ATTACHMENT D

Fee $250.00

Wasco County Planning Department
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FILE NUMBER: PLAAPL-16-10-0001 05
PLASAR-15-01-0004

APPEAL OF LAND USE DECISION

ORIGINAL PLANNING DEPARTMENT FILE NUMBER: PLASAR-15-01-0004

Date Received: 10/13/2016 **Planner Initials:** DN **Date Complete:** **Planner Initials:**

APPELLANT INFORMATION

Name: Friends of the Columbia Gorge, Columbia Riverkeeper, Physicians for Social Responsibility

Mailing Address: Gary Kahn, Reeves Kahn Hennessy & Elkins, PO Box 86100

City/State/Zip: Portland, OR 97286

Phone: 503-777-5473 **Email:** gkahn@rke-law.com

APPEAL INFORMATION

1. Appeal Type

   ☐ Administrative Decision to the Planning Commission: Fee = $250
   ☑ Planning Commission Decision to the Board of County Commissioners: Fee = $ 1,200

   If appellant prevails at Planning Commission or a subsequent appeal, the $250 fee for the initial appeal shall be refunded per ORS 215.416(11)(b). This is not applicable for any subsequent appeal costs.

2. Appeal Deadline: October 14, 2016

   Date Submitted: October 13, 2016

   All appeal documents filed with Wasco County must be delivered to the Wasco County Planning Department Office by postal service or in person. Documents faxed are not considered filed. An appeal will not be considered timely unless received no later than 4:00 p.m. on the deadline stated on the Notice of Decision or Resolution. AN APPEAL IS NOT CONSIDERED COMPLETE UNTIL BOTH THE SIGNED NOTICE OF APPEAL AND FILING FEE ARE RECEIVED.

3. Party Status: State how the petitioner(s) qualifies as a party to this matter:

   Please see attached statement of party status.

   Party includes the following:

   - The applicant and all owners or contract purchasers of record, as shown in the files of the Wasco County Assessor's Office, of the property which is the subject of the application.
   - All property owners of record, as provided in (a) above, within the notification area, as described in section 2.080 A.2., of the property which is the subject of the application.
   - A Citizen Advisory Group pursuant to the Citizen Involvement Program approved pursuant to O.R.S. 197.160.
   - Any affected unit of local government or public district or state or federal agency.
   - Any other person, or his representative, who is specifically, personally or adversely affected in the subject matter, as determined by the Approving Authority. (Revised 1/92)

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4. Grounds for appeal: List the **specific** grounds relied upon in the petition request for review (e.g. ordinance criteria not met, procedural error, etc.) Additional pages may be attached.

Please see attached grounds for appeal.

5. De Novo vs. On the record: All appeals to Planning Commission are DeNovo meaning new information can be entered into the record. All appeals to the Board of Commissioners are on the record unless a request is made as part of this request by party filing the petition. Any other party must make such a request no more than seven (7) calendar days after the deadline for filing a petition for review has expired.

The appeal is to the Board of Commissioners? ☐NO ☑YES

I request the hearing to be DeNovo or partial DeNovo? ☑NO ☐YES

State the reasons you are requesting a DeNovo or partial DeNovo without addressing the merits of the land use action:

Indicate any persons known to be opposed to a request for a DeNovo hearing.

When practicable, the requesting party shall advise the other parties and attempt to gain their consent.

I have attempted to gain the consent of the other parties associated with this file? ☐NO ☐YES

If you answered no indicate why this is not practicable. If you answered yes list the parties who have consented for this to be a DeNovo or partial DeNovo hearing.

The request for a DeNovo hearing for appeal of a quasi-judicial plan amendment shall be decided by the Board of Commissioners as a nonpublic hearing item, except that the Board may make such provision for notice to the parties

and may take such testimony as it deems necessary to fully and fairly address significant procedural or substantive issues raised. The Court shall grant the request only upon findings that:

- A de novo hearing is necessary to fully and properly evaluate a significant issue relevant to the proposed development action;
- The substantial rights of the parties will not be significantly prejudiced; and
- The request is not necessitated by improper or unreasonable conduct of the requesting party or by a failure to present evidence that was available at the time of the previous review.

5. Outstanding Appeal Fees: Any person wishing to appeal any decision shall be required to pay all outstanding appeal fees prior to their appeal application being considered complete.

