

From: [Mike Connors](#)
To: [Vera Kolia;](#) [Milwaukie Planning](#)
Cc: jon@smithrockinc.com
Subject: Smith Rock 6/7/22 Comments for VR-2021-012 (9285 SE 58th Dr)
Date: Tuesday, June 7, 2022 4:36:09 PM
Attachments: [image001.png](#)
[image002.png](#)
[We sent you safe versions of your files.msg](#)
[Planning Commission Ltr - 6-7-22 Submission.pdf](#)
[Lew Smith - Letter.pdf](#)
[Jon Phelps - Letter.pdf](#)

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Vera,

I'm submitting the attached letters on behalf of Smith Rock, Inc. per the Planning Commission's continuance at the May 24 hearing. Please let me know if you have any questions. Thanks, Mike

E. Michael Connors
Partner



Hathaway Larson LLP

1125 NW Couch St Ste 550

Portland, OR 97209

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HATHAWAY LARSON

Koback · Connors · Heth

June 7, 2022

VIA EMAIL (koliasv@milwaukieoregon.gov & planning@milwaukieoregon.gov)

Planning Commission
City of Milwaukie
6101 S.E. Johnson Creek Blvd.
Milwaukie, OR 97206

Re: Variance & Development Review Applications – 9285 SE 58th Dr.
Application File Nos. VR-2021-012, DEV-2021-006 & P-2021-003
My Client – Smith Rock, Inc.

Dear Commissioners:

As you know, this firm represents Smith Rock, Inc. (“Smith Rock”) who operates the business adjacent to the property subject to the above-referenced applications (the “Applications”) filed by Lyver Engineering and Design, LLC (the “Applicant”). At the May 24, 2022 hearing, the Planning Commission continued the hearing to allow the parties to submit additional testimony and evidence regarding the Applicant’s statements about the property owners (Carol and Keith Phelps) testimony at the April 12, 2022 hearing concerning an alleged conversation they had with Smith Rock about the proposed industrial project. The Applicant’s May 24 testimony, as well as the Applicant’s closing argument, suggest that Mrs. Phelps testified that the property owners spoke with Smith Rock about the proposed project and therefore Smith Rock’s claim that the Applicant has had no communications with Smith Rock or other neighbors about the project is false.

Smith Rock raised its procedural objection and requested an opportunity to respond to the Applicant’s testimony because the Applicant is twisting Mrs. Phelps testimony and misrepresenting the timing and purpose of their conversation with Smith Rock. Smith Rock is submitting this letter and the attached letters from Lew Smith, the former owner of Smith Rock, and Jon Phelps (no relationship to Carol and Keith Phelps), the current owner of Smith Rock, to correct the record and confirm that neither the Applicant nor the property owners have had any communication with Smith Rock or other neighbors about this project.

E. Michael Connors
1331 NW Lovejoy Street, Suite 950
Portland, OR 97209
mike@hathawaylarson.com
(503) 303-3111 direct
(503) 303-3101 main

A. Carol Phelps April 12 testimony.

At the April 12 hearing, Commissioner Khosroabadi referenced the public testimony about the Applicant's lack of communication with the neighbors concerning this project and asked the property owners to respond to that testimony. Carol Phelps responded as follows: "No, we have not had any communications, we are not familiar with this process and that's why I hired this team of people to do this for us, that is basically it."¹ Mrs. Phelps added that "we did talk to Lew Smith before we were deciding on a plan to building this" and allegedly asked him if he was interested in a build-to-suit development for Smith Rock. Mrs. Phelps testimony undermines the Applicant's claim for two reasons.

First, Mrs. Phelps confirmed that the property owners "have not had any communications" with the neighbors about the project and they were relying on the Applicant to have those communications. There is no dispute the Applicant failed to make any attempt to talk to the neighbors about the project, even after several neighbors raised concerns during this process.

Second, Mrs. Phelps testified that they spoke with Lew Smith "before we were deciding on a plan to building this," which means this conversation occurred before they had decided on any development plan. If the conversation occurred before they decided on a development plan, that conversation could not possibly have been about this proposed industrial project.

B. Letters from the former and current owners of Smith Rock.

Since Mrs. Phelps testimony did not elaborate on the timing and nature of their conversation with Lew Smith, we attached letters from Lew Smith and Jon Phelps to clarify several important facts about that conversation and the surrounding circumstances.

Lew Smith and Jon Phelps confirmed this conversation occurred between Keith Phelps and Lew Smith in December 2018, more than three and one-half years ago. The conversation occurred shortly after Lew Smith notified the Phelps that Smith Rock was terminating the lease to use their property for storage. Lew Smith and Jon Phelps confirmed this was a very short conversation and did not involve a discussion about a build-to-suit proposal or any other development plan. This additional testimony demonstrates that the property owners contacted Lew Smith to discuss his termination of the lease and they did not discuss the proposed project or any specific development of their property.

