CANBY CITY COUNCIL

REGULAR MEETING

JUNE 21, 1989

(Televised live on Channel 5.)

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

Also present: Administrator Michael Jordan, City Attorney John Kelley, Public Works Director Rusty Klem, Police Chief Jerry Giger, Library Director Beth Saul, Swim Center Director Scott Nelson, Public Works Supervisor Roy Hester, City Recorder Marilyn Perkett, Marv Dack, Attorney John Shurts, Dorothy Knight, Hazel Adams Bob Traverso, Robert Graham, John Beck, Dr. E.E. Davies, and John and Sandy Torgeson.

Mayor Kopelk called the regular session to order at 7:00 p.m., and immediately recessed to a workshop session with Chief Giger and Lieutenant Scharmota on the future direction of the Canby Police Department.

Mayor Kopelk reconvened the regular session at 7:30 p.m., followed by the flag salute and meditation.

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

**Councilman Daniels moved to approve as distributed the minutes of regular session June 7, 1989, seconded by Councilman Carroll and approved uanimously.

CITIZEN INPUT ON NON-AGENDA ITEMS: Mayor Kopelk welcomed Councilor Carroll back from his trip to our prospective Sister City, Kurisawa, Japan. Mr. Carroll presented Mayor Kopelk with gifts from Kurisawa Mayor Yamada.

PUBLIC HEARING: Mayor Kopelk opened the public hearing on the 1988-89 Supplemental Budget at 7:35 p.m.

Administrator Jordan reviewed the $46,000 Supplemental Budget.

Proponents: None voiced.

Opponents: None voiced.

Mayor Kopelk closed the public hearing at 7:38 p.m.

**Councilman Taylor moved to approve Resolution No. 426, A RESOLUTION ADOPTING A SUPPLEMENTAL BUDGET in the amount of $46,000, for the 1988-89 fiscal year. Motion seconded by Councilman Carroll and approved 6-0.

COMMUNICATIONS: None presented.

NEW BUSINESS: **Councilman Carroll moved to approve payment of accounts payable in the amount of $106,115.65, seconded by Councilman Prince and approved by roll call vote, 6-0.

Administrator Jordan informed the Council that the City received only two bids for the mausoleum project. Staff recommended the low bid from Milne Construction, Portland, Oregon, in the amount of $114,065. **Councilman Daniels moved to accept the recommendation from staff and approve the bid from Milne Construction in the amount of $144,065, for construction of a mausoleum at Zion Memorial Cemetery and to instruct staff to prepare the implementing ordinance. Seconded by Councilman Prince and approved 6-0. Roy Hester informed the Council that the project should be complete by October 1st and the latest date of November 1st.

Recorder Perkett informed the Council that both the Library Director and Swim Center Director had made recommendations for appointments to positions on their prospective advisory boards. Also, the Canby Adult Center has four positions that expire in July, and only two members are eligible for reappointment, this will be on the July 5th agenda. **Councilman Carroll moved to reappoint Dave Traaen to a four year term on the Library Advisory Board and Charles Driggers to a three year term on the Swim Center Advisory Board. Motion seconded by Councilman Taylor and approved 6-0. Attorney Kelley also noted that the City would like to change expiration dates on the terms of the City Budget Committee from March to July. The change would be beneficial due to the budgeting process. Council gave a general consensus for approval for this proposal.

ORDINANCES & RESOLUTIONS: Administrator Jordan explained that Resolution No. 425, was a "housekeeping" document to balance the current budget. **Councilman Prince moved to adopt Resolution No. 425, A RESOLUTION AUTHORIZING TRANSFER OF FUNDS IN BUDGET LINE ITEMS TO BALANCE THE 1988-89 BUDGET in the amount of $17,000. Motion seconded by Councilman Daniels and approved 6-0.

UNFINISHED BUSINESS: The Council next considered the Torgeson appeal of a Planning Commission decision from an April 10, 1989, public hearing regarding Mr. Torgeson's right to operate a gravel extraction operation in a residential zone. Attorney Kelley noted that this issue had been continued from the June 7th meeting. Mr. Kelley reviewed Municipal Code Section 16.88.140 (C), which sets for the criteria for an appeal, specifically, that no new evidence can be heard and the Council must make their decision based upon the record.

Mayor Kopelk noted that established "ground rules" for this appeal was that each side would have twenty-five (25) minutes to make their presentation.

(**NOTE**: The following is verbatim transpcript according to the tape of the June 21, 1989 Council meeting.)

SANDY TORGESON: Mayor Kopelk, members of the Council, my name is Sandra Torgeson, 34819 S. Dickie Prairie Road, Molalla, Oregon. I am co-owner of the property which is the subject of this hearing. I hope you've got your pencils ready, because I have a lot of material to cover, all argument on the record and a short amount of time to do it. So after I'm through, if you think I've said anything relevant and you'd like for me to review some of it, I'd be glad to do that.

