

**PLANNING & ZONING COMMISSION
OF
CITY OF CRYSTAL CITY, MISSOURI**

**WRITTEN REPORT TO THE CITY COUNCIL ON THE
CONDITIONAL USE PERMIT APPLICATION OF
WINGS ENTERPRISES, INC.**

SUMMARY:

Section 9(E)(1) of the ordinances of the City of Crystal City, Missouri, provide that the Planning & Zoning Commission (the "Commission") upon submission to it by the City Building Commissioner of a Conditional Use Permit Application shall "review, consider and prepare a written report, recommending approval, revisions or denial to the City Council." The Commission has received a Conditional Use Permit Application from Wing Enterprises, Inc. ("Wings") which has been delivered to it by the City's Building Commissioner. The Application consists of the Application for Special Permit, which is attached hereto and incorporated herein as Exhibit "A", a Site Plan, which is attached hereto and incorporated herein as "Exhibit B", and a Site Development Plan Presentation, which is attached hereto and incorporated herein as "Exhibit C" (Exhibits A-C are collectively referred to herein as the "Application"). Upon the Commission's review and consideration, including four (4) public meetings, it is the Commission's recommendation that the Application submitted by Wings be approved subject to certain conditions as hereafter set forth.

FINDINGS AND CONCLUSIONS:

Section 9(E)(2) of the ordinances of the City of Crystal City, Missouri, provide that, in considering whether a Conditional Use Permit Application is to be granted, it is the duty of the Commission "to give consideration to the effect of the requested use on health, safety, morals and general welfare of the residents in the area in the vicinity of the property in question, and the residence of the City generally, including the effect on:

- (a) Traffic in the streets;
- (b) Fire hazard;
- (c) Overcrowding of land or undue concentration of people;
- (d) Fire, police and utility services.
- (e) Municipal expenditures;
- (f) The character of the district, and the property values in the area; and,
- (g) The general suitability of the property in question for the proposed use.

The Commission has made the following findings and conclusions as to each of the following issues:

(a) **Traffic in the Streets:** Wings has acknowledged the potential for substantial truck traffic during the construction phase of the project particularly on Bailey Rd. and the City streets adjoining the subject property. It is further represented by Wings that it would anticipate two (2) trucks per day after the facility became operational. A condition to such application should provide that the applicant will be required to remove all dust, sand, mud, dirt, litter, garbage, debris or waste material from any street, road or highway adjacent to or abutting the facility during the construction period within forty-eight (48) hours after notice to remove the same is given by the City. Further, so as to minimize "tracking" on City streets, all roads, access driveways, and parking areas, during the construction phase and thereafter shall be either graveled or paved prior to any excavation or topsoil stripping on the site in order to prevent sediment from being tracked onto public and private roadways. Additionally, any "mud tracking" reaching a public street shall be removed by street cleaning (not flushing) before the end of each workday.

Further, the City's Street Superintendent provided a written report regarding the impact the proposed use would have on the City's streets. Such report is marked as Exhibit "D", attached hereto and incorporated herein by reference. Based on the Superintendent's findings, a fully operational plant will not have a negative effect on the Street Department. In addition, the Superintendent found that Bailey Road is capable of handling the increased traffic flow and is adequate to handle the contemplated weight capacities of a fully operational facility.

The Commission was also provided with a written report by the City Engineer, Carl Vogt, regarding the increased traffic on the City's streets due to the number of production workers expected to be present at the facility. Such report is marked as Exhibit "E", attached hereto and incorporated herein by reference. Based on this report, the City's Engineer found that the increased volume of vehicles is not expected to stress the traffic on the City's streets and will cause minimal, if any, traffic jams or resident inconvenience. In addition, as provided by the City Engineer, a condition to this granting of the permit shall be that "hard surface parking" shall be available on site for all employees and visitors of the facility. Hard surface parking shall include any porous or non porous surface suitable for the function of driving and parking of vehicles. Permitted types of non-porous surfaces include asphalt and concrete surfaces. Permitted porous surfaces include a parking surface constructed of materials that permit water to enter the ground by virtue of their nature or by large spaces in the material, such as pre-cast and mold in place concrete blocks, concrete grids, interlocking bricks, and plastic mats with hollow rings, hexagonal cells or porous concrete. All employee and visitor parking shall be on-site at the facility and not on the City's streets or adjacent properties.

