 15 days of the date of the ruling or decision.

(B) An action or ruling of the Planning Commission pursuant to this chapter may be appealed to the County Board of Commissioners within 15 days after the Planning Commission has signed its findings of facts and conclusions of law.

(1) If the appeal is filed it shall be in writing *stating the reasons for appeal* pursuant to the criteria for review.

(2) The County Board of Commissioners shall receive the written findings of the decision and the minutes from the Planning Commission hearing and shall hold a public hearing on the appeal.

(3) The Board may amend, rescind, affirm or remand the action of the Planning Commission.

(C) All appeals shall be made in writing, accompanied by the appropriate fee, and shall state the reasons for the appeal and the alleged errors made on the part of the Planning Director or authorized agent or the Planning Commission. If the decision being appealed utilized criteria for review established elsewhere in this chapter, the reasons for the appeal shall be stated pursuant to these criteria.

(D) All appeals shall be on a de novo basis. The body hearing the appeal shall be able to receive any additional testimony presented by the applicant or proponent.

(E) Appeals of a Board of Commissioners decision shall be made to the Land Use Board of Appeals within 21 days of the date of the decision. Such appeals shall not be based on issues that are not raised at the local hearings with "sufficient specificity" as to afford the decision-makers and parties involved an opportunity to respond to the issue.

### FILING FEE

Filing of an Appeal - \$800.00

(Effective July 1, 2007 via Ord. #2007-06)

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It is the responsibility of the applicant to submit a complete application with all necessary attachments. Planning staff can refuse an incomplete application.

Version: February 20, 2009  
File Location: H:\shared\FORMS\_Master\Appeal\_Notice.doc

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## Section 1: Request and Description of Application

This information deals with the Land Use Request Application that an Appeal is being filed against.

THE REQUEST IS FOR... (Check the one that applies)

- an Appeal to the Planning Commission from a decision of the Planning Department  
 an Appeal to the Board of Commissioners from a decision of the Planning Commission

### DESCRIPTION OF THE LAND USE REQUEST APPLICATION IN QUESTION:

- Land Use Request Application File Number: REQUEST NO. C122613
- Type of Land Use Request Application: CONDITIONAL USE PERMIT REQUEST
- Decision-Making Body:  Planning Director or  Planning Commission
- Date of Decision (date on Findings): SEPT. 18, 2013
- Date you received notice of the decision or learned of the decision: SEPT. 24, 2013  
(ROBERT BERRY)

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## Section 2: Contact Information

Name of Appellant(s): JOHN RESER BAKKENSEN as TRUSTEE for  
HELEN RESER BAKKENSEN TRUST

Address: 1141 S.W. MITCHELL LANE

City, State, Zip: PORTLAND, OREGON 97239

Telephone Number & Email 503-245-0385

Address: jrbaakfen@aol.com

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Date of Submittal for the Appeal: OCT. 2, 2013

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### **Section 3: Basis of Appeal**

Complete only when appealing a decision made by the Planning Department or Planning Commission.

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The Appeal is based on the belief that certain policies and/or procedures of the Comprehensive Plan and/or provisions of the Development Code were not properly administered or followed. Please specify the chapter, section and page numbers of the Comprehensive Plan and/or Development Code where the policies and/or procedures are found; as well as a narrative explaining the issues that the Appeal is based upon (*use additional pages if necessary*):

PLEASE SEE ATTACHED DOCUMENT.

## Section 4: Certification

I/We, the undersigned, swear under penalty of perjury that the above responses are made truthfully and to the best of my knowledge.

X Robert R. Berry Oct. 2, 2013  
Signature of Appellant Date

ROBERT R. BERRY  
Printed Name of Applicant

X John Reser Bakkenen as Trustee for Helen Reser Bakkenen Trust /rb Oct. 2, 2013  
Signature of Appellant Date

JOHN RESER BAKKENEN AS TRUSTEE FOR HELEN RESER BAKKENEN TRUST  
Printed Name of Applicant

X \_\_\_\_\_  
Signature of Appellant Date

\_\_\_\_\_  
Printed Name of Applicant

X \_\_\_\_\_  
Signature of Appellant Date

\_\_\_\_\_  
Printed Name of Applicant

### Office Use Only

Date this paperwork was received: \_\_\_\_\_

Accepted by: \_\_\_\_\_  
*Signature of Planning Staff & Printed Name*

Fee Paid?  Yes  No

Receipt Number: \_\_\_\_\_

This is an Appeal from a decision of the Umatilla County Planning Department dated September 18, 2013, which provides "Tentative" Final Approval for a Conditional Use Permit for Request #C 1226-13 to establish an Asphalt Batch Plant in an existing aggregate site (Map #6N 36, Tax Lot #4600). The proposed site is located approximately 6.5 miles east of State Highway 11 on Birch Creek Road with a site address of 57445 and 57491 Birch Creek Road, Milton-Freewater, Oregon.

Applicant:

The Applicant is Humbert Asphalt, Inc., of 84899 Highway 11, Milton-Freewater, Oregon. The Owner of the aggregate site is Barbara Kenney et al., c/o Kenney Farms, Inc. of 3629 Braden Road, Walla Walla, Washington.

Appellants:

The Appellants, Helen Reser Bakkensen Trust and Robert R. Berry, are co-owners of an undivided one-half interest in the abutting farmland located at 84205 Hood Road, Milton-Freewater, Oregon (Tax Lot Nos. 5N 3600-00-00500U2 and 6N 3600-00-08200U2).

Statutes and Code Cited:

Umatilla County Code Sections: 152.055; 152.060; 152.061; 152.615; 152.616; 152.617; ORS 215.283 and ORS 215.301.

Partial Summary of Appeal:

The "Tentative Final Approval for a Conditional Use Permit" (referred to below as the "Permit Approval") contains errors of fact and law as well as unsupported findings and conclusions in the analysis of Umatilla County Land Development Ordinance Sections 152.060 and 152.061. The Permit Approval for the location of an asphalt plant abutting agricultural land does not give due consideration to and indeed directly conflicts with Umatilla County's stated objectives in Code Section 152.055 to "preserve and maintain agricultural lands for farm use, including range and grazing uses, consistent with existing and future needs for agricultural products, forest and open spaces; to conserve and protect scenic resources; to maintain and improve the quality of air, water and land resources of the county...." (Emphasis Added.)



Detrimental Environmental Effects on Domestic Water Source for Ranch of Adjoining Property Owners: Appellants not only own abutting farm land which the proposed plant will pollute but also own an historic water right to a natural spring at the head of Birch Creek less than one mile from the plant location, which the plant will also pollute. Appellants object to the proposed siting of a hot mix asphalt batch plant along Birch Creek Road, because of the potentially dire environmental consequences on Birch Creek and more particularly to the spring located at the head of Birch Creek from which the domestic water is obtained for the adjacent ranch property owned by Appellants. It is uncontroverted that hot mix asphalt plants emit carcinogenic hazardous air pollutants (HAPs) and polycyclic aromatic hydrocarbons (a subclass of HAPs) and metallic HAPs such as arsenic, lead, and mercury. The natural spring from which the domestic water is taken for the adjacent ranch is located only about 4,500 feet from the proposed asphalt batch plant. The water right, which Appellants wish to have fully protected from environmental contamination, dates to 1894. The water right was judicially confirmed by a Decree dated May 16, 1932 and signed by Judge Calvin L. Sweek of the Circuit Court of Umatilla County, Oregon. A Certificate of Water Right was also issued by the State Engineer on April 5, 1940 and recorded in Volume 11, page 13150 of the State's Record of Water Right Certificates. This water right may be reviewed at the following State of Oregon Internet link:

[http://apps.wrd.state.or.us/apps/wr/wrinfo/wr\\_folder\\_image.aspx?snp\\_id=65539](http://apps.wrd.state.or.us/apps/wr/wrinfo/wr_folder_image.aspx?snp_id=65539)

Detrimental Environmental Effects on Birch Creek: The Tentative Findings and Conclusions of Umatilla County's Planning Director acknowledge that Birch Creek is only 30 to 50 feet away from Birch Creek Road [page 9 of 12]. Birch Creek is located down slope from Birch Creek Road, and Birch Creek Road is located down slope from the proposed hot mix asphalt plant site with its two large access haul roads cut into the rock outcropping. The topography of the area is a natural canyon with Birch Creek at the low point and the proposed hot mix asphalt plant to be located on higher ground. It is clear beyond doubt that carcinogenic emissions from the batch plant initially deposited on the ground at the site of the quarry will become waterborne in each heavy rain event or "cloudburst" and find transport by gravity to Birch Creek. Appellants' concern is not limited to the harmful solids and liquid materials that the asphalt batch plant will produce and that will seep into the surrounding grounds but some of the noxious chemical molecules produced by the asphalt plant have high vapor pressures and will easily evaporate and condense around the cold flowing waters of nearby Birch Creek. The Planning Commission needs to protect the quality of Birch Creek waters that originate in the depths of the Blue Mountains, and join the Walla Walla River as a tributary, and then onto the mighty Columbia River. Birch Creek as a tributary of a navigable stream is subject to the Federal Clean Water Act and all of its considerable protections.

