CITY OF West Linn

Memorandum

Date: January 9, 2014

To: West Linn City Council

From: Zach Pelz, Associate Planner

Subject: AP-12-02 and AP-12-03 Remand – New testimony and staff recommendation to reject certain items

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The notice for the January 13, 2014, City Council hearing regarding the LUBA remand of AP-12-02 and AP-12-03 was mailed to all persons with standing on Friday, December 20, 2013, and was posted on the City of West Linn's project website on Monday, December 23, 2013.

This packet includes all information and correspondence received, regarding the LUBA remand of AP-12-02 and AP-12-03, between December 17, 2013, and 5:00 p.m. on January 8, 2014. The hearing notice for January 13, 2014, stated the proceeding was:

> **[A] limited hearing based solely on the issues identified in LUBA's Order as follows**:
>
> A. Provide a meaningful opportunity for rebuttal of the Mayor's ex parte disclosures regarding neighborhood associations opposition, by having the Mayor provide additional information regarding the ex parte contacts. After the Mayor responds to certain requests for additional information in the record, the City must provide a reasonable opportunity for participants to rebut the substance of the disclosure.
>
> B. Conduct the proceeding required by CDC 99.180(B) and adopt appropriate findings.
>
> C. Adopt findings that either address the Wilkerson Report, or explain why no further consideration of the Wilkerson Report and economic impacts is necessary.
>
> **Only one of these matters, Issue A, requires that the City open the evidentiary record and consider additional public testimony. As such, all written and oral testimony, including argument and evidence, must be directed specifically to the substance of the Mayor's responses to the questions as required by LUBA in its decision.**

Emphasis in original.

Staff has reviewed all testimony submitted regarding the LUBA remand and believes three items, included on pages 1 through 8 of the attached packet are responsive to Issue A. In staff's opinion, the remaining public testimony, pages 9 through 231, does not respond to Issue A. Therefore, staff recommends excluding pages 9 through 231 from the public record for these decisions.

Pelz, Zach

From: Scott Gerber <jumpin@cmn.net>
Sent: Sunday, January 05, 2014 6:09 PM
To: Pelz, Zach
Subject: LUBA remand of AP-12-02 and AP-12-03

Hi Zach
Would you please deliver the comments below for the record and confirm receipt
Thanks
Scott Gerber

LUBA Remand of AP-12-02 and AP-12-03

To the West Linn City Council:
I would like to address the subject of the Mayor's ex parte disclosures and the manner in which the city is choosing to handle the remand from LUBA.
The city has chosen to offer statements from the mayor that respond to certain questions that were brought forth at the time. Of course, the city has decided in its ultimate wisdom which questions the mayor should answer and which he should not as per its interpretation of LUBA's ruling. I would suggest that the city's interpretation is incorrect and that there are other proposed questions that should be answered to comply with the ruling. However, rather than following the city's limited line of thought, I would rather address what I believe to be much more pertinent aspects.
To begin with, what is the problem that the city and the mayor have with transparency? Why is there and has there been such effort taken to only provide as little information as they can possibly get away with? What is it that the mayor is so obsessed with hiding? At its core, this is a relatively simple matter that Mayor Kovash could have dealt with at the time by just revealing everything that was said and done and who it involved. Instead, he obscures the facts and remains insistent on doling out the minimum amount of information he thinks he can get away with.
This brings me to the crux of this entire affair, and that is one of honesty and integrity in our elected officials. This whole mess began with the mayor failing to admit to ex parte communications. When asked, he declared he had had none. The fact that he used these same communications later in the hearing to rebut statements from Councilor Jones makes it very clear that these contacts did not just "slip his mind". Afterwards, the mayor KNOWINGLY AND WILLINGLY REFUSED to comply with the public process when asked to come forward with further information.
Herein lie the larger issues of the LUBA remand. The fact is that Mayor Kovash's actions were so blatantly discordant with the public process that he tainted the proceedings beyond

repair! It is absurd that the city and this council can support such a transgression against honesty and transparency and simply sweep it under the rug by having the mayor answer a few chosen questions. Is everyone involved here so blind with the intent of pushing this project through that basic integrity is willingly tossed aside?

I am not making this up. You councilors all witnessed the same behavior that I did. It is not a matter of interpretation. The mayor's actions, if not dishonest, most certainly exhibited a conscious disdain for and dismissal of the public process. Because of this and the impact that his actions had upon the final decision, the only correct course of action is for you to remand to the Planning Commission's ruling and begin the process anew without the mayor's participation. Given that that is unlikely to happen, the very least acceptable course of action on your part would be to recuse Mayor Kovash from any further participation in these proceedings.

Finally, I would also suggest that because his actions are primarily what are under review here, Mayor Kovash should absolutely step down from presiding over these hearings.

Respectfully

Scott Gerber
2740 Warwick
West Linn

Sent from my iPad

Pelz, Zach

From: Mollusky, Kathy
Sent: Thursday, January 09, 2014 9:18 AM
To: Pelz, Zach
Subject: FW: :Please add this to the record for the remand hearing
Attachments: LUBA Remand comments for Jan 13 2014.odt

Kathy Mollusky, City Recorder
Administration, #1430

From: teric518@comcast.net [mailto:teric518@comcast.net]
Sent: Wednesday, January 08, 2014 4:59 PM
To: Mollusky, Kathy
Subject: :Please add this to the record for the remand hearing

Kathy , please submit these comments for me, thank you, Teri Cummings

January 7, 2014

Teri Cummings
2190 Valley Ct,
West Linn, OR 97068

Please submit the following comments to record of Agenda bill 2014-01-13-0, LUBA remand

Mayor Kovash, and Councilors Carson, Jones and Tan,

I am writing to raise questions and comment on the remand hearing scheduled to address errors cited by LUBA that occurred in the process of approving Lake Oswego and Tigard's application which among other things, condemns codes written to preserve a residential neighborhood in West Linn for the sake of constructing a water treatment plant large enough to serve the two cities' prospective 100,000 customers. While property values fall, the hazards and inconveniences will continue to rise for residents and businesses located nearby. West Linn's long standing, mutually beneficial IGA with LO for emergency water supply has been traded for an IGA that only supplies "up to" 4MGD when available and ends in 2041. Our children have yet to know what that uncertainty will cost. A change in the use of Mary S Young Park, never brought to a vote of the citizens, was sold for a pittance along with our city's land use codes, all sold off cheap for the sake of satisfying Lake Oswego and Tigard's thirst for new water revenue.
Mayor Kovash, although you should have known better with a decade of experience chairing public meetings, you injected ex-parte comments into the midst of deliberations going in a direction you opposed and therefore additional time became available so that you and your fellow Councilors could craft a decision apparently behind closed doors.
After having already personally invested so much of my own personal time and money in hopes of helping you reach a better understanding and respect for Oregon Public Meetings Law just eight months earlier for your abuse of an Executive session, I decided this time to file an ethics complaint after seeing a such a crucial decision handled so improperly, yet againd you have disappointed me. You have spent countless tax dollars to avoid taking responsibility for your improper and unethical actions. The laws set a minimum standard but after all our city has suffered because of what you have done,I hope you will take the high road and step down from the hearing. Please shoiw some respect for the people of West Linn by remanding this to the Planning Commission.

Having a complete record available in a timely manner before a decision is important, both to those potentially affected by the decision and for decision makers too, because everyone hopes for the best, most well-informed decision possible.

After reading the staff report and way that this hearing has been set up, I am quite surprised that pertinent information related to this case still isn't adequately disclosed. One might think after having spent untold time and tax dollars to defend the errors that triggered this LUBA appeal, extra effort to answer all questions and show information would be empoyed. Unfortunately, the scope of discussion has been needlessly narrrowed down while again providing only partial information. This only furthers the perception of a potentially unfair and biased hearing.

Unless I have missed something, the 48 page staff report produced for this remanded hearing does not have an attachment or link to the actual LUBA appeal that was filed. I have never seen it because although I signed in and testified January 28, 2012, I have never been noticed or given information about the consequent LUBA appeal or LUBA decision. Therefore, my ability to speak according to

the LUBA record is profoundly limited to the footnotes in the staff report about the LUBA decision. I believe the city, in good faith , should make this pertinent information readily available to the public . Merely stating that records might be available somewhere else on the city website fails to serve the true purpose of freedom of information law.

Therefore, I request the LUBA file be added to the staff report posted online and a continuance to allow time for review and comment.

Considering the extensive amount of effort and expense your fellow citizens were forced to invest, in order to address multiple errors on your part, I really had hoped to see you answer all the questions regardless of whether the minimum standards of the law require it or not, fif nothing else, or the sake of regaining public trust.

LUBA requires that you provide citizens with a meaningful opportunity to rebut information that Mayor Kovash failed to disclose at and before the January 28, 2012 hearing. But I see Megan Thornton, the assistant attorney hired by the City Manager has advised Mayor Kovash to only answer three out of ten questions posed by citizens in the LUBA appeal.

First, I question whether it is appropriate for Council to rely on legal advice supplied by an attorney hired by the City Manager regarding this matter. West Linn voters recently approved City Charter amendment measure 3-429, which determined that City Council hires a city attorney to represent the city in legal matters. Appointed and removed by the Council, the city attorney reports directly to the City Council, not the City Manager, as is the case with Ms Thornton.
I believe the distribution of powers in the city were originally designated in this manner in order to provide reasonable opportunities to check and balance important matters like this where bias or conflict of interest might become an issue. Cost is a problem, I'm sure. It would be fascinating to know how much it has already cost to defend these unfortunate errors already. But you have no choice, the City Charter requires you, the Council to hire an attorney to represent and advise you in this critical decision. I urge you to immediately seek out the most knowledgeable and non-conflicted attorney our money can buy.