Based on these reports, the Commission finds that the City's streets are adequate to accommodate the increased traffic flow and the weight capacities of such traffic of a fully operational facility.

(b) **Fire Hazards:** The Commission has received two reports from the City's Fire Department, which are respectively marked as Exhibits "F" and "G" and are attached hereto and incorporated herein by reference.

As compiled by the City's Fire Chief and evidenced on Exhibit "F", the Commission recommends several conditions to the granting of this Application:

i. At Wings' sole cost and expense, Wings shall provide for training to the City's Fire Department and surrounding companion mutual aid departments regarding any potentially dangerous materials or substances present on the site, as well as fire procedures for each structure erected on the property;

ii. Each building located on or within the facility shall be conspicuously numbered or lettered on the outside of each building for the purposes of identification by the responding department in emergency situations;

iii. Wings shall perform routine fire drills in accordance with all applicable federal, State and Municipal laws or an emergency evacuation plan so formulated by Wings, and if the same shall not be so required, Wings shall perform at least two (2) fire drills per year, which shall encompass a complete evacuation of the facility and all employees on site;

iv. Upon notification to Wings by the Council, Wings shall reimburse the City within thirty (30) days for any supplies, tools or equipment the City purchases on behalf of the Fire Department that it deems necessary due to the operation of the facility.

As provided in Exhibit "G", should such conditions be approved, the Fire Chief believes that the facility as proposed would not impose any additional strain on the City's Fire Department and the services it currently provides. Thus, the Commission recommends the above conditions to the granting of the Application.

In addition, shall the same not be required by any permitting process or federal or State laws, Wings shall formulate and adopt an Emergency Management Plan for all foreseeable emergencies that may occur during the construction phases and operational phases of the facility and produce such Plan to the City and its Fire and Police Departments upon its adoption, which shall be no later than eight (8) months from the acceptance of the Application by the Council. Such Plan shall include but not be limited to, the procedures for responding to medical emergencies and any and all production related emergencies.

(c) **Overcrowding of Land or Undue Concentration of People:** The Commission does not find there to be any potential for either the overcrowding of land or undue concentration of people for this facility.

(d) **Fire, Police and Utility Service:** The Commission has received and reviewed reports and reviewed from the City Fire Department (Exhibits F and G as discussed above), the City's Police Department (Exhibit "H"), the Water Superintendent (Exhibit "I") and an oral report from City Engineer regarding City utilities. Exhibits F-I are attached hereto and incorporated herein by reference.

The Chief of Police has reported that the City currently has the resources to address any increase in criminal activity due to the proposed facility and that no additional expenses for supplies or personnel would be contemplated at this time.

Also, it is the finding of the Water Superintendent and the City's Engineer that the proposed use would not have any negative impacts on the City's water and sewer treatment systems. Further, both the officials have found that the City's sewer and water treatment

plants are more than adequate to handle the increased activity due to the development of this facility.

Fire Department concerns are further addressed above in subparagraph (b).

Thus, it is the Commission finds that the proposed use would not have a negative impact on the City's Police Department or the Water Department. Further, the Commission incorporates the recommendations of the City's Fire Department as set forth in subparagraph (b) into this section.

(c) **Municipal Expenditures:** The potential impact on municipal expenditures of this facility as proposed is a potential increase in expenditures for police personnel and equipment, fire personnel and equipment, street maintenance and repair. All of these issues have been previously addressed in this report.

