

From: [Robin Froerer](#)
To: [Eric Evans](#); [Tatiana Burgess](#)
Cc: [Jim Maret](#)
Subject: Please share with all involved.
Date: Thursday, January 14, 2021 4:27:55 PM
Attachments: [image001.png](#)
[PZ Memo \(002\)3.docx](#)

Please include this for everyone, who is involved with next p&Z meeting, also let them know if anyone would like to come see Gem ave. crossing or area to just let us know.

Regards,

Robin Froerer

Owyhee Produce

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Memo to the planning and zoning committee of City of Nyssa and Malheur County

For consideration of the January 2021 Planning and Zoning Committee Meeting.

Date: January 6, 2021

From: Froerer Family Limited Partnership (FFLP)

To: Malheur County Planning and Zoning Committee and City of Nyssa Planning and Zoning Committee

The transload facility proposed for Nyssa, Oregon has been structured to be partly owned and partly managed by the Malheur County Development Corporation (MCDC). MCDC is an offshoot of the County Government of Malheur County working under the direction of Malheur County Court and the County Commissioners. The following will identify several violations to the comprehensive land use plan of Malheur County and the city of Nyssa comprehensive land use plan (plan or plans) that have occurred or will occur with the proposed action tonight. This plan for Malheur County states its purpose is "To identify the present and future needs of Malheur County and to guide its future growth and development in compliance with State law."

Ostensibly, this supervision by the County Court and or the County Commissioners of MCDC is mandated by the grant award from the state of Oregon and administered through the Oregon Department of Transportation that has to this point funded, the development of the transload facility. This supervision is also to ensure the Comprehensive Land Use Plan for Malheur County (the plan) aligns the project with the plan. This plan for Malheur County has in its present configuration fourteen goals and upwards of 20 policies within each goal category upon which planning, zoning, and land development issues are to be addressed in Malheur County. This memo will identify some of many violations of policy effected within this proposed subdivision and development change thus far.

This plan for Malheur County is designed to protect agricultural lands, "to establish a comprehensive planning process and policy for all decisions and actions related to land use, and to assure an adequate factual base for those decisions and actions. These actions are to foster citizen involvement at the local level for these planning and use actions. They are also intended to preserve forest lands and agricultural usages as well as preserve open space, scenic and historic areas and natural resources" such as mineral and aggregate resources, energy sources, fish and wildlife habitat, scenic areas, and water resources, "to protect life and property from natural disasters and hazards, to meet the recreation needs of the citizens of Malheur County and visitors, to diversify the local economy, and to assure citizens ample opportunity to obtain adequate housing." Per the plan," to the greatest extent possible new residential, commercial, and industrial areas shall be adjacent to areas that already are developed to permit the

most efficient use of public facilities and services.” The protection of Agricultural lands is defined as “land having the highest agricultural capabilities will be given the greatest protection (class I has the highest capability; class VI has the least). (Goal Three policy 2)

In short, the above summarizes the charge for The County Planning Commission as defined by the plan adopted by Malheur County Court and ratified through the Land Conservation and Development Commission and its successors (LCDC) and enacted into law through ORS Chapters 197 and 215 and other subsequent ORS enactments. The County Planning Commission is convened to uphold those policies procedures and established goals of this documented comprehensive strategic plan.

As consideration is given to change the subdivision plat of the proposed site of the transload facility from EFU to non- EFU use there are numerous issues that have transpired thus far that are clear violations of the plan ratified by Malheur County and LCDC to this point.