The various accounts provided by Mayor Kovash about his exparte contacts so far simply do not add up nor do they make sense. It is disappointing to see such vague, nonspecific answers given to so few questions. Surely Mayor Kovash has had sufficient time by now, after this LUBA appeal and so forth, to obtain his phone records and pin down the specific dates and times of his phone calls. After all, it's not as if the phone numbers of the persons involved, NHA presidents, are unknown. Specificity is particularly important because the hearings commenced mid-January, but even so, Mayor Kovash, who has presided over hearings for almost a decade, each time reciting rules for disclosure of exparte contact, he of all people had to have known that to call those people while the application was in process, was wrong. Not disclosing his exparte communications when hearings commenced was wrong. And then, to bring his ex-parte contact out in the midst of deliberation, thereby opening the opportunity to discuss the matter further behind closed doors, January 28, 2012, was without exception, the worst thing I have ever seen Mayor Kovash do. And in allowing Mayor Kovash's improper actions to go unaddressed, meanwhile, engaging in ex-parte discussions as well between meetings as it appears, Councilors Jones, Carson and Tan have yet again demonstrated a pronounced unwillingness to uphold public meetings law. The indelible impression of bias and improper behavior on the part of these Councilors has stained all possible trust in their ability to conduct a fair hearing. The fact that the entire proceedings have become such an embarrassment and liability to West Linn citizens is sufficient reason to demand that Mayor Kovash and Councilors Carson, Jones and Tan all recuse themselves from

this hearing. Please, for the sake of preserving the trust of West Linn citizens, remanded this hearing to the Planning Commission and in good faith , please also provide the most knowledgeable, non-conflicted and credible attorney our money can buy.

After all this, I just hope that the people of West Linn who invested so much effort and expense to seek justice and the truth, will finally get the kind of transparency and fair consideration that all parties involved in a decision should be able to expect.

With sincere gratitude for your time and effort in considering my opinions,
Teri Cummings

Pelz, Zach

From: ericjones2009@aol.com
Sent: Wednesday, January 08, 2014 4:45 PM
To: Pelz, Zach; Ericjones2009@aol.com
Subject: LUBA Remand Comments for CC LOT Land Use Approvals

Zach,

Please include the following comments into the official record and confirm receipt of this email and that my request has been taken place. Having participated in the planning commission and city council hearings processes, I have standing in this matter for the record.

Thank you,

Jay Eric Jones

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1. The mayor should recuse himself from participation (in public or behind the scenes) or voting regarding the LUBA remand of the LOT water plant expansion and accompanying water transmission lines city council decisions from last year (AP-12-02 and AP-12-03). Since it largely due to his ex parte communications in January 2013 that the matter was returned to the city for reconsideration by LUBA and due to his disregard for his own warnings at the beginning of each meeting to avoid ex parte contacts, the mayor should not participate in further consideration of these land use decisions. I personally do not believe the mayor when he says the contacts were not a land use decision problem and/or not deliberately designed to disrupt a vote that was about to go against his obvious bias toward the project. His disregard during the entire hearings process for citizens' input/suggestions, testimony, and concerns is obviously to anyone viewing the record by the manner in which he conducts himself. There is no reason to believe that the mayor's consideration of this matter at this time would be any less biased. I call upon the mayor to recuse himself and on the council to call for this action.

2. It is equally clear that LUBA's remand regarding the Wilkerson Report holds merit. The projects, particularly the pipeline, will adversely affect local businesses and the West Linn economy. ANY major construction zone includes construction equipment, reduced speed limits, lane closures and restrictions, and driveway/entryway closures and restrictions - even when construction is not actually occurring. Traffic *will* be disrupted. It appears to me that the council chose to "cherry pick" arguments, facts, and study sections that allowed them to support the appeals last year. It is not a time to allow projects that do not directly benefit (in perpetuity) West Linn businesses and have a great potential to damage the local business economy in the next three years to move forward.

3. The city council has a unique opportunity here to undo a major decision (one the mayor said is most likely the most important and far reaching decision this council will ever make) that unacceptably burdens West Linn citizens and businesses for nearly three years (and beyond) and offers little to no direct and perpetual community benefits. It does not meet the CDC nor the comp plan nor the Highway 43 planning document. The construction by LOT is underway in its early stages. It has, as anyone paying attention has seen, not gone well! Roads have been damaged and are in need of repair, a child was almost hit by a dump truck, fences have been placed on public ROWS for weeks, trucks have routinely exceeded the posted construction speed limits and made unwieldy turns on narrow residential streets, and traffic on Highway 43 has already been delayed by the voluminous number of double bed dump trucks. I know the latter two personally from having sat behind a number of the trucks on the highway and having witnessed the fast speeds and unsafe maneuvers a number of them have made. The construction is just beginning and the most disruptive work is yet to come. Conditions of approval have been already ignored by LOT. Examples include that the backup warning devices on heavy equipment that were not deactivated until neighbors complained, a long delayed telephone hotline, and a water supply from the intertie that is not perpetual as Councilor Jones demanded.

4. A note on the project's progress: LOT *chose* to proceed while the appeals and lawsuits were underway at their OWN peril. West Linn's government has no obligation to accept or promote the projects because of time and money LOT has already spent. These projects do not belong in a quiet West Linn residential neighborhood! How will the council react

when someone is killed or seriously hurt and/or property is seriously damaged as a result of them? I believe that this *will* occur if these projects proceed. Then it will be too late. But it is not too late now. Please reconsider approval of these CUP appeals in the LUBA remand and place West Linn's citizens and safety first!! Please follow your planning commission's unanimous recommendations to reject both projects and reverse your 2013 decisions.

Thank you for your time and consideration.

Sincerely,

Jay Eric Jones

1-7-14

This is in regards to the meeting for Jan. 13th. 2014.

First off we would have to disagree that LUBA's finding were minor. What the Kovash did was nothing short of criminal. That was his way of convincing others to accept it. This discision should start over with Kovash recusing himself and a unbiased descion made based on the facts. Deep down we don't believe this will happen, based on the bias we've seen from the beginning. When Kovash pirated his phone calls and messages in, the number of neighborhood associations that weighed in against LOT's plans still outweighed the pirated exparte. The counsels members absolutely slapped the planning commision in the face. To completely go against their decison, that was made based on facts and not bias. You all have ignored the city development code, so one would have to wonder why we have them. The responsiblity of the city counsel is the citizens of West Linn not Lake Oswego or Tigard. Regardless of the outcome on LOT, the intertie takes both parties to agree, and cannot be broken. LOT would have been required to hook back up if the new main had gone through, instead of having and end date for this agreement. The city counsel should represent the citizens of West Linn instead of selling them out to the highest bidder. Considering exparte forward is the right thing to do, since Kovash dirtied up the water.

Carl and Linda Edwards

3680 Mapleton Dr.

Pelz, Zach

From: Steve Hopkins <sfhopkins9@aol.com>
Sent: Friday, January 03, 2014 11:37 AM
To: Pelz, Zach
Cc: Frank, Thomas
Subject: LO/T treatment plant expansion

Dear Zach,

We won't be in town for the city's disposition of LUBA's remand on aspects of the city's handling of the water treatment plant expansion in our neighborhood but want to weigh in one last time before this approval travesty is consummated. We were...

... active partners in presenting the neighborhood's concerns to the city planning commission,
... pleased with their rational rejection of the applications,
...outraged at being stifled in an attempt to address the city council on the issue in an open comments section of a council meeting.
Why bother attending council meetings?
...incensed at the council's violation of their own "ex parte" policy,
...incredulous that the council would reject the planning commission's reasoned decision. Why serve on a commission?
...amazed that the council would ignore residents' interests in accepting the $5 million bribe which we understand hasn't been
paid yet,
...amused by the suggestion that the $5 million bribe "changed everything and justified rejecting the planning commission's
findings". It certainly didn't "change everything" in our neighborhood.
...irritated that LOT's agents assumed that they could do whatever they damned please throughout the ramp-up. For example, one
actually asked our 95-year-old neighbor whether they could store their pipes in her yard in preparation for their installation...in
exchange for putting gravel on her driveway. Who are these people?
...dismayed that those who aren't directly impacted by this three-to-four year "inconvenience" publicly dismissed our concerns as
being "overblown and the whining of a few disgruntled activists". Meanwhile, huge, heavily-loaded trucks roll by our house every
few minutes, the street is being torn up for the first of two pipe installations, 200 trees have been cut down, we're faced with the
probability that many more will be sacrificed along with street-side landscaping and plantings, and the promise of two+ more
years of this "inconvenience", and the likelihood of declining property market values.

We are disappointed in our city's stewardship of its residents' interests. We are appreciative of city commission and council members' service, but are convinced that the council performed poorly in this matter. We will soldier through this four-year-inconvenience but have lost faith in the process. We hope there hasn't been fraud or malfeasance involved but won't be surprised to hear of it.

Steve and Nancy Hopkins
3910 Mapleton Drive

Pelz, Zach

From: Scott Gerber <jumpin@cmn.net>
Sent: Monday, January 06, 2014 5:57 PM
To: Pelz, Zach
Subject: LUBA REMAND AP-12-02 and AP-12-03

Hi Zach
Below are further comments for the record regarding the LUBA remand. I would like this entered into the record and acknowledged as such. I am also awaiting acknowledgement of comments sent earlier.
Thank you
Scott Gerber

LUBA Remand of AP-12-02 and AP-12-03

To the West Linn City Council:
In the Public Notice for the hearing on the LUBA remand of the LOT appeal Issue B states that the Council will conduct the proceedings required by CDC 99.180(B) and adopt appropriate findings. The notice goes on to say that only testimony addressing issue A will be considered.
The City obviously thinks that this satisfies the LUBA remand regarding this issue and that no further testimony is necessary to comply with the remand.
I would argue that the City's response to this portion of the remand is completely interpretive and would further argue that this response is incomplete, and in shutting out further testimony only exacerbates the errors that led to this particular remand.
The LUBA ruling on this matter states:
"Petitioners allege in the petition for review that due to the city council's failure to act on the challenges, the city council allowed what could be a biased decision maker to participate in deliberations and the vote at the February 11, 2013 hearing, which prejudiced the petitioners' substantial rights to have a decision by impartial decision makers.....
The 'substantial right' protected by the process at CDC 99.180(B) is the right to an impartial decision maker, a right that is protected by allowing participants to challenge the impartiality of decision makers, and requiring the hearings body to resolve that challenge. The city effectively denied petitioners the ability to challenge the Mayor's impartiality during the proceedings below. We agree with petitioners that the city' failure to comply with CDC99.180(B) prejudiced, their substantial rights, regardless of whether the Mayor would have been disqualified had the city acted on the challenge, and regardless of whether the Mayor's participation influenced other decision makers."
LUBA is very clear in its comment, "PREJUDICED THEIR SUBSTANTIAL RIGHTS". LUBA does not state how or if this might be corrected. The city has made its own interpretation and expects those whose substantial rights have been prejudiced to blindly

accept this. I do not. I do not believe that the council, one year after the fact, with the LOT project under way, can be expected to deliver a fair assessment of the bias issues that have been raised. Furthermore, I see no way that this decision can be reached at the same council meeting that is addressing the mayor's ex parte actions. That remand issue in and of itself will bring new evidence that very likely could relate to the bias issues that are related to CDC99.180(B).

