Inc. 1910 Planning and Zoning Department

60 S Main St | PO Box 48 - Driggs, ID 83422 | Ph: 208-354-2362 | Fax: 208-354-8522 | www.driggs.govoffice.com

July 25, 2012

Curt Moore
Planning Department
Teton County, Idaho
150 Courthouse Drive
Driggs, ID 83422

RE: Burns Holdings, LLC – Variance Application to Exceed Height Restriction (to 75ft) for Concrete Batch Plant at 175/185 N Hwy 33 in the Driggs Area of City Impact

Curt:

This letter accompanies the City of Driggs files for the above referenced application, located in the Driggs Area of Impact. The Driggs Planning and Zoning Commission is recommending denial of the variance application as presented to the Commission at a noticed public hearing on July 11, 2012.

The file contains the following:

CITY DOCUMENTS
Driggs Planning and Zoning Commission Findings, Conclusions and Recommendation
Driggs Planning and Zoning Commission Meeting Minutes (7/11/12)
Planning and Zoning Commission Hearing Notice
List of Property Owners w/in 300ft

MATERIAL SUBMITTED BY APPLICANT:
Application
Narrative
Conditional Zone Change Development Agreement and Exhibits (Inst. #191250)

WRITTEN COMMENTS
Reid Rogers, Teton Scenic Byway Advisory Committee
Anna Trentadue, VARD
John Grabow, adjoining neighbor to the South
Kambiz Taleghani, adjoining neighbor to the East

This application was received after the effective date of the recently adopted ordinance amending the Driggs Area of City Impact. Therefore, according to the current Driggs Area of City Impact

agreement, a final hearing should be scheduled for this application with the Board of County Commissioners.

The Plan and Ordinances applicable within the Driggs Area of City Impact at the time of application are: Driggs Comprehensive Plan adopted by Driggs Resolution 264-10, Driggs Zoning Ordinance #281-07 (both adopted by the Teton Board of County Commissioners on February 10, 2010).

Please contact me at City Hall if you have any questions.

Sincerely,

Doug Self, AICP
Planning & Zoning Administrator

CITY OF DRIGGS PLANNING AND ZONING COMMISSION
FINDINGS OF FACT, CONCLUSIONS OF LAW AND RECOMMENDED DECISION

REGARDING: **VAR12-1: Burns Holdings, LLC, 175/185 N Hwy 33, 75ft High Concrete Batch Plant**

HEARING DATE: July 11, 2012

FINDINGS

APPLICANT'S REQUEST: Variance to maximum building height regulation to allow for a 75ft high concrete batch plant, as detailed in attached application narrative.

DETAILS OF PROPOSAL: The variance is being sought in order to construct the concrete batch plant shown and described in the attached "Exhibit B – Site Plan", "Exhibit C – Building Elevations", and "Exhibit E – Views".

LOCATION: 175/185 N Hwy 33. Figure 1 shows the parcel location.

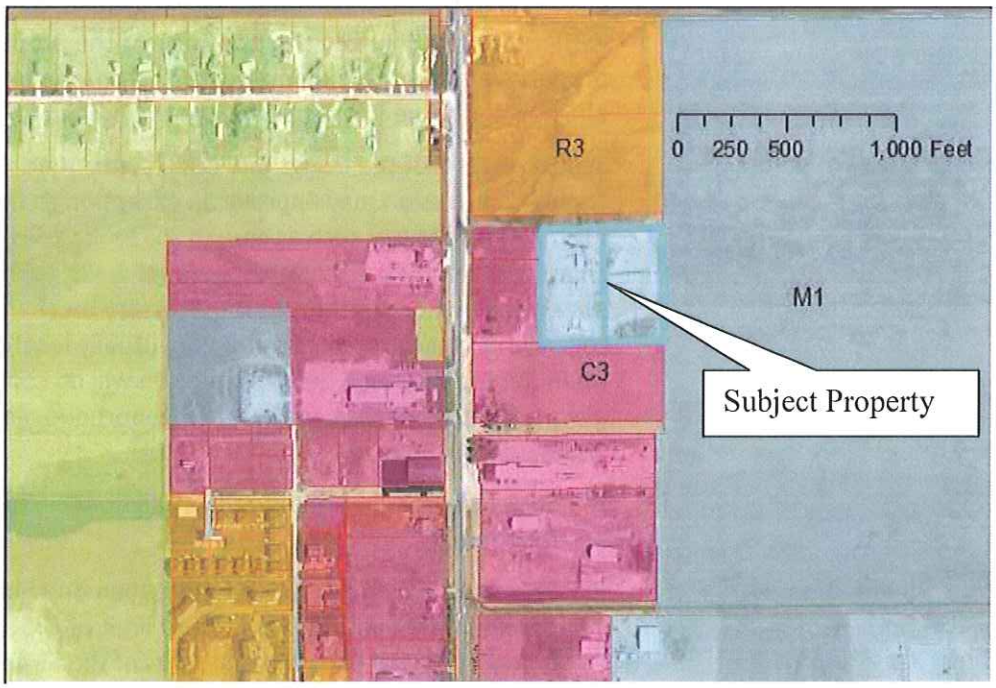


Figure 1

PROPERTY DESCRIPTION: The property currently is partially developed in accordance with the "Exhibit B – Site Plan". See photographs in Figure 2, which were taken on 6/28/12. A 'temporary batch plant' is currently located on the property, which has a height of approximately 65ft. The site is otherwise open and gently sloping to the SW at 1-2%. No water features or floodplains exist on the site.

Figure 2

CURRENT ZONING:	Conditional M1 zoning, in accordance with the development agreement recorded as instrument # 191250 with Teton County Idaho, which specifies that the M1 uses are restricted to a concrete batch plant as specified in the Exhibits B, C, and E.
HEIGHT REGULATIONS:	Section 9-7E-6 of the Driggs City Code (M1 Building Height) states that "Any building or structure or portion thereof hereafter erected shall not exceed forty five feet (45') in height above grade, unless a height exception is granted by the planning and zoning commission following the procedures in chapter 2 article D of this title. "Grade" is defined by Title 9, Driggs City Code, as: "The lowest point of elevation of the finished surface of the ground, paving, or sidewalk within the area between the building and the property line, or when the property line is more than five feet (5') from the building, between the building and a line five feet (5') from the building. Section 9-2D-2 of the Driggs City Code states that: the planning and zoning commission may approve an exception to the base height limit for building features such as church spires, belfries, cupolas, or domes, chimneys, ventilators, skylights, parapet walls, cornices, solar energy systems, elevator penthouses or necessary mechanical appurtenances, together with any requires screening, usually located on the roof level, upon finding that such height exception will be compatible with surrounding properties, uses and neighborhood, and that the following standards will be met: A. Such features are limited to the height necessary for their proper functioning. B. Such features do not exceed more than one hundred twenty percent (120%) of the base height limit of the applicable zone [54ft in the M1] or the height limitations of the airport hazard zoning regulations [approximately 200ft height restriction at this location].
SURROUNDING ZONING:	C3, Service and Highway Commercial (West/South); M1, Light Industrial (East); R3, Multi-Family Residential (North)
SURROUNDING LAND USES:	Light Industrial (vodka distillery) to the West; Single-Family Residential to the South (330ft from home to Burns property corner); vacant land to East and North.

Figure 3 – View from Hwy 33, with Grand Teton Vodka in Front.

