

CANBY CITY COUNCIL

REGULAR MEETING

APRIL 4, 1990

Mayor Nancy G. Kopelk presiding. Council members present: Scott Taylor, Shawn Carroll, Keith Stiglbauer, Terry Prince, Robert Smith and Walt Daniels.

Others present: Administrator Michael Jordan, City Attorney John Kelley, Public Works Director Rusty Klem, Police Chief Jerry Giger, Library Director Beth Saul, City Recorder Marilyn Perkett, James C. & Thelma Kriegshauser, James E. Kriegshauser, Larry Horne, Bill Cannon, Toni Olonner, Joseph Kahut, Roger Reif, Fred Kahut, Richard Shipley, Irene Kahut, Katie Kahut, Dorothy Knight, John & Bernice Morris, Mr. & Mrs. Franklyn Wood, Don & Chris Hopkins, Kim Smith, Ginny Jones, Nikki Jones, Don & Pat Ewert, Mel & Cindy Moss, Rex Samples, Kelleher Christopher, Gwen Keller, Kent & Pam Thompson, Richard Woodworth, Judy Brown, Gwen Woodworth, Wade Wiegand, Gloria Hudson, Cathy Burdett, Joy Gerig, Edna Vosika, James Burdett, Ray Hudson, David & Tracee Feskens, Earl & Sabina Oliver, Fred Stefani, Dirk & Lisa Williams, Minnie Coon, Romona Kennedy, Virginia Daniels, Gary Sowles, Terrie Trexler, Tony & Caroline Bucklew, Dave Seeley, Sean & Barbara McVicker, Jennifer Seeley, Steve Walker, Michael Markowski, Grace Doering, Judy Keeney, Mr. & Mrs. Diggles, Lois Larson, Helen Richmond, Tara Nofziger, E. & Dena Kersting, Ed & Barbara Busch, Rudy & Elevira Colliander, Bruce & Patti Farmer, Lance White, Robert Westcott, Mike Rinkes, Myra Weston, Debbie Barber, Ronald Tatone, Mavourn Stuart, Izzy Marlak and others.

Mayor Kopelk opened the session at the Canby Adult Center at 7:30 p.m., followed by the flag salute and meditation.

Roll call of the Council showed a quorum to be present.

MINUTES OF PREVIOUS SESSION - **Councilman Carroll moved to approve as distributed the minutes of regular session March 21, 1990, seconded by Councilman Prince and approved unanimously,

CITIZEN INPUT ON NON-AGENDA ITEMS - None presented.

COMMUNICATIONS - None presented.

ORDINANCES & RESOLUTIONS - The Council considered Ordinance 842, for final action, a contract with Excel Environmental for removal of ceiling material in the proposed library building. **Councilman Smith moved to adopt, on final reading, Ordinance No. 842, AN ORDINANCE AUTHORIZING THE MAYOR AND CITY RECORDER TO EXECUTE A CONTRACT WITH EXCEL ENVIRONMENTAL, INC., FOR THE REMOVAL OF CEILING MATERIAL IN THE OLD ACE HARDWARE BUILDING; AND DECLARING AN EMERGENCY. Motion seconded by Councilman Daniels and approved 6-0, by roll call vote.

Administrator Jordan explained that Ordinance 843 was to be considered for final action for a contract to remodel the Ace Hardware building into a public library. **Councilman Daniels moved to adopt and make part of the laws of the City, Ordinance No. 843, AN ORDINANCE AUTHORIZING THE MAYOR AND CITY RECORDER TO EXECUTE A CONTRACT WITH TENANT IMPROVEMENT SERVICES CORPORATION FOR THE REMODELING OF THE OLD ACE HARDWARE BUILDING; AND DECLARING AN EMERGENCY. Seconded by Councilman Carroll and approved by roll call vote, 6-0.

NEW BUSINESS - **Councilman Carroll moved to approve payment of accounts payable in the amount of \$35,481.34, seconded by Councilman Stiglbauer and approved by roll call vote, 6-0.

UNFINISHED BUSINESS - Appointment to Planning Commission - Administrator Jordan reviewed a memo regarding appointing a Planning Commission member to replace Carol Meeuwsen, Municipal Code Section 16.06.30 states that the City Council will fill any vacancy. Rex Samples, Morris Cederquist and Linda Mihata were names suggested to the Council. **Councilman Taylor moved to appoint Linda Mihata to the Canby Planning Commission to complete the term of Carol Meeuwsen, expiring in December, 1991. Motion seconded by Councilman Carroll and approved unanimously.

Appeal of the Kahut Garbage Transfer Station - Mayor Kopelk briefly reviewed the procedure for the appeal process.

Mayor Kopelk asked the Council to report any exparte' contact, the entire Council said they had none. Attorney Kelley requested that the Council be polled individually regarding possible exparte' contact with Attorney Roger Reif. Mayor Kopelk question each Councilor and they all said they had no exparte' contact with Attorney Reif.

STAFF REPORT - Rusty Klem, Public Works Director, reviewed the history of the current appeal of the February 12, 1990, Planning Commission decision to deny a Conditional Use Permit for a garbage and recycling station for Fred Kahut at N.W. Third and N. Baker. The first application was filed on July 11, 1988, and on September 26, 1988, the Planning Commission approved the Conditional Use subject to 25 conditions. No action was taken and in one year the Conditional Use Permit expired. A new application was filed in November, 1989, public hearing were held, and the commission denied the request. Mr. Kahut appealed the decision to the City Council.

Attorney Kelley reviewed the three Standards and Criteria which the Council must considering in making a decision on the appeal.

APPLICANT - Roger Reif, Attorney for the applicant of Canby Disposal Company, handed out a written brief of his argument.

Mr. Reif noted that his client is required by City Ordinance and Oregon State Law to grant recycling services. He pointed out that the current site of 2.7 acres is inadequate and the proposed site of 4.79 acres was purchased for a new transfer station. In

June, 1988, the Planning Commission approved a Conditional Use for the project with 25 conditions, within three weeks they made application to DEQ and did not receive that approval in the one year time frame, and a second application was filed in November, 1989. Mr. Reif pointed out that only two changes had occurred between the time of the two applications: 1. The extension of S.W. 13th Avenue on Berg Parkway through the middle of Canby Disposal company; and 2. increasing the building from 4,800 to 30,000-35,000 square feet to keep more activities inside the structure.

Mr. Reif pointed out this is a transfer station not a dump or landfill. The project is on a current truck route with 733.94 tons per month hauled to the Riverbend Landfill.

In regards to water pollution, the present site is closer to the Molalla River than the proposed site. Experts from the County, DEQ, and Don Godard of CUB, all agree that there should be no ground water contamination with a properly designed facility.

Two specific areas of the Comp Plan were reiterated: 1. the need for a waste disposal site and of a local transfer station as appropriate is found in the Public Facilities and Services Element; and 2. Policy 2 of the Land Use Element points out "best interests of the overall community must, at times, outweigh the concerns of specific neighborhood groups."

Mr. Reif argued that the Planning Commission decision should be voided because of the bias testimony of a Commissioner, one that had participated in household literature distribution and testified in opposition at a DEQ hearing. Also, as a Commissioner, the member in question then becomes a quasi-judicial official to judge applications, case law was cited.

Mr. Reif reviewed the findings of fact with his arguments to the following:

Criteria A. The Proposal Will be Consistent with the Policies of The Comprehensive Plan and the Requirements of this Title and Other Applicable Policies of the City. FINDING - no information in record to demonstrate that the development will not have a negative impact on surface and/or groundwater. RESPONSE - abundant information was cited in the record. FINDING - Policy 3-R was not met in regards to requiring all existing and future development activities meet prescribed standards of air, water and land pollution; and enforcement by DEQ and the City could not be met. RESPONSE - DEQ approved the application and they set the standards.

Criteria B. The Characteristics of the Site are Suitable for the Proposed Use Considering Size, Shape, Design, Location, Topography, Existence of Improvements and Natural Features. FINDING - not adequate information to show site would be adequate to handle projected 20,000 population. RESPONSE - testimony was that site was sufficient to handle Canby's garbage now and in future. FINDING - site plan did not accurately reflect size and dimension of property. RESPONSE - this was a dispute between

drawings and assessor's map, and at the last minute new copies were provided to City.

Criteria C. All Required Public Facilities in Services Exist to Adequately Meet ;the Needs of the Proposed Development. FINDING - no existing evidence that existing truck route could handle increased traffic; and no evidence to show that City, County and State could adequately monitor operations and conditions. RESPONSE - record and comp plan show this to be an adequately made truck route and used by heavy truck traffic. FINDING - three other facilities exist in area to handle current and projected City needs for garbage and recycling. RESPONSE - without merit and unresponsive to the applicant. No information in the records as to cost and Canby Disposal has a franchise with City. FINDING - no record to contain sufficient information to show all required public facilities and services exist to meet needs of development. RESPONSE - very much an error, 1988 and 1989 staff reports show no indication from staff that there are not required facilities. FINDING - no demonstrated need for new transfer facility. RESPONSE - felt this was not a finding. Testimony supported recycling and inadequacy of present facility; increased costs of operations; the comp plan suggests a local transfer stations; and editorial and paper articles testifying to need.

Criteria D. The Proposed Use will Not Alter the Character of the Surrounding Areas in a Manner Which Substantially Limits or Precludes the Use of Surrounding Properties for the Uses Listed as Permitted in the Zone. FINDING - The Commission found that this requirement was met.