Additionally the city has planned a meeting on Jan 15 for the final order. Scheduling this meeting presupposes that this entire remand will be nicely put away in one meeting.

LUBA makes it very clear that citizens have a right to impartial decision makers. What we are getting here are biased decision makers deciding on the impartiality of their peers. It simply doesn't work and is not in the spirit of the LUBA decision. I have written previous comments arguing that the only correct course of action is remand to the PC decision. This second LUBA remand issue reinforces that opinion. Furthermore, the city's attempt to silence comment on this and arrive at a swift and predetermined decision is contrary to the LUBA decision.

In the staff report addressing the LUBA remands it states, "In its remand (attached), LUBA was clear about the necessary actions required of the City to cure the MINOR deficiencies of its approval of the project." I have emphasized the term"minor" in this statement. I most emphatically do not consider the prejudice of my substantial rights to be "minor". Nor do I consider the mayor's ex parte and subsequent dismissal of the public process to be "minor". These are serious procedural and ethical errors which influenced the outcome of a decision which will have a major impact on this city.

I implore this council to come clean and remand back to the Planning Commission decision. It is the only right and ethical position to take.

Respectfully

Scott Gerber

2740 Warwick

West Linn

Sent from my iPad

Pelz, Zach

From: LOTWP
Sent: Tuesday, January 07, 2014 1:59 PM
To: Pelz, Zach
Subject: FW: LOT Meeting on 1/13/2014

From: lamontking@comcast.net [mailto:lamontking@comcast.net]
Sent: Tuesday, January 07, 2014 12:10 PM
To: Jones, Michael
Cc: Tan, Jennifer; Frank, Thomas
Subject: LOT Meeting on 1/13/2014

Hi Mike,

There is nothing in this email that should concern you regarding exparte communication. If you feel there is, simply report it and you are fine.

In the CC Meeting last night I was concerned with your take on Neighborhood Associations. I have only been active the last 5-6 years and we both know the attendance is usually dismal. But, when an item of concern appears in a neighborhood that effects the general population, turnout increases dramatically. Whether it is trails, LOT or some other hot button issue, our NA's are an outlet for citizens to become involved and communicate their feelings to the CC. Until we have an effective alternative, I think we need NA's.

On the Planning Commission. On mayor said they were in disarray last year and apparently brought in new people to straighten things out. I attended many of those meetings and the "disarray" was directly related, in a large part, to the unprofessional conduct of our city staff. The Cut the red tape program was a good example. The Economic Development Commission made some recommendations and then our city staff added a great number of additional ones. These were not well thought out and the PC wasted hours sorting through the mess created by staff. Michael Babbitt did an exemplary job in maintaining control and working through complex issues but he failed to be a "yes" man to Jordan and now he is gone.

If you are still reading this, I have one more concern. I have been hearing that the 1/13/14 meeting will not include community comments. I do not know if this is true, but if it is, it is wrong. The response to the Wilkerson Report is very one sided and the author(and our city) deserves to hear his rebuttal of LOT's and city staff's comments. I see very valid reasons that our mayor should be excluded due to bias and a simple vote by the existing council fall far short of what LUBA was asking for.

I look forward to your response!

Lamont

Pelz, Zach

From: Vicky and Pat <patvicsmith@q.com>
Sent: Wednesday, January 08, 2014 7:30 AM
To: Pelz, Zach
Subject: LUBA Remand of AP-12-02 and AP-12-03

Zach -

Please include in the public record and in the information provided to the City Cuncil

We request the City Council direct staff to convene a meeting with Mr. Wilkerson to discuss the information presented by Mr. Wilkerson. It is clear from Staffs' report, they have many questions about the information presented and so cannot adequately evaluate the recommendations. In addition Staff has incorrectly defined the duration and length of the business and residential impacts along Hwy 43 (page 5).

This should have been revised AFTER City Council broadly defined "Community" to include communities OUTSIDE of West Linn's boundaries. To be clear the LOT pipeline will impact OVER TWO miles of Hwy 43, with one mile of this work being in the limits of WEST LINN. This extends the duration assumed by Staff from 5 months to up to ONE year. Staff also FAILED to mention that LOT is NOW exploring alternative routes for the pipeline since the HDD installation under Lake Oswego is too expensive. This design change may require the 48-inch pipeline to continue on Hwy 43 even longer and therefore disrupt the primary customer and delivery routes on HWY 43 even longer.

This information was brought to Staff's and Council's attention during the previous public testimony on this project.

Also for Staff to suggest this is "a pipeline project" and therefore the information presented is irrelevant is a wrong conclusion. This is a major construction project in the middle of Hwy 43 that is a significant business travel corridor. A 2 mile, yearlong disruption to the West Linn' major travel corridor is clearly relevant to the impacts of a roadway project. While the majority of the pipeline work will occur at night, the condition of the roadway will be so compromised and existence of the large scale stockpiled materials and equipment parked just outside the travel ways will impact travel speeds and therefore peoples travel route choices.

These are real and significant impacts to our local businesses and we request the City Council re-evaluate this issue as suggested by LUBA.

Pelz, Zach

From:	lamontking@comcast.net
Sent:	Wednesday, January 08, 2014 12:31 PM
To:	Pelz, Zach
Cc:	Jones, Michael; Kovash, John; Tan, Jennifer; Carson, Jody; Frank, Thomas
Subject:	Request to keep record open on LOT

Hi Zach,

I read in your LOT write up a critical review of the Wilkerson Report and thought given that this is the largest industrial project to ever be forced on our community it only seem fair to allow Mr. Wilkerson to respond. I have spoken to him and I believe he will have a response prepared for the 1/13/14 CC Meeting. I would like to request you keep the record open for this report.

Have a great day!

Lamont

Written testimony from
Michael Monical, PE, LEED A/P, MASCE
Professional Civil Engineer
35 years engineering experience
West Linn Utility Advisory Board Member

January 8, 2014

Subject: Agenda Bill 2014-01-13-01 LUBA Remand

On January 28, 2014, due to Mayor Kovash's misconduct, Council President Mike Jones requested that Citizens recommend additional Conditions of Approval. At that time due to statements by Jenni Tan and Mike Jones, it seemed unnecessary as the appeal would not be approved.

The matter is now before us again. While we hope that the Council will now reject the appeal, we are aware that the appeal may be granted.

In the event that the Council decides to approve the Appeal, the following additional conditions of approval are recommended.

NOTE: This is a draft. A revised list with additional signatories shall be submitted on Monday, January 13, 2014 at the council meeting.

1. **All** of the Attorney's fees that Mapleton residents expended to defend their rights will be reimbursed in addition to the $4,000 per parcel as required by the court.

   Discussion: LOT agreed to reimburse up to $2000 to a lot the legal fees spent to defend their rights from the lawsuit brought against West Linn Citizens. However that is significantly less then expended by several of the residents who shouldered the burden of the legal fees.

2. A temporary widening of Mapleton to 24 feet and an additional 4 foot walking path will be installed to provide for the safe usage of Mapleton for the duration of construction. The widening will be removed at the conclusion of construction if requested by the Mapleton community.

   Discussion: This is a condition that many on Mapleton do not agree with. However it is a condition that the city should have required in the beginning and for which you have ample evidence of the need for now. Safety is the primary consideration and you have seen and heard sufficient evidence to validate the requirement.

3. The intersection of Mapleton and Hwy 43 shall be modified to provide for adequate turning radius per ASHTO and a safety refuge for School Children waiting for the bus.

   Discussion: This is a condition that the city should have required in the beginning and for which you have ample evidence of the need for now and in fact have partially done.

4. The school bus stop on Mapleton and all on Kenthorpe will be identified and a safety plan prepared and approved for school children refuge from construction activities. Jersey barrier protection is envisioned

in this condition. The Plan will be continually reviewed and update as required based on changing construction activities.

Discussion: Self explanatory

5. It is physically impossible for the applicant to provide the specified emergency access at the Heron Creek crossing during Water Line installation. Detailed plans of the crossing of Herron Creek will be submitted to and agreed to the city with community comment. Special concern for the emergency access and WRA protection will be implemented.

   Discussion: Staff did a miserable job in evaluated requirements at this key choke point of construction. There is testimony in the record of the risks associated with this location and is herewith included as a reminder.

6. Heron Creek WRA will be upgraded for 200' upstream and downstream of the waterline crossing with the removal of all invasive species and restoration of native plants.

   Discussion: It is a fact already demonstrated that disturbance will not be limited to the pavement as claimed in the staff report. This is a reasonable accommodation for impacts, not that difficult for the applicant and would be a "community benefit".

7. The applicant will install traffic guards along Mapleton at the Heron Creek Crossing slopes prior to Water Linn installation for the safety of residents and construction workers.

   Discussion: Same as No. 5.

8. Each day a resident is denied full access to their home, lodging will be provided at " Lakeshore Inn(?) " or agreed to substitute or a fee of $75/day will be paid by LOTWP to deferred costs of resident relocation to local temporary lodging.

   Discussion: Actual compensation and details to worked out.

9. Each day a resident is denied the enjoyment of their home due to construction activity, a fee of $50 will be paid by LOTWP to allow residents to perform activities at local entertainment and service establishments.

   Discussion: Actual compensation and details to worked out.

10. A $1,000,000 fund will set up and administered by West Linn to receive claims and distribute fees per COA 9 and 10.

    Discussion: Actual amount and details to worked out.

11. LOTWP, Lake Oswego and Tigard will provide for interconnection of the West Linn Water System to the Washington County and City of Portland Water System and sufficient FIRM capacity to deliver 2 MG/day supply to the West Linn Water Supply System. West Linn will adopt and fund the appropriate infrastructure project in coordination with LO and Tigard engineering departments

Discussion: Significant details to worked out. Agreement in principal needed. An alternative source could also include Tigard Aquifer Storage Reservoir.

12. The IGA will include provisions that in the event LOTWP no longer provides 4 MG/day water supply to West Linn, addition fees for use of West Linn ROW will be access in the amount of $500,000 per year.

    Discussion: Actual fees and details to worked out. Agreement in principal needed. IGA amendments needed.