First and most foremost the plan has as its guiding goal involvement from citizens whether it be with the Planning Commission or appointed advisory committees, they shall be to open to citizen input and citizen involvement at all steps in the process. In the development of the reload facility a citizen committee was formed and eventually titled Malheur County Development Corporation (MCDC). After forming this public entity, several of their quorum meetings were closed to the public either by no open invitation, lack of notice, or inappropriate timelines of notice for these meetings. Further as a subcommittee, MCDC in concert with the County Commissioners appointed an economic development coordinator to spearhead this project. The direction of the development was hidden from the affected citizens and adjacent landowners and or those citizens were provided with purposeful misinformation to move this project forward at all costs. In the Argus Observer in Jan 2020 these contentions above were confirmed as Greg Smith stated he had been working to secure an operating agreement for the reload center for several months. However, because some of the companies were publicly traded Smith could not inform the public as to what the agreements were nor who the companies involved could be. That information should long ago have become public as the agreements were reached and should have been ratified by vote of either MCDC or the County Court or both in open public meetings. These agreements were all negotiated without input from the affected citizens and landowners who now are being affected by this development and their land use change.

One example of this purposeful misinformation is the adjacent landowner, Froerer Family Limited Partnership, (FFLP) was informed by the economic development coordinator and contracted agent of Malheur County, Greg Smith, that access the south entrance of their adjacent property would not be altered with this development. This same assurance was also forwarded to FFLP by Commissioner Wilson. This information was relied upon by FFLP to not contest the initial zoning change in 2018. Today, per Jake Bevan of Union Pacific that this assurance is both “presumptive and careless.” Further stated by Bevan, Smith and Wilson had no right or authority to forward this assurance. Again, had these facts been fully disclosed to all parties the initial zoning change would have come under significant questioning. One of many emails is inserted for reference in this document.

Brad Baird <bbaird@andersonperry.com>

Mon 8/17/2020 9:34 AM



To:

- Robin Froerer;
- Shay Myers

Cc:

- Greg Smith <malheurcountydevelopmentcorp@gmail.com>

New Road Locations Froerer Reload.pdf
448 KB

Hello Robin and Shay

Attached is a map showing the two locations for road improvements to provide improved access to your property to both Gamble and King. The route to Gamble is the one we have always talked about. The route to King follows a dirt road from the nearest improved road, shortening the access from the area to King.

Both of these options would provide good gravel roads from the property and for residents both north and south, so if they are going north, they have a good route to King, and south, a good route to Gamble.

Please look this map over and let me know if that is what you were thinking. If the map is unclear in any way, please feel free to give me a call.

Looking forward to hearing from you. Thank you again for your time.

Brad

Brad D. Baird, PE
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Later in the process, FFLP was informed by Smith that the south access to their property would be facilitated with an access across the UP tracks and emails and maps of the crossing location were forwarded to FFLP to pick a location for this crossing. To these emails and maps, Bevan of Union Pacific insisted the comments from Smith have “egregiously errored to presumptive and carless.”

Still Smith continued to inform FFLP that an access from Gamble Island road and a public crossing over the Union Pacific Railroad tracks would be pursued (see email above). When questioned about this access later FFLP was informed by County Commissioner Wilson that access from Chestnut and Gamble Island Road would not be available, as a landowner was not willing to grant an access easement. However, in the meantime, a zoning change was made with untrue information given to affected landowners. Had FFLP been appropriately informed of these facts the initial zoning change enacted in 2018 would have been opposed by FFLP and the zoning change per the plan would have been declined most likely as a matter of law.

Two questions of misinformation arise from this. Did Smith contact the landowner for the Gamble Island Access or was this a ploy to simply pacify what Smith thought would just be collateral damage (a devaluing of use for property owned by FFLP because of imminent access changes already negotiated by Smith) to the overall project?