Mr. Reif reserved his time left for rebuttal.

OPPONENTS - Rick Parrish, Attorney for the neighborhood group, from 215 S.W. Washington Street, Portland, Oregon, pointed out that the Neighbors Against Garbage urged denial of the permit. Mr. Parrish said the group was not aware of the 1988 decision and it was when the second application was filed they became concerned.

The alleged bias of a Planning Commissioner does not invalidate the decision, and noted that the entire Commission accepted his statement that he was not prejudging the proposal. However, six other members unanimously voted against the proposal and the one other vote would not change the final outcome.

Mr. Parrish claimed that the 1988 CUP approval was irrelevant to this current proceedings, claiming more citizen interest and critical information submitted to the record. Also, he maintained that the Commission and Council had rights to alter or deny the permit and the conditions according to proper standards and procedure.

Two basic problems with the application were specified: the site is simply not appropriate for an operation and the applicant has not demonstrated a willingness or ability to comply with conditions and regulations applying to the existing operation. Mr. Parrish suggested that if the present location were to be

cleaned up and it becomes inadequate, then a good plan and good site could be submitted for consideration.

Mr. Parrish cited the following four criteria in the planning ordinance.

1. The proposal was consistent with polices of the comp plan, Land Development and Planning Ordinance and other policies of the City - the applicant failed to satisfy Policy 2-R, regarding protection of water resources with insufficient information demonstrated. Also, Policy 3-R, regarding compliance with environmental protection standards, insufficient evidence to indicate conditions would be enforced.

2. Characteristics of the site are suitable for the proposed use considering size, shape, design, location, topography, existence of improvements and natural features. Traffic was the primary concern regarding the site, as to impacts. Testimony provided stated that the truck traffic far exceeded the predicted traffic for the proposal and is only two blocks from the school.

3. All required public facilities and services exist to adequately meet the needs of the development. Concerns cited were lack of sidewalks, capability of truck route to handle increased traffic, City staffing resources and the Commission found no pressing need for the facility. It was never explained if the sewage plant could meet the demands of the facility.

4. The proposal will not alter character of surrounding areas which limits or precludes the use of surrounding properties for uses listed as permitted in the zone. The commission concluded this factor had been met, we disagree. Some evidence submitted by business was disregarded and many residents testified to the possible noise, traffic, odor and etc.

Mr. Parrish said they disagree that a Light Industrial zone is a proper zone for such a facility, it should be in a Heavy Industrial zone.

Mr. Parrish encouraged the Council to include all facts in supporting their decision and to uphold the Planning Commission decision for denial

CINDY MOSS, 750 N. Ivy, addressed the Council regarding concerns about the water. She noted the City intake for water supply is above site and past history showed a water problem with the CUB pole yard contaminating the water with creosote. Also, DEQ does not make routine checks and will only come out on a call.

PAT EWERT, 596 N.W. Baker, expressed concern over the traffic, noting a three day study showed one truck every 8 minutes and about 20 trucks a day come to the site for drop boxes. Also, she expressed a concern about lack of enforcement.

GINNY JONES, 620 N.W. Baker, said the Molalla River is one of the top 10 steelhead rivers in the Columbia System and is a fish spawning area and a swimming area. She cited some of her reasons for opposing were blowing liter, lack of proper screening, conditions in the area would produce tins, glass, etc., improper

storage of trailers and drop boxes, garbage stored on ground not cement and lack of permits to operate. Mrs. Jones stated the reason no one knew about the issue in 1988, was that notices were only sent to people within 200 feet of the project.

Mike Rinkes, 2980 S, Beavercreek Road and owner of property in the area, maintained there was water contamination in the area and a City cover up was involved.

Attorney Kelley noted that Mr. Rinkes' testimony would not be counted in the time allowed for the opponents.

DON EWERT, 596 N.W. Baker, pointed out that the proposal will not keep our rates lower. Also, there are five springs under the subject property and what if our water condition got to the standards that happened in Milwaukie. He maintained the facility was not wanted by other businesses in area. Why were 30 conditions allowed, however, he noted that he had nothing against recycling but it is financially productive for the owner.

JENNIFER SEELEY (676 N. Birch) and NIKKI JONES (620 N.W. Baker) addressed the Council stating they represented 300 kids in our community and 100 in the area that were against the transfer station. They noted that many people walk and jog in the area, play ball in the streets and felt the traffic would stop those activities. Also, they stressed the contamination of water for the future generations.

KIM SMITH, 955 N.W. 6th, urged the Council to not allow the project and reminded them of 270 + citizens that were against the proposal.

REBUTTAL: REX SAMPLES, 1105 N.E. 13th Circle, pointed out that the current site is inadequate; the water supply is up-river; why the traffic concern about truck since Johnson Controls already runs many trucks and are they Light Industrial; there are no schools in that area; and this is not a dump but a transfer station. Also, he pointed out that we could all find chemicals in our own homes. We all use the Canby Disposal services, he asked if it could be put to a citizen vote.

Attorney Reif presented rebuttal on the following issues.

Reif noted that the first meeting was in the front pages of the local paper and some of the same people testified at that first hearing.

Reif disagreed with the fact of one Commissioner being bias, and felt that members participation as an opponent prior to Commission appointment voided the proceeding.

He pointed out that a lot of extra effort was put in by the engineering on the project. DEQ approved the project and they are the experts.

This is a Light Industrial zone but it has an overlay and there

is no Heavy Industrial land that is available. He sited existing industries such as Potter's in that area.

Mr. Reif said a lot of the testimony centered around "What If?", however, he asked the Council to rely on the reasonable probabilities of engineering and not on the "What If" scenario.

Canby Disposal had a conditional use, not a permit, and urged the Council to approve the permit with conditions.

Mayor Kopelk opened the appeal up to questions from the Council.

Councilor Prince questioned the allowable run-off and sewer testing procedure. Mr. Klem said we have a pretreatment process approved by EPA that we use for testing or sometime send to a private lab.

Councilor Taylor questioned if the 1988 application was also for a recycling center. Reif answered that it was.

Councilor Taylor questioned the testimony of conflict from the two attorneys regarding the bias testimony of a Commissioner as voiding the proceeding. City Attorney Kelley said there is no current case law to make the decision valid one way or another, however, in his opinion, should not affect the decision.

Councilor Taylor questioned if the Council could add conditions to the Findings of Fact, and was told they could.

Councilor Taylor asked who would be responsible for enforcement.

Mr. Klem said the sewage treatment staff, Building Official, City Planner and ultimately himself, the Public Works Director.

Klem also noted that the City has the right to enforce the Clean Water Act.

Councilor Prince asked which way the ground water flowed.

Cindy Moss stated that the Oregon Water Resources told her it always flowed downhill toward the river.

Councilor Prince questioned the storage of dump boxes on the site.

Mr. Reif noted that they 1988 CUP gave permission for them to store the containers in a gravel area and they are leak proof.

Lisa Wilcox, 685 N.W. 4th Avenue, maintained that they are not truly leak proof.

Mayor Kopelk polled the Council to ask if they were ready to make a decision tonight: YES - Carroll, Stiglbauer, Prince and Daniels; and voting NO - Smith and Taylor. Mayor Kopelk requested a motion and asked each Council to site the criteria for their vote.

****Councilman Carroll** moved to uphold the February 12, 1990, decision of the Planning Commission for denial of the Conditional Use Permit for a Garbage Transfer Station by Canby Disposal at the subject site. Motion seconded by Councilman Daniels. Councilor Taylor asked that each Councilman be allowed to delete or add to the Findings of Fact. Councilman Daniels withdrew his second to the motion. ****Councilman Carroll AMENDED THE MOTION,** the Council may add or delete to the Findings of Fact. Councilman Taylor seconded the amended motion. Mayor Kopelk polled each Councilor separately asking for their vote and criteria:

Carroll - YES, based on the Findings of Fact presented by the Planning Commission.

Stiglbauer - YES, based on the Findings of Fact presented by the Planning Commission.

Taylor - YES, based on the Findings of Fact of the Planning Commission and adding: does not agree with Criteria B regarding traffic pattern and availability of road; further develop criteria regarding water flow and ability to protect groundwater; and Criteria C lack of ability for service to meet the water run off, sewage lines to the area and contamination. He does not believe the current sewage facilities can handle the need of the project.

Prince - YES, based on the Findings of Fact of the Planning Commission and adding: expand on Criteria A, the drop boxes in the gravel area will, due to leakage and poor soil, possibly add contaminants to the soil. Heavy metals capacity of the sewage plant is not adequate to meet this need.

Smith - YES, based on the Findings of Fact of the Planning Commission and adding: a lack of traffic count and pattern for the proposal and we can not enforce the traffic pattern.

Daniels - YES, based on the Findings of Fact of the Planning Commission and adding: there is not enough staff to monitor the 30 conditions.

Motion passed 6-0, the Planning Commission decision of February 12, 1990, has been upheld and the Findings of Fact will be presented at the next meeting.

Don Bear, 1630 N. Maple, Planning Commissioner, commended the Council as a doing a great service in their decision and noted the Commission will continue to serve the City to their best of their ability.

Councilor Daniels said he appreciated the efforts on this issue and urged citizens to stay informed about City issues.