We have appealed the April 10, 1989, decision of the City Planning Commission for the reasons that we believe the CIty staff and Planning Commission did not correctly interpret the interpretation, the requirement of the Land Development and Planing Ordinance, the Comprehensive Plan, or other requirements of law, specifically, City and State Statute and the Constitutional Bill of Rights. There will be much of argument tonight as to whether we have a right to say anything in the manner because we did not attend the commission hearing being appealed. When we are through with our twenty-five minute argument there will be no doubts in your mind as to our rights and what your decision must be.

Our main contention is that we were denied due process as is guaranteed by the Fourteenth Amendment of the Bill of Rights. The first violation of our right to due process was in the holding of the Dack appeal hearing in the first place. State Statues ORS 227-1781 and City Ordinance 10.8.40 (E), plainly state that under no circumstances shall the City take further action on an application, including appeals, after 120 days from the filing of the complete application which was on April 1, 1986. Understanding this, any appeals filed in the matter after April 1, 1986, are statutorily prohibited from consideration. This should have been part of the criteria used to evaluate the legality of the appeal. Violations of its own regulations by the City constitutes violation of due process, especially when it is profoundly injurious to a citizen in a proceeding to take away a previously acknowledged right.

In this letter of April 6, 1989, to us, the City Attorney made the arbitrary decision that a hearing would be held. He based this on his erroneous belief that LUBA had said that Dack must have a hearing before the Planning Commission. First of all, not only does LUBA lack authority to override clear and unambiguous statues, but LUBA did say--did not say that Dack must be given a hearing. Page 5, lines 14-16, of the Dack-LUBA final opinion, which you have, states Dack is --quote, entitled to written notice of the City Administrator's April 4, 1989, decision. And the City the City has not given him such notice, unquote. Page 13, line 21, of that opinion, simply states that LUBA is remanding the case back to the City of Canby. Remand, means that LUBA is sending the appeal back for reconsideration. If a hearing was mandatory, LUBA would have reversed the City's decision and ordered the hearing. The opinion clearly states that LUBA remanded the case back because the City denied it for the wrong reasons of late filing. If the City wished to abide by LUBA's instructions, the first obligation it had was to fulfill

its duty to send out the notice of the original 1986 decision to all the neighbors within 200 feet. Notwithstanding the 120 day limitations statute, we just discussed, this action would have at least made it possible to consolidate all of the appeals into one hearing and thus save the City a tremendous amount of money.

Furthermore, a continued refusal to do your duty, denies Torgeson's the equal protection afforded to applicants under the laws of the United States, Oregon and the City of Canby. As it is, unless you recognize the 120 days limitation or send out the required notices, the time for the appeal tolls on and on and on. So even if we succeed here, we are subject to a new appeal at any time.

Secondly, the City Code lists the duties of the City Attorney, and we could find no provision in that statue for decision making authority. Although it is perfectly within the right of the City to retain legal counsel, if he is granted decision making power then a procedure for appeal is required in City statue as is done for City Administrators to protect the right of due process for anyone adversely affected by that decision. We contend that the commission erred in not dismissing the appeal prior to full hearing based on the above criteria and request that the City Council reverse the decision and dismiss Mr. Dack's appeal.

If we were to pretend that none of what I have just said was relevant, there are still other reasons why Mr. Dack's appeal should have been dismissed prior to the hearing.

The first reason is that Torgeson's withdrew their application prior to that hearing. We did this based on the fact that the City Attorney's letter to us dated February 27, 1989, set forth criteria for the evaluation of our application which was different from the value---criteria we understood to be applicable three years ago. Under that situation, we were entitled to choose if wanted to make an application. Specifically, he stated that the only criteria which was to be considered was that not nonconforming use must be determined from the date of zoning on July 15, 1963. We believed that Bob--that Bud Atwood was making a decision using a controlling date of 1978 for the City and states controlling date of 1972. You'll recall from listening to the tape that Mr. Bob Traverso's testimony at the commission hearing verified that he was under a similar understanding after speaking to Mr. Atwood in 1986.

The City Attorney made another unauthorized, arbitrary decision and denied to accept that withdrawal. The first reason he gave was that it was his belief that LUBA had said that the City Administrator's 1986 decision was final. Once again, the City Attorney erred. This matter is not truly appealable until Bud's letter is final and according to LUBA, the letter doesn't achieve finality status for appeal until the neighbors are notified. That LUBA final opinion, page 4, line 16. LUBA never ever said that their opinion substituted for this notification in affecting a final decision for appeal purposes.

