

Legal Counsel Update: August 29, 2017

2:00 p.m. – Board Conference Room

Attending: Commissioners Simon G. Hare and Daniel E. DeYoung; (Lily N. Morgan was attending a meeting in Denver) Leah Harper and Pat Ellison, Legal Counsel; Wendy Watkins, Recorder

Chair Simon G. Hare called the meeting to order at 2:00 p.m. Due to guests present, agenda items were taken out of order.

1. LUBA Remand- Shoemaker/Ellison- 1995 Comp Plan Zone Change (Russell Road)

Commissioner Hare said this was the case that the Board in 1995 had tabled indefinitely and asked for direction from Julie Schmelzer, Community Development Director, whether to leave it tabled indefinitely or reopen the case. The Board agreed that the applicant shall start the process again as a new case.

2. Findings and Decision In the Matter of an Appeal filed by Brimstone Natural Resources Co. of the Community Development Director's Decision to Approve with Conditions, to Authorize Placer Mining Activities within the Riparian Corridor of Brimstone Gulch and to Consider the Proposed Reclamation and Landscaping Plan; Assessor's Legal 34-06-08, TL 800

Pat Ellison, Legal Administrator, advised she took out the order number because Findings of Fact do not have an order number and Ms. Schmelzer submitted her **corrections to the findings (Exhibit 3)**. Commissioner Hare agreed to listen to the audio recording for the May 15, 2017 hearing again. *Staff was directed to place the item on the Consent Calendar on next week's Weekly Business Session Agenda.*

3. Amendment No. 1 to Intergovernmental Agreement No. 160056, with the State of Oregon Judicial Department for Courtroom Improvements

Commissioner Hare mentioned the Board approved the contract and this is an amendment to the original contract. *Staff was directed to place the item on the Consent Calendar on next week's Weekly Business Session Agenda.*

4. Intergovernmental Agreement with City of Grants Pass for Emergency Services Manager

The Board discussed **Draft 1 – Intergovernmental Agreement between Josephine County and the City of Grants Pass (Exhibit 1)** and agreed to make a few changes before approving the contract.

5. Matters from Commissioners - ORS 192.640(1)

Commissioner Hare spoke about an email the Board received from **Christine Gardiner (Exhibit 2)**, who is a current member on the Planning Commission, and he believes her ability to represent the public is bias and would like her to recuse herself from the marijuana hearing. Commissioner Hare said it is his recommendation that Legal send a letter to the Planning Commission asking Ms. Gardener to recuse herself due to her biased opinion.

Chair Simon G. Hare called for Executive Session at 2:32 p.m.

Additional Attendees: Shaun Hall, The Daily Courier

6. EXECUTIVE SESSION:

a. Legal Counsel Priorities – ORS 192.660(2)(f)(h)

Executive Session Adjourned at 3:07 p.m.

The Board reported the following:

Agenda Item #6a: For discussion only.

Meeting adjourned at 3:08 p.m.

EXHIBITS:

Exhibit 1 – Christine Gardiner’s Email

**Exhibit 2 – Draft 1 - Intergovernmental Agreement between Josephine County and the City of Grants
Pass**

Exhibit 3 – Julie Schmelzer’s corrections

Draft 1

Exhibit 1
Legal
8/29/17

INTERGOVERNMENTAL AGREEMENT
Between Josephine County, Oregon and the City of Grants Pass, Oregon

This Intergovernmental Agreement is made by and between JOSEPHINE COUNTY, OREGON, a political subdivision of the State of Oregon ("County"), and The City of Grants Pass, Oregon ("City") pursuant to Chapter 190 of the Oregon Revised Statutes. The parties agree as follows:

1. **TERM:** This agreement shall commence on the date last signed, and shall continue until June 30, 2020, unless terminated or extended as provided herein. City shall notify the Contract Administrator in writing thirty (30) calendar days before this contract expires of the upcoming expiration of the contract.
2. **CONTRACT ADMINISTRATOR:** The Josephine County Finance Director shall be the Contract Administrator and is authorized to request, oversee, and approve Services.
3. **SERVICES:** County shall provide to City the services of County's Emergency Services Manager (Manager), as listed in Scope of Services, Exhibit "A," attached hereto and incorporated herein.
 - 3.1 **Licenses:** County and its agents and employees shall hold all licenses, certificates, authorizations, and other approvals required by applicable law to provide the Services under this Contract, and shall maintain such licenses and certificates in good standing for the duration of this Contract.
 - 3.2 **Hours:** [FILL IN AMOUNT]
4. **PAYMENT:**
 - 4.1 In exchange for materials and services, City shall pay County the following sums on or before the following dates:

August 31, 2017:	[FILL IN AMOUNT] Dollars (\$XXXXX.XX).
July 30, 2018:	[FILL IN AMOUNT] Dollars (\$XXXXX.XX).
July 30, 2019:	[FILL IN AMOUNT] Dollars (\$XXXXX.XX).

City may suspend or withhold payments if County fails to comply with the requirements of this Contract.
 - 4.2 Any increase to the maximum compensation amount under this contract will be effective only upon a written, fully executed amendment to this contract. No payment will be made to County for any services rendered after the expiration of this contract, unless prior to such services being rendered, the expiration date of the contract has been extended and the maximum compensation amount has been increased.
 - 4.3 City may suspend or withhold payments if County fails to comply with requirements of this Contract.
 - 4.4 The parties shall not be required to make any expenditure under this Contract if funds have not been appropriated pursuant to ORS 291.305 et seq. (Local Budget Law). The parties shall not be indebted or liable for any obligation created by this

Contract in violation of the debt limitation provisions of Article XI, Section 10 of the Oregon Constitution.

5. **RECORDS MAINTENANCE:** County shall retain and keep accessible all books, documents, papers, and records that are directly related to this Contract, the funds paid to County, or any Service delivered under this Contract for a minimum of six (6) years following the termination of this Contract. If there are unresolved audit or other questions at the end of the six-year period, County shall retain the records until the questions are resolved
6. **CONFIDENTIALITY:** County shall maintain confidentiality of all records, reports, or other information acquired under this Contract that are exempt from disclosure under the Oregon Public Records Law (ORS 192.501 et seq.). County shall not release any such information that is exempt from disclosure without the prior written consent of City.
7. **INDEMNIFICATION:**
 - 7.1 City shall defend, indemnify and hold harmless County, its officers, agents and employees, from any and all claims, liabilities, demands, damages, actions or proceedings arising from or relating to the negligence, wrongful acts, or omissions of City in connection with the performance of any services under this Contract.
 - 7.2 County shall defend, indemnify and hold harmless City, its officers, agents and employees, from any and all claims, liabilities, demands, damages, actions or proceedings arising from or relating to the negligence, wrongful acts, or omissions of County in connection with the performance of any services under this Contract.
 - 7.3 While performing Services as Emergency Service Manager for City under this agreement, Manager shall be deemed an agent of the City, and not County, under the Oregon Tort Claims Act.
8. **TERMINATION:**
 - 8.1 **Mutual Agreement:** This Contract may be terminated at any time upon the mutual agreement of parties.
 - 8.2 **For Convenience:** This Contract may be terminated by either party upon ten (10) days' written notice to the other party. In such case County shall be paid for work completed to date of the Notice.
 - 8.3 **For Cause:** Either party may terminate this Contract, in whole or in part, effective upon delivery of written notice to the other party at such later date as may be established upon occurrence of any of the following:
 - A. If funding to the City is not obtained or is not continued at levels sufficient to pay for services authorized by this Contract.
 - B. If changes in federal or state law or regulations abrogate or disallow procurement of County's services under this Contract.
 - C. If any letter of approval, license, or certificate required by law or regulation to be held by County in order to provide services under this Contract is denied, revoked, suspended, or not renewed.

- D. If a party fails to provide the services or perform the acts required under this Contract, and after receipt of written notice from the other party, fails to correct such failure within thirty (30) calendar days or such other period as required. Written notice shall specify the nature of the breach with reasonable particularity. If the breach specified in the notice cannot be completely cured within the thirty-day period, but curative action is undertaken with reasonable diligence, then such breach shall not constitute a default. Time is of the essence of this contract.