Further, the City Clerk has provided the Commission a report on effect the proposed use would have on the City's administration and personnel, which is attached hereto as Exhibit "J" and incorporated herein by reference. Based on this report, the Clerk has determined that the City's administration would spend a nominal amount of time on a monthly basis to complete ministerial duties in connection with the proposed use. In addition, the Clerk has determined that no negative effects from the facility are anticipated on the City's administration and office personnel.

Thus, the Commission finds that municipal expenditures, if any, would be minimal as a result of the proposed use and would not negatively impact the City.

(f) **Character of the District and the Property Values in the Area:** The proposed facility would be located in a M-2 General Industrial District, the permissive uses of which specifically prohibit residences. The location of the proposed facility has been historically a heavy industrial manufacturing plant (from the 1880's through the early 1990's) around which the City was developed. As a result, the proposed facility would be well within the character of the zoning district.

As to property values in the area, there is no indication to the Commission that the construction of the proposed facility would have any direct adverse effect on residential property values in areas adjoining or in close proximity to the proposed facility. It would be anticipated that the property values of undeveloped property in the same zoning district would probably increase from the proposed development.

(g) **General Suitability of the Property in Question for the Proposed Use:** As previously stated, the property in question is zoned "M-2 General Industrial", such being reflective of not only the historical use of the property but the uses to which it is now limited by virtue of the "restricted covenants" which have been imposed on the site. Further, the site has optimal suitability for an industrial use, it having river frontage upon which barge loading/unloading facilities could be constructed, as well as a juncture of two (2) major railroads.

Additional Proposed Conditions and Reaction to Public Comments:

Below are the Commission's additional recommendations for conditions to be included in any acceptance of the Application for the proposed use. In addition, several recommendations have been proposed by the City's Engineer, Carl Vogt, and such written proposal is marked as Exhibit "K", attached hereto, incorporated herein by reference and adopted in full by this Commission.

A. Landscaping Plan. With regard to visual and noise aesthetics, a condition to the grant of this permit would be the establishment of a "Landscaping Plan" formulated by Wings, or by and through an agent or representative of Wing's with the background and experience in industrial landscaping. Such Plan shall incorporate "aesthetic barriers" for entryway corridors into the facility, as well as between any railroad tracks on the property and residences. An aesthetic barrier also should be required for any outdoor storage if it is visible from or within 1000 feet of any residence, school, church, public park, recreational facility, or public library. Such an aesthetic barrier would have a minimum height of six (6') feet with such screening to be by landscaped earth and berm or an opaque fence, at least six (6') feet in height but not more than eight (8') feet in height, with shrubs or other vegetative material planted and maintained by Wings. The Plan shall be provided to the City prior to the installation of any barriers or berms as mentioned above and all costs in the formulating, installing and maintaining such Plan shall be born by Wings.

B. Perimeter Fence Line. In addition to the Landscaping Plan as set forth above, Wings, shall re-establish and replace the existing perimeter security fence with a fence of similar type and manner as shall be typical in the industry. The fence shall be of a type and manner to serve the purpose of additional protection and security around the facility and create a buffer between the facility and the residential and other commercial areas of the City. However, due to the pending litigation in the Twenty Third Judicial Circuit, Jefferson County, Missouri, styled, *Fiesta Corporation, Plaintiff v. PPG Industries, et al., Defendants*, Cause No. 07JE-CC01091, such interior fence line running from Crystal Avenue to the western bank of the Joachim Platin Creek shall not be disturbed, repaired or removed unless permission is granted by the Circuit Court, Jefferson County, Missouri, or such litigation has resulted in a final judgment.

C. Bicycle Plan. Wings should provide ample parking and access for workers and employees of the facility that travel or commute by bicycle. This shall include the placement of bike racks and designated bike routes or areas that are otherwise available for bicycle access and transportation.