Detrimental Environmental Effects on Agricultural Land: The science is clear that wheat can be environmentally contaminated by polycyclic aromatic hydrocarbons

(PAHs). Many PAHs are mutagenic and carcinogenic to mammals. Hot mix asphalt plants are a point source for PAHs. Can siting a smoking, belching hot mix asphalt plant next to historic wheat fields in the foothills of the Blue Mountains be considered good and enlightened land use policy? Umatilla County has already spoken to this issue in its policy statement defining the purposes of the Exclusive Farm Use Zone [Section 152.055]: “to preserve and maintain agricultural lands for farm use...” and “to maintain and improve the quality of air, water and land resources of the county....” Does Umatilla County wish to be known as the sole source of genetically modified wheat resistant to Roundup® weed killer as well as wheat contaminated with PAHs? How will Japanese, Korean or other international wheat buyers react when they learn of this new variety of environmentally contaminated wheat?

Appeal:

1.0 Appellants contend that the Permit Approval errs in its analysis and interpretation of Umatilla County Code Section 152.060, entitled “Conditional Uses Permitted”. (See page 4 of 12 in “Findings and Conclusions” of the Permit Approval.)

1.1 Summary of Error

The Permit Approval errs by restricting its analysis to Section 152.060 and by not considering Section 152.060 within the context of Section 152.055, which states that one of the purposes of an Exclusive Farm Use Zone (EFU) is “to maintain and improve the quality of air, water and land resources of the county”.

Detailed Analysis:

Section 152.056 lists a number of “Uses Permitted Outright” in an EFU, and Section 152.060 lists “Conditional Uses Permitted” in an EFU. Under both ORS 215.283 (2)(b)(C) and Umatilla County Code Section 152.060, an asphalt plant is only potentially permissible as a conditional use within an Exclusive Farm Use (EFU) Zone after administrative review by the governing body. By strictly limiting the number and types of uses, the Oregon Revised Statutes and Umatilla County Land Development Ordinance clearly do not favor the location of such conditional uses within an EFU. As disfavored uses, they deserve stricter scrutiny by the local governing body, and ORS 215.283 (2)(b)(C) is explicit on this point when it states that “The following nonfarm uses may be established, subject to the approval of the governing body....” Moreover, ORS 215.301 and Section 152.060 prohibit the location of an asphalt plant within two miles of a planted vineyard, which implies that there is a legal presumption that the asphalt plant inflicts harm on the grapes of a vineyard, at least within that radius.

An asphalt plant generates hazardous air pollutants (HAPs). (EPA *Hot Mix Asphalt Plants: Emission Assessment Report*, EPA-4-454/R-00-019; December 2000). These HAPs include polycyclic aromatic hydrocarbons (PAHs), which are known carcinogens. (Environmental Protection Agency, "Evaluation and Estimation of Potential Carcinogenic Risks of Polynuclear Aromatic Hydrocarbons" 1985; K. Srogi, "Monitoring of Environmental Exposure to Polycyclic Aromatic Hydrocarbons: a Review," *Environmental Chemical Letters*, 2007, vol. 5, p. 169). PAHs do accumulate in the soil and are present in crops, with wheat crops as one example. (Kobayashi, et al., "Polycyclic aromatic hydrocarbons in edible grain: A pilot study of agricultural crops as a human exposure pathway for environmental contaminants using wheat as a model crop," *Environmental Research*, 2008, vol. 107, pages 145-151).

As stated, an asphalt plant is only a potential conditional use within an EFU Zone subject to administrative review and scrutiny by the governing body. As noted above, Section 152.055 states that "The purposes of an EFU, Exclusive Farm Use Zone, are to preserve and maintain agricultural lands for farm use...to conserve and protect scenic resources; to maintain and improve the quality of air, water and land resources of the county...." Clearly, the presence of an asphalt plant will degrade, and not improve, the air quality in an EFU Zone.

Section 152.060 of the Umatilla County Land Development Ordinance lists the potential conditional uses within an EFU and this list includes an asphalt plant in Subsection (B)(3). Either the County Land Development Ordinance contains mutually inconsistent provisions (as shown above) or the County must apply additional scrutiny to the location of an activity which emits environmentally harmful, carcinogenic contaminants in an EFU Zone. Such administrative scrutiny might include requiring the Applicant to show that another location, not within an EFU, is at least as suitable, such as in the East County industrial lands identified in the County Plan (p.18-377).

## 1.2 Summary of Error

The Permit Approval further errs in its analysis and interpretation of Umatilla County Code Section 152.060, entitled "Conditional Uses Permitted". (See page 4 of 12 in "Findings and Conclusions" of the Permit Approval.) The Permit Approval errs by applying an overly broad interpretation of the Code Section which prohibits an asphalt plant within two miles of a vineyard.

### Detailed Analysis:

In its interpretation and application of Section 152.060 entitled "Conditional Uses Permitted", the Permit Approval states that "Processing, as defined by ORS 517.750, of aggregate into asphalt or Portland cement as provided in § 152.617 (I)(A). New uses that batch and blend mineral and aggregate into asphalt cement may not be authorized within two miles of a planted vineyard. Planted

vineyard means one or more vineyards totaling 40 acres or more that are planted as of the date the application for batching and blending is filed; and The Umatilla County Planning Department finds that the proposal is for an asphalt batch plant. The existing pit covers some 3-4 acres and material will be extracted, crushed and batched into asphalt within the existing site. The closest vineyard to the proposed asphalt plant location is more than four miles away (Telephone Pole Road area). Thus, there are no vineyards located within two miles of the proposed asphalt plant location."

The Permit Approval cites Umatilla County Code Section 152.060 (B)(3) which states in relevant part: "New uses that batch and blend mineral and aggregate into asphalt cement may not be authorized within two miles of a planted vineyard. Planted vineyard means one or more vineyards totaling 40 acres or more that are planted as of the date the application for batching and blending is filed."

The Permit Approval interprets this Code Section too broadly. The Permit Approval interprets this Code Section as implicitly authorizing the location of an asphalt plant which is not within two miles of planted vineyards totaling 40 acres, but this Section only prohibits authorizing a plant within two miles, nothing more. This Code Section is silent on authorizing an asphalt plant in other cases; this Section neither authorizes nor prohibits asphalt plants in other cases. Moreover, this Section reinforces the disfavored status of asphalt plants by specifically prohibiting an asphalt plant within two miles of a planted vineyard.

### 1.3 Summary of Error

Appellants contend the Permit Approval commits a factual error in stating that the closest vineyard is over four miles away. The closest vineyard to the proposed asphalt batch plant is less distant.

#### Detailed Analysis:

The Permit Approval states that the nearest vineyard is over four miles away in the Telephone Pole Road area. This is factually incorrect. Based upon information supplied by a local rancher and belief, one planted vineyard is located about three miles away on Hood Road on the Washington side of the state line and another vineyard identified as DeWitts is situated about 2 ½ miles from the proposed asphalt plant site.

### 1.4 Summary of Error

The Permit Approval further errs by failing to perform a factual analysis as required by Umatilla County Code Section 152.060. Like ORS 215.301, although seemingly explicit, the language of Umatilla County Code Section 152.060 does not contain a "bright line" test. Instead, this Code Section requires analyzing the individual fact situation. The Permit Approval erred by omitting a factual analysis

of the impact of the proposed plant on nearby vineyards although these vineyards are not within the two mile radius but are quite close to the proposed asphalt batch plant and will be affected by the environmental contaminants carried by air currents.

Detailed Analysis:

Appellants note that Umatilla County Code Section 152.060 (B)(3) is nearly identical to ORS 215.301 entitled "Blending materials for cement prohibited near vineyards," which prohibits the siting of an asphalt plant within two miles of a planted vineyard. As stated above, Oregon land use law requires local planning authorities to enact land development codes consistent with State law and County Section 152.060 (B)(3) is nearly identical to ORS 215.301. Thus, the typical appellate court deference given to local interpretations of local code is not apposite where the local code is directly derived from a State statute; in that circumstance the State has an interest in uniform interpretation.

Moreover, according to a representative of the State Archives, there is no legislative history of committee hearings pertaining to the development of the language contained in ORS 215.301, which means there is no legislative history of intent and no support for either a narrow or broad interpretation. In this case, interpretation must rely solely on the language of the statute. Like ORS 215.301, Code Section 152.060 (B)(3) references a specific activity, vineyards, and a specific radius, two miles, which taken together could imply a "bright line" test. However, some examples show that this Section cannot be reasonably applied without consideration of the specific factual situation. As noted above, this Section prohibits the location of an asphalt plant within two miles of a planted vineyard, which implies that there is a legal presumption that the asphalt plant inflicts harm on the grapes of a vineyard, at least within that radius.

Consider the case of an asphalt plant proposed within two miles of a 40 acre or larger vineyard but where only 20 acres of the vineyard lie within two miles. Permitting a conditional use for an asphalt plant in such a case would result in substantial harm to the portion of the vineyard within the two mile radius and diminution in the economic value of the farming operation. Such a result surely conflicts with the purposes of the EFU Zone and Code Section 152.055 that encourage and support agricultural uses.

