

CITY OF OAKLAND
AGENDA REPORT

FILED
OFFICE OF THE CITY CLERK
OAKLAND

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TO: Office of the City Administrator
ATTN: Dan Lindheim
FROM: Community & Economic Development Agency
DATE: October 21, 2008

RE: **A Public Hearing and Resolution Denying the Appeals and Upholding the Planning Commission Approval of the Legalization of a Previously Unpermitted Expansion of a Recycling Facility (Aaron Metals) at 750 105th Avenue**

SUMMARY

On March 19, 2008, the Planning Commission approved (by a vote of 4 to 0) a Major Conditional Use permit to legalize the prior expansions of the Aaron Metals recycling company. (CM06-268) (Project).

On March 31, 2008, Rose Black and Communities for a Better Environment (CBE), filed an appeal of the Planning Commission's Approval of the Project to the City Council (Attachment A).

On March 31, 2008, Paul Forkash of Aaron Metals, also filed an appeal of the Planning Commission's Approval of the Project to the City Council (Attachment B).

The appeal by Rose Black and CBE (CBE appeal) essentially maintains that (a) the Conditional Use Permit findings were not met; (b) the Conditions of Approval imposed by the Planning Commission were inadequate to lessen the impact of the Aaron Metals facility on the surrounding neighborhood; and (c) the project does not qualify for any Exemption under CEQA because of the potential for noise, traffic, water quality, and air quality impacts from the site.¹

The appeal by Paul Forkash of Aaron Metals (Aaron Metals appeal) essentially maintains that (a) several of the conditions of approval imposed by the Planning Commission are onerous, will have severe financial impacts on their business, and are unnecessary; and (b) that staff's final writing of condition #8 went beyond the desires of the Planning Commission.

The arguments raised by each of the appellants are summarized below in the Key Issues portion of this report along with staff's response to each argument, as well as addressed in the attached March 19, 2008 Planning Commission Report (Attachment C). For the reasons stated in this report, and elsewhere in the record, staff recommends the City Council adopt the attached

¹ CBE sought to supplement its appeal with additional materials submitted after the 10 day appeal period had expired. Staff permitted a limited amount/type of supplemental materials in this situation and these are included in Attachment A.

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Resolution denying the appeals, thereby upholding the Planning Commission's approval of the project.

FISCAL IMPACT

The project involves an existing business and does not request or require public funds and has no direct fiscal impact on the City of Oakland. If allowed to continue to operate, the project would continue to provide a positive fiscal impact through sales taxes, property taxes, and business license taxes. As the site is not seeking a further physical expansion it would not require an increase in the level of municipal services that must be provided. Were the appeals to be upheld and the project overturned (specifically the appeal by the neighbors seeking the business be reduced in scale), it is likely that there would be a diminished amount of revenue from sales taxes.

BACKGROUND

PROJECT SITE AND SURROUNDING AREA

Existing Conditions

The property site is flat and is approximately 2.5 acres (108,967square feet) in size. The geometry of the overall property site is roughly rectangular. The site is developed with an active recycling facility. The property is surrounded by a 12 foot tall wall with one vehicular opening on 105th Avenue and an access gate off of 106th Avenue. The site has several buildings on it as well as equipment for the processing of scrap metal and wire. Storage of materials, both open and loose, and in storage containers, takes up the bulk of the property.

Surrounding Area

The western border of the property is the Union Pacific railroad and there are light industrial uses to the west and north, existing and recently approved housing to the southwest and east and a mixture of residential and industrial uses to the south.

GENERAL PLAN ANALYSIS

The General Plan is Business Mix. The General Plan describes it as being intended to provide a transition between high intensity commercial and industrial areas and those of lower intensity or as buffers with residential zones. The desired character includes a mix of businesses including light manufacturing, commercial, research and development, truck and rail related transportation services, and warehouses amongst others. Scrap metal recycling operations are considered to conform to the Business Mix Designation. Activities in conformance to the General Plan require a CUP through the normal process when the zoning also conditionally allows the use which is the case in this permit.

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ZONING ANALYSIS

This property was formerly zoned M-40 Heavy Manufacturing. The property, as with most industrial lands in the City of Oakland, was rezoned in June of 2008. The property is now zoned CIX-2/S-19. However, the City Council could not agree on the type of regulations to apply to recycling facilities and thus there are no regulations in the CIX-2/S-19 Zone and technically this facility would be permitted as of right, without any discretionary review by the City.² Scrap operations are generally permitted outright in the M-40 zone, however, in cases, like this, where the scrap operation is located within 400' of a residential zone, a Major Conditional Use Permit is required. Since there is a residential zone directly across Pearmain Street from the project site the Major CUP requirement exists. This zone does not require design review, although there is a CUP finding which addresses design review.

HISTORY OF THE OPERATION

Aaron Metals originally was approved by the Planning Commission, for a 10,000 square foot operation under a Major Variance (VM75-404) in January 1976. At the time, the zoning code required a Major Variance be filed for scrap metal recyclers to operate within 400' of residential (the minutes from the hearing state that the nearest residences were approximately 235' away). The variance requirement was later changed to a Major Conditional Use Permit. The business was located on 105th Avenue and did not extend to 106th to the southeast or to Pearmain to the east. Over time, the business expanded, without benefit of the required planning-related permits, although the exact timeline of the expansion is not clear. Aaron Metals did get some permits that are likely related to these expansions, including building permits for demolition, construction of warehouses and perimeter fencing, and miscellaneous electrical and plumbing permits. Sometime prior to 2005, Aaron Metals expanded in a southeasterly direction on two vacant parcels. This extended the southern border of Aaron Metals from 106th to 107th Avenue. This expansion (like the others) was done without amending the 1976 land use permit, which limited the business to 10,000 square feet. When informed of the violation, the applicant filed a Major Conditional Use Permit with the City to attempt to legalize the whole facility, which now exceeds 100,000 square feet.

Currently the facility is operating as a Scrap Metal Recycling facility. Customers deliver scrap metal to Aaron Metals for sale to the business. This metal is then compacted and shipped to the Port of Oakland where it is sent out for further refining (often overseas). During this process, the metal is stored in storage bins on the premises and, in early stages of receiving, in heaps on the surface of the property.

² Efforts are underway to establish new regulations for recycling facilities, and a moratorium prohibiting the expansion/alteration of existing facilities. This project is exempt from the terms of the moratorium and new regulations have not yet been adopted, therefore this application is evaluated under the set of regulations existing at the time of the completed application.

ENVIRONMENTAL DETERMINATION

The Planning Commission determined that the project is exempt from CEQA pursuant to Section 15332 of the CEQA Guidelines (In Fill Development Projects) based on the size and location of the project site, as well as the findings of the traffic report and historic analysis, as detailed in the March 19, 2008 Planning Commission Report (Attachment C).

Further, as a separate and independent basis from the other CEQA findings, pursuant to Public Resources Code section 21083.3 and CEQA Guidelines section 15183 (Projects Consistent with a Community Plan, General Plan, or Zoning), the City Council hereby finds, if it approves the project, that: (a) the project is consistent with Land Use and Transportation Element (LUTE) of the General Plan, for which an EIR was certified in March 1998; (b) feasible mitigation measures identified in the LUTE EIR were adopted and have been, or will be, undertaken; (c) the EIR evaluated impacts peculiar to the project and/or project site, as well as off-site and cumulative impacts; (d) uniformly applied development policies (imposed as Standard Conditions of Approval) have previously been adopted and found to, when applied to future projects, substantially mitigate impacts. To the extent that no such findings were previously made, the City Council hereby finds and determines (in approving the project) that the Standard Conditions of Approval imposed on the Project substantially mitigate environmental impacts; and (e) substantial new information does not exist to show that the Standard Conditions of Approval will not substantially mitigate the project and cumulative impacts.

The Planning Commission also found this project to be exempt under Section 15301, which is a category for minor alterations to existing facilities. The property has been operating as a scrap metal recycling business for a number of years and the applicants are not proposing further changes or expansions to this facility. Additionally, the City found the project to be exempt under CEQA Guidelines section 15061(b) (3), which provides that only projects that can be considered to have an environmental effect are subject to CEQA. As this project proposes no change from the baseline footprint when the application came in, it is reasonable to state that this would apply as CEQA directs the City to look at proposed changes to the environment, not existing ones. Likewise, the City found the project to be exempt from CEQA under Guidelines section 15378(a), since this is not a project as it involves no physical changes. (See response #3 to the CBE appeal, for further discussion)

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KEY ISSUES AND IMPACTS

A. CBE APPEAL

The CBE appeal is included as Attachment "A" (the original March 31, 2008 appeal, supplemented on June 16, 2008) and described below. The basis for the appeal is shown in bold text and the staff response follows each point in italic type.

1. The project does not meet any of the Conditional Use Permit findings.

CBE failed to specifically state how the findings adopted by the Planning Commission were incorrect. For each of the five findings, CBE simply repeats the findings own language with a statement that the project did not meet the findings and that "Appellants will further describe failures in this finding in their written and oral arguments to the City Council." However, even after given a further opportunity to do so (by allowing the filing of supplemental materials), CBE has failed to clearly state any specific reasons, supported by substantial evidence, why the project does not meet the findings.

In contrast, the Planning Commission approved the project, making specific and detailed findings, supported by substantial evidence in the record. Essentially, the Commission found this is a mixed neighborhood consisting of both residential and industrial uses. It was zoned M-40 at the time of the hearing, which is a heavy manufacturing zone. The facility is well screened from surrounding uses and conditions have been included to both extend the height of fencing and reduce the heights of stored and stacked materials to be no taller than the fence. Other conditions of approval were added that require the applicant to monitor the neighborhood for illegal dumping, install flagmen at the corner of 105th and Edes Avenue on Saturday, require an acoustical study to review noise around the metal crushers, and install landscaping and/or art to attempt to aesthetically improve the site. With the inclusion of these and other conditions, the Planning Commission found that the findings for granting a Conditional Use Permit could be met.

2. The conditions of approval are inadequate for dealing with the impact of the Aaron Metals facility.

CBE contends that Aaron Metals has a long history of violating conditions of use of it's property and that the Planning Commission should have further strengthened the conditions to be imposed on the operator because of this.

CBE maintains the approval of the use should expire within one year if conditions of approval are not met. This is not necessary as any Conditional Use Permit can be revoked by the City (after a public hearing) for a number of reasons; in addition, the City has other enforcement mechanisms. Condition #5 provides adequate tools and processes and adding a separate and new process that essentially to does the same thing is unnecessary, cumbersome and confusing.

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CBE also contends a condition requiring a public hearing before the Planning Commission should be required after 3 years. This is less stringent than condition of approval #5 from the approved planning permit which requires review after 1 year. The city fails to see why the appellant's change would be beneficial. If there were to be continued issues between the business and the neighbors having a public hearing closer in time to the approval date would allow those issues to be discussed and remedied more quickly. Moreover, if warranted and properly noticed, the Planning Commission can hold public hearings before, during or after a one or three year period—it is not necessary to revise the condition to state a 3 year review period.

CBE also recommends the compliance plan mentioned in condition #8 be filed as a public record and mailed to the neighbors. The submitted compliance plan is a public record and is disclosable to the public. It is not standard to mail out submitted documents automatically, but rather on a request basis.

CBE contends the buffering to be inadequate and therefore recommends changing Condition #17 to require that fencing abutting residences be solid and that new fencing should be required within 60 days. The appellant's request is rather convoluted in that it first states that improving the fencing is not a solution but then make no recommendations to address the perceived problem save for improving the fence. The City disagrees with the assertions about the fence adjacent to the sole residential use being inadequate; it is generally of the same composition as the rest of the fence. The City believes such a condition is unnecessary and that the conditions raising fences and limiting the height of stacked materials to no more than 12 feet tall will help buffer the property from the neighborhood.

Conditions 19, 25, and 32 deal with parking conditions and traffic concerns on the part of the appellants. CBE maintains capital improvements need to be made and that posting flag people is not adequate. The Transportation Services Division of CEDA did not have issues with the flagmen so long as they were trained and the Planning Commission placed a requirement that flag personnel also operate at the corner of Edes and 105th Avenue on Saturday mornings to help with heavy traffic volume. Otherwise, heavy capital improvements are not practical here. 105th Avenue is relatively narrow and fronted with buildings on both sides and railroad tracks to the west. Thus, there is little room to widen roads or add more curbs or other infrastructure. Also, the entrance to Aaron Metals is on the commercial street (105th) as opposed to the street that is more mixed with residential and commercial uses (Pearmain), which is the better place for the entrance. It is also along the wider section of 105th Avenue as the road narrows as it approaches Pearmain. Planning staff, working in conjunction with Transportation Services Division (TSD), have created conditions designed to re-engineer the driveway entrance by changing the angle at which it connects with the street to make it more perpendicular. Conditions have been included to ensure that the final design will be done without affecting the ability of trucks to turn into the property.

CBE is concerned scrap metal recyclers are magnets for those selling stolen metals. The Planning Commission recognized this as well and in Condition 23b required the applicant to not knowingly accept stolen materials (which in any case would be a crime on the part of the applicant or anyone else to ever knowingly accept stolen materials). CBE contends a procedure should be established for dealing with theft although they do not suggest what might be appropriate. Staff believes it would not be unreasonable to expect that the applicant would notify the police if they recognize stolen materials.

The City does not understand CBE's concerns with Condition #24, as the condition (as written) requires the applicant to retain a qualified consultant to perform an acoustical study within 6 months of approval and that, if it reveals excessive noises, alterations will be made to the project to reduce noise levels. Any study prepared by these consultants must be submitted to the City for review and approval. The City retains veto/editorial power over anything in the report that it disagrees with or believes needs modification, not the business. If the City deems it necessary it has the latitude to, at the expense of the property owner, have the document peer reviewed by a separate consultant.

3. The City's use of CEQA Exemptions are inappropriate here.

For purposes of evaluating environmental impacts under CEQA, the lead agency compares the existing, physical baseline conditions (usually at the time of zoning application) against the future conditions with the project. CEQA authorizes/permits the lead agency to follow this same type of analysis where, as here, there has been an illegal expansion of a facility.³ The illegal expansion is considered to be a code enforcement matter, rather than a CEQA issue.

Here, the existing conditions are the operations of a 100,000+ square foot facility. The applicant is seeking to legalize its existing operations, but is not proposing a physical increase/expansion of the existing facility as it now operates. Thus, the existing conditions are the same as the future conditions and therefore there is no change in the physical conditions, thus there is no environmental impact under CEQA.

"Common Sense" Exemption

CBE contends that an exemption under CEQA Guidelines section 15061(b)(3) is not appropriate here. CBE maintains the expansion must be reviewed separately. The City's view of CEQA law

³ Conversely, the City Council could find that there has been environmental degradation as a result of the facility's illegal expansion. If so, the Council could then decide to use the pre-expansion baseline to evaluate the project's impacts, such that there would be an evaluation of the impacts of a 90,000+ square foot expansion, if supported by substantial evidence. As a result, some of the reasons cited why no further environmental review is required may no longer be applicable (i.e., CEQA Guidelines section 15378(a), 15061(b)(3), and 15301). However, the other cited exemptions (15183 and 15332) would still apply. See also Environmental Determination Section above, and following text, for a discussion of the CEQA exemptions.

is that the project, even one resulting from an illegal expansion, is analyzed from the impacts it is likely to cause in the future. As the application proposes no changes to the footprint of the site as it is developed now or any increase in the volume of material it receives staff does not foresee that any further impacts. CBE acknowledges in its appeal that case law supports the City's position.

In-Fill Exemption

CBE asserts that the In-Fill Exemption (CEQA Guidelines section 15332) does not apply to this project. CBE contends the project is not consistent with the zoning and general plan and that it will have significant impacts on traffic, noise, and water quality impacts (see pgs 3-4 in the Planning Commission report, Attachment C). For reasons why the City believes the project is consistent with both the zoning and general plan, see the "General Plan" and "Zoning Compliance" sections on pg 2-3 of this report, as well as the detailed discussion and findings in the Planning Commission Report, and the discussion below under Section 15183 on pages 12-13 of this report.

CBE also contends that this project is not consistent with the new zoning of CIX-2 which was adopted in June 2008, well after the Planning Commission approved the Aaron Metals project in March of 2008. This is not entirely accurate because while the property was rezoned to CIX-2, the rezoning ordinance grandfathered in applications complete as of the date of the ordinance adoption. Here, not only was the application complete, the Planning Commission approved the project. Moreover, as explained in footnote 2, new regulations relating to recycling facilities such as this have not yet been adopted by the City Council.

In support of its claims that the project will have significant impacts on traffic, noise, and water quality impacts, CBE submitted a supplemental declaration from Anna Yun Lee, who described herself as a staff researcher/scientist for CBE. Although Ms. Yee's declaration purported to catalogue a variety of potential health impacts from truck traffic, running generators, and noise, these are broad generalizations of the sort of potential problems associated with industrial uses, and not specifically attributed to the operation of Aaron Metals. Only the issues regarding noise were remotely tied to Aaron Metals.

City records indicate only two noise complaints were filed with the Code Compliance Division of CEDA-- one in 2002 and the other in 2003. Both stemmed from complaints about loud noise emanating from the property. The complaints were investigated and abated by Code Enforcement. Due to these types of complaints, the Planning Commission imposed conditions of approval requiring the applicant to retain an acoustical engineer to prepare a noise study within six months of permit approval and that if the report showed exceedance of City standards, the property owner would effect necessary changes to the property to eliminate those impacts. Additionally, two other complaints concerning trash, litter, and blight were filed in late 2007 and again in the Spring of 2008. Both were investigated by Code Enforcement and the sites were deemed clean and not blighted and the cases were closed.

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A review of other agencies (both City and outside entities) finds a general lack of complaints about Aaron Metals aside from the aforementioned issues. The City's Fire Prevention Bureau has no data on the property being a problem with regards to hazardous materials or toxic contaminants. The San Francisco Regional Water Quality Control Board (SFRWQCB), which regulates and investigates complaints about pollution that affects surface and ground water, has no history on this site or any other active complaints in the neighborhood associated with Aaron Metals. Staff has reviewed records from the Bay Area Air Quality Management District (BAAQMD). The BAAQMD reviews air quality and investigates complaints about air pollution in the San Francisco Bay Area. A review of their databases shows no recorded incident reports related to Aaron Metals have been recorded by them since 1997 (the earliest date records were available for review). The property is also not on the "Cortese List," which is a compilation of lists about toxic sites and leaking underground storage tanks. Finally, the site is not listed as a problem with the Alameda County Department of Environmental Health. Indeed, while Aaron Metals did not get flagged as a problem facility by these agencies other nearby businesses showed up as having past or active cleanup issues. While the CBE appeal makes assertions about the health risks emanating from industrial activities these do not link to impacts demonstrated to have come from Aaron Metals.

CBE mentions, but does not elaborate on, a lawsuit filed against Aaron Metals alleging violations of the federal Clean Water Act for discharging pollutants into stormwater. Staff obtained copies of the lawsuit, the settlement agreement and a recent letter from the plaintiffs' attorney relating to compliance. Essentially, the settlement provides for Aaron Metals to implement improvements to its Best Management Practices and allow inspections to make sure the terms of the settlement are followed. In August 2008, plaintiffs counsel performed a site inspection and found Aaron Metals to be in compliance with the settlement agreement. To the extent there may have been past problems with pollutants being discharged into stormwater, there is no evidence of any current problems, nor any regulatory agency actions in response to the lawsuit or otherwise.

CBE also argues that public services do not adequately pick up garbage caused by Aaron Metals. It is not clear what volume of trash and debris is generated by customers using this business although City records indicates only a handful of complaints to Code Enforcement regarding litter and blight and the investigations into these found they were erroneous. Conditions of approval have been included for the regular pickup of litter in the surrounding neighborhood by Aaron Metals and such conditions are typical for recycling facilities.

CBE contends that noxious smells or odors have emanated from the property from time to time, apparently the result of burning certain rejected materials that were not suitable for recycling but accepted. This was inspected in one of the aforementioned complaints filed in 2002 and the City inspectors appear to have drawn no definite conclusions. Aaron Metals has consistently denied the burning of materials and the Planning Commission attached a condition of approval requiring absolutely no burning of any materials on the property. Staff believes this is sufficient.

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CBE also contends that the facility emits an excessive amount of noise. Noise is typical with industrial activities, particularly those that are conducted outside. Staff has been on or at the property several times and noted noise but wasn't in a position to determine if it was excessive. No noise monitoring has been done and therefore the Planning Commission placed a condition on the project requiring them to retain a licensed, professional sound engineer to conduct a noise study of Aaron Metals within 6 months of the approval of the CUP. This engineer would report to the City its findings. If it fails to meet City noise standards the condition further required walls, screening, or other noise deadening measures be put in place.

CBE argues that the traffic impact from Aaron Metals is too great and that the street was not designed to handle this volume of traffic. Other factors such as the proximity of the railroad complicate things as the City is restricted in its ability to construct major street improvements. Staff notes that while traffic can be tight, particularly on Saturdays, the project has taken steps to solve this and the Planning Commission further augmented this through conditions. First, the applicant is required to angle off the driveway, which currently points toward the railroad tracks at an angle. This will improve maneuverability into and out of the site and reduce vehicle queuing. The applicant also has a flag person in front of their business directing traffic and the Planning Commission placed a condition requiring that another such person direct traffic at the nearby intersection of 105th Avenue and Edes. The City believes such measures are suitable to address this concern.

CBE raises the question of employee parking on an unimproved portion (an undeveloped street) of Gravenstein Street. The employees of Aaron Metals and another business park their private vehicles on Gravenstein Street, which is closed by a gate put up by the City's Public Works Agency. Two neighboring businesses, one of which is Aaron Metals, claim permission to park on the property. Apparently, in an effort to reduce parking problems on adjacent streets and combat illegal dumping activities, Public Works officials did grant permission for this parking. In any event, the Planning Commission has imposed conditions that should this parking scheme be lost for whatever reason the applicant would be required to find accommodations for the employees of Aaron Metals subject to review and approval by the City.

Unusual Circumstances & Cumulative Impacts

CBE argues that even if the other exemptions are appropriate, there are exceptions that defeat use of the categorical exemptions, specifically citing significant impacts due to "unusual circumstances." In this case, CBE maintains Aaron Metals' location adjacent to residential makes it an unusual circumstance, but this is not supported in actuality. The entire East Oakland industrial area (extending from Fruitvale to the southern City boundary) is bordered on its eastern flank by residentially zoned land. Industrially zoned land is on three sides of the Sobrante Park neighborhood (the fourth side is the City of San Leandro) and the West Oakland industrial area is well mixed with residential uses. Unlike most suburban communities, in Oakland, residential uses are in close proximity to higher intensity Commercial and Industrial

uses. Thus, this situation is not unusual, it is common. For instance, most commercial zones in Oakland allow residential and Oakland also has a Housing and Business Mix zone (the zoning designation for the properties directly south of here) which anticipates residential, commercial, and industrial uses in close proximity to one another. Indeed, this particular neighborhood is a mixture of manufacturing, commercial, residential, live-work (a non-residential use allowing proprietors of a business to reside where they work), and civic uses. This is not an unusual circumstance in Oakland.

CBE contends the rezoning of the industrial areas in the City of Oakland is due in part to outcry from community members impacted by Aaron Metals and that this rezoning is in itself an unusual circumstance. This is inaccurate. While community members adjacent to Aaron Metals have been involved in the public rezoning process, citizens from across Oakland have been involved in the rezoning effort. This has been a multi-year process that began, after the City adopted a new general plan in 1998, well before the issue of Aaron Metals' expansion was known to have occurred. Rezoning is, in fact, fairly common as the entire Planning Code is currently being overhauled to conform to the general plan and the industrial rezoning process is simply one component of that process. The rezoning process is not being driven by this project. Further, if the City had decided the best answer to the Aaron Metals situation was to rezone, then rezoning all the industrial areas is hardly an appropriate response for the City to take; rather it would have rezoned this site.

