

# Council Communication

## January 5, 2015, Business Meeting

---

### Options to Move Forward with UPRR and DEQ

---

**FROM:**

Dave Lohman, city attorney, lohmand@ashland.or.us

**SUMMARY**

At the Council study session on October 6, the Council directed staff to develop options for achieving full-site remediation of the UPRR's railyard property with soil removal by rail and as little environmental risk and community disruption as possible.

**BACKGROUND AND POLICY IMPLICATIONS:**

In August of 2015, the City asked UPRR to conduct a full-site remediation of the former railyard using rail, rather than the partial cleanup UPRR was planning for summer/fall of 2015. UPRR agreed to work towards a full-site remediation if the City would agree to modify a 1999 deed restriction on the property.

In November 1999, the City placed a deed restriction on the UPRR property requiring that it be cleaned to *Residential* remediation standards prior to further development or division of the property. Because a deed restriction "runs with the property," it applies even to discrete subdivisions of the property established after the approximate 20 acres parcel has been generally cleaned to DEQ's *Residential* standards. The deed restriction means that (1) unduly high concentrations of contaminants ("hotspots") must be remediated to DEQ's *Residential* standards; (2) the entire parcel must be remediated to DEQ's *Residential* standards as an aggregated unit (that is, the average statistically estimated concentration of contaminants must be below the maximum allowed for residential use of the property); and (3) when the UPRR property is subsequently sold and subdivided, each subdivided parcel must be remediated to DEQ's *Residential* standards even if the parcel is to be developed for light industrial or commercial use or partially capped with asphalt for use as a street or parking area.

From what staff has been able to determine, the intent of the 1999 Council that imposed the deed restriction was that the *Residential* cleanup standard should be applied to the UPRR railyard property as a whole, but not necessarily to each future subdivided parcel without regard to how the parcel would actually be used.

The property is currently zoned E-1 (employment), with a residential overlay. The residential overlay allows for a maximum of 15 residential units per acre and requires at least 65% of ground floor buildings to be dedicated for commercial uses.

At the Council's October 6 study session on this matter, representatives from the Oregon Department of Environmental Quality (DEQ) and a representative from CH2MHILL, the remediation contractor for Union Pacific Railroad (UPRR), provided information to the Council.



Greg Aitken of DEQ explained that due to the low-risk contaminants on this property, cleanup of the railyard site is voluntary – meaning DEQ cannot compel UPRR to take remediation action.

To undertake full-site remediation, UPRR would have to get DEQ approval, which would entail cleaning up the worst hotspots and then bringing the entire parcel as an aggregated unit into compliance with DEQ's *Residential* standards. This initial full-site remediation would also comply with the City's 1999 deed restriction. Prior to deciding whether to approve a UPRR remediation plan for the whole site, DEQ would host a public meeting in Ashland to address questions and suggestions about the plan. Approval or disapproval of the plan would have to be based on substantive scientific criteria.

Absent the City's deed restriction, upon completion of the initial full-site remediation to *Residential* standards, UPRR could sell the property to a buyer intending to develop it in separate subdivided parcels. In that event, DEQ would evaluate the site data and site risks for each parcel and require the new property owner/developer(s) to remediate each parcel consistent with its proposed use. The required remediation level for each parcel would be based on anticipated exposure to contaminated soil. For example, a subdivided parcel to be used exclusively for residential purposes would have to meet DEQ's stringent *Residential* cleanup standards. A subdivided parcel to be used exclusively for light industrial or commercial purposes would be subject to somewhat less stringent *Occupational* cleanup standards. A subdivided parcel to be used for a mixed commercial/residential development would likely have to meet a variation of DEQ's *Urban Residential* cleanup standards, which are not quite as stringent as the *Residential* standards but more restrictive than the *Occupational* standards.

If the use of a parcel were to change over time -- for example if a property owner wanted to convert a parcel from exclusive commercial use to mixed commercial and residential use -- DEQ would conduct a reassessment of the contaminants, determine risk levels, and require the property owner to remediate the property to standards appropriate to the new uses.

At the October 6 meeting, Mark Ochsner of CH2MHILL, representing UPRR, outlined the three possible scenarios for UPRR's actions at the railyard: 1) full remediation per DEQ standards using rail to remove contaminated soil and truck to bring clean fill to the site; 2) partial cleanup per DEQ standards using trucks for both contaminated soil and clean fill; 3) no remediation, leaving the property as is. Mr. Ochsner said UPRR would prefer to implement scenario 1 and then sell the property. However, the City's current deed restriction is a barrier because it requires cleanup to *Residential* standards even for future subdivided parcels that may not be used for residential purposes. Potential buyers/developers are put off by lack of consistency between the deed restriction and DEQ's remediation requirements and by the unwarranted financial burden of having to remediate each parcel to *Residential* standards even if the contemplated use for a particular parcel is commercial, mixed-use or light industrial.

At the conclusion of the Council's October 6 study session on this matter, staff was directed to develop options for achieving full site remediation of the UPRR's railyard property in full compliance with DEQ's requirements, with soil removal by rail, and with as little environmental risk and community disruption as possible.