Written Testimony
Michael Monical, PE
18735 Nixon Ave
West Linn, Oregon 97068

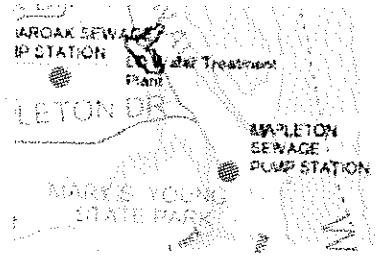
Water Transmission Pipeline CUP-12-04 fails to meet CDC Code requirements 60.070(A)(1) – "The site size and dimensions provide, a) adequate area for the needs of the proposed use; and, b) adequate area for aesthetic design treatment to mitigate any possible adverse effect from the use on surrounding properties and uses...." **and 60.070(A)(2)** "The characteristics of the site are suitable for the proposed use considering size, shape, location, topography, and natural features."

These conditions are not met.

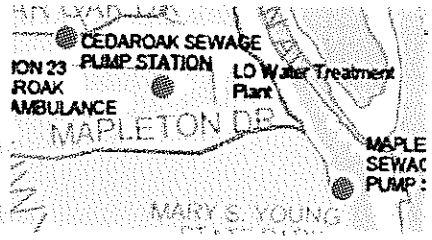
The applicant has burden of proof when addressing CDC Code Requirements. He has failed to provide evidence that the 42" Raw Water Pipeline can be installed along the eastern portion of Mapleton in the very narrow and geologically, environmentally, geologically and geotechnically constrained uphill winding segment immediately west of the intersection with Nixon Avenue.

Riparian Corridors

Landslides and steep slopes



Earthquake Hazards



Requested as early as January 25, 2012 Vicky and Pat Smith submitted at the preapplication meeting. "

14) Please have the applicant provide a series of "Typical Cross Sections" for the transmission line along Mapleton Drive. Specifically showing; relative depth to top of pavement, relationship with existing utilities, proximity to the right-of-way and typical trench width.

Staff's response was that "

' for the transmission
p of pavement,
ypical trench width.

t proposes installing

Comment [z13]: We anticipate the applicant's application will include this information

This information appears to never have been submitted for the record nor did staff require it.

At the October 17th hearing, allegedly (you can ask him) the verbal response to the same query was "Basically at the end of the day the City Engineer can waive this - and according to Zach - The City folks are fine with it ". While this is apparently true, and it **might** be technically feasible to accomplish this installation, the applicant has not demonstrated the means and methods by which this might be accomplished. The work cannot be done within the normal application of West Linn's Standard Design Details or the OAR 333-061 and will require variances with the review and approval by the City Engineer to whom all decision making will be delegated.

Like CUP 12-02 Water Plant CUP-12-02, the pipeline is a condition use permit required to meet all aspects of the code including review and comment by the citizens. Staff has failed to require the applicant meet the burden of proof criteria and has given a pass to the applicant in all aspects of the physical location of the oversized waterline in the ROW.

The Application includes the following criteria (pg 27):

APPROVAL STANDARDS AND CONDITIONS (60.070)

A. The Planning Commission shall approve, approve with conditions, or deny an application for a conditional use, except for a manufactured home subdivision in which case the approval standards and conditions shall be those specified in CDC 36.030, or to enlarge or alter a conditional use based on findings of fact with respect to each of the following criteria:

1. The site size and dimensions provide:

a. Adequate area for the needs of the proposed use; and

b. Adequate area for aesthetic design treatment to mitigate any possible adverse effect from the use on surrounding properties and uses.

2. The characteristics of the site are suitable for the proposed use considering size, shape, location, topography, and natural features.

.....

7. The use will comply with the applicable policies of the Comprehensive Plan.

The applicant then provides his response

Applicant Response:

The pre-application conference notes provided the following list of potentially applicable Comprehensive Plan and supporting plan goals, policies, and action measures.

The following 30 pages of the application are all in response to 60.070(A)(7) addressing the goals. The first 6 requirements are ignored completely in the entire application. 60.070(A)(1)&(2) are not address in any fashion, in spite of several requests from the citizens.

In other words, a complete blow off of identified concerns of the citizens on very critical engineering challenges.

Having been responsible for preliminary engineering in the Portland Metropolitan Region for over 20 years including several projects in West Linn, I have often been required to show plan, profile and sections for utilities in Preliminary Engineering for challenging aspects of design. If there is a question about saving a tree, show how it is done. If there is a question about gravity service or pipe cover, show a profile. If there is a question about a structure or geotechnical hazard, show a detail and discuss in depth how the safety of the public will be protected. Happily, by utilizing the engineering standards, challenging situations are usually avoided. **In this case, engineering standards have been ignored.**

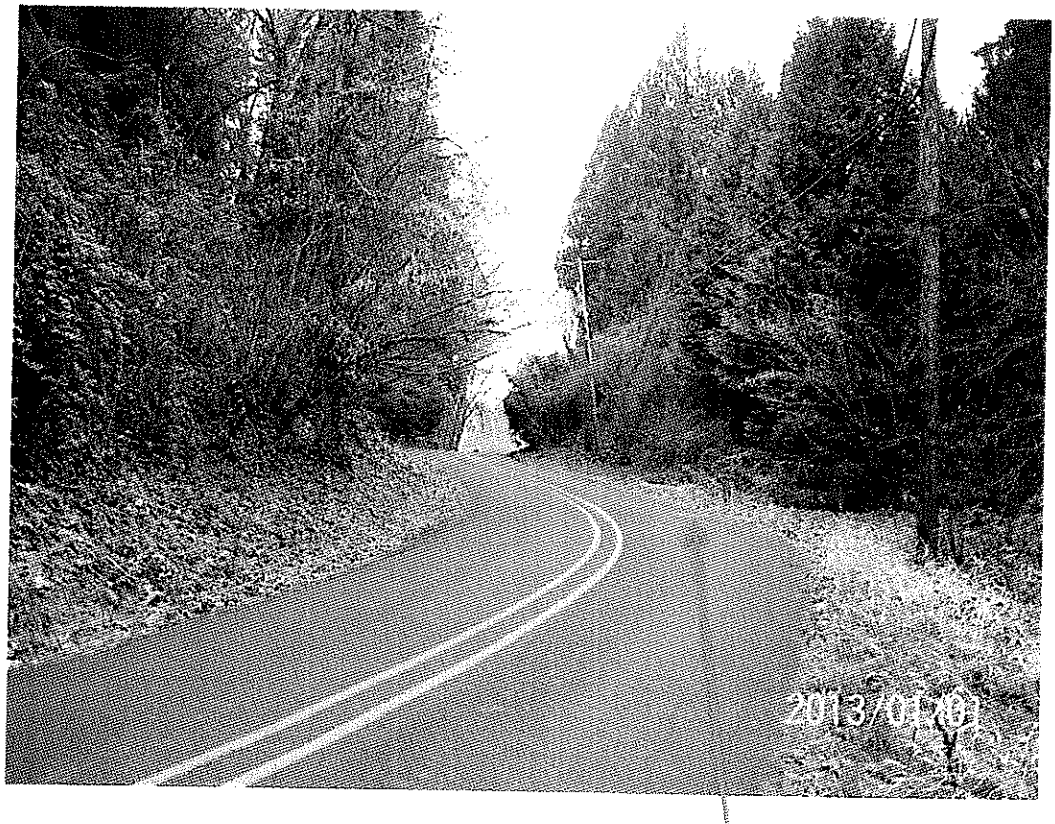
There will be important decisions being made which will affect Mapleton Avenue in perpetuity. How deep are the 42" & 48" water lines, how will it affect the other utilities, what is the impact on crossing laterals which will have to relocated, what is the impact of future laterals which will limit what development can be done, what is the impact to West Linn standard of undergrounding all franchise utilities? The list goes on and on. Many of these issues impact costs to the city in plan review and all future work on Mapleton Avenue. The Highway 43 ROW has identical issues but is under ODOT jurisdiction and has more physical space for accommodation. **These issues could be considered in determining an appropriate Franchise Fee.**

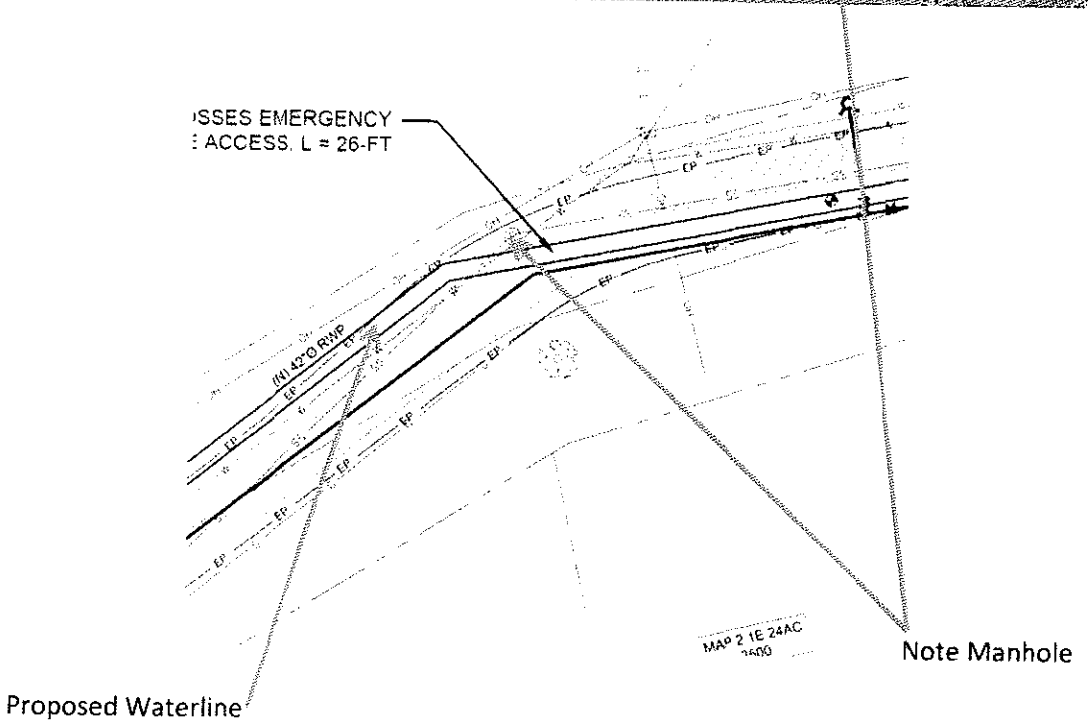
There is precedence to be set by this decision. If City Council passes on this authority, will the Planning Commission or City Council be able to ask for detailed explanation of critical engineering design choices in the future? Will they be able to demand that developers demonstrate that utilities can successfully service a site? Would a Neil Nedelisky, Herb Koss, or Vic Coombes have gotten away with such a nonchalant response to a requirement? My experience is no they would not have. I hope that City Council will agree that just because LOTWP represents two of our neighboring cities that they still have to abide by our codes when working in this city. I can also attest from personal experience that neither city would allow me to get away with not showing specific details of how to address the critical points of infrastructure installation during the planning process. I suppose in the future when asked by planning for details of how I plan to avoid impacts to the trees or conflicts with the existing utilities in West Linn I will just tell planning I will work it out with the City Engineer.