MATERIALS RECEIVED:	Application Form Narrative Development Agreement (191250)
PUBLIC NOTICE:	Notice to the public and surrounding land owners has been provided by city staff for the Driggs Planning and Zoning Commission Public Hearing in accordance with the Driggs City Code and as required by the Idaho Local Land Use Planning Act, with publication of notice in the Teton Valley News on June 21 and June 28, 2012, mailing of notice to all real property owners within 300 feet of the subject property, and posting of notice on the property for seven days prior to the hearing.
PUBLIC COMMENTS:	Reid Rogers, Teton Scenic Byway Advisory Committee, submitted a letter dated 7/2/12, stating opposition to the height variance "as the proposed facility is directly on line with one of the most scenic views of the Byway corridor." Anna Trentadue, staff attorney for Valley Advocates for Development, submitted a letter (email) on 7/10/12, which the Commission decided to admit and requested staff to read as testimony at the hearing. The letter stated opposition to the granting of a variance based on the lack of evidence of any physical characteristics that would warrant a variance. John Grabow, owner of property adjoining the South boundary of the Subject Property, submitted a letter (email) on 7/10/12, which the Commission also had read as testimony at the hearing. The letter stated opposition to the variance request due to the conflict with the scenic corridor and 'overall public interest'. Kambiz Taleghani, owner of property adjoining the East boundary of the Subject Property, submitted a letter at the 7/11/12 hearing, which was read into the record by Mark Rockefeller. The letter stated opposition to the granting of a variance because of conflict with the scenic corridor, aesthetic, traffic, noise and pollution impacts to neighboring properties, and lack of any physical characteristics justifying a variance.
STAFF COMMENTS:	Staff researched height restrictions related to Scenic Byway designation and found that there are no restrictions on building height established under any state or federal Scenic Byway program.
VARIANCE ALTERNATIVES:	The 75ft height sought for the concrete batch plant would exceed the maximum allowed height in the M1 zone of 45ft, and also would exceed the maximum height allowed by exception (Section 9-2D-2) in the M1 zone (54ft), and could therefore, under the current city code, only be obtained through the granting of a variance.
VARIANCE CRITERIA:	**Criteria For Granting a Variance (Driggs City Code, Section 9-2C-2)** This section of the city code, which mirrors the state code, contains two criteria for granting a variance: A variance shall not be considered a

right or special privilege, but may be granted to an applicant only upon the showing of undue hardship because of characteristics of the site and that the variance is not in conflict with the public interest nor the general land conditions in the neighborhood.

1. Conflict with the Public Interest or Neighborhood Land Conditions:
    a. The Driggs Planning and Zoning Commission previously found that the proposed 75ft high concrete batch plant facility would not be in conflict with the public interest nor the general land conditions in the neighborhood, and recommended approval to the Board of County Commissioners for a Conditional Use Permit granting a building height of 75 feet.
    b. The CUP application was denied by the County. Amongst the County Commissioner's reasons for denying the CUP, the Commissioners found that a structure with a height of 75 feet in the area North of Driggs conflicted with the applicable (city) comprehensive plan and that there were no conditions that could be imposed on a structure of that size that would assure protection and compatibility with surrounding properties, uses and neighborhood. The denial was upheld by the Idaho Supreme Court, which found that a height restriction can be waived only by a variance, not by a conditional use permit.
2. Undue hardship because of the characteristics of the land: This criteria does not ask generally if hardship has or will be experienced by the applicant because there is a height restriction, but specifically whether there is or will be undue hardship ***because of characteristics of the site***. On this property, there are no unique characteristics of the site that have been presented which can be found to cause undue hardship. The open, gently Southwesterly sloping (1-2%) terrain can be found on most every parcel of land in the vicinity. There are no floodplains, wetlands or other environmental restrictions on the property that create unique circumstances or characteristics which may cause hardship in meeting the adopted height restriction.

CONCLUSION

The variance application should be denied based on the finding that there are no unique characteristics of the site that have been presented which can be found to cause undue hardship to Burns Holdings in its effort to construct a 75ft concrete batch plant. Subsequently, the question of whether the proposed concrete batch plant would conflict with the public interest or general land conditions in the neighborhood does not need to be addressed again by the Commission.

RECOMMENDATION

Commissioner Chris Valiante moved to recommend denial of the Burns Holdings variance application based on the Driggs City Code and the applicant's inability to show undue hardship because of the characteristics of the site. Commissioner Rick Baldwin seconded the motion. The motion passed with all in favor.

City of Driggs
PLANNING AND ZONING COMMISSION MEETING
MINUTES
MEETING HELD AT CITY HALL
July 11, 2012
6:30pm

MEMBERS PRESENT: Delwyn Jensen (Conducting), Rene Lusser, Rick Baldwin, Jen Calder, and Chris Valiante.

OTHERS PRESENT: Planning and Zoning Administrator Doug Self and Deputy Planning and Zoning Administrator Kreslyn Schuehler, Kirk Burns, Linda Szimhardt, Mark Rockefeller, Cody Runyan, Bob Ablondi, and Todd Woolstenhulme.

1) Approval of Minutes
The Commission reviewed the minutes from June 13, 2012.

Commissioner Rene Lusser made a motion to approve the minutes from June 13, 2012. Commissioner Jen Calder seconded the motion. The motion passed with all in favor.

2) Public Hearing – 6:40PM – Amendment to the Comprehensive Plan, adopting the new Fire Capital Improvement Plan
Doug Self explained to the Commission the information regarding the application. He stated an updated Capital Improvement Plan and Fire Study for the Teton County Fire District had been completed. It was in the same format and had the same idea as the previous impact fees. However, this would accept the finding from the Fire District regarding those fees. The application included an update to the Capital Improvement Plan and changed it to include the county, not just the City of Driggs.

Mr. Self further stated the City would continue to collect 50% of the fees as stated in the previous Impact Fee Ordinance. This would be a reduction of approximately $94.00 in fees.

Commissioner Delwyn Jensen opened the Public Hearing at 6:45PM. There were no public comments and the Public Hearing was closed.

Commissioner Rick Baldwin made a motion to adopt the new Fire Capital Improvement Plan. Commissioner Chris Valiante seconded the motion. The motion passed with all in favor.

3) Public Hearing – 6:45PM – Conditional Use Permit for Trailer Sales behind the Broken Spur as submitted by Red Hawk Investments
Mr. Self presented his staff report. He stated the application was for proposed trailer sales in the C2 zone, which required a conditional use permit. He stated there were other similar businesses in the area located in the C3 zone, where trailer sales are an allowed use. At this time, the business had outdoor sales items and was looking to expand.

Mr. Self stated there was no other public comment that was received before the meeting besides the letter from Mike Dronen voicing he had no concerns with the application.

Mr. Self stated the conditional use permit could be approved if the Commission found it was not in conflict with the Comprehensive Plan. He further stated there was mostly vacant land immediately adjacent to the subject property with a health clinic, residential units and an abandoned off-road vehicle business nearby.

Mr. Self read from the CC&R's for the Valley Centre Subdivision, stating light industrial uses shall be permitted if, "There is no exterior open storage without fencing and landscaping." He stated that if there was a Home Owners Association and enforcement was in place for the CC&R's, the applicant would need to conform. He felt the sketch supplied by the applicant was hard to determine if landscaping and fencing would be completed. He further stated that the Design Review requirements would also have to be met.

Commissioner Lusser asked about the previous subdivision application for this property. Mr. Self stated the subdivision's final plat was never approved and the extension that was granted would expire in September with very little likelihood that the City Council would grant another.

Cody Runyan spoke to the Commission. He stated he had put money into the community and would continue to do so with this project, to an extent. However, he did not want to incur added expenses that were not necessary. He stated he would put in the culvert needed to have a new access point and would add a berm with trees, but was not will carry "onerous expenses."

Commissioner Valiante questioned if Mr. Runyan was familiar with the CC&R's for the landscaping requirements. Mr. Runyan stated he was and had complied with them at the time of his first endeavor, but did not feel other property owners were held to the same standards. He hoped the Commission would "not put that on my back because I can't financially do it." Commissioner Valiante informed Mr. Runyan that a detailed landscaping plan would be needed that conformed to the Design Review standards as well as the CC&R's.

Commissioner Jensen questioned if the Grand Teton Canal Company had been informed about the proposed culvert. Mr. Runyan stated they had not. Commissioner Lusser suggested using the current access point and applying the savings to the landscaping.

Mr. Runyan voiced his concerns of providing an additional landscape plan. Mr. Self stated the Commission simply wanted a few more details.