At the hearing the City Attorney gave a second reason for denying

to accept our withdrawal. He cited Robert Randall vs. City of Wilsonville. This is a case which Mr. Dack's attorney researched for Mr. Kelley. Note that the letter sending a copy of this case to Mr. Kelley was dated April 4, 1989, the same date as our letter of withdrawal. How Dack's attorney's knew to research an action which had not yet been put on the public record is a mystery to us. At any rate, the City Attorney quoted the Wilsonville case as finding that an applicant could withdraw his application only prior to the issuance of written findings. This case is only partially applicable to the Torgeson matter for the following reasons. Although there were written findings issued in our case, unlike Wilsonville we were not at the highest level of City authority. Adjudication has been defined in various law proceedings as the determination by highest or ultimate authority of an agency of rights, duties, privileges, benefits, etc., of a specified person. Your own zoning ordinance supports this at 10.8.40 (B), regarding finality of commission decisions. Wouldn't it be reasonable to assume that the rule carried down to decisions by a City Administrator as well? Furthermore, a decision which is final as to one party, should also be final as the other party, absent clear statutory authority to the contrary. Even the opponents on Wilsonville case states on page 198, with note to which you have, we believe the public is better served by holding the written order to be effective for both parties. Yes, Bud made written dec--er findings in our case. Nevertheless, LUBA ruled that the order wasn't final for Dack's purposes until the written findings were mailed to him. In other words, just because written findings are made doesn't mean you can stick them in a desk draw and call them final. You have to deliver to all the parties. Therefore, we conclude that this--if this decision was not final to exhaust appeal tolling it was not final to preclude withdrawal. It is our contingent that the City Attorney violated our right to due process by making this decision without giving Torgeson's the benefit of even arguing its validity before the commission and the Council should so rule by reversing the commission's decision and dismissing the Dack appeal.

The next thing we will address is the fact that even if the appeal had been legally admissible, in view of the previously discussed circumstances, Dack's July 11, 88' appeal letter, or his January 16, 89' appeal letter, still does not constitute a proper appeal. It is not proper because it does not meet the criteria for proper form as set out by LUBA in its Dack - LUBA opinion, page 8, lines 10-19. Specifically, the July 11, 88' letter is not properly addressed to the Planning Commission. The January 16, 89' letter is properly addressed but relies on the July 11, 88' letter to provide further details of appeal. Neither letter identifies the precise date of the decision being appealed and both letters refer to a non existent decision, the granting of a - quote - nonconforming use status for the aggregate removal operation on the Dietz-Torgeson Ranch. Look at Bud's letter, it does not contain that language.

Furthermore, the City did not treat it as proper appeal in July, of 88, in that they failed to follow all the proper quoted

procedures for processing an appeal. Instead, the commission treated it more as a nuisance and dismissed it upon receipt without so much as taking a word of testimony from either opponents or proponents of the appeal request. This denial of due process hurt both parties, in this case and sent Dack to LUBA. Additionally, as you will hear, the City did not follow proper procedures of the January 16, 89' appeal letter either. The opposition will probably argue that these are technicalities and irrelevant, but LUBA is very big on technicalities. Furthermore, please don't be deceived into thinking that LUBA considered the July 11, 88' valid as to form, they never ruled on form. They ruled on the argument that the letter could not be dismissed for untimeliness. They can only rule on what's put before them as an argument. We submit to you, that prior to going forward with the appeal hearing, the commission should have considered the additional evaluation criteria of determining whether the appeal request was proper in form. Therefore, we request that the Council reverse the commissions decision and dismiss Dack's appeal.

In the surprising event that the Council has still not seen its duty to reverse the commission decision from the argument presented thus far, we will move on the procedural errors in notice and hearing itself which so severely violated Torgeson's right to due process.

The notice in this matter must be adequate to reasonably inform the parties of administrative proceedings which may directly and adversely affect their legally protected interest and the issues in controversy. Additionally, it must follow the format of ORS 197-762, for notices involving applications for land development. The February 27, 89' letter, which we received from the district attorney, we assumed was the notice. Because that was the only notice we every got. I did notice that there was a notice that was published in the paper, in the file, but I don't know if it was sent to anyone. The Oregon Statue requires that notices give an indication that the hearings--what the hearings are going to be about. Mr. Kelley's letter did not give any indication that the hearing were going to include acceptance and charges of fraud, discussions of penalties for Torgeson's, and reclamation decisions. The letter did not set out the street address or the easily understood geographical reference to the subject property. The letter did not state, and this is very important to our case, the letter did not state that the failure to raise an issue in person or by letter, precludes appeal and that failure to specify to which criterion the comment is directed precluded the appeal based on that criterion. We were entitled to know that prior to the hearing. One of the tests of whether a notice is effectual is whether the defendant should have anticipated the affects and orders possible. The notice was not adequate and we did not understand our rights. Furthermore, we saw no evidence in the record that the City had followed the provisions of City Code 10.8.30 (D), in issuing the notice. We could not find any evidence that the notice of the hearing was sent to the neighbors within 200 feet of the property as required. This was excusable in the original 1986 decision, because Bud didn't know he had

made a decision --and thereby he had made an opinion. Such action is not excusable in this appeal. No notice was posted on our property ten days prior to the hearing as required. We also received a copy of the letter to Mr. Dack from the City Attorney, dated the same day as our letter on February 27, 89'. In this letter the City Attorney discussed admissible evidence. I suppose you might say the letter constituted yet another notice of appeal on the same matter. When we read the letter we concluded that the commission was conducting a true appeal period and would be restricting new evidence to what had been previously submitted by Torgeson's as to what was going on around July 15, 1963, or before, and that Dack would be limited to argument on that evidence. Feeling frustrated as we did in view of past events in this matter, it was apparent to us that we would be barred from our last defense of even arguing that July 15, 63' was not the controlling date. What we did not know at the time, was that this violated due process. Due process of law with respect to administrative proceedings required an adequate hearing in which the procedure is consistent with the essentials of fair trail. Apparently the City intended the hearing to be a de novo hearing, (end of tape before turning to side two, lost a few words--however my notes indicate that Mrs. Torgeson said applicable procedures to be followed should be of an evidenciary as provided by City Code 2.28.10 which planes no restriction on evidence. ---and speaking of evidenciary acceptance, the only guidance I could find in the City's zoning ordinance was 10.8.30 (C),13, which indicated that only the commission or the Council are authorized to sensor or deny evidence in testimony by major vote of a quorum present. Therefore again, we submit to you that the City Attorney's unauthorized arbitrary decision as to acceptable evidence prejudiced our right to a fair and open hearing and respectfully request that the Council reverse the commission's decision and dismiss the appeal.