CBE also asserts that being adjacent to sites with hazardous waste is an unusual circumstance. The City disagrees. There are hundreds of sites on the Cortese List in Oakland and several in the surrounding area but the Aaron Metals site is not on the Cortese List. The 1998 EIR (prepared and certified) for the Land Use and Transportation Element of the General Plan (LUTE) adequately addresses the issue of hazardous materials, including sites on the Cortese List. These sites are industrial sites actively manufacturing products, including metals on the property. While these sites are indeed nearby, Aaron Metals is not the cause of these hazardous materials issues, nor are other regulatory agencies viewing Aaron Metals as a problem (see pg 9 above). CBE has not demonstrated that Aaron Metals is a cause of these or other significant impacts. The fact that Aaron Metals is nearby sites on the Cortese List reinforces the previous point of the City that Aaron Metals is located in a highly mixed neighborhood of different activities.

CBE contends there are cumulative impacts because Aaron Metals will illegally expand in the future. This is wholly speculative and not reasonably foreseeable.

Projects Consistent with General Plan or Zoning (CEQA Guidelines Section 15183)

CBE contends that CEQA Guidelines section 15183 is not applicable here because the project does not conform to the zoning or general plan. As previously discussed in this report and in the Planning Commission Report, the zoning at the time of approval was M-40, a heavy manufacturing zone that allows such activities with a Conditional Use Permit within 400' of

residential uses. The M-40 is a zone designed for high intensity uses, indeed uses of a much higher intensity than Aaron Metals including the manufacture, compounding, and processing of things like aircraft, insecticides, various chemicals, alcohol, asphalt, and linoleum. All of these manufacturing activities would have been allowed by both the zoning and general plan (as all were classified as "general industrial activities") by right, without public review or discretion on the part of the City. Due to of the proximity to residential uses, a conditional use permit is required.

CBE cites several policies in the General Plan to make the case that this project does not conform to the general plan's business mix designation including N5.1 Environmental Justice, N5.2 Buffering Residential Areas, and N5.3 Supporting Live-Work Development. Staff disagrees with the position taken by CBE. First, Policy N5.1 deals specifically with including the community in the process through communication. This project has had, and benefited from, a great deal of public participation and many of the imposed conditions of approval resulted from this. Policy N5.2 talks about buffering residential zones through performance-based regulations, removal of non-conforming uses, or other tools. In this case, the Planning Commission chose to approve the project with multiple performance-based conditions as well as the requirement of a 1 year review of the project to investigate how the conditions of approval are being met. Finally, N5.3 talks about supporting Live-Work development. This is not relevant to this application, however, much of the land to the southeast is zoned Housing and Business Mix which is generally a very appropriate Live-Work environment.

CBE maintains that CEQA prohibits the City from imposing environmentally-related conditions of approval if exemptions are used. First, the City has the authority under the Planning Code (see OPC Chapter 17.134) to impose special conditions of approval, independent of CEQA, and regardless of what type of CEQA review is performed [EIR, (mitigated) negative declaration, or exemption], in order to make the proposed use compatible with the surrounding neighborhood and avoid having any adverse impacts. Hence the name – conditional use permit. Under CBE's theory, every conditional use permit would require at least a Mitigated Negative Declaration, as no special conditions of approval can be imposed if a CEQA exemption is used.

Second, the City's Uniformly Applied Development Standards are currently incorporated into projects as Standard Conditions of Approval regardless of a project's environmental determination. As applicable, the Standard Conditions of Approval are adopted as requirements of an individual project when it is approved by the City and are designed to, and will, substantially mitigate environmental effects, in part, pursuant to CEQA Guidelines section 15183. In reviewing project applications, the City determines which of the standard conditions are applied, based upon the zoning district, community plan, and the type(s) of permit(s) / approvals(s) required for the project. Depending on the specific characteristics of the project type and/or project site, the city will determine which standard conditions apply to each project; for example, standard conditions related to creek protection permits will only be applied projects on creekside properties.

The Standard Conditions of Approval incorporate development policies and standards from various adopted plans, policies, and ordinances (such as the Oakland Planning and Municipal Codes, Oakland Creek Protection, Stormwater Water Management and Discharge Control Ordinance, Oakland Tree Protection Ordinance, Oakland Grading Regulations, National Pollutant Discharge Elimination System (NPDES) permit requirements, Housing Element-related mitigation measures, California Building Code, and Uniform Fire Code, among others), which have been found to substantially mitigate environmental effects. Where there are peculiar circumstances associated with a project or project site that will result in significant environmental impacts despite implementation of the Standard Conditions, the City will determine whether there are feasible mitigation measures to reduce the impact to less than significant levels in the course of appropriate CEQA review (mitigated negative declarations or EIRs). The City's Standard Conditions of Approval are found in documents dated September 2007, and October 2003.

CBE also contends the Planning Commission did not make the required Section 15183 findings and that there are "peculiar" impacts not previously considered. The City disagrees. The Planning Commission implicitly made the section 15183 findings; to the extent they did not, the City Council will make such findings, as discussed earlier in the staff report, if they deny the appeal and uphold the Planning Commission decision. The EIR certified for the LUTE did consider unique/peculiar aspects of the site, off-site and cumulative impacts, including hazardous materials. Moreover, the CEQA review conducted for this project also considered such issues, including the traffic analysis.

B. AARON METALS APPEAL

The March 31, 2008 Aaron Metals letter (Mr. Forkash was the original applicant) is included as Attachment "B" and described below. The basis for the appeal is shown in bold text and the staff response follows each point in italic type.

- 4. Several of the conditions of approval imposed by this project are onerous to the business and are unnecessary.**

Aaron Metals contends a number of the conditions of approval imposed on the project by the Planning Commission are excessively burdensome to them and will hinder the ability of their business to function. Their appeal document cites each condition they are concerned with, gives an example of replacement language they would suggest (except where they argue for the wholesale deletion of a condition), and provide an argument why the change should be made.

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Condition #11

Aaron Metals contends this condition, which would require the stacking of materials to be no higher than 12 feet, which is the current height of the wall surrounding the property, would be excessively burdensome on their operations. Aaron Metals seeks to retain the language as originally proposed by staff requiring stacking be limited to 12 feet high within 20 feet of the eastern perimeter boundary. It was felt that this would sufficiently screen the material from views by the residential neighbors to the east. The Planning Commission strengthened this condition given the fact that new homes were being approved as part of Habitat for Humanity's phase II project to the southwest and also because this would be a simpler and more easily enforceable condition for the City. The appellant maintains this would be unduly burdensome by restricting the amount of scrap material that could be stored on site. Materials at this site are generally stacked in containers when they are ready for pickup to be shipped offsite (and usually out of the country) for further processing. Given the proximity of the port and the size of the site it is reasonable to expect that some combination of either increased shipping of processed materials or reorganized open storage on the property could allow the appellant to meet this condition. While the City does not deliberately seek to harm a viable business it is well within its scope to impose conditions that minimize impacts on surrounding neighbors, regardless of real or presumed economic impacts. It is quite common for these types of facilities to be conditioned such that materials are fully screened behind walls and therefore it is not considered excessively burdensome or unfair to the appellant.

CONDITION # 18B

Aaron Metals challenges condition #18b which requires the reduction of on premise business signs to the current, legally allowable levels, which for a property this size would be 300 square feet. The current amount of signage is estimated to be approximately 700 to 800 square feet. Aaron Metals notes such signage has been there for the life of the property and should therefore be allowed to stay. Staff agrees that some of the signage has likely been there that long although some of it looks to be in newer condition than 32 years old (the age of the original permit). Staff argues however that there are no records of any sign permits being applied for or issued. The original Major Variance for the site (VM75-404) required the business to apply for design review for the signage, also apparently never done. Therefore, while the signage may indeed be old it never received proper permission and cannot now claim any "grandfathering" provisions. Staff notes that the City Council took deliberate action in 2004 to reduce the signage allowed in all zones, including manufacturing to reduce the overall visual clutter of signage that prior regulations allowed. Staff believes that the reduction in signage will improve the visual quality of the 105th Avenue frontage and will correct this outstanding issue.

Condition #21

Aaron Metals contends that staff made a clerical error in condition #21 and should have added the word "finished" in front of materials. Staff has reviewed video of the meeting and agrees

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with the appellant that this condition was indeed modified on the floor to include the word "finished" and that the Planning Commission accepted this modification. This was inadvertently left out of the final write up of the conditions by staff. Therefore, the resolution includes language to correct this condition.

Condition #22

Aaron Metals challenges a provision within condition #22 requiring the business to develop a litter control plan that will ensure that an area of a one block radius from the facility is kept free of litter and debris. Aaron Metals believes this condition should only extend to adjacent sidewalks and gutters. They argue that this greater radius would require them to be responsible for picking up other people's materials that were not caused by customers to Aaron Metals. The City maintains that such a condition is hardly punitive and is a standard condition for scrap metal recycling facilities. Dumping of rejected materials is an unfortunate but not uncommon problem generally associated with this type of activity. The Planning Commission appropriately weighed the relative pros and cons and concluded it was a reasonable position given the scale of the operation involved.

Condition #25

Aaron Metals seeks the deletion of the last sentence of Condition #25 that allows staff the final determination of the width of the driveway. Currently the driveway enters the property from the street at a diagonal. Staff was particularly concerned since the diagonal was pointed at the adjacent Union Pacific railroad tracks. After discussion, the appellant proposed placing non-removable bollards from the fence line to the street. This would straighten out the driveway, leading to a more conventional 90 degree turn. There was discussion with the City's Transportation Services Division about also narrowing the opening of the driveway by several feet to further guide traffic flow into the site. The exact amount however was not agreed upon and the Planning Commission agreed to allow staff to review this further, after the approval of the project. The appellant seeks to remove this discretion as they're afraid that the City might narrow the driveway entrance in a way that hinders truck movement. Staff rejects this argument as the City has no wish to do anything that would hinder truck movement into or out of the facility, impact the operations of the business or of traffic flow in the street. Staff will work with the appellant's traffic consultant to ensure that whatever solution is arrived at will not impact public safety or adequate vehicle maneuverability.

Condition #33

Aaron Metals also contends that the condition requiring them to submit a landscape/metal art plan to the City is burdensome and not appropriate due to site constraints, as well as being an added and unnecessary expense. This condition was incorporated by the Planning Commission in an attempt to beautify the site. Staff notes that the nature of a Conditional Use Permit gives the City broad latitude to impose conditions such as this and that Finding "B" for granting a

CUP requires the City to make the finding that the project "... will be as attractive as the nature of the use and its location and setting warrant." While there is likely an upper limit to what one can do to make this sort of use "attractive," this condition was written broadly to allow a variety of options. Other metal facilities have done creative things to dress up their exteriors and indeed Aaron Metals already has metal art on it's property, just not readily visible from the street. Some of this art is from customers who have brought in metal art pieces for recycling and the owner decided to retain them, others have perhaps been crafted out of random scrap pieces by employees. The City does not view this condition as onerous as it adds to the attractiveness of the site and could partially make use of existing materials.

Since filing the appeal, Aaron Metals has indicated a willingness to at least partially comply with the condition. At the time they began to rebuild their sidewalks (see below) they also took the opportunity to plant street trees along Pearmain Street. They are not dropping their objection to the full breadth of COA #33 however they have put in the trees. Staff notes that the condition does call for them to submit a landscape plan but staff has not seen that yet. Staff would expect any street trees to be part of an overall and comprehensive landscape/metal art plan as described in the condition.

Resolved Issue (Condition #28)

Initially, Aaron Metals also challenged Condition #28 which required the business to close off any unused curb-cuts in the sidewalk. These curb-cuts were remnants from businesses and homes that used to be on what is now Aaron Metals property but were demolished during various expansions of the business. The curb cuts no longer provide access from the street due to the fence that surrounds Aaron Metals and are therefore surplus. These curb cuts should have been removed as a part of these expansions, per the City Building Code. Initially Aaron Metals contested the validity of this condition but after reviewing the regulations realized the condition conformed to the law. Since then, the applicant has filed the necessary building permits to close up these curb-cuts and the permit was issued in June 2008. Therefore, this issue is dropped from the appeal.

5. The final version of Condition #8 provided by staff goes far beyond what the Planning Commission actually said at the hearing.

Aaron Metals argues that City staff added too much to condition #8 in requiring them to prepare a compliance plan. They argue the Planning Commission only specifically mentioned holding a one year compliance review before the Planning Commission (which they also reject as being too onerous). Staff notes that it is not uncommon to clarifications/refinements/additions to the conditions of the Planning Commission as staff understands them; indeed the Planning Commission specifically mentioned this as something that should be done for this project. Requiring a compliance plan is useful when returning a project for review before the Planning Commission as it sets a baseline for the City to objectively decide whether they are in compliance with the conditions or not. The compliance plan is simply the conditions of approval

placed in a matrix, typically with one column for the adopted conditions, another column for whether they are in compliance or not, and a third column for the date compliance was verified.

As to the one year provision, given the amount of controversy and concern surrounding this project, as well as the number of conditions being imposed, it is appropriate for the Planning Commission to ask to review the project at a later date and is not discriminatory. Indeed, the Planning Commission often asks for the return of projects generating significant public commentary and where the conditions of approval revolve around operational issues. This is common for scrap metal recycling facilities and other activities such as transitional housing, homeless shelters, and it is common for activities such as nightclubs; all of these uses where conditions of approval are geared at regulating the operations of the activities in question and periodically reviewing how their conditions are working. Therefore, staff rejects the argument that Aaron Metals is being singled out in ways similar facilities are not and recommends this condition be retained as written.

SUSTAINABLE OPPORTUNITIES

Economic: The project will maintain an existing scrap metal recycling business in the City of Oakland.

Environmental: See CEQA determination above.

Social Equity: This project represents the continuation of an existing Scrap Metal Recycling business.

DISABILITY AND SENIOR CITIZEN ACCESS

No senior citizen or ADA access issues have been identified.

RECOMMENDATION(S) AND RATIONALE

Staff recommends that the City Council adopt the attached Resolution denying the appeals, thereby upholding the Planning Commission's approval of the project. Staff recommendation is based on the following reasons: 1) The Project and the approval of the Project comply in all significant respects with applicable general plan policies, conditional use permit criteria and review procedures; and 2) the Project complies with CEQA.

ALTERNATIVE RECOMMENDATION(S)

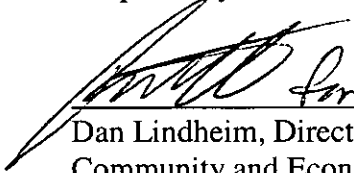
The City Council has the option of taking one of the following alternative actions instead of the recommended action above:

1. Uphold the CBE appeal and reverse the Planning Commission's decision thereby denying the project. This option would require the City Council to continue the item to a future hearing so that Staff can prepare and the Council has an opportunity to review the proposed findings and resolution for denial.
2. Uphold the Aaron Metals appeal and reverse the Planning Commission's decision thereby approving the project without some of the conditions added or modified by the Planning Commission.
3. Uphold the Planning Commission's decision, but impose additional or revised conditions on the project and/or modify the project.
4. Continue the item to a future hearing for further information or clarification.
5. Refer the matter back to the Planning Commission for further consideration on specific issues/concerns of the City Council. Under this option, the item would be forwarded back to the City Council with a recommendation after review by the Planning Commission.

ACTION REQUESTED OF THE CITY COUNCIL

1. Affirm the Planning Commission's environmental determination that the Project is exempt from CEQA review as detailed in this report.
2. Adopt the attached Resolution denying the appeals, and thereby upholding the Planning Commission's approval of the Project.

Respectfully submitted,

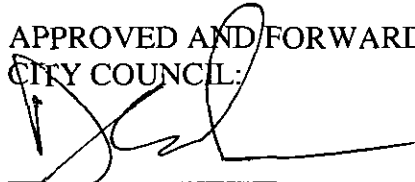


Dan Lindheim, Director
Community and Economic Development Agency

Reviewed by: Scott Miller, Zoning Manager

Prepared by: Robert D. Merkamp, Planner IV

APPROVED AND FORWARDED TO THE
CITY COUNCIL:



Office of the City Administrator

ATTACHMENTS:

- A. Rose Black/CBE appeal submitted March 31, 2008, as supplemented by CBE's June 16, 2008 materials⁴
- B. Paul Forkash/Aaron Metals appeal submitted March 31, 2008
- C. Planning Commission Staff Report of March 19, 2008 with revised, adopted conditions

⁴ CBE submitted voluminous materials which are not included here but were made available to the City Council offices and are available for review at the City Clerk and Planning Department.

REQUEST FOR APPEAL TO THE CITY COUNCIL
CASE FILE NO. CM06-268

AARON METALS
CONDITIONAL USE PERMIT AND NOTICE OF EXEMPTION

Communities for a Better Environment, Stonehurst Association, Sobrante Park Resident Action Council, School of Urban Missions, Sobrante Park Home Improvement Association and Tai Lan Industrial Park (collectively "Community Appellants") submit this request for appeal of a Conditional Use Permit ("CUP") that would allow Aaron Metals to use an additional 90,000 square feet of property in close proximity to homes, dormitories and businesses, in a way that creates serious health and lifestyle threats. Despite clear evidence of significant impacts, the Planning Commission issued the CUP without any CEQA review. The Planning Commission committed numerous errors of law and fact in approving the CUP and relying on CEQA exemptions. This request for appeal provides notice of issues for appeal, which are evidenced by the attached documentation and information presented to the Planning Commission. Community Appellants intend to further describe the Planning Commission's violations of law in their written and oral arguments to the City Council.

I. Incorrect Findings on which Planning Commission Approval is Based

Finding 1

The location, size, design and operating characteristics of the additional property to be used by Aaron Metals are not compatible with, and adversely affect the livability and appropriate development of abutting properties and the surrounding neighborhood with respect to:

- a) scale, bulk, coverage and density;
- b) availability of civic facilities and utilities
- c) harmful effect on desirable neighborhood character, including public safety
- d) traffic and capacity of surrounding streets; and
- e) other impacts. The Planning Commission's Finding is an abuse of discretion and not supported by evidence in the record. Appellants will further describe failures in this finding in their written and oral arguments to the City Council.

Finding 2

The location, size, design and operating characteristics of the additional property to be used by Aaron Metals do not provide a convenient and functional living, working, shopping or civic environment, and will not be as attractive as the nature of the use and its location and setting warrant. The Planning Commission's Finding is an abuse of discretion and not supported by evidence in the record. Appellants will further describe failures in this finding in their written and oral arguments to the City Council.

Finding 3

The use of the additional property by Aaron Metals will not enhance the successful operation of the surrounding area in its basic community functions or provide an essential service to the community or region. While scrap metal recycling is a valuable service, expansion of Aaron Metals from 10,000 square feet to over 100,000 square feet interferes with basic community functions. The Planning Commission's Finding is an abuse of discretion and not supported by evidence in the record. Appellants will further describe failures in this finding in their written and oral arguments to the City Council.

Finding 4

The use of the additional property by Aaron Metals does not conform with all applicable regular design review criteria set forth in the regular design review procedure at Section 17.136.050. The Planning Commission's Finding is an abuse of discretion and not supported by evidence in the record. Appellants will further describe failures in this finding in their written and oral arguments to the City Council.

Finding 5

The use of the additional property by Aaron Metals does not conform with all applicable land use plans, including but not limited to the Oakland General Plan. The Planning Commission's Finding is an abuse of discretion and not supported by evidence in the record. Appellants will further describe failures in this finding in their written and oral arguments to the City Council.

II. Inadequate Conditions in CUP

The conditions imposed by the Planning Commission do not adequately mitigate the impacts of Aaron Metals' expanded operation, and therefore violate the City's general use criteria. Specific flaws with the CUP conditions are described below:

Conditions 2 - 8

As documented in the attached information and in testimony before the Planning Commission, Aaron Metals has a long history of violating conditions of use of its property. The CUP should contain additional conditions to ensure compliance with the conditions for use of the additional property. In addition to approved conditions two (2) through eight (8), approval of use should expire within one year if conditions of approval are not met and maintained. Furthermore, a public hearing before the Planning Commission should be required after three (3) years. Finally, Aaron Metals should file a condition compliance plan with the City as public record and mail it to the Planning Commission's CUP approval service list.

Condition 17

Aaron Metals does not maintain an adequate buffer area, and merely improving its fencing is not a solution. Nevertheless, the insubstantial fencing where the facility abuts

residential uses (for example, the house at Pearmain and 106th) was a dangerous and non-structural temporary solution. All fencing that abuts residences should be solid and replaced within 60 days of granting CUP.

Conditions 19, 25, 32

As documented in evidence submitted to the Planning Commission and attached herewith, Aaron Metals is a source of danger and parking problems in the community. These problems are inadequately addressed by the conditions. Posting employees in the streets to conduct or direct traffic is not enough to remedy the problems. Actual capital improvements must be made to the business. A "Parking and Circulation "Plan" should be submitted as part of the request for CUP approval, before the granting of the CUP, not after. The width of driveway must be determined before granting the CUP. There must be a setback onto the property to create truck turn-around on the premises and for onsite parking and line up.

Any documents regarding traffic control, street modification, or parking must be made available to the public as part of this application, including, but not limited to, alleged permission to use Gravenstein Street as an employee parking lot. If no permission in writing exists for this use, it should not be permitted.

Condition 23

As demonstrated in the attached documents and in testimony before the Planning Commission, businesses such as Aaron Metals are a magnet for stolen materials. In addition to prohibiting Aaron Metals from knowingly accepting stolen materials, this condition should require a procedure and posting for dealing with theft.

Condition 24:

Aaron Metals currently operates two balers. This has increased the noise level considerably. To address potential incentives on the applicant's part to operate in ways that might skew results of an acoustical study, this condition should require Aaron Metals to fund an independent acoustical study. Noisy machinery should be contained and moved from its proximity to residential areas, for the safety of workers and the community.

III. NOTICE OF EXEMPTION

Rather than conducting an environmental impact report, the Planning Commission incorrectly claimed four CEQA exemptions:

1) General Rule (15061(b)(3))

The Planning Commission incorrectly concluded that the action may not be a "project". A project is any activity that may cause either a direct physical change in the

environment, or a reasonably foreseeable indirect physical change in the environment. (Pub. Res. Code § 21065.) An agency activity that is “a necessary step in a chain of events which would culminate in physical impact on the environment” is a project under CEQA. *Kaufman & Broad-South Bay, Inc., v. Morgan Hill Unified Sch. Dist.* (1992) 9 Cal.App.4th 464. The CUP is a project because it is a necessary step for Aaron Metals to operate on the disputed 90,000 square feet of property, to cause traffic back-ups, contribute to crime in the community, and to condemn for private parking a public street. The Planning Commission’s conclusion that this exemption may apply is an abuse of discretion and not supported by significant evidence in the record. Appellants will further describe legal flaws in this conclusion in their arguments to the City Council.

2) Consistent with zoning and General Plan (15183)

The Planning Commission incorrectly concluded that the project is consistent with zoning and the General Plan, which it is not. However, even if it were, the exemption applies only for those impacts the City considered in the EIRs adopting the zoning regulations and General Plan. The Planning Commission must still consider the impacts beyond those considered in the EIRs establishing the zone and General Plan. Here, significant evidence documents that Aaron Metals’ impacts are unusual for its zone and are not like those considered in the General Plan. For these reasons and others, which will be described further in argument to the City Council, the Planning Commission’s conclusion that this exemption applies is an abuse of discretion and not supported by significant evidence in the record.