Commissioner Delwyn Jensen opened the Public Hearing at 7:16PM. There were no comments and the Public Hearing was closed.

Commissioner Chris Valiante made a motion to approve the application with the conditions that a landscaping plan must be submitted to and approved by the Design Review Advisory Committee prior to placement of trailers on the lot, if a culvert was needed it must be approved by the Grand Teton Canal Company and any exterior lighting

must conform to city ordinances and be approved prior to installation. Commissioner Jen Calder seconded the motion. The motion passed with all in favor.

4) Public Hearing – 7:00PM – Variance to construct a 75-foot Batch Plant as submitted by Burns Holdings

Kirk Burns spoke to the Commission. He stated Exhibit A that was submitted provided his stance on the matter and that he had "nothing much to add."

Commissioner Calder asked the applicant to clarify the options for locations for this type of use. Mr. Burns stated that in the beginning of the process, the city and the county directed him to the current location. Mr. Self later explained there was a land owner adjacent to the property that may be interested in a land swap. Mr. Burns stated he tried for 5 months to make a deal but it never went through.

Mr. Self presented his staff report. He stated two public comments were received after the deadline of July 3, 2012. The Commission will need to decide if they should be reviewed now or put in the file. The Commission determined they would like to view the comments at the appropriate time.

Mr. Self continued his report. He stated the current zone was conditional M1 zoning, in accordance with the development agreement which specifies that the M1 use was restricted to a concrete batch plan. The Driggs City Code states that "any building or structure or portion thereof hereafter erected shall not exceed forty five feet in height above grade, unless a height exception is granted by the planning and zoning commission following the procedures in Chapter 2 Article D of this title, and providing these features do not exceed more than one hundred twenty percent of the base height limit of the applicable zone or the height limitations of the airport hazard zoning regulations." In the M1 zone, the height limitation with the exception would be 54 feet.

Mr. Self provided some history on the matter, stating that the Driggs Planning and Zoning Commission previously found that the proposed 75ft high concrete batch plant facility would not be in conflict with the public interest nor the general land conditions in the neighborhood, and recommended approval to the Board of County Commissioners for a Conditional Use Permit granting a building height of 75 feet. The CUP application was denied by the County, and amongst the County Commissioner's reasons for denying the CUP, the Commissioners found that a structure with a height of 75 feet in the area North of Driggs conflicted with the applicable (city) comprehensive plan and that there were no conditions that could be imposed on a structure of that size that would assure protection and compatibility with surrounding properties, uses and neighborhood. The denial was upheld by the Idaho Supreme Court, which found that a height restriction can be waived only by a variance, not by a conditional use permit.

Doug read the criteria for a variance from the Driggs City Code, which stated a "variance shall not be considered a right or special privilege, but may be granted to an applicant only upon the showing of undue hardship because of characteristics of the site and that the variance is not in conflict with the public interest nor the general land conditions in the neighborhood."

Mr. Self felt the issue was if there was undue hardship because of the characteristics of the land. He stated there were no unique characteristics of the site that could be found to cause undue hardship. Therefore, he recommended the application be denied based on that finding. He further stated that the City Attorney was in support of this recommendation.

Mr. Self read public comments from John Grabow, the neighboring property owner to the South, and Anna Trentadue, VARD representative, received on July 10th, 2012. Both comments were in opposition to the variance request.

Commissioner Calder questioned the statement made by Reid Rogers in his letter that the site was in the Scenic Byway and should follow state regulations for such. Mr. Self stated there were no height restrictions tied to the Scenic Byway designation, only sign regulations, and therefore it was not an issue. He further stated that the property was in the airport overlay zone but could build to 75 feet without reaching the protected air space.

Commissioner Jensen opened the Public Hearing at 7:37pm. Kirk Burns spoke in favor of the application, stating the height maximum of 54 feet was not in place when he started the process. He stated there was a signed Development Agreement allowing a height of 75 feet. However, Teton County refused to approve a Conditional Use Permit.

Mark Rockefeller spoke in opposition on behalf of Kambiz Talagani. Mr. Rockefeller read a letter from Mr. Talagani stating he was uncomfortable with the land exchange in the past. He further stated he was the owner of 250 acres adjacent to the subject property and wanted to object to the variance as he felt it would become an "eye sore" and was not keeping with the surrounding uses.

Commissioner Jensen closed the public hearing.

Commissioner Baldwin questioned if an alternative conditions would allow the building to be depressed. Mr. Burns stated with the type of plant, the height cannot be altered and continue to work.

Commissioner Lusser questioned the difference between a wet and dry plant as discussed in the beginning of the process. Mr. Burns stated a Development Agreement had been signed that allowed the 75 foot height and that was the direction he wanted to continue.

Commissioner Chris Valiante moved to recommend denial of the Burns Holdings variance application based on the Driggs City Code and the applicant's inability to show undue hardship because of the characteristics of the site. Commissioner Rick Baldwin seconded the motion. The motion passed with all in favor.

5) Public Hearing - 7:45PM – Plat Amendment to increase the lot sizes at Huntsman Springs as submitted by Huntsman Springs

Bob Albondi, with Rendezvous Engineering, spoke to the Commission. He stated the project was originally designed for townhomes and urban design. However, now it appeared there needed to be more flexibility in the lot sizes. The infrastructure was in and utilities were already

LEGAL NOTICE OF PUBLIC HEARING

CITY OF DRIGGS, IDAHO
Planning and Zoning Commission

Pursuant to established procedure, NOTICE IS HEREBY GIVEN that the Driggs Planning and Zoning Commission will hold a public hearing in the Driggs City Hall, 60 South Main Street, Driggs, Idaho on Wednesday, July 11, 2012 at 7:00 PM.

The Purpose of the hearing is to consider an application for a VARIANCE to construct a 75-foot batch plant at 175 and 185 N. Highway 33, as submitted by Burns Holdings, LLC.

Information pertinent to this application, including a map of the subject property and the applicant's narrative, is available for review at Driggs City Hall or on the web at www.driggs.govoffice.com, under Meeting Agendas and Minutes / Hearing Notices.

Written comments must be received by 5 p.m. Tuesday, July 3, 2012, at Driggs City Hall P.O. Box 48, Driggs, Idaho 83422. You may also FAX your written response to 208-354-8522 or email a response to pzdriggs@pdt.net. Verbal and written comments will be heard during the public hearing.

1121 24TH STREET LP
1635 ROBINHOOD LANE
CLEARWATER, FL 33764

COLUMBINE TELEPHONE CO INC
PO BOX 226
FREEDOM, WY 83120

GRABOW, JOHN C
PO BOX 6880
KETCHUM, ID 83340

RAUBE, PAUL J & RAUBE, JANE J
1776 N HWY 33
DRIGGS, ID 83422

BURNS CONCRETE INC
2385 GALLATIN AVE
IDAHO FALLS, ID 83402

GERDOM, ALMA
1621 S NEBRASKA AVE
CASPER, WY 82609

HUNTSMAN SPRING INC
97 N HIGHWAY 33
DRIGGS, ID 83422

TALEGHANI, KAMBIZ
3675 MORLEY DR
P O BOX 584
TETON VILLAGE, WY 83025

Driggs, Idaho
Planning & Zoning

APPLICATION FOR VARIANCE
(Not a business license or building permit)

OWNER/APPLICANT NAME: Burns Holdings, LLC **PHONE:** (208) 524-4000

**** A statement authorizing a representative to apply for owner/applicant must accompany this form if applicable.**

ADDRESS: P.O. Box 1864, Idaho Falls, Idaho

PROPERTY ADDRESS UNDER EVALUATION AND LEGAL DESCRIPTION (ATTACH IF NECESSARY): 175 and 185 N. Highway 33, Driggs, Idaho 83422

REASON FOR VARIANCE: Seeking a variance to construct a seventy-five foot (75') high concrete batch plant.