We now turn to the irregularities of the hearing itself. Not only was the notice vague and misleading, but the very proceeding which the commission was suppose to follow was violated from the beginning. First of all, as we said, we were precluded from offering any testimony which was vital to our case before we ever even got to the hearing. Secondly, our case was severely prejudiced by biased and omissions contained in the staff report given by the City Attorney as follows: 1. a record was constructed which omitted pertinent data from City records surrounding the City Administrator's 1986 decision. You heard Mr. Kelley tell you at the last hearing that Bud based his decision on the rock history plus other evidence. Where is that other evidence, which we know exists in at least the forms of a site plan or notes on his site visit that he made. If the original record is compromised, how can anyone every get the truth of what Bud meant in this 1986 decision? Or is that irrelevant? 2. The City Attorney violated his own rule from the staff report cited evidence pertaining to events after July 15, 1963. Specifically, evaluating aerial photographs and maps dated in 1964 and 1976. In addition to the staff report, Mr. Kelley's own basis testimony further prejudiced our rights, in that - 1. He mislead the commission with his testimony when he said the

staff had begun an investigation into the matter after the LUBA decision came down in December of 88'. Evidence in the file indicate that the investigation was begun in late October or early November of 88, before the LUBA decision ever came down. I think the question that Council has to ask, is why were we under investigation when LUBA had not rendered a decision in the case. Did the City have plan to prosecute us anyway? 2. He made prejudicial remarks during the hearing that were designed to undermine Torgeson's credibility and motives in their actions. In one instance he misquoted out of context that Mr. Torgeson had told Ginny that - quote, the Bureau of Mine's issues permits and the City had no jurisdiction over him whatsoever, unquote. Thus creating a false impression of hostility and contempt toward the commission on the part of Mr. Torgeson. He reinforced that false impression of Torgeson's contempt by making a further bias statement on the record when the commission was discussing enforcement actions, that he doubted very much if Torgeson would voluntarily comply with the order to cease operations. 3. He told the commission in his staff report that the City---this is very important, please listen--he told the commission in his staff report that the City had received a letter from Rodney Pitts which said that no gravel was taken from the property during the period 1950 to 1964, no even in prior years. What did he did not tell the commission and did not enter into evidence was the fact that there was a previous letter from Rodney Pitts dated November 4, 1988, in which Mr. Pitts had said, - quote, also a pea gravel source was available on this same tract, the first graveling of City streets was from this source- unquote. The letter went on to verify some other miscellaneous information contained in Torgeson's rock history which had been related to us by another old timeer, Ivor Nieland. It is our contention that Mr. Kelley concealed this information which would have partially confirmed that Torgeson's weren't intentionally bribing the City when they drew up their original rock excavation history. We have not yet ascertained his exact motive behind this action, although recent events lead us to believe the actions have something to do with his belief that he has to - quote, go after us, unquote, and thus come out a winner on this. Was someone trying to establish a cause of fraud against us in this appeal hearing. Mr. Rodney Beck testified something to the affect that when a person is caught in one lie, his whole testimony should be suspect. For heaven sake, Rod Beck said that he played cowboys and indians on that property four days a week from 1959 until he graduated from high school in 1976. Now if I was a suspicious person, I might say he wasn't telling the truth or he was confused. But I like to give people the benefit of the doubt, I think it's perfectly conceivable that Rod did in fact play cowboys and indians on the property until he was 18 years old and that it wasn't until he put away his six-guns and become cognizant of the real world that he discovered that rock was being excavated there.

I think it is important to point out something that has been very relevant here. We are talking about a history that extend back over 75 years. The truth is that all the parties have been going at it for so long now its doubtful whether anyone is 100%

correct. But charges of fraud are ridiculous. I'm not going to tell you that there were not some errors in the history, however, I will tell you that had we received a fair opportunity to present our case we could have proved the accuracy of the history prior to 1978 was irrelevant because Bud Atwood was using 1972 and 1978 as the controlling dates, not 1963 and he was right for reasons I don't have any right to discuss right now.

We additionally contend that the City Attorney had significant ex parte communication with the opponents and their attorney's which indirectly affected the outcome of the appeal and that Mr. Kelley made important decisions that should have been left to the unbiased commission. Furthermore, even if the will to win was not the determining factor in the City Attorney's bizarre and prejudicial behavior, it has been held in some legal cases that the combination of investigator, prosecutor, and City member of a judicating panel, even as a non voting member, is lethal to a fair hearing, especially when these functions are combined in a single person.