Mayor Kopelk commended both sides on the issues and felt it was done in "great - good manners."

OTHER REPORTS OR ANNOUNCEMENTS: Administrator Jordan announced that Clackamas County will have a hearing on April 12, 1990, 7:30 p.m., regarding county road projects. He urged concerned citizens to attend and pointed out some County roads in the City.

Beth Saul, Library Director, noted that May and June are "no fines months" due to changing to a new computer system.

ACTION REVIEW:

1. Implement contracts with Excel Environmental and Tenant Improvement Corp. for the new library facility.
2. Letter to the Linda Mihata.
3. Prepare final Findings of Fact on the Garbage Transfer issue.

Councilman Daniels informed the audience that the library construction will start April 9th, and Mr. Jordan said the contract is scheduled for 120 days.

****Councilman Taylor moved to go into Executive Session under ORS 192, 660 (1)(h), regarding pending litigation and (1)(i), regarding employee evaluation. Motion seconded by Councilman Carroll and approved 6-0.**

Mayor Kopelk recessed the regular session at 10:04 p.m. to go into Executive Session. The regular session was reconvened at 10:49 and immediately adjourned.

(NOTE: The written briefs of Attorney Reif & Parrish will become a part of the minutes of this meeting.)

EXECUTIVE SESSION
APRIL 4, 1990


Attendance: Mayor Kopelk, Councilors Carroll, Smith, Daniels, Taylor, Prince and Stiglbauer, Administrator Jordan and Attorney Kelley.

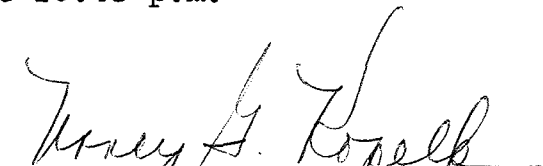
Mayor Kopelk called the session to order at 10:13 p.m.

ORS 192.660 (1)(h), the Council discussed two litigation cases, Torgeson vs. City of Canby, LUBA appeal and City of Canby vs. Torgeson Injunction.

ORS 192,660(1)(i), the Council discussed evaluation of a City staff member.

Mayor Kopelk adjourned the session at 10:48 p.m.


Marilyn K. Perkett, City Recorder


Nancy G. Kopelk, Mayor

Richard A. Parrish
Attorney at Law
215 S.W. Washington St., #200
Portland, Oregon 97204
~~(503) 228-5222~~

222-5339

April 4, 1990

City Council
City of Canby
Canby, Oregon 97013

Re: Canby Planning Commission Denial of
Conditional Use Application CU-89-09
Garbage Transfer and Recycling Station

To the City Council:

I am appearing on behalf of Neighbors Against Garbage in support of the decision of the Canby Planning Commission to deny a conditional use permit for the proposed garbage transfer and recycling station. Though we do not agree with all of the statements in the Planning Commission's Final Decision, we strongly support the denial of the permit.

The Canby Planning Commission voted unanimously on February 12, 1990 to deny the conditional use permit for the proposed Garbage Transfer Station and Recycling Center. The reasoning behind the denial is contained, at least in part, in a February 22, 1990 letter from Hank Skinner, Canby City Planner, to Mr. Fred Kahut, the applicant.

The bases for Mr. Kahut's appeal are contained in a February 19, 1990 letter to Mr. Skinner from Mr. Kahut's attorney, Roger Reif. Four assignments of error are contained in that letter.

First, Mr. Kahut alleges that one of the Planning Commission members was biased against his proposal, and that this invalidates the entire Planning Commission action. He is referring to Commissioner Wiegand, who stated that he had had contacts with citizens opposed to the facility and that he had asked questions about DEQ's ability to regulate the facility. Neither action disqualifies Commissioner Wiegand, and the entire Commission accepted his statement that he was not prejudging the proposal.

But, even if one Commissioner had decided to vote against the proposal before hearing all the evidence, there were still six others who voted against it in the proper course. If there was any bias at work here, it was irrelevant to the outcome and is not a valid basis for appeal.

Second, Mr. Kahut claims that the Planning Commission should be bound by its decision to grant him a conditional use permit in 1988 for the same facility. Unfortunately for Mr. Kahut, that permit has long since expired and is irrelevant to this proceeding. We are dealing with a new permit here, and perhaps the increased public inquiry helped convince the Commission to reach a different result. Certainly, there was a great deal more information critical of his proposal that was submitted to the record this time around. There is nothing that prevents the Planning Commission from reaching a contrary result this time, so long as the basis for its decision is adequately explained. We believe the reason for changing its position is clear.

Third, Mr. Kahut claims that he has an absolute right to a conditional use permit in this instance, subject only to reasonable conditions. Nothing could be further from the truth. There are jurisdictions where local codes provide an absolute right to conditional use permits. Canby is not one of them. The Canby Land Development and Planning Ordinance clearly provides that conditional uses "shall be permitted, altered, or denied in accordance with the (proper) standards and procedures...." Thus, it is clear that the Planning Commission and this Council have every right to deny this permit.

Finally, Mr. Kahut contends that the Planning Commission misinterpreted the evidence presented in the hearings. The Planning Commission's decision applies that evidence to the four criteria that the Canby City Code applies to conditional use permits.

Before getting to the specifics, there are two basic problems with Mr. Kahut's application. The site is simply not appropriate for an operation of the intensity described in the proceedings before the Planning Commission. And the applicant has not demonstrated a willingness or ability to comply with the conditions and regulations applying to his existing recycling facilities. Related to that last factor is the total inability of any level of government -- federal, state, county, or city -- to enforce the permit conditions or standards and regulations that are applicable to operations of this type.

In reviewing the testimony or evidence presented at the hearing, you must bear in mind some important points. The applicant bears the burden of proof in this matter. That is, he must demonstrate that he satisfies the criteria. It is not up to the Planning Commission or the concerned citizens to prove that he does not. It follows that when a legitimate issue is raised and there is not sufficient information in the record to resolve that issue, it must be decided against the applicant. This was a recurring theme in the Planning Commission's decision. Without sufficient information in the record to resolve potential problems, it had no choice but to deny the application.

I would now like to turn to the four criteria in the city planning ordinance.

1. The proposal will be consistent with the policies of the comprehensive plan and the requirements of the Land Development and Planning Ordinance and other applicable policies of the city.

The Planning Commission determined that the application failed to satisfy Comprehensive Plan Policy #2-R regarding protection of water resources, primarily because there was insufficient information in the record to demonstrate that the proposed operation would not have a negative impact on surface waters or groundwater, including the City's drinking water supply.

We agree. In fact, the applicant's plans for wastewater discharge remained incomplete at the hearing before the Planning Commission. A representative of DEQ informed one of the concerned citizens that he was unaware of and uncertain whether the agency would permit Mr. Kahut's plan to discharge surface water run-off to the proposed dry wells on site.

Additional testimony regarding potential contamination problems resulting from appliances or automobiles leaking various fluids onto bare ground or pavement was provided at the hearing. Even if the various lubricants and insulation fluids were collected and discharged to the sewers, the City must then deal with either POTW (publicly owned treatment works) discharges to the Molalla River or sewage sludge that is contaminated with residues that can include toxic organic compounds such as PCB's.

The Planning Commission also found that the application did not satisfy Policy 3-R regarding compliance with environmental protection standards, because there was insufficient evidence in the record to indicate that permit conditions could be enforced.

Again, we agree. Government agencies don't have the resources to even monitor this operation, much less take reasonable enforcement action in appropriate instances. This factor becomes even more important in light of the compliance history of the applicant's two existing recycling facilities. There was testimony about recurring problems at both the Canby and Milwaukie recycling facilities operated by the applicant.

2. The characteristics of the site are suitable for the proposed use considering size, shape, design, location, topography, existence of improvements and natural features.

The Planning Commission found that the applicant had not provided sufficient information to demonstrate that the site was suitable

for the proposed use, primarily reflecting concerns about traffic impacts and uncertainties and inaccuracies in the plans for the facility.

We agree. In fact, eyewitness testimony was provided that truck traffic at the applicant's existing recycling facility in Canby far exceeded the truck traffic predicted in the application at the proposed facility. All too often it was clear that information contained in the application, information that this review was based upon, was either wrong or incomplete. Again, the Commission had no choice but to reject the application.

3. All required public facilities and services exist to adequately meet the needs of the proposed development.

The Commission found that there was no demonstration of adequate public facilities to support the proposal, basing its concern primarily upon the lack of sidewalks, the capability of the truck route to handle increased traffic, and city staffing resources. The Planning Commission also found that there was no pressing need for the proposed facility in Canby.

Again, we agree and add that concerns with sewage disposal were never answered completely either. Even if the capacity is in place, it was never explained how the sewage treatment plant would handle the addition of even small amounts of toxic organic chemicals certain to drain from some of the recyclables.

4. The proposed use will not alter the character of the surrounding areas in a manner which substantially limits, or precludes the use of surrounding properties for the uses listed as permitted in the zone.

The Planning Commission concluded that the fourth factor had been met, that the proposed use would not affect the use of surrounding properties. We disagree. In order to make that finding, the Commission had to interpret "surrounding properties" to mean "adjacent properties." And even then, it disregarded evidence in the record that some of the nearby businesses objected to the proposal.