3) Existing facility (15301) – The existing facility exemption applies when a facility seeks a permit to continue a use that was previously analyzed and permitted¹. The “baseline” for the existing facility exemption is the use previously analyzed and permitted. The last time Aaron Metals received a permit to operate, it was a much smaller operation, covering fewer than 10,000 square feet. Now it is asking for permission to operate on 100,000 square feet, a ten-fold expansion over the last environmental analysis conducted. Therefore, the existing facility exemption cannot apply. Further, the exemption permits demolition of up to three single-family residences. The record shows that Aaron Metals has demolished four single-family residences, which on its face disqualifies it from the existing facility exemption.

4) In-fill Development (15332) – Certain projects are exempt from CEQA in order to streamline in-fill in urban areas. Projects that could cause significant traffic impacts, noise impacts, air quality impacts, cumulative impacts or water quality impacts do not qualify for the exemption. Significant evidence in the record shows the project has significant traffic impacts, noise impacts and water quality impacts. In addition, the facility has cumulative impacts.

¹ The exemption also applies to a use that pre-dates CEQA itself. That is not the case for Aaron Metals, which began operations in 1976.

None of these four exemptions apply to an activity where there is a reasonable possibility that the activity will have a significant effect on the environment due to unusual circumstances. Here, special circumstances should have prevented the Planning Commission from approving the CUP without conducting a full environmental impact report. The facility's location in close proximity to residences, its effect on traffic and abutting the railroad, and the environmental injustice of entrenching another polluting facility on this low-income community of color are all special circumstances that should operate to require an EIR and full community disclosure. In addition, the City of Oakland is on the brink of adopting new zoning regulations that would prohibit use such as that proposed by Aaron Metals, for good reason – it is too much of a burden on the surrounding community, including neighboring industrial and business operations – to have such a large recycling facility without adequate buffer or conditions.

IV. CONCLUSION

By issuing the CUP, the Planning Commission is rewarding a facility for ignoring the applicable laws, and allowing a use that is not suited to the surrounding mixed-use area. The Planning Commission violated the Oakland Planning Code by approving the CUP without findings of fact that are based in evidence, and without conditions that will conform Aaron Metals' use of the property to the requirements of the community. Appellants therefore request that the City Council review the decision to issue a CUP and Notice of Exemption, provide an opportunity for briefing, conduct a hearing, and deny the CUP outright, or at a minimum, deny approval of Aaron Metals' most recent expansion onto a 10,000 square foot parcel between 106th and 107th Avenue. In addition, in the event the City Council does not deny the CUP outright, Community Appellants are entitled to a full and public evaluation of the environmental impacts of Aaron Metals' vast expansion of its facility.

Shana Lazerow, State Bar # 195491
slazerow@cbeal.org
COMMUNITIES FOR A BETTER ENVIRONMENT
1440 Broadway, Suite 701
Oakland, California 94612
Telephone: (510) 302-0430
Facsimile: (510) 302-0438

CITY COUNCIL

CITY OF OAKLAND

CASE FILE NO. CM06-268

COMMUNITY APPELLANTS' OPPOSITION

TO ISSUANCE OF CONDITIONAL USE PERMIT TO AARON METALS

AND TO RELIANCE ON CEQA EXEMPTIONS

Communities for a Better Environment, Stonehurst Association, Sobrante Park Resident Action Council, School of Urban Missions, Sobrante Park Home Improvement Association and Tai Lan Industrial Park (collectively "Community Appellants") appeal and oppose issuance of a Conditional Use Permit ("CUP") that would allow Aaron Metals to use an additional 90,000 square feet of property in close proximity to homes, dormitories and businesses, in a way that creates serious health and lifestyle threats. Despite clear evidence of significant impacts, the Planning Commission issued the CUP without any CEQA review. The Planning Commission committed numerous errors of law and fact in approving the CUP and relying on CEQA exemptions. Community Appellants urge the City Council to correct these legal and factual errors, deny the CUP, or at a minimum require a full environment impact report before revisiting whether any CUP should be issued.

I. Incorrect Findings on which Planning Commission Approval is Based

The record before the Planning Commission shows that body's findings are not supported by evidence in the record. Further, evidence submitted with the March 31, 2008 Request for Appeal shows that the following findings are simply incorrect:

Finding 1

The location, size, design and operating characteristics of the additional property to be used by Aaron Metals are not compatible with, and adversely affect the livability and appropriate development of abutting properties and the surrounding neighborhood with respect to:

- a) scale, bulk, coverage and density;
- b) availability of civic facilities and utilities
- c) harmful effect on desirable neighborhood character, including public safety
- d) traffic and capacity of surrounding streets; and
- e) other impacts.

Finding 2

The location, size, design and operating characteristics of the additional property to be used by Aaron Metals do not provide a convenient and functional living, working, shopping or civic environment, and will not be as attractive as the nature of the use and its location and setting warrant.

Finding 3

The use of the additional property by Aaron Metals will not enhance the successful operation of the surrounding area in its basic community functions or provide an essential service to the community or region. While scrap metal recycling is a valuable service, expansion of Aaron Metals from fewer than 10,000 square feet to over 100,000 square feet interferes with basic community functions.

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Finding 4

The use of the additional property by Aaron Metals does not conform with all applicable regular design review criteria set forth in the regular design review procedure at Section 17.136.050.

Finding 5

The use of the additional property by Aaron Metals does not conform with all applicable land use plans, including but not limited to the Oakland General Plan.

II. Inadequate Conditions in CUP

The conditions imposed by the Planning Commission do not adequately mitigate the impacts of Aaron Metals' expanded operation, and therefore violate the City's general use criteria. Specific flaws with the CUP conditions are described below:

Conditions 2 - 8

As documented in the attached information and in testimony before the Planning Commission, Aaron Metals has a long history of violating conditions of use of its property. The CUP should contain additional conditions to ensure compliance with the conditions for use of the additional property. In addition to approved conditions two (2) through eight (8), approval of use should expire within one year if conditions of approval are not met and maintained. Furthermore, a public hearing before the Planning Commission should be required after three (3) years. Finally, Aaron Metals should file a condition compliance plan with the City as public record and mail it to the Planning Commission's CUP approval service list.

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Aaron Metals does not maintain an adequate buffer area, and merely improving its fencing is not a solution. Nevertheless, the insubstantial fencing where the facility abuts residential uses (for example, the house at Pearmain and 106th) was a dangerous and non-structural temporary solution. All fencing that abuts residences should be solid and replaced within 60 days of granting CUP.

Conditions 19, 25, 32

As documented in evidence submitted to the Planning Commission and with Community Appellants' Request for Appeal, Aaron Metals is a source of danger and parking problems in the community. These problems are inadequately addressed by the conditions. Posting employees in the streets to conduct or direct traffic is not enough to remedy the problems. Actual capital improvements must be made to the business. A "Parking and Circulation Plan" should be submitted as part of the request for CUP approval before the granting of the CUP, not after. The width of driveway must be determined before granting the CUP. There must be a setback onto the property to create truck turn-around on the premises and for onsite parking and line up.

Any documents regarding traffic control, street modification, or parking must be made available to the public as part of this application, including, but not limited to, alleged

permission to use Gravenstein Street as an employee parking lot. If no permission in writing exists for this use, it should not be permitted.

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Condition 24:

Aaron Metals currently operates two balers. This has increased the noise level considerably. To address potential incentives on the applicant's part to operate in ways that might skew results of an acoustical study, this condition should require Aaron Metals to fund an independent acoustical study. Noisy machinery should be contained and moved from its proximity to residential areas, for the safety of workers and the community.

III. NOTICE OF EXEMPTION

The CUP would allow Aaron Metals to operate on 108,442 square feet rather than 9,750 square feet. Under CEQA the City must conduct a full analysis of the environmental impacts the CUP will generate. Contrary to the Planning Commission's conclusion, no CEQA exemptions apply. This is true regardless of what conditions the City imposes on Aaron Metals, since an agency cannot "mitigate" its way into a CEQA exemption. "Guide to CEQA" Remy, Thomas & Moose (11th Ed.) p. 137 (citing *Azusa Land Reclamation Co. v. Main San Gabriel Basin Watermaster*, (1997) 52 Cal. App. 4th 1165, 1200, *Salmon Protection and Watershed Network v. County of Marin*, (2004) 125 Cal. App. 4th 1098, 1102.)

CEQA provides three types of exemptions: statutory, categorical and commonsense or "not a project." When claiming a categorical exemptions, an agency must show not only that the project meets the categorical requirements, but also that no unusual circumstances apply that would cause an environmental impact unlike other projects in that category. 14 Cal. Code Regs. 15300.2. The Planning Commission incorrectly relied on four exemptions to avoid CEQA analysis -- the "common sense" exemption (14 Cal. Code Regs. 15061(b)(3)), the "in-fill" exemption (14 Cal. Code Regs. 15332), the "existing facilities" exemption (14 Cal. Code Regs. 15301, and the partial statutory exemption for projects that have already been analyzed as part of a General Plan (14 Cal. Code Regs. 15183).

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A. The General Rule or “Common Sense” Exemption Does Not Apply because Issuing Aaron Metals’ CUP is a Project that has Significant Environmental Impacts

The Planning Commission incorrectly concluded that the action may not be a “project”. A project is any activity that may cause either a direct physical change in the environment, or a reasonably foreseeable indirect physical change in the environment. (Pub. Res. Code § 21065.) An agency activity that is “a necessary step in a chain of events which would culminate in physical impact on the environment” is a project under CEQA. *Kaufman & Broad-South Bay, Inc., v. Morgan Hill Unified Sch. Dist.* (1992) 9 Cal.App.4th 464. The CUP is a project because it is a necessary step for Aaron Metals to operate on the disputed 90,000 square feet of property, to cause traffic back-ups, contribute to crime in the community, and to condemn for private parking a public street. The record lacks any evidence showing that Aaron Metals could legally conduct an operation beyond its originally-permitted 9,750 square feet without issuance of the disputed CUP.

To rely on the common sense exemption, an agency must provide evidence to support a determination that there is no POSSIBILITY of significant environmental effects. *Davidon Homes v. City of San Jose* (1997) 65 Cal. App. 4th 106, 116-117. Here, to the contrary the record shows that allowing Aaron Metals’ operations on more than 100,000 square feet will have significant environmental effects. Community members have documented Aaron Metals’ impacts in multiple letters and comments to Oakland City Planners, Planning Commission members, City Councilmembers, and Mayor Dellums, discussing dangerous traffic conditions, constant loud noises, noxious fumes, and water runoff contaminated with heavy metals. Letter from Stonehurst Association, Sobrante Park Neighborhood Improvement Association & Residential Action Council to Members of Oakland Planning Commission, February 26, 2008; Letter from Stonehurst Association, Sobrante Park Neighborhood Improvement Association & Residential Action Council to Mayor Dellums, October 30, 2007; Letter from Rose Black to Claudia Cappio, Director of Planning, October 30, 2007; Letter from Rose Black to Eric Angstadt, City Planner, April 2, 2007; Letter from Property Owners & Residents Affected By Aaron Metals to Robert Merkamp, City Planner, September 5, 2006; Letter from Elin Christopherson to Robert Merkamp, City Planner, August 17, 2006; Letter from Tai K. Lan to City of Oakland Planning Dept., August 3, 2006; Letter from Victoria Skirpa to Larry Reid, City Councilmember, February 27, 2006; Letter from Rose Black to Larry Reid, City Councilmember, February 27, 2006; Letter from Robert Johnson & Haven Porter to Larry Reid, City Councilmember, February 26, 2006; Petition Regarding Aaron Metals’ Application for Major Conditional Use Permit and Petition (“Community Letters & Petition”).

Expert analysis supports the conclusion that these include impacts will have significant effects on human health from air pollution (Declaration of Anna Y. Lee (“Lee Dec.”), ¶¶ 5-16) and from noise (*id.* at ¶ 25). Aaron Metals’ operations also are likely to have significant effects on the aquatic environment. *Id.* at 20-23. Thus, the common sense exemption does not apply to issuance of a CUP to Aaron Metals.

B. The In-fill Exemption Does Not Apply

Certain urban in-fill projects are exempt from CEQA in order to hasten projects that will invigorate or improve urban areas. *See* 14 Cal. Code Regs. 15332. The in-fill exemption is narrowly tailored to meet that end. It applies only to projects on small urban properties with no habitat value, where the project complies with all existing general plan and zoning designations, and “would not result in” significant “traffic, noise, air quality, or water quality” effects or exceed the location’s existing municipal services. *Id.* Since Aaron Metals’ project conflicts with the General Plan and the zoning designations, would have significant traffic impacts, noise impacts and water quality impacts and is not adequately served by existing public services, the exemption cannot apply.

1. The Project Does Not Comply with the General Plan and Zoning

The in-fill exemption requires that the project be “consistent with the applicable general plan designation and all applicable general plan policies as well as with applicable zoning designation and regulations.” 14 Cal. Code Regs. 15332(a) As described at length below in subsection E., (explanation of ways in which the project is not consistent with the General Plan and zoning ordinance), the Aaron Metals CUP conflicts with the Oakland General Plan and zoning ordinance. In addition to the discussion below, the City of Oakland is in the process of rezoning the property either to prohibit or severely curtail operations such as Aaron Metals. The language of the zoning change allows the City to hear CUP applications that are deemed complete prior to adoption. However, once the property’s zoning changes, the exemption on its face no longer applies. When the property is zoned in such a way that Aaron Metals’ use is not consistent with the zoning designation or regulation, regardless of when its application is deemed complete, the City can no longer rely on the in-fill exemption.

2. Aaron Metals’ Increased Operations Significantly Affect Traffic, Noise, Air Quality and Water Quality

CEQA prohibits use of the in-fill exemption for a project that “would result in significant effects relating to traffic, noise, air quality, or water quality.” 14 Cal. Code Regs. 15332(d). Evidence in the record establishes that this project would result in significant effects to all four.

First, Aaron Metals’ operations cause significant traffic impacts. As City staff noted, “there are times when large queues of cars waiting to drop off materials slow down traffic on 105th Avenue.” March 19, 2008 Staff Report, p. 5. As documented in Community Letters & Petition, as well as photographs submitted with the March 31, 2008 Notice of Appeal, Aaron Metals traffic clogs the community’s roads. These roads cannot be expanded to relieve increased volume because the railroad runs adjacent to the facility. March 19 Staff Report, p. 5.

Further, Aaron Metals' operations not only increase the volume of traffic on these narrow streets, it draws a different, more harmful type of traffic – diesel trucks. As discussed below and at length in the Lee Declaration, while increased emissions from automobile traffic harms community members, diesel engine exhaust is particularly harmful. Lee Dec., ¶¶ 5-8. Finally, Aaron Metals does not provide onsite parking for its workers and visitors. This failure violates its 1976 CUP and vastly exacerbates the traffic impacts by interfering with both residential and other neighboring businesses' ability to operate. Community Letters & Petition, Undated Letter from Jesykah Forkash to City Planning Commission (“Aaron Metals employees . . . park on the abandoned and gated street of Gravenstein. . . . Regarding truckers, there are times when we do not have room in the yard for an 18 wheeler so we ask that they park in the triangular area connecting Pearmain, Gravenstein and 105th Ave.”)

While Aaron Metals has submitted traffic studies denying it contributes to traffic impacts, these studies ignore on-the-ground reality. By contrast, actual evidence, including staff report and photographs, shows that people routinely wait in traffic snarls caused by vehicles attempting to enter and exit Aaron Metals. This testimony from the community is not only admissible to show traffic impacts, *Leonoff v. Monterey County Bd. of Supervisors* (1990) 222 Cal.App.3d 1337, 1351-1352, it is far more reliable than self-serving studies conducted for the purpose of convincing the City to legalize a ten-fold increase in Aaron Metals' operations.

Next, approval of this project would result in significant effects to noise. Aaron Metals sits directly next to a residence, and within three blocks are schools, dormitories, businesses, and live-work establishments. When the City granted the 1976 CUP for operations on less than 10,000 square feet, Aaron Metals operated significantly less and smaller machinery. Community Letters & Petition. Further, as a smaller operation, it attracted fewer diesel trucks. Both truck traffic and onsite equipment cause noise impacts.

The project would have significant air quality impacts from onsite operations and from traffic. Aaron Metals not only attracts traffic and causes traffic idling, including idling of diesel trucks, it also operates equipment onsite that emit air pollution and evidence in the record shows that it burns insulation, causing serious air quality impacts. Community Letter & Petition. Expert testimony in the record describes air quality impacts from Aaron Metals operations. Impacts from diesel engine exhaust can be extremely serious. Lee Dec., ¶¶ 4-8, 14. Diesel engine exhaust is known to the state of California to cause cancer, and is therefore on the state's Proposition 65 list. *Id.* ¶5 & Table 2. Diesel engines emit very small particles that bury deep in the lungs. Diesel engine exhaust is especially harmful to babies and children, and people with pre-existing respiratory conditions. *Id.*

Cars burning gasoline as they sit idling also cause serious air quality impacts. Lee Dec., ¶¶ 9-13. They can emit a range of toxic air pollutants, include nitrogen oxides and sulfur dioxide, as well as ozone. *Id.* ¶ 9.

Finally, Aaron Metals' expanded operations will have significant effects on water quality. Lee Dec., ¶¶ 20-23. Aaron Metals has already been subject to a civil action under the federal Clean Water Act for violations of the stormwater regulations. Its discharges are likely to include metals and dioxins, as well as other pollutants that pose a serious risk to San Francisco Bay. *Id.*

3. Public Services Are Not Adequate to Address Aaron Metals' Operations

CEQA prohibits reliance on the in-fill exemption for projects where public services do not already exist to address the project's needs. 14 Cal. Code Regs. 15332(e). Here, Aaron Metals contributes to waste throughout the neighborhood. Clients strip materials Aaron Metals does not accept and leave it as garbage in the streets, gutters, on the sidewalks, and in vacant lots, even neighbors' doorway. Community Letters & Petition. The City's garbage collection and street cleaning services are woefully inadequate to address these impacts. Aaron Metals ridicules the idea of cleaning up the garbage it generates in the neighborhood, instead contending it is the City's responsibility. Undated Letter from Jesykah Forkash to Planning Commission, p. 2. Aaron Metals has appealed a condition that would require it to clean up garbage in the surrounding blocks. Even if it had not, imposing a conditions of use, or mitigation, is not a basis to invoke a CEQA exemption. Remy & Thomas, p. 137. Thus, the in-fill exemption does not apply to relieve Aaron Metals from full CEQA analysis.

C. The "Existing Facilities" Categorical Exemption Does Not Apply Because Aaron Metals, which is Seeking Approval of an Illegal Tenfold Expansion, Is Not the Type of "Existing Facility" Contemplated

Where a project involves negligible or no expansion of the use of a structure, facility, mechanical equipment, or topographical feature, CEQA regulations provide for an exemption from environmental review. 14 Cal. Code Regs. 15301. Case law is unsettled as to the "baseline" against which to measure the change in conditions at a facility. *See, e.g., Bloom v. McGurk*, (1994) 26 Cal. App. 4th 1307, 1315 (holding that such expansion is measured from the facility's usage "as it exists at the time of the agency's determination, rather than a facility existing at the time CEQA was enacted"; *Azusa*, (1997) 52 Cal. App. 4th 1165 (holding that expansion should be measured from the time of the facility's last environmental review, citing 14 Cal. Code Regs. 15006(f), which states that public agencies should use "a previously prepared EIR when it adequately addresses the proposed project").

The exemption applies to existing facilities that are contemplating "minor alterations." The regulations include specific criteria for expansion, demolition, and conversion activities that qualify as "negligible" expansion of use under this exemption. 14 Cal. Code Regs. 15301(e),(k),(l),(n),(p). Specifically, these criteria include: expansion of no more than 50 percent of floor area or 2,500 square feet, whichever is less, in most cases; expansion of no more than 10,000 square feet in cases where available public services and facilities allow for the maximum development permissible in the General Plan and

the site is not environmentally sensitive; demolition of individual, small structures within a subdivision, where no more than six dwelling units or no more than three commercial structures with occupant loads of 30 or fewer persons; demolition of accessory structures such as garages, swimming pools, and fences; conversion of existing residences to common-interest ownership; conversion of a single family residence to office use; subdivision of existing commercial or industrial buildings; and use of a single-family residence as a small family day care home. *Id.*

The Aaron Metals facility CUP, making legal an illegal operation ten times greater than that previously considered, is not the type of operation contemplated under the “existing facilities” exemption. Categorical exemptions must be construed in light of their statutory purpose: to avoid duplicative or unnecessary environmental review where a class of projects has been determined not to have a significant effect on the environment. *Azusa*, 52 Cal. App. 4th at 1192. The *Azusa* court observed that “[t]he apparent rationale for the existing facilities exemption is that the environmental effects of the operation of such facilities must already have been considered.” *Id.* at 1195. CEQA exemptions must not be interpreted broadly, or expanded “to include a class of businesses that will not normally satisfy the statutory requirements.” *Id.* at 1192-93.

The Aaron Metals facility as it currently operates has never undergone environmental review pursuant to CEQA. Its last environmental review, conducted when the owners applied for the facility’s original major variance permit in 1976, only analyzed the environmental impacts of and authorized the use of the site’s original size – less than 10,000 square feet. March 19, 2008 Staff Report 1. Since that time, Aaron Metals has purchased over 90,000 square feet of adjacent property on which it operates in noncompliance with City requirements, in the process demolishing four residential units. March 19, 2008 Staff Report 1. CEQA analysis of the large-scale facility currently operated by Aaron Metals would be in no way duplicative or unnecessary: the project sought to be permitted has never been determined not to have a significant effect on the environment. *See Azusa*, 52 Cal. App. 4th at 1192.

Application of the “existing facilities” exemption to this project would undercut the regulatory rationale that the facility’s environmental effects have already been considered. *Azusa*, 52 Cal. App. 4th at 1192, 95. As such, the City must “re-evaluate the conditions . . . as warranted by changing circumstances” and not labor to construe the term “existing facility” to include a business that has expanded illegally, operated illegally, and never undergone adequate environmental review. *Id.* at 1199. Relying on an exemption for minor changes at existing facilities in a situation like this, where a tenfold expansion and demolition of four residences is occurring, would directly contravene the statutory requirements to analyze and address all potentially significant environmental impacts.

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D. Aaron Metals' Expanded Operations Have a Significant Effect Due to Unusual Circumstances and Cumulative Impacts

Even if the City chose to make such a labored application of the “existing facilities” and “in-fill” exceptions to the Aaron Metals project, two statutory exceptions to the exemptions would nonetheless mandate environmental review. First, no categorical exemption applies where, as here, the cumulative environmental impact of successive projects is significant. Second, where there are unusual circumstances that raise a “reasonable possibility” that a project will cause significant environmental impacts, categorical exemptions cannot apply. 14 Cal. Code Regs. 15300.2(b),(c). The “cumulative impacts” exception inheres where, taken in the context of other closely related past, present, and reasonably foreseeable probably future projects, multiple environmental impacts become “considerable” or compound other environmental impacts. *Id.* § 15355(b). The “Significant Effect” exception provides for agencies “to determine which specific activities – within a class of activities that does not normally threaten the environment – should be given further environmental evaluation and hence excepted from the exemption.” *Azus*, 52 Cal. App. 4th at 1206-07. A two-pronged test can be used to determine whether a project is “unusual” within the category of projects otherwise exempt under § 15301: (i) if a particular project differs from the general circumstances of the projects covered by a particular categorical exemption, and (ii) those circumstances create an environmental risk that does not exist for the general class of exempt projects. *Id.* Such “unusual circumstances” have been found where a noisy commercial project was located adjacent to residential areas. *Lewis v. Seventeenth Dist. Agricultural Assn.*, (1985) 165 Cal. App. 3d 823, 829, 831.