Lew Smith and Jon Phelps confirmed there have been no discussions between the property owners/Applicant and Smith Rock since that December 2018 conversation. Jon Phelps purchased Smith Rock from Lew Smith in December of 2020, more than a year and one-half ago, which neither the property owners nor the Applicant seem to know. Since the Applicant filed the subject

¹ Smith Rock's quotation of Carol Phelps testimony is based its review of the City's Youtube video of the April 12 hearing.

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Page 3

application well after December 2020, there is no question that neither the Applicant nor the property owners have had any communication with Smith Rock about this specific project.

C. Conclusion.

We appreciate the Planning Commission's willingness to allow us an opportunity to respond to the Applicant's May 24 testimony and apologize for the additional delays it created. However, we felt it was necessary to correct the record when it became apparent that the Applicant was twisting Mrs. Phelps testimony to suggest that Smith Rock misrepresented the Applicant's lack of communication with it and other neighbors about this project. We hope this clarification and additional information will ensure that the Planning Commission understands that Smith Rock's statement that neither the Applicant nor the property owners have had any communications with the neighbors about this proposed industrial project was truthful and accurate.

Very truly yours,

HATHAWAY LARSON LLP

/s/

E. Michael Connors

EMC/ep

Cc: Smith Rock, Inc.

Attachments

Jon Phelps
Smith Rock, Inc.
6001 SE Johnson Creek Blvd
Portland, OR

June 5th, 2022

To The Milwaukie Planning Commission,

My name is Jon Phelps, I reside in Portland, Oregon. For clarity's sake - I have no relationship with Keith or Carol Phelps. I have worked at Smith Rock since May of 2005. Managed Smith Rock since July of 2012. And purchased Smith Rock from Lew Smith in December of 2020.

In December of 2018 there occurred a very brief phone conversation between Lew Smith and Keith Phelps. It came after Lew gave notice to terminate Smith Rock's rental of the plot owned by the Phelps' at 9285 SE 58th Drive. I was not a part of the phone conversation that Carol Phelps had described in her statement to the Planning Commission on April 12th. I was however in the room with Lew while said conversation occurred; and he and I had discussed it in depth afterward. As mentioned above, 'brief' would be the best characterization I can provide in description of the conversation in question. It couldn't have lasted longer than a minute or two.

Beyond that, I can attest to there being no further communication between the Phelps' and any representative of Smith Rock since that phone call, which occurred nearly three and a half years ago. Not with Lew who retained ownership of the business for the proceeding two years; nor myself in the nearly-year and a half since assuming ownership of the company. It wasn't until we had received notice in a mailer from the City of Milwaukie, that we were made aware of any formulated plans to develop the space.

Thank you for your consideration,



Jon Phelps
President
Smith Rock, Inc.

Lewis Smith
8921 SE 58th Drive
Milwaukie, OR 97206

June 2nd, 2022

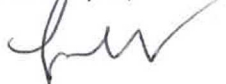
To the Milwaukie Planning Commission,

I am Lew Smith, I live in Milwaukie, OR. During your May 24th meeting, Robert Price raised the issue of Carol Phelps' recollection of a conversation I had with Keith Phelps. That phone call came at the heels of me giving notice and vacating his lot on the corner of 58th Drive and Johnson Creek Blvd. This would have occurred in December of 2018. As it was so long ago, my recollection is somewhat vague; though I know it was a short chat.

We rent space and store material behind Wichita Feed & Hardware, and frequently transport it over to Smith Rock's main lot. I recall Keith asking me if I had access to our lot from Wichita. I responded that we do. Presumably he was trying to keep me as a tenant and was trying to establish value in continuing to rent from him.

To Carol's statement, I honestly cannot recall being asked if I would be interested in working with them on developing the property. Once again, it was quite a while ago. I can tell you that they have not contacted me since.

Thank you,

A handwritten signature in black ink, appearing to read 'Lew Smith', written over the printed name below.

Lewis Smith

From: [Jenai Fitzpatrick](#)
To: [Vera Kolas](#); [Milwaukie Planning](#)
Cc: [Troy Lyver](#); [Bob Price](#); [CAROL PHELPS](#)
Subject: VR-2021-012 - 6/7 Owners Testimony
Date: Tuesday, June 7, 2022 4:57:11 PM
Attachments: [We sent you safe versions of your files.msg](#)
[Owners Testimony VR-2021-012 DEV-2021-006.pdf](#)
[2018.11.15 Letter of Vacate.pdf](#)
[2022.04.18 Testimony from Owners.pdf](#)
[2002.08.21 RentalAgreement.pdf](#)

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Vera,

Enclosed you will find a letter of testimony from Carol and Keith Phelps (applicants) dated April 18, 2022 which details communications between them and the Lew Smith (owner of the adjacent properties) regarding future plans for the site. The letter confirms Carol's verbal testimony on April 12th that Lew Smith (Smith Rock) rented the subject property from Phelps for over 15 years. During this time the future development of site was discussed along with the possibility of the Phelps developing the property for Mr. Smith. As such, Mr Smith has no claim that were unaware the site would be developed with an industrial use.