FEE: $711.00 *(plus any additional cost incurred)* must accompany this completed application.

DRAWING: A plan which shows the property that is under consideration, location of all improvements, and the specific information concerning the requested variance.

NARRATIVE: A narrative statement demonstrating that the requested variance conforms to the following standards:

1. That special conditions and circumstances exist which are peculiar to the land, structure or building involved and which are not applicable to other lands, structures, or buildings in the same district;

2. That a literal interpretation of the provisions of this Ordinance would deprive the applicant of rights commonly enjoyed by other properties in the same district under the terms of this Ordinance;

3. That special conditions and circumstances do not result from the actions of the applicant; and

4. That granting the variance requested will not confer on the applicant any special privilege that is denied by this Ordinance to other lands, structures or buildings in the same district.

The Planning Administrator reserves the right to NOT officially accept this application until total review is accomplished and all required information is submitted. The date of the public hearing will be established by the Administrator upon the acceptance of a complete application.

The P&Z Office Staff reserves the right to take photographs and/or videos of the property under consideration for a variance as deemed necessary as an addendum to the file.

I have read and understand the variance procedures and responsibilities which accompany this application.

Burns Holdings, LLC

By: _____ 5/4/12
Kirk Burns
Managing Member

Date

OFFICE USE ONLY

Date Completed Application Received: 5.4.12 Accepted By: DES

PUBLIC HEARING DATE & TIME: 7-11-12 7pm

EXHIBIT A

NARRATIVE
Variance Application — Burns Holdings, LLC

Applicant seeks the issuance of a variance to construct a 75 foot high concrete batch plant. Applicant's property is currently zoned M-1, industrial and manufacturing. The purpose for seeking the variance is to allow the construction of a building housing certain dust and noise control equipment which cannot be constructed inside a building of lesser height. Applicant previously sought a CUP permit from Teton County in order to construct a 75 foot tall concrete batch plant, which CUP permit was denied by the Teton County Board of Commissioners, notwithstanding the County's previous execution of a Developer's Agreement. A copy of such Developer's Agreement is attached hereto, including Exhibits A through E, inclusive. These exhibits consist of a legal description of the subject property, a site plan, building elevations, an exemplar photograph of a similar temporary batch plant and perspective conceptual drawings of the proposed plant. The property is located within the Driggs/Teton County Area of Impact.

The variance is necessitated because of the actions of Teton County in seeking invalidation of the Driggs CUP Ordinance in *Burns Holdings, LLC v. Teton County*, Teton County Case No. CV-07-376. At the urging of Teton County, the Idaho Supreme Court invalidated the Driggs' CUP Ordinance and as a result it is impossible under current state law for CUP's to be granted with respect to lot size, lot coverage, width, depth, front yard, side yard, rear yard, set backs, parking space and height of buildings. Prior to the action of Teton County, the Driggs' Ordinance permitted issuance of conditional use permits for building heights in excess of forty-five feet (45') within the M-1 zone, subject to a finding that such additional height was compatible with adjacent industrial and commercial uses. There is no other zone that would allow the use as designed, therefore effectively precluding Applicant's operation at any other location in the County. Applicant is a distributor of concrete and concrete products and it has no other use for the property. The property was specifically selected for such use, based upon recommendations of various Driggs and Teton County planning officials.

There is no industrial zone in Teton County or the City of Driggs that permits buildings with a height greater than 45 feet. See section 8-4-4, Teton Zoning Ordinance; section 9-7E-6, Driggs Zoning ordinance.[1] Therefore, under current ordinances of the City and County, industrial uses of this nature and height, are totally forbidden in the County, notwithstanding their otherwise lawful nature (i.e. not a nuisance). Although Applicant questions whether the County has lawful authority to completely bar a

[1] The Driggs Zoning Ordinance allows "building features" to exceed 45 feet in height, but not the building itself. See chapter 2, Article D, Driggs Zoning Ordinance.

particular use which is otherwise lawful, nevertheless such is the circumstance that currently exists under the City and County Zoning ordinances as currently drafted. As a result of this unusual circumstance, Applicant is being deprived of the same rights and privileges enjoyed by other persons and entities within the same zone.

In the absence of the issuance of such variance, Burns will be subject to significant hardship. Specifically, Burns has expended hundreds of thousands of dollars for construction of site improvements, in reliance upon the recommendations of such local officials and in reliance upon the Developer's Agreement, which Teton County signed. Such expenditures will be lost if the variance is not granted.

The special circumstances described above were not in any way caused by Burns, rather they were precipitated by the unforeseen actions of Teton County.

Granting the variance will not confer on the Applicant any special privilege because all other owners of property located within the zone were eligible for CUP's for building heights prior to January 25, 2012, and Applicant will be deprived of such use through no fault of his own. Further, the M-1 zone allows industrial uses and if the variance is granted, Applicant will merely be exercising the same rights and privileges as other industrial owners within the zone.

Instrument # 191250
TETON COUNTY, IDAHO
2007-09-05 04:57:00 No. of Pages: 12
Recorded for : BURNS CONCRET
MARY LOU HANSEN Fee: 36.00
Ex-Officio Recorder Deputy
Index to: AGREEMENT

191250 SEP 5 '07 PM 4 57

DEVELOPER'S AGREEMENT for BURNS HOLDINGS, LLC

On the 31st day of August, 2007, Teton County, Idaho (hereinafter referred to as "County"), and Burns Holdings, LLC, an Idaho limited liability company (hereinafter referred to as "Developer"), the owner of the real property described in the attached **Exhibit** "A" enter into the following agreement:

WHEREAS, the Developer has applied for a zone change from C3, Service and Highway Commercial to M 1, Light Industrial, for certain real property described in **Exhibit** "A", attached hereto and located in the City of Driggs Area of Impact, Teton County Idaho, and hereinafter referred to as "the property"; and

WHEREAS, the Developer has requested the zone change for the purpose of developing a concrete batch plant facility on the property; and

WHEREAS, the County, pursuant to Section 67-6511A, Idaho Code, has the authority to conditionally rezone the property and to enter into a development agreement for the purpose of allowing, by agreement, a specific development to proceed in a specific area and for a specific purpose or use which is appropriate in the area, but for which all allowed uses for the requested zoning may not be appropriate pursuant to the Idaho Code and the City of Driggs Zoning Ordinance, adopted by the County as the official zoning ordinance for the Driggs Area of Impact; and

WHEREAS, the County and the Developer desire to formalize and clarify the respective obligations of the parties, it is agreed as follows:

1. Zoning Ordinance Amendment: The City of Driggs (hereinafter referred to as "City") has recommended approval of, and the County hereby grants, the zone change to M 1, Light Industrial, for the property, and will adopt an ordinance amending the Driggs Area of Impact Zoning Map to rezone the property to M1.

2. Conditions on Development: The sole use allowed and restrictions pursuant to this conditional rezone as reflected in this Agreement are as follows:

a. The property shall be used exclusively for the operation of a ready-mix concrete manufacturing facility.

b. At the current time the property has been re-zoned to M1, Light Industrial as described in paragraph 1. above. Part of such approval and recommendation was based upon execution of this development agreement to identify responsibilities and obligations pertaining to certain matters relating to the improvement and operation of the property. This development and operation shall be subject to the following terms and conditions, in addition to the other terms hereof:

(i) Developer intends to operate a Ready-Mix Concrete Manufacturing Facility (a "Facility") on the property.

(ii) All operations on the property shall comply with all applicable and governing local, state or U.S. ordinances and laws relating to dust, noise, water quality and air quality.

(iii) Attached as **Exhibit "B" - Site Plan, and Exhibit "C" - Building Elevations**, and by this reference incorporated herein are plans for construction of Developer's intended permanent facility ("Permanent Facility").

(iv) Immediately upon execution of this Agreement, Developer shall order and commence construction of the Permanent Facility. The installation of the Permanent Facility shall be completed within eighteen (18) months of execution of this Agreement by the County, subject to delays resulting from weather, strikes, shortage of steel or manufacturing equipment or any other act of force majeure or action beyond Developer's control.

