

City of La Pine

La Pine City Hall, PO Box 3055, 51340 Hwy 97, Deschutes County, Oregon 97739
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FINDINGS AND DECISION OF THE LA PINE CITY COUNCIL

FILE NUMBERS: CU-10-25/SP-10-12, including modifications, and related appeal A-10-06

LOCATION: The property is located in the City of La Pine, Oregon between Reed Road and Foss Road in the La Pine Industrial District. It is the eastern portion of the property identified on Deschutes County Assessor's Map 22-10-14 as Tax Lot 100.

APPLICANT: Biogreen Sustainable Energy Co. LLC
445 Port Avenue, Suite A
St. Helens, OR 97051

OWNER(S): Deschutes County
1300 NW Wall Street
Bend, OR 97701

ATTORNEY: Liz Fancher
644 NW Broadway
Bend, OR 97701

CIVIL ENGINEER: Matthew Steele
HWA Associates
62930 O.B. Riley Road, Suite 100
Bend, Or 97701

REQUEST: Conditional Use Permit and Site Plan review for a Biomass power generation facility

STAFF CONTACTS: William Groves, Senior Planner - Deschutes County and Deborah McMahon, Planner - City of La Pine

I. APPLICABLE CRITERIA:

Title 18 of the Deschutes County Code, the County Zoning Ordinance.
Chapter 18.61, Urban Unincorporated Community Zone, La Pine
Chapter 18.116, Off Street Parking and Loading
Chapter 18.124, Site Plan Review
Chapter 18.128, Conditional Uses

Title 22, the Deschutes County Land Use Procedures Ordinance.

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The City has reviewed the unacknowledged La Pine Comprehensive Plan and has determined that none of its provisions, including those cited by project opponents, are mandatory approval criteria for the review of this application. All cited provisions are written to guide future City actions rather than to serve as approval criteria for this land use application.

These include: Goal #1 Policies for Public Facilities and Services. That policy says that the City should not enter into arrangement with service providers to provide public facilities for City residents and businesses in the City in a way that requires the City to subsidize activities of the provider or to repair damage created by other service providers. Biogreen will not be a City service provider. Rather, it will generate electricity that will be delivered to residents in La Pine or elsewhere by a service provider. The plan statement that La Pine has the lowest power rates in the region is not an approval criterion – just a statement of fact. Information in the plan about area street intersection issues, also, does not provide an approval criterion for the review of this application. Instead, it is evidence that was considered by the City in making this decision.

II. **BASIC FINDINGS:**

- A. **LOCATION:** The property is located in the City of La Pine, Oregon between Reed Road and Foss Road in the La Pine Industrial District. It is the eastern part of property identified on Deschutes County Assessor's Map 22-10-14 as tax lot 100.
- B. **LOT OF RECORD:** The subject property is a legal lot of record as it is Parcel 1 of Partition Plat No. 2010-13, a final partition of Tract E of the La Pine Industrial Site subdivision. The final partition plat was recorded with the Deschutes County Clerk on November 12, 2010.
- C. **ZONING:** The subject property is within the Industrial District of the La Pine Planning Area. The La Pine Planning Area is within the Urban Unincorporated Community zone of La Pine. This area is now within the City of La Pine.
- D. **LAND USE HISTORY:** In January 1985, the plat of the La Pine Industrial Site was recorded by the Deschutes County Surveyor as file CS07947. The subject property was a portion of the 88.84-acre Tract E that was created with that plat. In January 2002, the Newberry Business Park was platted on the west portion of Tract E leaving Tax Lot 100, Assessor's Map 22-10-14 as a lawfully created remainder parcel. On July 21, 2010, Deschutes County filed MP-10-6 seeking permission to divide Tax Lot 100. On August 6, 2010, the Deschutes County Planning Division approved the request to partition Tax Lot 100. The final plat was recorded on November 12, 2010. The subject property is undeveloped.
- E. **SITE DESCRIPTION:** The subject property is approximately 19.5 acres with relatively level topography. The northern and southern boundaries of the property abut Reed Road and Foss Road, respectively. Truck access to the site will be taken from Reed Road. Small vehicle access will be taken from Foss Road. The entire site is undeveloped but was recently cleared of most tree cover. Vegetation consists primarily of scattered immature lodge-pole pine trees, buck brush and native fescue grasses.
- F. **SURROUNDING LAND USES:** The properties that surround and adjoin the subject property are industrial-zoned properties located in the City of La Pine. Vacant industrial zoned properties lie to the south and west of the subject property. The La Pine Sewer

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District wastewater treatment and disposal facility lies north of the subject property and north of Reed Road. Northwest of the property and immediately north of Reed Road is also a cellular tower facility that is approximately 150-feet tall. The Burlington Northern railroad right-of-way and tracks lie to the east. Approximately 300 feet further east is Phase II of the La Pine Industrial Site subdivision. Two of the Phase II lots east of the subject property were partitioned into 5 smaller parcels in the years 2000 and 2001. An auto repair shop occupies one of those resulting parcels. A landscape materials supply company formerly occupied another resulting parcel. A wood chip processing facility occupies at least two parcels in La Pine Industrial Site Phase II southeast of the subject property. The nearest residentially zoned properties are residential subdivisions that are located to the southwest of the subject property – over 750 feet away and, mostly, to southwest of the intersection of Mitts Way and Foss Road. The nearest residence is located at the southwest corner of the intersection of Mitts Way and Foss Road.

G. PROPOSAL: The applicant is requesting approval of a Conditional Use Permit and Site Plan to construct and operate a biomass power generation facility (utility facility) on the subject property. The business will involve the importing of biomass from remote or mobile chipping facilities and the storage and conditioning of bio-mass on site in large piles up to 60 feet tall. Biomass will be burned in furnaces to create heat for boilers that will create steam for turbine-powered generators. The plant will produce approximately 24.9 megawatts of electricity. The plant will employ approximately twenty-one (21) direct employees on three shifts. It will create approximately 90 more indirect jobs in the forest and in the trucking industries. The applicant estimates the business will have approximately fifty (50) to sixty (60) business-related vehicle trips at the site per day by employees, customers or clients, including parcel delivery services. In addition, a maximum of approximately thirty-five (35) truckloads of biomass materials will be delivered to the site each day. The estimate is based on the fact that the biomass plant requires about 24 truck loads of biomass per day (one truck per hour) to meet the needs of the plant. The proposed structures will include a 200-square foot scale house building, 15,000-square foot boiler/turbine/treatment complex, cooling towers, truck dump facilities, a bag house, a power substation and a stack with a height of approximately 100 feet.

I. PUBLIC AGENCY COMMENTS: The Deschutes County Planning Division mailed notice to several agencies and received the following comments prior to issuing its decision approving the conditional use and site plan applications:

1. Deschutes County Transportation Planner:

Background

After consulting with County staff from the Planning Division and the Road Department, Morrison Transportation Consulting prepared a Site Traffic Report (STR) for the proposed Biogreen plant in La Pine. The STR was prepared consistent with the suggestions of County staff. Greenlight Engineering has submitted a critique of the STR. While it is the Applicant's burden to respond to Greenlight, County staff has reviewed both the STR and Greenlight's letter and offers the following observations on the substantive issues.

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Trip Generation Rates

The applicant used the Institute of Traffic Engineers (ITE) manual for Utilities, (Land Use #170). Greenlight is correct in that ITE states to exercise caution for land uses with small sample sizes. A caution, however, is not a prohibition. County staff and the Applicant's traffic engineer discussed Biogreen, its number of employees, origin and destination of trips, existence of comparable biomass power facilities, etc.

Greenlight points out the number of employees in the four studies of Utilities (Land Use #170) ranged from 50 to nearly 750. Biogreen intends to have 21 employees with approximately seven per shift. By using Utilities as the trip generator, the traffic impacts of Biogreen have been overstated, yet all analyzed intersections still met ODOT or Deschutes County performance standards post-development. Greenlight has not provided any contravening data from other biomass plants in terms of trip generation rates.

The City finds that County staff and the Applicant's traffic engineer have exercised the appropriate levels of caution.

Intersections Analyzed

Under 17.16, the County Code for traffic studies, the geographic breadth of a traffic analysis is tied to the anticipated volumes of generated trips. For land uses that generate less than 200 daily trips and 20 p.m. peak hour trips, the Deschutes County Code (DCC) at 17.16.115(C)(4)(b) requires a STR. Biogreen, based on the number of employees and the Utilities category in the ITE manual, is expected to produce between 170-190 trips daily. In the 4-6 p.m. peak hour period the site is expected to generate 12 trips. Thus, Biogreen's traffic falls within the STR parameters.

DCC 17.16.115(D)(2)(a-c) sets the geographic boundaries for traffic analysis. The Applicant must analyze site access points, the nearest intersecting collector or arterial that will *experience an increase of 25 additional peak hour trips*, and other intersections requested by staff. (emphasis added)

As the total p.m. peak hour trips from Biogreen will be 12 trips, no collector or arterial will meet the additional 25 p.m. peak trip threshold required for traffic analysis under DCC 17.16.115(D)(2)(b).

County staff, utilizing DCC 17.16.115(D)(2)(c), did request the intersection of 97/1st-Reed be analyzed as this intersection was an area of community concern in previous land use applications and the Biogreen STR indicated 60% of the site traffic would travel through the intersection. Additionally, there have been several traffic studies of this intersection since 2006 and Biogreen offered another opportunity to monitor the intersection's performance. The Biogreen STR concluded 97/1st-Reed would meet ODOT's mobility standard before and after development. The City of La Pine concurs with the studies conclusions.

There have not been similar comments regarding 97/Foss or 97/Finley Butte, two intersections Greenlight wanted analyzed. The Biogreen STR indicated only 15% of the trips would come from the south; the STR narrative assigned those to Darlene Way. The most recent count for Foss (2006) had an average daily traffic (ADT) of 786 vehicles, which is a relatively low volume. Neither the City nor County observed any

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significant delays at Foss/97. For similar reasons, staff did not request 97/Finley Butte be analyzed. In the most recent count for Finley Butte (2008) the road had 745 ADT. Given the combination of low background traffic and minimal trips to/from Biogreen that would use these intersections, City and County concluded there was insufficient reason to analyze the 97/Foss and 97/Finley Butte intersections.

For those same reasons, the County did not request the Mitts Way/Finley Butte intersection be analyzed. The intersection was built to County geometric standards as set by DCC 17.48.090, including curb returns. Greenlight's concern was an eastbound semi-truck and trailer would have to swing wide (meaning the semi would briefly enter the lane of opposing traffic to enable the trailer to remain in its lane) when making a right turn to continue north to Biogreen. Such a maneuver happens hourly at intersections throughout the County with no deleterious effects. Given the low volumes on Mitts Way, the City finds that there should be sufficient gaps to allow a semi to make this right turn without conflict. It is important to realize that only 15% of Biogreen traffic will be from the south. Given the total volumes in the p.m. peak is 12 vehicles, which means two vehicles can be expected to use Mitts Way between 4-6 p.m.

Analysis Methods Required

The STR only analyzed sight distance of the plant's main entrance at Reed Road whereas Greenlight asserts the driveway's actual operational performance should be measured. The ambivalent wording of the County's code does lead to understandable confusion. While it is not unreasonable to conclude a STR would require a level of service (LOS) analysis, past County practice is a STR is a lesser analysis of traffic and relates more to simple geometrics of a driveway or intersection.

DCC 17.16.115(F) sets the minimum for a STR. DCC 17.16.115(F)(4) requires an access be analyzed for sight distance and operation characteristics. Note that (F)(4) begins with a requirement for a "Safety analysis of the site access." Safety analyses typically are concerned with sight distance, stopping sight distance, crash histories by type, magnitude, and rate, etc.

Contrast the requirements for a STR with the requirements in DCC 17.16.115(G) which sets the minimum for a Traffic Impact Analysis (TIA). By comparison, DCC 17.16.115(G)(10) explicitly requires LOS and volume/capacity (V/C) ratio analysis. The County code does not seem to require LOS or V/C for a STR, but specifically requires them for a TIA.

Finally, DCC 17.16.115(F)(4) talks about "characteristics" whereas DCC 17.16.115(H) is about operation and safety standards, which are then defined specifically at (H)(1) and (H)(2). Distinguishing in the code between characteristics vs. standards is an important distinction in the language of 17.16. Clearly, the intent of a STR is not to determine whether an analyzed location meets County or ODOT performance standards, whereas a TIA does have that requirement.

Crash History at 97/1st-Reed

The goal of any transportation provider is to minimize crashes on the system. However, that desire must be balanced against scarce resources. In the transportation industry, a crash rate of less than 1.0 crashes per million entering vehicles (MEV's) is considered acceptable. The crash rate at 97/1st-Reed is 0.76 per MEV for the most recent year

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available. Crashes, unlike traffic volumes, are not as mathematically predictive as forecasting future traffic volumes. In other words, if an intersection has seen a 5% traffic growth in the last ten years, then that intersection can be expected to have 5% growth for the next ten years. But one cannot say that an intersection that has had four crashes in the last ten years can be expected to have four crashes in the next ten years.

Darlene Way

This is a public right of way under Bureau of Land Management (BLM) jurisdiction but maintained by the County. The County Engineer and Transportation Planner traveled the road last month and assessed it would be adequate for truck traffic. The road is obviously the main stem in the road network of logging roads in this area.

2. Deschutes County Road Department: Reed Road is classified as a City Collector. Existing width of Reed Road is currently 32 feet and there are existing drainage swales located on the south side of the roadway. Minimum road design standards for a City Collector are 36 foot width with sidewalks. Sidewalks will be installed on Reed Road as a condition of approval for MP-10-6. Applicant will be required to widen Reed Road to provide a width of 18 feet from centerline as part of this application.

Foss Road is classified as a City Local. Existing width is 26 feet. Minimum road design standards for a Commercial City Local are 32 foot width pavement with sidewalks and drainage swales. Applicant will be required to widen Foss Road to provide a width of 16 feet from centerline as part of this application along with the installation of sidewalks and drainage swales.

Per Table "A", the following would apply to this land use application:

- The applicant will be required to improve Reed Road to the standards listed in Title 17, Table "A" for a Collector Road. This will require the widening of the existing pavement to a width of 18 feet from centerline along the frontage of the applicant's property. Sidewalks will have been installed as a condition of approval for MP-10-6. Drainage swales will be required along the frontage of the property.
- The applicant will be required to improve Foss Road to the standards listed in Title 17, Table "A" for a Commercial Local Road. This will require the widening of the existing pavement to a width of 16 feet from centerline along the frontage of the applicant's property. Sidewalks and drainage swales will be required along the frontage of the property.

3. Deschutes County Environmental Soils Division: In the La Pine Sewer District. DEQ permit applied for air discharge.
4. La Pine Water and Sewer Districts: The proposals are acceptable to both Districts.
5. Department of Environmental Quality: The Biogreen facility will use treated recycled wastewater from the La Pine Sewer District for the cooling tower. DEQ is currently reviewing the District's permit, including this use of recycled water.

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6. Department of Environmental Quality – Water Quality: La Pine has high local groundwater. DEQ regulates the UUC program for stormwater and other discharges to groundwater. Apply for UIC approval if proposed for use at the site.
7. Oregon Department of Transportation: I have read the application for the biomass plant at La Pine. I have no comment other than to say that the Central Oregon Rail Study written by ODOT and COACT calls for the eventual grade separation of Reed Road and the BNSF Railway.
8. TransCanada (Gas Pipeline): We will gladly take a look at this. Preferable method would be an 811 locate call by the Biomass Plant of the delivery route that will be used by the trucking contractor. This will insure a responder to the site to determine the depth of the pipelines. If they are using our right of way we will have to give permission to do that. The contractor may have to build up the road way where they are crossing. We will also need to know the weight and number of axles of the trucks to compute the load weight on our pipelines.
9. La Pine Rural Fire Protection District: The La Pine Rural Fire Protection District has reviewed the September 20, 2010 notice of application (CU1025-2210140000100) for a conditional use permit for a Biomass Power Generation Facility in La Pine. The district has had the opportunity to provide input in the design and development process. This resulted in the condition that the facility be fully sprinklered and have sufficient supporting water supply and hydrants. The District has no objection to the application and will remain engaged on related life and fire safety matters.
10. No Comment: the following agencies did not respond to the request for comment or responded with “no comment” during the administrative review of the application by Deschutes County: Deschutes County Assessor, Deschutes County Building Division, Watermaster, Department of State Lands, ODOT Aviation, United States Forest Service, Oregon Health Division, La Pine Parks and Recreation District, City of La Pine, Bureau of Land Management.

J. PUBLIC COMMENTS: The Deschutes County Planning Division sent notices of the application and administrative review to all property owners entitled to notice as required. Public comments filed prior to issuance of the administrative decision identified the following concerns: traffic impacts, 1st Street/Reed Road/Highway 97 intersection safety, suitability of Darlene Way as a truck route, groundwater contamination, compatibility with TransCanada gas pipeline, potential use of Rosland Road, groundwater availability, air quality impacts, traffic impacts to Finley Butte Road, noise impacts, dust impacts, procedural questions, 4th/Foss/Highway 97 intersection, facility access entrances, traffic impact mitigation fees, compliance with the City of La Pine Comprehensive Plan, transportation of weeds and nuisance species, the relationship between County permits and the DEQ air quality permitting process and adequacy of the applicant submitted traffic study.

Public comments also identified the following concerns that are not regulated by the applicable provisions of the County Code that apply in the City of La Pine: off-site

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forestry practices, fuel source sustainability/availability, project ownership and financials, public tax credits and funding, and the use of local labor in the plant.

Appeal of Deschutes County Administrative Decision CU-10-25/SP-10-12

An appeal of the County's administrative decision was filed (known as A-10-06) by an opponent of the project. The appeal generally included issues related to the County staff decision, Council bias, procedures, traffic, noise, compatibility, state of the site plan, and DEQ permits. These issues are fully discussed below and are either resolved to the City's satisfaction by submission of additional applicant data and subsequent City/County analysis, additional conditions of approval, or in some cases the appeal issues were found to be unsupported by criteria or law. The City has been very cooperative with opponents in providing multiple venues for public participation, customized hearing dates, and time to present materials.

- K. POSTING REQUIREMENT:** The applicant complied with the posted notice requirements of Section 22.23.030 (B) of Title 22. The applicant submitted a Land Use Action Sign Affidavit dated September 24, 2010 that indicates that the applicant posted notice of the land use action on September 22, 2010.
- L. REVIEW PERIOD:** The Planning Division received this application on September 17, 2010. Deschutes County deemed this application complete and accepted it for review on October 12, 2010. The City Council decision on this matter is at day 82 of the 120-day timeline set by law for the processing of land use permits.
- M. ADMINISTRATIVE DECISION:** On October 13, 2010 the Deschutes County Planning Division issued an administrative decision approving CU-10-25/SP-10-12.

III. CITY REVIEW OF ADMINISTRATIVE DECISION

The City of La Pine makes the following findings of fact and conclusions of law:

- A. INTERGOVERNMENTAL AGREEMENT:** The City of La Pine and Deschutes County have entered into an intergovernmental agreement regarding the processing of land use applications in the City of La Pine. The agreement recognizes the fact that the County's land use laws apply within the City as the City has not yet adopted its own land use regulations. It also provides that Deschutes County Title 22 regarding land use procedures shall be used in the review of City land use decisions with the exception that the City Council will exercise duties assigned to the Deschutes County Commission. These facts have not been disputed by any party.
- B. CALL UP FOR REVIEW:** On October 19, 2010, the La Pine City Council issued Order No. 2010-01 (incorporated by reference herein). That order initiated a *de novo* review of the October 13, 2010 administrative decision. This action was authorized by DCC 22.28.050. DCC 22.28.050 gives the La Pine City Council the right to initiate a review of an administrative land use decision within 12 days of the date the administrative decision is mailed. DCC 22.28.050 allows the City to hear the matter *de novo* or to impose limits on its review. A *de novo* review was selected because the City hearing would be the first hearing held to consider the land use applications.

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C. APPEAL BY JOHN WILLIAMS: On October 19, 2010, John Williams filed an appeal of the October 13, 2010 administrative decision prior to the time set that evening for the City Council to decide whether to initiate a review of the Biogreen decision.

1. *Jurisdictional Argument*

In an October 28, 2010 letter to the Deschutes County Community Development Department, Mr. Williams' attorney Bruce White presented the legal argument that DCC 22.24.020(B) requires that a land use hearings officer, rather than the City Council, hear the Williams appeal. Mr. White argued that DCC 22.24.020(B) deprives the City Council of jurisdiction to hear the Biogreen case. Mr. White claims that the law does not "explicitly address" the issue of whether an appeal divests the City Council of its right to initiate a review of an administrative decision if an appeal is filed. This issue is, however, addressed and resolved by DCC 22.24.020 (B) and there is no real question whether the Council has the authority to initiate a review of the administrative decision.

DCC 22.24.020(B) allows administrative decisions to be heard by the governing body without the necessity of a hearing before a hearings officer. It says:

B. The Hearings Body order shall be as set forth in DCC 22.24.020(A), except that the Board may call up an administrative decision for review without the necessity of an application going before the Hearings Officer.

The only time an administrative decision is to be heard by a hearings officer is when an appeal has been filed. Mr. White's legal position, if adopted, would render subsection (B)'s clear statement that an administrative decision can be considered by the Council without "the necessity of * * going before the Hearings Officer" meaningless. DCC 22.24.020(B) specifically states that the City Council, exercising powers granted to it through the Intergovernmental Agreement, has the right to call up an administrative decision without the necessity of having the decision reviewed by a hearings officer. As the Council made a decision to call up the administrative decision for review, it is clear that there is no need for the matter to be considered by a hearings officer. The City Council is the review body and the Biogreen applications are appropriately before the City Council for review and decision.

DCC 22.28.050 supports the City's reading of DCC 22.24.020(B). It says that the governing body may initiate a review of an administrative action. It also says that the review must be initiated within 12 days of issuance of the decision. It does not say that the review must be initiated within 12 days of issuance or prior to the filing of an appeal of the decision, whichever occurs first.

2. *Jurisdiction over Appeal*

Mr. White has cast his argument as a jurisdictional issue. It is important to note, however, that even if the appeal of the Biogreen case was heard by a hearings officer, that Title 22 would give the City Council jurisdiction to hear any appeal of the hearings officer's decision.

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3. *Predetermined Outcome of Jurisdictional Issue*

In the first full paragraph of page 3 of his October 28, 2010 letter, Mr. White claims that the City Council had decided to resolve the jurisdictional argument against his client before considering the argument. Mr. White claims that a newspaper article from July 1010 and an e-mail from September 28, 2010 prove this point. This argument is flawed, however, because the legal issue had not been raised in July and September of 2010. Additionally, the argument is not one a reasonable person would anticipate before it was raised by Mr. White as the County code clearly dispenses with the need for a hearing when an administrative decision is called up for review by the governing body.

The documents referenced by Mr. White, also, do not support his claim. The newspaper article referenced by Mr. White discusses the City Council and City Planning Commission's joint meeting to discuss the 2010 Biogreen text amendment application. It did not involve a discussion of what might be done if a future land use decision was filed, decided administratively and then both appealed and called up for review by the Council. The September 28, 2010 e-mail, also, does not address the issue. It is an e-mail from the La Pine City Manager that indicates that the consensus of the City Council was to ask the Deschutes County Planning Division to conduct an administrative review of the conditional use and site plan applications.

4. *Opportunity to be Heard on Jurisdictional Issue*

Mr. White claims that Mr. Williams was deprived of an opportunity to be heard on the issue of whether the City Council should call up the administrative decision for review or whether the decision should be heard by a hearings officer. This claim is without merit.

The City Council considered whether to initiate its review of the administrative decision at public meetings. The decision whether to initiate a review of the decision was made at a public meeting of the LaPine City Council on October 19, 2010. Mr. White and Mr. Williams were entitled to attend the LaPine City Council meetings and to be heard on the issue. Mr. White and Mr. Williams were aware that the City Council was considering whether to call up the administrative decision before the decision was made on October 19, 2010. Mr. Williams presented legal arguments in his written objections to a potential call up of the decision by La Pine on October 1, 2010 in a letter to Will Groves. These objections are a part of the record considered by Mr. Groves and the City Council.

