

**Apollo Land Holdings Remand
LUBA #2017-014**

Written Comments Received Prior to March 9, 2018

County File #17-0237
March 9, 2018

February 22, 2018

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VIA EMAIL

Mr. Ron Rivers, Chair
Hood River County Board of Commissioners
County Business Administrative Building
601 State Street
Hood River, Oregon 97031

RE: Remand of Apollo Land Holdings, LLC's Permit Application for a Fifty (50) Room Hotel by Oregon Land Use Board of Appeals ("LUBA"); Hood River County File No. Appeal # 16-0200

Dear Chair Rivers and Members of the Board:

This office represents Apollo Land Holdings, LLC ("the Applicant"). This letter requests that the Hood River Board of County Commissioners ("the Board") address the remand by the Oregon Land Use Board of Appeals ("LUBA") in *Hood River Valley Residents Committee v. Hood River County*, _____ Or LUBA _____ (LUBA No. 2017-014, June 29, 2017) by approving the application on remand as explained below.

1. Time in Which the Board Must Make a Decision.

ORS 215.435 contains provisions applying to the remand of permit decisions. The Applicant submitted a letter to Hood River County ("the County") on January 26, 2017 asking that the Board take final action within the 120 day period between January 16, 2018 and May 26, 2018 to make a final, written decision on the application on remand. If the Board holds the first hearing on March 19, 2018, there is ample time for the Board may issue a final decision before May 26, 2018.

2. Request.

The Applicant requests, consistent with LUBA's decision in *Hood River Valley Residents Committee*, that the Board approve a thirty-five (35) unit hotel in the M-1 "Industrial" zoning district. As explained below, and based on LUBA's decision in *Hood River Valley Residents Committee*, a thirty-five unit hotel is an approval of a rural, as opposed to an urban, use consistent with relevant Oregon Statewide Planning Goals (the "Goals") and administrative rules implementing the relevant Goals.

3. Summary of LUBA Decision.

The Board approved the Applicant's permit application for a fifty unit hotel. Hood River Valley Residents Committee appealed the Board's decision to LUBA. LUBA remanded the Board's decision for several reasons. First, LUBA held that a fifty unit hotel implicated Goal 14, "Urbanization", and OAR 660-004-0018, an administrative rule implementing Goal 14. The central issue before LUBA was whether the fifty unit hotel constituted an urban use. Urban uses are generally not allowed outside of urban growth boundaries ("UGBs") without an exception to Goal 14. LUBA decided that the County's exception for the Dee Mill site did not allow for a fifty unit hotel because it was an urban use.

LUBA rejected the Board's determination that the Dee Mill Exception was "acknowledged" by the Oregon Department of Land Conservation and Development ("DLDC") and also said and that it was unclear whether the M-1 zone allowed a hotel. LUBA asked for clarification of whether the hotel was allowed in the M-1 zoning district.

LUBA held:

"OAR 660-004-008(3) makes reasonably clear that a proposed different use of land from the use from which an exception was originally taken may be "approved" only if the proposed use is consistent with maintaining the exception as "rural land", pursuant to OAR 660-004-0018(2)(b). The County's interpretation of the Dee Mill Exception in the M1 zone as allowing the proposed hotel use without consideration whether the new use will "maintain the land as Rural Land" is not consistent with OAR 660-004-0018(3). As we explain below, the County must apply OAR 660-004-0018(2)(b)(A)-(C) to the apparent new use of the exception site". *Id*, *Slip Op 20*.

LUBA also held that OAR 660-004-0018(3) requires the County to determine under OAR 660-0018(2)(b) if the proposed hotel will be a "rural" use. *Id*, *Slip Op 25*. LUBA said that if the proposed hotel use under the current M-1 zone is not a rural land use, then a new exception is necessary pursuant to OAR 660-004-0018(3). *Id*

As explained below, the Board can find that the change from a fifty unit hotel to thirty-five unit hotel results in a rural land use, consistent with Goal 14 and the County's M-1 zoning district.