Next consider two contrasting cases: (a) an asphalt plant is proposed within two miles of a 40 acre or larger vineyard, but in a deep valley which isolates the asphalt plant from the vineyard with the prevailing wind blowing away from the vineyard; and (b) an asphalt plant is proposed at slightly more than two miles distant from a vineyard but in a valley upwind of the vineyard. In applying Section 152.060, should the difference between these fact situations be ignored?

Finally, consider the case where an asphalt plant is proposed within two miles of a 40 acre field containing a crop which is at least as environmentally sensitive as a grape vineyard. Does Section 152.060, or more generally Umatilla County's Land Development Ordinance, say nothing in such a case?

2.0 Appellants contend that the Permit Approval errs in its analysis and interpretation of Umatilla County Code Section 152.061, entitled "Standards for All Conditional Uses". (See pages 4-5 of 12 in "Findings and Conclusions" of the Permit Approval.) The Permit Approval errs in not presenting analysis or facts to support its conclusion that the proposed asphalt plant will not force a significant change in accepted farming practices and will not significantly increase the cost of accepted farm practices. The Permit Approval also errs in adopting a narrow definition of the word "practices" and not presenting an analysis of the impact of the plant on future agricultural practices or activities in the nearby fields where Code Section 152.055 supports such an analysis of "future needs".

2.1 The Permit Approval errs in not presenting analysis or facts to support its conclusion that the proposed asphalt plant will not force a significant change in accepted farming practices. Moreover, the Permit Approval errs in adopting a narrow definition of the word "practices" and in not recognizing the impact of "future" uses for nearby fields within the EFU Zone, which could include a vineyard.

In its interpretation and application of Section 152.061 entitled "Standards for All Conditional Uses", the Permit Approval states that "The following limitations shall apply to all conditional uses in an EFU zone. Uses may be approved only where such uses:

(A) Will not force a significant change in accepted farm or forest practices on surrounding lands devoted to farm or forest use; and the Umatilla County Planning Department finds that the batching of asphalt will not force a significant change in accepted farm practices on surrounding lands devoted to farm use. As previously described, the property contiguous to the mining site is farmed in dry land wheat. Dry land peas and beans have also been grown in the general area as well as the grazing of livestock. The site is located in an area on the parcel that has never been farmed and is a rocky outcropping of surface rock. The location of the rock pit is in a valley or gully where there are steep slopes along both sides of the roadway. Thus, farming of land around the rock pit takes place far away from the development site. Farming practices of the adjacent farmland have been in place for decades and no change to farming practices (i.e., crop patterns, crop rotation, farm equipment movement, etc.) will occur because of the proposed processing—asphalt plant. There will be no change to how the farming will occur on the adjacent farm fields because the site for the asphalt plant has direct access to Birch Creek Road and will not cause a disruption to any existing farm field. The road is a county road and is a paved roadway that is constructed to handle large truck traffic and since it is paved will not create

additional dust from the movement of large trucks on the roadway. Other effects from the asphalt plant (noise, dust and odor and emissions) will be monitored by the Department of Environmental Quality through the Air Quality program. Therefore, insofar as the plant operates in compliance with the DEQ ACD Permit, the County recognizes the air quality will not impact farming practices in the area. Copies of these permits must be provided to the County Planning Department. Other State and Federal permits necessary for the operation of an asphalt plant are also required to be obtained and copies of such permits and restrictions provided to the County Planning Department."

2.1.1 The Permit Approval errs in advancing a conclusion and providing no evidence for its statement that "The Umatilla County Planning Department finds that the batching of asphalt will not force a significant change in accepted farm practices on surrounding lands devoted to farm use."

2.1.2 The Permit Approval errs in its statement that "The site is located in an area on the parcel that has never been farmed and is a rocky outcropping of surface rock. The location of the rock pit is in a valley or gulley where there are steep slopes along both sides of the roadway. Thus, farming of land around the rock pit takes place far away from the development site." These statements conflate the alleged lack of farming history on the proposed site with the farming activity on abutting sites. Moreover, the use of the phrase "far away" is undefined and the Permit Approval simply repeats the conclusion that no change in farming practices will occur without presenting evidence or analysis in support.

2.1.3 The Permit Approval errs in providing an illogical condition subsequent when it states that "Farming practices of the adjacent farmland have been in place for decades and no change to farming practices (i.e., crop patterns, crop rotation, farm equipment movement, etc.) will occur because of the proposed processing—asphalt plant." The fact that the history of farm activity has allegedly been stable has no necessary implication for any future change in farm practices in general or in response to the proposed location of the asphalt plant. The Permit Approval provides no analysis to support its conclusion that there will not be a significant change in farming practices in response to the location of the plant. Moreover, this statement is factually incorrect because farming practices have recently changed. Given the decline in the demand for green peas, some farms in the area including the farm in which the Appellants have an interest have changed their practices from a wheat-green pea rotation to a wheat-recrop-fallow rotation.

2.1.4 The Permit Approval errs in analyzing farm practices in terms of traffic patterns when it states that "There will be no change to how farming will occur on the adjacent farm fields because the site for the asphalt plant has direct access to Birch Creek Road and will not cause a disruption to any existing farm field." However, if the Permit Approval intends to comment only on traffic impacts, then the Permit Approval errs by not providing a projected traffic

analysis to support its conclusion which states “The road is a county road and is a paved roadway that is constructed to handle large truck traffic and since it is paved will not create additional dust from the movement of large trucks on the roadway.”

2.1.5 The Permit Approval errs in the statement “Other effects from the asphalt plant (noise, dust and odor and emissions) will be monitored by the Department of Environmental Quality through the Air Quality Program. Therefore, insofar as the plant operates in compliance with the DEQ ACD permit, the County recognizes the air quality will not impact farm practices in the area.” This statement errs in at least three ways. First, it relinquishes the County’s authority for air quality impacts to the DEQ without analysis. Second, it does not acknowledge that the DEQ adopts an EPA standard which does not control for local impacts to sensitive areas. Third, DEQ has authority over point sources which emit pollutants and at least has no direct authority over “noise” or “odor”. By relinquishing authority to the DEQ in the case of one activity, the Permit Approval errs in not separating those activities where the County can relinquish authority from those activities where it should not such as the location of an asphalt plant adjacent to a school or a hospital or a valuable domestic water source for a ranch (as in this Appeal).

Pursuant to Code Section 152.615 (A), Umatilla County has an affirmative duty to impose conditions and restrictions to limit and “minimize” environmental effects such as “noise, vibration, air pollution, water pollution, glare or odor.” (Emphasis Added.) Likewise, Umatilla County has an affirmative duty pursuant to Code Section 152.616 (C)(4) [specifically dealing with asphalt plants] to assure that “The operation complies with all applicable air, noise, and dust regulations of all county, state or federal jurisdictions; and all state and federal permits are obtained before the activity begins.”

This Appeal relates to three extremely sensitive natural resources: (a) a natural spring at the head of Birch Creek to which Appellants have judicially recognized rights to draw water for domestic use and other purposes; (b) Birch Creek itself, a year-around waterway that is a tributary of the Walla Walla River and the Columbia River and thereby subject to the Federal Clean Water Act; and (c) agricultural lands that have been continuously devoted to the production of wheat and other crops for over a century by the Reser family.

It is uncontroverted that hot mix asphalt plants emit carcinogenic hazardous air pollutants (HAPs) and polycyclic aromatic hydrocarbons (a subclass of HAPs) and metallic HAPs such as arsenic, lead, and mercury. The natural spring from which the domestic water is taken for the adjacent ranch is located only about 4,500 feet from the proposed asphalt batch plant. The water right, which Appellants wish to have fully protected from environmental contamination, dates to 1894. The water right was judicially confirmed by a Decree dated May 16, 1932 and signed by Judge Calvin L. Sweek of the Circuit Court of Umatilla



County, Oregon. A Certificate of Water Right was also issued by the State Engineer on April 5, 1940 and recorded in Volume 11, page 13150 of the State's Record of Water Right Certificates. This water right may be reviewed at the following State of Oregon Internet link:

[http://apps.wrd.state.or.us/apps/wr/wrinfo/wr\\_folder\\_image.aspx?snp\\_id=65539](http://apps.wrd.state.or.us/apps/wr/wrinfo/wr_folder_image.aspx?snp_id=65539)

The Tentative Findings and Conclusions of Umatilla County's Planning Director acknowledge that Birch Creek is only 30 to 50 feet away from Birch Creek Road [page 9 of 12]. Birch Creek is located down slope from Birch Creek Road, and Birch Creek Road is located down slope from the proposed hot mix asphalt plant site with its two large access haul roads cut into the rock outcropping. The topography of the area is a natural canyon with Birch Creek at the low point and the proposed hot mix asphalt plant to be located on higher ground. It is clear beyond doubt that carcinogenic emissions from the batch plant initially deposited on the ground at the site of the quarry will become waterborne in each heavy rain event or "cloudburst" and find transport by gravity to Birch Creek. Appellants' concern is not limited to the harmful solids and liquid materials that the asphalt batch plant will produce and that will seep into the surrounding grounds but some of the noxious chemical molecules produced by the asphalt plant have high vapor pressures and will easily evaporate and condense around the cold flowing waters of nearby Birch Creek. The Planning Commission needs to protect the quality of Birch Creek waters that originate in the depths of the Blue Mountains, and join the Walla Walla River as a tributary, and then onto the mighty Columbia River. Birch Creek as a tributary of a navigable stream is subject to the Federal Clean Water Act and all of its considerable protections.