Record evidence shows that Mr. White was also aware that the City Council planned to consider whether to call up the administrative decision at its October 19, 2010 meeting and could have attended the meeting. This knowledge is documented by Exhibit 8 of Mr. White's October 28, 2010 letter. Exhibit 8 is an e-mail exchange. The exchange was sent to Mr. White by Ms. Fancher and Mr. Allen. In the exchange, William Groves advised the applicant's attorney, Ms. Fancher, that Mr. White "argued that, procedurally, since this appeal came before the City call-up, it has to go to a Hearings Officer." Ms. Fancher responded to that claim on the merits. Mr. Allen said "we will do as planned tonight, call it up and let it shake out later." Mr. Allen's statement is neither a statement of the City Council nor a statement by any Council member. In fact, the Council made its official decision to call up the Biogreen matter after discussion of the matter. Mr. White and Mr. Williams could have attended the City Council meeting to present their position on the jurisdictional issue but did not attend. In addition, Mr. White and Mr.

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Williams chose to wait until October 28, 2010 to raise the jurisdictional issue in writing. The argument could have been included in the appeal document or in another concurrently filed document. If this had been done, the Williams/White issue could have been considered by the Council at its October 19, 2010 meeting.

5. *Failure of Council to Consider Williams Appeal at October 19, 2010 Meeting*

Mr. White faults the Council for failing to consider the Williams appeal at its October 19, 2010 hearing. Mr. White, however, failed to file any written statement of his legal position on this issue. As such, there was nothing for the Council to consider on October 19, 2010. The Council was not required to construct a legal argument for Mr. White – something he did on October 28, 2010 after the period in which the City could initiate a review of the administrative decision had expired. Until October 28, 2010, there was nothing for the Council to consider. As explained above, the law clearly gives the Council the right to initiate a review even where a case would otherwise be heard by a hearings officer due to the filing of an appeal.

6. *Setting Hearing Prior to Considering Jurisdictional Argument*

Mr. White claims that the Council should not have set a hearing promptly after initiating a review of the matter. Mr. White cites no legal basis for this claim. When the hearing date was set, Mr. White and Mr. Williams had not formally raised their jurisdictional claim. As such, there was no reason for the City to delay setting the land use hearing as there was no issue to resolve.

Mr. White cites no law that gives a participant in a land use process the right to such a hearing prior to setting a hearing on the merits of a land use matter. No such right is provided by the applicable land use procedures ordinance or by State law.

Mr. White's procedural arguments were considered at the beginning of the November 16, 2010 City Council hearing. It was not a violation of Mr. Williams' rights for the City to consider the jurisdictional argument at the hearing set for consideration of the Biogreen applications on the merits. The Council heard the jurisdictional argument raised by Mr. White from Mr. White on November 16, 2010 prior to proceeding to hear the case on its merits. If the Council had agreed with Mr. Williams' position, it could have referred the matter to a land use hearings officer for hearing. In addition, if this decision had found that the claim had merit, the case would have been sent to a hearings officer for review.

7. *November 16, 2010 Arguments*

On November 16, 2010, Mr. White filed written objections to the Biogreen applications. In those objections, he again asserted that the City Council lacked jurisdiction to act to determine the jurisdictional issue. This jurisdictional issue was considered by the Council at the beginning of the November 16, 2010 hearing. The Council has determined that the jurisdictional argument is without merit because it is inconsistent with the plain language of DCC 22.24.020(B)

In his November 16th argument, Mr. White refers to what he calls "response" by City Manager Allen to Mr. Williams' appeal. This appears to be an October 19, 2010 e-mail attached as Exhibit 8 of Mr. White's October 28, 2010 letter. That e-mail is a response

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to two e-mails – one from Will Groves and the other from Biogreen attorney Liz Fancher. Mr. Allen’s “response” does not show that it would have “made no difference” for Mr. White or Mr. Williams to appear at the City Council meeting on October 19, 2010. The e-mail comment reflected the course Mr. Allen intended to recommend but it was not a statement of position by the City Council. At the time, the Council had not made a final decision regarding the review process and had not considered the jurisdictional argument that had been raised informally, apparently in a discussion between County staff and Mr. White.

It, therefore, is clear that Mr. Williams and Mr. White made a choice not to avail themselves of the public process – not, as they claim, that the City deprived them of an opportunity to have their issues considered. Additionally, Mr. Williams and Mr. White were not prejudiced. They were allowed to present their arguments about this issue at the commencement of the Council’s November 16, 2010 public hearing.

- D. CLAIM OF BIAS:** Mr. Williams, through his attorney Bruce White, raised claims that the La Pine City Council is biased and cannot provide Mr. Williams with a fair hearing. He claims that the case should be decided by a hearings officer rather than by the Council.

The Council has considered this argument and applicable Oregon law and has determined that it can exercise the legal review function assigned to it by the applicable land use procedures law. The following findings and analysis support this conclusion:

1. *Oregon Law Re Bias by Legislative Bodies Acting in Quasi-Judicial Matters*

When a person challenges a public official with bias, the person making the challenge has the burden to demonstrate that the public official charged with bias is incapable of making a decision on the basis of the evidence and arguments presented. This is the standard established by the Oregon Supreme Court in the case of *1000 Friends of Oregon v. Wasco County Court*, 304 Or 76, 742 P2d 39 (1987), *cert den*, 486 US 1007, 108 S Ct 1733, 100 LEd2d 197 (1988). *See also, Cummins v. Washington County*, 110 Or App 468, 823 P2d 438 (1992); *Oregon Entertainment Corp. v. City of Beaverton*, 38 Or LUBA 440, 445 (2000), *aff’d* 172 Or App 361, 19 P3d 918 (2001); *Poddar v. City of Cannon Beach*, 26 Or LUBA 429 (1994). In this case, Mr. Williams claimed that the entire City Council, rather than any particular councilor, was biased. Mr. Williams failed, however, to demonstrate that the Council is incapable of making a decision on the basis of the evidence and arguments presented. Additionally, at the commencement of the November 16, 2010 land use hearing, each of the four city councilors and the mayor made a prehearing statement indicating that they would listen to the evidence and arguments presented and make a decision based on that information and the applicable law. In response, Mr. Williams attorney, Bruce White, responded that what he called the Council’s advocacy for code changes disqualified the Council from deciding the applications. Mr. White and Mr. Williams did not make any more specific claim of bias nor did they claim that any information disclosed by Council members during the prehearing disclosures or during the hearings process showed bias.

Oregon law says that if a councilor is able to consider an application on its merits and vote with an open mind, the councilor is not biased. *Roberts v. Clatsop Co.*, 44 Or LUBA 178 (2003); *Friends of Jacksonville v. City of Jacksonville*, 42 Or LUBA 137, 143, *aff’d* 183 Or App 581, 54 P3d 636 (2002); *Eastgate Theatre v. Board of County*

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Commissioners, 37 Or App 745, 588 P2d 640 (1978). When a councilor has taken a position on an issue related to a pending application in their public capacity, rather than as a private citizen, the position is far less likely to create the type of bias that will prevent the councilor from making a land use decision. *Friends of Jacksonville v. City of Jacksonville*, 42 Or LUBA 137, *aff'd* 183 Or App 581, 54 P3d 636 (2002). See also, *Woodard v. City of Cottage Grove*, 54 Or LUBA 176 (2007). In this case, the Council supported approval of the Biogreen text amendments that changed provisions of land use laws that apply inside of the City of La Pine. This action, however, was a normal governmental function undertaken as a part of the Council's public duties to administer land use laws inside the City limits of La Pine. Council supported changes to height and landscaping rules needed to allow Biogreen to file an application that might be able to be approved. This support, however, did not amount to support for approval of the Biogreen site plan and conditional use permits without regard to whether the land use approval criteria will be met by Biogreen.

LUBA has explained the rule regarding bias and prejudice as follows:

*"[L]ocal quasi-judicial decision makers, who frequently are also elected officials, are not expected to be entirely free of any bias. * * * Local decision makers are only expected to (1) put whatever bias they may have to the side when deciding individual permit applications and (2) engage in the necessary fact finding and attempt to interpret and apply the law to the facts as they find them so that the ultimate decision is a reflection of their view of the facts and law rather than a product of any positive or negative bias the decision maker may bring to the process. Only if there is a strong emotional commitment by a decision maker to approve or to defeat an application for land use approval will the bias or prejudice require a councilor to step down from making a decision."* *Wal-Mart Stores, Inc. v. City of Central Point*, 49 Or LUBA 697, 709-10 (2005); cited with approval in *Woodard v. City of Cottage Grove*, 54 Or LUBA 176 (2007)(emphasis added).

This decision shows that the City of La Pine conducted a lengthy and detailed review of the Biogreen applications and that it made its decision based on the land use approval criteria. The decision documents the fact that the Council considered positive and negative factors in applying the approval criteria. *Beck v. City of Tillamook*, 113 Or App 660, 833 P2d 1327 (1992).

The Oregon Court of Appeals and LUBA have ruled that a local government's prior support for a project that is pending before it for land use review does not amount to actual bias that prevents it from approving the land use application. In *Beck v. City of Tillamook*, 113 Or App 660, 833 P2d 1327 (1992) the Court of Appeals upheld a City land use approval of a homeless shelter where the City had approved an application for a federal grant to fund construction of the shelter without notice to impacted neighbors. The court declined a request by opponents that the Court order the City's Planning Commission to make the land use decision.

In *Oatfield Ridge Residents Rights v. Clackamas County*, 14 Or LUBA 766, 768 (1986), LUBA found that a local government is not biased and disqualified from reviewing a land use application when its own agency is seeking land use approval for a program the

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government supports – in that case, a residential treatment facility. The fact that one member of the governing body was serving as a member of the board of the organization that will operate the treatment facility, likewise, did not amount to bias that requires recusal.

In *Carlsen v. City of Portland*, 36 Or LUBA 614, 628-29 (1999), *rev'd on other grounds*, 169 Or App 1, 8 P3d 234 (2000) LUBA found that the city's adoption of a resolution reserving a potential site for a proposed memorial is insufficient evidence of bias or prejudgment in a challenge of a subsequent decision that approved the construction of the memorial.

2.. *Participation in Text Amendment Review in 2009 and 2010*

Mr. White has argued that the City Council's support for the approval of two text amendments proposed by Biogreen (one in 2009 and one in 2010) and the City's support for a timely review of the Biogreen application show that the Council is biased against his client, John Williams. Mr. White argues that these acts prevent the Council from hearing and deciding the Biogreen applications. We disagree.

In this case, it is clear that the City Council does not have the type of bias that disqualifies it from making a fair decision in this matter. Council members have repeatedly stated that their general support for the Biogreen text amendment and project will not prevent them from basing their decision on the law and evidence that applies to the land use applications. This is the level of even-handedness that is required in Oregon land use proceedings.

During its review of the 2010 text amendment, Deschutes County asked the City Council to make a recommendation to the Deschutes County Board of Commissioners regarding the legislative text amendment application. The Council considered the matter at a July 21, 2010 public meeting and made a recommendation that the County Commission approve the text amendments. The primary focus of the amendment was to increase height limits to allow taller buildings and stacks for utility buildings. In addition, landscaping requirements were amended to make it clear that stacks and tall buildings do not need to be screened from residential areas. The Council's comments were responsive to that request and related to matters of concern to the city.

In a typical text amendment application filed by a developer to enable it to proceed with a development project, the governing body must first vote to amend the code before it can act on the development application. Such a vote, however, does not disqualify a local government from reviewing the subsequent land use application that relies on approval of the text amendment. *Beck v. City of Tillamook*, 113 Or App 660, 833 P2d 1327 (1992) ("An elected public body cannot be disqualified by a court from discharging its lawful responsibility simply because it earlier performed another responsibility that was connected with the same project."). In this case, the Council expressed support for a text amendment rather than voting for it because County land use laws still apply within the City of La Pine. If the City had adopted its own land use laws, it would have voted on the Biogreen text amendments prior to deciding the site-specific land use applications. Nothing about that fact demonstrates bias that disqualifies the Council from fulfilling its governmental function of reviewing significant development applications like the Biogreen application.

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The 2009 and 2010 text amendments both made discrete changes to a small part of the law. A later development application involves a broad consideration of laws and issues that are completely unrelated to the text amendment application. The text approval, in no way, indicates that a local government will ignore all other provisions of law because it supports narrow changes needed by a development.

- i.. City Councilor Attendance and Statements at November 9, 2009 Hearing (pages 4 and 7, White 10/28/10 letter)

Deschutes County filed a land use application to allow utility facilities in the La Pine UUC Industrial zone and to allow stacks up to 100 feet tall at the request of the Board of County Commissioners. Mr. White claims that the City Council's participation in the review of this text amendment shows that the City favored approval of the amendment and is biased in favor of the Biogreen site plan and conditional use application. He submitted minutes of a November 9, 2009 hearing on the application as proof of bias.

The minutes submitted by Mr. White show that La Pine City Councilor Moilanen and La Pine City Planning Commissioner both appeared at the hearing and offered comments on the text amendment. Ms. Fleming expressed concern about potential negative impacts on La Pine from taller stacks. Ms. Moilanen said the Council "did want to support the text amendment" but did not say that the Council actually supported the amendment. Instead, she told the County Board that the Council would put comments in writing.

- ii. Support for 2010 Text Amendment (pages 5 and 7, White 10/28/10 letter)

The La Pine City Council and Planning Commission reviewed the Biogreen text amendment application on July 21, 2010 and made a recommendation to the Deschutes County Board of Commissioners regarding the amendment. The City conducted a meaningful review of the proposal and recommended that changes be made to the Biogreen proposal to add screening requirements to the text proposed by Biogreen. The City Council relayed its unanimous support for the amendment, as revised, to the County Commission.

In making a recommendation for approval of the text amendment, the Council was fulfilling its obligation to its citizens to help create local land use laws that are responsive to the needs of its community. In a typical Oregon city, the council would actually adopt the new text rather than make a recommendation. Such an act would not disqualify the Council. La Pine's lesser involvement in the text amendment process does not create bias or make approval of the conditional use and site plan application a foregone conclusion.

The statement offered by Adele McAfee to the Board of County Commissioners on August 26, 2010 during the Board's review of the text amendment does not show that the Commission has made a final decision to approve the Biogreen site plan and conditional use applications. It does not show that the Council will not and cannot make a fair decision on the merits of the land use application. It

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does not show, as required to establish bias as defined by Oregon law, that the City Council has a strong emotional commitment to approve the applications.

The McAfee statement shows that the City Council has concerns about traffic, safety and visual impacts on the community if the Biogreen project is approved. The statement shows that the issues will be considered in a future land use review process and that the Council would ask the City Manager to make sure that County staff would address those issues during its review of the site plan and conditional use applications. The statement shows that the City generally supports the project because, if approved, it will be economically beneficial to the community. This general support did not mean that the Council would approve the applications if they did not meet all relevant land use approval criteria.

Mr. White seeks to recast Ms. McAfee's comment by claiming they give "lip service" to the specific concerns identified by Ms. McAfee in her statement simply because the Council supported the text amendment. This claim is unsubstantiated and illogical. It is simply not logical for Ms. McAfee to have expressed concerns about the amendment if she did not mean them – especially if she was the dedicated, biased advocate Mr. Williams claims. Raising these concerns made it more likely that the County might decline to adopt the text amendment application. Mr. Williams, therefore, has failed to show that the McAfee statement creates bias that disqualifies the Council from deciding the Biogreen development applications.

Other statements that have been made by Council members at City meetings and in correspondence also indicate that the Council will not approve the Biogreen applications unless they comply with the law and respond to community concerns. For instance, Mayor Kitty Shields wrote a letter dated October 7, 2009 to Rob Broberg of Biogreen. In that letter, Mayor Shields expressed the "preliminary support" of the City for the project but cautioned Mr. Broberg that support was conditioned on the City having the opportunity to review and evaluate information about the project and its potential impact on the City and its citizens.

3. *Briefing of City re Partition Application by Deschutes County Staff (page 4, White 10/28/10 letter)*

The City Council received a report at its July 21, 2010 meeting from County staff about the status of a pending partition application filed by Deschutes County to allow Deschutes County to sell a part of its property to Biogreen for its biomass plant. Mr. White has not explained why the update in the partition case created bias. It is clearly appropriate for the City's staff and its council to remain informed about City of La Pine land use matters, such as listening to a report by a County employee about the status of the County application to divide the County property that will be sold to Biogreen.

The pending Biogreen development applications were filed after the partition decision was issued. The partition application, also, involved significantly different legal issues as it was a review under Title 17 rather than Title 18 of the Deschutes County Code. The Council finds that the fact that the Council was briefed about the County partition did not cause the Council to be biased against Mr. Williams.

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4. *July 29, 2010 Letter to Board of Commissioners from Biogreen's Attorney (page 7, White 10/28/10 letter)*

Mr. White claims that a description of the Council's support for the Biogreen text amendment as "strong support" is evidence of bias related to the site plan and conditional use approval. As discussed earlier, it was appropriate for the Council to make a recommendation about a text amendment that will apply to land in La Pine. Strong support for the amendment does not necessarily translate into bias in favor of approving the Biogreen development applications. Furthermore, Biogreen's attorney, Liz Fancher, was speaking as an advocate on behalf of her client's position in the text amendment case. She was not speaking on behalf of the Council.

5. *Selection of Review Procedures (pages 5, 7 and 8, White 10/28/10 letter)*

It is the city's legal duty to review and process land use applications. La Pine fulfills a part of this duty by contracting with Deschutes County for planning services but all actions are taken in the name of and on behalf of the City of LaPine. Deschutes County's Planning Division staff acts on behalf of the City of La Pine. Making decisions about how a land use application will be reviewed are a normal part of the fulfilling the obligations assigned to local governments by the Oregon land use system. The City and County's proper exercise of the functions assigned to them by law and contract is not a sign of bias.

- i. *Administrative Review (p. 7 and 8, White 10/28/10 letter)*

DCC 22.20.010 gives the Deschutes County Planning Director, not the City Council, the choice to have a land use application reviewed in one of three ways. An application can be reviewed administratively without prior notice, reviewed administratively with prior notice or reviewed by a hearings officer at a land use hearing. In the Biogreen case, the Planning Director decided that the applications should be reviewed administratively with prior notice. The Planning Director for Deschutes County, Nick Lelack, sought the input of the City Council in making the decision. He, however, had the sole authority to make the decision and his decision is binding. DCC 22.20.010(B). The fact that Mr. Lelack asked for and the city provided input on what procedure should be followed for the initial review of the application is not a sign that the city is biased against Mr. Williams.

- ii. *Prompt Review of Application (pp. 7-8, White 10/28/10 letter)*

The prompt processing of land use applications is required by law and not a sign of bias. The Oregon land use system places the City under a strict 120-day deadline to make a final decision in land use cases. ORS 227.178(1). The law provides a penalty for noncompliance, the writ of mandamus, that strips the City of its authority to issue the land use decision and allows for the award of attorney fees against the City.

It is extremely difficult to provide all needed notices and conduct a complete review in the 120-day time frame. As a practical matter, the process does not leave time for two hearings within the 120-day period especially where a

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committed opponent is determined to exploit every procedural rule to delay a decision. This fact is readily evident from the fact that opponent Williams was able to delay the City's decision of this matter by approximately three weeks by attacking County notice of the hearing and by asking for opportunities to comment on post-hearing evidence after the period set for post-hearing comments expired.

Mr. White claims that the quick issuance of an administrative approval indicates Council bias. The decision to approve the application and timing of the administrative review was, however, a matter determined by the County Planning Director and County staff, not by the Council. DCC 22.20.020(C). A prompt decision is also consistent with the requirements of Title 22 that call for an administrative decision to be issued no later than 30 days after an application is accepted as complete. DCC 22.20.020(C)

The right to call up a decision assures the Council the right to hear cases of importance to the community without running out of time on the 120-day clock – a right the code is, theoretically, designed to give it.

In this case, the viability of Biogreen's project was dependent on the prompt processing of its applications in order for it to be able to obtain grant funding to build its plant. In addition to meeting the 120-day deadline, the City of La Pine wanted to make a decision that would allow Biogreen to proceed if approval was ultimately granted by the Council. The fact that the Council did not want to issue a meaningless decision of approval, if an approval was merited, is not a sign of bias.

Mr. White claims that the City's willingness to review land use applications promptly to prevent Biogreen from losing grant funding "pre-supposes that land use approval desired by the applicant will be granted." This claim is based on faulty logic. The City's prompt review simply makes it possible for this project to proceed if it can obtain all needed governmental approvals, including land use permits. City councilors and the mayor have repeatedly told Biogreen's representatives that their support for a prompt review of the site plan and conditional use permits and support for approval of the text amendments does not mean that the council will approve the land use permits.

iii. Selection of City Hearing v. Hearing by County Hearings Officer

The County's land use procedures ordinance does not give Mr. Williams a right to have a final decision issued by a County hearings officer. Decisions issued by a hearings officer are subject to review by the governing body, in this case, the LaPine City Council. In addition, Mr. Williams has claimed that Deschutes County's staff is biased in favor of the Biogreen applications because Deschutes County owns the Biogreen site and pays their wages. Any hearings officer who would be assigned to consider this application would be a Deschutes County contractor who would be subject to a similar claim of bias as the County pays for their services.

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The conduct of a land use hearing by a governing body is a typical function of a local government. An interest by the Council in fulfilling this function is not evidence of bias. The City Council has the right to make a decision that will help shape the future of its community. It has that right under State law. It is given the right to call up an administrative decision for review by DCC 22.24.020(B). A call up and hearing allows the Council the right to make the final decision in a case of importance to the local community. The exercise of powers granted to the Council by law is not a sign of bias.

6. *Amendment of IGA (p. 5, White 10/28/10 letter)*

Mr. White claims that the October 2010 amendment of the Deschutes County and City of La Pine IGA addresses how land use appeals will be addressed shows bias because it “only contemplates appeals of administrative decisions to the City Council, not to a Hearings Officer” (p. 5, *White 10/28/10 letter*).

The October 2010 IGA amendment changes the responsibility for paying for the cost of planning and legal services. It does not change the appellate process provided by Title 22 of the Deschutes County Code. The amended IGA continues to provide that Title 22 provides land use procedures for the review of City of La Pine land use applications. The 2010 amendment does not change the procedure set by Title 22 and does not remove a hearings officer from the role of reviewing appeals of administrative decisions. This is clear as Section 10.1 says “if” an appeal is filed with the City Council, the City will bear the cost of planning and legal services.

Mr. Williams appears to understand that an appeal to a hearings officer is still allowed by Title 22 after amendment of the IGA as he filed his appeal after the IGA was amended. Also, Mr. Williams argues that his appeal entitles him to an appeal hearing before a hearings officer – an argument that is inconsistent with the claim that the amendment calls for all appeals of administrative decisions to be heard by the City Council.

The IGA amendment, also, may have no bearing on the current case. The IGA amendment discusses the payment of costs for appeal hearings. The City Council did not appeal the Biogreen administrative decision. Instead, it called up the decision for *de novo* review pursuant to DCC 22.28.050(B).

7. *Setting Hearing Date without Consulting Mr. Williams (p. 5, White 10/28/10 letter)*

Mr. Williams objected to the fact that the appeal hearing on November 16, 2010 was set without first consulting with him. Mr. Williams does not claim that the law requires consultation but speculates that “the City” checked with the applicant about setting the date. He claims that, if this occurred, it would show bias. He asked that the case be set before a hearings officer on another date.

The evidence presented on this point shows that City Manager Rick Allen set the hearing date. It does not show that the Council set the date of the hearing or that the Council is biased against him. It does not show that the Council checked with the applicant about its availability. It does not show that the Council is incapable of making a decision on the basis of the evidence and arguments presented. Furthermore, Mr. Williams was not prejudiced. He and his attorney, Bruce White, appeared at and

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participated in the November 16, 2010 hearing. They, also, were able to secure a continuance of the November hearing date until December 8, 2010. The December 8, 2010 continued hearing was set after discussion and consideration by the Council of Mr. Williams' preferences and schedule of availability.