(v) In order to facilitate and support the construction of the Permanent Facility and to allow the Developer to expedite commercial operations, the Developer shall erect and operate a temporary concrete batch plant on site as shown in **Exhibit "B" - Site Plan and Exhibit "D"**.

(vi) In the event that the Permanent Facility is not completed within the time allowed herein, the County shall have the right to revoke the authority to operate the Temporary Facility. The grant of authority of the Temporary Facility is to allow Developer to operate Developer's business until the Permanent Facility is constructed. The

authority to operate the Temporary Facility shall terminate upon completion of the Permanent Facility even if sooner than the described eighteen (18) month time period.

c. The access to the property from State Highway 33 shall be via Casper Lane, which shall be improved to City of Driggs Public Works Standards and Specifications, as shown in the construction drawings submitted by Developer and held by the City of Driggs, prior to operation of the Temporary Facility.

d. To assure compatibility with other surrounding uses the following additional matters have been addressed and agreed upon for the Permanent Facility as follows:

(i) Noise related issues will be addressed by construction of decorative concrete block walls of eight and three-quarters feet (8.75') in height along the boundaries of the property, as shown in Exhibit B – Site Plan and enclosure of the Batch Plant Equipment within a building, as shown in Exhibit C – Building Elevations.

(ii) Dust will be controlled through paving of the area around the Facility, the enclosure of the Batch Plant Equipment within a building, a truck wash for trucks utilized by the Facility and a dust collection system on the Batch Plant. In addition, the Facility will have an air quality permit from the Idaho Department of Environmental Quality and comply with the requirements of that agency.

(iii) Hours of operation shall not be restricted as this is consistent with the provisions for M1 and C3 zoning. The property is surrounded by property zoned M1 and C3. The construction business activities of the Facility sometimes require varying hours of operation due to the nature of the construction industry.

(iv) Traffic issues shall be mitigated by construction of improvements on Casper Drive as described herein and the implementation of improvements on Highway 33 as required by the Idaho Department of Transportation.

(v) Landscaping on the North and West side will consist of a block wall with planter areas that will include trees or vegetation. The east boundary of the property shall have a fifteen (15) foot wide area reserved for future landscaping that will be

addressed if the future road planned for the area is developed. See Exhibits "B"-Site Plan and "E"- Block Wall Planter Detail.

(vi) Lighting issues shall be mitigated by using cut-off fixtures that direct the light downward rather than flood lighting.

3. Indemnity: Developer agrees to, and does hereby, defend, hold harmless and indemnify the City and County, all associated elected and appointed officials, officers, employees, agents, representatives, and attorneys, from any and all claims that may, at any time, be asserted against any such parties in connection with:

a. the City's or County's review and approval of any plans or improvements, or the issuance of any approvals, permits, certificates, or acceptances relating to the use and/or development of the property;

b. the development, construction, and maintenance of the property;

c. the performance by the County of its obligations under this Agreement and all related ordinances, resolutions, or other agreements; and

d. Notwithstanding the foregoing, the indemnification terms of this paragraph 3 shall not extend or apply to the failure of the County to follow, in good faith, governing law or ordinances.

4. Agreement Modification: This Agreement may be modified only by a written document, signed by the parties, or their successors in interest, after complying with the notice and hearing procedures of Idaho Code §67-6509 and of the Driggs Zoning Ordinance.

5. Zoning Reversion Consent: The execution of this Agreement shall be deemed written consent by Developer to change the zoning of the subject property to its prior designation upon failure to comply with the conditions imposed by this Agreement. No reversion shall take place until after a hearing on this matter pursuant to Idaho Code §67-6511A. Upon notice and hearing, as provided in this Agreement and in Idaho Code §67-6509, if the property described in attached Exhibit "A" is not used as approved, or if the approved use ends or is abandoned, the Board of County Commissioners may, upon

receiving a recommendation from the City's governing board, order that the property will revert to the zoning designation (and land uses allowed by that zoning designation) existing immediately prior to the rezone action, i.e., the property shall revert back to the C3, Service and Highway Commercial zoning designation.

6. Annual Review: The County may, while this Agreement is in effect, annually review the extent of good faith substantial compliance with the terms of this Agreement. Developer shall have the duty to demonstrate Developer's good faith compliance with the terms of this Agreement during such review.

7. Performance: Developer shall comply with all commitments set out in this Agreement. Developer shall timely and satisfactorily carry out all required performance to appropriately maintain, in the discretion of the County, all commitments set forth in this Agreement.

8. Default and Remedies: In the event of a default or breach of this Agreement or of any of its terms or conditions, the party alleging default shall give the breaching party not less than thirty (30) days Notice of Default, in writing, unless an emergency exists threatening the health and safety of the public. If such an emergency exists, written notice shall be given in a reasonable time and manner in light of the circumstances of the breach. The time of the giving of the notice shall be measured from the date of the written Notice of Default. The Notice of Default shall specify the nature of the alleged default and, where appropriate, the manner and period of time during which said default may be satisfactorily cured. During any period of curing, the party charged shall not be considered in default for the purposes of termination or zoning reversion, or the institution of legal proceedings. If the default is cured, then no default shall exist and the charging party shall take no further action.

9. Termination: This Agreement may be terminated in accordance with the notice and hearing procedures of Idaho Code §67-6509, and the zoning designation upon which the use is based reversed, upon failure of Developer, a subsequent owner, or other person acquiring an interest in the property described in attached Exhibit "A" to comply with the terms of this Agreement.

10. Compliance with Laws: Developer agrees to comply with all federal, state, county and local laws, rules and regulations, which appertain to the subject property.

Developer's failure to comply with the above laws or the terms of this Agreement will subject Developer to an enforcement action by the County in a court of competent jurisdiction.

11. Changes in Law: Any reference to laws, ordinances, rules, regulations, or resolutions shall include such laws, ordinances, rules, regulations, or resolutions as have been, to the date of this agreement, or as they may then be in force in the future with respect to proposed amendments to this Agreement in the future.

12. Miscellaneous Provisions:

a. The parties agree that the relationship created by the agreement is solely that of a private Developer and the City. Nothing in this agreement shall create the Developer or City as an agent, employer, employee, legal representative, partner or subsidiary of the other.

b. The parties agree that this Agreement shall run with the land and bind the property in perpetuity, and shall inure to the benefit of and be enforceable by the parties, and any of their respective legal representatives, heirs, successors, and assigns.

c. All notice must be in writing, mailed in the U.S. Mail via certified mail to the addresses indicated on this agreement.

d. This agreement shall be construed and enforced pursuant to the laws of the State of Idaho.

e. If any party shall bring suit against the other party to enforce this agreement, the prevailing party shall be entitled to reasonable attorney fees and costs.

f. If any term of this agreement is declared invalid, illegal or unenforceable, the remainder of this agreement shall remain operative and binding.

g. The Developer hereby guarantees the prompt and satisfactory correction of all defects or deficiencies in the improvements that occur or become evident during the one-year period following [final construction of the improvements. If the defect or deficiency occurs or becomes evident, then the Developer shall commence correction of

the defect of deficiency within ten days after written notice from the City. The Developer shall proceed with reasonable diligence to correct the defect or deficiency. The guaranty shall be extended one full year from the date of repair or replacement of any improvement made pursuant to this paragraph.

h. This agreement shall be signed in duplicate originals. Each party shall receive one original of this agreement.

i. The County shall have this agreement recorded in the office of the Teton County Clerk.