Enclosed are also copies of the rental agreement between Smith Rock and the Phelps dated August 21, 2002, and a letter of vacation between Smith Rock and the Phelps dated November 15, 2018.

We trust this resolves the owners testimony for the planning commission to approve our proposal at the June 28th hearing.

Jenai Fitzpatrick

jenai@fdgpnw.com

Fitz Design Group

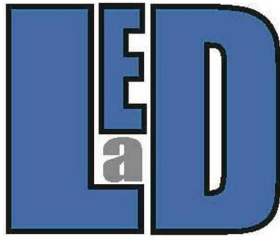
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LYVER ENGINEERING AND DESIGN

7950 SE 106th, Portland, Oregon 97266

Ph: 503.705.5283 Fax: 503.482.7449 TroyL@Lyver-EAD.com www.Lyver-EAD.com

June 7th, 2022

Reference: Phelps Industrial/ Light Manufacturing Bldg
9289 SE 58th Drive, Milwaukie, OR 97206
LU application #VR-2021-012;DEV-2021-006

LEAD Project No: 19-042

Subject: Owners Testimony

Enclosed you will find a letter of testimony from Carol and Keith Phelps (applicants) dated April 18, 2022 which details communications between them and the Lew Smith (owner of the adjacent properties) regarding future plans for the site. The letter confirms Carol's verbal testimony on April 12th that Lew Smith (Smith Rock) rented the subject property from Phelps for over 15 years. During this time the future development of the site was discussed along with the possibility of the Phelps developing the property for Mr. Smith. As such, Mr Smith has no claim that they were unaware the site would be developed with an industrial use.

Enclosed are also copies of the rental agreement between Smith Rock and the Phelps dated August 21, 2002, and a letter of vacation between Smith Rock and the Phelps dated November 15, 2018.

We trust this resolves the owners testimony for the planning commission to approve our proposal at the June 28th hearing.

Sincerely,

A handwritten signature in black ink, appearing to read 'Troy Lyver', written in a cursive style.

Troy D. Lyver, PE/SE.
Lyver Engineering and Design, llc

April 18,2022

RE: Project om 58th Drive & Johnson Creek Blvd.

Property owners: Keith and Carol Phelps
P.O. Box 68631
Milwaukie, OR 97268

We purchased this property in 1997 from a city auction. Lew Smith was one of those individuals bidding against us for the property at that time.

On August 21,2002 , We signed a contract with Lew Smith to lease him the property for his rock business. He rented this from us for over 15 years up until December 31,2018.

Approximately around the end of 2018, Keith called Lew up and told him that we were thinking of developing the lot in the future. He asked Lew at the time, if we could develop it in a way that it would benefit him and his business. He said no, that he owned the house next door and could go around the other side of the house to get to the feed store across 58th where he had rocks stored too. Lew asked why we wanted to develop it, and Keith told him that we were getting older and wanted to do it for extra retirement income. Keith asked Lew to let us know if he changed his mind, and we would work with him to build a building for him to rent if he wanted to.

Lew did not contact us, so we started the planning process at the City of Milwaukie with our own plans. Unfortunately, a year later, Covid hit, and Keith was diagnosed with cancer. Thus the delay in our progress.

The family in the house next door are Lew Smith's tenants and have lived there for years next to his company Smith rock. His company is a commercial rock establishment which comes with all the noise that goes along with a commercial property. We are requesting to build a building on a lot zoned M which complies with all the codes as Rock Smith does.

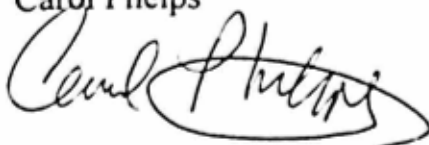
To date, we are still going through the process, and interested in developing this lot. Neither Lew or the neighbors in the house have contacted us.

Sincerely,

Keith Phelps



Carol Phelps



November 15, 2018

Carol Phelps
PO Box 68631
Oak Grove, OR 97268

Dear Carol,

In summary of your conversation today with Lew, Smith Rock Inc. will vacate your property 12/31/18. We will also inform PGE that we are no longer renting your property. We will send you the December final rent payment of \$600 on or before the 15th of December.

Thank you for all the years of use of this land.