We submit that the proposed operation would substantially limit the use of surrounding neighborhoods as residential neighborhoods. If the code intended only for impacts on "adjacent" properties to be considered in this factor, it would have stated "adjacent" properties. Instead, the term is "surrounding" properties. Many residents of surrounding properties testified at the hearings how the proposed use would

alter their use of their property. Whether because of traffic, noise, litter, odor or concerns about drinking water and other water quality issues, the surrounding properties would be changed irrevocably. We believe the Planning Commission erred in deciding otherwise.

Before closing, I would like to return to an issue that has been touched on briefly ... zoning. The concerned citizens did not appeal the Planning Commission decision because we feel it was the correct decision. But we maintain that the entire process was unnecessary, because a garbage transfer and recycling station should not qualify as a conditional use in a Light Industrial zone. A Light Industrial zone is intended to serve as a transition area, a buffer between residential neighborhoods and heavy industrial zones. The only Light Industrial conditional use provided for in the code is that of "motels, hotels and similar accomodations." The proposed facility bears little resemblance, either in appearance or in impact, to motels, hotels and similar accomodations.

We submit that the proposed facility belongs in the Heavy Industrial zone, where consideration of traffic, noise, odors, and potential water pollution are specifically provided for. The Heavy Industrial review process is already in place for proposals such as this one. Part of the problem with this entire proceeding is the effort to fit an inappropriate use onto this site. If necessary, we intend to challenge the initial determination that this even qualified to be considered as a conditional use in the Light Industrial zone.


Finally, your decision tonight must be supported by factual findings drawn from evidence in the record before the Planning Commission. If you uphold the Planning Commission's unanimous decision to deny this permit, I encourage you to include all of the multitude of facts that support that determination in your final written decision. The Planning Commission's written decision of February 22, 1990 is conspicuous by its failure to include reference to all of the factual problems with this application that were included in the hearings record. You should be much more careful to review the final decision in this instance.

This has obviously been a contentious proceeding. Let's not lose sight of the fact that each and every individual opposing this facility at this location in fact supports recycling in Canby. But like every activity in our society, it must be done right and it must be done in the right location. We encourage

Mr. Kahut to focus his impressive energies on cleaning up and maintaining the existing Canby recycling facility. If a new facility becomes absolutely essential, an eventuality that we doubt given METRO's comments about the existing facilities in surrounding communities, we encourage Mr. Kahut to find a location where it will not present the kinds of impacts present with this site.

I've been told that the Planning Commission has never been reversed in Canby. It must be doing a commendable job. It did so in this instance, and the City Council should not undo what the Planning Commission agonized over during hours of hearings and weeks of deliberations. The process is in place. It worked. It's time to move on.

Respectfully submitted,

A handwritten signature in dark ink, appearing to read "Richard A. Parrish". The signature is fluid and cursive, with a large initial "R" and "P".

Richard A. Parrish
Attorney for
Neighbors Against Garbage

cc: R. Roger Reif

REIF & REIF

RAYMOND R. REIF
R. ROGER REIF
STEVEN SCHWINDT
MARVIN O. BOLLAND
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April 3, 1990

Mayor and Members of the City Council
City of Canby
182 N. Holly Street
Canby, OR 97013

Re: Canby Disposal Company
Conditional Use Application No: CU 89-09(C) CUP 89-11

Dear Mayor and Members of the City Council:

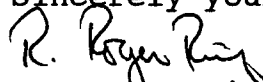
Enclosed is the brief of Canby Disposal Company (Appellant). It is believed all of the information contained in the brief is part of the public record; however, should there be a dispute it is requested that this council review the record and form its own conclusion.

This appeal is filed in good faith because of the sincere belief that substantial errors were made by the Planning Commission which justify reversal. It is respectfully submitted that a review of the evidence as well as the applicable law will cause this council to agree that one or more of the following acts occurred:

1. The Planning Commission did not correctly interpret the requirements of the conditional use, the comprehensive plan or other requirements of law;
2. The Planning Commission did not observe the precepts of good planning as interpreted by this council;
3. The Planning Commission did not adequately consider all of the information which was pertinent to the case.

Finally, I wish to represent that I have never discussed this application with the mayor or any council persons. I have periodically been at places at which council members were present such as town meetings (on railroad property), council meetings, school sporting events, business establishments such as banks, church, etc. However, I have not as much as indirectly discussed this application with the mayor or members of the council. Should a council member disagree I ask he or she to publicly state it on the record.

Sincerely yours,


R. Roger Reif

ROG:mw

BEFORE THE CITY COUNCIL

CITY OF CANBY

APPEAL OF CANBY DISPOSAL CO.

Conditional Use Application No. CU-89-09 (see CUP-89-11)

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HISTORY OF APPLICATION

Canby Disposal Co., by Ordinance No. 793, was given the franchise to collect and dispose of the City waste. As part of the Ordinance, they are required to grant curbside recycling service to all citizens of Canby. Furthermore, pursuant to Section 11, paragraph F, Canby Disposal Co. is to provide recycling services, that is, "now or hereafter required by State laws or regulations." Consequently, Canby Disposal Co. is responsible for the collecting and disposing of all solid waste, waste and recyclable materials within the City of Canby.

Canby Disposal Co. is concerned about the cost of providing services to the citizens of Canby at a reasonable rate. We are all aware of the increased cost of labor and equipment. It should also be noted that State required contributions for unemployment and Worker's Compensation are very high in the waste disposal business. Finally, landfill disposal fees are increasing by leaps and bounds.

Consequently, Canby Disposal made the business decision to apply for a transfer station and operate the facility similar to other communities such as St. Helens, The Dalles, Astoria, Seaside, Forest Grove, Hillsboro, Woodburn, Hood River, Oregon City and Sandy. The present Canby Disposal Co. site, which has been occupied since June of 1978, was obviously inadequate. The site consists of only 2.7 acres and is long and irregular in shape.

In 1982 Canby Disposal Co. had purchased the 4.79 acre parcel of property at N. W. Baker and Third Streets with the expectation

of developing the property. The property was seen as a "natural" since it had the same zoning as its present Southwest Berg property (M-1). The M-1 zoning was the most intensive use zone in the City. It is also believed that the transfer and recycling activity of Canby Disposal Co. was similar in use to the present activities of the industrial park (Potter Industries - recycling of glass, outside storage, cranes, etc.; Johnson Controls - manufacture of batteries, outside storage of lead batteries to be recycled; Auto repair shops and other industrial uses in the industrial park). The property was located on a designated truck route and adjacent to the old sanitary landfill. The Kahuts, sole shareholders of Canby Disposal Co., participated in the development of the property and paid its share of the local improvement district costs.

On or about June 16, 1988, Canby Disposal Co. filed an application that its operation was an outright permitted use and in the alternative, if the outright permitted use was denied, requested a conditional use. The staff recommended denial of an outright permitted use, but recommended approval of the conditional use. After several evenings of public testimony, the outright permitted use was denied, but a conditional use was unanimously approved on September 8, 1988. Attached to the conditional use approval were 25 conditions. Canby Disposal Co. was not particularly happy with all 25 conditions, but agreed to accept the conditions as reasonable, and no appeals were filed by Canby Disposal Co. or any other party.

Part of the approval required (as it should) the approval of all D.E.Q. permits and other State and Federal permits that might be required. On October 10, 1988, Canby Disposal Co. filed its permit with the D.E.Q. In the opinion of the applicant, the D.E.Q. was "slow" in acting upon the application. Part of the delay was the D.E.Q.'s rigid evaluation of the plans and D.E.Q.'s own hearing process.

D.E.Q. did not approve the project within one year and consequently, the project was not completed. Therefore, by City ordinance, Canby Disposal Co. was required to refile its application, which it did on or about November 16, 1989.

The decision was made not to apply for an outright permitted use since the Planning Commission had already made a ruling. It was believed that since there had not been an appeal by Canby Disposal Co. of the denial of the outright permitted use, Canby Disposal Co. should continue to live with the conditional use process as it had agreed to do in September 1988. It was also believed that the Planning Commission would continue to live with its prior commitment and approve this conditional use application as well.

In the December 1989 and January 1990 hearings, Canby Disposal Co. represented that the only relevant changes from the September 8, 1988, application were as follows:

1. The site on Southwest Berg became even more unworkable since the City Council had sited the extension of Southwest Berg to 13th Avenue through the middle of Canby Disposal Co.'s property.

The road, when extended, would go right through Canby Disposal Co.'s main building.

2. Because of opposition by neighbors to its prior application, Canby Disposal Co., on its own and without requests by the City and/or D.E.Q. or other governmental agencies, had decided to increase the size of the building from approximately 4,800 square feet to 30,000 - 35,000 square feet to keep more of the activities inside.

The staff again recommended approval of the project subject to the 25 earlier conditions and an additional five conditions. Canby Disposal Co. agreed to these conditions. (See pages 34-36).

The Planning Commission unanimously denied the application. Canby Disposal Co. appealed within the proper time limitations and has agreed to waive the 120 day provisions of ORS 227.178.

DESCRIPTION OF PROJECT

To begin with, it should first be asked what is a transfer station? The answer can best be made by stating what a transfer station is not. A transfer station is not a landfill, a dump, a disposal site, nor a treatment facility. A transfer station can best be explained by analogy. Imagine the waste can beneath your kitchen sink. Waste products are deposited into the waste basket and when filled, a few days later, it is transferred to the garbage can in your garage. Three days later, your garbage can is put on the curbside, and the garbage is collected by Canby Disposal Co. Under our proposal, the garbage would then be taken to the proposed site and transferred to a large tractor trailer and transported to the disposal site. Therefore, what Canby Disposal Co. is proposing is one additional transfer to a large vehicle which would transport the waste material to the sanitary landfill.