AGREED:

Teton County, Idaho

By: _____
County Commissioners
P.O. Box
Driggs, Idaho 83422

BOARD OF COUNTY COMMISSIONERS
TETON COUNTY
IDAHO

Attest:

By: _____
County Clerk

Developer:

BURNS HOLDINGS, LLC

By: _____
Kirk Burns, Manager

EXHIBIT "A"

FROM INSTRUMENT NO. 183802

TRACT 1: FEE ESTATE

LOT 1B-W, TETON PEAKS VIEW SUBDIVISION, TETON COUNTY, IDAHO, PART OF THE Wl/2.NEI/4, SECTION 23, TOWNSHIP 5 NORTH, RANGE 45 EAST, BOISE MERIDIAN, TETON COUNTY, IDAHO, BEING FURTHER DESCRIBED AS: FROM THE Nl/4 CORNER OF SAID SECTION 23, SOUTH 975.63 FEET AND EAST, 627.41 FEET TO THE POINT OF BEGINNING; THENCE SOUTH 510.00 FEET TO A POINT; THENCE WEST 274.41 FEET TO A POINT; THENCE NORTH 510.00 FEET TO A POINT; THENCE EAST 274.41 FEET TO THE POINT OF BEGINNING.

TRACT 2: EASEMENT ESTATE

TOGETHER WITH A 60 FOOT WIDE ROAD AND UTILITY EASEMENT ALONG THE SOUTH SIDE OF THE. REMAINDER LOT lA, AS SHOWN ON THE RECORD OF SURVEY RECORDED FEBRUARY 24, 1999 AS INSTRUMENT NO. 133115, RECORDS OF TETON COUNTY, IDAHO.

FROM INSTRUMENT NO. 183803

LOT 1B-E, TETON PEAKS VIEW SUBDIVISION, TETON COUNTY, IDAHO, BEING FURTHER DESCRIBED AS FOLLOWS: PART OF THE W1/2NE1/4 SECTION 23, TOWNSHIP 5 NORTH, RANGE 45 EAST, BOISE MERIDIAN, TETON COUNTY, IDAHO, BEING FURTHER DESCRIBED AS: FROM THE N1/4 CORNER OF SAID SECTION 23, SOUTH 975.63 FEET AND EAST 627.41 FEET TO THE POINT OF BEGINNING. THENCE EAST 274.60 FEET TO A POINT; THENCE SOUTH 510.00 FEET TO A POINT; THENCE WEST 274.60 FEET TO A POINT; THENCE NORTH 510.00 FEET TO THE POINT OF BEGINNING.

Exhibit B

Burns Holdings Driggs Site Plan Version 9.5

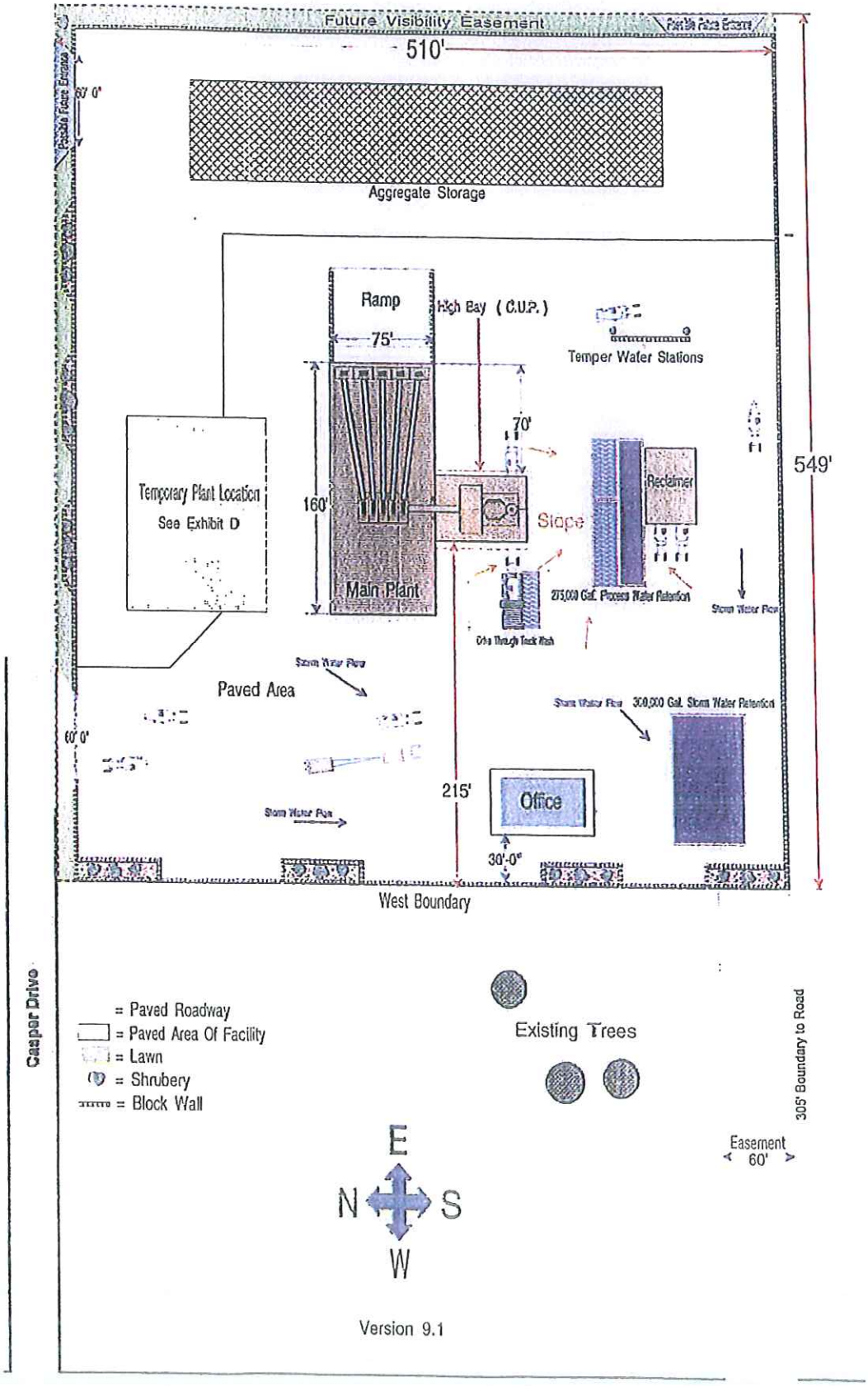
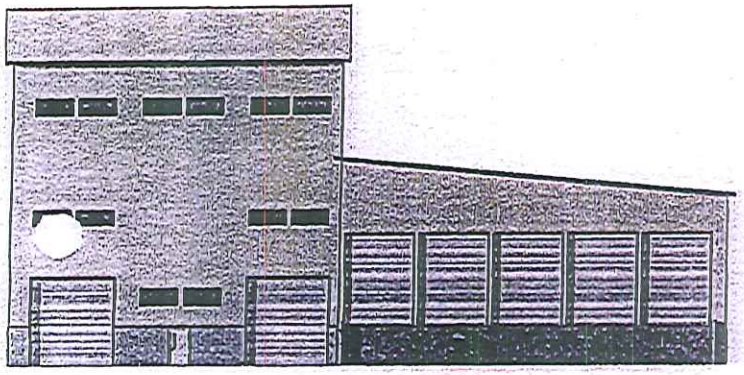
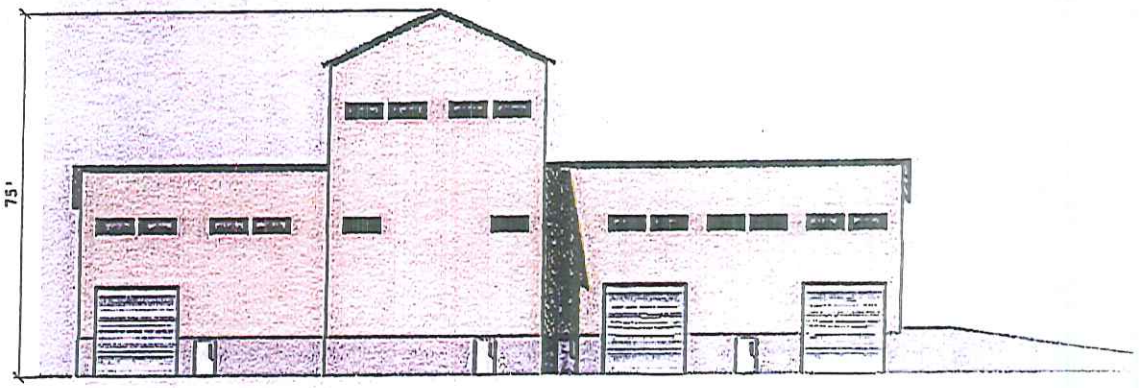