In all likelihood this work has been done by the applicant. However this information is not in the record and neither the Citizens, staff, Planning Commission, nor City Council are afforded the opportunity to review and comment. Among other problems this violates Goal 1 Citizen Involvement.

It would be imprudent and I am not saying that LOTWP would adopt a developer's approach to a difficult design situation, but it is said that some developers when faced with a challenging planning approval take the approach that it is better to ask forgiveness than permission. Is that the case here?

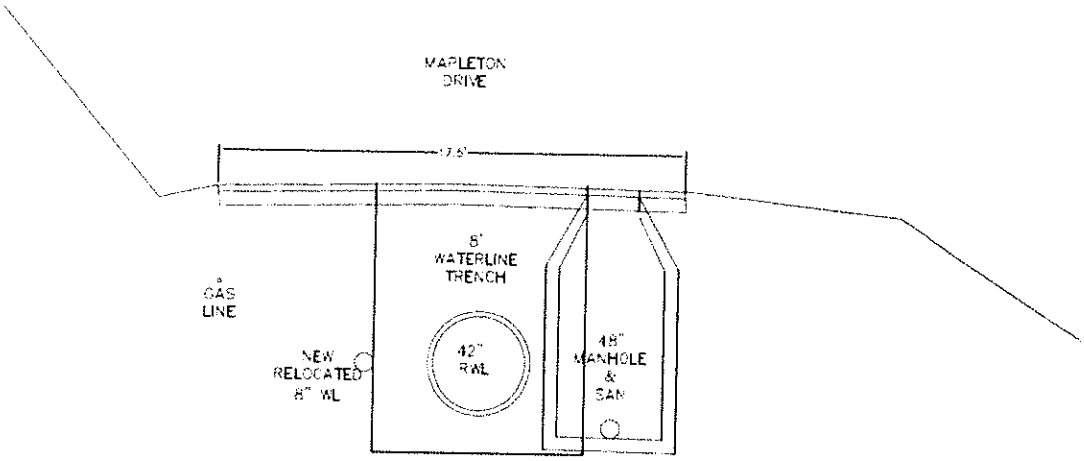
The following shows application layouts, photos and a rough cross section of a critical area.



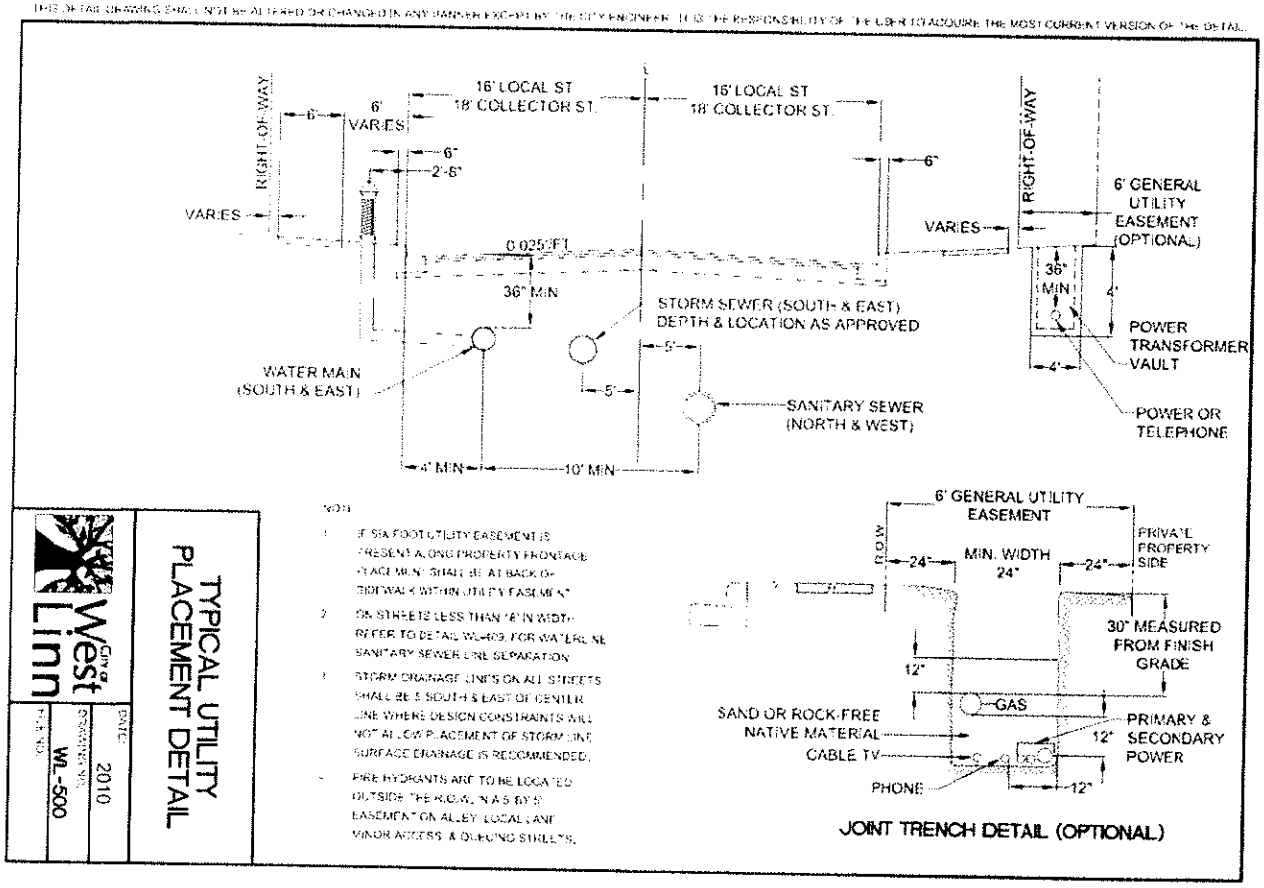


Note Manhole

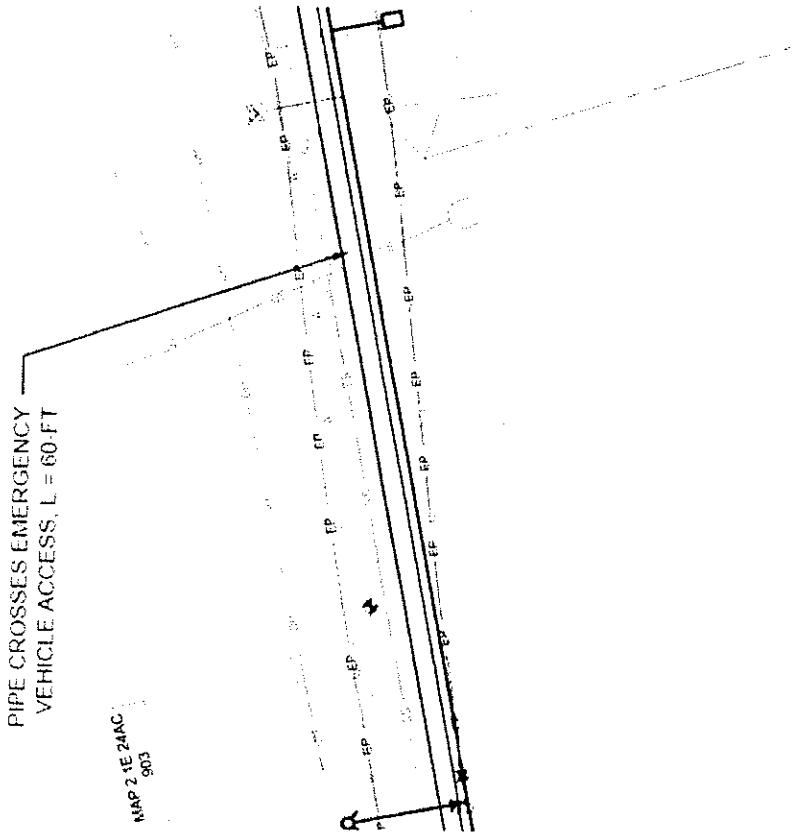
Proposed Waterline



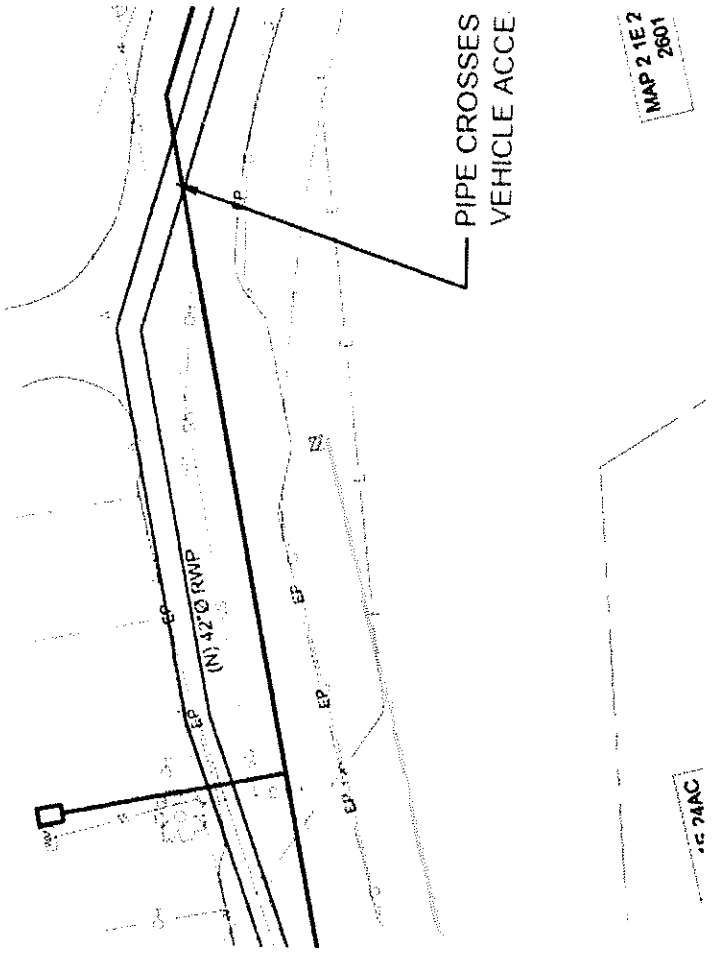
Actual exact location and depth of any utility is unknown, there seems to be a number of challenges with this layout regardless of depth, how is the applicant going to solve this? Is sanitary above water, below, where do laterals go? Are you undercutting the new water line? Extra maintenance and design requirements.