The proposed site is in the designated industrial area of the City. Neighbors would be Johnson Controls (numerous lead batteries stored outside), Potters Industry (cranes, scrap piles, forklifts), an industrial park (auto repair shop, other manufacturing concerns), Ward-Henshaw and Custom Thermoform. All of these industries are located closer to residential areas than the proposed transfer station.

The proposed site is on the designated truck route of N. W. Third Avenue and is located at the intersection with Baker Drive. Entering trucks would turn right on Baker, travel a few yards and enter the site. Exiting trucks would turn right on Baker Drive,

travel a few yards, and turn left on to N. W. Third Avenue. N. W. Third Avenue has been used as a truck route for a number of years. Historically, N. W. Third Avenue was the road used by the logging trucks to get to the old mill and garbage vehicles to get to the landfill. In modern times, the route has been used by Johnson Controls, Potters Industries and the other manufacturing concerns in the area. There has been testimony by Baker Street residents that Canby Disposal Co. would use their property as a truck route. Canby Disposal Co. would not use the area and has no objection if Baker Street, between the industrial park and the residential area, is closed. Canby Disposal Co. admits that the truck route is not ideal; however, it is of long-standing use and adequate to handle the truck traffic. If another route into the industrial area can be developed, Canby Disposal Co. will obviously adhere to any regulations.

Testimony in the 1988 hearings was that Canby Disposal Co. has been averaging 733.94 tons per month that are hauled to the Riverbend Landfill in McMinnville. This is compared to in excess of 1,000 tons per day at Oregon City. The tonnage equates to 36.3 transfer loads (roughly one and one-half trips per day) to the McMinnville landfill. In addition, Canby Disposal Co. hauls several hundred tons monthly to other landfills.

The building was to be approximately 30,000 to 35,000 square feet and would be facing Baker Street. The transfer would take place within an enclosed building, and much of the recycling activities would also take place within the enclosed building or

outbuildings (see conditions of approval, pages 34-36).

The site was to be fenced by an eight foot high, sight obscuring cyclone fence, and there was to be landscaping in front of the building. Much of the recycling area would be behind the building in order to provide further obscurity from vision.

The City's water intake system comes from beneath and along the Molalla River, a few hundred yards to the West of the site. The Molalla River is closer to the present site at S. W. Berg than the proposed site at the intersection of N. W. Third Avenue and Baker Drive. The City contacted Tim Davison from D.E.Q., Bob Rieck from the City of Portland, Dave Phillips from Clackamas County, and the Canby Utility Board. All experts seem to agree that a properly designed, constructed and operated transfer station should result in no greater ground water contamination that would be expected to result from other industrial operations in the surrounding area. (See staff report of December 4, 1989, page 2). The waste water from restrooms and office plumbing were to be drained directly to the City sanitary sewer system. All other waste water from garbage handling areas was to be subject to the City's requirements for sewage pretreatment. (see staff report of December 4, 1989). Don Godard of the Canby Utility Board stated in his letter that he would prefer the proposed site as opposed to the present site. It is most interesting to note and should be emphasized that directly across the street is the sanitary landfill over and through which a major storm drain from the City of Canby has flowed and is

allowed to enter the Molalla River. There have been no documented incidents of water pollution.

In summary, no one loves waste products. However, waste is a product of society in which we all take part in creating. To the best of our knowledge, there has been no serious question on the wisdom or desirability of a transfer station. The opponents' testimony can be summarized by saying, "not in my backyard". (NIMBYS). The City Council is respectfully reminded of two specific provisions of the Comprehensive Plan:

1. The text of the public facilities and services element of the Plan contains the following wording as part of its description of the Canby Disposal Co.:

"The regional need for waste disposal sites should increase public awareness of alternatives to conventional landfill practices. No local landfill sites are recommended, but a local transfer station may be appropriate as part of a regional collection and disposal system."

2. Policy No. 2 of the land use element: CANBY SHALL ENCOURAGE A GENERAL INCREASE IN THE INTENSITY AND DENSITY OF PERMITTED DEVELOPMENT AS A MEANS OF MINIMIZING URBAN SPRAWL.

IMPLEMENTATION MEASURES:

... E. In reviewing development proposals, recognize that the best interests of the overall community must, at times, outweigh the concerns of specific neighborhood groups. While maintaining the quality of life in Canby remains of critical importance, the implementation of the Comprehensive Plan will necessitate some actions will be opposed by individuals or groups as having an adverse impact on certain neighborhood areas. (Emphasis added).

Obviously, there is neighborhood opposition; however, it is respectfully argued that the best interests of the overall

community must outweigh the concerns of specific neighborhood groups.

WHAT IS A CONDITIONAL USE PERMIT

The City ordinance does not define a "conditional use". We can only conclude that the City follows the definition as determined by Oregon case law. "A conditional use is one which is not permitted outright within the zoning district; but a permit for such use may be granted with the approval of the planning commission upon a finding that the use is provided for in the ordinance and meets specified conditions." Milwaukie Company of Jehovah Witness v. Mullen, 214 Or 281, 330 P2d 5 (1958).

The Planning Commission already determined that a transfer station was a conditional use within the a light industrial zone. (see Findings of Fact and minutes of September 1988 Planning Commission meeting). Conditional uses are sometimes troublesome because of their nature; however, the use meets a societal need, and the standard is, therefore, to allow the use within a particular zoning district subject to reasonable conditions. See CLE, Land Use, Section 11.9 (1982).

Canby Disposal is fulfilling a societal need, to-wit: The collecting and transfer of waste and the opportunity to recycle which is required by State law and City ordinance. The City ordinance recognizes this principle of law:

" ... [t]he Planning Commission shall weigh the proposal's positive and negative features that would result from authorizing the particular development at the location proposed and to approve such use shall find that the following criteria are either met, can be met by observance of conditions or are not applicable ..." (emphasis added).

It is the applicant's position that if the criteria were not met,

they could be met by the observance of conditions. The applicant has not been particularly satisfied with all the conditions of approval; however, it accepted them as an effort by the 1988 Planning Commission and staff to address the concerns of the citizenry and desire to insure proper development of the property.

The staff has always recommended approval subject to conditions. The 25 original conditions of the 1988 Planning Commission decision and the additional five conditions recommended to the 1989 Planning Commission by the staff assure the criteria can be met.

In summary, there has already been a determination that a transfer station is a conditional use within a light industrial zone. The conditions adequately address the concerns of the City as a whole.

DECISION OF PLANNING COMMISSION SHOULD BE VOIDED
BECAUSE OF PREJUDGMENT AND PERSONAL BIAS

The participation of Commissioner Wiegand was challenged by the applicant because of his personal bias. Prior to becoming a Planning Commission member, Mr. Wiegand testified as an opponent at a DEQ hearing. He also signed as a sponsor of an article that was distributed to households as a "Neighbor Against Garbage". A copy of the document distributed by "Neighbors Against Garbage" was delivered to City Hall by the applicant's attorney along with a written request that he not be allowed to participate because of his bias. Roger Reif, attorney for the applicant, also questioned whether Mr. Wiegand had written Letters to the Editor or to the City and/or DEQ in opposition to the applicant's proposal. Mr. Wiegand admitted that he testified in opposition and that his name appeared as a sponsor of the document distributed by "Neighbors Against Garbage". He denied that any letters had been written. He stated that he could be impartial and not biased since these events had occurred prior to his appointment as a Planning Commission member and after he became a Planning Commission member, he did not participate further as an opponent.

Land use "quasi-judicial" hearings require decisions by impartial board member under Fasano v. Washington County Commissioners, 264 Or 574, 507 P2d 23 (1973). It is true that the main holding in Fasano itself concerned burdens of proof in the scope of review of local zone changes. However, the court considered it appropriate to add some procedural guidance for

future cases, specifically that parties at county board hearings "are entitled to an opportunity to be heard, to an opportunity to present and rebut evidence, to a tribunal which is impartial in the matter, i.e. having had no prehearing or ex parte contacts concerning the question at issue, and to a record made and adequate findings executed." Fasano 264 Or at 588. In using "i.e." in the quoted sentence, Fasano did not mean to imply that only prehearing or ex parte contacts could destroy the required impartiality. Obviously, self dealing and various types of bias would do also. Fasano did clearly state that board members must maintain impartiality only towards the parties and issues "in the matter", not toward all individuals and all competing interests in the community, generally, and similarly, that the disqualifying contacts must be "concerning the question at issue".

In the present situation, we have a citizen who openly opposed the application of Canby Disposal Co. Not only did he "openly oppose" the application, but he sought support to defeat the proposal.

There is nothing wrong with Commissioner Wiegand's actions as a citizen; however, he stepped over the boundaries when he became a Commission member and became a quasi-judicial official to judge the application of Canby Disposal Co. This case is remarkably similar to the case of McNamara v. Borough of Saddle River, 60 NJ, supra 367, 158 A2d 722 (1960). There, neighboring residents have fought the conversion of a large residential property into a private school, obtaining an enactment of a restrictive ordinance

and joined in a litigation to enforce the restriction. One of the leaders of the protesting home owners was elected to the Borough Council, where he voted to impose space requirements on schools that would further restrict possible enrollment of a school at the disputed site. The New Jersey court held that the councilman's vote required invalidation of this ordinance, not because of his prior political and legal battles to block the proposed school, but because of his strong personal interest as a nearby home owner impaired his ability to vote objectively "in the interests of the citizens at large".