The science is clear that wheat can be environmentally contaminated by polycyclic aromatic hydrocarbons (PAHs). Many PAHs are mutagenic and carcinogenic to mammals. Hot mix asphalt plants are a point source for PAHs. Can siting a smoking, belching hot mix asphalt plant next to historic wheat fields in the foothills of the Blue Mountains be considered good and enlightened land use policy? Umatilla County has already spoken to this issue in its policy statement defining the purposes of the Exclusive Farm Use Zone [Section 152.055]: "to preserve and maintain agricultural lands for farm use..." and "to maintain and improve the quality of air, water and land resources of the county...."

2.1.6. The Permit Approval errs in not considering Umatilla County Code Section 152.055 in the context of Section 152.061. As noted above, Section 152.055 includes the objectives of the County with respect to the creation of an EFU Zone: "to preserve and maintain agricultural land for farm use, including range and grazing uses, consistent with existing and future needs for agricultural products, forest and open spaces; to conserve and protect scenic resources; to maintain and improve the quality of air, water and land resources of the county...." (Emphasis Added.) This Section explicitly considers "future" needs.

In 1973, Oregon embarked on a path to conserve farmland with the passage of SB100 which created the Land Conservation and Development Commission, whose function was to develop statewide planning goals (Edward Sullivan, "The Long and Winding Road: Farmland Protection in Oregon 1961-2009", *San Joaquin Agricultural Law Review*, 2009, vol. 18, pages 1 to 69). There are now over 50 uses allowed in an EFU zone and while "Many are directly supportive of agriculture", "One of the more controversial uses, mining was allowed in 1973 and has been the subject of intense debate between farm and mining interests ever since." (Sullivan, *ibid*, p.26).

The history of Oregon land use legislation since 1973 expresses a preference to adopt policies which encourage designated farmland to continue in agricultural use and to avoid policies which would discourage farm use. This preference appears in the goal setting activity of LCDC. Such goal setting is inherently forward looking. This forward looking perspective must inform the interpretation of the two prong test, particularly the interpretation of the phrase "accepted farm or forest practices". Certainly, "accepted" means at least current farm practices but to work in a dynamic market environment the term must also include the "future."

Consider, for example, the farmer who faces a decline in demand for a crop and who must find a substitute crop to continue to make the farm economically viable. Should the interpretation of the term "accepted" ignore this possibility? Or should the interpretation include not only the crops raised historically on a given farm but also include other crops, raised on nearby farms with similar soil, rainfall and temperature? With a production history, these nearby crops are demonstrated, not speculative, substitutes. This approach implies a two step test: first, the farmer shows that the historical crops are no longer economically viable; and second, the farmer identifies an alternative crop on farms with similar soil, temperature and rainfall with a declining weight placed on farms which are increasingly remote. However, applying this test is much simpler because it merely extends the definition of "surrounding" land from abutting to, for example, the boundary of the EFU Zone. This test extends the flexibility of the test in *Dierking*, in which the Land Use Board of Appeals noted both the abandonment of a plan and development of alternative plans (*Dierking v. Clackamas County*, 38 OrLUBA 106 (2000)). Instead, the proposed test here only evaluates the impact of the conditional use on crops raised in a wider ambit of surrounding lands.

If the County were to approve the requested conditional use for the asphalt batch plant, Appellants' farm land would be effectively foreclosed from ever growing grapes, which at present is a viable alternative crop in this region. Accordingly, the County's action could potentially reduce the economic value of Appellants' farm land resulting in damages.

2.2 The Permit Approval errs in not presenting analysis or facts to support its conclusion that the proposed asphalt plant will not significantly increase the cost of accepted farm practices. Moreover, the Permit Approval errs in adopting a narrow definition of the word "practices" and in not recognizing the impact of future uses for nearby fields within the EFU, which could include a vineyard.

In its interpretation and application of Section 152.061 entitled "Standards for all Conditional Uses," the Permit Approval continues to state that

"(B) Will not significantly increase the cost of accepted farm or forest practices on lands devoted to farm or forest use. The Umatilla County Planning Department finds that the farming practices (crop patterns, crop rotation, equipment movement during planting and harvesting) will not change because of the placement of the asphalt plant. The cost of farming may include the fuel required to cultivate, plant and harvest the crop, the seed necessary to plant the crop and the time it takes to complete these task throughout the year. The placement of the asphalt plant will not alter or modify the farming patterns on adjacent farm land where additional time, seed and fuel are required to accommodate the asphalt plant. Thus, there will be no disturbance of any adjacent farm field from the placement of the asphalt plant. No new access roads or site clearing will be required that would take additional land out of production. The proposed site has been a rocky non-productive area where the aggregate site has been operating since 1992. There will be no increase in the cost of farming practices since there is no disturbance of any farm field from the placement of the asphalt plant structure. Therefore, the farming practices will not be altered that could increase the time taken, fuel required or material (seed, fertilizer, etc.) necessary to continue to farm the adjacent farm fields."

2.2.1 The Permit Approval errs by advancing a conclusion without providing any evidence to support the statement, "The Umatilla County Planning Department finds that the farming practices (crop patterns, crop rotation, equipment movement during planting and harvesting) will not change because of the placement of the asphalt plant."

2.2.2 The Permit Approval again errs by advancing a conclusion without providing any evidence to support the statement "The placement of the asphalt plant will not alter or modify the farming patterns on adjacent farm land where additional time, seed and fuel are required to accommodate the asphalt plant." The Permit Approval repeats this pattern of advancing a conclusion without providing any evidence to support its statement "Thus, there will be no disturbance of any adjacent farm field from the placement of the asphalt plant." And this pattern continues with the statement, "There will be no increase in the cost of farming practices since there is no disturbance of any farm field from the placement of the asphalt plant structure. Therefore, the farming practices will not be altered that could increase the time taken, fuel required or material (seed, fertilizer, etc.) necessary to continue to farm the adjacent farm fields."

2.3 The Permit Approval errs in not providing any evidence that crop practices will not change and costs will not significantly increase due to the presence of an asphalt plant. Such evidence is available from a "sample" which gathers data on the impact on nearby farms before and after the location of asphalt plants. The analysis of data from such a sample is the proper way that the County can reach the conclusions which it offers under Section 152.061.

3.0 The Permit Approval errs in not acknowledging the scope of the land use authority which the County has in stating that "The County does have a great deal of interest to ensure the environment is protected from hazardous substances, however, the DEQ Air Quality program is relied upon to institute the environmental protection program to protect from harmful levels of emissions." The County can and should use its land use planning process to effectively isolate or prohibit activities which emit harmful pollutants which DEQ regulates. The County cannot relinquish its land use planning authority to DEQ.

4.0 The Permit Approval errs in the statement that "The question is not whether persons in the general area will see, hear or smell the asphalt plant, but the standard seeks to minimize the environmental effects." The Permit Approval provides no statutory or code authority to support the adoption of the explicit standard to "minimize the environmental effects". The implementation of the County's land use planning authority through zoning implies the use of a balancing of interests test. Moreover, the County can and should use this balancing of interests to isolate noxious activities.

5.0 The Permit Approval errs in providing no evidence to support its conclusion in the statement "Protecting Birch Creek which is located along the west side of Birch Creek Road is also important to address. It is not presumed that the asphalt plant will adversely impact the stream." It then goes on to state that "Another concern to impacts to the stream would be possible effects from air quality emissions. Monitoring of emission discharge will take place through the required DEQ Air Contaminate Discharge Permit program." The Permit Approval errs by using an undefined standard, presenting no evidence to support its conclusion and again improperly relinquishing all authority to the DEQ.