D. No Lead. Notwithstanding any other provision contained in the Lease Agreement and any amendments executed thereto between the City and Wings. Wings should be strictly prohibited from processing, smelting, extracting, distributing, loading/unloading and shipping lead ore or lead ore concentrate. However, nothing in this condition should limit Wings from processing, distributing or shipping incidental lead related by-products, if any, as a result of the iron ore reduction process as proposed.

E. "Smoke Stacks". Wings should be prohibited from constructing, building, and maintaining and industrial-type "smoke stack", flue stack or any other industrial chimney or similar device. Wings shall be further prohibited from constructing, building or maintaining

an exhaust system or venting system that is taller than twenty-five percent (25%) of the height of the production building the system serves. This condition shall not be construed so as to affect the height of storage buildings or any production building within the facility.

F. Noise Emitted From the Site. Issues have been raised by public comment regarding noise being emitted from the site. It is the opinion of the Commission that a condition to the granting of the Application should be restrictions on noise emitted from the site during operation. Such condition should provide that any noise emitted from the facility while during operation shall not exceed 80 DBA as measured at the lot line of the effected property. Such determination shall be made by a "L10" level by making fifty (50) observations on the A-weight Network with the sound-level meter at slow response at 10 second intervals. During any of these observations, if a measurement is substantially affected by a source outside of the facility site, these measurements will not be considered. Observations will be continued until fifty (50) valid observations have been recorded. The "L10 Level" will be equivalent to the 10th highest level recorded.

G. Soil and Water Testing. Shall the same not be required by any federal or Missouri Law or by any federal or State agency, including the Missouri Department of Natural Resources and the Environmental Protection Agency, Wings shall employ a third party with experience in industrial soil, water and land pollution testing and detection to perform annual testing on the property to determine compliance with the Restrictions so placed on the property by the Missouri Department of Natural Resources and whether any new contaminates have been emitted on the property. All such test results shall be provided to the City within ten (10) days of receiving the results of such report and testing.

H. Permits and Release of Documentation. Wings should obtain all necessary environmental, building or other applicable permits prior to operation of the facility. Further, Wings should provide the City with all documentation and information relating in any way to such permits prior to operation of the facility. Such documentation shall not be provided to the City for approval, but rather for informational and education purposes only.

I. Prohibition on Fill Material. Wings should not be permitted to transfer or move any fill material that will be required to raise portions of the site above the flood plain on or through the City's street without first receiving prior written approval from the City. Before written approval is granted by the City, Wings shall provide the City with a proposal of the expected plan for moving or transferring such fill, which shall include but not be limited to, the expected weight capacity of each vehicle transporting such fill through the City, the number of vehicles carrying such fill and the duration of the fill operation. After report and review by the City and the appropriate City officials, the City shall issue its written opinion on the proposal.

J. Barge Dock. It has been represented to the Commission by Wings that any barge port or dock constructed on the property would be limited to Wings private use for purposes of furthering the project as proposed. As a result, a condition to the permit should be, except as otherwise provided by the Lease Agreement and the amendments executed thereto by the City and Wings, that any barge dock, port, or other loading/unloading facility so built on the property, shall be limited to the sole use of Wings for products and materials associated with the proposed iron ore reduction facility and maintenance of the same.

K. Air Emissions. The Commission has also considered matters pertaining to air emissions. Section 643.140.1 RSMo specifically provides that Missouri's Air Conservation Law does not preempt cities or counties from enacting and enforcing ordinances with respect to air pollution. However, such ordinances must be "consistent with" the Air Conservation Law. Approximately eight (8) years, the Missouri Legislature amended the Air Conservation Law to add a restriction prohibiting legislative regulations which are stricter than federal regulations and is commonly referred to as the "no stricter than" rule. The "Clean Air Act", a federal statute, with accompanying regulations promulgated by the Environmental Protection Agency, govern the entire field of air pollution. Pursuant thereto, if the federal statute or regulations contain limitations, then those limitations will be binding on the City, and neither the City nor the Missouri Department of Natural Resources may impose stricter limitations. Presently, federal statute and regulations do not regulate CO₂ and, accordingly, any action by the City to impose such regulations would be considered "stricter than" the federal regulations and, accordingly, the City is precluded from attempting to regulate CO₂ in any manner.