We have a remarkably similar situation here. Mr. Wiegand, like the New Jersey citizen, was a leader in opposing the project. After election (or appointment), he voted to deny the project.

In our neighboring State of Washington, an officer of a lending institution participated as a county commissioner in approving a development that could indirectly benefit his company. The court stated, "The question to be asked is this: Would a disinterested person, having been apprised of the totality of a board member's personal interest in a matter being acted upon, be reasonably justified in thinking that partiality may exist? If answered in the affirmative, such deliberations, any course of conduct reached thereon, should be voided." Swift v. Island County, 87 Wa 2d 348, 552 P2d 175 (1976).

Our Oregon courts recognize that an applicant has certain due process rights under the Fourteenth Amendment to the Constitution. See the case of 1,000 Friends of Oregon v. Wasco County Courts, et

al, 304 Or 76 (1987). The court stated that there would be a three part test to determine whether a person should be disqualified and the action voided: (1) The more the officer or agency purports to act as a court; (2) The closer the issues and interests at stake resemble those in a traditional adjudications; and (3) The more the disqualifying element moves from appearances of the possible temptation and generic self-interest to actual personal interest in the outcome of a decision.

It is respectfully argued that in this case, each element is at the high end of the scale.

To begin with, we had a quasi-judicial hearing which is a more judicial type of hearing than legislative. There were no amendments to the zoning maps, ordinances or comprehensive plans. It was a judicial type of hearing where the Planning Commissioners were the "judges". After listening to the "proponents and opponents" in an adversary type of relationship, the Commissioners (or judges) would weigh the evidence and make the decision. Finally, it is respectfully submitted that the activities of Commissioner Wiegand prior to becoming a Commission member cannot be magically erased by self-brain surgery. Ask yourself, would you, as an applicant, want your judge to be one who has demonstrated personal bias against your application?

It should also be pointed out, which was also made part of the record, that Commissioner Baer had signed up to testify in opposition to the proposal. He did not, however, testify.

The proceedings were sufficiently tainted by personal bias so that the action of the Planning Commission should be voided.

PLANNING COMMISSION IS BOUNDED
BY ITS SEPTEMBER 1988 DECISION

was Sept⁸⁸ Hearing included
Transfer Station?

In September 1988, the Planning Commission found that a garbage transfer station is a conditional use in the light industrial zone. (see Findings of Fact No. 8 and minutes of meeting). The Planning Commission is bound by its prior judicial determination that a transfer station is a conditional use in the light industrial zone. The Planning Commission is bound by its prior legal determination for which there were no appeals. The new findings of the Planning Commission cannot be substituted for the original findings of the Commission. The different doctrines that can apply to this case are Res Judicata, Collateral Estoppel and Law of the Case.

The term "Res Judicata" has been used to refer to the preclusive effect of the claim. The term "Collateral Estoppel" refers to the preclusive effect on the issues. In fact, some writers now refer to these as claim preclusion and issue preclusion instead of by their old fashion names.

The law on each which is described in State Farm Fire and Casualty v. Reuter, 299 Or 155, 700 P2d 236 (1985):

"If a person has had a full and fair opportunity to litigate a claim to final judgment, most courts (including this one), hold that the decision on a particular issue or determinative fact is determinative in a subsequent action between the parties on the same claim (direct estoppel) (citation omitted). The judgment is generally conclusive as well in a different action between the parties as to the issues actually litigated and determined in the prior action if their determination was essential to the judgment (collateral estoppel)."

The application of Res Judicata rules prevents harassment by successive proceedings and promotes the economy of resources in the judicatory process. Dean v. Exotic Veneers, Inc., 271 Or 188, 531 P2d 266 (1975).

The next question is whether the judicial doctrines of Res Judicata and Collateral Estoppel are applicable to an administrative agency facing the same proceeding involving the same parties and arguably the same claim. In North Clackamas School District v. White, 305 Or 48, 750 P2d 485, [petition for reconsideration allowed, 305 Or 468, 572 P2d 1210 (1988)], the court said:

"Although judge-made Res Judicata rules may not be applicable to all administrative proceedings, we should apply them where they facilitate prompt, orderly and fair problem resolution." Professor Davis states this view:

"As a matter of principle, it is competently clear that the reasons behind the doctrine of Res Judicata as developed in the court system are fully applicable to some administrative proceedings. The reasons against a second litigation between the same parties of the same claims or issues are precisely the same for administrative determinations as they are for most judicial determinations. The sound view is therefore to use the doctrine of Res Judicata where the reasons for it are present in full force, to modify it when modification is needed, and to reject it when reasons against it outweigh those in its favor."

The doctrine of Res Judicata (claim preclusion) has been addressed in a land use decision. In Marsh v. Wasco County, 10 LUBA, 58 (1984) the board said:

"The tests of whether two suits are based on the same claim or cause of action for Res Judicata purposes are (1) whether the second suit is based upon the same transaction as the first and (2) whether the evidence

needed to sustain the second suit would have sustained the first."

The "Law of the Case" concept applies to subsequent proceedings involving the same claim, not a subsequent claim. It is more applicable to questions raised on a remand of a case rather than a subsequent case challenging a prior case.

It is clear that the doctrines of claim preclusion and issue preclusion apply to our case. The second conditional use application is the same as the first application. The evidence of Canby Disposal Co. used in the second application was identical with the first with the exception that the building would be larger (changed from 4,800 sq. ft. to 30,000 to 35,000 sq. ft.) and the City Council siting of the extension of S. W. Berg to 13th Avenue. The opponents and the city had the right to appeal the determination in the first case, but chose not to do so. Those findings of fact now carry judicial weight as being conclusive to subsequent claims and issues that are contrary to the original findings. These same parties are also barred from collaterally attacking the prior decision. The place to attack the prior decision was a direct appeal not a second subsequent proceeding. The Federal District Court in Oregon stated it better:

"The right to seek judicial review from an administrative determination is an essential factor in determining whether to apply the doctrine of collateral estoppel to an administrative decision. (citations omitted). Where a party had a full and fair opportunity to litigate a issue in an administrative proceeding but failed to seek judicial review at the appropriate time, it is necessary and sound to bar re-litigation of the same issue in a subsequent judicial proceeding...the integrity of the administrative process is threatened when agencies' intentions and participants' expectations as to the

finality of administrative decisions are not upheld in the face of subsequent challenges." Sierra Club v. Block, 576 F Supp 959 (Or, 1983).

In summary, there were no appeals, and the Planning Commission is legally bound to follow prior judicial decisions. Even in retrospect if they feel a wrong decision was made, they cannot change the result.

RESPONSE TO FINDINGS OF FACT TO SUPPORT DENIAL
OF CONDITIONAL USE APPLICATION

Criteria A. THE PROPOSAL WILL BE CONSISTENT WITH THE POLICIES OF THE COMPREHENSIVE PLAN AND THE REQUIREMENTS OF THIS TITLE AND OTHER APPLICABLE POLICIES OF THE CITY.

Finding

The Planning Commission found that there was no information on the record which demonstrates that this development will not have a negative impact on surface and/or ground water.

Response

This is a de novo review and the City Council can look to the record. There is abundant information rather than "no" information on the record.

1. To begin with, the Canby Utility Board, in a letter from Don Godard to the City, stated he saw no adverse impacts and that this site was preferable to the present site of Canby Disposal Co.

2. The City contacted Tim Davison from DEQ, Bob Rieck from the City of Portland, Dave Phillips from Clackamas County, and the Canby Utility Board. All experts seem to agree that a properly designed, constructed and operated transfer station should result in no greater ground water contamination than would be expected to result from other industrial operations in the surrounding area. (See staff report of December 4, 1989, page 2).

3. The conditions of approval of the 1988 application were that the proposal meet all DEQ and other regulatory agency requirements which monitor water control.

4. Waste water from restrooms and office plumbing must be drained directly to the City sanitary sewer system. All other waste water from garbage handling areas was to be subject to the City's requirement for sewage pretreatment. There was to be a discharge of the waste water into the City sanitary sewer system for treatment purposes.

5. The record also indicates a major storm drain running through the abandoned landfill into the river. This occurs immediately south of the applicant's property. There have been no reports of contamination.

6. The record also indicates the engineering to have a holding tank for testing purposes prior to the discharge of the water into the City sanitary sewer for treatment purposes.

7. The record indicates that lead batteries are stored outside Johnson Controls immediately east of the proposed site. There is no indication that there is any ground water contaminants from this storage.

Finding

The Planning Commission found that Policy No. 3-R was not met: "Canby shall require that all existing and future development activities meet the prescribed standards for air, water and land pollution." The Commission found that there was insufficient evidence on the record to indicate that this condition could be met because DEQ lacked time and manpower to enforce regulations and that the City has been unable to enforce conditions upon the applicant on another site.

Response

Canby Disposal Co.'s alleged poor relations with governmental agencies are grossly exaggerated. A review of the record discloses that there were no more than three disputes.