1. Unusual Circumstances Surround Aaron Metals' CUP

Even if Aaron Metals' expanded operations met the conditions for the in-fill or existing facilities exemptions, the “Significant Effect” exception to categorical exemptions applies. Here, several special circumstances require a full environmental analysis prior to approving a CUP for Aaron Metals. *See* 14 Cal. Code Regs. 15300.2(d); *Lewis v. Seventeenth Dist. Agricultural Assn.*, 165 Cal. App. 3d at 829, 831; *Azusa Land Reclamation Co. v. Main San Gabriel Basin Watermaster*, 52 Cal. App. 4th at 1206-07 (finding “unusual circumstance” where commercial project abutted residential zone); *see also, McQueen v. Board of Directors*, 202 Cal. App. 3d 1136 (1988) (finding “unusual circumstance” where project would maintain preexisting hazardous contamination).

a. Location is a Special Circumstance

One such special circumstance is the facility's location. *See Lewis v. Seventeenth Dist. Agricultural Assn.*, 165 Cal. App. 3d at 829, 831. Aaron Metals sits in close proximity, even adjacent to, residences, and other businesses that are negatively impacted by its operations. As indicated by the Community and Economic Development Agency's discussion of proposed amendments to Oakland's Zoning Ordinance and Planning Code, only 6.5% of Oakland's industrially designated lands fall within 300 feet of existing residential zones. Community and Economic Development Agency, CEDA: New

Industrial Zones, Mapping and Related Regulations 5 (2008). Aaron Metals, as illegally expanded, directly abuts one private residence and is located across the street from a sizable residential zone. March 19, 2008 Staff Report, Attachment A. Thirty-eight residential properties are located between 105th and Moorpark, in the immediate neighborhood of the Aaron Metals project, while only three industrial projects exist in the same area. Letter from Property Owners & Residents Affected By Aaron Metals to Robert Merkamp, City Planner, September 5, 2006. As such, this project “differs from the general circumstances” of the vast majority of industrial projects in Oakland and creates environmental risks that do not exist for the general “existing facilities” class of exempt projects. *See Azusa*, 52 Cal. App. 4th at 1206-07.

Community members are, in fact, being impacted because Aaron Metals’ location is simply not suited to its operations. They have submitted multiple letters and comments to Oakland City Planners, Planning Commission members, City Councilmembers, and Mayor Dellums complaining of dangerous traffic conditions, constant loud noises, noxious fumes, and water runoff contaminated with heavy metals. Community Letters & Petition.

Another factor in the poor siting of Aaron Metals’ large operations is that it abuts the railroad, which limits both the mitigation measures Aaron Metals can undertake and the alternatives for local community members to avoid Aaron Metals impacts. *See* March 19, 2008 Staff Report, p. 2.

Due in part to the outcry from community members impacted by Aaron Metals’ operations, the City is in the process of completely changing the zoning for this type of land use and this part of Oakland. The fact of the re-zoning process constitutes a special circumstance. The reasoning behind re-zoning applies in full to the proposed CUP – allowing a large recycling facility without adequate buffer is too great a burden on the surrounding community.

Yet another aspect to the poor siting for this expansion project is the environmental injustice of entrenching another polluting facility on this low-income community of color. East Oakland is predominantly low income – according to the City’s own data, over a quarter of families’ income put them below the poverty line. www.ofcy.org. This community is also predominantly made up of people of color. Over eighty percent (80%) of residents are either African-American or Latino. *Id.*

Likewise, Aaron Metals’ increased operations conflict with the character of this particular part of the East Oakland community. Although predominantly zoned residential, the area is truly mixed-use, and Aaron Metals’ operations impact each category or type of use. Most obviously impacted are nearby residences (for instance, Aaron Metals shares a fence line with one a private residence and its new “storage” properties abut several others.) In addition, with the new Habitat for Humanity homes, many new residents will be joining long-suffering neighbors who document noise, bad smells, garbage, traffic congestion and crime caused by Aaron Metals’ operations. The immediate neighborhood also hosts schools such as the School of Urban Missions on 105th Avenue, which has

dormitories, and Fred T. Korematsu Discovery Academy at 103rd Avenue. Aaron Metals even negatively impacts other industrial operations, such as Tai Lan Business Park at 732 105th Avenue and Renaissance Stone at 751 Moorpark. February 27, 2006 letters to Larry Reid. A project that interferes with every other use in a mixed-use area is a special circumstance.

a. Proximity to Multiple Hazardous Waste Cleanup Sites is a Special Circumstance

The second “unusual circumstance” is Aaron Metals’ proximity to two sites included on a list compiled by the Department of Toxic Substances Control (“DTSC”) pursuant to Cal. Gov. Code § 65962.5. *See*, Envirostar, Department of Toxic Substances Control (2007), <http://www.envirostor.dtsc.ca.gov/public/> (query “94603”); *see also*, *McQueen v. Board of Directors*, 202 Cal. App. 3d 1136. The project is located “directly south” of the Hard Chrome Engineering Active State Response Site, contaminated with chromium VI, and across railroad tracks to the east of the Edes “B” Active Voluntary Cleanup Site, listed as contaminated with lead and polynuclear aromatic hydrocarbons. *See*, Envirostar, Department of Toxic Substances Control (2007), <http://www.envirostor.dtsc.ca.gov/public/> (query “94603”); Community Letters and Petition. Although this project does not directly implicate the “Hazardous Waste Cleanup Site” exception to categorical exemptions at 15300.2(f), which mandates environmental review of projects located on DTSC-listed sites, its proximity to multiple hazardous waste cleanup sites renders this project different from “the general circumstances” of most industrial projects and creates environmental risks that do not exist for the general “existing facilities” class of exempt projects. *See Azusa*, 52 Cal. App. 4th at 1206-07; *see also*, *McQueen v. Board of Directors*, 202 Cal. App. 3d 1136. Community complaints of contaminated runoff originating at the Aaron Metals facility give rise to a “reasonable possibility” that this project maintains or aggravates the significant impacts of preexisting contamination on the DTSC sites. *See* Community Letters and Petition.

c. Project Causes Significant Impacts

Finally, Aaron Metals’ operations in fact cause significant environmental impacts. As described at length in the expert testimony before the Planning Commission and the attached declaration of Anna Y. Lee, air, water and noise impacts from Aaron Metals are significant. Thus, “unusual circumstances” inherent in the Aaron Metals project raise a “reasonable possibility” that the project will cause significant environmental impacts and thus mandate CEQA environmental review. These circumstances create an environmental risk that does not exist for the general class of “in-fill” projects or for “existing facilities.”

2. Aaron Metals’ Operations Have a Cumulative Impact

The cumulative environmental impacts of Aaron Metals’ illegal expansion and continued illegal operation, which have never been analyzed under CEQA, are significant. *See* 14

Cal. Code Regs. 15300.2(b). Community members have submitted multiple letters and comments to Oakland City Planners, Planning Commission members, City Councilmembers, and Mayor Dellums complaining of dangerous traffic conditions, constant loud noises, noxious fumes, and water runoff contaminated with heavy metals. Community Letters & Petition. If the City condones Aaron Metals past illegal activities by granting the project a conditional use permit after the fact, it is reasonably foreseeable that Aaron Metals will continue to expand its usage without requisite environmental review in the future, resulting in even more significant environmental impacts. Taken in the context of past large-scale facility expansion undertaken illegally without environmental review and the reasonable foreseeability of similar future endeavors, the multiple environmental impacts of which community members have repeatedly complained are “considerable” and compound the impacts of the originally permitted facility. *See* 14 Cal. Code Regs. 15355(b). For this reason, among others, CEQA environmental review is crucial to ensure mitigation of current and future environmental impacts in the neighboring community. Thus, the cumulative impact exception overrides any categorical exemption applied to the Aaron Metals project.

For the foregoing reasons, the Aaron Metals facility is not the type of “existing facility” contemplated under 14 Cal. Code Regs. 15301, and implicates two statutory exceptions to categorical exemptions to CEQA review, each of which independently overrides any finding of exemption pursuant to § 15301.

E. The CUP Is Neither Partially Nor Fully Exempt from CEQA as Consistent with Zoning and General Plan

The Planning Commission incorrectly concluded that the project is consistent with Oakland’s General Plan and current zoning regulations, which it is not. March 19, 2008 Staff Report, p. 3. As such, the partial statutory exemption provided for consistent projects does not apply. However, even if it did, the exemption applies only for those impacts the City considered in the EIRs adopting the zoning regulations and General Plan. *See* Cal. Pub. Res. Code § 21083.3(a),(b) (2007). No previously conducted environmental impact report has adequately considered the environmental impacts of the unpermitted Aaron Metals expansion and operations. The Planning Commission must still consider any impacts peculiar to the Aaron Metals project or unaddressed in the EIRs certified for the General Plan and zoning regulations. *See id.*

CEQA provides a partial statutory exemption for projects consistent with a General Plan and zoning actions for which environmental impact reports have already been certified. The California Public Resources Code provides for a partial statutory exemption to CEQA review where: (1) a project is consistent with the relevant municipal general plan or zoning action; and, (2) an environmental impact report has been previously certified for such general plan or zoning action. Cal. Pub. Res. Code § 21083.3(a),(b); *Gentry v. City of Murrieta*, 36 Cal. App. 4th 1359, 1405-06 (1995). Under this partial exemption, when a project is consistent with a general plan or zoning action, an agency must still conduct environmental review of all environmental impacts, including offsite and cumulative impacts, that are peculiar to the project and were not analyzed as significant

impacts in the previously conducted environmental impact report. Even where impacts were identified in a previous environmental impact report, new information since that environmental impact report shows a more severe impact than previously analyzed, those more severe impacts must be analyzed. 14 Cal. Code Regs. § 15183(b).

This partial exemption streamlines approval of projects that conform to previously established guidelines by avoiding repetitive environmental studies. *Id.* § 15183(a). However, the lead agency must make an initial determination as to whether the project will result in any peculiar environmental impacts and, if it will, whether these impacts were addressed in the previously conducted environmental impact report. *Gentry v. City of Murrieta*, 36 Cal. App. 4th at 1407. An environmental impact is not considered peculiar to the project if it will be substantially mitigated by previously adopted, uniformly applied mitigation measures, like public access requirements or habitat protection ordinances, unless new information shows that despite these ordinances, the mitigation will not occur. Cal. Pub. Res. Code § 21083.3(d); 14 Cal. Code Regs. § 15183(g). In addition to conducting an initial study and a limited environmental review, the lead agency must hold a public hearing determining whether feasible mitigation measures specified in the previously conducted environmental impact report will be undertaken. Cal. Pub. Res. Code § 21083.3(c). The partial exemption only applies to projects where all qualified agencies undertake or require the undertaking of every feasible mitigation measure specified in the previously conducted environmental impact report. *Id.*

1. The Partial Exemption Does Not Apply Because The Aaron Metals Project Is Not Consistent With The Oakland General Plan

The Oakland General Plan reveals a multitude of inconsistencies between this project and the policies and guidelines that comprise the Plan.¹ Land use conflicts that arise when industrial uses abut residential zones represent one of the principal issues addressed throughout the General Plan. Planning and Zoning Division, Community and Economic Development Agency, *Envision Oakland: City of Oakland General Plan, Land Use and Transportation Element (1998)* (“General Plan”). Recognizing that “both non-residential and residential activities can be negatively impacted if proper consideration of compatibility issues is not taken,” “Objective N5” calls for the City to “[m]inimize conflicts between residential and non-residential activities while providing opportunities for residents to live and work in the same location.” *Id.* at 108. The illegal expansion and operation of the Aaron Metals facility, the environmental impacts of which have never been addressed, directly contravened and continues to contravene this General Plan objective by encroaching further on residential activities, demolishing housing units, and magnifying adverse environmental effects on the community. March 19, 2008 Staff Report 1; Community Letters & Petition.

¹ This flatly contradicts the summary claim that the Aaron Metals project is “consistent with applicable General Plan policies and the Business Mix designations.” March 19, 2008 Staff Report p. 3.

The General Plan identifies three policies intended to minimize these kinds of land use conflicts. The first, "Policy N5.1," addresses environmental justice and requires the City to "encourage active participation of all its communities" and to inform and involve environmental justice groups and community representatives in the early stages of the planning and development process. General Plan, p. 108. The Aaron Metals project, undertaken in noncompliance with municipal permitting processes, did not invite any community participation and did not inform or involve environmental justice groups or community representative in the early stages of the planning and development process. If the City approves a conditional use permit without full environmental review, the action will undercut basic community participation, not duplicate previous efforts.

The second, "Policy N5.2," provides that residential areas should be "buffered and reinforced from conflicting uses" through tools such as performance-based regulations and removal of non-conforming uses. General Plan, p. 109. Rather than remove non-conforming uses as prescribed, granting the Aaron Metals project a conditional use permit would encourage illegal, nonconforming operations to expand clandestinely, eradicating any buffer from residential zones in the process.

The third, "Policy N5.3," calls for encouragement of live-work arrangements where "neither the residential use nor the work occupation adversely affects nearby properties or the character of the surrounding area." General Plan, p. 109. The Aaron Metals project, which has caused and continues to cause noise, air, and water pollution as well as dangerous traffic conditions suffered by the surrounding community, adversely affects nearby properties and the character of the surrounding area. *See*, Community Letters and Petition; Lee Dec. Policies advancing other objectives within the General Plan include: pursuing environmental cleanup, alleviating public nuisances, and protecting existing uses that conform to Oakland's long-term development goals. General Plan, pp. 41, 42, 114. The expanded Aaron Metals project supports none of these: (1) it exacerbates environmental degradation, rather than cleaning up the environment (*see* Lee Dec.); (2) it increases the likelihood of public nuisances (*see* Community Letters & Petition); and (3) it does not conform to Oakland's long-term development goals. Thus, the Aaron Metals project does not conform to the General Plan objectives and policy prescriptions, as required for partial exemption under CEQA. *See* Cal. Pub. Res. Code § 21083.3.

Moreover, the General Plan specifically addresses land use conflicts in the neighborhood surrounding the Aaron Metals facility. General Plan, pp. 199-200. The Plan's "East Oakland Area View" section describes "long standing blighted areas," including the "Railroad Avenue area near Pearmain Street," which exhibit conflicts surrounding "[p]ockets of industry . . . interspersed with housing," the environmental impacts of which include noise, emissions, toxins, odor, and glare. *Id.* The Plan purports to address these conflicts by separating heavy industry from housing where possible, utilizing such tools as community based planning, and establishing a "Housing and Business Mix" land use classification for "areas where low impact industry and housing can peacefully coexist." *Id.* at 200. Notably, the Plan does not designate the area surrounding the Aaron Metals facility as such a "Housing and Business Mix" where industry and housing can "peacefully coexist," but rather divides the area into a mosaic of incompatible zones,

some abutting each other within the same city block. *See*, Planning and Zoning Division, Community and Economic Development Agency, City of Oakland General Plan and Zoning Map (2008) (“General Plan and Zoning Map”). The General Plan classifies the Aaron Metals facility as “Business Mix,” a land use classification that allows “high impact industrial uses” “provided they are adequately buffered from residential areas.” City of Oakland General Plan and Zoning Map; General Plan, p. 152. However, as illegally expanded and operated, Aaron Metals maintains no buffer from residential areas. March 19, 2008 Staff Report, Attachment A. The erratic zoning in this neighborhood and Aaron Metals’ nonconformance with pertinent use restrictions represent just the sort of land use conflicts that the General Plan, via “Objective N5” and corresponding policies, seeks to remove, mitigate, and avoid in the future. *See* City of Oakland General Plan 108. As such, far from consistent with the General Plan, the Aaron Metals project inhibits progress toward achieving General Plan objectives and violates its land use guidelines.

2. The Partial Exemption Does Not Apply Because the Aaron Metals Project is not Consistent with Current Zoning Regulations

Oakland’s current zoning regulations as express in the Planning Code (as of June 16, 2008), was originally adopted in 1965, and not updated following the adoption of Oakland’s current General Plan in 1998. Community and Economic Development Agency, CEDA: New Industrial Zones, Mapping and Related Regulations 3. Therefore, the Zoning Ordinance is not consistent with the General Plan and “does not effectively implement the goals and policies for the Business Mix and General Industrial/Transportation land use designations.” *Id.* Specifically, the outdated regulations for Business Mix and General Industrial/Transportation land use designations “do not adequately provide protections for neighboring residentially zoned areas.” *Id.* The Planning Commission’s “Guidelines for Determining Project Conformity With the General Plan and Zoning Regulations” specifies that, where a project presents an express conflict with the General Plan, the project is not allowed despite its conformity with the outdated Planning Code. City Planning Commission, City of Oakland, Guidelines for Determining Project Conformity With the General Plan and Zoning Regulations 9 (2006), *as amended*.

Even if that were not the case, the Aaron Metals Project is not consistent with the current Planning Code because it conflicts with the Code’s objectives and with its express requirements.² Among its primary objectives, the Planning Code lists: protection against “intrusion of incompatible uses”; provision of “desirable, appropriately located living areas”; stabilization of “expectations regarding future development”; security of the equity individuals possess in “the utilization of their property”; and promotion of an “attractive urban environment.” Oakland Mun. Code § 17.07.030(C),(D),(I)-(K) (2008). The Aaron Metals project contravenes each of these objectives: it exacerbates “intrusion of incompatible uses” by allowing Aaron Metals to operate in ways that generate loud noise, water and air pollution, and traffic congestion and threaten public safety adjacent

² This is simply contrary to the March 19, 2008 Staff Report, p. 3 summary conclusion that it is consistent.

to existing homes and very close to other business and residential uses. Lee Dec., Community Letters & Petition. The same evidence shows that the Project decreases the desirability and appropriateness of location of living areas; destabilizes neighboring individuals' real equity in the use of their property; and detracts from the "attractiveness" of the urban environment. See *id.* Aaron Metals' Project conflicts with achievement of the Planning Code's existing objectives.

The Planning Code specifically prohibits "scrap operations," such as Aaron Metals, from locating within 400 feet from the boundary of any zone other than the M-30 "General Industrial Zone," except "upon the granting" of a conditional use permit pursuant to proper, mandatory permitting procedure. *Id.* § 17.72.070(D). The unpermitted expansion of the Aaron Metals facility illegally encroached upon residential and commercial zones, demolishing four residential units in the process, and resulting in no buffer from the boundary of residential and mixed-use zones. March 19, 2008 Staff Report, p. 1, Attachment A. The Planning Code requires the City to "control, ameliorate, or terminate uses which do not conform to the zoning regulations," except where such nonconforming uses conformed to existing permits or "existed lawfully" under previous zoning regulations. Oakland Mun. Code § 17.114.010-40(A). The Aaron Metals facility, as illegally expanded and operated, never conformed to any permit nor "existed lawfully" under any zoning regulations. See *id.* As such, the Planning Code does not permit the City to approve a nonconforming use such as the Aaron Metals facility. See *id.*

3. The Partial Exemption Does Not Apply Because the Aaron Metals Project Is Not Consistent With Proposed Zoning Ordinance Amendments Pending Before the City Council

Oakland's City Council is currently considering proposed amendments to the Planning Code in order to bring Oakland's zoning regulations into conformance with the General Plan. CEDA: New Industrial Zones, Mapping and Related Regulations I. These amendments are specifically designed to address conflicts between industrial and residential uses, like that generated by Aaron Metals' illegal expansion. *Id.* The proposed amendments specifically define three categories of "Recycling Uses" in an effort to optimize their regulation. *Id.* at 5. Under the proposed amendments, "Primary Collection Centers," such as Aaron Metals, located in East Oakland would be rezoned to a wholly new land use classification: CIX-2, "Commercial Industrial Mix." *Id.* at 9. The most recent iteration of these proposed amendments would prohibit facilities such as Aaron Metals from operating within 600 feet of residential zones. CEDA: New Industrial Zones, Mapping and Related Regulations - Supplemental Report 1 (May 20, 2008). Furthermore, proposed changes to the Code's "Performance Standards" would classify unpermitted expansion of more than 20% of a facility's production area as a prohibited "change in operation" subject to noncompliance regulations. CEDA: New Industrial Zones, Mapping and Related Regulations Exhibit A, p. 24. Demonstrating the importance of these changes to projects similar to the Aaron Metals expansion, the City has proposed a moratorium on permitting scrap facilities until the Planning Code amendments have been adopted. CEDA: New Industrial Zones, Mapping and Related

Regulations, Supplemental Report (June 5, 2008). Although the amendments and moratorium will not apply to permit applications “deemed complete” prior to their adoption, they represent the best indication of where the current, outdated regulations do not conform to the General Plan, and thus constitute further evidence that the Aaron Metals application is not consistent with the General Plan and zoning regulations as required for partial exemption under Cal. Pub. Res. Code § 21083.3.

4. The Partial Exemption Does Not Apply Because The Planning Commission Did Not Take Proper Steps To Identify, Evaluate, And Mitigate Peculiar Or Unaddressed Environmental Impacts.

Even if the City determines that the Aaron Metals project conforms to the Oakland General Plan and Planning Ordinance, the partial exemption does not apply because the Planning Commission and other responsible agencies have not taken the proper steps to identify, evaluate, and mitigate peculiar or unaddressed environmental impacts. *See, Gentry v. City of Murrieta*, 36 Cal. App. 4th at 1407. The following procedural determinations are missing from Planning Commission findings. March 19, 2008 Staff Report 2; Notice of Exemption.

- An Initial Determination Of Significant Environmental Impacts Peculiar To The Project Pursuant To 14 Cal. Code Regs. § 15183(b).
- An Initial Determination Of Whether Such Significant Impacts Were Adequately Analyzed In Previously Conducted Environmental Impact, Pursuant To 14 Cal. Code Regs. § 15183(b).
- An Initial Determination Of Whether New Information Indicates That Previously Identified Significant Environmental Impacts Have A More Severe Impact Than Previously Analyzed, Pursuant To 14 Cal. Code Regs. § 15183(b).
- An Initial Determination Of Whether Previously Adopted, Uniformly Applied Municipal Development Standards And Policies Will Substantially Mitigate Any Peculiar Or Unaddressed Significant Environmental Impacts, Pursuant To Cal. Pub. Res. Code § 21083.3(d) and 14 Cal. Code Regs. § 15183(g).
- A Public Hearing To Determine Whether Feasible Mitigation Measures Identified In The Previously Certified Environmental Impact Report Will Be Undertaken, Pursuant To Cal. Pub. Res. Code § 21083.3(c).
- Undertaking Of All Feasible Mitigation Measures Identified In The Previously Certified Environmental Impact Report. Cal. Pub. Res. Code § 21083.3(c).

Without these initial determinations, it is impossible to determine whether this partial exemption applies and the scope of any limited environmental impact analysis still to be conducted.

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5. Even If the Partial Exemption Applied, Aaron Metals' Specific Impacts Would Need to Be Analyzed

Even if the City determined that the Aaron Metals project were partially exempt from CEQA review under Cal. Pub. Res. Code § 21083.3, the same statute requires the City to conduct a limited-scope environmental impact report. *See* Cal. Pub. Res. Code § 21083.3(a),(b). As mentioned above, this environmental impact report would assess and address environmental impacts, including offsite and cumulative impacts, that are: (1) peculiar to the project or parcel on which the project would be located; (2) not analyzed as significant impacts in the previously conducted environmental impact report; or (3) previously identified but, as a result of new information unknown at the time of the prior environmental impact report, are determined to have a more severe impact than previously analyzed. 14 Cal. Code Regs. § 15183(b) (2008).

Community testimony, letters and submissions to the Planning Commission document Aaron Metals' serious, ongoing offsite impacts. For example, neighbor Victoria Skirpa by letters dated February 27, 2006 and September 5, 2006 documented for the City the increases in crime, noise, and pollution Aaron Metals' operation causes on her property, which neighbors Aaron Metals. One neighbor testified that she had to wear ear protection in her own home because of noise coming from Aaron Metals. September 2006 Letter from Skirpa to Merkamp (submitted as part of Community Letters & Petition.) She was routinely awakened before normal business hours by machinery noises coming from Aaron Metals. Additionally, copper materials were stolen from her property, of the sort Aaron Metals exchanges for cash. February 2006 Letter. These are simply two of many examples of offsite impacts that would have to be addressed in an EIR for the Aaron Metals CUP.