The Petitioners also raised two other assignments of error which merit attention. The Petitioners argued in their Fourth Assignment of Error that Goal 11, "Public Facilities and Services", was not addressed in the Board's decision. LUBA did not reach the assignment of error because of its determination that the proposed hotel was an urban use that required an exception to Goal 14. LUBA held "when it addresses [the Goal 14] issues, the County can address the provisions of Goal 11 and OAR 660-011-0060, which implements Goal 11, to determine whether the proposed sewage system is consistent with the Goal and rule." *Slip Op 26*.

As part of the Board's decision in this matter, the Board can find that OAR 660-011-0060(1)(f) defines "sewer system" as a system that serves more than one lot. Because the permit application proposes to serve only a single lot, Goal 11 is not violated by the establishment of the sewer system outside of a UGB.

Finally, Petitioners raised a Fifth Assignment of Error concerning Hood River County Zoning Ordinance ("HRCZO") 31.60 which controls site access in the M-1 zone, arguing that the County's decision was not supported by substantial evidence in the whole record. LUBA considered and rejected the Petitioner's assignment of error, affirming the County's decision that the application satisfied HRCZO 31.60.

The remainder of this letter explains why the thirty-five unit hotel is a rural use and why the use is allowed in the M-1 zone.

3. Record.

The Applicant respectfully requests that the prior record made before the Board be included as part of the record before the Board in this remand proceeding.

The Board may take additional evidence in the remand hearing. HRCZO 61.10.E provides:

"The Board's review of the Planning Commission's order shall be confined to the record unless the Board elects at its option to hear the application *de novo* and allow testimony and other evidence in addition to that received upon initial action. If the Board elects to hear the application *de novo* this fact should be included in the notice with the hearing."

The Applicant respectfully requests that the Board conduct the remand hearing as a limited *de novo* hearing to the extent of considering new evidence about whether a thirty-five unit hotel is rural use, whether a hotel is allowed in the M-1 zoning district and if Goal 11 is satisfied. The Board need not open the record for other matters or issues.

4. Analysis.

According to LUBA, a thirty-five unit hotel would be a rural use under OAR 660-022-0030, the administrative rule that governs planning and zoning of unincorporated communities outside of urban growth boundaries. *Id.*, *Slip Op. 10, n4*. LUBA noted that the County's "Rural Unincorporated Community Zone" allows motels and hotels with up to thirty-five unit served by a sewer system. *Id.* LUBA stated at *Slip Op. 10, n4*: "In our view, relevant context for determining whether the 50-unit hotel proposed in the present case is a rural or urban use, for purposes of OAR 660-004-0018 and Goal 14, includes both OAR 660-022-0030 and the County's unincorporated community zone that allows hotels on rural land under limited circumstances."

The Applicant has amended its application to request approval of a thirty-five unit hotel instead of a fifty unit hotel. Based on this analysis, the Board can find that the proposed use is a rural use and not an urban use.

Further, LUBA held at *Slip Op. 20* that OAR 660-004-0018(3) makes “reasonably clear” that a different use of the land from use for which an exception was originally taken can be approved if the new use is consistent with maintaining the exception as “rural land”, pursuant to OAR 660-004-0018(2)(b). *Slip Op. 20*. As explained above, because the Applicant proposes to change the hotel from a fifty unit hotel to a thirty-five unit hotel, the Board can find that this maintains the use of the Dee Mill property for rural uses.

Finally, LUBA held at *Slip Op. 25* that a new reasons exception for use of the land is required if the M-1 zoning district does not maintain the land as “rural land”. Because the proposed thirty-five unit hotel is a rural use, this standard is met.

HRCZO Section 60.08.C provides that Hood River County may approve an application with conditions as necessary to carry out the Comprehensive Plan and HRCZO 60.14. The Applicant proposes that if the Board approves this application on remand, that the decision include the following condition of approval: “The hotel shall be constructed with no more than thirty-five (35) units.”

5. The Board May Interpret the M-1 Zone as Allowing a Hotel as a Permitted Use Outright.

LUBA’s decision explained that it believed that the M-1 zone was ambiguous as to whether it allowed a hotel as a permitted use outright in the M-1 zone.