In summary, the City Attorney made unauthorized decisions in this matter designed to undermine the ability of Torgeson to defend their position. He further submitted erroneous and prejudicial written and oral reports in the proceeding which irreparably damaged Torgeson's ability to every receive a fair hearing in the matter. Under these circumstance, we request that the decision of the commission be reversed and the Dack appeal dismissed, thus granting the discretionary relief to which Torgeson's are entitled. How much time do I have?

Mayor - Oh, about 4 and one half minutes.

Sandy Torgeson - Good.

As far as the decision made by the Planning Commission, we're not surprised as to their conclusions in view of the travesty of justice which has occurred here. However, we do feel they made a few errors in procedure which prejudiced our case. 1. It should not have allowed Kelley's unauthorized decision to deny our withdrawal of the application, but should have acted on our request by their own motion and vote. 2. They should have questioned Kelley's decision to prohibit the extent of testimony and what was to be a new hearing and subject to evidenciary hearing procedures. 3. Their finding of facts, with the effective date of zoning establishing an R-1 zone for the subject property was July 15, 1963, was a matter of hear say and not substantiated by any fiscal evidence on the record. On the contrary, the tape of the meeting contains much discussion as to the difficulty and the uncertainties surrounding the establishment of such zoning for the property. 4. The commission should not have shown discrimination against Torgeson's by accepting evidence from opponents dated after July 15, 63, when such evidence had previously been forbidden to both parties by the City Attorney, much less base their decisions on such evidence as 1964-65 and 76 maps and photos. Their taped comparison of Torgeson's one man sporadic gravel extraction site

to Canby Sand and Gravel's 200 hundred man daily gravel extraction operation site, is like comparing a raisin to a watermelon. 5. We also feel from listening to the tape that the commission took official note of some testimony and evidence in the decision which was not officially a part of the record pertaining to Torgeson's belief that the decision was final. Since information for the previous --from the previous hearings has been excluded from the record this type of analysis was based on a hear say, not on clear evidence. 6. The con--excuse me-- the commission erred in relying on our old adversary, Bob Traverso, for expert mining law testimony. We agreed with Mr. Traverso when he says he is an expert on grandfather rights. He has received grandfather rights on 13 separate parcels next to us, next to our property, from Clackamas County without a neighbor ever being notified of their rights in the matter and based solely upon the unimpeachable evidence of Mr. Traverso's statement to Gary Naylor that he had grandfather rights. This preferential treatment, in view of the County's supposedly long standing rules of required receipts for everybody else to prove grandfather rights, was what started our problems in 1986 and sent us to the City of Canby in search of equity. However, we draw the line as to Mr. Traverso's accuracy in citing mining laws. If the commission had read the mining laws they would have concluded that Mr. Traverso didn't know his pea gravel from a dirt clods in the matter. According to DOGAMI the real experts in mining, the fact that someone sells the gravel, gives it away, or flushes it down the drain after excavation is irrelevant to his right to extract it under past or present statutes. And you will find no restrictions on disposal of material in state statute which is what the City is controlled by, maybe not the county, but that's what the City is controlled by.

For all the reasons we have given, we believe that the Council can and should reverse the commission's decision and dismiss the Dack appeal since each reasons fits the first of the criteria under which the Council must review this decision.

This has been a very complex issue. There are no easy answers. There have been errors and inaccuracies on all sides. LUBA said that Dack's rights were inadvertently violated through misinterpretation. But that wrong has been righted now and it's time---your next obligation is to right the wrongs done to Torgeson's. The devastating procedural errors and blatant bias and prejudice. The only way to do that is to grant the discretionary relief requested in this argument. Thank you very much for your attention in this matter.

Mayor - Thank you Mrs. Torgeson. I believe now that Mr. Dack gets 25 minutes. All right, Mr. Dack, I assume you---

Shurts - Good evening, my name is John Shurts, I'm an attorney with a law firm Stoel Rives Boley Jones and Grey. That's at 900 S.W. 5th Avenue, Suite 2300, Portland, Oregon, 97204. And tonight I'm representing Marv Dack and John Beck.

We are here to ask that the appeal be denied and that the

Planning Commission decision, that there is no nonconforming use right to extract aggregate from the Torgeson property be affirmed.

The task before you tonight is, in our opinion, very simple. Your criteria boils down to, is the Planning Commission's decision supported by evidence in the record and was that decision consistent with the law. On the first point, the record showed that the commission's decision is based on evidence in the record. That evidence is first a letter from Mr. Pitts, who was the owner of the property at the time of question, who stated that no mining was occurring on the property during the time that he owned it and that is at the year that the zoning was first applied to the property at the time when mining had to be going on for them to get on the nonconforming use. I think that is fairly clearly stated right there. Secondly, aerial photos from years in question, you don't need an expert to be able to judge them, looking at only through our own eyes, there's trees, there is no scares on the land. Whether it is a major gravel operation or minor one, there would be some evidence of it on the aerial photos, there isn't.