Aaron Metals' massive expansion approval project is also likely causing cumulative impacts on the property. As discussed by scientist Anna Y. Lee, pollution from the Aaron Metals operation poses serious threats to human health and the environment. *See generally*, Lee Dec. Operation over time at that location is likely to exacerbate impacts like dioxins build up and discharge to local waterways.

Because of Aaron Metals' location and its particular manner of operation, it has impacts far beyond what the General Plan and zoning ordinance considered when analyzing environmental impacts from scrap facilities. Thus, an environmental impact report must be prepared before issuance of a use permit allowing Aaron Metals to operate on more than 100,000 square feet.

IV. CONCLUSION

By issuing the CUP, the Planning Commission is rewarding a facility for ignoring the applicable laws, and allowing a use that is not suited to the surrounding mixed-use area. The Planning Commission violated the Oakland Planning Code by approving the CUP without findings of fact that are based in evidence, and without conditions that will conform Aaron Metals' use of the property to the requirements of the community.

Appellants therefore request that the City Council deny the CUP outright. In addition, in the event the City Council does not deny the CUP outright, Community Appellants are entitled to a full and public evaluation of the environmental impacts of Aaron Metals' vast expansion of its facility prior to the CUP taking effect.

Respectfully submitted,

/s/

Shana Lazerow

Staff Attorney

Communities for a Better Environment

Aaron Metals Major CUP Appeal

Declaration of Anna Yun Lee

I, Anna Yun Lee, hereby declare as follows:

1. I am a Staff Researcher/Scientist for Communities for a Better Environment. Based on my experience and my review of the evidence, including studies submitted with this appeal and community testimony concerning operations, I conclude that allowing Aaron Metals to operate on more than 100,000 square feet is likely to have significant environmental impacts, including impacts to air quality, water quality, noise and human health.

2. I gave oral testimony to the Oakland Planning Commission on March 19, 2008.

3. Aaron Metals is a scrap metal facility in Sobrante Park, East Oakland. Based on its website (last accessed June 12, 2008: <http://aaronmetals.com/en/index.php>), Aaron Metals buys, sells, and processes many types of metals, including "aluminum, copper, brass, stainless steel, nickel, titanium, lead, insulated wire, high temp alloys, gold, silver and platinum." The business operates machinery to analyze the metals, crush into bales, move and stack the bales. The business currently operates on 100,000 square feet, adjacent to residences. Aaron Metals conducts business with other businesses as well as the public.

4. Based on information submitted to the Planning Commission and with the March 31 Request for Appeal, Aaron Metals' operations cause noise, water pollution and air contamination from operation of onsite equipment and burning of insulation as well as from vehicles entering, exiting and causing traffic back-ups. As described below, these conditions pose serious threats to human health and the environment.

I. Air Quality

A. Human health impacts

5. Air pollution from fossil fuel combustion, including diesel and gasoline, is harmful to human health and disproportionately affects East Oakland. Equipment at Aaron Metals may be diesel-powered. In addition, diesel-fueled vehicles enter and exit Aaron Metals regularly. Diesel particulate matter can be inhaled deep into the lungs where some ultrafine particles can enter the bloodstream. Diesel exhaust is linked to early death, asthma and other respiratory problems,

heart attacks, premature birth, and cancer (See Table 2)^{1 2 3}. In California, diesel exhaust particulate matter causes 2000 premature deaths per year, 250 lung cancers per year, decreased lung function in children, chronic bronchitis, increased respiratory and cardiovascular hospitalizations, aggravated asthma, increased respiratory symptoms, lost workdays⁴.

Table 2.
Cancer Risk Assessments of Diesel Exhaust

Year	Organization	Conclusion
2002	U.S. Environmental Protection Agency	Likely human carcinogen
2001	American Council of Government Industrial Hygienists (proposal)	Suspected human carcinogen
2001	U.S. Department of Health and Human Services	Reasonably anticipated to be a human carcinogen
1998	California Air Resources Board	Toxic air contaminant
1996	World Health Organization International Programme on Chemical Safety	Probable human carcinogen
1995	Health Effects Institute	Potential to cause cancer
1990	State of California	Known to cause cancer
1989	International Agency for Research on Cancer (IARC)	Probable human carcinogen
1988	National Institute for Occupational Safety and Health (NIOSH)	Potential occupational carcinogen

6. Diesel contains a number of chemicals that are known to be extremely hazardous in humans. One such group of chemicals is polycyclic aromatic hydrocarbons, or PAHs. Some PAHs have been classified as probable human carcinogens by the U.S. EPA and by the International Agency for Research on Cancer and have also been shown to damage DNA and considered to be able to damage cells in tissues such as the lung⁵. Diesel also contains benzene,

¹ Pacific Institute. 2006. *Paying with Our Health: The real cost of freight transport in California*. Unless otherwise noted, all cited materials were submitted with March 31 Request for Appeal.

² California Air Resources Board. July 2005. *Summary of Adverse Impacts of Diesel Particulate Matter*.

³ Wargo, J., *et al.* 2006. *The Harmful Effects of Vehicle Exhaust: A Case for Policy Change*. Environment and Human Health, Inc.

⁴ California Air Resources Board. March 2006. *Health Effects of Diesel Exhaust Particulate Matter*.

⁵ *Id.*

a toxic air contaminant listed by the State and a known human cancer-causing agent for leukemia, and other cancer causing compounds such as formaldehyde, acetaldehyde, acrolein, and 1,3-butadiene.

7. The effects of diesel exhaust and poor air quality on health are severe and even affect the ability of children to learn and the economy. Pediatric asthma is linked to poor air quality from vehicle exhaust⁶. Rates of asthma hospitalizations, which only represent a small portion of the asthma epidemic in any population and the most severe asthma, among children under five years of age in North, West and East Oakland exceeded the Alameda County average rate by two or more times^{7 8}. The age-adjusted asthma hospitalization rate for Aaron Metals' zip code -- 94603 -- from 1998 to 2000 for children ages 0 to 14 is 239.5 and the annual rate per 10,000 is 87.22 (95% confidence interval is 76.52 - 99.00) , significantly higher than the Healthy People 2010 Target (See Figures 1 and 2)⁹. Each year in California, diesel PM contributes to 2000 premature deaths and thousands of hospital admissions, asthma attacks and other respiratory symptoms, and lost workdays¹⁰. The impacts of air pollution from freight transport, which is almost wholly diesel exhaust, have medical and social costs in the billions of dollars due to hospitalizations, missed workdays and missed school days that predominantly affects low-income communities of color in California¹¹. Exposure to higher levels of black carbon, a marker for automobile and diesel exhaust, in children have been shown to be associated with decreased cognitive function—decreased IQs and lower scores on other tests of intelligence and memory¹².

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⁶ Paige, Connie. March 2, 2008. Pediatric asthma linked to traffic living near busy roads raises risk. The Boston Globe.

⁷ Alameda County Public Health Department. 2006. Alameda County Health Status Report.

⁸ Kay, J. September 2007. Big Rigs at Port of Oakland Linked to Health Woes. San Francisco Chronicle.

⁹ Community Action to Fight Asthma, California State Coordinating Office. June 2004. Asthma Hospitalization Rates (1998-2000, CA OSHPD data) by Zip Code Tabulation Area for 15 Counties in Four Regions of California. Bay Area, Alameda County, Children 0 - 14, 67 pages. Oakland, CA. <http://www.calasthma.org>.

¹⁰ California Air Resources Board. March 2006. Health Effects of Diesel Exhaust Particulate Matter.

¹¹ Pacific Institute. 2006. Paying with Our Health: The real cost of freight transport in California.

¹² Suglia, S. F.; Gryparis, A.; Wright, R. O.; Schwartz, J.; Wright, R. J. 2007. Association of black carbon with cognition among children in a prospective birth cohort study. American Journal of Epidemiology.

Figure 1. Age-adjusted Asthma Hospitalization Rates for Alameda County (1998-2000)
For Children Ages 0-14, With 95% Confidence Intervals (ZCTAs 94602 - 95376)

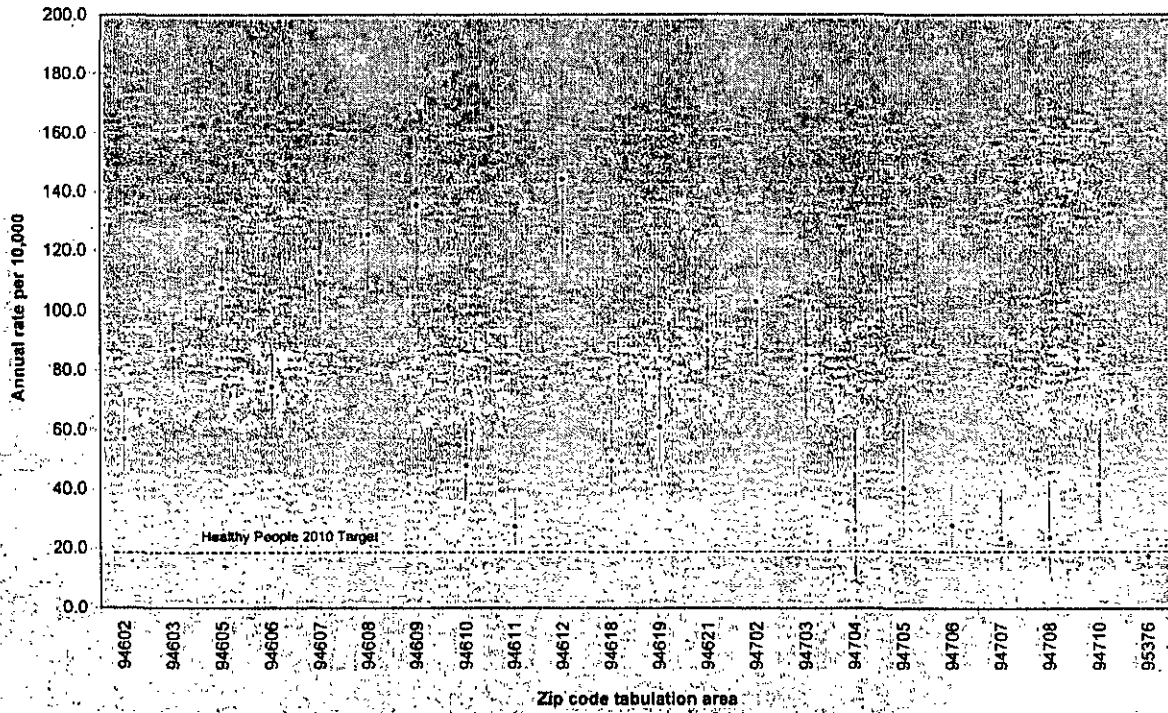
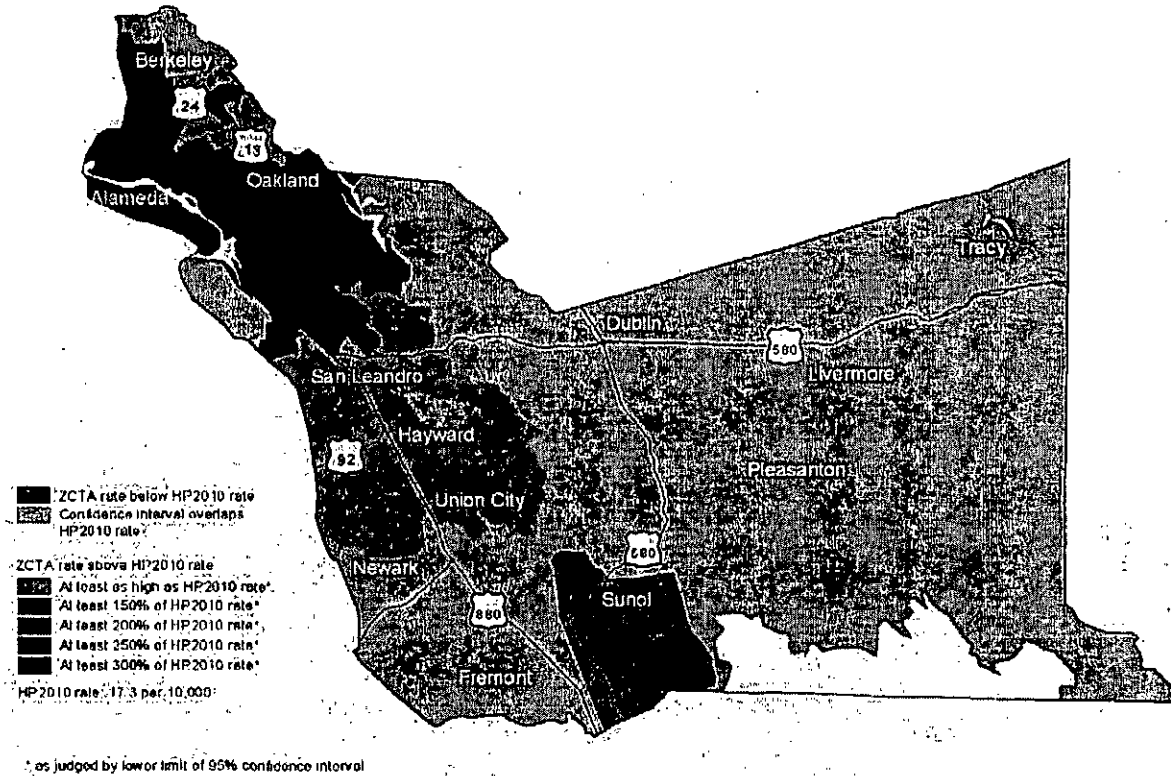


Figure 2.
Alameda County:
Annual asthma hospitalization rates among children 0-14
by zip code tabulation area (ZCTA) for 1998-2000



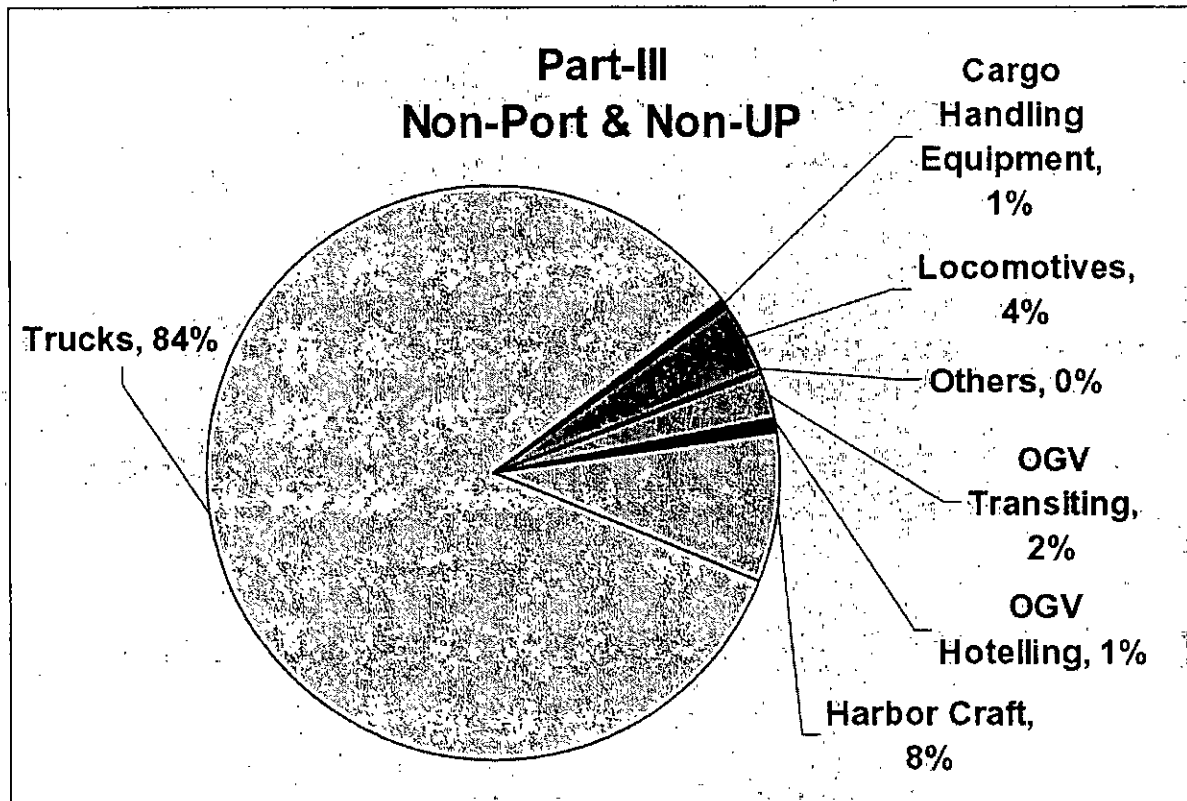
8. People who live closest to major roadways or sources of diesel exhaust are more at risk of the harmful effects on health¹³. The California Air Resources Board recently released a preliminary analysis of health risk to the neighboring West Oakland community. Based on that study, the estimated lifetime potential cancer risk for residents of West Oakland from exposure to diesel PM emissions three times the average background diesel PM ambient concentrations in the Bay Area Air Quality Management District is about 1,200 excess cancers per million (compare this to the estimated background potential cancer risk due to diesel PM in the San Francisco Bay Area, which is about 480 excess cancers per million), with on-road heavy duty trucks attributing to 71% of the potential cancer risk^{14 15}. When not associated with the Port or

¹³ East Bay Alliance for a Sustainable Economy. September 2007. Taking the Low Road: How Independent Contracting at the Port of Oakland Endangers Public Health, Truck Drivers, and Economic Growth.

¹⁴ California Air Resources Board. March 2008. Diesel Particulate Matter Health Risk Assessment for the West Oakland Community: Preliminary Summary of Results. Available at: <http://www.arb.ca.gov/ch/communities/ra/westoakland/westoakland.htm>

the Railroad, trucks attribute to 84% of the potential cancer risks in the West Oakland community¹⁶ (See Figure 3). In a study of railroad workers, lung cancer mortality was elevated in jobs associated with work on trains powered by diesel¹⁷. Toxic pollutant emissions from engines using lower-sulfur diesel fuels resulted in lower relative toxicities¹⁸. Port truck drivers are exposed to at least 10 times the level of black carbon in West Oakland^{19 20}.

Figure 3: Percent Contribution to the West Oakland Community Potential Cancer Risk by Source Category for the Part I, II, & III Diesel PM Emissions



9. Human health concerns from fossil fuel combustion, such as passenger cars and trucks, also include effects from nitrogen oxides, carbon monoxide, sulfur dioxide, ozone, and lead.

¹⁵ Fernandez, E. March 20, 2008. Study says diesel emissions raise cancer risk. San Francisco Chronicle.

¹⁶ California Air Resources Board. March 2008. Diesel Particulate Matter Health Risk Assessment for the West Oakland Community: Preliminary Summary of Results.

<http://www.arb.ca.gov/ch/communities/ra/westoakland/westoakland.htm>.

¹⁷ California Air Resources Board. March 2006. Health Effects of Diesel Exhaust Particulate Matter.

¹⁸ *Id.*

¹⁹ Natural Resources Defense Council. December 2007. Driving on Fumes: Truck Drivers Face Elevated Health Risks from Diesel Pollution.

²⁰ Cabanatuan, M. December 4, 2007. Truckers at Port of Oakland breathing too much soot. San Francisco Chronicle.

10. Nitrogen oxides have negative impacts on breathing and the respiratory system, damage to lung tissue and early death. Nitrogen oxides react with volatile organic compounds in the presence of sunlight to form ground-level ozone. Children, people with lung diseases such as asthma, and people who work or exercise outside are susceptible to adverse effects such as damage to lung tissue and reduction in lung function^{21 22}.

11. Sulfur dioxide affects particularly sensitive groups, like people with asthma who are active outdoors and children, the elderly, and people with heart or lung disease. When levels of sulfur dioxide in the air peak, it can cause temporary breathing difficulty for people with asthma who are active outdoors. Longer-term exposures to high levels of sulfur dioxide gas and particles cause respiratory illness and aggravate existing heart disease. Sulfur dioxide can also react with other chemicals in the air to form tiny sulfate particles. Such particles are harmful. After inhalation into the lungs, people experience increased respiratory symptoms and disease, difficulty in breathing, and premature death.

12. Carbon monoxide can cause harmful health effects by reducing oxygen delivery to the body's organs (like the heart and brain) and tissues. Lower levels of carbon monoxide threaten the health of those who have existing heart conditions with chest pain and reduce that person's ability to exercise; repeated exposures may contribute to other cardiovascular effects. High levels can affect the central nervous system of even healthy people, causing vision problems, reduced ability to work or learn, reduced manual dexterity, and difficulty performing complex tasks. At extremely high levels, carbon monoxide is poisonous and can cause death.

13. Lead, emitted from non-road diesel engine equipment, is a major health concern. The major exposure pathway in humans is via the air. Lead moves around the body via the blood and accumulates in the bones. Health problems from lead exposure include neurological effects in children and cardiovascular effects (e.g., high blood pressure and heart disease) in adults. Infants and young children are especially sensitive to even low levels of lead, which may contribute to behavioral problems, learning deficits and lowered IQ. Higher levels of exposure to lead can adversely affect the nervous system, kidney function, immune system, reproductive and developmental systems and the cardiovascular system. Lead exposure also affects the oxygen carrying capacity of the blood.

²¹ Accessed June 12, 2008: <http://www.epa.gov/air/urbanair/nox/hlth.html>. Not submitted with Request for Appeal.

²² McCreanor, J., *et al.* 2007. Respiratory Effects of Exposure to Diesel Traffic in Persons with Asthma. *The New England Journal of Medicine*. 357 (23): 2348-2358.

14. Low-income communities of color are disproportionately burdened by air pollution. In the U.S., a higher percentage of minorities live in communities that fail to meet EPA air quality standards²³. Low-income communities in particular face higher exposure levels to diesel exhaust because they tend to be situated closer to freeways, distribution centers, or industrialized areas with increased truck traffic^{24 25 26}. Workers also face exposure to diesel exhaust if they operate or work near heavy-duty diesel equipment²⁷. There are opportunities to control diesel emissions through engine improvements, fuel restrictions, and exhaust control technologies.

15. In addition to impacts from combustion of diesel and other fuel, Aaron Metals' combustion of insulation has harmful impacts on human health. There have been reports from the community of insulation combustion at Aaron Metals. The details of these materials are not known based on the information provided to the public. One type of wire insulation is polyvinyl chloride ("PVC"). The burning of PVC forms dioxins, which are a toxic air contaminant for which there is no known safe level of exposure, and is harmful to human health and the environment. Another type of insulation comes from much of home building insulation. This home building insulation contains formaldehyde, which is also a toxic air contaminant. Dioxins are a group of three closely related families: the chlorinated dibenzo-*p*-dioxins (CDDs), chlorinated dibenzofurans (CDFs) and certain polychlorinated biphenyls (PCBs)²⁸. Dioxins are a known human carcinogen and among the most toxic chemicals known. Dioxins disrupt brain development, behavior and hormone systems, particularly in the developing fetus, and affect reproduction and especially the immune system^{29 30 31 32 33}. They can accumulate in human

²³ Union of Concerned Scientists. June 2003. Cleaning Up Diesel Pollution Emissions from Off-Highway Engines by State. [http:// www.ucsusa.org](http://www.ucsusa.org).

²⁴ *Id.*

²⁵ Morello-Frosch, R., *et al.* 2007. Still Toxic After All These Years: Air Quality and Environmental Justice in the San Francisco Bay Area. Center for Justice, Tolerance & Community, University of California, Santa Cruz. Submitted with March 31 Request for Appeal.