The Board can find that as the legislative body for Hood River County, its interpretation of its own enactments is entitled to deference under the “plausibility” standard adopted by the Oregon Supreme Court. *Siporen v. City of Medford* 349 Or 247, 243 P 3rd 776 (2010). *Siporen* held that a legislative body’s interpretation of its own enactment will be deferred to if the interpretation is “plausible”. As explained below, the Board’s interpretation that the M-1 zoning district allows the hotel as a permitted use outright is plausible. ORS 197.829(1).

The M-1 zoning district sets forth uses permitted outright. HRCZO Section 31.10. HRCZO 31.10.A provides that a use permitted outright includes “other than a dwelling or a mobile home except when exclusively connected to the business involved, any use permitted in a C-1 zone.” The C-1 zone specifies uses permitted outright in HRCZO 21.10. HRCZO 21.10.C lists “commercial and professional service establishments unless otherwise listed.”

The Board can make two findings in determining that a hotel is a permitted use outright in the M-1 zone. First, the Board can find that in neither the M-1 zone nor the C-1 zone is a hotel “otherwise listed”. Second, the Board can find that a hotel is a commercial establishment. A hotel is a commercial establishment because it provides rooms for overnight lodging in return for payment.

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The Board can find that a hotel is a permitted use outright in the M-1 zone pursuant to the above analysis. The Board's interpretation is entitled to deference on review by LUBA and the courts.

6. Conclusion.

For reasons contained in this letter, the Applicant respectfully requests the Board find that a thirty-five unit hotel is a rural use, is allowed outright in the M-1 zone and that Goal 11 is not violated by the proposed hotel development. All other issues regarding the appeal of the Board's approval of the hotel have been resolved in favor of the Applicant, and were not appealed to the Oregon Court of Appeals. The "Law of the Case" doctrine bars final and resolved issues from being raised on remand.

The Applicant also respectfully requests that the Board give notice for a limited *de novo* public hearing to allow additional evidence concerning a thirty-five unit hotel as a rural use in the M-1 zone, that the hotel is allowed in the M-1 zone and that Goal 11 is not violated. In the event the Board approves the amended application on remand, the Applicant respectfully requests that it be allowed to prepare findings for review by the Planning Department and County Counsel prior to adoption by the Board at a subsequent meeting.

Sincerely,



Michael C. Robinson

MCR:gv

cc: Mr. John Roberts (via email)
Mr. Eric Walker (via email)
Mr. Jason Taylor (via email)
Mr. Dereck Dedorde (via email)
Mr. Robert Benton (via email)
Mr. Bill Summerfield (via email)

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March 5, 2018

Via Email: eric.walker@co.hood-river.or.us

Hood River County Board of Commissioner
c/o Eric Walker, Senior Planner
601 State Street
Hood River, OR 97031

RE: Remand #17-0237 of LUBA Appeal No. 2017-014

Honorable Commissioners:

This office represents Hood River Valley Residents Committee (“HRVRC”) in connection with the above-referenced land use matter. This letter responds to the February 22, 2018 Memorandum from Eric Walker (“Memorandum”) and the February 22, 2018 letter from the attorney for the applicant, Apollo Land Holdings LLC (“Letter”). Please include this letter in the record for the remand proceeding.

The Memorandum provides that testimony on remand will be restricted to three issues alleged to be “the basis for the remand in LUBA decision.” As explained below, HRVRC disputes the assertion that the three items are the only issues on which LUBA remanded the decision and respectfully requests that the County amend the scope of the remand hearing to include all of the issues and applicable criteria on which LUBA remanded the decision. Further the procedural nature of the hearing(s) must be clarified.

A. The LUBA Decision

LUBA remanded the County’s prior decision approving the original application for a 50-room hotel because it agreed with HRVRC’s first three assignments of error. LUBA found, *inter alia*:

- “As a matter of law, LCDC did not acknowledge the Industrial plan designation or the M1 zone as complying with Goal 14.” *Slip op* at 9.
- “The County must consider [on remand] whether OAR 660-004-0018(2)(b) and (3) require a new reasons exception for the proposed hotel.” *Slip op* at 11.
- “Nothing in the language of the Dee Mill Exception or the Central Valley Plan authorizes the use of the property for a hotel.” *Slip op* at 16.
- “The Dee Mill Exception, and the deeply ambiguous M1 zoning applied to the property pursuant to the exception, are capable of an interpretation and application that is fully consistent with the exception statutes as implemented by the Dee Mill Exception, and with LCDC’s rules and Goal 14, and *the county must interpret the*



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Dee Mill Exception and the M1 zone in a manner that is not contrary to the exception statutes.” Slip op at 18 (Emphasis added).