And finally, there were testimony from other individuals with recollections of the time in question that no mining was taking place on the Torgeson property. In sum, the Planning Commission considered all of this evidence, including the site history narrative that the Torgeson's submitted, they came to the conclusion that mining was not taking place on the land at the time zoning was applied to it, there is ample evidence in the records to support that decision and we ask you to confirm it.

On the second issue, whether or not what's been going on is in compliance with the law. It is our opinion that all procedures have been regular, that everything has been fair and above board with full notice to all parties of everything going on. And that the decision is consistent with the subject of law of non-conforming uses.

I can't believe that we are still fighting over the issue as to whether or not we were entitled to a hearing. The entire central theme of our appeal to LUBA, and LUBA's decision, is that the State Statutes state that when a discretionary decision is made by a local government concerning land use, a discretionary decision such as whether or not a nonconforming use has been established, citizens are entitled to notice of that decision and a public hearing. We've never got the notice, but all that means under LUBA's law is that the time for it to appeal and have a public hearing never is tolled, it continues to run.

The other half of that decision is that the State Statues require a public hearing on that type of determination. LUBA had stated that, the remand was to the City to follow LUBA's decision. On the basis of LUBA's decision we had our hearing before the Planning Commission on April 10th. Everyone got full notice of exactly what was going to happen at that hearing. Anyone, including the Torgeson's, was free to appear at that hearing to

present any and all evidence that they have that is relevant to that issue, including whether it's the date that Mr. Kelley had discovered from his research in the City ordinances was the correct date and any other issue. Anybody was free to come to that, no one was precluded from presenting any evidence that was relevant at that hearing. We showed up and presented evidence. The Torgeson's did not, they have to rely on whatever evidence was presented before, which was their site history narrative. They attempted to withdraw their application, but we did not appeal an application, we appealed the decision of the City Administrator based on certain facts, that a certain piece of property in your City had a non-conforming use right to extract aggregate. That decision was on the books. We had to appeal it, we did appeal it. It is a decision that is final for the basis of an appeal and can't be withdrawn and if --if--I guess if people were to think they could withdraw that decision and it would all go away--it will not. We have to continue to try to make certain that a decision by the City Administrator is reversed and we will continue to press ahead to get to that decision. We got the ---the Planning Commission made that decision, we're here to affirm it. We think the City Council should follow through and affirm it as well.

I could say a lot more concerning many of things that Mrs. Torgeson raised, but I just simply don't believe many of them had merit. The attacks on the City Attorney and indirectly the attacks on Mr. Dack and Mr. Beck and on our own law firm, I think are completely moot without merit. The procedures, it's been a long process but it has worked out fairly and competently and with justice and notice to all--and it is a regular decision in accord with the law. And, we are asking, that not only that you deny the appeal and affirm the Planning Commission, but you then take steps to insure that the decision is implemented and the gravel operation cease on the Torgeson property. Thank you.

Mayor - Thank you both for your presentations. At this time, Mr. Kelley would you like to entertain some questions, or would you like to make a statement or would you like to go?

Kelley - I would like to ask one question, one issue that was brought up by Mrs. Torgeson that I thought was important--she indicated that they did not understand their rights, they did not understand the notice, the notice was defective and so forth for the hearing on April 10th and at the time they withdrew their application, is that a fair characterization of your testimony? At that time, Mrs. Torgeson were you not represented by Mr. DeMar Batchelor, a lawyer of some renown in land use law and recognized in the State of Oregon as such-- and he represented you at that time, did he not?

Sandy Torgeson - He did write the letter, I guess.

Kelley - And in that letter it says he represents Mr. John Torgeson.

Sandy Torgeson - For that--

Kelley - So you had legal advise from a fairly reputable and prominent land use lawyer, did you not?

Sandy Torgeson - Well he didn't understand it either.

Kelley - I see. O.K., thank you. That's all I have.

Mayor - I take it, you were referring to the letter of April 4?

Kelley - Yes, from Mr. Batchelor.

Mayor - All right. Gentlemen, any questions?

Taylor - I have a question or two. I'm impressed with the amount of research and effort Mrs. Torgeson put into the presentation--and I have a couple questions, not being skilled in the law, on procedural--I want to make sure I understand. The concerns, in your opinion, the concerns brought up about - if the, as I understand it, Mr. Dack could appeal because it was a final decision. That LUBA said it wasn't a final decision until everybody was notified--in written--

Kelley - The City--yes,

Taylor - --written notification. That has an intriguing logic to it, that in fact does that mean then that Bud's decision was not final until everybody was notified?

Kelley - That's--O.K. the question to that--the answer to that is, is a grey area. What I would say is that, if the decision--what LUBA was talking about as far as Mr. Dack is concerned was the questions of the notice given to the neighbors of the City Administrator's decision. Now, what we did and which I think moots the point as Mr. Shurts brought out, is when Mr. Dack indicated that, yes he did want to have a hearing, we sent out the notice to everyone involved that there would be a hearing on this. And that included property owners within 250 feet, plus we published that notice and we held that hearing on April 10th. And that to me moots the issue that they are raising in the case.

Mayor - We have some record that, that was sent out?