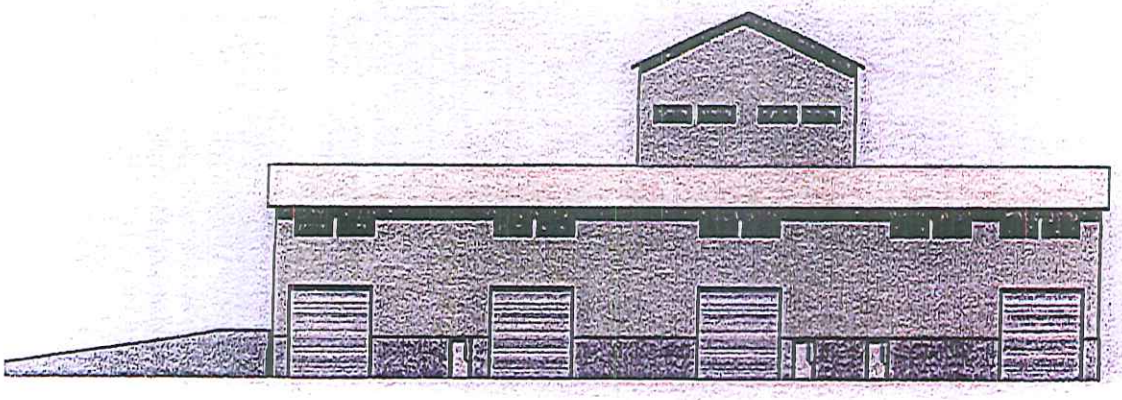
EXHIBIT "C"



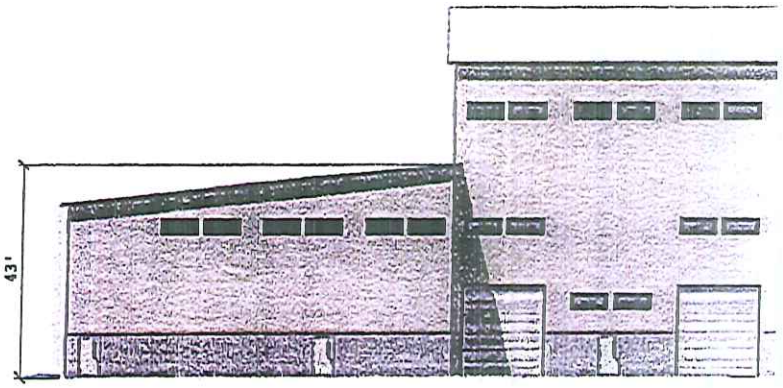
EAST ELEVATION



SOUTH ELEVATION



NORTH ELEVATION

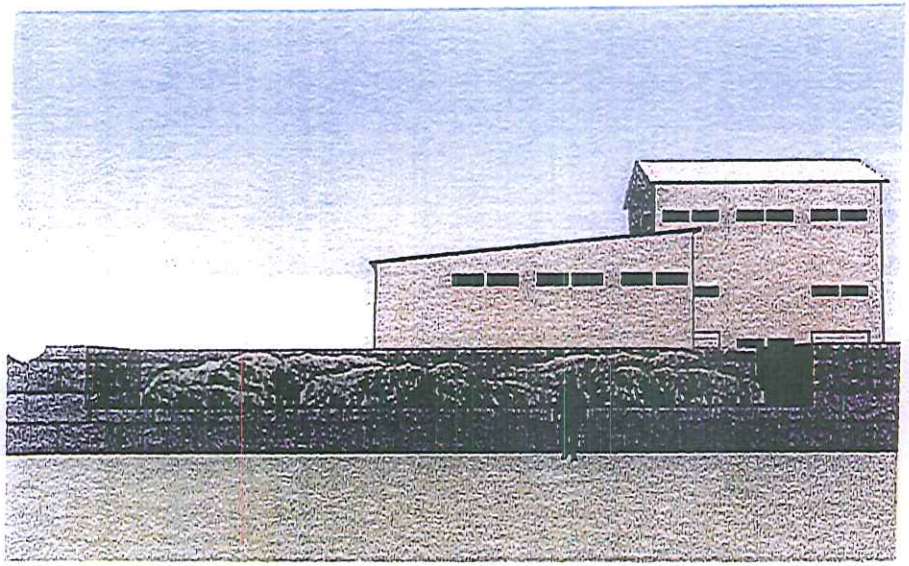


WEST ELEVATION

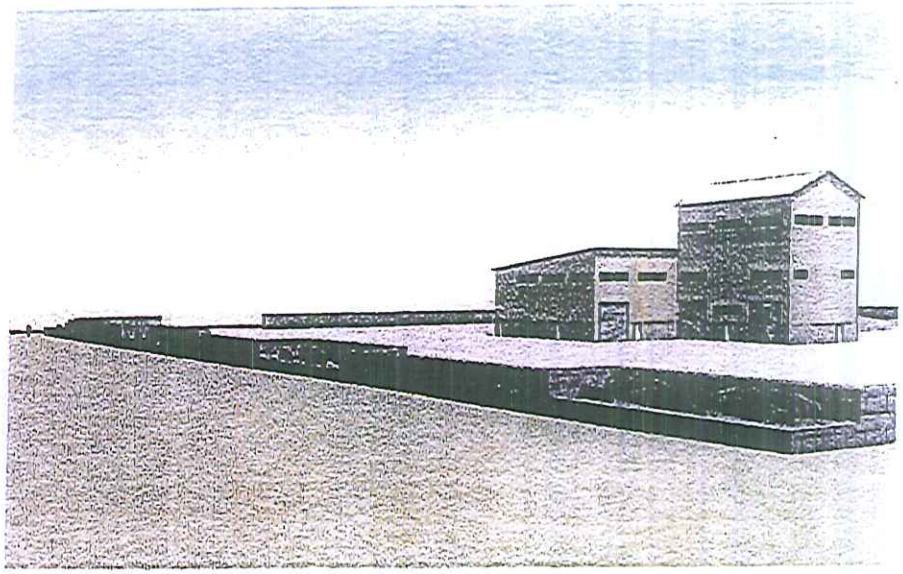
BUILDING ELEVATIONS

Exhibit D Temporary Batch Plant

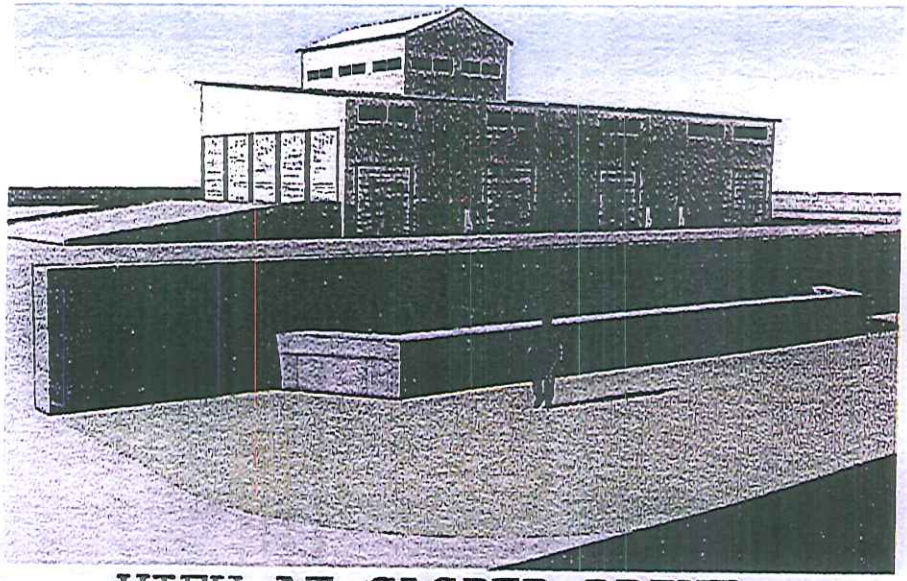
EXHIBIT "E"