List prior appeals filed:

PLAAPL-11-12-002 & 003 _____

SPR-02-107-WARR1-GA _____

APL-99-104 _____

I have paid all outstanding fees associated with prior appeals: ☐NO ☑YES

SIGNATURES

Gary Kahn, Attorney for Appellants 10/13/16

Name, Title Date

_____

Name, Title Date

Additional petitioner(s):

_____

Name Address

_____

Name Address

_____

Name Address

_____

Name Address

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Statement of Party Status (Item 3)

Friends of the Columbia Gorge (Friends) is a non-profit organization with approximately 6,000 members dedicated to protecting and enhancing the resources of the Columbia River Gorge. As documented in Friends' written and oral comments to the Planning Commission, the proposed project will violate the applicable law and harm the protected resources of the Columbia River Gorge National Scenic Area (NSA). This harm is in direct opposition to Friends' mission and would cause irreparable harm to Friends and its members.

Oregon Physicians for Social Responsibility (PSR), guided by the values and expertise of medicine and public health, works to protect human life from the gravest threats to health and survival by striving to protect our climate and advance environmental health. The proposed project would degrade the environmental health of the NSA and would add capacity for more trains through the Gorge thus causing harm to PSR and its members.

Columbia Riverkeeper's mission is to protect and restore the water quality of the Columbia River and all life connected to it, from the headwaters to the Pacific Ocean. The proposed project would cause irreparable harm to the aquatic and wildlife resources of the NSA in direct opposition to Columbia Riverkeeper's mission, thus harming the organization and its members.

Grounds for Appeal (Item 4)

In both oral and written substantive comments, the Appellants identified dozens of areas where the application fails to comply with the Wasco County National Scenic Area Land Use and Development Ordinance (NSA-LUDO), the Management Plan for the Columbia River Gorge National Scenic Area (Management Plan), and the Columbia River Gorge National Scenic Area Act (Scenic Area Act). The Appellants hereby incorporate all issues raised in the Appellants' comments to the Planning Commission. Despite being apprised of these issues, the Planning Commission approved the application and issued a Staff Summary with Planning Commission Revisions ("Staff Report") and decision (collectively "Decision"). The appeal issues include but are not limited to the following:

The proposal does not comply with the Management Plan and the Wasco County zoning ordinance:

- The Management Plan does not allow expansion of railroads in the GMA Open Space zone. However, about half of the proposed construction is in this zone. *See* Management Plan at II-3-5, NSA-LUDO § 1.070.
- This project cannot be lawfully permitted in the GMA Large-Scale Agriculture zone because the legally required resource-by-resource, parcel-by-parcel analysis of the affected resources was not done and because the applicant has not demonstrated that the new track is the minimum size necessary to provide the service as required by County code. *See* NSA-LUDO § 3.120(E)(20).
- The proposed new culvert cannot be legally placed in the GMA Open Space zone. *See* NSA-LUDO § 3.180(F).
- The temporary construction area in the GMA Water zone is not an allowed use. *See* NSA-LUDO § 3.020.

- Culverts in SMA Public Recreation are not an allowed use. *See* NSA-LUDO § 3.170(F).
- The Decision unlawfully approves signage without adequate evidence and findings to support the decision. The Staff Report references Chapter 23 (Sign Provisions) but does not address it. In addition, the applicant has not specified signage locations in its application. Therefore, whether the signage meets scenic area criteria cannot be evaluated and the signage cannot be approved. *See generally* NSA-LUDO Chapters 14 & 23.
- All over-height structures must be denied or conditioned to meet code. Based upon scenic resource review, the County may determine that the structures must be even shorter. *See* NSA-LUDO §§ 3.120(G)(6), 3.130(G)(5), 3.170(H)(4), 3.180(G)(4).
- For resources in the GMA, the Planning Commission unlawfully granted blanket exemptions from four different setback and buffer standards. In the GMA, each setback and buffer that is to be varied must be identified, the overlapping or conflicting setbacks and buffers must be identified, and then each instance must be analyzed to determine which buffers or setbacks should be varied to best achieve the protection of the affected resources. The evidence in the record does not demonstrate that this has been done. *See* NSA-LUDO §§ 6.020(B).
- The Planning Commission unlawfully granted variances to setbacks in the SMA. The applicant failed to adequately complete the Practicable Alternative Test which is a prerequisite to obtaining the requested variances. *See* NSA-LUDO §§ 6.020(D), 14.500(B)(5). In addition, for scenic resource variances, the scenic mitigation plan required in NSA-LUDO § 6.020(D) ensuring that "the development can be mitigated to ensure no adverse effects would result" has not been submitted by the applicant so the variances allowed in the Decision are unlawful. Also, the Planning Commission unlawfully removed a condition necessary to determine that the project was in the public interest and then unlawfully granted the variances. *See* Staff Report at 114.
- The Decision unlawfully allows the applicant to violate general setback standards. *See* Staff Report at 21; NSA-LUDO §§ 3.120(G)(2), 3.120(G)(3), 3.130(G)(2), 3.130(G)(3), 3.170(H)(2), 3.170(H)(3), 3.180(G)(2), and 3.180(G)(3).
- Conditions of approval to enforce the Planning Commission's conclusions regarding the proposed rock blasting and crushing must be included. Condition 37, or a new condition, must ensure that the rock cannot be sold or used off site.
- The proposed findings unlawfully allow the applicant to violate conditional use criteria because of fire and traffic safety issues; because it would significantly impair sensitive wildlife habitat and riparian vegetation; because there will be adverse effects on air, water, and land; because of the visual impacts that it will cause; and because the use is not compatible with surrounding uses. *See* NSA-LUDO § 5.020, Staff Report at 32.