Kelley - Yes. I don't know if we have the file with us tonight. Rusty, do we have that file--that shows the notice.

Klem - No, we don't.

Kelley - I know the notice was published and --in the paper and so forth.

Mayor - What--someone from planning, are these notice sent by regular mail, are they returned if they are undeliverable, are they sent out by the Police Department, would someone please tell me how these are sent?

Kelley - This is just a record, so it won't contain the public

notice--that the newspaper--see when we did that we sent a notice--I shouldn't say we, you send the notice out and then you document who you sent them to and you cut out the article, or the notice that appears in the paper, and put that in the file--er Ginny does that, right?

Klem - That's correct. They are sent out in regular mail--

Kelley - ---but this isn't her file that would have that information in it.

Klem - They are returned if they are not deliverable.

Kelley - I'm confident that, that was done in this case.

Mayor - Mr. Klem are you also confident that was done in this case?

Klem - Yes, I am.

Mayor - Thank you.

Taylor - One other question. So what we're saying basically, is that because a notice was sent out to everybody and everybody had a chance to come to present their side at a fresh deal--or a fresh hearing on the matter, everything was open for everybody to say what they wanted.

Kelley - Right, at that point, the City Administrator's decision was open on the issue of whether or not there was a non-conforming use as of the effective date of the zoning ordinance, which was in 1963, and that was the issue. The notice that went out to the public apprised them to come in and testify as that particular issue.

Taylor - O.K. And my last question I have is--the bottom line this comes down to--you can concur with Mr. Shurts--that the date of 1963, is the date that we have to use --when that's-that's--

Kelley - That's set forth in a legal case called, and I may have that case here--somewhere, if I can find it for you and I can read you the quotations from that case, it called Polk--Polk County vs. Martin, it's a decision of the Supreme Court made in 1981 -- and it happened to be an aggregate removal situation removal too, a rock quarry. On page 75 of that case it says: The outcome therefore turns on whether the defendant's land, at the time the zoning ordinance was enacted, was then being lawfully used for production of rock. The nature and extent of the prior lawful use determines the boundaries of permissible continued use after the passage of the zoning ordinance. So, that's the bench mark case in the area that --and this case has been around since, like I said 1981 and it is the leading case and I think Mr. Shurts will agree with me on this particular issue.

Taylor - And so, the last, and truly is my last question, we talked about gravel extraction and from my reading of the records

and the testimony, the concept was that this was a small time, occasional operation of mining.

Kelley - Correct.

Taylor - --is the presentation. And that Mr. Pitts' letter indicating that for the 13 years in which he owned the land no mining took place--and is a long enough period of time that we don't care what happened prior to that as far as sporadic or digging or mining.

Kelley - That's correct. The case says, you look what at what existed, basically you look at what existed at the date restrictive zoning become effective and what was going on then is allowed to continue on into the future. So for ten years prior to the effective date 1963, Mr. Pitts said there was no gravel being removed from the property at that time.

Taylor - So at that time the property was not a gravel---

Kelley - Correct, it wasn't at least ten years before that.

Taylor - That answers my questions.

Mayor - Gentlemen, any other questions? Something you want clarified here?

Carroll - When did Mr. Torgeson start his gravel extraction?

Kelley - I don't know/

Prince - There was one thing, that may be cleared, as of July, 1963, that's what you said the effective zoning was R-1?

Kelley - Correct.

Prince - This property was owned by Mr. Pitts?

Kelley - Correct.

Prince - And not Mr. Torgeson.

Kelley - Correct. Mr. Torgeson did not buy--this Mr. Torgeson didn't buy the property it was Mr. Torgeson's father and Mr. Dietz bought the property from Mr. Pitts in 1964 on a contract and it was latter deeded to them in 1968 or 1969.

Prince - I think the records show 1965.

Kelley - That was the date of the deed transaction, but they actually purchased the property in 1964.

Prince - And also during the hearing it was brought up - there was testimony from people who lived in the area that spoke of their knowledge, besides Mr. Pitts' statement that of----

Kelley - There was several other pieces of evidence, yes.

Taylor - I lied, I have another question.

Mayor - That's fine.

Taylor - I have recently moved and do not have my document with me--it seems to me, there were two letters from Mr. Pitts. Is that correct?

Kelley - Not in the file. There was an initial letter sent to Mr. Pitts early on that came back and that's the one Mrs. Torgeson was referring to and that was the letter-- I'm not even sure-- I think Ginny sent that letter. I wrote Mr. Pitts a letter, specifically, asking him when it became apparent that we were going to have this hearing, I wrote him a letter saying, Mr. Pitts- ah-- I want you to specifically answer these questions because they were, what I felt, relevant under the case law of Polk County vs.-I mean Martin vs. Polk County, i.e., was there any gravel being extracted in 1963 and for how long did you own the property and prior to this time and was there any gravel being extracted during the time you owned that property. And that was the second letter that came back that was more definite in nature and said, I owned the property from 1950 to 1951- 1963, whatever his letter says, it's in the record.

Taylor - I'm sorry, (I couldn't hear this area, however, he was saying someones name as being a signature, I believe.)

Mayor - Mr. Carroll?