If practicable, the parties shall endeavor to give notice of termination under this section thirty (30) days prior to the termination date, but failure to give notice within that time frame shall not invalidate the legal termination of this Contract.

- 8.4 **Material Breach:** Either party may declare a default immediately upon the occurrence of a material breach by the other party. A material breach is one that substantially impairs the contractual relationship of the parties to provide the services pursuant to this Contract, and includes, but is not limited to: A) Acts or omissions that jeopardize the health, safety or security of any person; B) Misuse of funds; C) Intentional falsification of records; D) Malfeasance by either party's officers, agents, or employees; E) Intentional refusal to comply with the provisions of this Contract; and F) A pattern of repeated non-material breaches.
- 8.5 In the event of a default, the party injured by the default may terminate this Contract and pursue any remedies available under Oregon law. Any litigation must be conducted in Circuit Court of the State of Oregon for Josephine County.
- 8.6 The rights and remedies of the parties provided herein are not exclusive and are in addition to any other rights and remedies provided by law.
- 8.7 **Liability of County:** The County's liability for monetary damages for breach of this Contract shall, in the aggregate, be limited to the payment amount of this Contract. In no event shall the County be liable to City for any indirect, special or consequential damages, notwithstanding any notice of the possibility of such damages.
9. **COMPLIANCE WITH LAW:** County and City shall comply with all applicable federal, state, and local laws, statutes, ordinances, rules, and regulations.
10. **GOVERNING LAW; VENUE:** This Contract shall be governed by and construed in accordance with the laws of the State of Oregon without regard to principles of conflict of law. Any claim, suit, action or other proceeding that arises from or relates to this contract shall be brought and conducted exclusively in the Circuit Court of the State of Oregon for Josephine County; provided, however, that if any such claim must be brought in a federal forum, it shall be brought and conducted exclusively in the United States District Court for the District of Oregon. City, by execution of this Contract, consents to the jurisdiction of said courts.
11. **FORCE MAJEURE:** Neither County nor City shall be held responsible for delay or default caused by fires, riot, civil disobedience, acts of God, or war where such cause was beyond the control of either party. Both parties shall, however, make all reasonable efforts to remove or eliminate such a cause of delay or default and shall, upon the cessation of the cause, diligently pursue performance of its obligations under this Contract.

12. **THIRD PARTY BENEFICIARY:** The County and City are the only parties to this Contract and are the only parties entitled to enforce its terms. Nothing in this Contract gives, is intended to give, or shall be construed to give or provide any benefit or right, either directly or indirectly, or otherwise, to third person unless such third persons are individually identified by name herein and expressly described as intended beneficiaries of the terms of this Contract.
13. **WAIVER:** No waiver of any provision of this Contract shall bind either party unless in writing and signed by both parties. Such waiver, if made, shall be effective only in the specific instance and for the specific purpose given. The failure of the City to enforce any provision of this Contract shall not constitute a waiver by the City of that or any other provision.
14. **SEVERABILITY:** If any term or provision of this Contract is declared by a court of competent jurisdiction to be illegal or in conflict with any law, the validity of the remaining terms and provisions shall not be affected, and the rights and obligations of the parties shall be construed and enforced as if the Contract did not contain the particular term or provision held to be invalid.
15. **ASSIGNMENT:** County shall not assign or transfer any interest in this Contract or enter into subcontracts for any part of the Services without the prior written consent of City. The provisions of this Contract shall be binding upon and shall inure to the benefit of any successors and permitted assigns.
16. **FURTHER ASSURANCES:** The parties agree to promptly execute and deliver any such further instruments and to perform any such further acts as may be required to carry out the intent and purpose of this Contract.
17. **NOTICES:** Any notices required by this Contract must be given in writing by personal delivery or by certified mail return receipt requested to the following addresses. Any notices so mailed shall be deemed to be given three (3) days after mailing. Any notice by personal delivery shall be deemed to be given when actually delivered.
 - 17.1 County's address for notices is: Finance Director, 500 NW Sixth St. Dept. 4, Grants Pass, OR 97526.
 - 17.2 City's address for notices is: City Manager, 101 NW "A" St., Grants Pass, OR 97526.
18. **AMENDMENT:** This Contract may be amended or modified at any time upon the written agreement of both parties, signed and executed in the same manner as below.
19. **TIME IS OF THE ESSENCE:** the parties agree that time is of the essence with regard to performance of all obligations under this contract.
20. **AUTHORITY:** By signing this contract the person signing affirmatively represents that he or she is fully authorized so to act.
21. **ENTIRE CONTRACT:** THIS CONTRACT CONSTITUTES THE ENTIRE AGREEMENT BETWEEN THE PARTIES and supersedes any previous promises, representations, agreements, conditions or understandings between the parties. There are no other promises, representations, agreements, conditions or understandings, either oral or