Further, as a third-class city, the City is not authorized by State statute to enact or enforce ordinances or orders under the provisions of Section 643.140 RSMo. Accordingly, it is the opinion of the Commission that all matters pertaining to air emissions must be addressed during the permitting process by the applicant with the Missouri DNR and the Federal EPA.

L. "Running with the Land" and Time Limitation. A question also has been raised as to whether a "Conditional Use Permit" "runs with" the land or with the applicant. It is the opinion of the Commission that a "Conditional Use Permit" designates a type of administrative permission by the City which allows a property owner to put its property to a use which the City zoning ordinances expressly permit under conditions specified in the zoning regulations themselves. Such a permit is regarded by Missouri law as personal to the landowner to whom it is granted. That is, the mere issuance of a Conditional Use Permit gives no vested rights to the permittee, nor does the permittee acquire a property right in the permit. However, a permittee does acquire a property or vested right where it has acted on the faith of the permit. That is, construction represents an investment in the improvement of the land upon which it was erected and, if regard was not had for the reasonable protection of such investments, then a zoning ordinance would be "confiscatory" with respect to its application to the particular structure. Accordingly, it is the opinion of the Commission that, upon the granting of a Conditional Use Permit to Wings, it would acquire a property or vested right when acting in good faith upon the permit, it proceeded with construction on the property. Therefore, at that time, it would have a vested right in the continued operation of the improvements constructed, which would run with the land and, consequently, to a subsequent tenant or property owner.

Further, Missouri also allows a "Conditional Use Permit" to be transferrable from one party to another where the permit itself expressly contemplates such transferability. Issues also have been raised as to whether a "time-limit" condition can be imposed upon the granting of the Conditional Use Permit. It is the opinion of the Commission that Missouri law allows a "time limit" to be placed upon a Conditional Use Permit only if such is specifically allowed by the relevant city ordinance. The ordinances of the City do not contain an explicit provision to establish a time period on the Conditional Use Permit and, therefore, such a limitation is not a matter within the discretion of the City to impose.

M. Train Regulation. An issue also has been raised regarding the blockage of City streets at train crossings by trains of a certain length. It is the opinion of the Commission that any condition upon the length or speed of a train, or the obstruction of a railroad-street grade crossing for a particular elective time is preempted by the Federal Railroad Safety Authorization Act of 1994 (FRSA), 49 U.S.C. Section 20101 et. seq. (2000). Therefore, any such condition would be, in the opinion of the Commission, in violation of this Federal law.

Finally, except as may be preempted or prohibited by any federal or state law, including any regulatory agency rules and regulations, rail cars should be delivered as a unit train and removed from the facility as such. In addition, individual rail cars are to be moved and relocated on site for loading and unloading purposes, utilizing a rail car indexer and not by train engine.

CONCLUSION

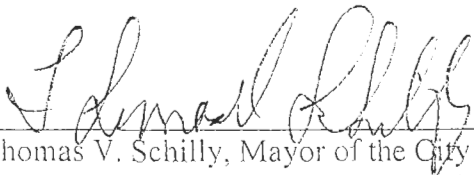
After review by this Commission, it is our recommendation that the Conditional Use Permit Application filed by Wings Enterprises, Inc. for the proposed use be **APPROVED**, **subject to the conditions and recommendations as set forth above in more detail.**

Sincerely yours,



Lonnie Compton,
Chairperson
Planning & Zoning Commission

Acknowledged Receipt of this 23rd day of February, 2009, and Signed By:



Thomas V. Schilly, Mayor of the City of
Crystal City, Missouri, on behalf of the
Crystal City, City Council