- “The County must apply OAR 660-004-0018(2)(b)(A)-(C) to the proposed new use of the exception site.” *Slip op at 20.*
- “OAR 660-004-0018(3) requires the county to determine under OAR 660-004-0018(2)(b) whether the proposed hotel is a ‘rural use[.]... that will maintain the land as ‘Rural Land’*** and [is] consistent with all other applicable goal requirements[.]’ If the proposed hotel use under the current M1 zoning designation does not maintain the land as Rural Land, then a new reasons exception and satisfaction of the other requirements is required, pursuant to OAR 660-004-0018(3).” *Slip op at 25.*
- “On remand, the county must determine whether OAR 660-004-0018(2) and (3) require a new reasons exception, *and* whether the proposed hotel is an urban use that requires an exception to Goal 14. When it addresses those issues, the county can address the provisions of Goal 11 and OAR 660-011-0060, which implements Goal 11, to determine whether the proposed sewage system is consistent with the goal and rule.” *Slip op at 26 (emphasis added).*

Scope of Remand

As a general matter, the scope of proceedings on remand from LUBA is governed by the terms of the remand and any applicable local requirements. *Fraley v. Deschutes County*, 32 Or LUBA 27, 36 (1996). Therefore, at a minimum, the County must address the all issues required to respond to LUBA’s remand order. *Siporen v. City of Medford*, 55 Or LUBA 29 (2007). Here, LUBA made several clear statements as to what the County must address on remand. The County’s notice improperly narrows the scope of the remand to preclude several issues that the County must address in order to comply with LUBA’s final order. The remand must do more than address just whether the proposed use is rural. It must apply and consider the entirety of OAR 660-004-0018, and in particular, Subsections (b)(2), (3), and to the extent applicable (4). Further to the extent the use is not found to meet those section and/or is inconsistent with the existing Dee Mill exception, new exceptions to Goal 4, 11 and 14 may be required.

Participation in the Remand Hearing and Open Record Period

The Memorandum refers to a “limited de novo hearing” to address the applicant’s modification of application. No copy of any modified application has been provided to HRVRC. Please provide a copy of the modified application as soon as possible. We also note that in the Letter, counsel for the applicant requests “a limited de novo hearing to the extent of considering new evidence about whether a thirty-five unit hotel is [a] rural use, whether a hotel is allowed in the M-1 zoning district and if Goal 11 is satisfied.” (Letter at 3). The Memorandum appears to be contrary to this request, as it limits the de novo hearing to only the modification of the application. However, to the extent that the



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applicant will be submitting new evidence on *any* of these issues the public should have an opportunity to respond to that evidence. ORS 197.763 (7). *See also Caine v. Tillimook County*, 25 Or LUBA 209, 213-214 (1993). Therefore to the extent new evidence is submitted at the hearing, HRVRC requests that the record be held open following the hearing for rebuttal of that evidence.

The Rural Unincorporated Community Zone is not determinative as to whether the proposed hotel is a rural use.

The applicant argues that LUBA's footnote referring to the Unincorporated Community Zone is a sufficient basis for the County to find that the proposed 35-unit hotel is a rural use. This analysis is insufficient and misstates LUBA's opinion. First, LUBA's footnote is merely a suggestion that the Unincorporated Community Zone could provide "context for determining whether" the proposed use is rural or urban. *Slip op* at 10, n 4. It is not definitive, particularly where that zone is qualitatively different than the Industrial Zone and the Dee Exception, and where there already exists a substantive test for determining whether something is urban or rural. HRVRC will submit testimony under separate cover addressing this issue but notes at this point that the applicant's submission is legally insufficient for the purposes of supporting a County determination.