IV. PROCEDURAL MATTERS RAISED AT NOVEMBER 16, 2010 HEARING

Prior to the receipt of testimony at the November 16, 2010 hearing, the City offered parties an opportunity to raise procedural and jurisdictional issues. Mr. White presented the following procedural arguments on behalf of Mr. Williams, in addition to presenting the jurisdictional and bias arguments he raised in his October 28, 2010 letter to Mr. Groves.

- A. NOTICE OF HEARING:** Mr. White objected to the fact that County staff sent notice of the hearing to property owners within 100 feet of the subject property as required by ORS 197.763(2)(a)(A). This notice area is the notice area required by County code and State law for site plan and conditional use actions that occur inside an urban growth boundary.

The City of La Pine has an adopted urban growth boundary that is pending acknowledgment by LCDC. Mr. White claims that the Biogreen property is still located outside an urban growth boundary because the adopted UGB has not been acknowledged. Mr. White says that State law, presumably ORS 197.763(2)(a)(B) requires notice to properties within 250 feet of the subject property. Since it is unclear whether the relevant State law allows a 100-foot notice area to land inside an unacknowledged urban growth boundary, the City agreed to set over the hearing to a later date and to provide new notice to an expanded notice area.

Mr. Williams was given the ability to wait to present evidence at the new hearing or to present evidence at the time set for the initial hearing. Mr. Williams decided to proceed with the hearing on the evening of November 16, 2010 so that his experts who traveled to La Pine could testify at the November 16th hearing. Evidence, therefore, was received at the November 16, 2010 hearing but the hearing was continued until December 8, 2010 so that persons who did not receive written notice would be allowed to present evidence.

Written notice of the December 8, 2010 hearing was, thereafter, mailed on November 17, 2010 by Deschutes County to all property owners residing within 1500 feet of Tax Lot 100, Assessor's Map 22-10-14, the tax lot that includes both Parcels 1 and 2 of Partition Plat No. 2010-13. This means that notice of the hearing was provided to a broader area than required by State law and by County code. No objection was raised to the sufficiency of the November 17, 2010 notice and the notice area selected.

- B. MODIFICATION OF APPLICATION:** Mr. White claimed that the land use application had been modified since it was filed and that new evidence filed, by the applicant, including the applicant's noise study, could not be considered by the City Council. In response to this claim, the applicant's attorney filed a properly completed application and filing fee to modify the site plan and conditional use applications and asked that all evidence submitted by the applicant be considered a part of the modified application. As the applicant filed an application to modify the application, it is not necessary for the

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Council to determine whether a modification is required for the Council to consider the applicant's evidence.

The modification application included a copy of Partition Plat No. 2010-13, the partition plat that divided Tax Lot 100, Assessor's Map 22-10-14. In the modification application, the subject property is correctly listed as Parcel 1 of Partition Plat No. 2010-13, the Biogreen site.

- C. STAFF REPORT:** Mr. White objected to the fact that no staff report was filed seven days in advance of the hearing. He claimed that ORS 197.663 and DCC 22.24.010 require that a staff report be filed seven days in advance of the hearing. County planner Will Groves advised the Council and the Council agrees that the administrative decision is the staff report for this matter and it was prepared more than seven days prior to the November 16, 2010 hearing. ORS 197.663 relates to the siting of residential homes and is not applicable to this proceeding. It appears that Mr. White meant to refer to ORS 197.763(4)(b). If so, he misstates the requirements of that law. ORS 197.763(4)(b) requires only that "any" staff report used at a hearing must be available seven days in advance of a hearing. If a report is used, an opportunity to respond to the report must be provided. A staff report is not, however, required. Furthermore, the remedy for a violation of ORS 197.763(4)(b) is a continuance of the hearing or an opportunity to submit post-hearing comments. In this case, Mr. William's request for a continuance was granted and Mr. Williams and others were given an opportunity to submit post-hearing comments.

DCC 22.24.010 says that a staff report shall be completed seven days prior to the hearing. In this case, the staff decision was the staff's report and it was completed over seven days prior to the hearing. Even if the decision is not considered the staff report, the remedy prescribed for a violation of the County's code, a continuance to a date seven days after the report is complete, is discretionary. DCC 22.24.010.

- D. PREHEARING DISCLOSURES:** At the commencement of the November 16, 2010 hearing and, again, at the commencement of the December 8, 2010 hearing, members of the City Council disclosed ex parte contacts and made statements regarding their lack of bias, prejudgment and personal interest.

At the start of the November 16, 2010 hearing, Mayor Shields disclosed that she had spoken with the applicant regarding its plan to bring a new business to town long before the conditional use and site plan applications were filed. Councilor McAfee disclosed the fact that she had received 12 e-mails regarding traffic at the intersection of 1st (Reed Road) and Highway 97. She also stated she was aware that research showed that Mr. Williams had distributed a flyer in La Pine similar to one distributed in Longview, Washington regarding the same issues he raised in La Pine. Councilor Hedges advised that she had received e-mails and had heard from constituents and area residents about the project. Councilor Greiner advised that he had not discussed the Biogreen matter after the hearing was set. Prior to that time, he had received comments from citizens that were both for and against approval of the Biogreen applications. He advised the parties that he will listen and decide the application based on the evidence. Councilor Ward disclosed the fact that he had discussed the matter with residents of the City and La Pine area. He also stated that he had no financial stake or conflict of interest.

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Attorney Bruce White questioned the mayor and councilors regarding their disclosures. He reiterated his position that the entire Council is biased because it supported approval of the Biogreen text amendments. Mr. White stated that *ex parte* contacts are not limited to those that occurred when the appeal was pending. In response, Mayor Shields told Mr. White that prior discussions with the applicant occurred at public meetings that were recorded and that the tapes would show that the Council asked tough questions. The mayor advised that she does not feel that the tough questioning is done yet. The Mayor also referred Mr. White to her letter of October 7, 2009 that showed preliminary support for the Biogreen project “conditioned on, among other things, the City having the opportunity to review and evaluate additional information about the project and its potential impact on the City and its citizens.” Councilor McAfee stated that she would make a decision based on the merits. Councilor Ward advised Mr. White that all *ex parte* contacts other than those disclosed had occurred at City Council meetings. Councilor Greiner disclosed that he had attended a public meeting at the Senior Center where the project was discussed by the community and applicant.

No party objected to the supplemented disclosure of *ex parte*. Mr. White was offered the right to review Council minutes and tapes and to raise objections based on *ex parte* contacts at or before the December 8, 2010 hearing. Council documents about these contacts were also included in the record.

At the beginning of the December 8, 2010 hearing, Council members were asked to provide an updated disclosure of *ex parte* contacts. Mayor Shields provided more detail about information she disclosed at the November 16, 2010 hearing. Mayor Shields advised that she met with Biogreen President Rob Broberg in Spring 2009. Mr. Broberg introduced himself and asked about the steps that must be followed to establish a business in the City of La Pine. Mayor Shields advised Mr. Broberg that he would need to convince La Pine that his business would be a good fit for La Pine. Mr. Broberg was advised to work with LIGI (La Pine Industrial Group) for land acquisition. He was also told that he would need to address sewer and water system impacts and that his proposal would receive a lot of scrutiny. Mr. Broberg attended a July 22, 2009 Council meeting and was told that La Pine always expects a new business to “prove up” and that there was going to be a lot of scrutiny of the Biogreen plans. Mayor Shield said that Biogreen was told that the city is generally in favor of enterprises if it does not bring detriment to the quality of life in La Pine. Mayor Shields also advised the public that she had received e-mails and that all had been sent to staff for inclusion in the record. Other councilors had no additional disclosures. No party challenged the adequacy of disclosures nor did they claim that the disclosures of *ex parte* contacts created bias. Mr. White did not file any oral or written objections on this particular topic on behalf of Mr. Williams but reserved his claim that the Council was biased due to involvement in review of the text amendment applications.

V. CONCLUSIONARY FINDINGS:

Title 17 of the Deschutes County Code:

1. Section 17.16.115, Traffic Impact Studies.

FINDING: The applicant provided a traffic report for the project. Based on a review of this report and a report submitted by Greenlight Engineering, the Deschutes County Transportation

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Planner concluded that affected transportation facilities are adequate to serve the proposed use during administrative review of the Biogreen applications.

After consulting with County staff from the Planning Division and the Road Department, Morrison Transportation Consulting (MTC) prepared a Site Traffic Report (STR) for the proposed Biogreen plant in La Pine. The STR was prepared consistent with the suggestions of County staff. Greenlight Engineering submitted a critique of the STR during the administrative review. County staff reviewed the Greenlight Engineering comments and found that the STR and other facts demonstrated compliance with the relevant provisions of DCC 17.16.115.

The following findings regarding challenged provisions of DCC 17.16.115 are provided below.

17.16.115. Traffic Impact Studies.

C. Guidelines for Traffic Impact Studies

- 3. The County Engineer shall determine when the report has satisfied all the requirements of the development's impact analysis. Incomplete reports shall be returned for completion.**

FINDING: The County determined that the STR that was prepared by Morrison Traffic Consulting (MTC) for the applicant and dated September 8, 2010 satisfied all requirements of the development's impact analysis. The STR was not returned to the applicant or MTC for completion.

- 4. The following vehicle trip generation thresholds shall determine the level and scope of transportation analysis required for a new or expanded development.**
 - a. No Report is required if there are fewer than 50 trips per day generated during a weekday.**
 - b. Site Traffic Report (STR): If the development or change in use will cause the site to generate 50-200 daily trip ends, and less than 20 PM peak hour trips, a Site Traffic Report will be required.**
 - c. Traffic Impact Analysis (TIA): If the development or change in use will generate more than 200 trip ends and 20 or more PM peak hour trips, then a Traffic Impact Analysis (TIA) shall be required.**

FINDING: The applicant's traffic engineer, Sean Morrison, P.E., made a professional estimate of daily vehicle trip ends based on information obtained from Biogreen about its operation needs and activities to estimate daily trip ends for the Biogreen plant. All estimates were accepted as reliable by County Transportation Planner Peter Russell. County staff and the Applicant's traffic engineer discussed Biogreen, its number of employees, origin and destination of trips, existence of comparable biomass power facilities, etc. Based on this analysis, it was determined that the plant will generate between 170 and 190 vehicle trips per day. When this estimate is compared to the trip generation estimates provided by the ITE Trip Generation Manual for other industrial land uses, it is clear that the Biogreen trip estimate is conservative and the determination that Biogreen will not generate more than 200 trip ends per day is correct. These estimates are shown in the following chart:

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<i>ITE 8th Edition Trip Generation Comparison</i>		
Land Use	Units	ADT
Biogreen	24 Employees	170 – 190
Light Industrial (110)		72
Heavy Industrial (120)		24
Industrial Park (130)		80
Manufacturing (140)		51
Warehousing (150)		93

Based on this evidence and other findings and evidence in the record on this point, the City finds that an STR was the required type of traffic analysis for this application because MTC's estimate of 170 to 190 trips per day is a reasonable and sufficiently conservative estimate of trips.

MTC estimated PM peak hour trips based on the rate provided by the ITE Trip Generation Manual for Utilities (Land Use #170). This resulted in an estimate of 12 peak hour trips for the Biogreen plant. As the total p.m. peak hour trips from Biogreen will be 12 trips, no collector or arterial street intersection will experience the 25 p.m. peak trip threshold of DCC 17.16.115(D)(2)(b) that requires a traffic impact analysis.

Greenlight Engineering challenged the use of the ITE trip rate. Biogreen was, however, required to use the ITE Trip Generation Manual in an STR unless more appropriate data is available and approved by the County Engineer. In this case, as discussed below, more appropriate data was not available so use of the ITE rates was required.

Greenlight noted that the number of employees in the four studies of Utilities (Land Use #170) ranged from 50 to nearly 750. Biogreen plans to employ fewer than 50 employees. The ITE Trip Generation Manual suggests that local trip generation data should be gathered and used to estimate plant traffic because the plant work force is small. The ITE Manual's suggestion that local studies be conducted to determine the appropriate trip rate is, in the context of a biomass plant use in Central Oregon, nonsensical. As noted by MTC, in its October 8, 2010 letter, "there are no other stand-alone biomass energy production facilities similar to the proposed use in the region." As a result, it is appropriate to use professional judgment to select the appropriate trip rate.

According to Deschutes County Transportation Planner Peter Russell, the ITE Manual advises traffic engineers to exercise caution for land uses with small sample sizes. Mr. Russell notes, however, that a caution is not a prohibition. In this case, Mr. Russell believes, and the City agrees, that the use of the ITE Manual to estimate pm peak hour trips was appropriate. Both Peter Russell, the County's Transportation Planner, and the applicant's traffic engineer, Sean Morrison, believe that the use of the Utility rate overstates the traffic impacts of Biogreen on the area transportation system. This opinion is supported by the trip generation rates provided by the ITE Trip Generation Manual for other industrial uses. The following chart compares ITE industrial trip generation rates:

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Some question was raised whether it was appropriate to use the pm peak hour in the MTC traffic study. The County code specifically refers to and requires the applicant to use the p.m. peak hour to determine study requirements.

ITE 8th Edition PM Peak Hour Average Trip Generation Comparison		
Land Use	Units	Trip Rate / # of Studies
Utilities (170)	Employees	0.76 / 4
Light Industrial (110)		0.42 / 19
Heavy Industrial (120)		0.88 / 2
Industrial Park (130)		0.46 / 34
Manufacturing (140)		0.36 / 46
Warehousing (150)		0.59 / 14

All uses in the industrial category, except Heavy Industrial, have lower peak hour trip rates than the Utilities rate used to estimate Biogreen peak hour trips. In addition, Biogreen will be located in an industrial park. It would have been reasonable for MTC to have applied an industrial park rate. Such a rate would have resulted in a 40% lower peak hour trip estimate.

The City, therefore, agrees with the County staff's professional determination that MTC's peak hour trip estimate was appropriate and sufficiently reliable to forecasting the impact of Biogreen trips on the intersection of Highway 97 and Reed Road/1st Street and complied with the requirements of DCC 17.16.115.

D. Traffic Study Area

- 1. After consulting with other affected jurisdictions, the County Engineer shall determine the impact analysis area.**
- 2. The impact analysis study area shall include, at a minimum:**
 - a. All site access points to the public roadway system via either a driveway or private roadway;**
 - b. Nearest intersecting collector or arterial roads to the development that would experience an increase of 25 additional peak hour trips;**
 - c. Any other collector or arterial intersection requested by staff.**

FINDING: The impact analysis area was determined by the appropriate County staff members. The impact area included all site access points. It also included the intersection of Reed Road and Highway 97 – a collector and highway intersection that County staff requested be studied. As the Biogreen plant is projected to generate 12 peak-hour trips on the entire street, the study of that intersection and all other area intersections is not required by subsection (D)(2)(b).

It has been claimed by Greenlight that the intersection of Foss Road and Highway 97 and Finley Butte and Highway 97 should have been analyzed. The analysis of that intersection is not, however, required by DCC 17.16.115 as staff did not request that the intersection be studied. Additionally, a recent Highway 97 corridor study commissioned by ODOT showed that all central

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La Pine intersections with Highway 97, including the intersections of Foss Road and Highway 97, Finley Butte and 97 and Reed Road/1st Street and Highway 97, meet ODOT standards.

County staff, utilizing the authority granted to it by DCC 17.16.115(D)(2)(c), requested that the applicant study the intersection of 97/1st-Reed. The reason this intersection was selected is that it has been an intersection of community concern in previous land use applications and Biogreen indicated that a majority of the site's traffic would travel through the intersection. Additionally, there have been several traffic studies of this intersection since 2006 and Biogreen offered another opportunity to monitor the intersection's performance. The Biogreen STR concluded 97/1st-Reed would meet ODOT's mobility standard before and after development.

A study of the intersection of Highway 97 and Foss Road was not required because the County's professional staff believe that the intersection was adequate to handle Biogreen traffic. County staff had not received citizen complaints regarding the intersections of Highway 97/Foss or Highway 97/Finley Butte. The most recent count for Foss Road (2006) had an average daily traffic (ADT) of 786 vehicles, which is a relatively low volume. County staff has not observed any significant delays at Foss/97. For similar reasons, staff did not request that the Highway 97/Finley Butte intersection be analyzed. In the most recent count for Finley Butte (2008) the road had 745 ADT. Given the combination of low background traffic and minimal trips to/from Biogreen that would use these intersections, staff concluded there was insufficient reason to analyze the 97/Foss and 97/Finley Butte intersections. The fact that the plant proposes a Foss Road access did not change the County's position that it is not necessary for Biogreen to study the intersection of Foss Road and Highway 97.

For those same reasons, the County did not request the Mitts Way/Finley Butte intersection be analyzed. This intersection was built to County geometric standards as set by DCC 17.48.090, including curb returns. Greenlight's concern was that a semi-truck and trailer would have to swing wide (meaning the semi would briefly enter the lane of opposing traffic to enable the trailer to remain in its lane) when making a right turn to continue north to Biogreen. Such a maneuver happens hourly at intersections throughout the County with no deleterious effects.

This turn movement is unlikely to occur because Mitts Way is an indirect route to the Reed Road truck entrance to the Biogreen plant. The logical truck routes are those identified by the applicant in its HWA A-4 Vicinity Map with Truck Routes and the route of Highway 31/97 to Reed Road. None of these routes use the Mitts Way/Finley Butte intersection. The Darlene Way truck route, however, is not currently available for use by Biogreen – the source of truck trips that might, if traveling out-of-direction, use the intersection of Mitts Way and Finley Butte Road. This fact further reduces the chance that any truck would make the turn that is of concern to Greenlight.

Even if a truck were to use the intersection of Mitts Way and Finley Butte Road, given the low volumes on Mitts Way, there should be sufficient gaps to allow a semi to make this right turn without conflict. At most, only 15% of Biogreen traffic will be from the south. Given the total volumes in the p.m. peak is 12 vehicles that, at most, means two vehicles of all types might use Mitts Way between 4-6 p.m.

E. Study Time Frames

The analysis shall include the following time frames:

- 1. Existing conditions (including approved, but not yet built developments as identified by the County Engineer);**

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* * *

3. Five year forecast after build out for each phase of development or the final phase of development.

FINDING: Greenlight Engineering claimed that the applicant's STR should have included a five-year forecast. County staff did not require MTC to provide a five-year analysis. It accepted the MTC STR without that analysis. County staff, later, decided that a five-year analysis should have been included in the STR.

MTC updated the STR to include the required five-year analysis. It also provided a supplemental analysis of the Reed Road/1st Street and Highway 97 intersection that assumes that no Biogreen traffic will use Darlene Way to travel to the Biogreen site (100% of trips assumed to use Reed Road and Highway 97 intersection). A five-year analysis was provided for this scenario. The supplemental analysis was reviewed and approved by the County (see December 21, 2010 e-mail from Peter Russell to Rick Allen and County Engineer George Kolb).

F. Minimum Study Requirements for a Site Traffic Report (STR)

The minimum study requirements for a Site Traffic Report are:

- 1. A vicinity map showing the location of the project in relation to the transportation system of the area;**
- 2. Trip generation forecast using data from the most recent edition of the Institute of Transportation Engineers (ITE) *Trip Generation Manual* unless more appropriate data is available and approved by the County Engineer;**
- 3. Trip distribution and assignment;**
- 4. Safety analysis of the site accesses, including sight distance and operation characteristics;**
- 5. Description of the proposed development and surrounding land uses;**

FINDING: This section lists information that should be included in an STR. This code section, however, is not an approval criterion.

Greenlight claims that the Reed Road driveway's operational performance (level of service) should be measured. Past County practice has been to read the code to require an analysis of the geometrics of a driveway or intersection and that information was provided. The City concludes that the County's reading is consistent with a proper reading of the code.

DCC 17.16.115(F) sets the minimum requirements for an STR. DCC 17.16.115(F)(4) requires an access be analyzed for sight distance and operation characteristics. Note that (F)(4) begins with a requirement for a "Safety analysis of the site access." Safety analyses typically are concerned with sight distance, stopping sight distance, crash histories by type, magnitude, and rate, etc. When the requirements for a STR are compared with DCC 17.16.115(G)'s requirements for a Traffic Impact Analysis (TIA), it is evident that a level of service determination is not required for a site access. DCC 17.16.115(G)(10) explicitly requires LOS and volume/capacity (V/C) ratio analysis while DCC 17.16.115(F) does not impose that requirement.

The applicant provided the County with its STR and the County accepted the STR as complete. The STR analyzed sight distance at the plant's main entrance on Reed Road. A November 15, 2010 addendum to the STR included a site access analysis for the Foss Road entrance that showed that the entrance meets sight distance requirements.

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Finally, DCC 17.16.115(H) sets “operation and safety standards.” The only safety standard in this section that is written to apply to driveways is DCC 17.16.115(H)(5). That subsection sets minimum site distance standards for driveways and intersections. All other standards in subsection (H) apply to intersections or roadways, not to driveways.

H. Operation and Safety Standards.

FINDING: Deschutes County staff required the applicant to review the level of service of one intersection – the intersection of Highway 97 and Reed Road/1st Street. The minimum level of service for this intersection and all intersections on Highway 97 in the La Pine commercial area is LOS .90 (V/C ratio). This issue is not in dispute.

The applicant’s STR determined that the intersection of Reed Road/1st Street and Highway 97 would operate with a level of service of .81 V/C ratio after development of the Biogreen site assuming that previously approved developments proceed as approved and a full 85% of Biogreen traffic would use the intersection. The STR showed that the current V/C ratio of the intersection is .62. The STR shows that the V/C ratio will rise to .78 if previously approved developments are developed and add trips to the system. The Biogreen traffic will increase the .78 V/C ratio to .81 V/C ratio if 85% of Biogreen traffic uses the studied intersection.

A 5-year forecast was prepared by MTC in response to Greenlight Engineering’s claim that such a forecast should have been included in the STR. The 5-year forecast projected that the level of service of the intersection will be .85 V/C on the worst leg of the intersection.

During the final post-hearing comment period, BLM advised the City that it would require Biogreen to obtain a right of way approval to use Darlene Way. In response, Biogreen asked MTC to recalculate traffic study results to assume that 100% of site traffic would use the Reed Road/1st Street and Highway 97 intersection

Biogreen had hoped to be able to use the Darlene Way truck route for fuel truck trips to and from the Embody Tract, a tract of land that Biogreen plans to use as a fuel source. The Darlene Way route, however, requires approval of a BLM right-of-way and road improvements. As a result, Biogreen’s heavy truck trips traveling to and from the Embody Tract will use Highway 31, US 97 and Reed Road to access the Biogreen site unless and until BLM allows Biogreen trucks to use the road.

MTC reviewed its STR and “ran the numbers” assuming that 100% of Biogreen pm peak hour traffic will use the Reed Road/1st Street and Highway 97 intersection so that the analysis would be certain to capture all trips that would have otherwise used Darlene Way. This analysis showed that a V/C ratio of .82 would be expected post-development and a V/C ratio of .85 would remain the number projected for 5 years post-development.

The City accepts Mr. Morrison’s professional analysis, calculations and findings related to the expected V/C ratios and as findings of the City. These findings are contained in: (a) the September 8, 2010 MTC STR and attachments; and (b) the “Five-year Post-Buildout Analysis” on pages 3 and 4 and the attachments to the MTC document dated December 15, 2010; and (c) on pages 2 (final paragraph) and 3 and the attachment of his December 20, 2010 document. Based on these findings, the City concludes that Biogreen has demonstrated compliance with the applicable V/C ratio.

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The City accepts the MTC results knowing that in 2006 and 2007, traffic studies projected a level of service failure at the intersection of 1st Street/Reed Road and Highway 97. County Transportation Planner explained, however, that the level of service of this intersection has improved since that time because the volume of traffic on the highway has declined and this explanation properly accounts for the change in projections.