The proposal would unlawfully harm scenic resources in the NSA:

- The approval was unlawful because the applicant acknowledges that it failed to include a landscaping plan that meets the requirements of the Scenic Area ordinance, the application lacks adequate elevation drawings, and the record does not reflect the location, size, and shape of all existing and proposed buildings and structures," *See* NSA-LUDO § 14.020(D–E) & (B)(2).
- The application and Decision fail to disclose and evaluate details about the surface area of the proposed project that would be visible from key viewing areas (KVAs) and the linear distances along the KVAs from which the project would be visible making it

impossible to conclude that the scenic resource standards will be met. *See* NSA-LUDO §§ 14.200(A)(1)(f), 14.200(A)(1)(c). The Decision also does not address or even mention some of the KVAs from which the proposed development is topographically visible. *See* NSA-LUDO § 14.020(A)(5).

- The project violates the scenic protection requirements of County code because the applicant has failed to propose any new trees to screen the new development from key viewing areas and the conditions of approval unlawfully fail to ensure the retention and replacement of existing screening trees. *See, e.g.,* NSA-LUDO § 14.400(I)(1).
- The applicant fails to demonstrate that the proposed development is sited to achieve the applicable scenic standards including that the development must be sited on each parcel so as to use the existing topography and vegetation for screening. *See* NSA-LUDO § 14.200(R)(4).
- The not visually evident and visual subordinance standards are often impermissibly discussed interchangeably and/or conflated in the Decision. This leads to violations of the not visually evident standard in the zones in which it applies. *See* Staff Report at 57.
- The application and Decision unlawfully fail to analyze and address the cumulative adverse impacts of the proposed project to scenic resources. *See, e.g.,* NSA-LUDO §§ 14.200(L), 1.200 (definition of "cumulative effects"); Staff Report at 50 (removing a condition that purported to minimize cumulative effects).
- In Condition 33, the Planning Commission unlawfully defers to Union Pacific standards that are not in the record and are under the control of the applicant, allowing it to violate scenic resource protections.

The proposal would unlawfully harm recreation resources in the NSA:

- The Decision fails to adequately ensure that the proposed development would comply with the protection measures for recreation resources in the Management Plan and in the County code. *See* Management Plan at I-4-25; NSA-LUDO §§ 14.700(F), 14.710.
- The conditions of approval unlawfully defer determination of mitigation measures until after project approval or omit mitigation measures entirely. *See* NSA-LUDO § 14.710(E).
- The application and Decision unlawfully fail to analyze and address the cumulative adverse impacts of the proposed project to recreation resources. *See, e.g.,* Management Plan at I-4-25.

The proposal would unlawfully harm natural resources in the NSA:

- The applicant unlawfully proposes to intrude on both water resources and their buffer zones. *See, e.g.,* NSA-LUDO § 14.610(A)(2)(g)(2).
- The applicant has failed to meet its burden to demonstrate compliance with the natural resource protection requirements. *See* NSA-LUDO § 14.610(D)(1–2).
- The Decision unlawfully substitutes the applicant's standards for the legal standards found in the Management Plan and County code for the protection of sensitive wildlife and plants. *See* NSA-LUDO § 14.610(B)(2).
- The application and Decision unlawfully fail to analyze and address the cumulative adverse impacts of the proposed project to natural resources. *See, e.g.,* Management Plan at I-3-3, I-3-31, I-3-36.

The proposal would unlawfully harm cultural resources and treaty rights in the NSA:

- The applicant failed to complete adequate cultural resource reconnaissance surveys and therefore failed to meet its burden to demonstrate compliance with the cultural resource protection requirements. *See* NSA-LUDO § 14.500.
- The application and Decision unlawfully fail to analyze and address the cumulative adverse impacts of the proposed project to cultural resources. *See Friends of the Columbia Gorge v. Columbia River Gorge Comm'n,* 346 Or 366, 213 P3d 1164 (2009).
- The Planning Commission unlawfully removed a condition to protect treaty rights and acknowledged this would bring the Decision out of compliance with the law. *See* Staff Report at 120.