The Proposed Use Must be Consistent with the Original Exception for the Site

Applicant encourages the County to find that the M1 zone allows a hotel as an outright use. Applicant's proposal ignores the LUBA decision, which plainly found that the proposed use must be consistent with both the M1 zone *and* the Dee Mill Exception and noted that "[n]othing in the language of the Dee Mill Exception or the Central Valley Plan authorizes the use of the property for a hotel." *Slip op* at 16. Therefore, in addition to addressing the criteria in OAR 660-004-0018, and explaining how the M1 zone allows the hotel, but also how the hotel (or any hotel) is allowed by the Exception.

In conclusion, the County must reconsider the scope of the remand hearing and ensure that all issues that were the basis for LUBA's remand are addressed. Further the County must clarify the nature of the hearing and allowed for adequate public testimony to avoid procedural violations.

Respectfully,

/s/ Meriel L. Darzen
Meriel L. Darzen
Attorney for Appellant HRVRC

Encl.

CC: Diana McDougale, County Counsel (via email)
Heather Staten (via email)



Steve Hunt
Hunt Orchards
5515 Alder Rd.
Hood River, OR 97031

March 5, 2018

To: Hood River County Board of Commissioners

Re: LUBA Remand Dee Mill Site

Dear Commissioners,

Goal #1 of Oregon's statewide land use planning system is Citizen Involvement. That this goal is listed first highlights the importance of citizen participation in the crafting of our land use laws. It also establishes the absolute importance that the citizens of this state can have full confidence and faith that the land use laws are respected and honored by our elected officials.

The series of applications pertaining to the Dee Mill Parcel has garnered a great deal of public comment. The overwhelming majority of these public comments have been in opposition. Legitimate and important comments were received concerning effects on a large concentration of nearby high-value farm lands, safety issues with the railroad, sewage treatment concerns, and overwhelming traffic concerns. However, a common thread that ran through nearly all the comments in opposition was a questioning of how this rural, industrial parcel, 12 miles from Hood River, came to be zoned for this type of urban, intensive, tourist-centric use. It seemed to the citizens commenting, the people who knew the area best, that there must be some mistake in the zoning!

On June 29, 2017, LUBA made a ruling pertaining to the legality of the zoning on this parcel. As you know, LUBA unanimously found that there was a mistake in interpreting the Hood River Comprehensive plan on this parcel.

The public perception, the public comment and frankly the common sense of the public has been vindicated by the LUBA decision. I ask you as commissioners to validate and respect these results.

The LUBA remand, with its complicated and serious ramifications for the zoning of this parcel, requires extensive and careful deliberation concerning the suitability of the parcel for development. In my view, it is not possible to address the LUBA remand with a piecemeal or minor tweaking of the applicant's hotel proposal for the Dee Mill site. Specifically as to your deliberations:

1. There are no grounds to let the hotel proceed. It was approved under mistaken interpretation of the zoning. The exception at the Dee Mill site was taken for Industrial use, not unlimited application of Commercial usage. The LUBA remand is crystal clear on this point.
2. The Applicant's pursuit of a 35-unit hotel has no particular relevance to this parcel. It was taken from another zone that has no connection to the zoning of the Dee Mill parcel. The Dee Mill site parcel is not

zoned as a "Rural Community Zone". The Applicant wants to cherry-pick a number from some other zone and pretend it has some relevance.

3. Urban Usage. An intensive tourist-related usage on this parcel is inappropriate and always has been. This parcel is surrounded by rural zoning F-1, F-2, and EFU. The impact on the 1,000 acres of prime farmland has never been examined by the Planning Department in any application for this parcel, never. This is a rural area, serviced by a road unsuited to intense daily tourist traffic. This rural area is characterized by long-standing, healthy, economically viable rural agricultural and forest uses.
4. There is a demonstrated need in the county for Light Industrial lands. A small light industrial park is consistent with the LUBA remand, and would be a perfect, beneficial and job producing project at this site. The County should encourage this usage, not a tourist-related destination resort.

There is no demonstrated need for the applicant's project. It has no public support, and is inappropriate. It has been struck down by the highest land use adjudicators in the state.

I urge the Hood River Commissioners to support Light Industrial uses at the former mill site and embrace that kind of sustainable rural use on this parcel.

Steve Hunt
Hunt Orchards

Handwritten signature of Steve Hunt and the date 3/5/18.