## Options



- 1) Delete the current deed restriction.
- 2) Replace the current deed restriction with one that references applicable DEQ standards, such as *Development of individual parcels must be remediated in conformance with the DEQ risk standards for the actual uses of the parcels and the contaminant concentrations thereon.*
- 3) Replace the current deed restriction with one that requires the full site and any subdivided parcels to at least meet DEQ's *Urban Residential* remediation standards.
  - a. Note: This would mean that on any subdivided parcels, DEQ *Residential* remediation standards would be applied for any exclusively residential uses, and any other uses, including light industrial and commercial-only uses -- to which DEQ's *Occupational*, remediation standards would normally apply -- would instead be subject to the more stringent *Urban Residential* standards. This would likely deter at least some potential buyers/developers because of concerns about regulatory uncertainty and because it could make light industrial and commercial-only development financially infeasible. This burden on the marketability of the property conceivably could affect UPRR's willingness to undertake full-site cleanup in 2016 instead of proceeding with the partial cleanup previously planned.

Keeping the current deed restriction in place was not one of the options Council directed staff to explore, although Council could, of course, choose that option. Imposing DEQ's *Residential* remediation standards even on subdivided parcels of the railyard would likely result in only a partial cleanup in 2016 using trucks only and about 16 unusable acres of property in proximity of downtown for an indefinite number of years. It would also likely inhibit any mixed use, commercial-only or light industrial development on the site and achieve no discernible health or environmental benefits.

#### Next Steps

If the Council decides to remove or modify the deed restriction, it would need to initiate a Type II planning action (see attachment). If the modification is approved, an Agreement between the City of Ashland and Union Pacific Railroad will be drafted. The Agreement would detail the City's expectations of UPRR, including but not limited to a full site remediation using rail, deflection testing of Clear Creek Drive and Oak Street prior to remediation, and compensation for the cost of repairing both streets at the end of the project. It would also include a commitment by the City to finalize the agreed-upon deed restriction language and file it with the County Clerk.

#### Timeline

It could take up to four months for the Agreement to work its way through the UPRR legal review and a month or more for the City Council to approve the final Agreement. If this process can occur by May or June, UPRR has indicated that full remediation could begin in late September of 2016.

#### Discussion Questions

1. Should the railyard be cleaned up and be allowed to be developed for beneficial use?
2. Should Council modify the deed restriction in order to get UPRR to perform railyard cleanup in one round over several months in the late summer and fall of 2016, or should Council maintain the deed restriction as is, thereby making it more likely that railyard cleanup will occur piecemeal in accord with UPRR's priorities?



3. What is the best option for achieving full-site remediation of the UPRR's railyard property with soil removal by rail and as little environmental risk and community disruption as possible?
4. Apart from providing greater clarity, would adopting Option 2 differ in terms of actual impacts from adopting Option 1?
5. If Option 2 were adopted, could the City count on UPRR to conduct the cleanup in the late summer and fall of 2016 using rail for transport of contaminated soil and at no cost to the City?
6. What would be the likely outcomes of adopting Option 3?
  - a. Would reservations about its impact on marketability of the property cause UPRR to again defer full-site cleanup indefinitely and opt for partial cleanup using trucks only?
  - b. Aside from making light industrial and commercial-only development at the railyard even more unlikely, would adoption of Option 3 serve any purpose not achievable through Option 2 – given that new light industrial development in the railyard site is already unlikely due to the Transportation System Plan street layout for the railyard and the Detail Site Review Overlay requirements already in effect?

**COUNCIL GOALS SUPPORTED:**

Environment

13. Develop and support land use and transportation policies to achieve sustainable development.
  - 13.2 Develop infill and compact urban form policies.

Economy

19. Ensure that commercial and industrial areas are available for development.
  - 19.2 Evaluate the prospects for the redevelopment of the railroad property.

People

- 5.2. Support and promote, through policy, programs that make the City affordable to live in.
  - 5.2.a Pursue affordable housing opportunities, especially workforce housing.

**FISCAL IMPLICATIONS:**

There are no noteworthy near-term fiscal impacts. Future development of the railyard site could yield significant economic activity and City tax revenues.

**STAFF RECOMMENDATION AND REQUESTED ACTION:**

Approve Option 2.

**SUGGESTED MOTION:**

I move to direct staff to prepare, file, and seek approval of an application for a Major Amendment to modify the condition of approval in PA99-048 concerning a certain deed restriction such that the deed restriction confirms to Option [?] as presented in the January 5, 2016 Council Communication titled "Options to Move Forward with UPRR and DEQ, and to negotiate with Union Pacific Railroad to develop an agreement concerning full-site remediation of the railyard property as soon as possible utilizing railcars for transporting contaminated soils.

**ATTACHMENTS:**

Background on Revising Railyard Deed Restriction



## **BACKGROUND ON REVISING RAILYARD DEED RESTRICTION**

On October 12, 1999, Planning Commission approved PA99-048 (lot line adjustment and land partition, including the construction of a new public street and public alley system) with the follow condition:

*9) That a deed restriction be placed on the remaining 25 acres (approximately) precluding further "development" or land divisions until the property has been cleaned to residential standards. Written compliance with these standards shall be provided to the City from the Department of Environmental Quality (see survey plat)*

To amend the condition:

- City Council initiates a Type II planning action by motion to direct staff to prepare an application for Major Amendment - Modification of a condition of approval.
- Planning Commission reviews the request at a public hearing and makes a decision.
- City Council may call up any decision of the Planning Commission, providing it takes place in the required appeal period.
- If Council calls the PC decision up for review, Council makes the final decision.
- Any appeal goes to LUBA.