Herron Creek Crossing




2013/01/01


PIPE CROSSES
VEHICLE ACCE
MAP 2 1E 2
2601
EP
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EP
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74AC

Written testimony from
Michael Monical, PE, LEED A/P, MASCE
Professional Civil Engineer
35 years engineering experience
West Linn Utility Advisory Board Member

January 8, 2014

Subject: Agenda Bill 2014-01-13-01 LUBA Remand

Mayor Kovash should to recuse himself from the proceeding or the council needs to remove him from the proceedings and deliberations. His disgraceful behavior at the Jan 28, 2013 meeting, his continued belligerence in face of criticism, and his failure to apologize that has cost the city tens of thousands of dollars of unnecessary expense and many citizens untold grief.

Staff has erred in their analysis of the LUBA remand and demonstrated bias in their recommendations to the LUBA remand issues. Staff's report looks more like a Sales Brochure than something prepared by professional planners. Council should reject the report and all recommendations and give serious considerations to the issues before them.

This is the most monumental Land Use Case that West Linn has faced in recent years. Council should reject Staff's attempt to sweep this under the rug in a two day flurry of activity. There is no reason to rush this decision and every reason to carefully review and discuss the issues presented by citizens. The clear expectation of Staff that no testimony would be relevant of discussion and deliberation as demonstrated by scheduling a special meeting to sign a final order 2 days after hearing testimony is biased, unprofessional and frankly an embarrassing demonstration of misconduct. It is noted that Staff and the City Manager work for the City Council, not vice versa. City needs to start demanding professional and unbiased services directed by City Council, not the City Manager.

Submitted to the record by reference is the entire proceeding of the LUBA appeal for Council to consider in addition to substance of the final order. This includes all documents of the LUBA Appellants and the Responders which include the City, Lake Owego and Tigard. It is requested that Council read and understand the issues that are discussed. Also note that that **minor** issues are identified and dismissed by LUBA. Contrary to staff's assertion, there are no minor issues that are remanded. The Citizens of West Linn trust that Council will understand and addresses the substance of the remand.

Almost a year ago we saw Councilors Jones and Tan stand up to the overwhelming barrage of biased staff work, regional advocates, and testimony of lies, distortions, fabricated misfacts and partial truths about our code to focus on the issue that the LOTWP was not a benefit to this community. Unfortunately and under extremely suspicious circumstances, two weeks later we saw that stand was reversed and we were sold out for a mere $5 million dollars in a deal that saves (at the time) LOTWP a minimum of $50 million in construction cost nets them additional millions of dollars per years revenue. This "deal" leaves West Linn an ongoing liability of the oversized water line, increased risks, no permanent benefit of adequate emergency supply and the extraordinary pain of three years of major

construction of an Industrial Plant in our own residential neighborhood. In other words we were sold out and sold out cheap.

The change of the positions of the two councilors were a direct result of Mayor Kovash's misconduct, allowed additional testimony and changes to the Conditions which the Citizens of West Linn had no opportunity to respond to. Given the magnitude of the Council's action and the reversal of an extremely popular and widely supported Planning Commission Decision, Council should have allowed additional time to respond and should have sent the revised decision back to the Planning Commission for further deliberations.

In the intervening year Council has had the opportunity to see firsthand the negative impacts of the construction which has borne out the residents' fears and demonstrated the inability of the LOTWP to deliver an effective Construction Management Plan as promised.

I will address technical issues which are my area of expertise and specifically the so called benefits to our WSMP which was used to justify that sell out. The bottom line is there are none that justify the pain and suffering which the community of Mapleton residents is undergoing nor the future liability of the water line. The fact they sold a valuable city asset for virtually nothing is disgraceful. Two week before the final decision Council approved a 10 year PGE franchise agreement for a utility West Citizens actually use for over $7 million and $23 million over 40 years.

Addressing the Water System Master Plan benefits.

Due to Mayor Kovash's misconduct on January 28, 2014 the Appellant was able to submit testimony rebutting my submittal to the Council to which I had no opportunity to respond.

The facts are:

1. **LOTWP does not meet the requirements for emergency water for West Linn.**
2. **LOTWP does not provide $11-$12 Million water system improvement benefit to West Linn of water line improvements.**
3. **LOTWP has delayed our own needed water system improvements.**

These points are addressed in detail in attachment 2 and summarized below.

The intertie with Lake Oswego was never an issue, it is a state policy by OAR 690-086-0170 that Municipal Water Supply Element include "(b) Interconnection with other municipal supply systems and cooperative regional water management;". Attachment 1.

The threat that they would take it out if we did not cooperate was a lie and a threat. It is an already existing mutual "benefit" for which we have already paid for.

The so called $12 million dollar benefit of an additional crossing of the Willamette was a joke. The master plan specifically stated that it was not recommended. We already have a seismically secure water line on a seismically secure bridge. What the Master Plan calls for is either adequate storage or

access to a different source. The LOT waterline provides neither of those. This is like your neighbor parking his Cadillac in your driveway and claiming it is a benefit, equal to its value to you because you can use it to go to the emergency room if you are hurt. Even if that was an acceptable "benefit" and your own car does not work you would not sell him the parking space and you would require the benefit last as long as the Cadillac is there.

As is known by common sense and written specifically into the engineering calculations which appears in the Water System Master Plan, TWO straws in the SAME glass is NOT an emergency supply. Councilors please think about that statement.

About my testimony on these issues, no one, not our Public Works Director nor the representative from MSA could dispute the facts. Ed Sullivan the applicant's legal counsel challenged my testimony but he could not and did not say that it was wrong on two points and, as shown in attachment 3, his characterization of my third point as false is incorrect.

The LOTWP debacle has delayed needed work on our water system and preparations for the water reservoir. Sacrificing West Linn needs to service Lake Oswego's need without adequate mitigation and compensation has been a huge blunder by the City Council. Please take this opportunity to correct that blunder.

Attachments

1. State Policy on Interconnection.
2. Response to appellant testimony.

Monical Testimony Attachment 1

OAR 690-086-0170

Municipal Water Supply Element

The water supply element shall include at least the following:

(1) A delineation of the current and future service areas consistent with state land use law that includes available data on population projections and anticipated development consistent with relevant acknowledged comprehensive land use plans and urban service agreements or other relevant growth projections;

(2) An estimated schedule that identifies when the water supplier expects to fully exercise each of the water rights and water use permits currently held by the supplier;

(3) Based on the information provided in section (1) of this rule, an estimate of the water supplier's water demand projections for 10 and 20 years, and at the option of the municipal water supplier, longer periods;

(4) A comparison of the projected water needs and the sources of water currently available to the municipal water supplier and to any other suppliers to be served considering the reliability of existing sources;

(5) If any expansion or initial diversion of water allocated under existing permits is necessary to meet the needs shown in section (3) of this rule, an analysis of alternative sources of water that considers availability, reliability, feasibility and likely environmental impacts. The analysis shall consider the extent to which the projected water needs can be satisfied through:

(a) Implementation of conservation measures identified under OAR 690-086-0150;

(b) Interconnection with other municipal supply systems and cooperative regional water management; and

(c) Any other conservation measures that would provide water at a cost that is equal to or lower than the cost of other identified sources.

(6) If any expansion or initial diversion of water allocated under existing permits is necessary to meet the needs shown in section (3) of this rule, a quantification of the maximum rate and monthly volume of water to be diverted under each of the permits;

(7) For any expansion or initial diversion of water under existing permits, a description of mitigation actions the water supplier is taking to comply with legal requirements including but not limited to the Endangered Species Act, Clean Water Act, Safe Drinking Water Act; and

(8) If acquisition of new water rights will be necessary within the next 20 years to meet the needs shown in section (3) of this rule, an analysis of alternative sources of the additional water that considers availability, reliability, feasibility and likely environmental impacts and a schedule for development of the new sources of water. The analysis shall consider the extent to which the need for new water rights can be eliminated through:

(a) Implementation of conservation measures identified under OAR 690-086-0150;

(b) Interconnection with other municipal supply systems and cooperative regional water management; and

(c) Any other conservation measures that would provide water at a cost that is equal to or lower than the cost of other identified sources.

Stat. Auth.: ORS 536.027, ORS 537.211 & ORS 540.572
Stats. Implemented: ORS 537.230, ORS 537.630 & ORS 539.010
Hist.: WRD 11-1994, f. & cert. ef. 9-21-94; WRD 4 2002, f. & cert. ef. 11-1-02, Renumbered from 690-086-0140(4)

Monical Testimony - Attachment 3

In the Appellant's February 8th, written testimony by Appellants Council Edwards Sullivan's begins on page 8.

"In this testimony Mr. Monical asserts:

1. "The water master plan directs the connection to Portland's Water System, not support for another connection to the Clackamas River"

The appellant in testimony before the Planning Commission stated that existing hydraulic constraints in the piping between the Tigard and Lake Oswego water systems that would allow water from Portland to pass into Lake Oswego is constrained to only 2 million gallons per day. The 2008 West Linn Water Master Plan identifies that pursuing this option would involve negotiating new intergovernmental agreements and "...probable participation in funding a portion of the transmission system intertie improvements." The water master plan included an estimated cost of $2.2 million dollars (2006 dollars) for this connection. In subsequent testimony to the Council, the Partnership has testified it is ready to provide a more reliable source of backup and emergency water of at least 4 mgd of water through 2041 and access to multiple sources of supply at NO COST TO WEST LINN."

Note that Mr. Sullivan does not deny the Water System Master plan directs connection to the Portland/ Washington County Water Systems. He obscures that fact that there are NO plans to install FIRM pumping capacity to get up to two million gallons of water (more than enough in an emergency) of water from an ALTERNATE SOURCE WITH CAPACITY or that LOTWP offers a substitute which **is neither another source nor a permanent capacity**. Two straws in the same glass are not an emergency supply. The fact is the existing LO line already supplies that capability and does not meet the criteria for emergency supply as identified in the WSMP which is why a Portland/Washington County Intertie is included in the Master Plan.