Carroll - My questions were the same as Mr. Taylor's.

Mayor - Mr. Stiglbauer?

Stiglbauer - Mr. Torgeson has the right to apply for a conditional use permit?

Kelley - Anybody has the right to apply for a conditional use permit.

Stiglbauer - I just wanted to make sure. That's all I have.

Mayor - Anything else, Mr. Prince?

Prince - I listened to the tapes twice. As far as I can glean out our whole case is subject to the ruling of the effective date of the ordinance, July of 1963? And as such, all the testimony is based on that direct testimony

Kelley - The crux of the case is based on that yes, exactly.

Prince - And since Torgeson did not own the property at that time, then he could not show a rock excavation history at that time--it would not be allowed--I mean it could be allowed but he didn't own it?

Kelley - Not necessarily. I would say that, had he purchased it,

if the facts were such that there was a rock excavation operation going on and he purchased it and was- you know- continued the operation, then I would say then he would have an argument that he has the grandfathered nonconforming use operation. In other word--and that was the reason why I asked Mr. Pitts to detail the time that he lived there whether he extracted any gravel off of there prior to 1963 because I knew that Mr. Torgeson didn't buy the property -- or Mr. Torgeson's father did not buy the property until 1964. So that's why I asked Mr. Pitts whether he had extracted any gravel during that time because then I felt well possibly then Mr. Torgeson Sr. purchased the property knowing it was a gravel -- on going gravel extraction operation and therefore he would have nonconforming right use. But that was not the case.

Mayor - Mr. Smith?

Smith - I have no questions or statements.

Mayor - Mr. Daniels?

Daniels - My questions have been answered.

Mayor - O.K. Gentleman, as you well know, this is an appeal and we need to decide here whether or not you are to uphold the decision of the Planning Commission of April 10th and you know what the rules are about how you can overturn that. They are stated here, would like the City Attorney to state them one more time or are you clear, are you ready for --

Carroll - Madam, Mayor?

Mayor - Mr. Carroll.

Carroll - **I moved that we uphold the Planning Commission's decision of April 10, 1989, on Mr. Torgeson's appeal for the extraction of rock.

Mayor - Do you want to restate these, overturning the --

Kelley - No, you're not overturning anything so you don't need -

Mayor - O.K., you don't need to do this, you just need to uphold their decision¶

Kelley - Right.

Prince - Second.

Mayor - It's moved by Councilor Carroll and seconded by Councilor Prince that the Planning Commission's decision on April 10, 1989, be upheld. All those in favor signify by saying Aye.

CARROLL-STIGLBAUER-TAYLOR-PRINCE-SMITH-DANIELS- Aye.

Mayor - Those opposed. Motion carries 6-0. Thank you all for coming.

(**NOTE:** This ends the verbatim transcript of the minute of June 21, 1989.)

OTHER REPORTS OR ANNOUNCEMENTS: Administrator Jordan asked the Council to be sure and let the office know who wanted to ride in the General Canby Day Parade.

Since the restrooms at Wait Park will not be repaired by then, Mr. Jordan noted that he would encourage the Canby Art Association to bring in additional facilities.

Administrator Jordan also informed the Council that our contract with Cascade Employers will soon be up for renewal and he advised not renewing it since we have basically the same services with LGPI. The Council gave an unanimous approval to terminate the contract with Cascade.

Mr. Klem informed the Council that Clackamas County had approved our application for a nonconforming use for the mausoleum.

Roy Hester addressed the Council, thanking them for their support throughout the mausoleum project. However, in turn, Mayor Kopelk thanked Mr. Hester and the Cemetery Committee for their hard work and seeing the mausoleum project through.

Scott Nelson said that he would have the final design in about a month from the architect on the Swim Center renovation project.

Beth Saul reminded everyone to vote on June 27.

ACTION REVIEW:
1. Letter to Mayor Yamada for gifts.
2. Ordinance for mausoleum contract.
3. Letters to advisory board appointments.
4. Change budget committee terms.
5. Research pricing for cemetery.

**Councilman Taylor moved to go into Executive Session under ORS 192.660 (1)(d) to discuss labor negotiations; (1)(e), to discuss purchase of real property; and (1)(i), to review and evaluate the chief executive officer. Motion seconded by Councilman Prince and approved 6-0.

Mayor Kopelk recessed the regular session at 8:55 p.m., to go into Executive Session. The regular session was reconvened at 10:30 p.m., and immediately adjourned.

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EXECUTIVE SESSION
JUNE 21, 1989

Mayor Kopelk called the Executive Session to order 9:09 p.m., with Councilors Carroll, Stiglbauer, Taylor, Prince, Smith and Daniels present. Also present was Administrator Jordan.

ORS 192.660 (1)(d), the Council discussed the Police Department negotiations which is in progress.

ORS 192.660 (1)(e), the Council discussed the proposed sale of City owned property.

ORS 192.660 (1)(i), a three month evaluation of the City Administrator was conducted at this time.

Mayor Kopelk adjourned the Executive Session at 10:30 p.m.

Marilyn K. Perkett, City Recorder

Nancy G. Kopelk, Mayor