At the very least if it took an amateur a matter of minutes to contact this landowner. How could a presumed professional economic development coordinator and contracted agent of Malheur County and MCDC be so inept as to spend months to contact this landowner? The contention from FFLP is that Smith all along had the intention and did carry out this intention to negotiate with Union Pacific to close the Gem Ave crossing of the railroad tracks and purposefully designed and negotiated a facility that encompasses less than sixty acres of nearly a three hundred acre parcel to encumber the Gem Ave crossing. The discussions of this design and location of this design on this massive parcel were never held in any public input arena and these negotiations between Smith and Union Pacific were held with no notice to the citizenry of Malheur County as required by the plan document. The State of Oregon Department of Transportation authorized through grant awards for this project to be built on less than 70 acres, yet the parcel purchased exceeds 290 acres. It is the contention of FFLP that the project design could be facilitated so as not to close the Gem Ave access to all affected parties. This was confirmed by Bevan of Union Pacific January 6, 2021 that the primary reason the Gem Crossing is being closed is “because of the design of the transload facility and the two tracks extending to the North of the development property.”

Goal one of the plan document adopted by Malheur County and LCDC for land use planning in the county has not only been violated but it has been trampled beyond any recognition of public input and citizen involvement. This goal has been in place and adhered to many times over the years since inception with a variety of projects and zoning requests before this transload project ever came to light.

The second goal of the plan is to provide factual base for making land use decisions. When Smith as a contracted agent of the County and the County Commissioners has purposefully forwarded false pretenses as above, and those pretenses are echoed by a County Commissioner, the basis for factual decisions has been eroded away to the point of oblivion. This negates goal two of the plan of which the County Commissioners acting collectively as the County Court are the governing body determining land use. Again, that governing body has eroded their own plan through misinformation or the concealment of information to numerous affected parties with this transload development to this point.

Goal three of the plan is to preserve and maintain agricultural land in the county for agricultural purposes. Specifically, policy two of this goal states that “whenever possible, land having the highest agriculture capabilities will be given the greatest protection.” This protection is the sole charge of the County Court and The Planning Commission.

As proposed, FFLP will lose access to the south end of their property as the Transload project will encumber the Gem Avenue railroad crossing causing it to be closed. It is the contentions of FFLP that this facility can easily be moved within the 290 plus acre parcel of land that the County purchased so as not to encumber a thirty-foot section of rail crossing. The County will tell you that Union Pacific is going to close the rail crossing anyway. While they have the right to do so, they are only acting to close this crossing at Gem Ave as the location of the transload facility as currently designed places the facility tracks in the Gem crossing. Again, this was confirmed by Jake Bevan of Union Pacific January 6, 2021. Current design can move the facility 50 feet to the south and this crossing access could easily be preserved. This crossing has been in place for over 100 years. The subdivision change and the precipitous development as designed along with closed door negotiations by Smith is why this crossing is changing. There are hundreds of Union Pacific crossings like Gem that are not changing at all today. In fact, in the Treasure Valley there are upwards of twenty crossings that are not being closed nor are they being considered for closure. The Gem crossing is being considered for closure as a result of this proposed development.

Per goal three of the plan, the land that is owned by FFLP is majority class I, II and III production soil. Per the goal three and policy two of the plan this “land having the highest agricultural capabilities will be given the greatest protection,” “when considered in land use.” If the transload plat change is granted and FFLP is required to access their land from the north end only, high capability agricultural land will not be afforded the highest protection. As a result, planting, cultivating, and harvest of high value crops will require a cost increase of minimally \$317,000 and most likely an average of \$500,000 annually to this farmland owner. This cost will only escalate into the future. This additional cost and County imposed logistics of one choke point access will cause the property to be utilized for grazing as if it were a class five or class six soil. In simple terms the crop production value of the land will decrease from upwards of \$2,000 to \$8,000 per acre to less than \$250 per acre annually. This is because the additional logistic costs will devalue the economics of certain crops and thus the property and will cause additional transportation and labor costs of planting and harvesting certain crops to be diminished to less than a breakeven for this land.

Also, with respect to the plan, goal three, policy 15 states the existing comprehensive plan ordinance will establish Exclusive Farm Use (EFU), Exclusive Farm/Forest Use (EFFU), and Exclusive Range Use (ERU) zones to protect agricultural lands, and it will include provisions limiting development of those lands. Allowing a development change that relegates some of the more productive cultivated land in the County to a low value crop acreage flies in the face of this plan policy and clearly violates the same policy that has been adopted by Malheur County and LCDC.