²⁶ Colliver, V. March 27, 2008. PBS to air study on link between money, health. San Francisco Chronicle.

²⁷ Union of Concerned Scientists. June 2003. Cleaning Up Diesel Pollution Emissions from Off-Highway Engines by State. [http:// www.ucsusa.org](http://www.ucsusa.org).

²⁸ United States Environmental Protection Agency Office of Research and Development. October 15, 2004 Update. Information Sheet, Dioxin: *Summary of the Dioxin Reassessment Science*.

²⁹ Weisglas-Kuperus, N., *et al.* 2000. Immunologic Effects of Background Exposure to Polychlorinated Biphenyls and Dioxins in Dutch Preschool Children. *Environmental Health Perspectives*. 108 (12): 1203-1207.

³⁰ Health Care Without Harm. October 16, 2002. Dioxin, PVC, and Health Care Institutions. *Going Green: A Resource Kit for Pollution Prevention in Health Care*. Pub 3-01.

tissue. Dioxins can be passed to unborn children in mothers' wombs and to infants through breast milk³⁴. People can be exposed through the skin, orally and by inhalation as well. More information of on-site combustion of materials is necessary.

16. Formaldehyde can be toxic, allergenic and carcinogenic. Formaldehyde can cause watery eyes, burning sensations in the eyes and throat, nausea, and difficulty in breathing in some humans exposed to elevated levels. High concentrations may trigger asthma attacks rendering asthmatics highly susceptible to its effects. It may also cause cancer in humans.

B. Impacts to the Environment

17. Trucks and automobiles travelling into and out of Aaron Metals are likely to contribute to poor air quality in East Oakland, particularly to the neighbors and workers of Aaron Metals. Diesel-engine trucks and equipment emit diesel exhaust, which can contain around 450 different chemicals. Forty of such chemicals are listed as toxic air contaminants by the California Environmental Protection Agency³⁵. Diesel particulate matter consists of tiny particles, most of which are smaller than the width of human hair, is among the most toxic air pollutants. In California, off-highway diesel engines (in trains, ships, and heavy equipment such as tractors, bulldozers, and excavators) contributed to 41% of particulate matter and 29% of smog-forming nitrogen oxides in 1999³⁶ (See Table 1). Motor vehicles also emit criteria air pollutants -- nitrogen dioxide, sulfur oxides, carbon monoxide, ozone, and lead along with particulate matter - and black carbon.

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³¹ Markowski, V.P., *et al.* 2001. Altered Operant Responding for Motor Reinforcement and the Determination of Benchmark Doses Following Perinatal Exposure to Low-Level 2,3,7,8-Tetrachlorodibenzo-p-dioxin. *Environmental Health Perspectives*. 109 (6): 622-627.

³² *Vreugdenhil, H. J. I., et al.* 2002. Effects of Perinatal Exposure to PCBs and Dioxins on Play Behavior in Dutch Children at School Age. *Environmental Health Perspectives*. 110 (10): A593-A598.

³³ United States Environmental Protection Agency. Office of Research and Development. October 15, 2004. *Dioxin: Scientific Highlights from the NAS Review Draft of EPA's Dioxin Reassessment* Information Sheet 2.

³⁴ Accessed on July 12, 2008. <http://www.bluevinyl.org/PVC.pdf>. Submitted with March 31 Request for Appeal.

³⁵ Pacific Institute. 2006. *Paying with Our Health: The real cost of freight transport in California*.

³⁶ *Union of Concerned Scientists.* June 2003. *Cleaning Up Diesel Pollution Emissions from Off-Highway Engines by State*. <http://www.ucsusa.org>.

Table 1 Types of Heavy Diesel Equipment

Construction and Mining	Agricultural
Bulldozers	Agricultural tractors
Excavators	Combines
Cranes	Irrigation sets
Graders	Commercial/Industrial
Backhoes	Generator sets
Tractors	Pumps
Skid steer loaders	Air compressors
Off-highway trucks	Welders
Rubber tire loaders	AC/refrigeration
Recreational	Terminal tractors
Snowmobiles	Forklifts
All-terrain vehicles	Lawn & Garden
Logging	Mowers
Shredders	Rotary tillers
Airport	Stump grinders
Ground support equipment	Commercial turf equipment

18. The effects of criteria air pollutants raise major concerns over environmental health. Sulfur dioxide and nitrogen oxides contribute to the formation of acid rain. Acid rain can cause plant and water damage, changing soil pH and rendering water-bodies acidic and poor habitat for fish. Over long periods of time, this can lead to species composition changes in an ecosystem. Sulfate particles contribute to visibility impairment. Sulfur dioxide accelerates damage to buildings exteriors and paints.

19. Motor vehicles emit carbon monoxide, which contributes to the formation of ground-level ozone, or smog, which can trigger respiratory problems, like asthma. Motor vehicles are also major contributors to global warming. In California, diesel exhaust particulate matter causes reduction in visibility (10 to 75% of total), or a regional haze, significantly contributes to global warming (2nd to carbon dioxide) in its ability to absorb solar radiation, and can be transported over long distances, affecting regional air quality³⁷. PAHs and lead persist in the environment and accumulate in soils and sediments through deposition from air sources. Ecosystems near point sources of lead demonstrate a wide range of adverse effects including

³⁷ California Air Resources Board. March 2006. Health Effects of Diesel Exhaust Particulate Matter.

losses in biodiversity, changes in community composition, and negative effects on wildlife.
 Diesel emissions also contain dioxins.

II. Water quality

20. Nitrogen oxides, like those from motor vehicles, cause water quality deterioration. An increase in nitrogen loading into water-bodies, particularly in estuaries which are high in nutrients, can cause a chemical imbalance of nutrients used by aquatic plants and animals. This increase in nitrogen accelerates eutrophication, which leads to oxygen depletion and reduces fish and shellfish populations.

21. Dioxins can enter waterways degrading water quality and the wildlife that depends on it. Dioxins emitted or volatilized can enter directly onto the Bay or it can deposit into the watershed and enter the Bay via stormwater runoff. Dioxins are found in municipal and industrial discharges, and can be found in storm drains in Oakland. Dioxins can bioaccumulate and concentrate up the food chain. The San Francisco Bay is on the Clean Water list of waterways that are severely impaired by dioxins. Several of the Bay's beneficial uses are possibly impaired by dioxins and there is also a fish consumption advisory based on levels of dioxins in fish and water (See Table 2-1)³⁸. Although the San Francisco Bay has legacy of dioxins, combustion is thought to be the main source of new dioxins in the environment³⁹.

Table 2-1. Beneficial uses of San Francisco Bay that could be impaired by dioxins.

Use	Abbreviation	Impairment
Ocean, commercial, and sport fishing	COMM	Sport fishing the most likely impairment. Cited as USEPA reason for the current listing.
Preservation of rare and endangered species	RARE	Possible
Fish spawning	SPWN	Possible
Wildlife habitat	WILD	Possible
Estuarine habitat	EST	Possible

22. The primary concern of dioxins in the SF Bay comes from its persistence, bioaccumulation and toxicity. Dioxins and related compounds are highly persistent in the environment and in living organisms. Dioxins released into the air from combustion can travel

³⁸ San Francisco Estuary Institute. November 12, 2004. SFEI Contribution #309. Dioxins in San Francisco Bay: Impairment Assessment/Conceptual Model.

³⁹ *Id.*

long distances before eventually falling to the earth to be deposited on surface waters, soils and plants where it moves up the food chain, accumulating and magnifying in concentration in the fatty tissues of wildlife as they go up the food chain (See Figure 3-7, 3-8) . They can alter and disrupt growth factors, hormones, enzymes, and developmental processes, and in animals, dioxin causes cancer in multiple organ systems, even at extremely low exposure levels, as low as *nanograms per kilogram of body weight* .

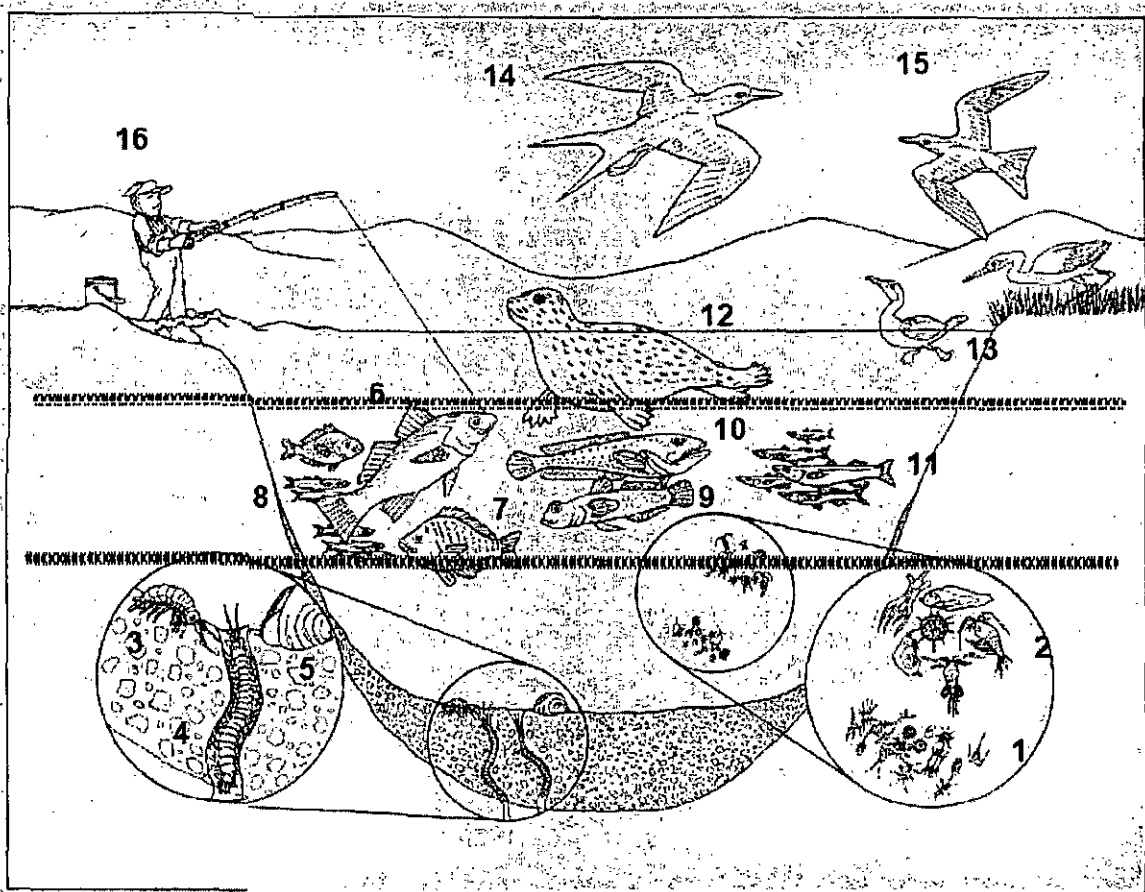


Figure 3-7. San Francisco Bay food web: (1) phytoplankton are consumed by (2) zooplankton and small invertebrates such as (3) amphipods, (4) worms, and (5) clams; (6-11) fish consume zooplankton and invertebrates; (12-16) fish are consumed by humans and wildlife species.

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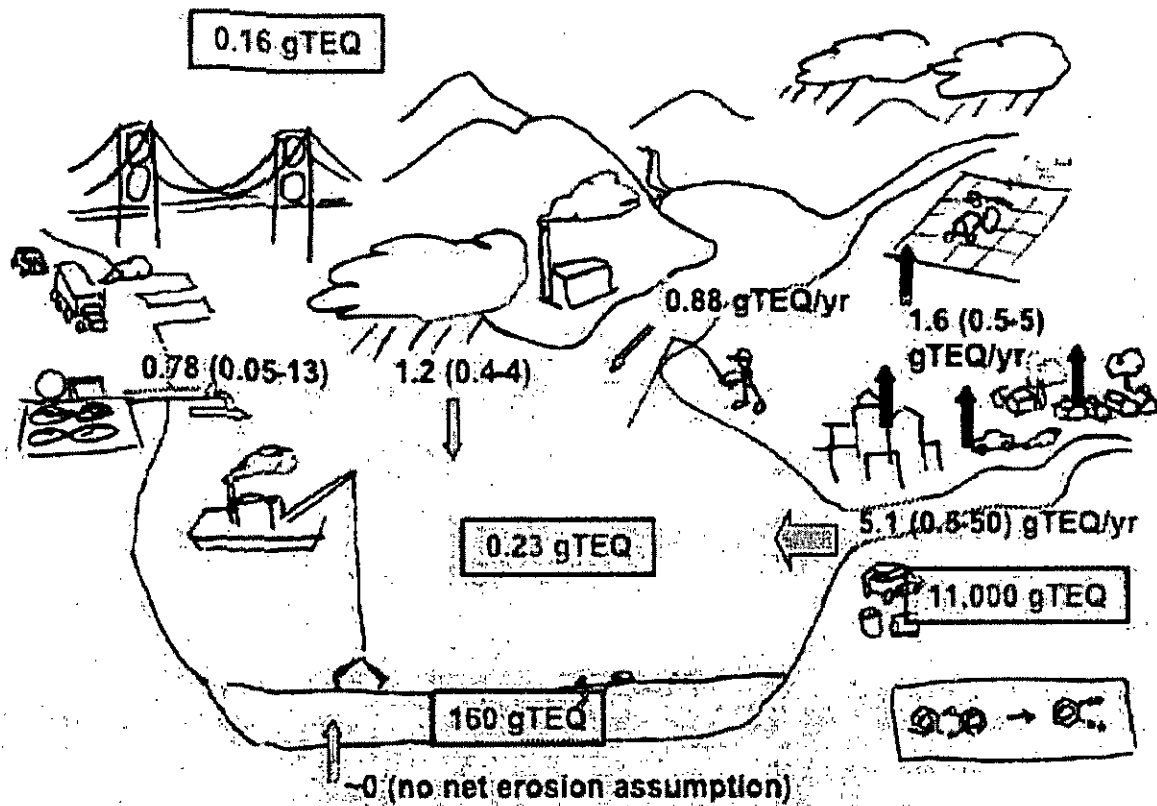


Figure 3-8. PCDD/F sources, pathways (g TEQ/year), and inventories (g TEQ) in San Francisco Bay (green=reservoirs in water, sediments, and watershed; red=emissions rates to atmosphere; blue=annual loads to Bay)

23. Contaminants from industrial sources also affect Bay sediment. The interaction between pollution and sediments leads to affects on benthic-communities, communities living in the sediment, and is the primary source of tissue contamination. San Leandro Bay is a confirmed highly polluted locations -- elevated metals, PCBs, PAHs -- that exhibited adverse biological effects⁴⁰. Polychlorinated biphenyls (PCBs), used in plastic coatings for electrical wiring, are persistent chemicals and pose great health risks to humans and wildlife and for San Francisco Bay fish consumption⁴¹.

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⁴⁰ Anderson, B; Hunt, J.; Phillips, B.; Thompson, B.; Lowe, S.; Taberski, K.; Scott Carr, R. 2007. Patterns and trends in sediment toxicity in the San Francisco Estuary. Environmental Research. 105: 145-155.

⁴¹ Davisa, J. A.; Hetzelb, F.; Orama, J. J.; McKee, L. J. 2007. Polychlorinated biphenyls (PCBs) in San Francisco Bay. Environmental Research. 105: 67-86.

III. Traffic – Public Safety Impacts

24. Heavy-duty truck traffic on streets designed for passenger car use is a safety hazard and produces less pedestrian-friendly communities. Truck traffic on streets for passenger vehicles increases the risk of collisions with other vehicles and pedestrians, and increases the wear and tear on these roads that can damage private vehicles⁴². Also, by blocking the main and only street into Sobrante Park can increase emergency response times to the neighborhood. All of these factors discourage pedestrians and creates unhealthy environments.

IV. Noise

25. Noise plays a factor in health. Community has documented Aaron Metals' noise impacts, including loud noises from its operation of equipment onsite. Neighborhood residents near Aaron Metals have voiced the impacts that noise from operations has on their well-being and stress level. The traffic from trucks at low speeds is noisy. The presence of large trucks on local streets (whether parked or moving)—and the noise from these vehicles—discourages people from taking walks in their neighborhood or visiting their local parks—both important forms of exercise that help people maintain healthy body weights⁴³. Various studies have cited the link between noise and increased risk of heart attacks; increases in overall stress levels; and impacts on children's mental health, reading comprehension, and school performance⁴⁴.

V. Conclusion

26. The evidence cited in this declaration shows that there is reasonable potential that Aaron Metals, a scrap metal facility in East Oakland, operating on 100,000 square feet, could result significant adverse environmental impacts in the following categories: air quality, human health, health of the environment, water quality, and noise. East Oakland, a low-income community of color, bears disproportionate burdens, cumulative impacts (the total burden of all emissions and discharges in an area from past and present industrial and domestic activities including social stressors), exposures, and risk from pollution. These concerns of the worker and community

⁴² Pacific Institute. 2006. *Paying with Our Health: The real cost of freight transport in California.*

⁴³ *Id.*

⁴⁴ *Id.*

health and environmental impacts merit an analysis in an Environmental Impact Report and public process.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge. Executed at Oakland, California on June 16, 2008.

_____/s/
Anna Yun Lee

ATTACHMENT A
TO
REQUEST FOR APPEAL OF PLANNING COMMISSION DECISION TO THE CITY
COUNCIL

Aaron Metals Company
CMD 06-268

This Attachment A is attached to and made a part of the appeal in this matter filed by Aaron Metals Company ("Appellant"). The Planning Commission committed error, abused its discretion and made a decision that is not supported by the evidence in the record by imposing the Conditions of Approval listed below in the form in which they were adopted by the Commission. Set forth below is an itemized list of the particular Conditions of Approval that are the subject of this appeal, together with Appellant's requested changes to those Conditions of Approval and the related reasons for such requests. Proposed language additions are underlined and proposed language deletions are indicated by ~~strikeouts~~.

1. **Condition 8 – Compliance with Conditions of Approval**

A. **Condition as Imposed by the Planning Commission**

8. **Compliance with Conditions of Approval**

Within 30 days of City Approval of CUP.

The project applicant shall submit to the Planning and Zoning Division and the Building Services Division a **Conditions** compliance plan that lists each condition of approval, the City agency or division responsible for review, and how/when the project applicant has met or intends to meet the conditions. The applicant will sign the Conditions of Approval attached to the approval letter and submit that with the compliance plan for review and approval. The compliance plan shall be organized per step in the plancheck/construction process unless another format is acceptable to the Planning and Zoning Division and the Building Services Division. The project applicant shall update the compliance plan and provide it with each item submittal. The project applicant shall be responsible for compliance with the recommendations in any submitted and approved technical report and all the Conditions of Approval set forth below at its sole cost and expense, and subject to review and approval of the City of Oakland.

One (1) year after the granting of the CUP.

The Planning Commission shall review compliance with conditions after inspection by staff.

B. **Appellant's Requested Change and Explanation**

(i) **Appellant's Requested Change**

8. **Compliance with Conditions of Approval**

Within 30 days of City Approval of CUP.

~~The project applicant shall submit to the Planning and Zoning Division and the Building Services Division a **Conditions** compliance plan that lists each condition of approval, the City agency or division responsible for review, and how/when the project applicant has met or intends to meet~~

~~the conditions.~~ The applicant will sign the Conditions of Approval attached to the approval letter and submit that to the Planning and Zoning Division ~~with the compliance plan for review and approval.~~ The ~~compliance plan shall be organized per step in the plan check/construction process unless another format is acceptable to the Planning and Zoning Division and the Building Services Division.~~ The project applicant shall update the compliance plan and provide it with each item submittal. The project applicant shall be responsible for compliance with the recommendations in any submitted and approved technical report and all the Conditions of Approval set forth below at its sole cost and expense, and subject to review and approval of the City of Oakland.

~~**One (1) year after the granting of the CUP.**~~

~~The Planning Commission shall review compliance with conditions after inspection by staff.~~

(ii) Explanation

As set forth in the March 19, 2008 Staff Report, the purpose of this Conditional Use Permit was to legalize an expansion of an existing recycling facility and operation in existence since 1976. The application did not involve the addition of any new development beyond the existing footprint of the site and did not involve any changes to Appellant's business or operations. The concept of a "compliance plan" was never raised or discussed at the Planning Commission level, either by Staff or the Commission. This language was added by Staff unilaterally after the date of the hearing. Since this language was not acted upon or included in any revisions to the Conditions adopted by the Commission, it is not properly included in the Conditions of Approval and should be deleted. With respect to the one year review requirement, Appellant believes that this Condition singles Appellant out for unequal treatment, and Appellant is concerned that this Condition penalizes Appellant for prior actions or inactions. Appellant was not provided with any statement or evidence that this one year review requirement is imposed on all other similar projects.

2. Condition 11, Container Stacking

A. Condition as Imposed by the Planning Commission

11. Container Stacking

Ongoing

The applicant shall not stack material containers or other materials higher than a maximum of 12 feet from the ground level in any outside yard.

B. Appellant's Requested Change and Explanation

(i) Appellant's Requested Change

11. Container Stacking

Ongoing

The applicant shall not stack material containers or other materials higher than 3 containers high within 20' of the perimeter fence along the eastern perimeter of the site between 105th and 107th avenues. ~~a maximum of 12 feet from the ground level in any outside yard.~~

(ii) **Explanation**

Appellant's requested change to this Condition would conform to Staff's recommendation in its Staff Report. Staff's proposed version of this Condition adequately addressed visual concerns with respect to residences located across Pearmain Street from Appellant's premises. It prohibited Appellant from stacking containers more than three high in areas of Appellant's premises where higher stacking might adversely affect views of those residents, while not unduly impacting Appellant's long-established operational practices.

3. Condition 18 – Signage

A. Condition as Imposed by the Planning Commission

18. Signage

a. *Ongoing*

The project applicant shall remove all off premise advertising signs within 7 days from the granting of this permit.

b. *Within 30 days of City Approval of CUP.*

The applicant shall submit a sign plan to the City Zoning Division for review and approval showing a reduction in square footage to all on site business signs to no more than the maximum allowable sign area by the Oakland Planning Code. The applicant shall implement the approved plan within 60 days of the CUP approval.

B. Appellant's Requested Change and Explanation

(i) **Appellant's Requested Change**

18. Signage

a. *Ongoing*

The project applicant shall remove all off premise advertising signs within 7 days from the granting of this permit.

~~b. *Within 30 days of City Approval of CUP.*~~

~~The applicant shall submit a sign plan to the City Zoning Division for review and approval showing a reduction in square footage to all on site business signs to no more than the maximum allowable sign area by the Oakland Planning Code. The applicant shall implement the approved plan within 60 days of the CUP approval.~~

(ii) **Explanation**

Appellant's existing signage at the premises has been in existence for the life of operations at the premises. Over a nearly thirty (30) year period, there has never been a claim or complaint that such signage interferes with the use, view or operations of any other property owner or the public. By its request to delete the language set forth above, Appellant seeks only to preserve its existing signage.

4. Condition 11, Facility Maintenance

A. Condition as Imposed by the Planning Commission

21. Facility Maintenance.

a. Ongoing

The recycling center shall be kept in as neat in appearance as is reasonable for the activity. All exterior storage of materials shall be in sturdy containers that are covered, secured, and maintained in good condition, on bales or pallets. Storage containers for flammable material shall be constructed of nonflammable material.

B. Appellant's Requested Change and Explanation

(i) Appellant's Requested Change

21. Facility Maintenance.

a. Ongoing

The recycling center shall be kept in as neat in appearance as is reasonable for the activity. All exterior storage of finished materials shall be in sturdy containers that are covered, secured, and maintained in good condition, on bales or pallets. Storage containers for flammable material shall be constructed of nonflammable material.