Additionally, the City accepts the MTC analysis and its assumption that 25% of the pm peak hour trips will be traveling to or from the west side of the intersection of 1st/Reed Road and Highway 97 on First Street. Opponents argued that the fact that Biogreen President Rob Broberg's rough guess estimate that 75% of Biogreen fuel truck trips will come from the north and 25% of fuel truck trips will come from the south means that the trip distribution in the MTC study is wrong and conflicts with the 75%-25% fuel truck estimate. This claim is clearly wrong. The Biogreen STR PM peak hour trip distribution reflects all site trips that will occur during the PM peak hour while the Broberg testimony related to a portion of the daily trips (70 of 170 to 190 site trips per day) which include employee trips from homes located west of Highway 97. In addition, the assignment of 25% of trips to the First Street leg of the intersection adds trips to the leg of the intersection that results in the highest V/C ratio – the ratio that determines whether the entire intersection meets ODOT V/C ratio requirements. As such, any error in assigning trips to First Street works in favor of showing a failure at the studied intersection.

Greenlight Engineering also misunderstood the MTC trip distribution estimates when it claimed that 15% of Biogreen's heavy trucks will utilize Mitts Way based upon the applicant's traffic analysis. Again, Greenlight Engineering confused heavy truck traffic with PM peak hour traffic. The Biogreen STR states:

For the purposes of analyzing the average weekday PM peak hour (emphasis added) capacity of the Highway 97/Reed Road intersection, 60% of the total site traffic is anticipated to travel to and from the north on Highway 97, 25% to the west (1st Street), while 15% of the traffic is to travel south via Darlene Way. Site trip distribution and traffic assignment is shown on Figure 1.

Figure 1 and the site trip distribution percentages represent the PM peak hour. The percentages relate to all site-related trips that occur during the PM peak hour – employee trips, fuel deliveries and other trips. They do not reflect the daily trip distribution of heavy truck traffic.

Mr. Morrison's Figure 1 is unclear because it does not show Darlene Way and it shows 15% of site traffic using Mitts Way south of Reed Road. The intent of the 15% distribution arrow on Mitts Way on Figure 1 was to show trip distribution to/from points south not using the Highway 97/1st Street/Reed Road intersection including trucks using the Darlene Way to Russell Road to Reed Road truck route. No fuel delivery trucks or heavy trucks are anticipated to use Mitts Way.

I. Mitigation

1. **The applicant shall be responsible to mitigate any safety or capacity problems that are caused by their proposed development.**
2. **At the County Engineer's discretion, if there are pre-existing safety deficiencies and/or capacity failures at relevant intersections or road frontages within the impact analysis area, then no additional development shall be allowed until a solution that accounts for the proposed project's additional impacts is funded or built.**

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FINDING: The applicant's development does not cause any safety or capacity problems. Also, the evidence in the record shows that there are no pre-existing safety deficiencies and/or capacity failures that merit a moratorium on development or imposition of a development exaction. In the past, the intersection of Reed/1st and Highway 97 had been identified as suffering from capacity issues. Those issues, however, have been resolved because the volume of traffic using this intersection has decreased since 2006 and since the time that the La Pine comprehensive plan was developed.

Crash History

MTC provided crash history information for the County to consider even though this information does not need to be included in an STR. This information supports the County staff's determination that is no pre-existing safety deficiency at 1st/Reed and Highway 97 that must be corrected by Biogreen.

According to Mr. Russell, the goal of any transportation provider is to minimize crashes on the system. However, that desire must be balanced against scarce resources. In the transportation industry, a crash rate of less than 1.0 crashes per million entering vehicles (MEV's) is considered acceptable. The crash rate at 97/1st-Reed is 0.76 per MEV for the most recent year available. Crash data, unlike traffic volumes, is not mathematically reliable to use in forecasting future traffic volumes. In other words, if an intersection has seen a 5% traffic growth in the last ten years, then that intersection can be expected to have 5% growth for the next ten years. But one cannot say that an intersection that has had four crashes in the last ten years can be expected to have four crashes in the next ten years. This data, however, supports the determination by County staff that there is no pre-existing safety deficiency at the intersection of Highway 97 and 1st/Reed that must be corrected by the applicant.

The City of La Pine does not presently require traffic impact mitigation fees or other system development charges.

The following issues regarding the transportation systems were raised in the Williams appeal. A summary of this issue and responsive findings by the City are provided below:

Williams: *There is conflicting evidence regarding traffic in the DEQ permit application, land use application and e-mails.*

Finding: Traffic analysis involves estimates of traffic. The most reliable estimate of traffic is provided by Morrison Transportation Consulting in its September 8, 2010 Site Traffic Report. Mr. Morrison used the Institute of Traffic Engineers (ITE) *Trip Generation Manual* 8th Edition to estimate PM peak hour trips, the document typically used by professional transportation engineers to estimate vehicle trips associated with new development. The estimate of 35 fuel truck deliveries per day used to estimate daily fuel truck traffic is reasonable because the plant requires just 24 fuel truck deliveries per day to operate. The 35 fuel truck trip estimate is almost 50% higher than the number of trucks that are needed by the plant on any given day.

Information about Biogreen trips is not conflicting once the meaning of the information is understood. The evidence provided regarding Biogreen trips

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sometimes relates to fuel truck trips only, at others to trips occurring during the pm peak hour only, to all truck trips and to all plant traffic other than fuel truck trips.

Opponents and others have misunderstood information about fuel truck traffic, pm peak hour traffic, all truck traffic and all site traffic and have made statements based on those misunderstanding that are incorrect. Opponents and others, sometimes, have assumed that information provided about fuel truck trips applies to all plant traffic, which it does not. They also sometimes fail to recognize the fact that the fuel truck estimate is not intended to include all truck trips or that all references to trucks is a not a reference to fuel truck trips only.

What the evidence shows is that the Biogreen plant will generate more than 35 truck trips per day but that 35 fuel truck round trips is a reliable estimate of fuel truck trips (70 trip ends). Biogreen has shown that its plant requires 24 fuel truck trips per day. Biogreen used the plants needs to estimate 35 fuel truck deliveries per day for purposes of determining what level of traffic study was required. The City finds that 35 trucks per day is a sufficiently conservative truck trip estimate given the needs of the plant and that it was appropriate for Biogreen to use that figure to estimate plant trips

Other truck trips were not included in the 35 fuel truck deliveries per day estimate. Instead, other truck trips such as ash hauling truck trips and parcel delivery vehicles were included in the 100 to 120 of additional trip ends estimated for the plant.

Peter Russell offered written comments that summarized Biogreen's testimony that he said referred to 35 to 45 truck trips a day (round trips). The Russell information refers to truck trips without breaking out the number of truck trips that will be fuel truck trips. As it refers to all truck trips, it does not conflict with Biogreen's estimate of 35 fuel truck deliveries per day.

Biogreen's DEQ permit application says that the truck dump area is "designed" to handle about 5 trucks per hours and an average of 44 trucks per day. This is a worst case assumption made by an air quality consultant, not by a transportation engineer based on information obtained from the future plant operator. A close analysis of the DEQ preliminary air quality permit shows that the 44 trucks per day design did not translate into 44 truck trips per day of use. The draft DEQ permit estimated that there would be 10,011 fuel truck trips per year. This is approximately 27.4 trips per day for each day of plant operations. The daily truck trip figure rises to 32 fuel truck trips per day if the plant does not accept deliveries on Sunday. If all fuel truck deliveries occur on Monday through Friday only, which is not Biogreen's plan, no more than 38.4 trucks per day would come to the plant. This shows that Biogreen's estimate of 35 trucks per day was reasonable and consistent with DEQ permit data. Even if the MTC estimate of daily truck trips were increased from 35 to 39 trips per day, the total number of daily trips associated with the Biogreen plant would increase by 8 trip ends and remain below the level of trips that would require the applicant to conduct a TIA (over 200 trip ends per day).

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The reliability of the MTC trip estimate is also confirmed by information submitted to the record by Mr. Williams. Mr. Williams claims that a 35 MW biomass plant being built in Klamath Falls will require an average of 52 truck arrivals per day. As the Biogreen plant is about 71.15% the size of the Klamath Falls plant, it will require just 71.15% of the fuel needed by the Klamath Falls plant. When 71.15% of the 52 trip estimate is calculated, a trip estimate of 37 trips is derived. This number is very close to the Biogreen estimate. Even if the two trips were added to the MTC daily trip estimate for Biogreen, the total trips for the plant would not exceed 200 and an STR remains the required study for the Biogreen plant.

Williams: *Deschutes County should have required the applicant to prepare a TIA and Five Year Analysis of affected intersections.*

Response: The ITE manual and MTC report show that the proposed development will not generate the amount of traffic in the relevant period that would require preparation of a TIA. DCC 17.16.115 says that if a use generates 50 to 200 daily trip ends and less than 20 pm peak hour trips, a Site Traffic Report will be required. The Biogreen plant is estimated to generate less than 200 average daily trips and less than 20 pm peak hour trips.

The MTC report shows that the Highway 97/Reed Road intersection will meet ODOT performance standards at year of opening and, therefore, will comply with DCC 17.16.115 using the assumption that 85% of site traffic will use that intersection. In addition, a supplement to the MTC report shows that even if 100% of site traffic used the intersection, the intersection would continue to meet ODOT V/C ratio requirements. MTC also provided a five-year analysis report using both an 85% and 100% intersection use assumption. In both cases, the resulting V/C ratio meets ODOT's V/C ratio requirements.

Williams: *The Morrison trip estimate should be rejected because it did not account for ash hauls or stockpiling of materials and contains "other omissions."*

Response: Mr. Morrison considered the evidence submitted by opponents about truck trips and other alleged omissions. The fuel truck trip estimate does not include ash hauling truck trips or other truck trips associated with the Biogreen plant. According to Sean Morrison, P.E., of MTC, ash hauling truck trips are included in his estimate of 170 to 190 ADT as a part of the 100 to 120 daily trips that will be generated by the plant over and above the trips generated by fuel truck trips.

The STR accounts for trips needed to stockpile materials on site. The fuel trucks bring material to the plant for stock piling. All fuel truck trips are included in the MTC estimate. Mr. Williams claimed that the applicant would be storing logs on site and chipping them. This misunderstanding was created by the fact that the site plan included with the air quality permit was a preliminary site plan that was revised prior to filing with the City of La Pine. The applicant corrected the site plan filed with DEQ so that it matched the one filed with the City of La Pine. The site plan filed with the City of La Pine does not include a log storage area. The applicant will not be storing and chipping logs on site so no truck trips related to this activity were omitted from the daily trip estimate.

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Williams: *The County decision erred in concluding that the subject property will adequately mitigate traffic impacts because impacts will occur along the length of the roads not just adjacent to the subject property.*

Response: The applicable approval criteria require the applicant to mitigate transportation system impacts but it does not require any particular level of mitigation. The level of traffic associated with the proposed development will not create a traffic problem that needs to be corrected as shown by the MTC analysis. In such a case, it is reasonable for the City to limit street and sidewalk improvement mitigation requirements to street and road improvements along the frontage of the subject property.

Williams: *The County allows a log deck. This only makes sense if a large chipper is located on site. If the logs are trucked elsewhere for chipping and returned as chips, the STR traffic estimate is too low (this objection is found in the "DEQ Air Permit" section of the Williams appeal).*

Response: There is no log deck in the proposed site plan. Logs will not be transported to the Biogreen plant and then sent off-site to be chipped. Logs will be chipped in the woods or in other off-site locations before being brought to the Biogreen plant. The "hog system" that is indicated in the proposed site plan refines already chipped material so that it burns more efficiently in the boilers. The proposed hog system is not capable of processing logs.

Title 18 of the Deschutes County Code, County Zoning.

A. CHAPTER 18.61, URBAN UNINCORPORATED COMMUNITY ZONE - LA PINE.

1. Section 18.61.020, Standards in All Districts.

A. *Solar Setback. The setback from the north lot line shall meet the solar setback requirements in DCC 18.116.180, excepting lots less than 10,000 square feet in size, or under 80-foot average width, as defined by DCC 17.08.030 "lot width," and located in the Neighborhood Planning Area of the Urban Unincorporated Community – La Pine.*

FINDING: The north lot line of the subject property is the south right-of-way line for Reed Road. The Reed Road right-of-way will be 90-feet wide once the additional road right-of-way is dedicated on the final plat for MP-10-6. As determined by a topographic survey of the subject property that is included in the Grading Plan that accompanies this application, the north-facing slope of the land in the vicinity of Reed Road is approximately 0.3 percent. The truck dump is the tallest structure on the north end of the subject property at 50 feet. The proposed smoke stacks will be approximately 100 feet tall, pending final approval from DEQ. The Deschutes County Shadow length computer program yields a setback distance of 119 feet for the truck dump and 260 feet for the smoke stack. The shadow patterns for the two structures are indicated on the submitted site plan drawing. The truck dump casts the shadow that extends closest to the north property line. When the 90-foot wide Reed Road right-of-way is subtracted from the shadow length, the required solar setback from the north line of the subject property is 29 feet. The proposed setback is 140 feet and thus satisfies the requirement.

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B. Stream Setback. To permit better light, air, vision, stream or pollution control, protect fish and wildlife areas and to preserve the natural scenic amenities and vistas along the streams and lakes the following setback shall apply:

1. All sewage disposal installations, such as septic tanks and septic drain fields, shall be set back from the ordinary high water mark along all streams or lakes a minimum of 100 feet, measured at right angles to the ordinary high water mark. In those cases where practical difficulties preclude the location of the facilities at a distance of 100 feet and the County Sanitarian finds that a closer location will not endanger health, the Planning Director or Hearings Body may permit the location of these facilities closer to the stream or lake, but in no case closer than 25 feet.

2. All structures, buildings and similar permanent fixtures shall be set back from the ordinary high water mark along all streams or lakes a minimum of 100 feet measured at right angles to the ordinary high water mark.

FINDING: There are no streams or lakes near the subject property.

C. Building Code Setbacks. In addition to the setbacks set forth herein, any greater setbacks required by applicable building or structural codes adopted by the State of Oregon and/or the County under DCC 15.04 shall be met.

FINDING: Section 306 of the Oregon Structural Specialty Code (OSSC) classifies the use and occupancy for "Electrical generation plants" as Factory Industrial F-1. The OSSC classifies the proposed Type of Construction as Type I. Table 602 in the OSSC indicates a fire-resistance rating of 0 is required for exterior walls that have 30 feet or more separation distance for all types of construction. The minimum proposed setback of 53 feet from the west property line exceeds the minimum separation requirement.

Section 1907 of the Oregon Fire Code states that wood chip storage piles shall not exceed 60 feet in height, 300 feet in width, and 500 feet in length. Piles must be separated from adjacent piles or other exposures by approved fire apparatus access roads. The submitted site plan shows that the proposed fuel pile will be separated from other uses as required, by at least 100 feet. These are separated from other exposures on the north, south and west sides by the truck service drive and the fire apparatus access road. The fuel pile will not be taller than 60 feet, wider than 300 feet, nor longer than 500 feet.

D. Off-Street Parking and Loading. Off street parking and loading shall be provided subject to the provisions of DCC 18.116, Supplementary Provisions.

FINDING: Compliance with DCC 18.116 parking standards is discussed below.

E. Outdoor Lighting. All outdoor lighting shall be installed in conformance with DCC 15.10 providing outdoor lighting control.

FINDING: The proposed light fixtures do not produce intensities in excess of 1800 lumens and will be shielded so they will not project light off of the subject property in compliance with DCC 15.10. A condition of approval will ensure compliance with this criterion.

2. Section 18.61.030, La Pine Planning Area.

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- C. La Pine Industrial District.**
- 3. Conditional Uses Permitted. The following uses may be allowed subject to the applicable provisions of DCC 18.61 and DCC 18.124, Site Plan Review, and DCC 18.128, Conditional Use:**
 - e. Electrical substation.**
 - q. Utility facilities**

FINDING: The applicant is proposing a biomass electrical power generation facility. The electrical substation is a component of the facility. The proposed use satisfies the DCC definition of a Utility Facility. The proposed business is permitted subject to applicable provisions of DCC Chapter 18.124, Site Plan Review, Chapter 18.116, Supplementary Provisions, and Chapter 18.128, Conditional Uses as addressed below.

- 4. Use Limits. The following limitations and standards shall apply to uses listed in DCC 18.61.030(C)(2) and (3):**
 - a. Sewer and Water Requirements:**
 - 1. New uses that require DEQ Water Pollution Control Facility (WPCF) permits shall be required to connect to the La Pine Sewer Treatment Facility in lieu of obtaining a WPCF permit.**
 - 2. Uses that do not require a WPCF permit shall demonstrate the ability to obtain approval for an on-site sewage disposal system either before approval of the land use permit or as a condition of permit approval.**
 - 3. If a use requires more than 5,000 gallons of water per day, an application shall be made to the Oregon Water Resources Department for a water rights permit or the use must be connected to a municipal, community or public water system.**

FINDING: The applicant will obtain water service from the La Pine Water District and sewer service from the La Pine Special Sewer District. The applicant has entered into water and sewer service agreements with the districts that assure it water and sewer service for the Biogreen site and its biomass plant. The anticipated average water demand is approximately 300 gallons per minute (gpm) or 432,000 gallons per day. The water demand will range between 50 gpm and 400 gpm. Treated effluent for the La Pine Sewer District will be utilized for cooling water and will reduce the utility facility's potable water demand. The use and flow of treated effluent will range between 50 gpm and 250 gpm. Additionally, the water district has the ability to meet all needs of the biomass plant using well water rather than treated effluent.

- b. Compatibility:**
 - 1. A use that requires a lot area exceeding 9,000 square feet shall not be permitted to locate adjacent to a lot in a residential district.**

FINDING: The subject property is not adjacent to a residential district. This criterion does not apply.

- 2. A use expected to generate more than 30 truck trailer or other heavy equipment trips per day to and from the subject property shall not be permitted to locate on a lot adjacent to or across a street from a lot in a residential district.**

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FINDING: The subject property is not adjacent to a residential district. This criterion does not apply.

3. Any use on a lot adjacent to or across the street from a lot in a residential district shall not emit odor, dust, fumes, glare, flashing lights, noise or similar disturbances perceptible without instruments more than 200 feet in the direction of the affected residential use or lot.

FINDING: The subject property is not adjacent to a residential district. This criterion does not apply.

4. Storage, loading and parking areas for uses permitted by DCC 18.61.030(C)(2) and (3) shall be screened from residential zones using trees, vegetation, and topography to the maximum extent practicable to screen the area from view of nearby residences.

FINDING: A residential zone is located to the southwest, across Mitts Way. Ground level storage, loading and parking areas at the proposed facility will be screened from the only nearby residential district (the LPR zone located west and southwest of the subject property beginning near the intersection of Mitts Way and Foss Road) by sight-obscuring perimeter fencing and a 12'-tall sound wall as shown in the applicant's site plan and HWA Exhibit A-1, Sound Wall. The sound wall will provide complete visual screening of all parking and loading areas, including the fuel unloading area at the north end of the Biogreen site, from view of nearby residences. The fuel pile storage area will not be visible from nearby residences but the fuel piles (up to 60' tall) kept in that storage area will be partially visible as a distant view from residences in the residential area. The closest nearby residence is located at the southwest corner of Mitts Way and Foss Road and the others are located further west or south. The LPR zone that contains the nearest residence is the only residential area that contains "nearby" residences.

The fuel pile has been located to the maximum extent practicable to screen the pile from view by all nearby residences. The proposed boiler/turbine building and cooling towers offer partial screening of the fuel pile from the residential zone because they are located between the residential district and a good portion of the fuel pile. The sound wall shown on HWA Exhibit A-1 Sound Wall will completely screen the lower part of the fuel pile from view of nearby residences.

A digital model and photograph of the view from the nearest residence in that area was provided by HWA in Exhibit A-5. An interactive model was prepared and viewed by the City Council. These documents and the landscaping plan, together with a consideration of the operational needs of a biomass plant and feasible screening methods, show that the location of the plant buildings will provide the maximum practicable screening.

No log deck is proposed by the applicant's site plan. A log deck was shown in the initial DEQ application site plan but was not included in the site plan submitted for City land use review. The approved DEQ permit was based on the land use site plan. The record shows that the initial DEQ plan was amended, during DEQ review, to match the land use site plan prior to issuance of the DEQ permit.

Existing trees located on Parcel 2 of Partition Plat No. 2010-13 will also help obscure residential views of the proposed raw material storage areas. It is likely that some of these trees will be

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removed when this adjacent property is developed for an industrial use. At that time, the trees will be replaced with industrial buildings and site development. It is, however, very likely that new buildings on the lot will provide visual screening between the residential area and the Biogreen fuel pile.

Additional trees, predominantly indigenous varieties of evergreens, will be planted around the perimeter of the project just inside the fence line. These trees will be tall, large diameter trees. Once established, these trees will grow above the sound wall and fence and offer additional screening of the fuel pile. An irrigation system will be installed to aid in establishment and growth of the new trees. The typical tree-planting and irrigation scheme is detailed in the drawings that accompany the application. Any planted trees that die within the initial five-year period will be replaced with a like tree of the same initial size. The screening provided by the new trees will be limited initially but will improve substantially over time.

To implement the tree planting scheme included in the application materials, The City includes the following conditions of approval:

- 1) The applicant shall plant or transplant a minimum of 220 trees, 40% of the trees will be Ponderosa or Lodgepole Pine that are 5 to 6 feet tall, 40 % of the trees shall be Austrian or Scotch Pine that are 5 to 6 feet tall and 20% of the trees shall be Aspen that have a trunk caliper of 1.5 to 2 inches. The trees shall be planted along the South, west and north property lines in the locations indicated in Site plan sheet 3/5 prior to issuance of occupancy permits, or initiation of use, whichever comes first.
- 2) This required landscaping, including screening trees, shall be continuously maintained and kept alive and attractive.

The City finds that storage, loading and parking areas will be screened from residential zones using trees, vegetation, and topography to the maximum extent practicable to screen the area from view of nearby residences. A 12' tall wall is the tallest visual screening that, practicably, can be provided. It provides 100% screening of all parking and loading uses planned for the site. It, and site layout, provide a significant amount of screening of the fuel pile, the only outdoor storage area that will be visible from nearby residences.

5. *No use requiring air contaminant discharge permits shall be approved by the Planning Director or Hearings Body prior to review by the applicable state or federal permit reviewing authority, nor shall such uses be permitted adjacent to or across a street from a residential lot.*

FINDING: The subject property, Parcel 1 of Partition Plat No. 2010-13, is not adjacent to or across a street from a residential lot.

An air contaminant discharge permit is required from DEQ for this use. DEQ reviewed and approved Biogreen's air contaminant discharge permit application. DEQ has completed its review. DEQ issued Biogreen an air contaminant discharge permit on December 15, 2010 (Permit Number 09-9557-ST-01 issued by Mark Bailey, the Eastern Region Air Quality Manager for DEQ).

Opponents to the project argued that this criterion requires that no approval of this application may be issued by Deschutes County prior to completion of the DEQ review of air contaminant

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discharge permits. This issue is moot, however, as DEQ issued the discharge permit on December 15, 2010 prior to approval of the land use applications.

6. A property hosting a service commercial use shall be subject to a waiver of remonstrance recorded in the Deschutes County Book of Records declaring that the operator and his or her successors will not now or in the future file a complaint aimed at curtailing industrial activities on adjacent properties conducted in conformance with DCC 18.61.

FINDING: The proposed use is industrial, not service commercial. This criterion does not apply.

7. Exhaust stacks shall be screened from residential zones using trees, vegetation, and topography to the maximum extent practicable to screen the stack from view of nearby residences.

FINDING: The utility facility exhaust stack must be sized to meet the DEQ air quality permit requirements. The applicable code, however, assures that the visual impact of the stack will be minimized by requiring that the height of the stack not exceed the height required by DEQ. In this case, the applicant's representatives testified that the stack height proposed to DEQ was approximately 100 feet tall. DEQ approval was granted based on the height requested in the permit.