Per goal five policy 2 with regards to Mineral and Aggregate Resources, the County will establish land use regulations that protect mineral and aggregate resources from incompatible uses.

In addition to being mostly class one and class two soil for production agriculture, the entire land of the adjacent parcel of land owned by FFLP has large aggregate deposits. Currently there are two aggregate production mines adjacent to the property of FFLP and two aggregate production sites contained within

the property of FFLP. By restricting the access to the property, the resources of aggregate are largely reduced in value in a similar manner as the high value crops are reduced. If any aggregate has to exit the property through the far north end of the property, the cost feasibility to deliver this aggregate to points south of the property are reduced or the recipient of any aggregate material to the south of this choke point access would pay a significant premium for this delivery. Creating a choke point for delivery of aggregate resources creates an incompatible use. At the very least this creation of a choke point for delivery devalues an aggregate resource in the adjacent property to the transload facility by a significant amount.

Within goal five subheading of Historic Sites and policy nine of the plan, "The County will protect individual landowners where structures or sites are located to ensure their property rights are safeguarded." Within the property of FFLP adjacent to the proposed transload facility there are no less than five structures that qualify for registry on the National Historic Registry per age standard. With this development change and precipitous closure of Gem Ave crossing, the Nyssa fire department response time to enter the property from the far north end is extended from eleven minutes to upwards of 27 minutes under ideal conditions. Many of the access roads the fire department will be required to use to access the south end of the property from the far north end are impassable during the winter months and are less than compatible after spring or summer rainstorms. This places additional response time hazards on these historical structures.

With respect to goal six the goal is to maintain and improve the quality of Malheur County's air, water, and land resources. By requiring minimally 2,500 loads of farm goods to be transported an additional twelve to fourteen miles to be sold, the carbon footprint of this operation is increased dramatically in Malheur County. Further with respect to goal six, policy nine states "Financial and technical assistance will be given to individual landowners through existing federal and state programs before implementation of Best Management Practices will be expected." It is FFLP's contention that additional road miles and increased carbon footprints are not a best management practice and the funds to develop this transload facility are existing state programs forthwith that should be used to eliminate this additional carbon pollution as opposed to forcing it to occur according to the policy of Malheur County as adopted by LCDC.

Within goal seven of Natural Disasters and Hazards the stated goal is to protect life and property from natural disasters and hazards. The stated policy twelve indicates the county will cooperate with other governmental agencies to help protect life and property from natural disasters and hazards. By initiating this plat change and choke pointing access to property, the county has increased the risk to life and property by significantly increasing first responder time of response. This increased risk affects six individuals who would currently qualify as elderly and or disabled. This increased risk would in some circles be regarded as elder abuse. Not only does this violate State and Federal law it also is a direct violation of the County comprehensive plan of goal twelve and policy four. Further in this planning process there has been no direct input from the Ontario Fire district which would be required to respond to an incident on the property as the entrance from King Avenue is in their district or they would be the earliest responder to an incident. Further the ambulance response from Ontario is like fire response. To date neither of Ontario Fire nor Ontario Ambulance have weighed in on this proposed plat change.

Also, by choke pointing access to the property to the North end, there are several easements that will be affected. Those easements are with Idaho Power and communication entities. This limiting of access to these entities will make electrical service repairs, communication repairs, and fiber optic repairs impossible as the repair trucks will not be able to travel the FFLP property from north to south in the winter or after a rainstorm. This becomes incompatible with goal seven of the plan as reestablishing communication and electrical services becomes impossible during certain times of the year. This is because north to south roads are not all-weather roads and these utilities have to this point relied upon the south access to this property and their easement.