Dated this 2<sup>nd</sup> day of October, 2013

Robert R. Berry  
Robert R. Berry

Helen Reser Bakkensen Trust

John Reser Bakkensen /rb  
John Reser Bakkensen, Trustee

PLANNING COMMISSION  
HEARING

*Findings for Conditional  
Use Permit #C-1226-13  
Humbert Asphalt*



**UMATILLA COUNTY PLANNING DEPARTMENT  
FINAL FINDINGS AND CONCLUSIONS  
CONDITIONAL USE PERMIT REQUEST, #C-1226-13  
MAP #6N 36, TAX LOT #4600, Account # 110617**

1. APPLICANT: Humbert Asphalt, INC, 84899 HWY 11, Milton-Freewater, OR 97862
2. OWNER: Kenney Barbara etal, c/o Kenney Farms INC, 3629 Braden RD, Walla Walla, WA 99362
3. REQUEST: The request is to establish an Asphalt Batch Plant in an existing aggregate site. The aggregate site was permitted via Conditional Use Permit #C-630-91 which did authorize an asphalt plant at that time. The asphalt plant was never set up at the aggregate site at that time and so will be reviewed during this process.
4. LOCATION: The subject property is located approximately 6.5 miles east of State Highway 11 on Birch Creek Road, about 2 miles southeast of the Hood Road/Birch Creek Road intersection and 3 miles south of Stateline Road.
5. SITUS: The site address for this parcel is 57445 and 57491 Birch Creek RD, Milton-Freewater, OR 97862.
6. ACREAGE: Tax Lot 4600 is 451 acres. The aggregate site was established on some 30 acres via #C-630-91.
7. PROP CLASS: Property Codes are assigned by the County Assessor as to what type of use present on the property. The Property Code 551 is assigned to this property, which means "Farm, Farm Zoned, Farm Deferred, Improved."
8. TAX CODE: The Tax Code is assigned by the County Assessor. Each Code Area has various taxing rates depending upon the services provided. The property has Tax Code of 07-12, which has the following taxing definition: General County, Umatilla Co Bond, School District #7 Milton Freewater, Intermountain ESD, BMCC, BMCC Bond, Port Of Umatilla, County Radio District, Umatilla Special Library District
9. PERMITS: Permits have been issued on this property:  
  
*Conditional Use Permit, #C-630-91 issued on 3-4-1992 for a DEV OF ROCK PIT, ESTABLISH A QUARRY SITE TO OPERATE A ROCK CRUSHER FF SIGNED 3/4/92 WITH CONDITIONS IN FILE*  
*Plan Amendment, #P-054 issued 3-4-1992 for a DEVELOP ROCK PIT, ESTABLISH QUARRY SITE & OPERATE A ROCK CRUSHER FF SIGNED 3/4/92 WITH CONDITIONS IN FILE*  
*Zoning Permit, #ZP-92-062 issued on 4-15-1992 for a ROCK PIT/CRUSHER SITE, ASPHALT PLANT SITE*

FINAL FINDINGS AND CONCLUSIONS

Humbert Asphalt, Conditional Use Request – Asphalt Plant #C-1226-13

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- 10. COMP PLAN: North/South Agricultural Region Designation
- 11. ZONING: Exclusive Farm Use Zone (EFU, 160 acre minimum)
- 12. ACCESS: The parcel has direct access to Birch Creek Road (Co. Rd. No 573), a two-lane, paved road.
- 13. ROAD TYPE: Birch Creek Road (#573) is a two-lane, paved roadway. The roadway is paved past the project site.
- 14. EASEMENTS: There are no access easements on this parcel.
- 15. LAND USE: The majority of the parcel is currently farmed with dry land wheat. The site for the quarry is non-farmable, rock outcropping land. There are two dwellings on the parcel, located approximately 1,000 feet southeast from the quarry. The dwellings are inhabited by the landowner who leases the quarry to the applicants.
- 16. ADJACENT USE: Surrounding property is similar EFU zoned farm land and is primarily in dry land type farming – wheat, peas, pasture. There is one dwelling located approximately 1/2 mile southeast of the site, and another 1.5 miles northwest along Birch Creek Road.
- 17. LAND FORM: Blue Mountains
- 18. SOIL TYPES: The subject property contains Non-High Value soil types. High Value Soils are defined in UCDC 152.003 as Land Capability Class I and II. The soils on the subject property are non-high value.

Soil Name, Unit Number, Description	Land Capability Class	
	Dry	Irrigated
8C: Athena silt loam, 7 to 12 percent slopes	3e	3e
11F: Bowlus-Buckcreek association, 40 to 70 perc	7e	---
64D: Palouse silt loam, 12 to 20 percent slopes	4e	---
64E: Palouse silt loam, 20 to 35 percent slopes	6e	---
112D: Waha silty clay loam, 12 to 25 percent slo	4e	---

*Soil Survey of Umatilla County Area, 1989, NRCS. The suffix on the Land Capability Class designations are defined as "e" – erosion prone, "c" – climate limitations, "s" soil limitations and "w" – water (Survey, page. 172).*

- 19. BUILDINGS: There is a home site and outbuildings on this property along with the aggregate site and machinery – rock crusher, scale.
- 20. UTILITIES: The parcel is within the service area of Columbia Rural Electric.
- 21. WATER/SEWER: There are no ground water rights on this property. The established home site does have a domestic water source and a sanitary disposal system.



FINAL FINDINGS AND CONCLUSIONS

Humbert Asphalt, Conditional Use Request – Asphalt Plant #C-1226-13

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22. FIRE SERVICE: The subject property is not served by a rural fire district.
23. IRRIGATION: The property is not within an irrigation district
24. FLOODPLAIN: This property is NOT in a floodplain. The property is found in Zone D “Undetermined Flooding”) which is not a special flood hazard zone. The Community Number for Umatilla County is #41059C and the Panel Number that covers this area is #0586-G with an effective date of September 3, 2010.
25. NOTICES SENT: Notices were sent on Wednesday, August 7, 2013.
26. CLOSING DATE: Comments were due back on Wednesday, August 28, 2013.
27. AGENCIES: Umatilla County Assessor, Umatilla County Public Works, Oregon Water Resources Department, Oregon Department of Geology & Mineral Industries, Oregon Department of Land Conservation and Development, Oregon Department of Environmental Quality
28. COMMENTS: Comment letters were received on the application.

A letter from Robert R. Berry dated August 27, 2013 expressing concern on a number of issues related to the application was received. The comment letter was broken up into eleven main topics:

1. Summary of Request including Permit Number
2. Status of Respondents.
3. Summary of Response in Opposition.
4. Umatilla County Code Sections and Oregon Revised Statutes
5. The Public Notice presents unsupported conclusions in its analysis under Section 152.061.
6. The Public Notice presents unsupported conclusions in its analysis under Section 152.615.
7. An Asphalt Plant is not a favored conditional use within an EFU.
8. The siting of an Asphalt Plant within an EFU requires more scrutiny.
9. The Asphalt Plant will generate Hazardous Air Pollutants.
10. Analysis of the Impact of an Asphalt Plant on the adjacent waterway, Birch Creek.
11. The County provides no evidence to support its conclusion under Section 152.061 and unnecessarily restricts the interpretation.
12. The Asphalt Plant will deposit contaminants which could make the crops from the surrounding land unmarketable.
13. Proposed conditions if the County approves the permit.

An email was received from John Reser Bakkensen on August 30, 2013 requesting to be a part of the comments made by Mr. Berry. This email was received after the comment period ended.

**29. STANDARDS OF THE UMATILLA COUNTY DEVELOPMENT CODE FOR CONDITIONAL USE PERMITS to establish an ASPHALT BATCH PLANT are found in Section 152.060 (B) (3), 152.061, 152.615 and 152.617 (I) (A) Asphalt Plant.** The following standards of approval are underlined and the findings are in normal text.

**§ 152.060 CONDITIONAL USES PERMITTED.**

In an EFU zone the following uses may be permitted conditionally via administrative review (§ 152.769), subject to the requirements of this section, the applicable criteria in §§ 152.610 through 152.617 and §§ 152.545 through 152.562. A zoning permit is required following the approval of a conditional use pursuant to § 152.025. Existing uses classified as conditional uses and listed in this section may be expanded subject to administrative review and subject to the requirements listed Oregon Administrative Rules, Chapter 660, Division 033.

(B) Operations conducted for:

(3) Processing, as defined by ORS 517.750, of aggregate into asphalt or portland cement as provided in § 152.617 (I) (A). New uses that batch and blend mineral and aggregate into asphalt cement may not be authorized within two miles of a planted vineyard. Planted vineyard means one or more vineyards totaling 40 acres or more that are planted as of the date the application for batching and blending is filed; and The Umatilla County Planning Department finds that the proposal is for an asphalt batch plant. The existing pit covers some 3-4 acres and material will be extracted, crushed and batched into asphalt within the existing site. The closest vineyard to the proposed asphalt plant location is more than four miles away (Telephone Pole Road area). Thus, there are no vineyards located within two miles of the proposed asphalt plant location. The applicable criteria for an asphalt batch plant are provided in UCDC 617 (I) (A) and will be reviewed below. The application complies with this standard.

**§ 152.061 STANDARDS FOR ALL CONDITIONAL USES.**

The following limitations shall apply to all conditional uses in an EFU zone. Uses may be approved only where such uses:

(A) Will not force a significant change in accepted farm or forest practices on surrounding lands devoted to farm or forest use; and The Umatilla County Planning Department finds that the batching of asphalt will not force a significant change in accepted farm practices on surrounding lands devoted to farm use. As previously described, the property contiguous to the mining site is farmed in dry land wheat. Dry land peas and beans have also been grown in the general area as well as the grazing of livestock. The site is located in an area on the parcel that has never been farmed and is a rocky outcropping of surface rock. The location of the rock pit is in a valley or gully where there are steep slopes along both sides of the roadway. Thus, farming of land around the rock pit takes place far away from the development site. Farming practices of the adjacent farmland have been in place for decades

FINAL FINDINGS AND CONCLUSIONS

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and no change to farming practices (i.e. crop patterns, crop rotation, farm equipment movement, etc.) will occur because of the proposed processing – asphalt plant. There will be no change to how the farming will occur on the adjacent farm fields because the site for the asphalt plant has direct access to Birch Creek Road and will not cause a disruption to any existing farm field. The road is a county road and is a paved roadway that is constructed to handle large truck traffic and since it is paved will not create additional dust from the movement of large trucks on the roadway. Other effects from the asphalt plant (noise, dust and odor and emissions) will be monitored by the Department of Environmental Quality through the Air Quality program. Therefore, insofar as the plant operates in compliance with the DEQ ACD Permit, the County recognizes the air quality will not impact farming practices in the area. Copies of these permits must be provided to the County Planning Department. Other State and Federal permits necessary for the operation of an asphalt plant are also required to be obtained and copies of such permits and restrictions provided to the County Planning Department.