written, between the parties other than those set forth in this Contract.

CITY:
CITY OF GRANTS PASS, OREGON

COUNTY:
JOSEPHINE COUNTY
BOARD OF COMMISSIONERS

Aaron Cubic, City Manager

Simon G. Hare, Chair

Date

Lily N. Morgan, Vice-Chair

Daniel E. DeYoung, Commissioner

Date

Approved as to form:

Wally Hicks, Legal Counsel Date

EXHIBIT A

SCOPE OF SERVICES

GENERAL SERVICES: County shall provide to City the services of County's Emergency Services Manager, through the County's Emergency Management Program, which is responsible for coordinating activities related to county-wide planning, mitigation, response, and recovery from natural and man-made disasters. Emergency Management is responsible for coordinating revisions for all emergency operations plans, administering Homeland Security grants, and many other pre-event administrative activities. Emergency Management relies on close coordination with local and state agencies, and community partners for preparedness activities and when responding to disasters.

SPECIFIC SERVICES: In addition to the general emergency management services, County shall provide the following specific services to City for the benefit of the City:

1. County shall assist with the ongoing maintenance of the City of Grants Pass Emergency Operations Plan (GP EOP).
2. County shall maintain a City Communications Directory, which shall be available to City staff in electronic and .pdf format.
3. County shall assist in developing and maintaining an emergency resources list including City, County, and an inventory of third party equipment and resources.
4. County shall assist in developing and maintaining an employee emergency management summary document for quick reference and for employee orientation, for City employees.
5. County shall develop and oversee semi-annual emergency management trainings and/or emergency management training exercises for the City of Grants Pass.
6. County shall develop the City of Grants Pass Continuity of Operations Plan (GP COOP).
7. County shall assist citizen preparedness through citizen outreach and through citizen emergency notification processes. This shall include two news articles each year (semi-annual) addressing citizen emergency preparations and preparedness.
8. County shall work with City in preparing and ~~outfitting~~ equipping and furnishing the City's Emergency Coordination Center (ECC). City shall providing funding for all equipment and furnishings.

Exhibit 2
LEGAL
8/29/17

Wendy Watkins

From: Simon Hare
Sent: Tuesday, August 29, 2017 3:15 PM
To: Wendy Watkins
Subject: FW: Citizen Response to Ord 2017-034

FYI

From: Christine Gardiner [mailto:siskiyou.alpaca@gmail.com]
Sent: Tuesday, August 8, 2017 5:12 PM
To: Board of Commissioners <BCC@co.josephine.or.us>; Dan DeYoung <DDeYoung@co.josephine.or.us>; Lily Morgan <LMorgan@co.josephine.or.us>; Simon Hare <SHare@co.josephine.or.us>
Cc: comments@thedailycourier.com; tracey@ivstreamteam.org
Subject: Citizen Response to Ord 2017-034

8 August 2017

To the Josephine County Board of County Commissioners

Citizen Response to Ordinance 2017-034

As a Rural Planning Commissioner in Josephine County, I am astonished to find the BCC and the Planning Dept acting, with this ordinance, in a manner that opposes every democratic principle I was raised to uphold. Apparently the BCC is prepared to commit economic warfare against many of the citizens who pay your salary.

You have the opportunity to save the county from the economic slump that follows “timber harvest” now that the supply of trees is exhausted. You have the chance to support the people who created an economic engine while timber declined, raised Cannabis for market, and created the foundations of a sustainable economy by producing the crop the world wants to buy from us.