The screening discussed above under Section 18.61.030(C)(4)(b)(4), as conditioned, will also serve to partially screen the exhaust stacks from residential zones using trees, vegetation, and topography to the maximum extent practicable. The subject property and nearby properties are relatively level. The topography, therefore, does not provide any opportunity for screening views of the stack from nearby residences. The applicant will provide tall trees, the only vegetation that will offer effective screening of views of the lower part of the stack. Views of the stack will also be partially screened by the sound wall.

The stack and plant was developed on Parcel 1 rather than on Parcel 2 which provides mature approximately 30'-tall trees as screening until Parcel 1 is developed. The stack will, also, be painted green to minimize its visual impact as viewed from nearby residences. It is not practicable to provide more extensive screening for the exhaust stack by using trees, vegetation or topography.

c. Traffic/Parking.

1. A use that generates more than 20 auto or truck trips during the busiest hour of the day to and from the premises shall be served directly by an arterial or collector.

FINDING: Reed Road directly serves the subject property and proposed use. County Road Department records indicate Reed Road is a county-maintained road within the City of La Pine that is classified as a City collector. According to the STR, the use will generate 12 vehicle trips during the PM peak hour. Thus, this criterion is not applicable.

However, if the criterion did apply, this criterion is met as the facility is served by a Reed Road, a City Collector. This criterion does not prohibit utility facility traffic from using other travel corridors, such as Foss Road or Mitts Way. The applicant has, however, designed the site plan so that the fuel truck entrance is located on Reed Road so that fuel trucks will use Reed Road to

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access the site. The fuel truck unloading area is at the north end of the site near Reed Road, as well.

2. *An applicant must demonstrate that affected transportation facilities are adequate to serve the proposed use, considering the functional classification, capacity and the level of service of such facilities.*

FINDING: The applicant has provided a traffic report for the project. Based on a review of this report and a report submitted by Greenlight Engineering, the Deschutes County Transportation Planner concluded that the affected transportation facilities are adequate to serve the proposed use. The County's Transportation Planner, Peter Russell, reiterated his opinion on this topic in his November 30, 2010 Memorandum to Will Groves, Senior Planner. Mr. Russell advised that "Reed, Finley Butte, Foss and Mitts Way were either built to County specification as their associated subdivisions and industrial parks developed or were pre-existing streets that will be required to be upgraded during the land use process. * * * The County roads are adequate to service the Biogreen site development." The City concurs with Mr. Russell's opinion and finds that these roads and area highways (Highway 97 and Highway 31) are adequate to serve the biomass plant site. Additional information about this topic was provided in a December 8, 2010 memorandum prepared by Peter Russell that included information provided by County Engineer George Kolb. That information further supports the determination that affected transportation facilities are adequate to serve the proposed use.

The Deschutes County Road Department commented that Reed Road is classified as a City Collector. Existing width of Reed Road is currently 32 feet and there are existing drainage swales located on the south side of the roadway. Minimum road design standards for a City Collector are 36 foot width with sidewalks. Sidewalks will be required to be installed on Reed Road as a condition of approval prior to operation of the biomass plant. Applicant will be required to widen Reed Road along its frontage to provide a width of 18 feet from centerline as a condition of approval of this application.

Foss Road is classified as a City Local street. Existing width is 26 feet. Minimum road design standards for a Commercial City Local are 32 foot width pavement with sidewalks and drainage swales. Applicant will be required to widen Foss Road to provide a width of 16 feet from centerline and install sidewalks and drainage swales along the frontage of subject property as a condition of approval of this application.

Darlene Way is a public right of way under Bureau of Land Management (BLM) jurisdiction but maintained by the County. The County Engineer and Transportation Planner traveled the road last month and assessed it would be adequate for truck traffic. The road is obviously the main stem in the road network of logging roads in this area. BLM controls use of this road, however, and will not allow use of the road by Biogreen truck traffic unless a right of way is obtained by Biogreen. Biogreen does not need to use Darlene Way to access the plant and will use the state highway system and Reed Road to access the plant unless and until the use of Darlene Way is allowed by BLM. The City is aware that there are concerns about truck travel and dust occurring on Darlene Way. However, if Biogreen is not using this road then no mitigation is required through this land use process. Should the applicant secure permits to use the road then participation with BLM and/or the County on dust abatement strategies may be warranted. If the applicant obtains a permit to use Darlene Way, a modification to this application may be required, as determined by the City, after review of the permit and related data.

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3. All parking demand created by any use permitted by DCC 18.61.030(C) shall be accommodated on the applicant's premises entirely off-street.

FINDING: The parking demand created by the power generation facility will be accommodated on the subject property. No on-street parking is proposed.

4. There shall be only one ingress and one egress from properties accommodating uses covered by DCC 18.61.030(C) per each 300 feet or fraction thereof of street frontage. If necessary to meet this requirement, uses shall provide for shared ingress and egress.

FINDING: The subject property has approximately 591 feet of frontage along Reed Road and 591 feet of frontage along Foss Road. The total amount of street frontage is approximately 1182 feet. The applicant is proposing one ingress/egress to Reed Road for the truck service road and a second access to Foss Road for small vehicles frequenting the boiler/turbine complex. A third, locked gate, ingress/egress to Foss Road near the southeast corner of the property will be provided for Midstate Electric Cooperative and the La Pine Water District. It will provide infrequent access to existing and proposed utility easements in that vicinity for maintenance purposes. Since the property is entitled to four points of access under the terms of this code provision, the three proposed accesses meet this criterion.

d. Requirements for Large Scale Uses. Any industrial use listed in DCC 18.61.030(C)(2) and (3) may be allowed in a building or buildings exceeding 20,000 square feet of floor space if the Planning Director or Hearings Body finds:

1. That such uses are necessary to provide employment that does not exceed the total projected work force within the community and the surrounding rural area;

2. That such uses would not rely upon a work force served by uses within urban growth boundaries; and

3. That the determination of the work force of the community and surrounding rural area considers the total industrial and commercial employment in the community and is coordinated with employment projections for nearby urban growth boundaries.

FINDING: The cumulative structure area of this facility is 19,671 square feet. These criteria do not apply.

5. Additional Requirements. As a condition of approval of any use proposed, the Planning Director or Hearings Body may require:

a. An increase in required setbacks.

b. Additional off-street parking and loading facilities.

c. Limitations on signs or lighting, hours of operation and points of ingress and egress.

d. Additional landscaping, screening and other improvements.

FINDING: Conditions of approval, where required, are discussed throughout this decision under the relevant criterion.

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6. Dimensional Standards. The following dimensional standards shall apply:

a. Minimum Lot Size. The minimum lot size shall be determined subject to the provisions of DCC 18.61.030(C) concerning setback requirements, off-street parking and loading.

FINDING: This criterion is applicable to land divisions. No new lots will be created as a result of site plan or conditional use approval. This criterion, therefore, does not apply.

b. Lot Coverage. Notwithstanding DCC 18.61.030(C)(3)(n), a use permitted by DCC 18.61.030(C) is located adjacent to or across the street from a lot in a residential district shall not exceed 70 percent lot coverage by all buildings, storage areas or facilities and required off-street parking and loading area.

FINDING: The subject property is not located across a street or adjacent to a residential district. This criterion does not apply.

c. Setbacks.

1. The minimum building setback between a nonrailroad related structure and a street, road or railroad right of way line shall be 50 feet unless a greater setback is required for compliance with Comprehensive Plan policies.

FINDING: The north and south property lines abut road rights of way. The east property line abuts a railroad right of way. The minimum building setbacks for the north, south and east property lines, therefore, are 50 feet. The proposed structure setbacks from those lines are 140 feet, 60 feet and 75 feet respectively and exceed the minimum of 50 feet. No greater setback is required by comprehensive plan policies.

2. The minimum setback between a structure and a property line adjoining a residential district shall be 50 feet.

FINDING: The subject property does not adjoin a residential district. This setback does not apply.

3. The minimum setback between a structure and an existing use shall be three feet from the property line and at least six feet from a structure on the adjoining property.

FINDING: No proposed structure is within 50 feet of a property line.

d. Building Heights. The maximum building height for any structure shall be 30 feet on any lot adjacent to a residential district and 45 feet on any lot not adjacent to a residential district or that is separated from a residential district by a street or road. The following exceptions apply:

1. If a building on a lot adjacent to a residential district, but not separated by a street or road, is set back 100 feet or more from the residential district, the maximum height shall be 45 feet; and

2. The maximum height for utility facility structures shall be 100 feet provided:

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FINDING: The proposed use is a utility facility and is not adjacent to a residential district. The proposed boiler/turbine building is the tallest of the buildings in the electric power production facility at an approximate height of 76 feet. It will not exceed the exception height limit of 100 feet.

i. The structure is located on a lot that is not adjacent to a residential district;

FINDING: The subject property is not adjacent to a residential district.

ii. The structure is the minimum height necessary to accommodate machinery and equipment;

FINDING: The proposed boiler/turbine building is the tallest of the buildings in the electric power production facility at an approximate height of 76 feet. The City finds that the applicant has provided adequate evidence to support the requested height for the structure. This is the minimum height necessary to accommodate the necessary machinery and equipment.

iii. The structure is equipped with fire sprinkler protection in accordance with current adopted editions of the Oregon Structural Specialty Code, Oregon Fire Code, and National Fire Protection Association 13; and

FINDING: The proposed use, utility facility, is an electric generation plant and is classified as Factory Industrial F-1 in the Oregon Structural Specialty Code (OSSC). The buildings will be designed in accordance with the OSSC and will satisfy the height exemption requirements listed in Section 503.1.1 of the OSSC. The buildings with heights in excess of 45 feet will be equipped with fire sprinklers designed and constructed in accordance with the Oregon Structural Specialty Code the Oregon Fire Code and NFPA 13. This decision includes a condition of approval, requiring that the structure shall be equipped with fire sprinkler protection in accordance with current adopted editions of the Oregon Structural Specialty Code, Oregon Fire Code, and National Fire Protection Association 13.

iv. The structure is at least 500 feet from the nearest residential district.

FINDING: The proposed structures will be more than 750 feet from the nearest residential district.

e. Utility facility exhaust stacks shall meet the DEQ air quality permit requirements, but shall not exceed DEQ permit minimum height requirements or 150 feet in height, whichever is less.

FINDING: The air contaminant discharge permit (ACDP) application was submitted to DEQ on July 16, 2010. The permit has been issued. The requested and DEQ-approved stack height is approximately 100 feet. As a condition of approval, the utility facility exhaust stack will be limited to the minimum height allowed by the DEQ air quality permit.

f. Minimum Lot Frontage. The minimum lot frontage shall be 50 feet.

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FINDING: No new lots will be created. This criterion does not apply. If the criterion applied, it would be met. The subject property has approximately 591 feet of frontage along Reed Road and 591 feet of frontage along Foss Road.

g. Side Yard. None required, except when a parcel or lot with a side yard adjacent to zoned forest land shall have a minimum side yard of 100 feet.

FINDING: The subject property is not adjacent to zoned forestland. As a result, no side yard setback is required by this part of the code. The north and south property lines abut road right of ways and must satisfy front yard criteria. The east property line is a side lot line but it abuts a railroad right of way and a 50-foot minimum building setback is required by another part of the code for that side yard. There is no minimum side yard requirement along the west property line of the subject property.

h. Rear Yard. None required, except when abutting a yard in a Residential District, and then the rear yard shall be a minimum of 20 feet. A parcel or lot with a rear yard adjacent to zoned forest land shall have a minimum rear yard of 100 feet.

FINDING: The subject property is not adjacent to zoned forestland and does not abut a residential district. The subject property does not have a rear yard because it is a through lot with frontage on two parallel roads.

C. CHAPTER 18.116, SUPPLEMENTARY PROVISIONS

1. Section 18.116.020, Clear Vision Areas.

A. In all zones, a clear vision area shall be maintained on the corners of all property at the intersection of two streets or a street and a railroad. A clear vision area shall contain no planting, fence, wall, structure, or temporary or permanent obstruction exceeding three and one-half feet in height, measured from the top of the curb or, where no curb exists, from the established street centerline grade, except that trees exceeding this height may be located in this area provided all branches and foliage are removed to a height of eight feet above the grade.

B. A clear vision area shall consist of a triangular area on the corner of a lot at the intersection of two streets or a street and a railroad. Two sides of the triangle are sections of the lot lines adjoining the street or railroad measured from the corner to a distance specified in DCC 18.116.020(B)(1) and (2). Where lot lines have rounded corners, the specified distance is measured from a point determined by the extension of the lot lines to a point of intersection. The third side of the triangle is the line connecting the ends of the measured sections of the street lot lines. The following measurements shall establish clear vision areas within the County:

1. In an agricultural, forestry or industrial zone, the minimum distance shall be 30 feet or at intersections including an alley, 10 feet.

FINDING: The subject property is not located at the intersection of two streets. The southeast corner of the property is located at the intersection of a street and railroad right-of-way. A condition

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of approval has been imposed to assure that the perimeter fence will be constructed outside of this clear vision area.

2. Section 18.116.030, Off-street Parking and Loading.

A. Compliance. No building or other permit shall be issued until plans and evidence are presented to show how the off-street parking and loading requirements are to be met and that property is and will be available for exclusive use as off-street parking and loading. The subsequent use of the property for which the permit is issued shall be conditional upon the unqualified continuance and availability of the amount of parking and loading space required by DCC Title 18.

B. Off-Street Loading. Every use for which a building is erected or structurally altered to the extent of increasing the floor area to equal a minimum floor area required to provide loading space and which will require the receipt or distribution of materials or merchandise by truck or similar vehicle, shall provide off-street loading space on the basis of minimum requirements as follows:

1. Commercial, industrial and public utility uses which have a gross floor area of 5,000 square feet or more shall provide truck loading or unloading berths subject to the following table:

Sq. Ft. of Floor Area	No. of Berths Required
Less than 5,000	0
5,000-30,000	1
30,000-100,000	2
100,000 and Over	3

FINDING: The proposed building floor areas fall into the 5,000 to 30,000 square foot range. Thus one loading berth will be required.

3. A loading berth shall contain space 10 feet wide, 35 feet long and have a height clearance of 14 feet. Where the vehicles generally used for loading exceed these dimensions, the required length of these berths shall be increased.

FINDING: The proposed chip unloading facilities (truck dumps) provide the function of loading berths on the site and measure approximately 15 feet wide and 80 feet long each. The height clearance will be unlimited.

4. If loading space has been provided in connection with an existing use or is added to an existing use, the loading space shall not be eliminated if elimination would result in less space than is required to adequately handle the needs of the particular use.

FINDING: Loading space has not been provided in connection with an existing use or is added to an existing use. This criterion does not apply.

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5. Off-street parking areas used to fulfill the requirements of DCC Title 18 shall not be used for loading and unloading operations except during periods of the day when not required to take care of parking needs.

FINDING: Off-street parking areas used to fulfill the requirements of DCC Title 18 are not proposed for loading and unloading operations.

C. Off-street Parking. Off-street parking spaces shall be provided and maintained as set forth in DCC 18.116.030 for all uses in all zoning districts. Such off-street parking spaces shall be provided at the time a new building is hereafter erected or enlarged or the use of a building existing on the effective date of DCC Title 18 is changed.

D. Number of Spaces Required. Off-street parking shall be provided as follows:

7. Industrial.

Use	Requirements
Manufacturing establishment	1 space per employee on the largest working shift
Storage warehouse, wholesale establishment, rail or trucking freight terminal	1 space per 2,000 sq. ft. of floor area

8. Other uses not specifically listed above shall be provided with adequate parking as required by the Planning Director or Hearings Body. The above list shall be used as a guide for determining requirements for said other uses.

FINDING: The City finds that the proposed utility facility is a use not specifically listed for parking requirements. The City has used the manufacturing establishment requirement of one space per employee on the largest working shift as a guide for determining parking requirements. The largest employee shift will include 8 persons. This fact is contained in the October 7, 2010 e-mail from Matt Steele of HWA to William Groves that corrects information provided in the application burden of proof statement. A total of twenty-one (21) employees will be employed on all three shifts rather than during the largest shift. This means that a total of 8 parking spaces are required. The applicant's original site plan was designed to provide 21 parking spaces. When the error was identified, a revised site plan was filed by HWA on October 7, 2010 to reduce the number of parking spaces proposed. The October 7, 2010 site plan was not accepted by the County because it was filed within 30 days of the filing of the land use application. Since that time, the applicant modified its application and chose to retain the proposed 21-space parking area shown on the original site plan. This parking area will allow ample room for parking by employees during the change of shifts and all parking needs.

E. General Provisions. Off-Street Parking.

3. Location of Parking Facilities. Off-street parking spaces for dwellings shall be located on the same lot with the dwelling. Other required parking spaces shall be located on the same parcel or another parcel not farther

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than 500 feet from the building or use they are intended to serve, measured in a straight line from the building in a commercial or industrial zone. Such parking shall be located in a safe and functional manner as determined during site plan approval. The burden of proving the existence of such off-premise parking arrangements rests upon the applicant.

FINDING: Nineteen (19) parking spaces are proposed west of, and within 150 feet of the Boiler/Turbine building. Two (2) parking spaces are proposed within 200 feet of the Scale House. This criterion is met.

4. Use of Parking Facilities. Required parking space shall be available for the parking of operable passenger automobiles of residents, customers, patrons and employees only and shall not be used for the storage of vehicles or materials or for the parking of trucks used in conducting the business or used in conducting the business or use.

FINDING: No trucks will be based at this facility. Should transient truck parking be necessary, it will occur in unused material storage areas. Material storage areas are designated on the site plan and do not conflict with the required parking.

5. Parking, Front Yard. Required parking and loading spaces for multi-family dwellings or commercial and industrial uses shall not be located in a required front yard, except in the Sunriver UUC Business Park (BP) District and the La Pine UUC Business Park (LPBP) District and the La Pine UUC Industrial District (LPI), but such space may be located within a required side or rear yard.

FINDING: The subject property is located in the La Pine Industrial Park. No parking is proposed in the required front or side yards.

F. Development and Maintenance Standards for Off-Street Parking Areas. Every parcel of land hereafter used as a public or private parking area, including commercial parking lots, shall be developed as follows:

1. Except for parking to serve residential uses, an off-street parking area for more than five vehicles shall be effectively screened by a sight obscuring fence when adjacent to residential uses, unless effectively screened or buffered by landscaping or structures.

FINDING: The subject property is not adjacent to residential uses. This code requirement, therefore, does not require the applicant to screen parking areas on the site. The applicant's sound wall and sight-obscuring fencing will, however, screen parking areas from view of the nearest residence as shown by illustrations provided by the applicant.

2. Any lighting used to illuminate off-street parking areas shall be so arranged that it will not project light rays directly upon any adjoining property in a residential zone.

FINDING: The subject property does not adjoin any property that is located in a residential zone. This code requirement, therefore, does not apply to the review of this application.

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3. Groups of more than two parking spaces shall be located and designed to prevent the need to back vehicles into a street or right of way other than an alley.

FINDING: The parking areas have been located and designed to avoid the need to back vehicles into a street or right of way.

4. Areas used for standing and maneuvering of vehicles shall be paved surfaces adequately maintained for all weather use and so drained as to contain any flow of water on the site. An exception may be made to the paving requirements by the Planning Director or Hearings Body upon finding that:

a. A high water table in the area necessitates a permeable surface to reduce surface water runoff problems; or

b. The subject use is located outside of an unincorporated community and the proposed surfacing will be maintained in a manner which will not create dust problems for neighboring properties; or

c. The subject use will be in a Rural Industrial Zone or an Industrial District in an unincorporated community and dust control measures will occur on a continuous basis which will mitigate any adverse impacts on surrounding properties.

FINDING: A part of the subject property will be paved for frequent vehicular use. Those areas include the access road to the powerhouse facility, the parking area near the powerhouse and truck dump maneuvering area. Any areas used for fuel storage and handling will be surfaced with 8 inches of compacted crushed aggregate to provide support strength and control dust. The areas that will not be paved or graveled will be stabilized with native grasses. Given that the vast majority of the site will be comprised of pervious surfaces, The City finds that off-site flow of storm water is not likely and that the proposed retention ponds will be sufficient to contain such flows.

The City interprets the application materials to indicate that some vehicle travel will occur off paved or graveled surfaces. According to County Zoning Maps the subject property is located in an Industrial District within an unincorporated community zoning district. The subject property, however, is not in an unincorporated community as it is now a part of the City of La Pine, recently incorporated in 2006. This means that it is unclear whether subsection (b) or (c) applies. The applicant has agreed, however, to meet the performance standards set by both subsections. As a condition of approval, all vehicle travel surfaces shall be maintained in a manner which will not create dust problems for neighboring properties.

5. Access aisles shall be of sufficient width for all vehicular turning and maneuvering.

FINDING: The parking lot access aisle will be 30 feet wide. That width exceeds the required 24-foot aisle width for two-way travel required for perpendicular parking. The proposed fire apparatus road that runs just inside the site perimeter will accommodate emergency vehicle movements with a width of 20 feet and minimum inside turning radii of 30 feet. The required aisle width for one-way travel is 12 feet. This criterion is satisfied.

6. Service drives to off-street parking areas shall be designed and constructed to facilitate the flow of traffic, provide maximum safety of traffic access and egress and maximum safety of pedestrians and vehicular traffic on the

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site. The number of service drives shall be limited to the minimum that will accommodate and serve the traffic anticipated. Service drives shall be clearly and permanently marked and defined through the use of rails, fences, walls or other barriers or markers. Service drives to drive in establishments shall be designed to avoid backing movements or other maneuvering within a street other than an alley.

FINDING: Service drives to off-street parking areas have been designed and constructed to facilitate the flow of traffic, provide maximum safety of traffic access and egress and maximum safety of pedestrians and vehicular traffic on the site. The proposed truck service drive will access Reed Road. Small vehicles will use Foss Road to access the site. The two primary access points will provide a safer site for vehicles and pedestrians than would be provided by a single point of access. Separating passenger vehicle and heavy truck traffic will reduce conflicts and minimize potential safety issues for pedestrians and passenger vehicles posed by the operation and unloading and loading of heavy trucks. The second access will provide an alternate evacuation route and improve response times for emergency vehicles which maximize the safety of pedestrians and vehicles leaving the site in the event of an emergency. Pedestrian safety has, also, been maximized by providing a sidewalk immediately adjacent to the parking area. A person may park their car and travel directly to the biomass plant from their parking space without crossing the access aisle.

Midstate Electric Cooperative and the La Pine Water District will share the use of a third, gated maintenance access driveway to Foss Road near the southeast corner of the subject property which will not serve as an access point for the proposed biomass plant. This point of access will separate utility vehicles from biomass plant traffic and is needed to provide convenient access to the existing Midstate Electric Cooperative power line easement that runs along the east side of the Biogreen site. An additional easement will also be granted to the La Pine Water District with dedication of the proposed water mains. All of the above facts show that two regular points of access are the minimum needed to accommodate and serve the traffic anticipated by Biogreen and that a gated access is needed for use by area utility providers.

The truck access route from Reed Road will be marked with signs to ensure that cars do not enter the truck and heavy equipment areas. Directional marking and parking space marking will be required on the westernmost Foss Road service drive. A sign shall be placed on the locked gate at the third entrance to mark the location of the gate and the utility access driveway.

7. Service drives shall have a minimum vision clearance area formed by the intersection of the driveway centerline, the street right of way line and a straight line joining said lines through points 30 feet from their intersection.

FINDING: The minimum vision clearance areas, as illustrated by the 30-foot baseline triangles at each service drive access point, are presented on the submitted Site Plan. These meet this criterion.

8. Parking spaces along the outer boundaries of a parking area shall be contained by a curb or bumper rail placed to prevent a motor vehicle from extending over an adjacent property line or a street right of way.

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FINDING: No parking spaces are proposed in locations where vehicles using the space will extend over an adjacent property line or street right of way. The parking spaces will be separated from adjacent property by screening trees and a fence.