(B) Will not significantly increase the cost of accepted farm or forest practices on lands devoted to farm or forest use. The Umatilla County Planning Department finds that the farming practices (crop patterns, crop rotation, equipment movement during planting and harvesting) will not change because of the placement of the asphalt plant. The cost of farming may include the fuel required to cultivate, plant and harvest the crop, the seed necessary to plant the crop and the time it takes to complete these tasks throughout the year. The placement of the asphalt plant will not alter or modify the farming patterns on adjacent farm land where additional time, seed and fuel are required to accommodate the asphalt plant. Thus, there will be no disturbance of any adjacent farm field from the placement of the asphalt plant. No new access roads or site clearing will be required that would take additional land out of production. The proposed site has been a rocky, non-productive area where the aggregate site has been operating since 1992. There will be no increase in the cost of farming practices since there is no disturbance of any farm field from the placement of the asphalt plant structure. Therefore, the farming patterns will not be altered that could increase the time taken, fuel required or material (seed, fertilizer, etc.) necessary to continue to farm the adjacent farm fields.

It should be noted that adjacent farm fields are mainly addressed since the possible impacts from the development should be greater on nearby property if adverse impacts are produced by the development. Subsequently, if there are minor impacts to adjacent property it would be reasonable to conclude that the impacts to property further away from the development should be even less. Therefore, the effects caused by the proposed development are more of a concern on adjacent property than distant property.

Currently, there are large trucks that frequent the site hauling gravel and rock out of the pit. Additional truck traffic will be experienced on Birch Creek Road during times when the applicant has projects requiring asphalt. Area farmers and residents may notice the increased traffic and it could necessitate some adjustment in the movement of large farm equipment on Birch Creek Road and other auxiliary roadways. The standard clearly states the use “will not *significantly* increase the cost of farming practices...” The word significantly or significant

is an important qualifier in this standard. The effects of additional truck traffic may change the movement of farm equipment on the roadway to some degree, but will it *significantly* increase the cost of farming (i.e. time and fuel used by the farmer moving farm equipment or livestock from one field to the other)? The word *significant* is generally defined as “fairly large in amount or quantity.”<sup>1</sup> Thus, to qualify as a significant increase in additional time or fuel the farmer would have to spend a large amount of additional time and fuel on the road by waiting for trucks to pass until the farm equipment or livestock could move from one field to another on the roadway. Of course, the trucks hauling asphalt would not take precedence and may have to wait if the roadway is impassable because of the travel of large farm equipment or the movement of a large number of livestock. As stated earlier, the typical crops grown in the area is dry land wheat and/or peas and beans, which requires use of farm equipment in the spring to cultivate, fertilize and plant the crop and summer harvesting. In any event, the possible interference of truck traffic with intermittent movement of farm equipment or livestock would not cause a large amount or a significant increase in the cost of farming practices on adjacent farm operations.

Emissions<sup>2</sup> of particulate and gaseous material from the asphalt plant will be addressed by the Air Contaminate Discharge (ACD) Permit, Air Quality Program of the Oregon Department of Environmental Quality (DEQ). The reduction in these emissions is the main emphasis for the permitting process through the DEQ. The applicant is required to obtain all State permits necessary to operate the asphalt plant and maintain the permits each year. The County requires such permits to be obtained and maintained. The County does have a great deal of interest to ensure the environment is protected from hazardous substances, however, the DEQ Air Quality program is relied upon to institute the environmental protection program to protect from harmful levels of emissions. Copies of all DEQ permits and relevant correspondence such as emission reports generated by third party consultants dealing with the asphalt plant must be provided the County Planning Department.

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<sup>1</sup> The word “significant” as defined by <http://www.thefreedictionary.com/significant> is as follows:

**sig·nif·i·cant** (sĭg-nĭfĭ-kənt) *adj.*

1. Having or expressing a meaning; meaningful.
2. Having or expressing a covert meaning; suggestive: *a significant glance*. See Synonyms at [expressive](#).
3. Having or likely to have a major effect; important: *a significant change in the tax laws*.
4. **Fairly large in amount or quantity: significant casualties; no significant opposition.**
5. *Statistics* Of or relating to observations or occurrences that are too closely correlated to be attributed to chance and therefore indicate a systematic relationship.

<sup>2</sup> *EPA Hot Mix Asphalt Plants: Emission Assessment Report, EPA-4-4541R-00-019; December 2000*). Page 1. The primary emission sources associated with HMA [Hot Mix Asphalt] production are the dryers, hot bins, and mixers, which emit particulate matter (PM) and a variety of gaseous pollutants. Other emission sources found at HMA plants include storage silos, which temporarily hold the HMA; truck load-out operations, in which the HMA is loaded into trucks for hauling to the job site; liquid asphalt storage tanks; hot oil heaters, which are used to heat the asphalt storage tanks; and yard emissions, which consist of fugitive emissions from the HMA in truck beds. Emissions also result from vehicular traffic on paved and unpaved roads, aggregate storage and handling operations, and vehicle exhaust.

**§ 152.615 ADDITIONAL CONDITIONAL USE PERMIT RESTRICTIONS.**

In addition to the requirements and criteria listed in this subchapter, the Hearings Officer, Planning Director or the appropriate planning authority may impose the following conditions upon a finding that circumstances warrant such additional restrictions:

(A) Limiting the manner in which the use is conducted, including restricting hours of operation and restraints to minimize such an environmental effects as noise, vibration, air pollution, glare or odor; The Umatilla County Planning Department finds that there are no limitations outlined for this proposal. The proposed asphalt plant will produce a certain level of noise, vibration and particulate and gaseous emissions. The question is not whether persons in the general area will see, hear, or smell the asphalt plant, but the standard seeks to *minimize* the environmental effects. The closest dwelling is greater than ½ mile away from the aggregate site where the asphalt plant will be located. At this time it is presumed that the impact to the nearby residents will be minimal because of the distance the project site is from the dwellings. The landscape along Birch Creek Road is a series of hills and gullies, which will shield to some degree the nearby residents from most of the issues listed in this standard. Birch Creek Road is paved, which does lessen the amount of dust created by the movement of trucks and other large vehicles on the roadway.

Additionally, asphalt plants generally do not run continuously for weeks on end, which also should lessen the impact on the surrounding property. The applicant will be required to obtain State permits that deal with air pollution. The Air Contaminate Discharge Permit (ACD) through the DEQ provides oversight for particulate and gaseous emissions. A third party consultant is called in to monitor emissions periodically and reports to the DEQ and the plant owner. If emission levels are not within regulated tolerances then actions are taken to bring the asphalt plant into compliance. The intent of the ACD Permit is to minimize emissions to State standards. Copies of the State permits and reports are required to be provided the Planning Department.

(B) Establishing a special yard, other open space or lot area or dimension; The Umatilla County Planning Department finds that there is no need to establish a special yard or open space in relation to this use. The standard setbacks will apply.

(C) Limiting the height, size or location of a building or other structure; The Umatilla County Planning Department finds that no new buildings are proposed with this development. Different pieces of equipment will be placed on the site that are a part of the asphalt plant, but will not be limited to size, height or location besides required setbacks. The required front yard setback from Birch Creek Road is 60 feet from the middle of the roadway. Also, the structures are to be a minimum of 100 feet from Birch Creek. The site plan submitted by the applicant shows these setback requirements will be met.

(D) Designating the size, number, location and nature of vehicle access points; The Umatilla County Planning Department finds that access points are already established and has been since at least 1992.

(E) Increasing the required street dedication, roadway width or improvements within the street right of way; The Umatilla County Planning Department finds that there is no requirement to improve the roadway width or other improvement to the road. Birch Creek Road is a county maintained roadway and has been paved to County Road standards past the development site. It should be noted that in the early 1990's Humbert Asphalt voluntarily paved the 2 mile stretch of Birch Creek from the intersection of Hood Road down to and past the rock pit. This criterion is not applicable.

(F) Designating the size, location, screening, drainage, surfacing or other improvement of a parking or loading area; The Umatilla County Planning Department finds that the area around the existing pit is large enough to accommodate parking and maneuvering of equipment. The site slopes into the pit away from the Birch Creek Road. Additionally, there is a tall earthen berm (some 10-20 feet in height) that prevents runoff from the site onto the roadway. The only area where the earthen berm does not create the physical barrier to prevent water from running off site onto the roadway are the two driveways off of Birch Creek Road. However, the elevation of the access points does slope away from the roadway such that any water on site will not run off site. It has been found that water pounds in the rock pit site catching any possible spring run off or large rain event on site.

(G) Limiting or otherwise designating the number, size, location, height and lighting of signs; The Umatilla County Planning Department finds that no signs were proposed with this request.