Page 6-9 of the WSMP states

Solution Approach C: Improve the Emergency Supply Capacity and Reliability of the Lake Oswego Emergency Supply Connection

...

An element of these discussions includes the construction of a transmission system intertie that connects the City of Portland supply to Tigard through the Washington County Supply

....

Page 6-15 "It was further directed to pursue development of reliable emergency supply capacity with the cities of Lake Oswego, Tigard and others in accordance with Solution Approach C."

This approach is hopelessly outdated now but the fact remains that the **LOTWP project does nothing to support our water supply needs as defined by the Water System Master Plan**.

Mr. Sullivan continues

[Mr. Monical] 2. "An $11 million savings to West Linn does not and never has existed: it is a fabrication on the part of LOT to claim benefits which do not exist."

The appellant directs the Council's attention to Figure ES-1 on page ES-6 of the 2008 Water Master Plan. In this figure Solution Approach B would involve construction of a new parallel water transmission main crossing the Willamette River. The cost of that solution is estimated at $8 million dollars (2006 dollars). This was updated in the October 16, 2012 letter from Murray Smith & Associates to a current value of $11.6 million dollars. The assertions by Mr. Monical are false, misleading, and contradicted by West Linn's consulting engineers and Public Works Director.

This is a joke and I assume Mr. Sullivan correctly assumes that neither Council nor Staff will actually look has his citation.

WSMP pg 5-8

"Finished Water Transmission Main (Willamette River Crossing)
Given that the existing 24-inch diameter transmission main has adequate capacity to meet the long-term transmission needs of the City, it is not recommended that the City pursue development of a new river crossing at this time."

WSMP pg ES-11

"Study Recommendations
It is recommended that the City of West Linn take the following actions:
1. Formally adopt this study as the City of West Linn's Water System Master Plan.
2. Adopt the prioritized recommended system improvements described in Section 8 and specifically listed in Tables 8-5 and 8-6 as the CMP and the CIP for the City's water service area.
3. Immediately proceed with supply system reliability improvements referred to as Approach C, which improves the emergency supply capacity and reliability of the Lake Oswego Emergency Supply Connection.
4. Proceed with the detailed water rate and SDC analysis recommended above and follow the recommendations generated through these processes.
5. Review and update this plan within seven (7) to 10 years or sooner, to accommodate changes or new conditions."

Approach C does not recommend a parallel crossing of the Willamette. Tables 8-5 & 8-6 do not include a project for the crossing.

Mr. Sullivan continues

[Mr. Monical] 3. "Reliance on Lake Oswego for emergency supply is detrimental to West Linn, not a benefit. It delays the construction of our needed storage, storage that EVERY other jurisdiction in the area has."

There is no evidence, testimony or facts supporting Mr. Monical's assertion that approval of AP 12-02 and AP 12-03 will delay construction of any water system improvements recommended in the City's approved Water Master Plan. On the contrary, the $5 million dollars that the City intends to assess the appellant for use of its right of way, if the applications are approved, could be used to fund over 56% of the cost of a new 4 MG gallon Bolton Reservoir4, which could start immediately rather than depend on the outcome of a future bond measure that would have to be approved by voters due to the City's water rate charter limitations.

As a member of the Utility Advisory Board I have been personally involved AS DIRECTED BY COUNCIL, in planning funding for the both Water Line repair and a new Water Reservoir. We have been personally briefed as early as 2009 and as late as 2012 that we needed to start serious engineering investigations for the Water Reservoir in 2012 and programing for construction in 2014-2015. That has not happened. It was Goal No. 4 of the City Council's 2012 Priorities.

The Utility Advisory Board spent all of 2011 and 2012 discussing how to fund these items. In 2012 staff formed a special Water System Improvement Task Force committee to assist in evaluating and educating the public on the need. On Dec 10 2012 Council voted to a ballot measure to fund water line repairs which also would have freed capital for needed preliminary planning and preparation for the Water Reservoir. On Jan 14 2013 Council "postponed" our own needs and as I understand it the City sued Clackamas County to remove the water measure from the ballot in order that it would not interfere with the LOT citing the "citizens would be confused". Thereby wasting a year of work by the UAB and others and tens of thousands of dollars in legal fees and staff time.

So the facts are that:

1. **LOTWP does not meet the requirements for emergency water for West Linn.**
2. **LOTWP has delayed ballot measures for our own needed water system improvement.**
3. **LOTWP does not provide $11-$12 Million benefit to West Linn.**

H. PHILIP EDER (1927-2004)
TIFFANY A. ELKINS*
J. MICHAEL HARRIS
PEGGY HENNESSY*
GARY K. KAHN*
MARTIN W. REEVES*

*Also Admitted in Washington

REEVES, KAHN, HENNESSY & ELKINS

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July 10, 2013

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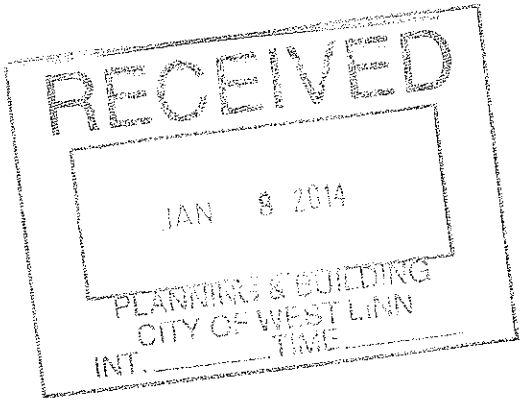

RE: *Stop Tigard Oswego Project, LLC, et al v. City Council of West Linn*
Clackamas County Circuit Court Case No. CV13040373

Dear Clients:

Attached please find Defendants' First Request for the Production of Documents. This is part of the pre-trial process known as discovery during which each side gets to inquire about the other sides' position. Unless there is a valid reason to object to a particular request, we must comply to the maximum extent possible.

In producing documents which are responsive to these requests, please do not produce any communication or correspondence between any of you and any of the lawyers involved in this process. Those are absolutely privileged and need not be provided. In reviewing the requests, while some of them are very broad, we believe they are all within the rules and we must respond. Although I don't think this is an issue, with respect to requests number 3 and 5, the only pertinent documents relate to the violation of the public meeting laws that we have alleged in the complaint. If you have documents pertaining to any other type of violation of the public meeting laws, those do not need to be provided.

It is possible, if not likely, that there will be no documents responsive to several requests including numbers 6, 7, 8, 10 and 11. If this is the case, please let us know. As I believe you are aware, all deadlines in the case have been temporarily suspended pending a ruling on several motions. Thus, we have no pending deadline but one could be imposed at any time. Thus we urge you to begin compiling the documents as quickly as possible.

We understand this is a burdensome task, however, it is part of the process and must be followed.

Please call us with any questions.

Sincerely,

REEVES, KAHN, HENNESSY & ELKINS

Peggy Hennessy

Peggy Hennessy

PH/blb
Enclosure

BEH ATTORNEYS AT LAW | Beery Elsner & Hammond LLP

June 5, 2013

SENT VIA FIRST-CLASS MAIL

Andrew H. Stamp
Andrew H. Stamp, P.C.
4248 Galewood St., Ste 16
Lake Oswego, OR 97035-2405

Re: *STOP, et al. v. City Council of West Linn, et al*
Clackamas County Circuit Court Case No. CV13040373

Dear Andrew:

Enclosed please find Defendants' First Request for Production of Documents to Plaintiffs.

Sincerely,

Christopher D. Crean

CDC/yh
Enclosure
cc: Megan Thornton

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Portland OR 97201-5106
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BEH

IN THE CIRCUIT COURT OF THE STATE OF OREGON

FOR THE COUNTY OF CLACKAMAS

STOP TIGARD OSWEGO PROJECT, LLC, ("STOP"), an Oregon Limited Liability Company, NORMAN KING, KEVIN BRYCK, WILLIAM J. MORE, CURT SOMMER, MIKE MONICAL, PETE BEDARD, KARIE OAKES, DAVE FROODE, SHANON VROMAN, THOMAS J SIEBEN, KEN PRYOR, SHERRY PRYOR, JAY ERIC JONES, GRACE CRARY, MCKINZEY HOLDER, ALISON HENDERSON, BOB STWOELL, and SCOTT GERBER, Plaintiffs, v. CITY COUNCIL OF WEST LINN, the Governing body of the City of West Linn, JOHN KOVASH, JODY CARSON, JENNI TAN, and MIKE JONES, Defendants.	Case No. CV13040373 DEFENDANTS' FIRST REQUEST FOR PRODUCTION OF DOCUMENTS TO PLAINTIFFS

To: **PLAINTIFFS STOP TIGARD OSWEGO PROJECT, LLC, NORMAN KING, KEVIN BRYCK, WILLIAM J. MORE, CURT SOMMER, MIKE MONICAL, PETE BEDARD, KARIE OAKES, DAVE FROODE, SHANON VROMAN, THOMAS J. SIEBEN, KEN PRYOR, SHERRY PRYOR, JAY ERIC JONES, GRACE CRARY, MCKINZEY HOLDER, ALISON HENDERSON, BOB STOWELL, and SCOTT GERBER, and their attorney of record, ANDREW H. STAMP, P.C., 4248 Galewood St., Ste. 16, Lake Oswego, OR 97035-2405**

Pursuant to ORCP 36 and 43, Defendants West Linn City Council, John Kovash, Jody Carson, Jenni Tan and Mike Jones (collectively "Defendants") request that Plaintiffs Stop Tigard Oswego Project, LLC, Norman King, Kevin Bryck, William J. More, Curt Sommer, Mike Monical, Pete Bedard, Karie Oakes, Dave Froode, Shanon Vroman, Thomas J. Sieben, Ken

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Pryor, Sherry Pryor, Jay Eric Jones, Grace Crary, McKinzey Holder, Alison Henderson, Bob Stowell, and Scott Gerber (collectively "Plaintiffs"), and their attorneys, respond to the following Request for Production, and produce the following documents and things for inspection and copying **within 30 days** of service of these Requests, at the law offices of Defendants' counsel, Christopher D Crean, Beery, Elsner & Hammond, LLP, 1750 SW Harbor Way, Suite 380, Portland, Oregon 97201-5106.