1. There was a three party dispute between Clackamas County, Canby Disposal Co. and its landscaper at the recycling center in Milwaukie, Oregon. Basically, the dispute was over the finishing of landscape in a certain area and some storage of some containers. Dave Phillips of Clackamas County, Solid Waste Disposal, testified that the matter was resolved.

2. There is a letter from the City of Canby to Fred Kahut concerning a fence dispute between Canby Disposal Co. and Marv Dack.

3. There are some letters concerning the transfer of waste products from the present S. W. Berg site. The DEQ is permitting the transfer until this application is resolved. Although the opponents spend a great deal of time discussing these three items, there should be little doubt that these types of complaints seriously endanger the City's health, welfare and safety.

The finding of lack of "manpower" and/or "time" is a unique argument. It is respectfully submitted that both public and private industry, as well as administrative agencies, sometimes believe there is a lack manpower and time. We create more manpower when there is a need, and governmental bodies allocate the available tax money accordingly. If the finding of the Planning Commission was adopted, then there would be no further development

of any type in this City. If the City cannot find the manpower and time to enforce this application, then they lack the manpower to supervise any development. Surely, the City Council will not agree with this finding of the Planning Commission.

The Planning Commission alleges that there was insufficient information to show that the prescribed standards for air, water and land pollution would be met. The standards are established by the DEQ. The application was properly made subject to DEQ approval. It is the responsibility of the DEQ whether the prescribed standards for air, water and land pollution are met. We have stated that we will meet the standards of all applicable agencies. Condition No. 1 of the 1988 approval adequately addresses this issue.

Criteria B. THE CHARACTERISTICS OF THE SITE ARE SUITABLE FOR THE PROPOSED USE CONSIDERING SIZE, SHAPE, DESIGN, LOCATION, TOPOGRAPHY, EXISTENCE OF IMPROVEMENTS AND NATURAL FEATURES.

Finding

The Commission found there was not adequate information in the record to show that the new site would be large enough to handle garbage for a projected population of 20,000.

Response

The record indicates that the size is adequate to handle our present needs and that there would be approximately one and one-half trips per day to the disposal site. This is not a landfill. It is merely a transfer station. The testimony was that the site was sufficiently large to handle the needs of the City of Canby and

surrounding area. The record indicates that Canby Disposal Co. averages 733.94 tons of garbage per month. The record also indicates that this an average of one and one-half trips per day to the landfill. If the City waste doubles, then Canby Disposal Co. would make three trips per day to the landfill. The record indicates that Oregon City averages well over 1,000 tons per day on a similarly sized site. Obviously, there is enough room for the transfer of garbage.

Finding

The Planning Commission found that the site plan did not accurately reflect the size and dimension of the property of the proposed improvements.

Response

It must be remembered that the staff could not find the original submitted drawings. At the eleventh hour, new copies were provided by the applicant to the City. It is respectfully submitted that a dispute between the drawings and the Assessor's map is not realistic grounds to deny this application. These minor matters would have been addressed in the site plan review process of Chapter 16.48. After the approval of the conditional use, the site plan would be submitted to the City for its review, and these "minor inconsistencies" could be thoroughly examined. Please note also that proposed Condition No. 29 provided that:

"29. The applicant shall submit a site plan for the proposed development. The following items shall be considered in the review of the plan: (1) Traffic circulation (2) Off-street parking (3) Landscaping (4) Fencing (5) Exterior lighting (6) Building and outdoor storage setbacks (7) Infrastructure. ..."

Criteria C. ALL REQUIRED PUBLIC FACILITIES IN SERVICES EXIST TO ADEQUATELY MEET THE NEEDS OF THE PROPOSED DEVELOPMENT.

Finding

The Commission found that there was no information submitted regarding how well the existing truck route could handle the increased traffic and congestion. Furthermore, the record did not adequately show the City, County of State had enough available staff to adequately monitor operations and conditions.

Response

The record and the Comprehensive Plan show that this particular route is the designated truck route of the City and that it is used for heavy trucks from Johnson Controls, Potters Industries, etc. The record also indicates that it was previously used for logging trucks, and there was testimony that there was an adequate rock base underneath the present paving by Ron Tatone, who was then the City Engineer.

Finding

The Planning Commission also found that three other facilities already exist within the area to handle all of Canby's current projected needs for garbage service and recycling.

Response

This finding of the Planning Commission is absolutely without merit and unresponsive to the applicant. There might be other companies that would like to have the franchise; however, there is absolutely no information in the record as to the cost for the additional transportation, costs or fees that these other companies

would charge the citizenry of Canby. The Planning Commission is absolutely disregarding the fact that Canby Disposal Co. has a franchise with the City which has a number of years to run.

Finding

The Commission concluded that the record did not contain sufficient information to show that all required public facilities and services exist to meet the needs of the proposed development.

Response

This is very much in error. The record is very clear that the staff recommended approval in 1988 and 1989, and there was no indication from staff that there was not the required facilities and services.

Finding

The Commission indicated that there is no demonstrated need for a new garbage transfer facility and recycling center in the City of Canby.

Response

This is hardly a finding. The applicant and several witnesses testified as to the importance of recycling, the inadequacy of the present facility, the cost of disposal fees at landfills and the increased cost of labor and equipment to make so many trips to the landfill. The Comprehensive Plan in the text of the public facilities and services element of the plan recited that a local transfer station may be appropriate as part of a regional collection and disposal system. Furthermore, introduced into the record were editorials in the local newspaper and from the Chamber

of Commerce citing the need for a transfer facility and recycling center in the City of Canby.

Criteria D. THE PROPOSED USE WILL NOT ALTER THE CHARACTER OF THE SURROUNDING AREAS IN A MANNER WHICH SUBSTANTIALLY LIMITS OR PRECLUDES THE USE OF SURROUNDING PROPERTIES FOR THE USES LISTED AS PERMITTED IN THE ZONE.

Finding

The Commission found that this requirement was met.

PROPOSED FINDINGS OF FACT

A. The proposal will be consistent with the policies of the Comprehensive Plan and the requirements of this title and other applicable policies of the City.

1. This application is consistent with the Policy #1 of the Economics Element of the Comprehensive Plan in that it provides increased industrial development at a site which has been found to be suitable for the purpose.

2. It is consistent with Policies #1 and #2 of the Land Use Element of the Plan in that it allows for industrial development of a previously undeveloped site but assures that the development will have adequate conditions of approval to minimize conflicts with surrounding properties.

3. The site is situated at the intersection of two officially designated truck routes. Both N. W. Third Avenue and N. Baker Drive are labeled truck routes. N. W. Third Avenue is labeled as an arterial road in the street circulation map. Both streets are on a well established truck route carrying numerous trucks on a daily basis.

4. The Canby Disposal Company is specifically listed in the Public Facilities Element of the Comprehensive Plan as a local service provider, acting under franchise agreement with the City of Canby. The plan states that, "... a local transfer station may be appropriate as part of a regional collection and disposal system."

5. The development of a transfer station with adequate capacity for future expansion conforms with the City's overall plan for growth. The proposed site is nearly twice as large as the existing irregular shaped parcel. The site should be large enough to handle the present and anticipated growth needs of the community for many years.

6. The City of Canby has historically allowed fairly intense industrial operations to locate within the M-1 zone.

7. This application is consistent with Policies #2-R and #3-R of the Comprehensive Plan dealing with pollution control. The conditions of approval include adequate safeguards for environmental protection. Of particular note are conditions numbers 1, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 18, 19, 24, 27 and 29, all of which deal directly with environmental issues raised in the hearing process.

8. A garbage transfer station is a conditional use in the light industrial zone. The City has no property that is zoned

for heavy industrial use. The conditions of approval will help to assure that this operation is compatible with other industrial uses allowed in the zone.

9. Canby Disposal Co. is fulfilling a societal need, to-wit: the collection and transfer of waste and the opportunity to recycle which is required by State law and City ordinance. The City has contacted Tim Davison from DEQ, Bob Rieck from the City of Portland, Dave Phillips from Clackamas County and the Canby Utility Board. All experts seem to agree that a properly designed, constructed and operated transfer station should result in no greater ground water contamination than would be expected to result from other industrial operations in the surrounding area.

10. The conditions of approval require that the proposal meet all DEQ and other regulatory agency requirements which monitor water control.

11. The conditions of approval reasonably protect the City's water system from contamination. Waste water from restrooms and office plumbing must be drained directly to the City sanitary sewer system. All other waste water from garbage handling areas is to be subject to the City's requirement for sewage pretreatment. Furthermore, there is to be a discharge of the waste water into the City sanitary sewer system for treatment purposes.

12. There is a major storm drain running through the abandoned landfill adjacent to the subject site. The storm drain runs through the landfill and into the River. There have been no reports of contamination.

13. The City's sanitary sewer should be protected since the applicant is required to have a holding tank for testing purposes prior to the discharge of the water into the City sanitary sewer.

14. Lead batteries are stored outside Johnson Controls immediately east of the proposed site. There is no indication of any ground water contaminants from this storage.

15. The location is relatively close to the freeway and Highway 99-E which places an increasingly important role in the transportation of the waste products. Canby has a stated policy of encouraging and expanding industrial development and to provide for public facilities and services which keep pace with growth. All of these planning efforts necessitate improvements in the City's garbage franchise service.