G. Off-Street Parking Lot Design. *All off-street parking lots shall be designed subject to County standards for stalls and aisles as set forth in the following drawings and table:*

(SEE TABLE 1 AT END OF CHAPTER 18.116)

- 1. For one row of stalls use "C" + "D" as minimum bay width.*
- 2. Public alley width may be included as part of dimension "D," but all parking stalls must be on private property, off the public right of way.*
- 3. For estimating available parking area, use 300-325 square feet per vehicle for stall, aisle and access areas.*
- 4. For large parking lots exceeding 20 stalls, alternate rows may be designed for compact cars provided that the compact stalls do not exceed 30 percent of the total required stalls. A compact stall shall be eight feet in width and 17 feet in length with appropriate aisle width.*

FINDING: The proposed parking stalls will be ten feet wide and twenty feet long. The aisle behind the parking bay will be thirty feet wide. The proposed parking lot complies with Development, Maintenance and Design Standards listed in Sections F and G above.

3. Section 18.116.031, Bicycle Parking.

New development and any construction, renovation or alteration of an existing use requiring a site plan review under DCC Title 18 for which planning approval is applied for after the effective date of Ordinance 93-005 shall comply with the provisions of DCC 18.116.031.

A. Number and Type of Bicycle Parking Spaces Required.

- 1. General Minimum Standard. All uses that require off-street motor vehicle parking shall, except as specifically noted, provide one bicycle parking space for every five required motor vehicle parking spaces. Except as specifically set forth herein, all such parking facilities shall include at least two sheltered parking spaces or, where more than 10 bicycle spaces are required, at least 50 percent of the bicycle parking spaces shall be sheltered.*

FINDING: The proposal requires for 21 vehicle parking spaces, thus 5 bicycle parking spaces are required. DCC 18.116.031 also requires such bicycle parking facilities include at least two sheltered parking spaces. The two sheltered bicycle parking spaces will be provided as racks inside the boiler turbine building or underneath an awning, eave, or other overhang. As a condition of approval, the applicant shall submit a revised plot plan showing at least two sheltered bicycle parking spaces, prior to issuance of building permits.

B. Bicycle Parking Design.

1. General Description.

- a. Sheltered Parking. Sheltered parking may be provided within a bicycle storage room, bicycle locker, or racks inside a building; in bicycle lockers or racks in an accessory parking structure; underneath an awning, eave, or other overhang; or by other facility as determined by the Hearings Body or Planning Director that protects the bicycle from direct exposure to the elements.*

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FINDING: DCC 18.116.031 requires bicycle parking facilities include at least two sheltered parking spaces. The two sheltered bicycle parking spaces will be provided as racks inside the boiler turbine building or underneath an awning, eave, or other overhang. As a condition of approval, the applicant shall submit a revised plot plan showing at least two sheltered bicycle parking spaces, prior to issuance of building permits.

b. *Unsheltered parking may be provided by bicycle racks.*

FINDING: The applicant has not specified a specific location for unsheltered bicycle racks. As a condition of approval, the applicant shall submit a revised plot plan showing the location of the required, unsheltered bicycle racks.

2. *Location.*

a. *Required bicycle parking that is located outdoors shall be located on-site within 50 feet of main entrances and not farther from the entrance than the closest motor vehicle parking space. Bicycle parking shall be located in areas of greatest use and convenience to bicyclist. Such bicycle parking shall have direct access to both the public right of way and to the main entrance of the principal use.*

FINDING: The applicant has not specified a location for unsheltered bicycle racks. As a condition of approval, required bicycle parking that is located outdoors shall be located on-site within 50 feet of main entrances and not farther from the entrance than the closest motor vehicle parking space. Bicycle parking shall be located in areas of greatest use and convenience to bicyclists. Such bicycle parking shall have direct access to both the public right of way and to the main entrance of the principal use.

b. *Bicycle parking facilities shall be separated from motor vehicle parking and drive areas by a barrier or sufficient distance to prevent damage to the parked bicycle.*

FINDING: The applicant has not specified a location for unsheltered bicycle racks. As a condition of approval, bicycle parking facilities shall be separated from motor vehicle parking and drive areas by a barrier or sufficient distance to prevent damage to the parked bicycle.

c. *Where bicycle parking facilities are not directly visible and obvious from the public right(s) of way, entry and directional signs shall be provided to direct bicyclists for the public right of way to the bicycle parking facility. Directions to sheltered facilities inside a structure may be signed, or supplied by the employer, as appropriate.*

FINDING: The applicant has not specified a location for bicycle parking. As a condition of approval, entry and directional signs shall be provided to direct bicyclists for the public right of way to the bicycle parking facility.

3. *Dimensional Standards.*

a. *Each bicycle parking space shall be at least two by six feet with a vertical clearance of seven feet.*

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FINDING: The applicant has not specified dimensions for bicycle racks. As a condition of approval, the applicant shall submit a revised plot plan showing that each bicycle parking space will be at least two by six feet with a vertical clearance of seven feet.

b. *An access aisle of at least five feet wide shall be provided and maintained beside or between each row of bicycle parking.*

FINDING: The applicant has not specified dimensions for bicycle racks. As a condition of approval, the applicant shall submit a revised plot plan showing that an access aisle of at least five feet wide shall be provided and maintained beside or between each row of bicycle parking.

c. *Each required bicycle parking space shall be accessible without moving another bicycle.*

FINDING: The applicant has not specified site design for bicycle racks. As a condition of approval, the applicant shall submit a revised plot plan showing that each required bicycle parking space shall be accessible without moving another bicycle.

4. *Surface. The surface of an outdoor parking facility shall be surfaced in the same manner as the motor vehicle parking area or with a minimum of one-inch thickness of aggregate material. This surface will be maintained in a smooth, durable, and well-drained condition.*

FINDING: The applicant has not specified the surface of the outdoor bicycle parking facility. As a condition of approval, the applicant shall submit a revised plot plan showing that the surface of an outdoor parking facility shall be surfaced in the same manner as the motor vehicle parking area or with a minimum of one-inch thickness of aggregate material. This surface shall be maintained in a smooth, durable, and well-drained condition.

5. *Security.*

a. *Bicycle parking facilities shall offer security in the form of either a lockable enclosure in which the bicycle can be stored or a stationary object (i.e., a "rack") upon which the bicycle can be locked. Structures that require a user-supplied lock shall accommodate both cables and U-shaped locks and shall permit the frame and both wheels to be secured (removing the front wheel may be necessary). All bicycle racks, lockers, or other facilities shall be permanently anchored to the surface of the ground or to a structure.*

FINDING: The applicant has not specified how the bicycle parking facilities will provide security. As a condition of approval, the applicant shall submit a revised plot plan showing either a lockable enclosure in which the bicycle can be stored or a stationary object upon which the bicycle can be locked. Structures that require a user-supplied lock shall accommodate both cables and U-shaped locks and shall permit the frame and both wheels to be secured. All bicycle racks, lockers, or other facilities shall be permanently anchored to the surface of the ground or to a structure.

b. *Lighting shall be provided in a bicycle parking area so that all facilities are thoroughly illuminated and visible from adjacent sidewalks or motor vehicle parking.*

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FINDING: The applicant has not specified the lighting in the outdoor bicycle parking facility. As a condition of approval, the applicant shall submit a revised plot plan showing that the bicycle parking area will be thoroughly illuminated and visible from adjacent sidewalks or motor vehicle parking.

6. Other means that provide the above level of bicycle parking may be approved by the Hearings Body or the Planning Director.

FINDING: No other means that provide the above level of bicycle parking have been proposed by the applicant.

4. Section 18.116.035, Bicycle Commuter Facilities.

A. Each commercial or public building having a work force of at least 25 people shall have bicycle commuter facilities consisting of shower(s) and changing rooms(s). For facilities with more than one building (such as a college), bicycle commuter facilities may be located in a central location.

B. This provision shall apply to (1) new development requiring off-street parking and (2) any construction, renovation or alteration of an existing use requiring a site plan review under DCC Title 18 for which planning approval is applied for after the effective date of Ordinance 93-005.

FINDING: The utility facility is not a commercial or public building. These criteria do not apply.

G. CHAPTER 18.124, SITE PLAN REVIEW

1. Section 18.124.010, Purpose.

DCC 18.124.010 provides for administrative review of the design of certain developments and improvements in order to promote functional, safe, innovative and attractive site development compatible with the natural and man made environment.

FINDING: The City finds that the criteria of this chapter apply to the design of the utility facility and associated improvements.

2. Section 18.124.020, Elements of Site Plan.

The elements of a site plan are: The layout and design of all existing and proposed improvements, including, but not limited to, buildings, structures, parking, circulation areas, outdoor storage areas, bicycle parking, landscape areas, service and delivery areas, outdoor recreation areas, retaining walls, signs and graphics, cut and fill actions, accessways, pedestrian walkways, buffering and screening measures and street furniture.

FINDING: The City finds this section provides examples of the types of structures and other improvements regulated by DCC 18.124.

3. Section 18.124.060, Site plan approval criteria.

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Approval of a site plan shall be based on the following criteria:

A. The proposed development shall relate harmoniously to the natural environment and existing development, minimizing visual impacts and preserving natural features including views and topographical features.

FINDING: The City finds that this criterion requires the development to relate harmoniously to the natural environment and existing development. Specifically, the City finds this section pertains to visual aesthetics and does not constitute a general compatibility requirement such as required under DCC 18.128.015(B). This interpretation is consistent with the fact that DCC 18.124.060(A) is a site plan requirement. It applies to uses allowed outright by the code as well as to conditional uses. It regulates how a use will be arranged and developed on a site. It does determine whether a use permitted is an allowed use based on subjective approval criteria.

Opponent John Williams challenged this interpretation. He argues that DCC 18.124.060(A) code section should not be restricted to an analysis of visual impacts only.

The City disagrees. An interpretation of DCC 18.124.060(A) to relate to visual impacts only is a proper interpretation of the code. The code says that “proposed development shall relate harmoniously to the natural environment and existing development, minimizing visual impacts and preserving natural features including views and topographical features.” The most reasonable reading of this code is that it describes the general requirement first and then, after the comma, explains how compliance with the standard is to be achieved. Developments that minimize visual impacts and preserve natural features comply with the “relate harmoniously” standard.

Finally, even if this code section were to be read more broadly, the City’s findings of compliance with the general compatibility requirement of DCC 18.128.015(B) demonstrates that the proposed development will be harmonious with existing development and the natural environment. A DEQ air quality permit has been issued. The permit assures that the plant will relate harmoniously to the natural environment by controlling pollutants. DEQ will also regulate the use of treated effluent to cool the plant and, thereby, protect the natural environment. In the event that DEQ does not approve the wastewater permit, the natural environment will be protected by the use of well water to cool the plant.

Existing development in the area consists of those developments described in the “Surrounding Land Uses” section of the “Basic Findings”, above, and is incorporated herein by reference. The record includes photographs of the residential area that will be visually impacted by the plant which show the appearance of this area and which are incorporated by reference herein. The area is a residential area that includes single-story homes of less than 2,000 square feet. Some homes front on the south side of Foss Road and are shown in HWA Exhibit B-6. This area is partially wooded. The property between the residential area and the Biogreen plant is undeveloped, partially cleared, level industrial land. A number of Ponderosa pine trees that are approximately 30’ tall are located on the County property that is Parcel 2 of Partition 2010-013. The appearance of the plant, as viewed from the residential area and other area properties is illustrated by the digital modeling shown at the November 16, 2010 hearing (included in the record on a CD submitted 11/30/10) and by HWA Exhibit A-5 that shows the view of the plant and its natural setting from the corner of Mitts Way and Foss Road. This evidence shows that the plant’s green color blends with the trees located on Parcel 2. Exhibit A-5 also shows that the top of the Biogreen facility appears at the same approximate location in the sky as the Foss

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Road power lines between the first and second power pole and second power pole from the corner. The first power line reaches a point higher in the sky, as observed from the residential area.

When Parcel 2 is developed, it is expected that trees will be removed but its buildings and development should create a separation between the residential area and the Biogreen plant and, also, minimize the plant's visual impact on the impacted residential area. Once Parcel 2 is developed with industrial uses, the approved development will provide some screening (as yet undetermined). This fact makes Biogreen's site choice one that minimizes visual impacts.

The natural environment includes scenic views of the Paulina Mountains from west of the proposed facility and views of the Cascade Mountains from east of the facility. No special natural features or topographical features exist on the subject property. As a result, there are no natural or topographical features that must be preserved.

The screening requirements implemented under DCC 18.61.030(C)(4)(b) also serve to minimize visual impacts for lower portions of the facility. In order to minimize visual impacts of those portions of the facility too tall to be effectively screened by trees, the applicant has proposed to paint the boiler/turbine building a desert forest green color to blend with the slopes of the Paulina Peak to the east and to install a sound wall along the western boundary and a part of the southern boundary of the plant. The sound wall provides visual and sound screening for the residential neighborhood located southwest of the Biogreen site. This is the only residential neighborhood in the impact area of the plant. Other area development is industrial or governmental (sewer treatment facility). These measures are sufficient to minimize visual impacts of the development on existing development.

Mr. Williams argues that the visual impacts of the plant have not been minimized as the 150' stacks and 100'-tall boiler will be visible to adjacent residential uses. The City finds that the stack height is controlled by the DEQ approval and will be approximately 100' tall. The County's code for the La Pine Industrial zone requires that the plant stack be built to the height allowed by DEQ – not taller. The applicant's illustrations show that the plant height will be lower than the stack height. The application shows that the building height will be approximately 76 feet tall.

Residential uses will not be adjacent to the plant or to the Biogreen parcel. During the Text Amendment process that changed the allowable building and stack height, Biogreen was considering two different boiler technologies. One boiler type required taller stack and building heights than the other (necessitating the text amendment request for a 100' and 150' height limit). Biogreen has committed to using Wellons boilers that are substantially lower than the maximum allowed. Biogreen, therefore, has minimized the visual impacts of its plant.

B. The landscape and existing topography shall be preserved to the greatest extent possible, considering development constraints and suitability of the landscape and topography. Preserved trees and shrubs shall be protected.

FINDING: The site will be utilized to develop a biomass plant, fuel storage area and related, needed facilities. The site plan is designed to allow use for fuel truck unloading and to provide required parking areas required by applicable law. The site plan will preserve existing vegetation and landscaping within the required setbacks and yards. The existing topography is relatively flat and will not be altered significantly. Otherwise, the majority of the property will be

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developed. The City finds that the project preserves to the greatest extent possible, considering development constraints and suitability of the landscape and topography.

C. *The site plan shall be designed to provide a safe environment, while offering appropriate opportunities for privacy and transition from public to private spaces.*

FINDING: The site plan has been designed to provide for a safe environment by creating a private and secure site that is accessible only to people associated with the workings of the facility and the dangers that are inherent to heavy equipment use and industrial operations. The transition from private to public space will occur at the ingress/egress points on Reed and Foss Roads. Landscaping and the sound wall will also ease the transition from public to private spaces on site.

D. *When appropriate, the site plan shall provide for the special needs of handicapped persons, such as ramps for wheelchairs and Braille signs.*

FINDING: The proposed parking areas include two (2) ADA accessible parking spaces. One is at the north end of the parking area adjacent to Boiler/Turbine building and the second is near the Control House. The ADA parking spaces and accessible routes to the building entrances will be designed and constructed to current ADA guidelines. The County Building Division will notify the applicant of any additional accessibility requirements.

E. *The location and number of points of access to the site, interior circulation patterns, separations between pedestrians and moving and parked vehicles, and the arrangement of parking areas in relation to buildings and structures shall be harmonious with proposed and neighboring buildings and structures.*

FINDING: Truck access to the facility will be provided from Reed Road. The proposed Reed Road access to the facility will align with the existing access to the La Pine Sewer District treatment facility. The aligned intersection will result in fewer and shorter traffic conflict zones than an offset intersection situation. Small vehicle access to the site will be from Foss Road. The two access points will provide a safer site than one access would. Separating car and truck traffic will reduce conflicts. The second access will provide an alternate evacuation route and improve response times for emergency vehicles. As addressed in the Site Traffic Report and addendums and by County staff review, the proposed accesses will be adequate for the traffic that will be generated. The proposed development will relate harmoniously with the sewage treatment facility to the north, the existing wood chip processing facility to the southeast and future industrial buildings and operations that will be developed to the west and south.

Opponent John Williams claimed that the administrative decision should have considered traffic impacts on neighboring residential uses in determining whether points of access to the site will be harmonious with proposed and neighboring buildings and structures. The City finds residential buildings are at least 850 feet away from any points of access to the Biogreen site. The residential buildings, in such a remote location, are not "proposed and neighboring buildings or structures." Even if the residential buildings are considered "neighboring," the points of access to the site are located to be harmonious with the residential area. The truck entrance to the subject property was located on Reed Road so that fuel trucks will not need to drive by residences in the City's residential LPR zoning district. Placing the employee entrance

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on Foss Road is harmonious with the residential area as it will provide a logical and convenient point of access for area residents to travel to the plant, if they are employed at the plant, without exposing area residents to the plant's fuel truck traffic.

F. Surface drainage systems shall be designed to prevent adverse impacts on neighboring properties, streets or surface and subsurface water quality.

FINDING: Stormwater will be directed to bio-retention ponds located on the perimeters of the facility and within the required setbacks and landscape areas. The preliminary pond and swale locations, as well as the drainage patterns and basin sizes are presented in the drainage plan that accompanies the application. The basins will be designed to accommodate run-off from a 25-year storm as well as snow removed from operational areas during winter months. The bio-retention basins and swales will be seeded with a mixture of dry-land grasses to aid in stabilization and treatment. Shrub or tree plantings in the basins and swales are not proposed because they would quickly be destroyed by stored snow. The planting medium in the bio-retention ponds and swales will be a mixture of compost (30%) and on-site soils (70%) that is 18 inches thick. All of the storm-water runoff from the proposed facility will be contained on site with treatment and disposal in accordance with current DEQ requirements. These systems will prevent adverse impacts on neighboring properties and surface and subsurface water quality from storm drainage associated with site development and use.

G. Areas, structures and facilities for storage, machinery and equipment services (mail, refuse, utility wires, and the like), loading and parking and similar accessory structures shall be designed, located and buffered or screened to minimize adverse impacts on the site and neighboring properties.

FINDING: The proposed facility will be screened from the residential district located southwest of the site by sight obscuring perimeter fencing around the entire site, existing trees, and new trees planted on site. A detail of the proposed fencing is included in the application drawings. That fencing will effectively screen the staff parking facility located near the southwest corner of the site, the unloading areas, and any ground level storage or equipment. Existing trees in the required 50-foot setbacks from the north, south, and east property lines will be preserved to help screen taller equipment and buildings. Existing trees in the areas between the west property line and proposed access road and parking will also be preserved. Additional trees, predominantly indigenous varieties of evergreens, will be planted around the perimeter of the project just inside the fence line, as described in detail above. The screening provided by the new trees will be limited initially but will improve substantially over time. An irrigation system will be installed to aid in establishment and growth of the new trees. The subject property and proposed use will be separated from the nearest residential district (the residential area located mostly southwest of the intersection of Mitts Way and Foss Road) by industrial district parcels that are at least 700 feet deep.

The applicant, also, amended its site plan to require it to construct a sound wall, as shown on HWA's **Exhibit A.1** – Sound Wall illustration that will enhance the proposed screening. The sound wall will be twelve (12) feet tall. It will screen or buffer all “[a]reas, structures and facilities for storage, machinery and equipment, services (mail, refuse, utility wires, and the like), loading and parking and similar accessory areas and structures” from view from the residential area southwest of the plant and the business park that lies west of the plant.

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The combination of existing and supplied screening (landscaping, fencing, sound wall) along with the amount of distance between the facility and the residential neighborhood will minimize adverse impacts on neighboring properties.

H. All aboveground utility installations shall be located to minimize adverse visual impacts on the site and neighboring properties.

FINDING: This criterion applies to aboveground utility lines. The City finds that the screening methods required above will also act to minimize any adverse visual impacts from utility lines on the site and neighboring properties.

I. Specific criteria are outlined for each zone and shall be a required part of the site plan (e.g. lot setbacks, etc.)

FINDING: Specific zoning standards for the site have been addressed above.

J. All exterior lighting shall be shielded so that direct light does not project off-site.

FINDING: The applicant is proposing lighting near the boiler/turbine building and fuel feed pile to facilitate safe working conditions during the swing and graveyard operating shifts of those facilities. The proposed lights will not be directed off-site and will comply with the Deschutes County Covered Outdoor Lighting Ordinance per Section 15.10 of Title 15 of the Deschutes County Code (DCC). A condition of approval will ensure compliance with this criterion.

4. Section 18.124.070. Required Minimum Standards.

B. Required Landscaped Areas.

1 The following landscape requirements are established for multi-family, commercial and industrial developments, subject to site plan approval:

a. A minimum of 15 percent of the lot area shall be landscaped.

FINDING: The subject property is nineteen and one-half (19.5) acres or 849,420 square feet in size. Accordingly, 2.92 acres or 127,413 square feet of landscaping shall be provided on site in order to meet this criterion. The naturally landscaped areas in the required 50 foot setbacks from the north, south and east property lines will be supplemented with new trees for screening purposes. Those landscape areas, less the access corridor and substation site areas amount to approximately 2.74 acres or 119,440 square feet. The landscape strip between the west property line and the proposed access road is approximately 1 acre or 45,000 square feet in size. The total area that will be committed to natural landscaping supplemented with new screening trees and landscaped storm-water retention facilities amounts to 3.74 acres or 19 percent of the lot area.

b. All areas subject to the final site plan and not otherwise improved shall be landscaped.

FINDING: The applicant did not fully address this criterion. As a condition of approval, all areas subject to the final site plan and not otherwise designated for improvement will be required to be landscaped. Thus, this criterion can be satisfied through a condition of approval.

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- 2. In addition to the requirement of DCC 18.124.070(B)(1)(a), the following landscape requirements shall apply to parking and loading areas:**
- a. A parking or loading area shall be required to be improved with defined landscaped areas totaling no less than 25 square feet per parking space.**

FINDING: As addressed above, the proposed power generation facility will require twenty-one (21) parking spaces. The parking areas will be improved with at least 525 square feet of adjacent landscaping to satisfy this criterion ($21 * 25 = 525$). This landscaping does not appear on the site plan. As a condition of approval, the applicant shall submit a revised plot plan showing 525 square feet of landscaping, with a width of not less than 5 feet, uniformly distributed throughout the parking or loading area.

- b. In addition to the landscaping required by DCC 18.124.070(B)(2)(a), a parking or loading area shall be separated from any lot line adjacent to a roadway by a landscaped strip at least 10 feet in width, and from any other lot line by a landscaped strip at least five feet in width.**
- c. A landscaped strip separating a parking or loading area from a street shall contain:**
- 1) Trees spaced as appropriate to the species, not to exceed 35 feet apart on the average.**
 - 2) Low shrubs not to reach a height greater than three feet zero inches, spaced no more than eight feet apart on the average.**
 - 3) Vegetative ground cover.**

FINDING: The proposed parking facilities will not be adjacent to a public roadway. Therefore, section (c) does not apply.

- 3. Landscaping in a parking or loading area shall be located in defined landscaped areas which are uniformly distributed throughout the parking or loading area.**

FINDING: The parking areas will be improved with at least 525 square feet of adjacent landscaping to satisfy this criterion ($21 * 25 = 525$). This landscaping does not appear on the site plan. As a condition of approval, the applicant shall submit a revised plot plan showing 525 square feet of landscaping, with a width of not less than 5 feet, uniformly distributed throughout the parking or loading area.

- 4. The landscaping in a parking area shall have a width of not less than five feet.**
- 5. Provision shall be made for watering planting areas where such care is required.**
- 6. Required landscaping shall be continuously maintained and kept alive and attractive.**
- 7. Maximum height of tree species shall be considered when planting under overhead utility lines.**

FINDING: The City finds that the submitted landscape plan, discussed above under Section 18.61.030(C)(4)(b)(4) and as conditioned, will meet these criteria for landscape location, distribution, maintenance, and irrigation. The applicant is not proposing to plant trees under

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overhead utility lines. A condition of approval requires watering and maintenance of required landscaping.

C. Nonmotorized Access.

1. Bicycle Parking. The development shall provide the number and type of bicycle parking facilities as required in DCC 18.116.031 and 18.116.035. The location and design of bicycle parking facilities shall be indicated on the site plan.