(H) Limiting the location and intensity of outdoor lighting and requiring its shielding; The Umatilla County Planning Department finds that any outdoor lighting in relation to this project must be shielded to prevent glare onto nearby and adjacent properties.

(I) Requiring diking, screening, landscaping or other methods to protect adjacent or nearby property and designating standards for installation and maintenance. The Umatilla County Planning Department finds that there is no requirement for diking, screening, landscaping or other similar activities. The intent of this criterion is to "protect" adjacent property from the visual impact of the development through diking, screening, landscaping etc. The earthen berm was constructed in 1992 to screen the rock pit from the roadway. The asphalt plant is tall and no amount of screening will limit the view of the equipment from nearby property. As pointed out early in this document, the geography of the area naturally screens this project from the general view because of the valley area with relatively steep slopes along the roadway. Thus, until someone enters the immediate area of the development site the asphalt plant cannot be seen. There are no dwellings that are closer than ½ mile that would be impacted by the view of the asphalt plant. Consequently, the asphalt plant cannot be seen from the closest off site dwelling because of the natural geography. The other standards will bring out other methods to protect adjacent property from other possible impacts such as dust, odor, etc.

(J) Designating the size, height, location and materials for a fence; The Umatilla County Planning Department finds that there is no requirement for adding fencing as part of this project at this time. There are gates at the two entrance points to the rock pit. The earthen berm does provide a natural barrier that a fence would typically serve.

(K) Protecting and preserving existing trees, vegetation, water resources, wildlife habitat, or other significant natural resources; The Umatilla County Planning Department finds that the subject property does not contain any trees or other notable landscaping features that will be removed because of the development. The proposed location of the asphalt plant will be located in the existing aggregate site which has been established since 1992. Thus, the project area is rocky and does not have any notable vegetation. Additionally, the site has been a rocky area which is why the site has been used for extraction and crushing of rock. Since there is little vegetation or natural ground cover the area has not been a significant wildlife habitat area for large game such as deer and elk. Wildlife habitat will not be impacted because of the establishment of the asphalt plant being located on the project site. The noise and movement of large trucks has been occurring in this area for over 20 years and so wildlife has most likely acclimated or become accustomed to the effects of truck traffic.

Protecting Birch Creek which is located along the west side of Birch Creek Road is also important to address. It is not presumed that the asphalt plant will adversely impact the stream. The constructed earthen berm and slope of the development site and the roadway itself does provide a barrier of water runoff between the asphalt plant and the stream. The stream is some 30-50 feet west of the roadway, which also provides additional open space to absorb any runoff from the road surface.

Another concern to impacts to the stream would be possible effects from air quality emissions. Monitoring of emission discharge will take place through the required DEQ Air Contaminate Discharge Permit program. A third party consultant will provide on-site emissions evaluation and report the findings to DEQ as required by the permit process. Non-compliance with required emission levels will be handled through that ACD program. All reporting and permit correspondence must be provided the County Planning Department.

(L) Parking area requirements as listed in §§ 152.560 through 152.562 of this chapter. The Umatilla County Planning Department finds that the area around the aggregate pit can accommodate parking of equipment and work trucks necessary for the development.

**§ 152.617 STANDARDS FOR REVIEW: CONDITIONAL USES AND LAND USE DECISIONS ON EFU ZONED LANDS.**

**(I) EFU CONDITIONAL USES**

*(A) Asphalt plants.*

(1) Access roads shall be arranged in such a manner as to minimize traffic danger and nuisance to surrounding properties; The Umatilla County Planning Department finds that the project site has direct access from Birch Creek Road. Access roads on the site are minimal with access points arranged such as to make traffic movement safe. Birch Creek Road is a paved roadway, but in this area of the county has minimal traffic. The applicant indicated that Humbert Asphalt worked with Umatilla County Road Department to widen and pave Birch Creek Road in the early 1990s to allow better movement of vehicles.

(2) Processing equipment shall not be located or operated within 500 feet from a residential dwelling; The Umatilla County Planning Department finds that the closest house is approximately ½ mile (2,500 feet +/-) from the project site. The homes that are on the subject parcel are more than 1,000 feet away from the development site. This criterion is not applicable.

(3) Haul roads shall be constructed to a standard approved by the Public Works Director to reduce noise, dust and vibration; The Umatilla County Planning Department finds that there are no new haul roads that will be constructed in relation to the asphalt plant.

(4) The operation complies with all applicable air, noise, and dust regulations of all county, state or federal jurisdictions; and all state and federal permits are obtained before the activity begins; The Umatilla County Planning Department finds that Humbert Asphalt has indicated that they have applied for Federal and State permits dealing with the establishment of an asphalt plant. Approvals are pending and copies of the permits are to be provided the Planning Department. These permits must be obtained prior to the asphalt plant beginning production.

(5) New plants proposed on EFU zoned lands. Plants that batch and blend mineral and aggregate into asphalt cement may not be authorized within two miles of a planted Vineyard totaling 40 acres or more that are planted as of the date the application for batching and blending is filed. The Umatilla County Planning Department finds that there are vineyards east of Milton-Freewater. The closest 40 acre vineyards to the subject project site are some 4-5 miles away near Telephone Pole Road.

(6) Complies with other conditions deemed necessary. The Umatilla County Planning department finds that there are no other conditions that are deemed necessary at this time.



**FINAL DECISION: THIS CONDITIONAL USE PERMIT REQUEST TO ESTABLISH AN ASPHALT BATCH PLANT COMPILES WITH THE STANDARDS OF THE UMATILLA COUNTY DEVELOPMENT CODE, SUBJECT TO THE FOLLOWING CONDITIONS:**

Precedent Conditions: The following precedent conditions must be fulfilled prior to final approval of this request:

1. Obtain all other federal and state permits necessary for development. Provide copies of these permit approvals and evaluation reports to the County Planning Department.
  - a. Obtain all applicable permits for the asphalt plant from DOGAMI before the activity begins.
  - b. Obtain all applicable permits for the asphalt plant from DEQ (air, noise, and water quality issues) before the activity begins.
  - c. Obtain State Fire Marshall permits necessary for the asphalt batch plant.
2. Pay notice costs as invoiced by the County Planning Department.

Subsequent Conditions: The following subsequent conditions must be fulfilled following final approval of this request Umatilla County:

3. Obtain a Zoning Permit from the Umatilla County Planning Department for the asphalt batch plant. The zoning permit should include an approved site plan showing existing structures, setbacks, etc.
4. Any lighting used for the asphalt batch plant must be shielded to prevent glare onto adjacent property.
5. The applicant shall be required to provide dust control on the project site and on all haul roads.
6. The standards of the required federal and state permits must be met on a continual basis for the conditional use permit to be valid. Additional review by the Planning Department will be conducted if the standards of the required federal and state permits are not met.
7. If the asphalt batch plant is removed from the property for more than one year then this conditional use permit becomes void per UCDC 152.613 (D).
8. A review of the asphalt batch plant will be completed one year from the approval date to ensure that the conditions listed above and the criteria for establishing this use in

FINAL FINDINGS AND CONCLUSIONS

Humbert Asphalt, Conditional Use Request – Asphalt Plant #C-1226-13

Page 12 of 12

the EFU Zone are being met with subsequent yearly reviews. Conditional use permits are valid as long as the conditions are met.