16. The Comprehensive Plan recognizes the critical relationship between the adequacy of public facilities and

services and the rate of community growth. If the City cannot provide adequate services and facilities, the City should not continue to grow. A transfer station is essential to the continued growth and proper maintenance of the City.

17. A goal of the Economic Element of the Comprehensive Plan is to diversify and improve the economy of the City. The Plan recognizes that the basic segment of the economy includes both industrial and commercial activities. In essence, a garbage service is essential to support these activities. The Canby Chamber of Commerce recognized this principle when it recommended to the Planning Commission approval of this application.

18. A policy of the City is to promote increased industrial development of appropriate locations. The land is zoned industrial, has been vacant and is a logical place to establish a transfer station.

19. A goal of the Energy Conservation Element of the City is to conserve energy. By allowing a transfer station, there will be fewer truck trips to the sanitary landfill and recycling centers. As a consequence, less energy will be used which can help minimize the disposal fees.

20. There are several recycling activities along waterways in the area (such as the Schnitzer Iron Works). Recycling centers and transfer sites can be managed so as not to become a threat to water supplies.

21. Any visual pollution is minimized by the eight foot, sight obscuring fence, most activities within the building, enclosed outbuildings, storage of various items, limits to height of stockpiles, setbacks and stockpiling behind the buildings.

B. The characteristics of the site are suitable for the proposed used considering size, shape, design, location, topography, existence and improvements in natural features.

1. All of the required public facilities are in place to properly serve this development. The site is located in an industrial area with utilities and street improvements provided through a local improvement district.

2. The subject property is located at the intersection of two City streets which have been designated as truck routes.

3. The subject property and all immediately surrounding properties are zoned M-1 (light industrial). This zoning conforms with the designation for the property on the land use map of the Comprehensive Plan.

4. The site is level and contains no existing structures. It has no natural features which would limit the use of the property.

5. The proposed site is rectangular in shape and nearly twice as large as the present parcel. This site should be large enough to handle the present and anticipated growth.

6. The operating characteristics of the proposed use are similar to other industries which exist in the zone. Directly across the street are Potters Industries and Johnson Controls. Potters Industries recycles glass which is stockpiled outside. Johnson Controls stores lead batteries outside. The industries within the area use heavy trucks, loaders and other heavy equipment. There is considerable outside storage and other activities that would be considered similar to the transfer and recycling activities of Canby Disposal Co.

7. Condition #29 requires a site plan review for the proposed development. The following items will be considered in the review of the plan:

- (a) Traffic circulation
- (b) Offstreet parking
- (c) Landscaping
- (d) Fencing
- (e) Exterior lighting
- (f) Building and outdoor storage setbacks
- (g) Infrastructure

The site review process will help assure a proper development plan.

C. All requirement facilities and services exist to adequately meet the needs of the proposed development.

1. The site has water and electric service available from the Canby Utility Board. Sanitary sewer service is available from the City of Canby. Special "pretreatment" requirements are expected to apply to sewage discharged from the loading area of the transfer station in order to assure that toxic materials do not reach the City's waste water treatment plant.

2. The present truck route is the most acceptable means of routing truck traffic into and out of the developing industrial area.

3. The conditions of approval will adequately protect the groundwater of the area, which is believed to be the source of water for municipal distribution. The conditions specify that the runoff from any area where garbage is handled is to be collected in the sanitary sewage system for treatment.

4. The City, with assistance from other regulatory agencies, has sufficient manpower to monitor the operation.

5. The present truck route is capable of handling the additional truck traffic.

D. The proposed use will not alter the character of the surrounding areas in a manner which is substantially limits or precludes the use of surrounding properties for the uses listed as permitted in the zone.

1. The proposed use is similar to the industrial operations existing in the zone in terms of operating characteristics and effects on neighboring properties.

2. Nothing about the proposed development is expected to hinder or preclude the development of surrounding property which are also industrially zoned.

3. The conditions placed on the property assure compatibility with surrounding properties within the zone.

PROPOSED CONDITIONS OF APPROVAL

1. Applicant to receive and continually comply with all required permits of the Oregon Department of Environmental Quality (DEQ), and any other state or federal agencies with regulatory authority over this sort of operation.
2. Only trucks owned by, or under contract to, Canby Disposal or K.B. Recycling are to use the transfer station. Garbage may be brought to the site only from that portion of Clackamas County where Canby Disposal has been granted a franchise as of August 29, 1988. Recycle materials may be brought in from outside the garbage franchise area.
3. No private individual will be allowed to utilize the transfer station for unloading personal garbage, except during the annual spring clean-up time where this is offered as a community service.
4. A perimeter fence of either solid or slatted construction is to be provided to help minimize visual impacts. The fence to be a minimum of eight (8) feet in height and is to provide for adequate vision clearance at each driveway. If the applicant chooses to fence an area which is smaller than the entire tax lot, the fenced area can later be expanded without requiring the approval of a new permit.
5. Wastewater from restrooms and office plumbing may be drained directly to the City's sanitary sewer system. All other wastewater from garbage handling areas is to be subject to the City's requirements for sewage pretreatment.
6. No storage or handling of garbage is to occur on any unpaved surface. All parking, loading and dumping areas to be paved of concrete. All roads and driveways to be paved of asphalt or concrete and properly drained. Outdoor areas used for the storage of dumpsters or drop boxes are to be completely graveled and adequately maintained to prevent tracking dirt or mud onto the public street.
7. The applicant is to establish and maintain a daily litter clean-up process on the site and along the truck route coming to the site from Highway 99-E. If it becomes necessary at any time for the City to conduct a clean-up of the public roadway, the applicant will be given seven (7) days written notice of the City's intention to conduct the clean-up at the applicant's expense. The applicant is to post a \$1,000 bond or other surety, to the satisfaction of the City Attorney, strictly for this purpose.
8. The site is not to handle any sewage sludge or septic tank pumpings.

9. The applicant is not to knowingly handle any electrical transformers or known hazardous or toxic waste at the site. Any lead-acid batteries handled at the site are to be stored indoors.
10. No burning of any kind is to be permitted at the site.
11. Any wash down locations for trucks, trailers, or other equipment are to be under cover and drained to the sanitary sewer system as approved by the City Public Works Department.
12. Trucks and trailers hauling garbage to or from the site to be of leak-proof construction, as defined by DEQ.
13. Appropriate procedures are to be taken to minimize problems from rodents, flies, birds, etc. The applicant is to comply with any lawful order or requirement of the City, the County, or DEQ for the abatement of any such nuisances.
14. Loads are to be hauled to the landfill as soon as they are full. In no case is garbage to remain on the premises for longer than 72 hours. All putrescible garbage on the site is to be kept in trucks or other covered containers. Transfer area is to be washed down nightly. On-site storage of full garbage containers is to be kept to a minimum.
15. Normal growth of the Canby Disposal operation in terms of such things as amount hauled, number of employees, number of trucks, etc. will not be regarded as an expansion of this conditional use, and will not require additional public hearings.
16. Utility easements, water and electric services and street lighting to meet the requirements of the Canby Utility Board.
17. A stop sign to City Public Works standards is to be provided at the applicant's expense and installed at the corner, controlling southbound traffic on N. Baker Drive.
18. No dumpsters or drop boxes contained any putrescible waste shall be stored outside the enclosing building. In no case shall dumpsters or drop boxes be stacked on top of one another outside the enclosed building.
19. The site is to be inspected at least every six months by the City Building Official. Any cracks that are found to have formed in the concrete in the garbage handling area shall be immediately sealed to prevent the entry of any run-off.
20. Other than garbage trucks engaged in the normal pick-up activities, no truck traffic is to use N. Baker Drive beyond the limit of the designated truck route.

21. Unless enclosed within a building, all recyclables stacked at the site shall not exceed twelve (12) feet in height and shall be set back from the perimeter fence at least thirty (30) feet.

22. Corrugated paper and newsprint shall be handled within a covered building. Once bailed, it may be stacked outside, provided that the stacks do not exceed twelve (12) feet in height.

23. Tin cans are to be handled within a three-walled structure on a concrete pad.

24. Oil for recycling is to be kept in an above-ground tank on a concrete pad and shall be subject to DEQ requirements for spill containment.

25. Before handling any other recyclable materials, unless required by law, the applicant is to secure the approval of the Canby Planning Commission acting on an expansion of this conditional use permit without additional fees.

26. The applicant shall be subject to the scope, guidelines and conditions contained within the City's Franchise Ordinance #793.

27. The applicant shall comply with all Federal, State and local laws, rules and standards as applicable to solid waste management and recycling.

28. The applicant shall obtain and comply with all necessary Federal, State and local permits required for construction and maintenance of the solid waste transfer station and recycling facility.

29. The applicant shall submit a site plan for the proposed development. The following items shall be considered in the review of the plan: (1) Traffic circulation (2) Off-street parking (3) Landscaping (4) Fencing (5) Exterior lighting (6) Building and outdoor storage setbacks (7) Infrastructure. Any conditions imposed as a result of staff's site plan review shall be appealable to the Planning Commission pursuant to Chapter 16.48.060 of the Canby Municipal Code.

30. The applicant shall designate an employee as the Operations Manager, who will be responsible for all of the conditions as approved by the Planning Commission. The Operations Manager will be required to be liaison with the City staff on all issues related to the operation of the facility and continued compliance with the conditions of approval.