Instead of honoring the producers and the 3,000+ farms who have grown us out of the “timber dependent” status, you have created an ordinance to put them out of business. I’m talking about the People who pay your salary through paying their county taxes. Do you not have an obligation in a democracy to inform the citizens who are affected by your decision?

Is the problem really Cannabis? This plant was recognized by the AMA as medicine in the US Pharmacopeia from 1851-1926, for 75 years, and still has no recorded deaths attributed to it. Why are you and the State of Oregon micro-regulating this plant? What other answer can there be, than you are clearly serving Big Corporate interests who would prefer to dominate the Industrial TCH market, while offering to pay you big taxes?

I suggest that the drugs that kill people deserve the kind of scrutiny you currently devote to Cannabis. What are you doing to address the black market for synthetic opioids, which will kill people in JoCo and Oregon today, tomorrow, next week, next month? Does this subject not deserve more of your attention than a plant medicine that has killed no one?

There are real problems with the “Marijuana” industry. Most of these problems stem from 80 years of Prohibition. Instead of banning the crop you love to hate, why not address HOW it is grown? Since you (and I) hate the fences, you have an obligation to request the State of Oregon to remove this unnecessary, divisive requirement.

To protect the character of rural neighborhoods, here are topics worthy for ordinances:

1. Protect and regulate the public water supply, and prosecute those who illegally take and/ or sell public water for private profit;
2. Disallow industrial noise above some threshold of decibels;
3. Disallow industrial greenhouses over 1000 sq ft. and regulate light pollution;
4. Protect the county’s irreplaceable farm soils from paving, toxins and erosion;
5. Encourage producers to treat Cannabis like the crop it is, and plant in the earth.
6. Protect the “character of the rural landscape” and enforce protection of a native tree canopy ordinance.

Josephine County could lead the world in organic Cannabis production. If we did, the world would beat a path to our door to buy what we produce. Why do you oppose a prosperous future for the People of this County, which is easily within our reach? Since I farm on EFU land, this ordinance does not affect me personally, but I speak out of concern for the wellbeing of my community.

The contempt you have shown for the People of Josephine County shows clearly you have chosen to side with Big Pharma/ Corporate interests. How many lives could you save in our county if you gave this much attention to the Black Market leakage for legal opioids?

Rescind this ordinance. Bigotry and hatred have no place in modern society. You have a legal and moral obligation to the citizens of your county, to engage in public dialog with those whose livelihoods are

affected by your decisions. How many of the citizens, producers and patients who live and work here have any idea what you have just enshrined in this ordinance?

Or have the lobbyists from Big Pharma so seduced you with the promise of lots of easy money that you no longer care about the People who call Josephine County their home?

Respectfully yours,

Christine Peralá Gardiner PhD

JoCo Rural Planning Commissioner

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BEFORE THE BOARD OF COUNTY COMMISSIONERS FOR JOSEPHINE COUNTY
STATE OF OREGON

Exhibit 3
Legal
8/29/17 ✓

In the Matter of an Appeal filed by)
Brimstone Natural Resources Co.)
of the Community Development Director's)
Decision to Approve with Conditions,)
to Authorize Placer Mining Activities)
within the Riparian Corridor of)
Brimstone Gulch and to Consider the)
Proposed Reclamation and Landscaping)
Plan; Assessor's Legal 34-06-08, TL 800)

ORDER NO. 2017-____
FINDINGS OF FACT AND
AND CONCLUSIONS OF LAW

~~ORDER NO. 2017-____~~
I haven't see Order numbers on other For Fact.

Facts.

The board finds the following facts, based on substantial evidence in the record:

On November 2, 2016, the applicant submitted an application to the Josephine County Planning Department for review of proposed activities within the "riparian corridor" of Brimstone Gulch. The application was necessitated by the Oregon Department of Forestry's (ODF) requirement that Brimstone obtain a "plan for alternate practice" to cure a violation of the Oregon Forest Practices Act (FPA). The application was filed after preapplication review.

The subject property is located at T34 S, R6 W, Section 8, TL 800. It is zoned Forest Commercial under the county's comprehensive plan and land use regulations. Brimstone Gulch is classified as a medium fish-bearing stream. The property is otherwise described in the May 15, 2017 Staff Report.