Sincerely,



Jody LaFollette
Smith Rock Inc.
Bookkeeper

EE THIS * , Made and entered into on AUGUST 21, 2002, between KEITH AND CAROL PHELPS, hereinafter called the lessor, and LEWIS E. SMITH JR. / SMITH ROCKS, hereinafter called the lessee, WITNESSETH:

The lessor hereby rents unto the lessee, and the lessee rents from the lessor, subject to the terms and conditions hereinafter set forth, the following described personal property:

VACANT LOT - CORNER OF 58th DR. & JOHNSON CREEK BLVD
LOT 5, BLOCK 1, MULLAN HEIGHTS
LOT 1500 MAP # 12E30AD 01500

* rental agreement \$100.- last month's rent deposit O.H 8/24/02
TO HAVE AND TO HOLD the same unto the lessee ON A MONTH TO MONTH BASIS, for a rental for the use of the property in the sum of \$ 100.- per MONTH, payable in advance to the order of the lessor.

The lessor hereby acknowledges payment by the lessee of the sum of \$ 300.00 covering the period from July 22nd, 2002, to AUGUST 21, 2002. Subsequent rental payments shall become due and payable on the 22nd day of each month hereafter. All rents not paid when due shall bear interest after maturity at the highest lawful rate until paid. Receipt and acceptance by the lessee of the property constitutes acknowledgment that the property has been found by lessee to be in good, safe condition.

During the term of this lease the lessee will take proper care of the rental property and will be responsible for and pay all charges for upkeep, and will make, at lessee's own expense, any and all repairs, and will supply and pay for any and all parts and accessories needed to maintain the rented property in proper condition and good order.

and that lessee will not sublet the property or assign this lease unless lessor's written consent has been obtained.

The lessor and lessor's representatives, at all times, shall have free access to lessee's premises during business hours for the purpose of inspecting the personal property or watching its use and operation or of altering, repairing, improving or adding to it or determining the nature and extent of lessee's use thereof, and the lessee shall afford the lessor and lessor's representatives all reasonable facilities therefor. The lessor reserves the privilege of terminating this lease and removing the property from the possession of the lessee on twenty-four hours' written notice, if, upon inspection, lessor finds that it is in any manner being abused or neglected, or is being taxed beyond its capacity.

The lessee further agrees to defend, at lessee's own expense, any and all actions brought against either or both of the parties hereto for damages to persons or property caused by the leased property or by its operation, and agrees to hold lessor free and harmless of and from any and all claims and demands that may arise or be occasioned to any person or to any property by or through the use of the property during the term of this rent or any renewal hereof.

Time is of the essence of this contract. Should lessee fail to make any of the rental payments promptly in advance as specified, or should lessee for any reason be or become in default in the performance of this lease, or should lessee sell or dispose of or attempt to sell or dispose of any of the personal property, or should any thereof be attached or levied upon or removed or attempted to be removed from the premises, or should bankruptcy or receivership proceedings be brought by or against lessee, then in any such event lessor, at lessor's option, may terminate this lease forthwith.

Upon the termination in any manner whatsoever of this rent, or of any renewal hereof, lessor shall be entitled to the immediate possession of the rental property, and lessee agrees forthwith to deliver the property to the lessor at lessor's address below, complete and in good order and condition, reasonable wear and tear alone excepted. Should the lessee fail to do so, the lessor may take the personal property into lessor's possession and for that purpose may enter the premises of the lessee and remove the personal property therefrom, in which event the lessee waives any trespass or right of action by reason of such removal. Lessee's liability for payments shall continue until the property is delivered to lessor, or possession thereof is recovered by lessor, in the condition aforesaid.

No waiver by the lessor of the nonperformance or violation of any condition of this rent, or of any default hereunder, shall be construed to be or operate as a waiver of any subsequent nonperformance, violation or default.

In the event of any suit or action to recover unpaid rentals or to recover possession of the personal property, or any thereof, or to recover damages from the lessee on account of lessee's breach of this agreement, the losing party agrees to pay such sums as the trial court may adjudge reasonable as the prevailing party's expenses and attorney fees to be allowed the prevailing party in such suit or action, and in the event any appeal is taken from any judgment or decree in such suit or action, the losing party agrees to pay such further sums as the appellate court shall adjudge reasonable as the prevailing party's expenses and attorney fees on such appeal.

No agreement between the parties hereto for the sale of the personal property to the lessee has been made or is to be implied.

IN WITNESS WHEREOF, the parties have hereunto set their hands the day and year first written above.

LESSOR & LESSOR ARE BOTH REQUIRED TO GIVE 30 DAY NOTICE TO TERMINATE

By Keith and Carol Phelps Lessor By Smith Rocks - Lewis E. Smith Jr. Lessee

MAILING: P.O. BOX 68031 OAK GROVE, OR 97268 ADDRESS 6001 SE Johnson Creek Blvd ADDRESS (503) 771-8853

MAIL NO. 2101 SE MOORE'S HILL DR CITY Portland, OR DATE 9/20/02 ZIP 97206

PLUS LAST MONTHS RENT