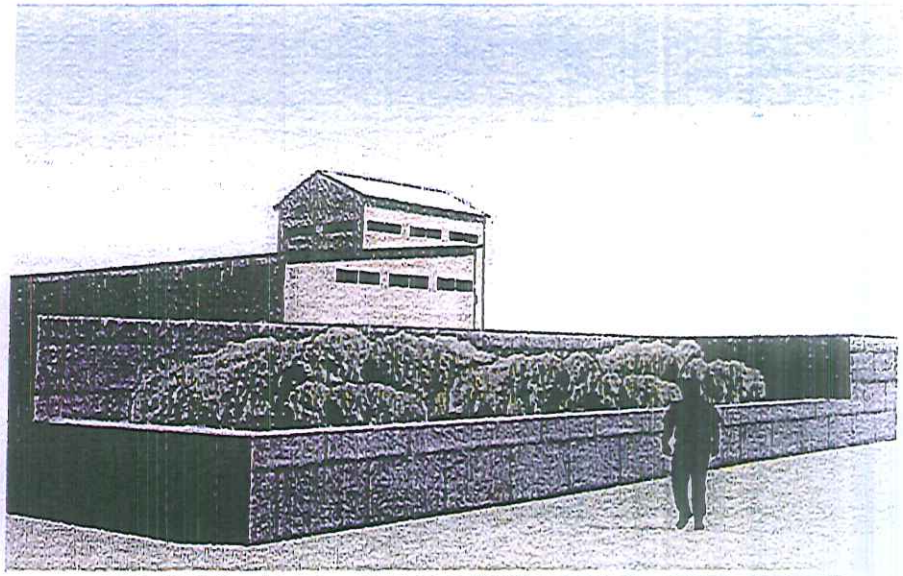
VIEW AT WEST BOUNDARY



VIEW AT WEST BOUNDARY



VIEW AT CASPER DRIVE



VIEW AT NORTHWEST CORNER

Rcvd
7/2/12

Teton Scenic Byway Advisory Committee

P.O. Box 782, Driggs, Idaho 83422

July 2, 2012

Driggs Planning and Zoning

P.O. Box 48, Driggs 83422

Attn: Doug Self

In response to your request for comment on the proposed cement plant variance, I would make two comments:

1. I assume P&Z will recognize and follow any State or Federal law regarding height and other restrictions In relation to designated State Scenic Byways. If there are questions on this the new administrator of the program is Maureen Gresham, ITD, Boise'
2. The Teton Scenic Byway Advisory Committee objects to the height variance requested as the proposed facility is directly on line with one of the most scenic views of the Byway corridor.

Sincerely, yours,

C. Reid Rogers

Committee Chair

Subject: Comments regarding the Burns Holdings height variance
From: Anna Trentadue <anna@tetonvalleyadvocates.org>
Date: 7/10/2012 2:58 PM
To: Doug Self <pzdriggs@ida.net>
CC: Kathy Spitzer <kspitzer@co.teton.id.us>

Dear Driggs Planning & Zoning Commission:

On behalf of Valley Advocates for Responsible Development, I am submitting comments regarding the Burns Holdings application for a height variance to build a 75-foot batch plant tower in the M1 zone. Idaho Code § 67-6516 allows for the granting of variances by Cities and Counties, but such variances cannot be granted unless specific statutory criteria are satisfied:

> *A variance shall not be considered a right or special privilege, but may be granted to an applicant only upon a showing of undue hardship because of the characteristics of the site and that the variance is not in conflict with the public interest.*

Burns has requested a 30-foot variance from the existing regulations to construct a 75-foot tower. This is a 66% increase over the current height limit for the M1 zone. Such a substantial variance request in a highly visible location to Driggs should be carefully scrutinized by both the City and County.

The issue here seems to be whether there are any physical characteristics of the site that warrant building a 75-foot tower. Any adjustment to the zoning regulations of this site <u>must be due to physical characteristics</u> of the subject property. (See *Gay v. County Commissioners of Bonneville County,* 103 Idaho, 626, 651 P.2d 560 (1982); A variance is limited to adjustment of certain regulations concerning the physical characteristics of the subject property.)

As a general rule, the burden is on the applicant to prove the statutory criteria for a variance has been met. Here, the applicant's 2-page narrative does not elaborate on any physical characteristics which make this 30-foot height exception warranted. The property is flat, with minimal vegetation, or any other remarkable physical features. While it might be economically beneficial for Burns to construct a 75 foot tower, the feasibility of an economic investment cannot be used as a basis to grant a variance. (See *City of Burley v. McCaslin Lumber Co.,* 107 Idaho 906, 693 P.2d 1108 (1984); In the *McCaslin* case, a variance for a triplex was approved instead of a duplex because it would make the project more economically feasible. This was reversed by the Idaho Supreme Court because the correlation between land use and the scope of feasible investments is not "peculiar" to the property at issue and thus does not satisfy the showing of undue hardship 'because of the characteristics of the site'.)

For these reasons, I agree with the recommendation by City Planner Doug Self that the statutory criteria for a variance has not, and cannot be satisfied here.

Thank you for the opportunity to comment.

Anna Trentadue

--
Anna Trentadue
Program Director and Staff Attorney
Valley Advocates for Responsible Development (VARD)

Subject: Public Comment re Burns Variance Application
From: jgrabow@mindspring.com
Date: 7/10/2012 7:13 PM
To: pzdriggs@pdt.net

I apologize for this late comment, having been out of town, and thus will be brief. My wife and I own a home and property immediately to the south of the Burns property. I attended multiple meetings before the P&Z on this subject in which I indicated that a concrete plant of this height was wholly inappropriate in this location in the scenic corridor and not in the overall public interest. Nothing has changed since then other than that the applicant's tactics these past five years belie their promises at those meetings to be a good citizen and neighbor. Thank you for your consideration, John Grabow

Rcvd
7-11-12

July 11, 2012

Planning and Zoning Commission
City of Driggs

RE. Item IV of tonight's Agenda.

Honorable Commissioners,

I am the owner of 250 acres adjacent to Burns Concrete. I respectfully register my objection to operation of a concrete plant in its current location in general, including the VARIANCE requested by Burns Holdings, LLC.

The current location of the "temporary" plant is within view of our scenic corridor. This, in my view, may constitutes a conflict with public interest.

A concrete mix plant at this location does not make common sense from the community's aesthetic and environmental point of view. It is an eyesore.

In addition to being an eyesore on a scenic corridor, if in full operation, the plant may create conditions (e.g. heavy equipment traffic, noise, environmental pollutants), and land use incompatible with the surrounding properties.

Allowing the VARIANCE for this location will most likely compound the above mentioned problems and is not in keeping with either the current neighboring C-3, R-3 or M-1 uses nor the code sections that govern these three zones.

Furthermore, The subject property is located within the Driggs Area of Impact. City Code allows for a variance up to 120% of the 45 foot height limitation for the M-1 zone of the subject and adjacent lands to the nOrth, south and east. Said 120% would allow for a 54 foot height limitation and same may (not shall) be granted to an applicant for variance, "only upon the showing of undue hardship because of characteristics of the site and that the variance is not in conflict with the public interest nor the general land conditions in the neighborhood."

The subject property is virtually flat and has no characteristics justifying undue hardship which merit the requested variance.

Respectfully submitted, Kambiz Taleghani, P.E.

Read allowed by Mark Rockefeller
@ The request of Kambiz Taleghani
7-11-12