Brimstone removed trees within the riparian corridor as part of its plan to mine for placer gold. ODF requires Brimstone to correct that by restoring the trees or by developing a plan for alternate practice pursuant to OAR 629-605-173. Brimstone chose to develop a plan for alternate practice, which requires ODF to consult with other potentially permitting agencies including Josephine County.

Brimstone's anticipated activities in the riparian corridor are described in its application dated November 6, 2016, and supplemented during the hearings process. In short, Brimstone's plan is to recover placer gold by digging a series of small holes, from which overburden will be set aside next to each so-called "cell". The ore-bearing material will then be moved a short distance to a processing plant where the gold is recovered. The material will then be returned to the mining site and the overburden will be replaced in the same horizons or strata as it was removed, then the site is replanted. All material is returned to each cell, less very small (but valuable) amounts of gold. The total volume of material that would be processed is below the 5,000 cubic yard per year threshold pursuant to ORS 517.750(15)(a).

The application and hearings process.

The community development director approved the application on March 1, 2017, subject to conditions. Brimstone timely filed its appeal application. Duly noticed public hearings occurred on May 15 and June 2, 2017. On May 30, 2017 the board of commissioners met in executive session with legal counsel. At the June 2 hearing the board unanimously voted to find that the county did not have authority to review the matter.

Discussion.

Section 65.020 of the Josephine County Rural Land Development Code (RLDC) states in part,

RECEIVED
from SOUE
AUG 23 2017

ORDER NO. 2017-____

JOSEPHINE COUNTY
LEGAL COUNSEL

Was this in the app/hearing?

NCBC

BNRA ✓

ADV ✓

"The following uses shall be allowed outright on lands in the Forest Zones. No permit or authorization is required to conduct the uses.... A(3) Physical alterations to the land auxiliary to forest practices including, but not limited to, those made for purposes of exploration, mining, commercial gravel extraction and processing, landfills, dams, reservoirs, road construction or recreational facilities . . ." Brimstone's application seeks authorization from the County to conduct an outright permitted use on privately held Forest Commercial property for which no permit or authorization is required. This activity is regulated by other state and federal agencies, including ODF. In light of the fact that the RLDC expressly provides that Brimstone's placer gold mining does not require a permit from the county but that other agencies do have review authority, the county's interest in reviewing this activity as a land use matter is minimal. Brimstone's proposal does not involve the placement of structures or other services or infrastructure and there is nothing involved in the proposal that would require follow up inspections by county departments.

Was this in the app hearing?

The RLDC defines development as the "alteration" to improved or unimproved land. RLDC 72.040.B.2 provides that "development within the riparian corridor setback area by fill or excavation, by placement of structures, by construction of impervious surfaces, or by removal of vegetation (with or without other development) is generally prohibited, except as listed in subsections 2.a through 2.j below . . . [and] shall require a pre-application review pursuant . . . and must be authorized by a development permit . . . prior to development." Brimstone's proposed activities do not constitute "development" because there is no proposed alteration to the land, where all that occurs in its plan to mine for placer gold is the removal of small amounts of earth, which is then processed and replaced exactly as it was before.

WHEREAS, Brimstone Natural Resources Co. has paid certain fees to the Community Development Department; and

WHEREAS, Brimstone Natural Resources Co. appealed a decision of the Community Development (Planning) Director; and

WHEREAS, the Board of County Commissioners held a hearing regarding the appeal on May 15, 2017, which continued to June 2, 2017, at which the board voted unanimously to dismiss the appeal; now, therefore,

The Board of Commissioners hereby orders as follows:

1. The appeal filed by Brimstone Natural Resources Co. and its application for riparian site plan review are hereby dismissed;
2. Any moneys that Brimstone Natural Resources Co. has paid to Josephine County Community Development regarding this matter shall be immediately refunded.

DONE AND DATED this _____ day of _____, 2017.

JOSEPHINE COUNTY
BOARD OF COMMISSIONERS

Simon G. Hare, Chair

Lily N. Morgan, Vice-Chair

Daniel E. DeYoung, Commissioner