FINDING: The General Minimum Standard in DCC 18.116.031 calls for all uses that require off-street motor vehicle parking to provide one bicycle parking space for every five required motor vehicle parking spaces. The proposal requires 21 vehicle parking spaces, thus 5 bicycle parking spaces are required. DCC 18.116.031 also requires such bicycle parking facilities include at least two sheltered parking spaces. The two sheltered bicycle parking spaces will be provided as racks inside the boiler turbine building or underneath an awning, eave, or other overhang. As a condition of approval, the applicant shall submit a revised plot plan showing at least two sheltered bicycle parking spaces, prior to issuance of building permits.

2. Pedestrian Access and Circulation:

a. Internal pedestrian circulation shall be provided in new commercial, office and multi family residential developments through the clustering of buildings, construction of hard surface pedestrian walkways, and similar techniques.

FINDING: This code section is written to apply to new commercial, office and multi-family residential developments. It does not apply to industrial developments.

H. CHAPTER 18.128, CONDITIONAL USE

1. Section 18.128.015, General standards governing conditional uses.

Except for those conditional uses permitting individual single-family dwellings, conditional uses shall comply with the following standards in addition to the standards of the zone in which the conditional use is located and any other applicable standards of the chapter:

A. The site under consideration shall be determined to be suitable for the proposed use based on the following factors:

FINDING: The City notes that DCC 18.128.015(A) applies to the subject property only. Discussion of off-site impacts is provided under DCC 18.128.015(B), below.

1. Site, design and operating characteristics of the use;

FINDING: The City finds that the generally level, large, industrial zoned property is a suitable site for a utility facility, based on the site, design and operating characteristics of the use, as presented in the application materials.

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2. Adequacy of transportation access to the site; and

FINDING: The applicant has provided a traffic report for the project. Based on a review of this report and a report submitted by Greenlight Engineering, the Deschutes County Transportation Planner has concluded that the affected transportation facilities are adequate to serve the proposed use. The Deschutes County Transportation Planner's comments, as modified by subsequent City findings, are incorporated herein by reference.

The Deschutes County Road Department commented that Reed Road is classified as a City Collector. The existing width of Reed Road is currently 32 feet. There are existing drainage swales located on the south side of the roadway. The minimum road design standards for a City Collector street are 36 foot width with sidewalks. Sidewalks will be installed on Reed Road as a condition of approval for MP-10-6 or will be provided by the applicant to achieve compliance with the conditions of approval of this application. The applicant will be required to widen Reed Road to provide a pavement width of 18 feet from centerline as part of this application.

Foss Road is classified as a City Local. The existing width is 26 feet. The minimum road design standards for a Commercial City Local are 32 foot width pavement with sidewalks and drainage swales. The applicant will be required to widen Foss Road to provide a pavement width of 16 feet from centerline. This includes a requirement to install sidewalks and drainage swales.

To implement the County Road Department's recommendations, the City has imposed conditions of approval at the end of this decision.

The County Engineer, George Kolb, also reviewed the adequacy of roads identified by Greenlight Engineering as being inadequate to provide transportation access to the site. This review included a December 8, 2010 on-site inspection of area roads and use of the County's pavement management system (PMS) data base. Mr. Kolb's review showed that the roads serving the Biogreen site are adequate for the use proposed. The cracking on Mitts Way mentioned by Greenlight is normal thermal cracking and does not indicate any kind of base or structural failure. Mitts Way from Finley Butte Road to Foss Road was constructed by the developers of Wheeler Ranch subdivision and R&W Estates to County standards with 2" of AC and a 6" aggregate base and to a width of 28 feet. The turning radius from Finley Butte Road to Mitts Way is 25 feet which, according to Mr. Kolb, meets AASHTO standards. Foss and Finley Butte Roads are rated by the County's PMS program as being in Good condition. Photographs included in the record by HWA confirm that Foss Road and Mitts Way between Reed and Foss are in good condition and provide adequate transportation access to the Biogreen site.

Darlene Way is a public right of way under Bureau of Land Management (BLM) jurisdiction but maintained by the County. The County Engineer and Transportation Planner traveled the road last month and assessed it would be adequate for truck traffic. The road is obviously the main stem in the road network of logging roads in this area. This is a forest road that is crosses land zoned for forest uses.

Opposition to the Biogreen application and use of the Darlene Way truck route in December 2010 caused ODOT and BLM to offer comments about the Darlene Way truck route. ODOT staff member, Pat Creedican, asked that Biogreen be required to upgrade the intersection of Highway 31 and Darlene Way to add approximately 30' of paving to the intersection apron if it uses

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Darlene Way for Biogreen truck traffic. Biogreen was willing to make ODOT's requested improvement.

BLM's Prineville District Engineer, Dana Maxwell Cork, told the City that even though Deschutes County maintains Darlene Way, that the road belongs to BLM. Ms. Cork said that Biogreen would need to obtain a right of way from BLM to use Darlene Way and that Darlene Way will need maintenance rock if used for biomass hauling. Ms. Cork indicated that if Deschutes County would not agree to maintain the road to this standard, that road maintenance should be made a condition of approval of issuance of the BLM/Biogreen right of way.

In response to BLM's position about Darlene Way information, Biogreen revised its STR to show that all Biogreen traffic use can use the State highway system and Reed Road (rather than Darlene Way truck route which bypasses the intersection of Reed Road and Highway 97) to access the plant. The assumption that 100% of plant traffic is aggressive¹ and assures that transportation access to the site will be adequate. The revised STR shows that in the initial year and in the five-year forecast period that the Reed/Highway 97 intersection will comply with ODOT's performance standards. This means that Biogreen trucks that would have used the Darlene Way truck route can use the Highway 31, Highway 97 to Reed Lane route to access the plant and without violating any applicable land use approval criterion and without using Darlene Way.

As Highway 31, Highway 97 and Reed Road and the Highway 97 to Reed Road routes provide adequate truck access to the north entrance to the Biogreen plant and other area roads provide adequate access to the south entrance, Darlene Way is not needed to provide adequate access to the subject property. The use of Darlene Way is regulated by BLM. BLM will not allow Biogreen to use the road unless and until a right of way is granted and the road is improved to be adequate for heavy truck traffic. BLM has the authority to enforce its regulations on road use to protect the public interest. The Darlene Way use issue, therefore, is a City of La Pine issue because other, adequate truck routes are available to serve the plant. Nonetheless, the City has imposed a condition of approval that prohibits Biogreen from using Darlene Way as a truck route until such time as BLM allows the use.

3 *The natural and physical features of the site, including, but not limited to, general topography, natural hazards and natural resource values.*

FINDING: The City finds that the site is suitable for the proposed use with regards to the natural and physical features of the site, as there are no topographic constraints or identified natural hazards on the site. No special natural resource values have been identified on the site that would render the site unsuitable for the proposed use.

B. The proposed use shall be compatible with existing and projected uses on surrounding properties based on the factors listed in DCC 18.128.015(A).

FINDING: The City agrees with the finding of the administrative decision that existing development in the area consists of those developments described in the "Surrounding Land Uses" section of the "Basic Findings", above, and is incorporated herein by reference. Projected uses of surrounding properties include those uses allowed in the underlying zones

¹ The assumption is aggressive because it is logical to assume that some employee trips will occur in the pm peak hour and will use the intersection of Foss Road and Highway 97.

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and include industrial, business park, sewer treatment and residential uses. All adjacent land is zoned industrial. or, north of Reed Road, zoned for sewer treatment plant use.

This code section says that a determination of compatibility between uses is based on the following factors:

1. Site, design and operating characteristics of the use;
2. Adequacy of transportation access to the site; and
3. The natural and physical features of the site, including, but not limited to, general topography, natural hazards and natural resource values.

Title 18 does not define the term “compatible.” The City finds that a proposed development is compatible when it is shown that it can coexist with existing and projected development uses on surrounding properties. Project impacts must be weighed and considered to determine whether they will make surrounding properties unsuitable for their intended uses using the listed factors. Compatibility is not an absolute standard that means that a use will create no interference or adverse impact whatsoever.

The proposed industrial facility will be compatible with existing and projected industrial, sewer treatment and business park uses on surrounding properties. No incompatibilities for these uses have been identified and none are found to exist. This is consistent with the fact that the Biogreen site was designated “shovel ready” for industrial development by the State of Oregon. The biomass plant adjoins roads on the north and the south. The east side of the site adjoins the railroad. The west side adjoins a vacant parcel zoned for future industrial development.

The plant entrance is aligned with the entrance to the sewer treatment facility. This provides a site design that is compatible with the sewer facility use. The Biogreen plant site plan minimizes the chance of conflict with the sewer facility by minimizing the chance of complaints about sewer treatment related odors and other impacts by locating the Biogreen plant and employee area toward the south of the Biogreen site and placing the truck area near the sewer plant. The site design provides an adequate buffer and 12’ tall sound wall between the plant and the industrial site to the west. These facilities prevent Biogreen’s development from adversely impacting the site, design and operating characteristics of a new use. In addition, noise control measures that are required as conditions of approval will prevent Biogreen’s operations from interfering with future uses on other area properties as this decision requires on-going compliance with noise regulations.

The level terrain and lack of natural hazards and areas of natural resource values mean that Biogreen’s development will not cause topographical or site changes that would adversely impact other industrial or business development on surrounding properties. Transportation access to the Biogreen site and other area industrial, business, treatment plant and residential areas in the surrounding area is adequate and will not be unduly compromised, as shown by the applicant’s STR and extensive discussion of transportation access and its impacts elsewhere in this decision.

The City finds that the natural resource values of surrounding properties includes air quality, surface and ground water quality and quantity, wildlife habitats, and natural vegetation. The City finds that there are no adverse impacts to wildlife, their habitats, or natural vegetation on surrounding properties identified in the record or by this decision. The City finds that fuel harvest practices off-site will not occur on “surrounding properties” and, therefore, cannot be considered under this criterion.

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Darlene Way/Griffin Area (F2 Zoning)

A forested area located about 3.5 miles southeast exists and includes the Griffin property (hereinafter referred to as the “Griffin area”). This area is too far removed from the subject property to be considered “surrounding property.”

The Griffin area properties are a group of medium sized, rural forest tracts that are zoned F2, Forest Use and are all located in Section 36, T22S R10E of the Willamette Meridian. The parcels have Darlene Way addresses but they do not adjoin the road. Instead, they obtain access to their properties by crossing intervening public F-1 zoned forest lands. Only a small amount of residential development has occurred in Section 36. All surrounding land in Deschutes County is zoned F1, Forest Use. Land south of section 36 in Klamath County also appears to be undeveloped forest land. Aerial photography shows that development in Section 36 is setback a considerable distance from Darlene Way and that forested land exists between the road and the buildings.

Even if the Griffin area were to be considered a part of the “surrounding area,” it is a forest-zoned area whose primary purpose is to harvest timber. Biogreen trucks that might use the Darlene Way route to reach the Biogreen site are trucks used in conjunction with the forestry practices of harvesting timber and thinning existing stands of timber on Biogreen’s Embody tract. According to BLM, Biogreen cannot lawfully use Darlene Way unless and until Darlene Way is approved for use by BLM for truck use by Biogreen. BLM comments indicate that Darlene Way would need to be maintained to heavy truck standards by the County or Biogreen for heavy truck use of the road to be allowed. BLM’s regulatory power and the City’s condition of approval regarding use of Darlene Way by Biogreen will protect Griffin area users from adverse impacts.

Dennis K. Griffin testified that he uses Darlene Way to access his Griffin area home and that dust from trucks is a concern for him. He testified that dust created by existing truck traffic on the road has forced him to pull his car to the side of the road and wait for the dust to clear.

The Griffin area contains some homes and structures that are located back away from Darlene Way. Darlene Way provides the main access to these properties. The only alleged impact between Griffin area and the Biogreen use is that trucks hauling fuel to the plant may use a BLM forest road that provides access to the Griffin area properties and will create dust and will negatively impact the condition of the road for use by Griffin area property owners. The City has examined the area in more detail. It finds that the County records show that Deschutes County has determined that Mr. Griffin’s home is not a lawfully established and permitted dwelling. The potential for future residential development in Section 36 is limited because the only feasible way to establish a single-family dwelling is by obtaining approval of a template dwelling. That test requires that a 160-acre area around a parcel have been developed with a specified number of homes on January 1, 1993. A review of County development records shows that at least one template dwelling application was voided. The apparent reason that the property would not meet the template test as notes in the file indicate a lack of development in 1993 on adjoining properties (CU-99-80/Tax Lot 900, Map 22-10-36). As a result, the most logical assumption is that most of these F2 forest lands will be used for their resource zone use rather than be converted into a forested, rural residential development area. The use of Darlene Way is certainly compatible with forest thinning and harvesting activities allowed outright on the Griffin properties.

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TransCanada/Darlene Way

Public comment and a comment from TransCanada identified a potential conflict between the proposed trucking routes and existing gas pipelines adjacent to Darlene Way during the administrative review process. If BLM allows Biogreen to use Darlene Way, this potential conflict could make the Biogreen use incompatible with the pipelines. As a result, TransCanada Community Relations Specialist Terry Wolverton and TransCanada operations personnel visited Darlene Way and the TransCanada lines. Mr. Wolverton noted that Darlene Way is a well maintained dirt/gravel road and that the road alignment parallels two high pressure natural gas transmission pipelines for about 850 feet more or less south and west of the intersection of Darlene Way and Finley Butte Road, a paved road. Mr. Wolverton advised that “from an operating stand-point we do not view the proposed Biomass project use of this existing road inconsistent with our facilities as they exist today. The pipeline crosses beneath the paved surface of Finley Butte Road. Mr. Wolverton advised that if Darlene Way is improved that it should be included in the review process for such plans. This has been required as a condition of approval if Biogreen opts to improve Darlene Way.

Air Quality

Public comments raise concerns about potential impacts to air quality. The applicant has obtained an Air Contaminant Discharge Permit (ACDP) from the Oregon Department of Environmental Quality (DEQ) for this utility facility. The City finds that DEQ’s permitting process provides objective standards to ensure that the facility will be compatible with existing and projected uses on surrounding properties with regard to air quality. In his draft permit, DEQ permit Mark Fisher found that “Biogreen’s power plant would not have an adverse impact on the ambient air quality of La Pine.”

By obtaining DEQ permit approval, Biogreen has proven that its plant will be compatible with adjacent development. DEQ and Biogreen will carefully monitor plant emissions and operations. DEQ will use the information gained from monitoring to enforce clean air standards.

Mr. Williams and others have argued that the City must impose monitoring requirements and assure that the plant is operated and built as promised to comply with the “compatibility” requirement. We disagree. Air quality monitoring is a task assigned to DEQ by the federal government. It is not a proper role for a local government. We find that DEQ’s permit and regulatory authority will assure that the Biogreen plant is compatible with uses in the surrounding area.

The Biogreen plant should help La Pine improve its ambient air quality. The open burning of slash is a common forest practice on timber lands surrounding La Pine that contributes to poor air quality conditions, on occasion, in La Pine. The Biogreen plant will create a market for this slash. Slash burned in the biomass plant will be burned efficiently and emissions will be controlled to produce far lower emissions. If slash in the local area is sold to Biogreen, as expected, this will be an additional factor that makes the plant compatible with the surrounding area.

Biogreen has also shown that the average home in La Pine burns between four and seven cords of wood in an average winter – in a fireplace or woodstove. This La Pine heating source produces 53% more pm 2.5 emissions than the emissions limit set for Biogreen’s power plant.

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Plant emissions will also be emitted high above area homes and businesses where emissions will disperse. These facts show that plant emissions are not incompatible with development on surrounding La Pine properties – especially not with surrounding area homes that heat with wood.

Public comment has raised concerns regarding potential health impacts from off-site vehicle emissions. Like plant emissions, off-site vehicle emissions are regulated by DEQ. County staff found that these emissions are not part of the review criteria for this application and cannot be addressed in this decision. The reason may be that DEQ rules on vehicle emissions preempt local control of vehicle emissions. This said, Biogreen has arranged its site to assure that off-site vehicle emissions will not create any incompatibility with surrounding uses. The truck routes for fuel trucks and ash trucks use the State highway system and Reed Road, a collector street that does not cross any residential areas in the City. If and when BLM allows Biogreen to use Darlene Way, that route will not require heavy trucks to pass through or near residential areas. The most logical and direct truck route is provided by traveling Darlene Way to Finley Butte Road to Russell Road to Reed Road as shown on HWA Exhibit A-4. Reed Road provides the primary access to the La Pine Industrial Area. This area is not heavily populated and should remain that way, compared to other areas of the city, because it includes a very large area of land just north of Biogreen's site devoted to the La Pine sewage treatment facility.

Public comments have identified concerns regarding surface and ground water quality and quantity. The applicant will connect to the La Pine Water and Sewer District systems. La Pine Water and Sewer District has commented that the facility, as proposed, is acceptable to the District. The applicant has shown that it has contracted with the districts to obtain all water and wastewater services needed by the Biogreen plant. By entering these binding service contracts, the districts have shown that they believe they have sufficient capacity to serve the water and wastewater needs of the facility. Additionally, Dick Nored of HGE, Inc and the sewer and water district provided written comments about the water and sewer system plans. The comments were contained in a letter dated December 1, 2010. The City adopts all of the statements in Mr. Nored's December 1, 2010 letter as findings of the City Council. These findings confirm the fact that the districts have the ability to meet Biogreen's water use needs using a mix of reclaimed water and the district fresh water sources (wells and the domestic water supply) and that the districts have planned how to serve Biogreen's proposed plant. The sewer district is currently seeking approval of a WPCF permit to allow it to use reclaimed water and expects approval. In that process, DEQ will determine whether the use of reclaimed water in the cooling tower will meet DEQ air emissions standards. These standards ensure compatibility with area uses by requiring that emissions be an "insignificant source" to local air quality. In the unlikely event that the WPCF permit is not approved, the water district can meet its contract obligation to supply water to Biogreen from its domestic water supply. A well-planned system of this type is compatible with area development.

Opponents have made unsubstantiated claims that use of reclaimed water may pose a health risk to City residents. The City finds that these issues relate to air quality and are appropriately addressed and resolved through the WPCF permit process.

In 18.124.060(F), above, the City found that the applicant's proposed surface water retention methods are sufficient to minimize offsite impacts. The system will assure that the biomass plant will be compatible with surrounding uses by containing storm water.

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The screening requirements implemented under DCC 18.61.030(C)(4)(b) are sufficient to minimize visual impacts for lower portions of the Biogreen plant. In order to minimize visual impacts of those portions of the facility too tall to be effectively screened by trees, the applicant has proposed to paint the boiler/turbine building a desert forest green color to blend with the slopes of the Paulina Peak to the east. The applicant has proposed to install a 12' high sound wall on the west boundary and part of the south boundary of the site. The applicant has also located the truck unloading area at the north part of the site where it will be completely screened from view of residential properties. The measures taken by Biogreen to screen the use are sufficient to minimize visual impacts of the development and to create compatibility with surrounding uses.

A utility facility is, in the greater context of Oregon land use system, most appropriately located in an industrial area and, therefore, logically compatible with most other industrial uses. Visually, the fuel storage and truck operations areas are similar and in appearance with existing industrial uses and potential new uses. A number of other industrial users, like Biogreen, store large quantities of material outdoors (see HWA Exhibit A-4). A wood chip processing facility also occupies at least two parcels in La Pine Industrial Site Phase II southeast of the subject property and is clearly compatible with the Biogreen use. Locating a biomass plant where it is surrounded by industrial land and where it is near wood products businesses and a sewer treatment facility is a place where the plant will be at its most visually compatible with most other uses.

Public comments have identified concern about potential noise impacts to nearby residential uses. The La Pine Industrial zone includes a noise compatibility standard under 18.61.030(C)(4)(b)(3) that requires that industrial uses adjacent to residential uses not emit noise perceptible without instruments more than 200 feet in the direction of the affected residential use or lot. This criterion, as discussed above, does not apply to this application. The City has, however, determined that noise impacts are a compatibility issue that must be evaluated under 18.128.015(B).

The primary sources of noise at the utility facility are the cooling tower, boiler stack, rapper, conveyors, water pumps, emergency generator, and building and combustion fans. Heavy trucks delivering wood chips and logs, and removing ash, will also frequently operate on site. Additional exterior noise sources will include front-end loaders and truck dumpers. On-site equipment may use backup beepers for OSHA safety warnings. Interior sound sources include the boiler and turbine units, a hog system, and auxiliary support equipment, all of which will be housed in industrial grade buildings.

DCC 8.08, Noise Control Ordinance requires that no person shall make any unreasonable loud or raucous noise which disturbs, injures or endangers the comfort, repose, health, peace or safety of others within the legal boundaries of the County. This section is administered by the Deschutes County Sheriff's Department. This section of the code is not an approval criterion for this facility as it is not an acknowledged land use regulation. The City finds, however, that if Biogreen's plant is operated in compliance with industrial noise standards, discussed below, that its noise will not be unreasonably loud or raucous.

Dale LaForest & Associates, on behalf of project opponent John Williams, submitted comments dated October 1, 2010 to County staff. The comments included what Mr. LaForest called an "Acoustical Study." Mr. LaForest's review indicates that he is a planner and "architectural" designer who designs homes (as opposed to being a licensed architect). Mr. LaForest has a bachelor's degree in architecture but he does not claim any specific training in acoustics. Mr.

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LaForest says he has conducted sound studies but does not provide any proof that he is trained in the current techniques and principles of sound measurement and the operation of sound measuring instrumentation appropriate to the measurements being taken as required by NPC-2, Requirements for Sound Measuring Instruments and Personnel that is a referenced standard in NPC-1, the document that governs noise testing according to OAR 340-035-0035 (3).

Mr. LaForest claims that the Biogreen power plant “may generate potentially significant noise impacts on residential properties and their occupants if it is approved and constructed as proposed.” The comments claim that the project may have significant impacts on the neighboring residents' rights and needs for peace and quiet and that these noise impacts are more extensive than merely violating various noise laws applicable to this project. Issues of sleep disturbance, serious impacts to human health, and a substantial adverse change in their otherwise very quiet neighborhood are likely to result from this project's operation. Mr. LaForest does not offer any factual support for his conclusion about medical matters nor has he shown that he is qualified to offer an opinion on this topic. The City generally agrees, however, that noise impacts can cause uses to be incompatible and that residences are categorized by noise professionals and laws as noise-sensitive uses.

Mr. LaForest concludes that this application should be revised to include an extensive acoustical analysis and to describe the likely noise sources from the various equipment involved. It claims that the utility facility, as proposed, may violate the standards of Oregon Administrative Rules (OAR) 340-035-0035.

The Department of Environmental Quality noise regulation under Oregon Administrative Rules (OAR) 340-035-0035, Noise Control Regulations for Industry and Commerce is the standard that applies when sound generated by the proposed power plant is audible off-site. The City and County staff used this objective standard to determine if the proposed project will be compatible with existing residential development in the area with regard to noise impacts. Opponents have argued whether the Biogreen plant can and will meet the rule's standards but have claimed that the applicable noise standards should be applied to assure compatibility. The nearest residentially-zoned properties are located to the southwest and west of the southeast corner of the subject property – approximately 750 feet and, mostly, southwest of the intersection of Mitts Way and Foss Road.

After Mr. LaForest's letter was filed, a noise study was prepared by the applicant's noise expert, Elki Lahav, P.E. Mr. Lahav has achieved professional engineering certification in acoustical engineering. To obtain such certification, Mr. Lahav was required to pass engineering exams to demonstrate competency in acoustical engineering. Mr. Lahav has, also, been trained to use sound testing equipment. He submitted a resume that shows his experience and training as an acoustical engineer. That experience includes extensive work conducting sound studies and assisting in designing buildings that comply with noise standards.