Goal eleven is “to plan and develop orderly, and efficient arrangement of public facilities and services to serve as a framework for urban and rural development.” Policy one states the county will consider information from local fire and police departments concerning provision of services to future rural land developments. Yet there has been no input from Ontario fire and ambulance districts to this commission tonight. Neither has the existing easement holders for utilities weighed in on this development change tonight. Why is that? Why develop and adopt any comprehensive plan and policies if they are just going to be ignored? If these granted easements of communication and public utilities are encroached upon by action tonight, there is a very good chance of litigation to undo encroachment upon these easements. Doesn’t that ignore goal eleven of the plan and violate the policies established within this goal?

Goal twelve purports to provide and encourage a safe, convenient, and economic transportation system. Policy seven within goal twelve states the “access to existing and potential aggregate resource sites will be maintained and protected through zoning regulations.” Again, the access to this aggregate resource is being limited to one point of access.

The County is obligated by policy to protect the citizenry through the comprehensive plan document. If the subdivision uses of this land proposed for the transload facility are not changed then common and reasonable contention is that UP would have no reason to change alter or modify the crossing in question. Further, policy nine of the same goal section states that transportation facilities will minimize the division of existing economic farm units. Being a part to the closing of a crossing that forces property access to travel an additional 27 minutes and minimally five to eight miles adversely impacts the economic farm unit that this policy requires county officials to safeguard against.

The above has stated numerous policy protections afforded the citizenry of Malheur County through the planning and zoning process namely through the adopted plan document of the county. Within these policies, the enactment of these policies is available to all citizens without regard to any discriminatory discernment and are in place to protect property rights of existing property owners and enterprises at the expense of proposed enterprises. This is a consistently applied standard of planning and zoning across Oregon. It is incumbent on a new development not to infringe upon the property values and uses of existing enterprises.

It is the contention of FFLP, a contention confirmed by Union Pacific representatives, that the closing of Gem Ave crossing and denying access to an existing enterprise is conditioned upon subdividing the transload property from EFU to non EFU uses. This subdivision a presently purposed violates the comprehensive plan on many fronts and at some point, violates the OAR adopted laws of comprehensive planning.

It does not have happen in that manner. There are at least five alternatives to access to this property that have to this point not been considered. Those documents have been provided to this committee. The only way any one of these alternatives will ever be considered is for this planning Commission to deny the requested subdivision change and force the proposed facility to solution this access issue. Short of that, a development change as requested violates numerous policies of the Malheur County Comprehensive planning document, devalues a significant portion of farmland, devalues aggregate resources, adversely affects numerous public utility easements, and disenfranchises the citizenry of Malheur County in total from today forward. If the policies of land use are compromised just this once they will forever be compromised into the future for all citizens and potential citizens of this county.

FFLP has made significant inroads to solution this south access issue. MCDC had two years to work on this and has failed or simply failed to try. At our last meeting, Mr. Smith promised he would work on this and that "the transload facility wanted to be a good neighbor." While FFLP has had nearly a dozen meetings with related parties to solve this access issue and has invited all stakeholders to participate in these meetings, the next meeting Mr. Smith attends with these stakeholders will be the first. That is by no stretch of any imagination a good faith effort nor is this lack of action a real surprise. Mr. Smith has made promises he had no authority to issue and has left many promises unkept and undeliverable, just to keep this project moving in the direction he wanted.

We ask the committee to encourage or, if need be, force this representative of stakeholders to the table to in fact carry out on his promises that, to this point, have been nothing more than polished talk and covert as well as overt violations of the planning and zoning comprehensive plan for Malheur County, the City of Nyssa, and their joint management agreement of Urban Growth Areas enacted between Malheur County and the City of Nyssa. At the **very least** make this contingent, that we get the roads Mr. Baird and Mr. Smith have continuously promised us, they would do to help be a good neighbor. That is by improving the road next to the existing tracks, on the East side, from King to Gem building it up, widening it and graveling it. I would hope it can do more than this. MUCH more. But please don't let them walk away without doing anything they have promised.

FFLP