9. Annual reviews fees will be assessed.

UMATILLA COUNTY DEPARTMENT OF LAND USE PLANNING



Tamra J. Mabbott, *Planning Director*

9-18-13

Date

PROPERTY OWNERS WITHIN 750'  
NOTICE OF SUBJECT PARCEL

MAP 5N36

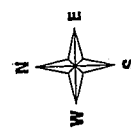
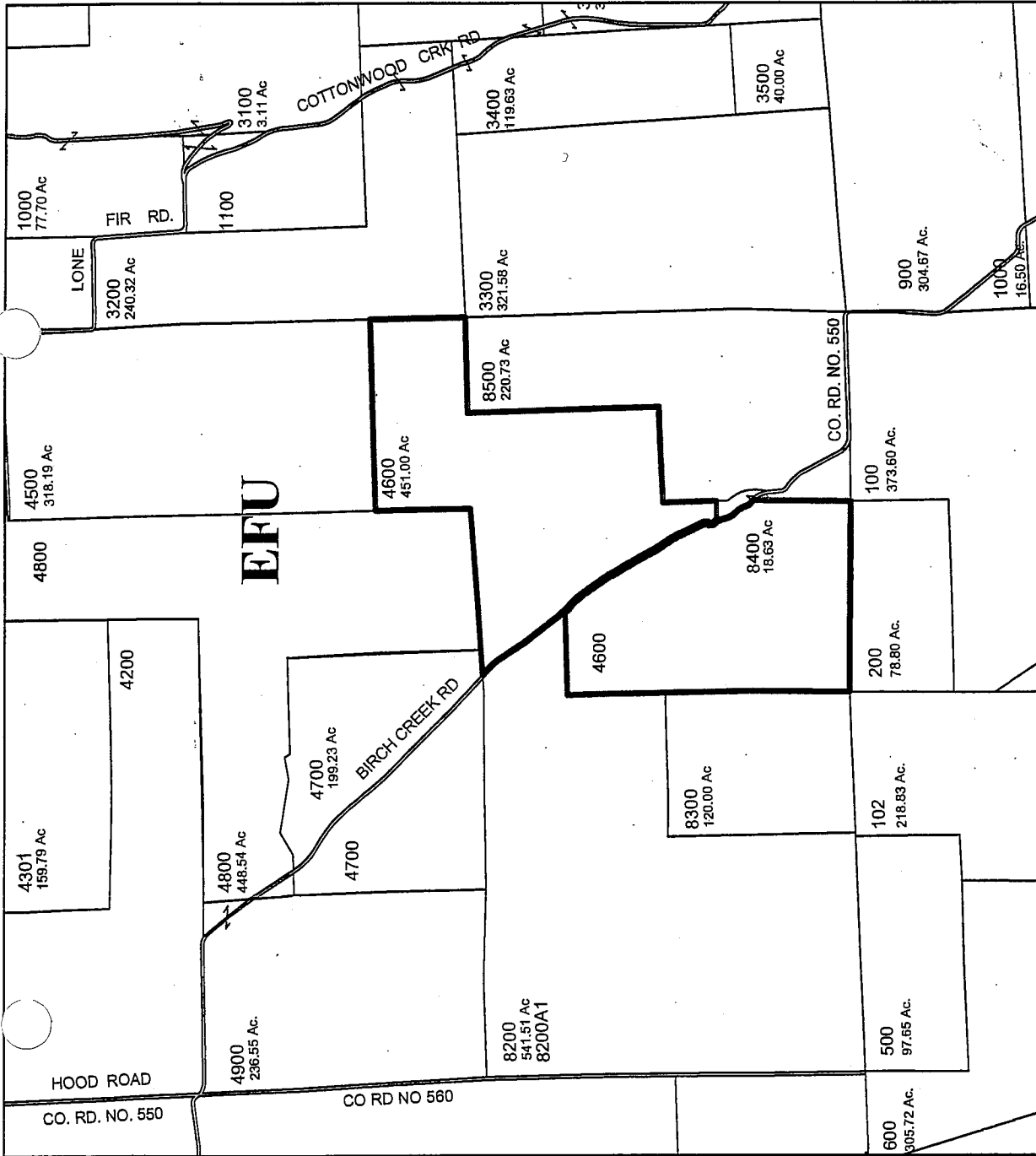
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- 102 REA AG CORP
- 200 KENNEY BARBARA ETAL
- C/O KENNEY FARMS INC

MAP 6N36

- 4500 MARUM MICHAEL J (TRUSTEE)
- 4600 KENNEY BARBARA ETAL
- C/O KENNEY FARMS INC
- 4700 LEAHY EDWARD P & CARRINE M & WILLIAM J
- 4800 TINKER TAMI JO
- C/O ROBERT TINKER
- 8200A1 BISHOP JOYCE RESER
- 8200U1 BISHOP JOYCE RESER 2/3 ETAL 1/3
- 8200U2 BAKKENSEN JOHN R (TRS) 1/3 ETAL 2/3
- 8200U3 BERRY ROBERT 1/6 ETAL 5/6
- 8200U4 BISHOP JOYCE R (TRS) 1/6 ETAL 5/6
- 8300 REA AG CORP
- 8400 DODGE LAND & CATTLE INC
- 8500U1 REA LAURA B, TRS REA DENNIS
- 8500U2 MCQUEEN MARILYN RAE 1/4 ETAL 3/4
- 8500U3 REA BONNIE J 1/4 ETAL 3/4
- 8500U4 REA DENNIS C (REA HT (TRS) 1/4 ETAL 3/4
- C/O REA DENNIS C
- 8500U5 REA NATHAN H & ETAL
- REA DENNIS

MAP 6N37

- 3200 MARUM MICHAEL J (TRUSTEE)
- 3300U1 REA LAURA B, TRS REA DENNIS
- 3300U2 MCQUEEN MARILYN RAE 1/4 ETAL 3/4
- 3300U3 REA BONNIE J 25% ETAL 75%
- 3300U4 REA DENNIS C & REA H T TRUSTEE
- C/O REA H T TRUSTEE
- 3300U5 REA NATHAN H & ETAL
- REA DENNIS



DATE: 8/1/13

MAP DISCLAIMER: No warranty is made by Umatilla County as to the accuracy, reliability or completeness of this data. Parcel data should be used for reference purposes only. Created by J.Alford, Umatilla County Planning Dept. 8/1/13

CONDITIONAL USE REQUEST #C-1226-13  
HUMBERT ASPHALT, APPLICANT  
KENNEY FARMS, OWNER  
MAP 6N36 TAX LOT 4600

 SUBJECT PARCEL



PROPERTY OWNERS WITHIN 750'  
NOTICE OF SUBJECT PARCEL

MAP 5N36

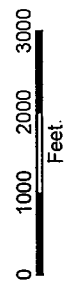
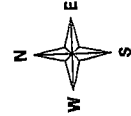
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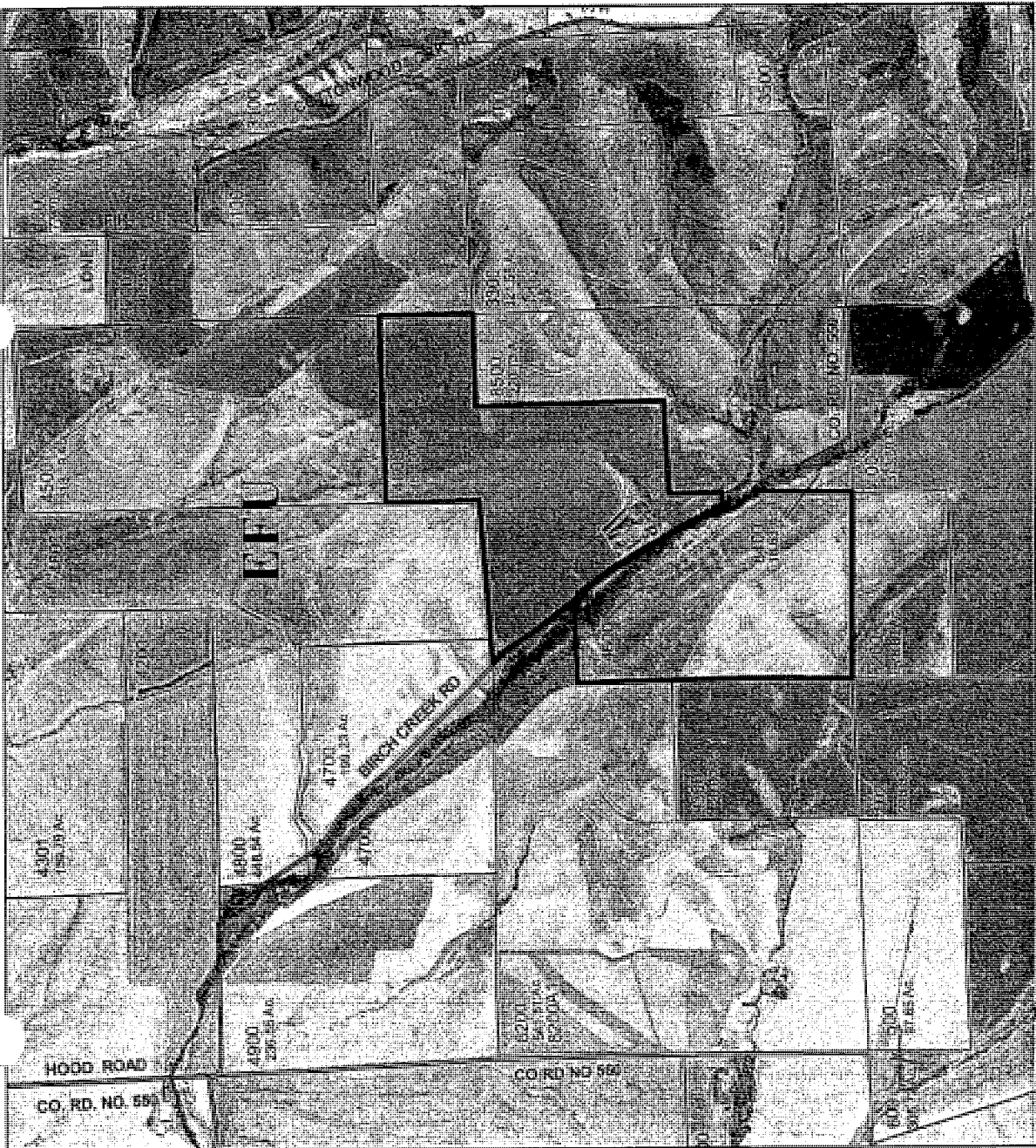
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- 3300U3 REA BONNIE J 25% ETAL 75%
- 3300U4 REA DENNIS C & REA H T (TR) 25% ETAL 75%
- C/O REA H T TRUSTEE
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- REA DENNIS



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2012 AERIAL PHOTO

CONDITIONAL USE REQUEST #C-1226-13  
HUMBERT ASPHALT, APPLICANT  
KENNEY FARMS, OWNER  
MAP 6N36 TAX LOT 4600



SUBJECT PARCEL