Mr. LaForest submitted a letter criticizing Mr. Lahav's study. Mr. LaForest and Mr. Lahav then traded criticisms. At one point, Mr. La Forest criticized the measurement point used by Mr. Lahav as not precisely matching the location required by OAR 340-035-0035(3). That criticism, however, revealed that the measurement locations used in the LaForest study were not compliant with OAR 340-035-0035(3). One location was on the side of a house rather than a point 25' to the northeast of the building. Mr. LaForest said the location he selected blocks highway noise and results in a lower reading than would be obtained in a location north of the house – the location where the rule requires noise to be measured. The other location was east

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of Mitts Way in a field on land zoned LPI (Industrial). This is not a noise sensitive use or property and is not a proper location to measure ambient noise for the existing residential neighborhood that is located southwest of the Biogreen plant.

Given the fact that Mr. LaForest has failed to demonstrate sufficient proof of specific education and training in acoustical analysis, the City finds that his criticisms are not expert opinions. As Mr. Lahav has established his education, training and professional certification in acoustical engineering the City finds that his opinions are professional opinions. In particular, engineering certification qualifies Mr. Lahav to design buildings to meet noise standards and requirements and to offer his opinion about the acoustical properties of those buildings. The City finds that Mr. Lahav's expertise qualifies him to offer a professional opinion whether it is feasible for Biogreen's plant to be built and insulated to comply with OAR 340-035-0035 noise standards. Mr. Lahav has offered his professional opinion that compliance is feasible through proper insulation of the plant and machinery and by installation of a sound wall. These measures can be implemented by Biogreen to the point of achieving compliance with noise standards. Mr. Lahav's professional opinion is also supported by his observation of the low noise levels at another biomass plant where appropriate noise buffering was implemented.

The City finds that Mr. LaForest's lay criticism of Mr. Lahav's opinion is of insufficient weight to rebut that opinion due to its lay nature and due to the fact that Mr. LaForest tailored his noise study to achieve ambient noise results that are lower than would apply if properly measured and then claimed the results represented ambient noise levels that should be used by the applicant. The fact that Mr. LaForest knew the requirements of OAR 340-035-0035(3) and chose to take measurements that were biased in favor of the opposition shows that lay opinions about Mr. Lahav's professional opinion that compliance is possible is unreliable and should be disregarded. The City finds that it is not necessary to resolve all other disputes between Mr. Lahav and Mr. LaForest about predictive studies and modeling and testing because new testing and a new study will be required once the plant has been constructed to show that the plant actually complies with noise standards.

Several City Councilors asked about various frequencies of noise, including low hums. Staff responded that it would determine of the proposed condition of approval to meet State laws includes low hum level requirements as part of the overall determination if applicant's facility noise is within State of Oregon noise standards. In order to assure that the Biogreen plant is built to comply with OAR 340-035-0035 noise standards, the City has required compliance and require professional noise testing and analysis to prove that the DEQ noise standards are met by the Biogreen plant as constructed. This post-approval review will assure that sound will not exceed DEQ noise standards and will, thereby, achieve compliance with the DEQ noise rules.

Under this standard, noise from the plant should be designed and built so that it will not exceed the statistical noise levels discussed in OAR 340-035-0035. The City and County found, based on the material in the record, that it is likely that the utility facility, as designed, will meet this standard. Nonetheless, the City has imposed conditions of approval to assure compliance with OAR 340-035-0035. The applicant will be required to comply with DEQ noise standards and to demonstrate that the plant they build complies with DEQ noise standards once it is constructed and on an annual basis. These conditions will assure that the plant will comply with the law and be compatible with the existing and projected uses on surrounding properties.

Project opponents have requested that the permit approval be of a limited duration, such as two years, and that compliance with approval criteria be assessed at that time. A limited duration

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approval is not, however, authorized by code nor warranted by the facts of this case. The conditions of approval are adequate to assure compliance with legal standards, including noise standards.

The City has also considered whether specific remedies for violating noise conditions should be included in the land use permit. The City finds, however, that it has the legal ability to enforce the conditions of approval by normal code enforcement means and, if necessary, by civil action to compel compliance or enjoin the use. These remedies are sufficient to assure that the Biogreen plant will comply with OAR 340-035-0035 and other conditions of approval.

The City finds that the traffic standards of DCC Title 17, as discussed above, are designed to ensure compatibility between proposed and existing uses based on traffic impacts. As these standards have been found to be met, the City finds that the proposed use is compatible with existing and projected uses on surrounding properties with regards to transportation and access issues. In addition, the applicant's site plan assures compatibility by locating the heavy truck entrance to the plant on Reed Road, away from all residential areas. The southern entrance will be used by the types of vehicles typically found in residential areas. The volume of vehicle trips using local streets near the south end of the plant will be relatively low and compatible with the residential areas through which it will pass.

Attorney Bruce White argued that the STR does not show that site-generated traffic will meet the requirements of DCC 18.128.015(A)(2) and (B).

Section (A)(2) requires that the Biogreen site be suitable for the utility facility based on the adequacy of transportation access to the site.

Mr. White questions whether large trucks can safely navigate existing streets because all area streets have not been shown to have been constructed to full County standards for new roads. This issue was reviewed by Deschutes County Senior Transportation Planner Peter Russell who concluded that area roads "are adequate to service the Biogreen site development." Access to the site for trucks will be provided by two truck routes: (1) Highway 97 and Reed Road; and (2) Darlene Way to Finley Butte Road to Russell Road to Reed Road, if allowed by BLM. These roads are currently used for heavy truck traffic related to timber and wood products industries and other La Pine Industrial Park traffic. Biogreen's traffic will be similar to other industrial park traffic. US Highway 97 is a State highway designed to carry interstate traffic.

Some Biogreen traffic will use Highway 97 and Foss Road to access the site. The typical vehicle trips that will use this route are vehicle trips by employees in passenger vehicles. These trips will be similar to trips generated by the residences located south of Foss Road. Foss Road is adequate to carry this type of traffic, a fact confirmed by Mr. Russell.

Section (B) requires that a proposed use be compatible with existing and projected uses on surrounding properties based on the factors listed in DCC 18.128.015(A). This is a subjective standard rather than the objective standards typically assessed by traffic engineers. Nevertheless, facts about Biogreen's operation and traffic contained in this decision bear on issues raised by Mr. White. Mr. White says that "the safety issues such traffic poses for other traffic and pedestrians on those streets are certainly relevant issues under this criterion. There are conflicts and traffic safety issues raised by the presence of school bus stops at the intersections of Mitt Road [*sic*] and Foss and the intersection of Mitt Road [*sic*] and Finley Butte Road." The following facts are relevant: (1) it is unlikely that truck traffic will use these

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intersections as the truck routes described, above, provide the most logical route to the plant and neither route uses either intersection; and (2) the traffic that will use the intersections identified by Mr. White will be primarily passenger vehicle traffic or delivery vehicles similar to vehicles associated with the single-family residential neighborhoods located southeast of the intersection of Mitts Way; and (3) the level of site traffic using these intersections will be low because the development will employ approximately 8 employees per shift.

The appellant states that the Comprehensive Plan refers to traffic congestion issues at the Highway 97/Reed and Highway 97/Foss Road intersections should provide 'guidance' on the adequacy of access to the facility. While the Comprehensive Plan provides guidance, that guidance is directed towards long-range plans (such as Deschutes County Capital Improvement Project list) and decision making bodies (such as La Pine City Council) and not towards individual development applications. For example, the County and City of La Pine have worked together to fund the US 97/La Pine Corridor Traffic Analysis, currently in process. The corridor traffic analysis' October 5, 2010 existing conditions report shows that all intersections in the La Pine Corridor Study area, including those identified by Mr. White, currently meet mobility standards.

Opponents have raised concerns about truck/school children conflicts at the Highway 97 intersections with Foss Road and Reed Road/1st Street. County Transportation Planner Peter Russell addressed this issue in his memorandum of November 30, 2010. The City accepts Mr. Russell's analysis of this issue and, based on the facts contained in his memorandum, finds that approval of the Biogreen application will not have an adverse impact on the safety of school children.

Mr. White raised a claim in a letter dated December 15, 2010 that the application is "not well developed." In particular he cites confusion about whether a chipper would be operated on site and the fact that the applicant modified this land use application to include a sound wall as examples of why the application is not "well developed." Mr. White then claims the fact that an issue arose about use of Darlene Way is another factor that makes it difficult to assess project impacts. In the case of the first two issues, both were identified and addressed long ago. The applicant modified its land use application to allow for consideration of the sound wall data and the applicant was allowed two hearings to comment on the sound wall proposal. The applicant also made it clear long ago that its plan did not call for the use of a chipper. The Darlene Way issue is the type of issue that arises in land use proceedings that must be addressed by all parties. All parties have been given ample opportunity to address the issue during the post-hearing comment period as shown by the post-hearing comments filed by Mr. White and Mr. Williams.

Mr. White also claims that the applicant has not provided an "adequate" description of the design and operating characteristics of the facility. Mr. White claims that highly detailed information about plant operations is needed to assess compatibility. He says that the applicant should have supplied information "describing each step of the industrial processes, what specific equipment is involved in each step and the location and duration of those processes." The reason Mr. White appears to believe this information is needed to determine that the plant will comply with DEQ noise standards. The City finds that the information is not needed, however, because it has imposed a post-construction testing requirement that will assure City residents the plant will comply with DEQ noise standards and this information is not needed to determine that this condition will achieve compliance with the applicable land use standard.

The following findings are adopted in response to the Williams appeal issues:

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Williams: *The project will violate DCC 18.128.015 because unmitigated traffic, noise and visual impacts will affect surrounding residential properties.*

Findings: In the event that the residential zone that is located over 750' away from the Biogreen site is considered "surrounding," the Biogreen development is "compatible" with that development based on factors in DCC 18.128.015(A). Those factors are (1) site, design and operating characteristics of the use; and (2) adequacy of transportation access to the site; and (3) natural and physical features of the site including topography, natural hazards and natural resource values. The proposed development has been designed to be compatible with the residential area as the term is used in DCC 18.128.015. The primary access to the site is from Reed Road. All truck and heavy equipment traffic will utilize the Reed Road access. The secondary access on Foss Road will be used for employee parking access and service deliveries only. A third access, also on Foss Road, will be provided for utility company easement access and emergency use only. The third access will be gated and secured with a chain. Midstate Electric, the LaPine Water District and the La Pine Fire District will each have their own padlock and key. Each padlock will act as a link in the chain such that any one of the three users may gain maintenance or emergency access without the need to coordinate with others. The power plant is located a significant distance from the closest residences. The applicant has agreed to install a sound wall to buffer noise impacts and to screen parking, loading and storage areas. The applicant has also proposed to plant and establish approximately 220 trees of significant size in an effort to provide additional taller screening in the future. The plant buildings will be painted a forest green color similar to that of the Newberry foothills to mitigate visual impacts as explained in the County's approval. The stack will be galvanized steel and silver in color. The stack environment is not suitable for paint applications. The City will require, as a condition of approval, verification and final approval of color chips prior to painting of the proposed utility facilities and installation of the sound barrier wall.

Williams: *DCC 8.08 precludes unreasonable loud or raucous noise and OAR 340-035-0035 regulates noise from new projects. Compliance with state noise regulations is a measure of compatibility under DCC 18.128.015 conditional use criteria.*

Response: The applicant will operate its plant in compliance with State noise regulations. As stated by Mr. Williams, that will achieve compatibility under DCC 18.128.015. The applicant has offered to install a sound barrier, as a condition of approval, to assure compliance with State noise standards. The applicant submitted a sound study to show that such a barrier will enable the applicant to comply with State noise standards. On October 5, 2010, the applicant submitted a plan that proposes to upgrade a part of the perimeter fence to a sound wall to buffer sound. The materials proposed for the fence are shown on the HWA **Exhibit A.1** –Sound Wall illustration. The applicant will build and insulate the plant and equipment so that it complies with DEQ noise standards. Biogreen's sound engineer, Elki Lahav of A Acoustics, is a registered professional acoustical engineer who is licensed to conduct business in the State of Oregon. He has offered his professional opinion that the Biogreen plant can be built and insulated

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to comply with DEQ noise regulations. This decision requires compliance with that law by the Biogreen plant.

Williams: *The analysis did not include a study of the drum chipper.*

Response: The applicant does not plan to operate a stand alone drum chipper on site. No study is required. The applicant understands that approval of its plan will not allow the use of a drum chipper on site.

Williams: *The County erred by requiring a noise study later.*

Response: A noise study has been produced. It shows that it is feasible for Biogreen to design and build its plant with sufficient insulation materials to meet DEQ standards. Proof of compliance with the noise standards also, is being required by the City to assure that Biogreen's buildings, as constructed, meet noise standards.

DEQ Air Permit

Williams: The County code does not allow issuance of land use approvals to projects that have not undergone DEQ review. DEQ has not completed its review of the Biogreen proposal.

Response: Mr. Williams appeal statement acknowledges the fact that DEQ has reviewed the Biogreen proposal. His only complaint is that the review is not finished as shown by the issuance of a permit. The County code does not require, however, that a permit have been issued. DEQ's review is now complete because a permit has been issued and this issue is moot.

Williams: *DEQ cannot approve the permit because Biogreen's site plan is seeking approval of a drum chipper. The DEQ permit application does not seek approval of a drum chipper.*

Response: Biogreen is not seeking approval of a drum chipper in this site plan review. The "hog system" that is indicated in the proposed site plan refines already chipped material so that it burns more efficiently in the boilers. The proposed hog system is not a drum chipper.

In response to the Williams comments, the applicant discovered that the DEQ permit application contained an outdated version of the Biogreen site plan. That plan was replaced by the site plan that has been reviewed by the City of La Pine.

2. Section 18.128.180, Radio, Television Tower, Utility Station or Substation.

A. *In a residential zone, all equipment storage on the site may be required to be within an enclosed building.*

FINDING: The subject property is not in a residential zone. This criterion does not apply.

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B. *The use may be required to be fenced and landscaped.*

FINDING: The proposal includes installing chain link fencing that is six feet tall and fitted with sight-obscuring vinyl inserts in a forest green color and a sound wall. The proposal also includes landscaping the north, west and south perimeter strips with a mix of evergreen and aspen trees. The bio-retention swales will also be stabilized with grasses native to the area. The bio retention swales will also be utilized to store snow removed from the site during efforts to maintain winter operations. For that reason, shrub and tree plantings, which would be crushed by the snow, will be avoided in the bio-retention swales. The City finds that the use as proposed meets all fencing and landscaping requirements and no additional screening is required.

C. *The minimum lot size for a public utility facility may be waived on finding that the waiver will not result in noise or other detrimental effect to adjacent property.*

FINDING: The subject property area is 19.5 acres and exceeds the minimum lot size requirements. No waiver is being sought.

D. *Transmission towers, posts, overhead wires, pumping stations and similar installations shall be located, designed and installed to minimize conflicts with scenic values.*

FINDING: The City finds that the relevant scenic views are of the Paulina Mountains from west of the proposed facility and views of the Cascade Mountains from east of the facility. The proposed power sub-station is located near the southeast corner of the subject property and adjacent to existing overhead power lines that run parallel to the east and south property boundaries. At that location, the substation will be approximately 1200 feet from the nearest residential district and extremely difficult to see through the existing and proposed screening. The proposed boiler/turbine building will be painted a desert forest green color to blend with the slopes of Paulina Peak.

VI. DECISION:

The City finds that the Appeal issues filed in this matter in A-10-06 have been adequately addressed and resolved, or have no merit as described above in the City's Findings and Decision. The applicant's proposal, CU-10-25/SP-10-12, including modifications, is APPROVED, as described above in the City's Findings and Decision, subject to the following conditions of approval.

VII. CONDITIONS OF APPROVAL:

- A.** Approval of this conditional use permit and site plan is based on the application, site plan, and supporting documentation as submitted. Any substantial change to the proposal will require a new permit.
- B.** The applicant shall comply with the requirements of the Deschutes County Building Safety Division of the Community Development Department.

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- C.** The truck access route from Reed Road will be marked with signs to ensure that cars do not enter the truck and heavy equipment areas. Directional marking and parking space marking will be required on the westernmost Foss Road service drive. A sign shall be placed on the locked gate at the third entrance to mark the location of the gate and the utility access driveway. Sign permits shall be obtained pursuant to the Deschutes County Code.
- D.** Biogreen fuel trucks shall not use Darlene Way to access its plant unless and until the use of Darlene Way is allowed by BLM. This restriction shall be included in Biogreen's fuel hauling contracts with its trucking contractors. In the event that Biogreen seeks BLM approval to use and maintain Darlene Way, it shall provide TransCanada or its successor in interest with notice of its application and details about its improvement plans. Use of Darlene Way may require a modification to this approval as determined by the City of La Pine after examination of the proposed BLM permit and related conditions. Future use of Darlene Way will require examination of the potential for participation with BLM and/or Deschutes County and other entities regarding dust abatement strategies.
- E.** Biogreen fuel trucks and ash hauling trips will be required to use Reed Road to access the plant and will be prohibited from using Foss Road between Highway 97 and Mitts Way and the part of Finley Butte Road that crosses the LPR zoning district to the southwest of the Biogreen plant. This requirement shall be included in all Biogreen fuel and ash hauling contracts for the La Pine plant.
- F.** The utility facility exhaust stack shall be the height approved and required to meet the DEQ air quality permit requirements (approximately 100 feet) and, in no case, shall the stack exceed 150 feet in height.
- G.** The applicant shall plant or transplant a minimum of 220 trees, 40% of the trees will be Ponderosa or Lodgepole Pine that are 5 to 6 feet tall, 40 % of the trees shall be Austrian or Scotch Pine that are 5 to 6 feet tall and 20% of the trees shall be Aspen that have a trunk caliper of 1.5 to 2 inches. The trees shall be planted along the south, west and north property lines in the locations indicated in site plan sheet 3/5 prior to issuance of occupancy permits, or initiation of use, whichever comes first.
- H.** At all times, the required landscaping, including screening trees, shall be continuously maintained and kept alive and attractive.
- I.** All vehicle travel surfaces shall be maintained in a manner that will not create dust problems for neighboring properties.
- J.** Prior to issuance of an occupancy permit, the applicant will be required to improve Reed Road to the standards listed in Title 17, Table "A" for a Collector Road. This will require the widening of the existing pavement to a width of 18 feet from centerline along the frontage of the applicant's property. This also requires that sidewalks and drainage swales be provided along the frontage of the subject property.
- K.** Prior to issuance of an occupancy permit, the applicant will be required to improve Foss Road to the standards listed in Title 17, Table "A" for a Commercial Local Road. This will require the widening of the existing pavement to a width of 16 feet from centerline

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along the frontage of the applicant's property. This also requires that sidewalks and drainage swales be provided along the frontage of the subject property.

- L.** At all times, the applicant shall comply with relevant DEQ noise standards under OAR 340-35-0035.
- M.** Prior to operating the plant, the applicant shall hire an Oregon licensed professional engineer with experience in sound testing to: (a) test ambient sound levels at the location specified by OAR 340-035-0035(3)(b) when the plant is not in operation for the residential property closest to the plant and for the first two residential properties south of that property on Mitts Way; and (b) conduct sound testing in the same locations once the plant is in full operation; and (c) determine if the standards of Table 8 of OAR 340-035-0035 are exceeded; and (d) determine whether the Biogreen plant violates the 10 dBA increase standards of OAR 340-035-0035(1)(B)(i), if applicable. The applicant shall provide testing results and analysis information to the City of La Pine no later than six months after the plant operations have been commenced. In the event that testing must occur on private property and permission to test is denied, the engineer may test sound on the property line in the alternate location specified by the rule (the property line). In that case, the engineer shall provide an analysis of whether the change in location impacts measured noise levels and the approximate level of impact due to a change in proximity to other ambient noise sources such as Highway 97.

In the event the engineer determines that DEQ noise standards are exceeded by plant operations, Biogreen may: (a) adjust its operations and/or improve soundproofing at the plant or site to achieve compliance with DEQ standards; or (b) seek approval from the City of La Pine for mitigation measures determined by the professional engineer to allow the plant to comply with DEQ standards.

If the plant is shown to comply with DEQ standards as constructed or if Option (a) is selected, Biogreen's engineer shall retest noise levels until measures adequate to achieve required noise levels have been installed and shall submit proof to the City of La Pine of compliance with DEQ noise standards. If Option (b) is selected, the mitigation plan shall be filed with the City of La Pine for its review. In either case, the applicant shall annually verify to the City of La Pine that the test results and/or the mitigation plan demonstrate compliance with OAR 340-035-0035. The mitigation plan review shall be a land use review subject to the then applicable land use review procedures of the City of La Pine with, at a minimum, notice and an opportunity to obtain a hearing (initially or on appeal). The scope of the review will be to determine whether the submitted evidence demonstrates compliance by the Biogreen plant with the applicable provisions of OAR 340-035-0035. The City may approve conditions of approval on its approval of a mitigation plan, if needed to assure compliance with OAR 340-035-0035.

- N.** All structures greater than 45 feet in height shall be equipped with fire sprinkler protection in accordance with current adopted editions of the Oregon Structural Specialty Code, Oregon Fire Code, and National Fire Protection Association 13.
- O.** All lighting shall comply with the Deschutes County Covered Outdoor Lighting Ordinance per Section 15.10 of Title 15 of the Deschutes County Code (DCC).
- P.** All areas subject to the final site plan and not otherwise improved shall be landscaped.

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- Q.** The applicant shall submit a revised plot plan showing 525 square feet of landscaping, with a width of not less than 5 feet, uniformly distributed throughout the parking or loading area.
- R.** Prior to issuance of building permits, the applicant shall submit a revised site plan showing the following:
1. At least two sheltered bicycle parking spaces.
 2. Location of the required, unsheltered bicycle racks.
 3. That required bicycle parking that is located outdoors shall be located on-site within 50 feet of main entrances and not farther from the entrance than the closest motor vehicle parking space. Bicycle parking shall be located in areas of greatest use and convenience to bicyclists. Such bicycle parking shall have direct access to both the public right of way and to the main entrance of the principal use.
 4. That bicycle parking facilities shall be separated from motor vehicle parking and drive areas by a barrier or sufficient distance to prevent damage to the parked bicycle.
 5. That entry and directional signs shall be provided to direct bicyclists for the public right of way to the bicycle parking facility.
 6. That each bicycle parking space will be at least two by six feet with a vertical clearance of seven feet.
 7. That an access aisle of at least five feet wide shall be provided and maintained beside or between each row of bicycle parking.
 8. That each required bicycle parking space shall be accessible without moving another bicycle.
 9. That the surface of an outdoor parking facility shall be surfaced in the same manner as the motor vehicle parking area or with a minimum of one-inch thickness of aggregate material. This surface shall be maintained in a smooth, durable, and well-drained condition.
 10. Either a lockable enclosure in which the bicycle can be stored or a stationary object upon which the bicycle can be locked. Structures that require a user-supplied lock shall accommodate both cables and U-shaped locks and shall permit the frame and both wheels to be secured. All bicycle racks, lockers, or other facilities shall be permanently anchored to the surface of the ground or to a structure.
 11. That the bicycle parking area will be thoroughly illuminated and visible from adjacent sidewalks or motor vehicle parking.

City of La Pine

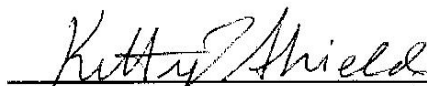
La Pine City Hall, PO Box 3055, 51340 Hwy 97, Deschutes County, Oregon 97739
Phone: (541) 536-1432 Fax: (541) 536-1462

12. That the perimeter fence will be located outside of the clear vision area required by DCC 18.116.020 at the southeast corner of the subject property.
13. Submission of paint/color chips and vinyl fence strip colors that verify colors to be used on the facility premises – this includes the colors of the sound barrier wall. The City recommends this condition be completed *prior* to purchase of paints, colored sound wall materials, or vinyl strips by applicant.

VI. DURATION OF APPROVAL:

The applicant shall submit an application for a building permit within two (2) years following the date this decision becomes final, or obtain an extension of time pursuant to Section 22.36.010 of the County Code, or this approval shall be void.

Unanimous vote of the City of La Pine Council to "approve, with conditions" the applicant's proposal as described and modified above. Signed by its Mayor/City Councilor Kitty Shields:



Mayor Kitty Shields Dated this 31st day of December 2010

This decision is final when mailed.