(ii) Explanation

The omission of the word "finished" represents a clerical error by Staff. This change had been requested by Appellant in writing prior to the Planning Commission hearing, was recommended by Staff at the outset of the Planning Commission hearing, and was approved by the Planning Commission as part of its approval. Appellant's representative has contacted Staff in this regard, and hopefully this error will be corrected prior to any hearing on this appeal.

5. Condition 22, Litter and Debris Control

A. Condition as Imposed by the Planning Commission

22. Litter and Debris Control.

a. Ongoing

a. The recycling center site shall be maintained free of litter and any other undesirable materials, and will be cleaned of loose debris on a daily basis. Delivery areas will be kept free of litter and any other undesirable materials, and the containers will be clearly marked to identify the type of material that may be deposited; facility shall display a notice stating that no material shall be left outside the recycling containers.

b. A Litter Control Plan that ensures that the premises of the property, and in a one block radius, are kept free of litter and debris shall be submitted to and approved by the Planning and Zoning Division. The applicant shall implement the approved plan within 30 days of granting the CUP at the applicant's expense. The plan shall include, but not be limited to:

1. Distribution of proposed locations of litter receptacles on site and in the public right of way. The design and location of litter receptacles shall be consistent and coordinated with the City's street furniture program.
2. A management schedule for keeping the premises and surrounding area free from litter originating from the operation of the commercial activities;
3. Daily sweeping and trash collection of the premises, the public sidewalk and the gutter area of the public street immediately adjacent to the project, and mechanically clean the sidewalk with steam or equivalent measures at least once per month; and
4. Provisions for removal of abandoned shopping carts.

B. Appellant's Requested Change and Explanation

(i) Appellant's Requested Change

22. Litter and Debris Control.

a. Ongoing

a. The recycling center site shall be maintained free of litter and any other undesirable materials, and will be cleaned of loose debris on a daily basis. Delivery areas will be kept free of litter and any other undesirable materials, and the containers will be clearly marked to identify the type of material that may be deposited; facility shall display a notice stating that no material shall be left outside the recycling containers.

b. A Litter Control Plan that ensures that the premises of the property, and adjacent sidewalks and gutters~~in a one-block radius~~, are kept free of litter and debris shall be submitted to and approved by the Planning and Zoning Division. The applicant shall implement the approved plan within 30 days of granting the CUP at the applicant's expense. The plan shall include, but not be limited to:

1. Distribution of proposed locations of litter receptacles on site and in the public right of way. The design and location of litter receptacles shall be consistent and coordinated with the City's street furniture program.
2. A management schedule for keeping the premises and surrounding area free from litter originating from the operation of the commercial activities;
3. Daily sweeping and trash collection of the premises, the public sidewalk and the gutter area of the public street immediately adjacent to the project, and mechanically clean the sidewalk with steam or equivalent measures at least once per month; and
4. Provisions for removal of abandoned shopping carts.

(ii) Explanation

This Condition of Approval, as proposed by Staff, required Appellant to address litter at its premises and areas immediately adjacent to the premises. There is no evidence in the record that Appellant creates litter problems a block away from its premises. There is no nexus between any burden or impact created by this application to continue Appellant's existing use, and the presence of litter one block from the premises. There are a number of other factors, including but not limited to nearby vacant property and abandoned public right-of-way that may well create any litter problems within the expanded area. By expanding Appellant's scope of responsibility to include all areas within a one-block radius, the Condition requires Appellant to address situations not attributable to its operations and effectively turn Appellant into a municipal garbage collector.

6. Condition 25, Entry Bollards

A. Condition as Imposed by the Planning Commission

25. Entry Bollards.

a. Ongoing.

Aaron Metals shall install non-removable bollards to prevent the diagonal movement in and out of the driveway. The bollards shall extend from the southerly fence edge to the back of walk of 105th Ave. The width of the driveway shall be determined by staff.

B. Appellant's Requested Change and Explanation

(i) Appellant's Requested Change

25. Entry Bollards.

a. Ongoing.

Aaron Metals shall install non-removable bollards to prevent the diagonal movement in and out of the driveway. The bollards shall extend from the southerly fence edge to the back of walk of 105th Ave. ~~The width of the driveway shall be determined by staff.~~

(ii) Explanation

The use of bollards, as reflected in this Condition, is based on a report and design prepared by traffic consultant Abrams Associates and was endorsed by Staff. This design results in a driveway width of approximately 30 feet, which is wide enough to safely accommodate truck and vehicular ingress and egress. However, the deleted language creates the risk that Appellant's driveway could be further narrowed, making truck turning more difficult and potentially exacerbating the traffic situation.

7. Condition 28, Curbcuts

A. Condition as Imposed by the Planning Commission

28. Curbcuts.

a. Ongoing.

All abandoned driveways along 105th Avenue and Pearmain Street adjacent to Aaron Metals property shall be removed and reconstructed to ADA compliant sidewalk meeting City of Oakland standards.

B. Appellant's Requested Change and Explanation

(i) Appellant's Requested Change

~~28. Curbcuts.~~

~~*a. Ongoing.*~~

~~All abandoned driveways along 105th Avenue and Pearmain Street adjacent to Aaron Metals property shall be removed and reconstructed to ADA compliant sidewalk meeting City of Oakland standards.~~

(ii) Explanation

This Condition of Approval calls for expensive removal and reconstruction of long-abandoned driveway curbcuts located in the public sidewalks in the public rights of way adjacent to Appellant's property. These curbcuts predate the start of Appellant's operations, and have never been utilized by Appellant as part of its operations. There is no nexus between Appellant's application and this Condition, and therefore this condition should be deleted in its entirety.

8. Condition 33, Landscape/Metal Art Plan and Installation

A. Condition as Imposed by the Planning Commission

33. Landscape/Metal Art Plan and Installation.

a. Within 30 days of approval of the CUP.

The applicant shall submit a draft Landscape/Metal Art Plan for City review and approval indicating the addition of several landscape areas along the outside perimeter of the property, as directed by the Planning Commission. Upon discussion with the applicant, any necessary revisions shall be made within ten (10) days and returned to Zoning staff for final review and approval. The applicant shall implement the approved plan. Landscape opportunities to be explored should include tree and shrub cut-outs along the perimeter fence along Pearmain St and 105th Ave., vines, and/or hanging plants mounted to the fascia and/or support columns of structures along Pearmain St., and/or sidewalk plantings, if permitted by Engineering. Metal Art "sculpture" shall be incorporated at one or more locations facing and visible from the public right-of-way.

b. Within 20 days of final staff approval of the Landscape/Metal Art Plan.

The applicant shall submit for appropriate and necessary building permits for all landscape/metal art installations. The applicant shall diligently address any requested modifications to the building permit plans in order to receive permits.

c. Within 60 days of building permit issuance.

All landscape/metal art installations shall be completed to the satisfaction of the Planning and Zoning Division and the Building Department.

B. Appellant's Requested Change and Explanation

(i) Appellant's Requested Change

33. Landscape/Metal Art Plan and Installation.

a. Within 30 days of approval of the CUP.

~~The applicant shall submit a draft Landscape/Metal Art Plan for City review and approval indicating the addition of several landscape areas along the outside perimeter of the property, as directed by the Planning Commission. Upon discussion with the applicant, any necessary revisions shall be made within ten (10) days and returned to Zoning staff for final review and approval. The applicant shall implement the approved plan. Landscape opportunities to be explored should include tree and shrub cut outs along the perimeter fence along Pearmain St and 105th Ave., vines, and/or hanging plants mounted to the fascia and/or support columns of structures along Pearmain St., and/or sidewalk plantings, if permitted by Engineering. Metal Art "sculpture" shall be incorporated at one or more locations facing and visible from the public right of way.~~

b. Within 20 days of final staff approval of the Landscape/Metal Art Plan.

~~The applicant shall submit for appropriate and necessary building permits for all landscape/metal art installations. The applicant shall diligently address any requested modifications to the building permit plans in order to receive permits.~~

c. Within 60 days of building permit issuance.

~~All landscape/metal art installations shall be completed to the satisfaction of the Planning and Zoning Division and the Building Department.~~

(ii) Explanation

There is no nexus between Appellant's Conditional Use Permit application for continuation of its existing use, and any requirement to install landscaping and artwork. In addition, the subject areas are physically constrained by long-standing public and private improvements, making such beautification requirements difficult as a practical matter and inordinately expensive. For the same reason, any requirement to seek additional building permits for such beautification also is unreasonably burdensome and unlawful.

Case File Number CM06-268

March 19, 2008

Location:	750 105 th Avenue (APN 045 -5248-005-01, -005-02; 045 -5249-004-01, -010-00, -013-00). (See map on reverse)
Proposal:	Proposal to legalize an expansion of an existing scrap metal recycling business. This application does not involve the addition of new square footage beyond the existing footprint of the site.
Applicant:	Paul Forkash
Owner:	Paul Forkash – Aaron Metals
Planning Permits Required:	Major Conditional Use Permit to legalize an unpermitted expansion of an existing Scrap Operation Commercial Activity within 400' of a residential zone.
General Plan:	Business Mix
Zoning:	M-40 Heavy Industrial Zone
Environmental Determination:	Exempt, Section 15301, State CEQA Guidelines, existing facilities; Projects consistent with general plan and zoning (Guidelines section 15183)
Historic Status:	No historic record
Service Delivery District:	6
City Council District:	7
Status:	Pending
Action to be Taken:	Contained in staff report
Staff Recommendation:	Approve with conditions
Finality of Decision:	Appealable to the City Council
For Further Information:	Contact Robert D. Merkamp at (510) 238-6283 or by email: rmerkamp@oaklandnet.com

SUMMARY

The applicant, Aaron Metals, has filed a Major Conditional Use Permit (CUP) to legalize a series of expansions of a previously permitted scrap metal facility. The original permit, a Major Variance, was issued in 1976 for an approximately 10,000 square foot facility fronting onto 105th Avenue. The zoning at the time required a Major Variance for scrap metal recycling facilities located within 400 feet of a residential zone (the modern code requires a Major CUP). Over time the applicant purchased adjoining properties and converted them into more square footage for his scrap metal facility. It appears that in many cases the applicant did obtain permits from the City of Oakland for various demolitions but it appears they never amended their land use entitlement, which still limited operation of the facility to the original 10,000 square foot property.

The item was brought to the City's attention as a result of a code complaint. Initially, it was thought to involve two parcels of land between 106th and 107th avenues that the scrap metal yard had begun operating on within the last several years but staff research revealed the true size of expansion of the project over the years. In this application, Aaron Metals is not asking for any additional expansion beyond their existing footprint. They do not propose new construction on the property, new buildings, fences, or signs (indeed, the fencing that surrounds the un-permitted portions of the yard was in fact permitted). The overall dimensions of the existing facility would not change. Certain improvements to the property would be made pursuant to Conditions of Approval as recommended by staff.

PROPERTY DESCRIPTION

The property site is flat and is approximately 2.5 acres in size. The geometry of the overall property site is roughly rectangular. The western border of the property is the Union Pacific railroad and there are light industrial uses to the west, existing and potential housing to the southwest and east and a mixture of residential and industrial uses to the south.

GENERAL PLAN ANALYSIS

The General Plan is Business Mix. It is intended to provide a transition between heavy and low intensity commercial and industrial zones. Scrap operations are considered to conform to the Business Mix Designation (see pg 14 of the General Plan conformity guidelines, attachment B). The guidelines provide direction for activities that are considered conforming on pg 4. Activities in conformance to the General Plan require a CUP through the normal process when the zoning also conditionally allows the use which is the case in this permit.

ZONING ANALYSIS

The zone of this property is M-40 Heavy Manufacturing zone. Scrap operations are generally permitted outright in the M-40 zone, however, in the cases where the Scrap operation is located within 400' of a residential zone a Major Conditional Use Permit is required. Since there is a residential zone directly across Pearmain St from the project site the Major CUP requirement exists. This zone does not require design review, although there is a CUP finding which addresses design review.

CURRENT REZONING PROCESS

As the Planning Commission is aware, this property is being considered as part of the overall zoning update of our industrial zones. This area is proposed to be mapped at CIX-2 which is a designation for commercial and industrial uses within the central and eastern portions of the city. A review of the proposed allowed uses chart for the CIX-2 shows a "Primary Recycling Collection Center" (which is how this business would be defined under such regulations) would not permit this activity within 300' of a residential zone (of which they are adjacent to) under the most current draft of the regulations, which have not yet been adopted by the City Council. However, this does not preclude the Planning Commission from considering this item because (a) the current regulations have not yet been adopted by the City Council and thus the current regulations are still operative; and (b) even if the Council had adopted the proposed regulations, as currently drafted, such new regulations would not apply to applications deemed complete by the adoption date. Here, the application was determined/deemed complete in September of 2006 (since this time staff has been working with the applicant on a variety of issues that do not affect completeness).

ENVIRONMENTAL DETERMINATION

Based on the size and location of the project site, as well as the findings of the traffic report and historic analysis, staff has concluded that the project satisfies the in-fill exemption under CEQA

Guidelines Section 15332, as well as projects being consistent with the general plan and zoning (Guidelines section 15183). The categorical exemption criterion follows with a brief summary of staff's analysis in bold print:

- a) The project is consistent with the applicable general plan designation and all applicable general plan policies as well as with applicable zoning designation and regulations; **As demonstrated in the General Plan Analysis and findings sections of this report, the application is consistent with applicable General Plan policies and the Business Mix designations. The Zoning Analysis and Required Findings sections demonstrate that, with approval of the CUP, the project is consistent with the Zoning Ordinance (as such required findings are a part of that ordinance).**
- b) The proposed development occurs within city limits on a project site of no more than five acres substantially surrounded by urban uses; **The project site encompasses approximately 2.5 acres (108,967 sq. ft.). The site is located within Oakland and is surrounded by a mixture of urban uses.**
- c) The project site has no value as habitat for endangered, rare or threatened species; **The project site is currently a scrap metal facility and has no value as habitat.**
- d) Approval of the project would not result in any significant effects relating to traffic, noise, air quality, or water quality;

Several traffic reports and updates by Abrams Associates was completed specifically for this project and submitted in May 2006, June of 2007, and February 2008. The reports concluded that the project is not a major contributor to traffic impacts in the neighborhood with peak traffic times coinciding with the movement of school children in the morning and afternoon or from operations of the railroad. City responses focused mainly on the safety of vehicle queuing and potential hazards with the railroad as a result of the driveway configuration. Transportation Services has reviewed a variety of strategies for modifying the vehicular entrance and recommends that a combination of traffic controllers and reshaping the entrance with bollards will provide adequate traffic control and safety, which have been included as conditions of approval, per standard practice.

- e) The site can be adequately served by all required utilities and public services. **The project site is located in a highly urbanized area within Oakland and can be adequately served by utility and public services. All services are already in the area and the project would not require the development of new public streets or other infrastructure.**

Exceptions to the use of the Exemption:

If any of the following can be made then an exemption cannot be applied to the project.

Location:

The project site is an industrial use located in an industrial zone and surrounded by a mixture of urban uses. This project would not impact any identified environmental resource. No such resources of concern have been identified by any governmental agency.

Cumulative Impacts:

This finding requires the city to analyze the cumulative impact of successive projects in the same place over time where it could lead to a significant impact. In this case, we have one facility that has, over time, expanded in size from approximately 10,000 square feet to roughly 2.5 acres. The surrounding area is generally low density residential, a range of industrial activities. The applicant analyzed the project's traffic impact in their own study and also cited a previous traffic study that suggested that the applicant's facility was not a cause of traffic congestion in the district. A review of other potential projects in the area shows a new 28 unit single family detached residential project on Edes Ave, to the south of 105th Avenue. The Initial Study/Negative Declaration did not cite traffic concerns in the neighborhood in general and found that project as well would not have a cumulative impact on the neighborhood traffic pattern. As the facility has been operating in an expanded mode for some time (and would not likely increase in activity as a result of this permit being granted as the facility itself cannot grow unless it buys other properties and converts them to this use, which in itself would require a revision to this CUP) it can be said reasonably that Aaron Metals is not a cause of cumulative impacts.

Significant Effect:

There are no unusual circumstances associated with this site. It is located in a zone and general plan designation that allows such activities pursuant to a Conditional Use Permit.

Scenic Highway:

The project site is distant from the nearest scenic route, I-580 and this hence does not apply.

Hazardous Waste:

The project site is not listed as a hazardous waste site.

Historical Resources:

The project site is not historic nor is it adjacent to a historic property.

KEY ISSUES AND IMPACTS

Traffic: Staff has had concerns about traffic at the entry and exit point on the property, primarily because of its proximity to the railroad tracks. There are times when large queues of cars waiting to drop off materials slow down traffic on 105th Avenue. Further, the driveway is set at an angle of forty five degrees to 105th Avenue making navigation difficult and turning out of and onto 105th Avenue tricky at times. And finally, the last factor is the proximity of the railroad along the western property boundary which is estimated by Union Pacific to carry 21 trains per day (6 passenger and 15 freight trains). Currently Aaron Metals employs flag people out front at all hours of business. The applicant has submitted several traffic studies reviewing the matter and Transportation Services has responded to those. The Public Utilities Commission also has weighed in with a variety of potential alterations that either the city or the applicant to make but did not make a recommendation for any one of them, only assessing the possible difficulty or complexity of the various choices. The PUC also provides a summary of the accident history at this railroad crossing and found 3 incidents within the past 7 years, all pedestrian incidents. While the report goes on to say pedestrian improvements should be considered that is beyond the scope of this permit and does not link the pedestrian accidents to the operation of this activity. Significantly, no vehicle accidents were found.

The city has reviewed this with an eye towards ensuring maximum safety at this junction. Staff has reviewed with the concept of either shifting the entrance further up 105th Avenue or placing bollards or a low wall along the border of and parallel to the railroad tracks to better direct the traffic flow. The former plan would relocate the driveway approximately 70' east along 105th Avenue. This would shift the driveway further away from the railroad but it would require more site renovations, some grading (the roadbed at this section is lower than the yard of the facility), and would shift the driveway entrance to a part of 105th Ave where the road narrows. The applicant is concerned this could make truck navigation even more difficult.

The recommended option is to install bollards or perhaps a low fence along the existing driveway entrance, parallel to the railroad. This would help to shape the traffic flow entering and exiting the site. The Transportation Services Division believes this would also be an effective measure, particularly when coupled with the continued use of traffic controllers by the applicant (see Attachment C and conditions of approval # 27).

Dumping: Neighbors have raised the issue of illegal dumping of materials or the stripping of materials not processed by Aaron Metals prior to entering the recycling center. This is not an uncommon issue around recycling centers and often requires diligence in reporting issues to the city by both residents as well as the facility operator. Staff has included a condition of approval requiring the property owner to promptly report issues of illegal dumping that are observed around the property to the City as well as requiring cleanup of perimeters by facility staff.

Crime: Recycling centers are often the targets of crime, due to the recent global spike in the price of metals. The applicant has generally secured his site through the use of tall fencing and a separate interior fence of corrugated metal for increased durability, barbed wire, internal security cameras, and dogs. Staff is recommending conditions requiring the applicant to keep the site more secure by patching the fences for holes, the removal of graffiti promptly, and repairing the

fence where it is adjacent to an existing industrial property located at the corner of Pearmain and 105th. This latter condition is to prevent the occurrences of some people who have been climbing that building and then jumping over the fence.

Screening: One issue common with scrap recyclers is the lack of screening of their materials. It is often not practical for large sites to be fully enclosed and so open storage of materials is typical. Often tall walls are used for screening, as is the case here. However, there is enough material at this location that the containers of processed scrap are now often taller than the fences that face towards Pearmain and 106th Avenue (the eastern side of the property). Staff is recommending as conditions of approval a condition limiting the stacking of materials to no more than three yellow bins high within 20' of the eastern side perimeter fence as well as additional vertical screening fencing on top of the perimeter fence adjacent to the single family dwelling at 106th and Pearmain.

Signage: Staff notes that the five on-site signs on the property exceeds the current legal restrictions for sign area (last revised in 2004) (the signs area is approximately 900 square feet and the current maximum is 300 square feet). Staff is unable to locate any permits for these signs. However, because this signage was in place prior to the current ordinance, conforms to the older regulations in effect at time of installation, and is located on the portion of the property that was legal to begin with, staff believes the signs be allowed to stay. No additional business signage would be allowed on this site unless the applicant wished to remove existing signage to accommodate it so there is no net increase. Staff is recommending a condition to remove the off-premise mobile sign that the applicant currently has located on a property across the street. Such a sign was never permitted and would not be allowed under the code, and the applicant has agreed to remove it.

Land Use: This type of use represents a conflict along the industrial edges and is common in East Oakland with heavy industrial uses located directly adjacent to residential uses with little or no transition. The city often works through a combination of conditions and at times enforcement action to balance the needs of the competing land uses. In this case, we have an industrial zoning and a use that has been in existence in the area for over 30 years and has grown over time to its current extent. It has been found that appropriate conditions can often reduce the impact of such incompatible uses and staff believes the conditions attached to this permit dealing with fencing, dumping, container stacking, and equipment operations and maintenance will help to do that.

CONCLUSION

The city acknowledges that a scrap metal yard and adjacent residential uses are often in conflict and the potential for friction is high. This is a common issue throughout Oakland as often residential and manufacturing zones are located adjacent to one another with little buffering. The city does believe however that there are benefits to keeping residential and industrial uses in close proximity such as the potential for housing next to employment centers, potentially reducing the costs of workers traveling to jobs and allowing more Oakland residents to work in Oakland. The city believes that many of the nuisance aspects of such land uses can be addressed

through conditions of approval. Staff recommends approval of the project subject to the attached conditions of approval.

RECOMMENDATIONS:

- For approvals:
1. Affirm staff's environmental determination.
 2. Approve the CM06-268 subject to the attached findings and conditions.

Prepared by:

ROBERT D. MERKAMP
Planner IV

Approved by:

SCOTT MILLER
Zoning Manager

Approved for forwarding to the
City Planning Commission:

DAN LINDHEIM
Interim Agency Director

ATTACHMENTS:

- A. Project Plans
- B. Driveway Entrance sketch dated February 20, 2008 by Abrams Associates
- C. Final Transportation Services Division Memo dated March 10, 2008
- D. Abrams Associates Traffic Report dated June 8, 2007
- E. Abrams Associates Traffic Report dated May 30, 2006
- F. PUC Memorandum dated September 28, 2007
- G. Original Variance Approval VM75-404
- H. Original Project Boundaries Map
- I. Public Correspondence received on or prior to February 27, 2008

FINDINGS FOR APPROVAL:

This proposal meets the required findings under Sections 17.134.050 (General Use Permit Criteria)..

Section 17.134.050 (General Use Permit Criteria):

- 1. That the location, size, design, and operating characteristics of the proposed development will be compatible with and will not adversely affect the livability or appropriate development of abutting properties and the surrounding neighborhood, with consideration to be given to harmony in scale, bulk, coverage, and density; to the availability of civic facilities and utilities; to harmful effect, if any, upon desirable neighborhood character; to the generation of traffic and the capacity of surrounding streets; and to any other relevant impact of the development.**

The surrounding neighborhood is a mixture of residential, industrial and commercial activities. The zoning and predominant land use to the east of the property is residential. To the south, west, and north the zoning is a mixture of manufacturing zones and HBX (Housing and Business Mix) and the current land uses reflect this. The facility is generally well screened from the surrounding neighborhood and conditions of approval have been incorporated to enhance this. Additional fencing as well as stacking limits for storage containers are included and conditions dealing with the maintenance of the fencing, prompt notification to the city of illegal dumping, and operating conditions should allow this facility to operate in character with the mixed use neighborhood it is located in.

- 2. That the location, design, and site planning of the proposed development will provide a convenient and functional living, working, shopping, or civic environment, and will be as attractive as the nature of the use and its location and setting warrant.**

Staff believes the project meets this finding. The site is screened generally from the neighborhood now and additional operating conditions for stacking of materials, fencing to screen materials, reporting and removing litter, removing graffiti, and repairing damage to any fencing promptly shall enhance the property. Staff believes this is reasonable given the nature of the activity involved (a scrap yard) and will sufficiently shield this activity from adjacent residential uses.

- 3. That the proposed development will enhance the successful operation of the surrounding area in its basic community functions, or will provide an essential service to the community or region.**

The project is a scrap metal recycling facility which is an essential service for both the City of Oakland and the region as a whole. This activity employs over 40 people in a mixed industrial/residential neighborhood in East Oakland.

- 4. That the proposal conforms to all applicable design review criteria set forth in the design review procedure at Section 17.136.070.**

The M-40 is not a standard design review zone however a Major CUP requires Design Review findings to be made. The M-40 zoning does contain a provision for such facilities that do NOT require CUP's which include standards for the yard being fully enclosed by a solid fence no less than

FINDINGS

10 feet high with solid gates and doors at any entry to the site. This site is completely fenced save for the vehicular opening at 105th Avenue and has a gate that seals off the facility after hours.

5. **That the proposal conforms in all significant respects with the Oakland Comprehensive Plan and with any other applicable plan or development control map which has been adopted by the City Council.**

The General Plan is Business Mix. It is intended to provide a transition between heavy and low intensity commercial and industrial zones. Scrap operations are considered to conform to the Business Mix Designation (see pg 14 of the General Plan conformity guidelines, attachment B). The guidelines provide direction for activities that are considered conforming on pg 4. Activities in conformance to the General Plan require a CUP through the normal process when the zoning also conditionally allows the use which is the case in this permit.

ADOPTED CONDITIONS OF APPROVAL

Modifications to the conditions of approval as directed by the City Planning Commission at the **March 19, 2008** meeting or clarification made by staff are indicated in underlined type for additions and ~~cross-out type~~ for deletions.

CONDITIONS OF APPROVAL

1. Approved Use

Ongoing

- a) The project shall be constructed and operated in accordance with the authorized use as described in the application materials, **Staff report**, the Entrance Diagram prepared by Abrams Associates and submitted on **February 2022, 2008**, and the plans dated and submitted on **February 26, 2008**, and as amended by the following conditions. Any additional uses or facilities other than those approved with this permit, as described in the project description and the approved plans, will require a separate application and approval. Any deviation from the approved drawings, Conditions of Approval or use shall required prior written approval from the Director of City Planning or designee.
- b) This action by the **City Planning Commission** ("this Approval") includes the approvals set forth below. This Approval includes: **A Major Conditional Use Permit to allow the previously unpermitted expansion of an existing Scrap Metal Facility.**

2. Effective Date, Expiration, Extensions and Extinguishment

Ongoing

Unless a different termination date is prescribed, this Approval shall expire **one year** from the approval date, unless within such period all necessary permits for construction or alteration have been issued, or the authorized activities have commenced in the case of a permit not involving construction or alteration. Upon written request and payment of appropriate fees submitted no later than the expiration date of this permit, the Director of City Planning or designee may grant a one-year extension of this date, with additional extensions subject to approval by the approving body. Expiration of any necessary building permit for this project may invalidate this Approval if the said extension period has also expired.

3. Scope of This Approval; Major and Minor Changes

Ongoing

The project is approved pursuant to the **Planning Code** only. Minor changes to approved plans may be approved administratively by the Director of City Planning or designee. Major changes to the approved plans shall be reviewed by the Director of City Planning or designee to determine whether such changes require submittal and approval of a revision to the approved project by the approving body or a new, completely independent permit.

4. Conformance with other Requirements

Prior to issuance of any future demolition, grading, P-job, or other construction related permit

- a) The project applicant shall comply with all other applicable federal, state, regional and/or local codes, requirements, regulations, and guidelines, including but not limited to those imposed by the City's Building Services Division, the City's Fire Marshal, and the City's Public Works Agency.
- b) The applicant shall submit approved building plans for project-specific needs related to fire protection to the Fire Services Division for review and approval, including, but not limited to automatic extinguishing systems, water supply improvements and hydrants, fire department access, and vegetation management for preventing fires and soil erosion.

5. Conformance to Approved Plans; Modification of Conditions or Revocation

Ongoing

- a) The site shall be operated and maintained in compliance with this approval and kept in a nuisance-free condition.
- b) The City of Oakland reserves the right at any time during construction to require certification by a licensed professional that the as-built project conforms to all applicable zoning requirements, including but not limited to approved maximum heights and minimum setbacks. Failure to construct the project in accordance with approved plans may result in remedial reconstruction, permit revocation, permit modification, stop work; permit suspension or other corrective action.
- c) Violation of any term, **Conditions** or project description relating to the Approvals is unlawful, prohibited, and a violation of the Oakland Municipal Code. The City of Oakland reserves the right to initiate civil and/or criminal enforcement and/or abatement proceedings, or after notice and public hearing, to revoke the Approvals or alter these **Conditions** if it is found that there is violation of any of the **Conditions** or the provisions of the Planning Code or Municipal Code, or the project operates as or causes a public nuisance. This provision is not intended to, nor does it, limit in any manner whatsoever the ability of the City to take appropriate enforcement actions.

6. Signed Copy of the Conditions

Upon Approval

A copy of the approval letter and **Conditions** shall be signed by the property owner, notarized, and submitted with each set of permit plans to the appropriate City agency for this project.

7. Indemnification

- a) *Ongoing* The project applicant shall defend (with counsel reasonably acceptable to the City), indemnify, and hold harmless the City of Oakland, the Oakland City Council, the City of Oakland Redevelopment Agency, the Oakland City Planning

Commission and their respective agents, officers, and employees (hereafter collectively called the City) from any claim, action, or proceeding (including legal costs and attorney's fees) against the City to attack, set aside, void or annul this Approval, or any related approval by the City. The City shall promptly notify the project applicant of any claim, action or proceeding and the City shall cooperate fully in such defense. The City may elect, in its sole discretion, to participate in the defense of said claim, action, or proceeding. The project applicant shall reimburse the City for its reasonable legal costs and attorney's fees.

- b) Within ten (10) calendar days of the filing of a claim, action or proceeding to attack, set aside, void, or annul this Approval, or any related approval by the City, the project applicant shall execute a Letter Agreement with the City, acceptable to the Office of the City Attorney, which memorializes the above obligations and this condition of approval. This condition/obligation shall survive termination, extinguishment, or invalidation of this, or any related approval. Failure to timely execute the Letter Agreement does not relieve the project applicant of any of the obligations contained in 7(a) above, or other conditions of approval.

8. Compliance with Conditions of Approval

Within 30 days of City Approval of CUP. Ongoing

The project applicant shall submit to the Planning and Zoning Division and the Building Services Division a **Conditions** compliance plan that lists each condition of approval, the City agency or division responsible for review, and how/when the project applicant has met or intends to meet the conditions. The applicant will sign the Conditions of Approval attached to the approval letter and submit that with the compliance plan for review and approval. The compliance plan shall be organized per step in the plancheck/construction process unless another format is acceptable to the Planning and Zoning Division and the Building Services Division. The project applicant shall update the compliance plan and provide it with each item submittal.

The project applicant shall be responsible for compliance with the recommendations in any submitted and approved technical report and all the Conditions of Approval set forth below at its sole cost and expense, and subject to review and approval of the City of Oakland.

One (1) year after the granting of the CUP

The Planning Commission shall review compliance with conditions after inspection by staff.

9. Severability

Ongoing

Approval of the project would not have been granted but for the applicability and validity of each and every one of the specified conditions, and if any one or more of such conditions is found to be invalid by a court of competent jurisdiction this Approval would not have been granted without requiring other valid conditions consistent with achieving the same purpose and intent of such Approval.

10. **Colors of Equipment**

Ongoing

The applicant shall paint the equipment and equipment shelter facing and visible from Pearmain St a similar color as the fence within 30 days of this approval.

11. **Container Stacking**

Ongoing

The applicant shall not stack material containers or other materials higher than ~~3~~ a maximum of 12 feet ~~±~~ from the ground level ~~at (3 containers high)~~ containers high in any outside yard within 20' of the perimeter fence along the eastern perimeter of the site between 105th and 107th Avenues.

12. **Equipment Maintenance**

Ongoing

The project applicant shall maintain the equipment in good order and see to all oiling of equipment regularly.

13. **Fencing**

a. Ongoing

The project applicant shall maintain exterior fencing in good condition at all times. Any holes or missing boards shall be replaced within 72 hours. Any graffiti shall be removed or painted over with a matching color of the fence within 72 hours.

b. Ongoing

The security fencing on top of the perimeter fence adjacent to the industrial use at the corner of 105th and Pearmain St shall be repaired within 60 days of the granting of this permit. Such fencing shall be maintained in good condition at all times. Any holes or missing boards shall be replaced within 72 hours.

14. **Hours of Operation.**

a. Ongoing.

The hours of operation for the recycling center shall be conspicuously posted and limited to between 7:30am – 4:30pm Monday through Friday and 7:30am – 2:00pm on Saturdays. The business will not operate on Sundays. No after-hours deliveries of recyclable materials shall be accepted, excepting customers already on the premises for the purposes of submitting materials.

15. **Equipment Operations**

a. Ongoing

The machinery shall not operate past closing hours except that operation of machinery and equipment for not more than one hour past closing shall be permitted to the extent necessary to shut down and secure the facility.

16. **After-Hours Access.**

a. Ongoing

All entrance gates shall be closed and locked when the recycling center is not in operation to the public. Signs stating that no deliveries of materials to be recycled shall be accepted after hours shall be posted by each of the entrances to the project site.

17. **Additional Fencing**

a. Ongoing

The project applicant shall extend the corrugated screening adjacent to the single family dwelling at the corner of Pearmain St and 106th Avenue within 60 days of the granting of the permit.

18. **Signage**

a. Ongoing

The project applicant shall remove all off premise advertising signs within 7 days from the granting of this permit.

b. Within 30 days of City Approval of CUP.

The applicant shall submit a sign plan to the City Zoning Division for review and approval showing a reduction in square footage to all on site business signs to no more than the maximum allowable sign area by the Oakland Planning Code. The applicant shall implement the approved plan within 60 days of CUP approval.

19. **Traffic and Parking.**

a. Within 30 days of City Approval of CUP.

The applicant shall submit for review and approval by the Planning and Zoning Division a Parking and Traffic Circulation Plan and shall implement the approved plan within 30 days of granting of this permit. This plan shall include wheel stops for all parking spaces, and pavement marking and striping that delineate the driveways and traffic paths to be used by the general public who are delivering materials to be recycled. The pavement marking and striping shall accommodate the parking spaces and customer loading/unloading areas shown on the project plans, as well as the truck turn-around area, the truck scale, and a queuing area for vehicles waiting to deliver materials to be recycled.

20. **Contact Information.**

a. Within 30 days of City Approval of CUP.

The owner and operator shall post on the property a sign that shall be clearly visible from the street-facing property line(s), indicating the name and 24-hour contact telephone number of the staff responsible for receiving and responding to all written and verbal complaints received by the facility.

21. **Facility Maintenance.**

a. Ongoing.

The recycling center shall be kept in as neat in appearance as is reasonable for the activity. All exterior storage of materials shall be in sturdy containers that are covered, secured, and maintained in good condition, on bales or palettes. Storage containers for flammable material shall be constructed of nonflammable material.

22. **Litter and Debris Control.**

a. Ongoing.

a. The recycling center site shall be maintained free of litter and any other undesirable materials, and will be cleaned of loose debris on a daily basis. Delivery areas will be kept free of litter and any other undesirable material, and the containers will be clearly marked to identify the type of material that may be deposited; facility shall display a notice stating that no material shall be left outside the recycling containers.

b. A Litter Control Plan that ensures that the premises of the property, and adjacent sidewalks and gutters in a one block radius, are kept free of litter and debris shall be submitted to and approved by the Planning and Zoning Division. The applicant shall implement the approved plan within 30 days of granting the CUP at the applicant's expense. The plan shall include, but not be limited to:

1. Distribution of proposed locations of litter receptacles on site and in the public right of way. The design and location of litter receptacles shall be consistent and coordinated with the City's street furniture program.
2. A management schedule for keeping the premises and surrounding area free from litter originating from the operation of the commercial activities; and
3. Daily sweeping and trash collection of the premises, the public sidewalk and the gutter area of the public street immediately adjacent to the project, and mechanically clean the sidewalk with steam or equivalent measures at least once per month.
4. Provisions for the removal of abandoned shopping carts.

23. **Rejected Materials.**

a. Within 30 days of granting the CUP and Ongoing.

The recycling center operator shall be responsible for providing a dumpster or other acceptable trash receptacle for disposing of materials that were brought to the project site by customers but rejected for recycling; provided that the operator shall have no obligation for disposal of any hazardous or toxic materials. This trash receptacle shall be regularly emptied by an approved garbage disposal service. The location of the proposed trash receptacle area shall be shown on the building permit plan set. This area shall be screened from the street and adjacent properties by a wall, fence, or dense landscaping with a minimum height of six (6) feet, and with an opaque closure. No trash shall be stored outside the designated trash collection area.

b. Ongoing.

The applicant shall not knowingly accept stolen materials from customers.

24. Operational Noise.

a. Within 6 months of granting the CUP and ongoing.

~~a. Ongoing.~~

Noise levels from the activity, property, or any mechanical equipment on site shall comply with the performance standards of Section 17.120 of the Oakland Planning Code and Section 8.18 of the Oakland Municipal Code. The applicant shall submit a professionally prepared acoustical study within 6 months of issuance of the CUP for City review and approval. If this study shows that noise levels ~~if noise levels~~ exceed these standards, the activity causing the noise shall be abated until appropriate noise reduction measures such as sound barriers or baffles around crushers ~~measures~~ have been installed and compliance verified by the Planning and Zoning Division and Building Services.

DRIVEWAY/TRAFFIC CONDITIONS

Within 30 days of project approval, the applicant shall perform the following (Condition Nos. 25-29):

25. Entry Bollards.

a. Ongoing.

Aaron Metals shall install non-removable bollards to prevent the diagonal movement in and out of the driveway. The bollards shall extend from the southerly fence edge to the back of walk of 105th Ave. The existing width of the driveway shall be narrowed by 5' using non-removable bollards from the extension ~~determined by staff.~~

26. Pavement Signage.

a. Ongoing.

Aaron Metals shall paint and maintain a limit line with a STOP stencil and a centerline at the driveway thus improving traffic ingress and egress to the facility.

27. Traffic Controller.

a. Ongoing.

As recommended from PUC, Aaron Metals shall prepare, for City review and approval, written procedures for human traffic controllers in the vicinity of the project driveway for all periods the business is open and at the intersection of Edes and 105th Avenues on Saturdays during and at least 15 minutes prior to the business opening. The written procedures shall include at a minimum: (1) that the controllers shall obtain education on general railroad crossing safety and "roadway worker protection" procedures; and (2) that the human traffic controller stop a semi-truck or any vehicle before the crossing when there is immediate indication that a

train is crossing, in order to avoid a possible semi-truck or any vehicle to be trapped at the railroad crossing. Aaron Metals shall implement the approved procedures.

28. Curbcuts.

a. Ongoing.

All abandoned driveways along 105th Avenue and Pearmain Street adjacent to Aaron Metals property shall be removed and reconstructed to ADA compliant sidewalk meeting City of Oakland standards.

29. Entry Easement.

a. Within 30 days of City approval.

The applicant shall demonstrate to the satisfaction of the city that their easement across railroad property allows vehicular access.

OTHER SPECIFIC CONDITIONS

30. Burning of Materials.

a. Ongoing.

No burning of any materials shall take place on the property.

31. Future Expansions.

a. Ongoing.

The applicant shall not further expand his operation without applying for and receiving appropriate permits, including land use permits, from the City prior to the commencement of the expansion.

32. Employee Parking Modifications.

a. Ongoing.

Should the City re-open Gravenstein St. as a public street in the future the applicant will be required to find alternate parking arrangements for the employees, subject to review and approval by the city.

33. Landscape/Metal Art Plan and Installation.

a. Within 30 days of approval of the CUP.

The applicant shall submit a draft Landscape/Metal Art Plan for City review and approval indicating the addition of several landscape areas along the outside perimeter of the property, as directed by the Planning Commission. Upon discussion with the applicant, any necessary revisions shall be made within ten (10) days and returned to Zoning staff for final review and approval. The applicant shall implement the approved plan. Landscape opportunities to be explored should include tree and shrub cut-outs along the perimeter fence along Pearmain St and 105th Ave, vines, and/or hanging plants mounted to the fascia and/or support columns of structures along Pearmain St, and/or sidewalk plantings, if permitted by Engineering. Metal Art "sculpture" shall be incorporated at one or more locations facing and visible from the public right-of-way.

b. Within 20 days of final staff approval of the Landscape/Metal Art Plan.

The applicant shall submit for appropriate and necessary building permits for all landscape/metal art installations. The applicant shall diligently address any requested modifications to the building permit plans in order to receive permits.

c. Within 60 days of building permit issuance.

All landscape/metal art installations shall be completed to the satisfaction of the Planning and Zoning Division and the Building Division.

APPROVED BY:

City Planning Commission: March 19, 2008 (date) (6-0) (vote)

City Council: _____ (date) _____ (vote)

Applicant and/or Contractor Statement

I have read and accept responsibility for the Conditions of Approval, as approved by Planning Commission action on March 19, 2008. I agree to abide by and conform to these conditions, as well as to all provisions of the Oakland Zoning Code and Municipal Code pertaining to the project.

Signature of Owner/Applicant: _____ (date)

Signature of Contractor _____ (date)

FILED
OFFICE OF THE CITY CLERK
OAKLAND
2008 OCT -9 PM 5:24

Approved as to Form and Legality

Mark P. Wall
Oakland City Attorney's Office

OAKLAND CITY COUNCIL

Resolution No. _____ C.M.S.

Introduced by Councilmember _____

RESOLUTION DENYING THE APPEALS AND SUSTAINING THE DECISION OF THE CITY PLANNING COMMISSION IN APPROVING THE APPLICATION FOR A MAJOR CONDITIONAL USE PERMIT TO LEGALIZE THE PREVIOUSLY UNPERMITTED EXPANSION OF THE AARON METALS SCRAP METAL RECYCLING FACILITY LOCATED AT 750 105TH AVENUE, OAKLAND, WITH REVISED CONDITIONS OF APPROVAL

WHEREAS, the applicant, Aaron Metals, filed an application on June 1, 2006 to legalize the unpermitted expansion of the Aaron Metals Scrap Metal Recycling Facility at 105th Avenue; and

WHEREAS, the aforementioned application filed by the applicant, Aaron Metals, was deemed to be complete by the City of Oakland on July 1, 2006; and

WHEREAS, the City Planning Commission held a duly noticed public hearing, took testimony and considered the matter at its meeting held March 19, 2008, and at the close of the public hearing it voted (4-0) to approve the Project, subject to revised conditions of approval; and

WHEREAS, on March 31, 2008, an appeal of the Planning Commission's decision was filed by CBE, representing Rose Black and others (CBE Appellant); and

WHEREAS, on March 31, 2008, an appeal of the Planning Commission's decision was filed by Paul Forkash, representing Aaron Metals (Aaron Metals Appellant); and

WHEREAS, the CBE Appellant was permitted to submit certain additional materials and did so on June 16, 2008; and

WHEREAS, after giving due notice to the Appellants, the Applicant, all interested parties and the public, the Appeals came before the City Council at a duly noticed public hearing on September 16, 2008; and

WHEREAS, the Appellant, the Applicant, supporters of the application, those opposed to the application and interested parties were given ample opportunity to participate in the public hearing by submittal of oral and/or written comments; and

WHEREAS, the public hearing on the Appeals was closed by the City Council on September 16, 2008; now, therefore, be it

RESOLVED: That, the City Council independently finds and determines that this Resolution complies with CEQA and the Environmental Review Officer is directed to cause to be filed a Notice of Exemption with the appropriate agencies, for the reasons stated in the March 19, 2008 Staff Report to the City Planning Commission and the September 16, 2008 City Council Agenda Report; and be it

FURTHER RESOLVED: That, the City Council, having heard, considered and independently weighed all the evidence in the record presented on behalf of all parties and being fully informed of the Application, the City Planning Commission's decision, and the Appeals, independently finds that both Appellants have not shown that the City Planning Commission's decision was made in error, that there was an abuse of discretion by the Commission or that the Commission's decision was not supported by substantial evidence in the record based on the March 19, 2008 Staff Report to the City Planning Commission and the September 16, 2008, City Council Agenda Report (hereafter called "City Reports"), hereby incorporated by reference as if fully set forth herein. Accordingly, the Appeals are denied, the Planning Commission's findings and decision are upheld, and the Project is approved, subject to the findings and conditions of approval contained in the City Reports, each of which is hereby separately and independently adopted by this Council in full, except where otherwise expressly stated in this Resolution; and be it

FURTHER RESOLVED: That, in support of the City Council's decision to approve the Project, the City Council independently affirms and adopts as its own findings and determinations (a) the March 19, 2008 Staff Report to the City Planning Commission [(including without limitation the discussion, findings, conclusions and conditions of approval(each of which is hereby separately and independently adopted by this Council in full)]; and (b) the September 16, 2008, City Council Agenda Report (including without limitation the discussion, findings, and conclusions [(each of which is hereby separately and independently adopted by this Council in full)], except where otherwise expressly stated in this Resolution; and be it

FURTHER RESOLVED: That, condition of Approval # 21 is amended to read as follows:

The recycling center shall be kept in as neat in appearance as is reasonable for the activity. All exterior storage of finished materials shall be in sturdy containers that are covered, secured, and maintained in good condition, on bales or palletes. Storage containers for flammable material shall be constructed of nonflammable material.

and be it

FURTHER RESOLVED: That, the record before this Council relating to this application and appeals includes, without limitation, the following:

1. the application, including all accompanying maps and papers;

2. all plans submitted by the Applicant and his representatives;
3. the notices of appeal and all accompanying statements and materials;
4. all final staff reports, final decision letters and other final documentation and information produced by or on behalf of the City, including without limitation and all related/supporting final materials, and all final notices relating to the application and attendant hearings;
5. all oral and written evidence received by the City Planning Commission and City Council during the public hearings on the application and appeal; and all written evidence received by relevant City Staff before and during the public hearings on the application and appeal;
6. all matters of common knowledge and all official enactments and acts of the City, including, without limitation (a) the General Plan; (b) Oakland Municipal Code (c) Oakland Planning Code; (d) other applicable City policies and regulations; and, (e) all applicable state and federal laws, rules and regulations; and be it

FURTHER RESOLVED: That, the custodians and locations of the documents or other materials which constitute the record of proceedings upon which the City Council's decision is based are respectively: (a) Community & Economic Development Agency, Planning & Zoning Division, 250 Frank H. Ogawa Plaza, 2nd Floor, Oakland CA.; and (b) Office of the City Clerk, 1 Frank H. Ogawa Plaza, 1st floor, Oakland, CA.; and be it

FURTHER RESOLVED: That, the recitals contained in this Resolution are true and correct and are an integral part of the City Council's decision.

IN COUNCIL, OAKLAND, CALIFORNIA, _____

PASSED BY THE FOLLOWING VOTE:

AYES - BROOKS, BRUNNER, CHANG, KERNIGHAN, NADEL, QUAN, REID, AND
PRESIDENT DE LA FUENTE

NOES -

ABSENT -

ABSTENTION -

ATTEST:

LATONDA SIMMONS
City Clerk and Clerk of the Council of
the City of Oakland, California