DEFINITIONS AND INSTRUCTIONS

A. The terms "**document**" or "**documents**" as used herein refer to all written, graphic and/or media matter, however produced or reproduced, of every kind and description that is in the actual or constructive possession of Plaintiffs or under the custody, care, or control of any agent, representative, or person that will respond to Plaintiffs' direction, including, but not limited to emails, text messages, video clips, voice messages, papers, books, letters, photographs, maps, objects, tangible things, floppy disks or other magnetic or photo electronic media, correspondence, drafts, memoranda, interoffice communications, reports, contracts, agreements, journals, calendars, appointment books, diaries, logs, notations, plans, computer printouts, pleadings, depositions, notes or sound recordings of any conversation, notes of meetings or conferences, and minutes of any meetings.

B. The term "**relating to**" as used herein shall mean relevant in any way to the subject matter

C The term **"identify"** means the full name of the person, place of employment, title of employment, and relation to **Plaintiffs**.

D. The term "**or**" as used herein means both the disjunctive and conjunctive as in the expression "and/or."

E The term "**Plaintiffs**" refer collectively and individually to Stop Tigard Oswego Project, LLC, Norman King, Kevin Bryck, William J More, Curt Sommer, Mike Monical, Pete Bedard, Karie Oakes, Dave Froode, Shanon Vroman, Thomas J. Sieben, Ken Pryor, Sherry

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Pryor, Jay Eric Jones, Grace Crary, Mckinzey Holder, Alison Henderson, Bob Stowell, and Scott Gerber, or any individual or entity acting on their behalf, and their predecessors and successors.

F. The term **"Complaint"** refers to the First Amended Complaint filed by **Plaintiffs** in the Clackamas County Circuit Court on May 9, 2013, captioned *Stop Tigard Oswego Project, LLC, et al. v. West Linn City Council, et al.*, Case No. CV 13040373.

G. If you contend you are entitled to withhold from production any or all **documents** identified herein on the basis of attorney/client privilege, work product doctrine, or other ground, then do the following with respect to each and every **document**:

1. Describe the nature of the **document**, in sufficient particularity to **identify** it and to enable you to identify or disclose it in response to an order of the Court, including the date and subject matter of such **document**;

2. **Identify** the person(s) who prepared the **document**;

3. **Identify** the person(s) who sent and received the original and copy of the **document**, **or** to whom the **document** was circulated, **or** its contents communicated or disclosed;

4. State the basis upon which you contend you are entitled to withhold the **document** from production; and

5. State the date of the **document**.

H This request is a continuing one. If, after producing **documents**, you obtain or become aware of any further **documents** responsive to this request, you are required to produce such additional **documents**.

REQUESTED DOCUMENTS

REQUEST NO. 1: All **documents relating to** any and all communications whatsoever, including but not limited to correspondence, email, faxes, text messages, voice messages and other forms of memorialized communications, between, among and/**or** by:

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Portland, Oregon 97201-5106
Tel 503 226 7191; Fax 503 226 2348

(1) Stop Tigard Oswego Project, LLC, on the one hand, and any person that was a council or staff member of the City Council of West Linn from the period of January 17, 2012 to the present;

(2) Norman King, on the one hand, and any person that was a council or staff member of the City Council of West Linn from the period of January 17, 2012 to the present;

(3) Kevin Bryck, on the one hand, and any person that was a council or staff member of the City Council of West Linn from the period of January 17, 2012 to the present;

(4) William J. More, on the one hand, and any person that was a council or staff member of the City Council of West Linn from the period of January 17, 2012 to the present;

(5) Curt Sommer, on the one hand, and any person that was a council or staff member of the City Council of West Linn from the period of January 17, 2012 to the present;

(6) Mike Monical, on the one hand, and any person that was a council or staff member of the City Council of West Linn from the period of January 17, 2012 to the present;

(7) Pete Bedard, on the one hand, and any person that was a council or staff member of the City Council of West Linn from the period of January 17, 2012 to the present;

(8) Karie Oakes, on the one hand, and any person that was a council or staff member of the City Council of West Linn from the period of January 17, 2012 to the present;

(9) Dave Froode, on the one hand, and any person that was a council or staff member of the City Council of West Linn from the period of January 17, 2012 to the present;

(10) Shanon Vroman, on the one hand, and any person that was a council or staff member of the City Council of West Linn from the period of January 17, 2012 to the present;

(11) Thomas J. Sieben, on the one hand, and any person that was a council or staff member of the City Council of West Linn from the period of January 17, 2012 to the present;

(12) Ken Pryor, on the one hand, and any person that was a council or staff member of the City Council of West Linn from the period of January 17, 2012 to the present;

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(13) Sherry Pryor, on the one hand, and any person that was a council or staff member of the City Council of West Linn from the period of January 17, 2012 to the present;

(14) Jay Eric Jones, on the one hand, and any person that was a council or staff member of the City Council of West Linn from the period of January 17, 2012 to the present;

(15) Grace Crary, on the one hand, and any person that was a council or staff member of the City Council of West Linn from the period of January 17, 2012 to the present;

(16) McKinzey Holder, on the one hand, and any person that was a council or staff member of the City Council of West Linn from the period of January 17, 2012 to the present;

(17) Alison Henderson, on the one hand, and any person that was a council or staff member of the City Council of West Linn from the period of January 17, 2012 to the present;

(18) Bob Stowell, on the one hand, and any person that was a council or staff member of the City Council of West Linn from the period of January 17, 2012 to the present; and

(19) Scott Gerber, on the one hand, and any person that was a council or staff member of the City Council of West Linn from the period of January 17, 2012 to the present

RESPONSE:

REQUEST NO. 2: All **documents relating to** any and all communications whatsoever between any **Plaintiff** and any Neighborhood Association and/or any Neighborhood Association member **relating to** Lake Oswego Tigard Partnership's ("LOT") appeal of the West Linn Planning Commission's denial of the proposed water treatment plan and pipeline at issue in this lawsuit.

RESPONSE:

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1750 SW Harbor Way, Suite 380
Portland, Oregon 97201-5106
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REQUEST NO. 3: All **documents relating to** any and all communications whatsoever between any **Plaintiff** and any Neighborhood Association and/**or** any Neighborhood Association member **relating to** any purported violation of the Public Meeting Laws (ORS 192.610 *et seq.*) by any Defendant.

RESPONSE:

REQUEST NO. 4: All **documents relating to** any and all communications whatsoever between and/**or** among any **Plaintiffs relating to** LOT's appeal of the West Linn Planning Commission's denial of the proposed water treatment plan and pipeline at issue in this lawsuit.

RESPONSE:

REQUEST NO. 5: All **documents relating to** any and all communications whatsoever between and/**or** among any **Plaintiffs relating to** any purported violation of the Public Meeting Laws (ORS 192.610 *et seq.*) by any Defendant.

RESPONSE:

REQUEST NO. 6: All **documents** that **identify** any and all witnesses to the purported meeting **or** meetings that allegedly violated the Public Meeting Laws (ORS 192 610 *et seq.*).

RESPONSE:

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REQUEST NO. 7: All **documents** that **identify** any and all persons with knowledge of the purported meeting **or** meetings that allegedly violated the Public Meeting Laws (ORS 192.610 *et seq.*).

RESPONSE:

REQUEST NO. 8: All **documents** that record **or** otherwise memorialize the purported meeting **or** meetings that allegedly violated the Public Meeting Laws (ORS 192.610 *et seq.*).

RESPONSE:

REQUEST NO. 9: All **documents** of agreements between **or** among any **Plaintiffs relating to** the subject matters of this action, including, but not limited to, the water treatment plan, pipeline, and purported meeting **or** meetings in violation of the Public Meeting Laws (ORS 192.610 *et seq.*)

RESPONSE:

REQUEST NO. 10: All **documents** demonstrating **or** otherwise supporting **Plaintiffs'** allegation in paragraph 15 of the **Complaint** that Mayor Kovash "knowingly and purposefully scuttled the voting process that would have otherwise taken place" and that Mayor Kovash's "purpose in disclosing *ex parte* contacts" was to delay the vote.

RESPONSE:

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Tel 503.226.7191; Fax 503.226.2348

REQUEST NO. 11: All **documents** that demonstrate **or** otherwise support **Plaintiffs'** allegations that Defendants' alleged violations were an "intentional" disregard **or** "willful misconduct," as alleged in paragraph 37 of the **Complaint.**

RESPONSE:

REQUEST NO. 12: All **documents** that demonstrate or otherwise support **Plaintiffs'** allegations in Paragraph 21 of the **Complaint** that Mayor Kovash committed perjury.

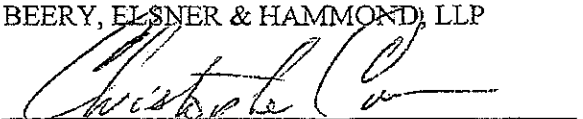
RESPONSE:

REQUEST NO. 13: All **documents relating to** any and all efforts, if any, by **Plaintiffs** to inquire about and explore the alleged *ex parte* contacts disclosed by Mayor Kovash during the period of January 17, 2012 to the present

RESPONSE:

DATED this 5th day of June, 2013.

BEERY, ELSNER & HAMMOND, LLP



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Of Attorneys for Defendants

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CERTIFICATE OF SERVICE

I hereby certify that on the date indicated below, I caused to be served a copy of the foregoing DEFENDANTS' FIRST REQUEST FOR PRODUCTION OF DOCUMENTS TO PLAINTIFFS on:

Andrew H. Stamp
Andrew H. Stamp PC
4248 Galewood St., Ste. 16
Lake Oswego, OR 97035-2405
Attorney for Plaintiff

by the following indicated method or methods:

☒ by **First-Class Mail**

☐ by **Hand-Delivery**

☐ by **Overnight Delivery**

☐ by **Facsimile Transmission**

☐ by **Electronic Mail**

☐ by **CM/ECF**

DATED this 5th day of June, 2013.

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September 30, 2013

Clerk
Oregon Land Use Board of Appeals
DSL Building
775 Summer Street NE, Suite 330
Salem OR 97301-1283

Re: Stop Tigard Oswego Project ("STOP") et al. vs. City of West Linn, et al.
Consolidated LUBA Case Nos. 2013-021, 2013-022 and 2013-023
Petitioners' Reply Brief (LUBA Case No. 2013-023)

Dear Clerk:

I am enclosing the original plus four copies of Petitioners' Reply Brief for filing in LUBA Case No. 2013-023. Please note that this case has been set for oral argument on Thursday morning, October 3, 2013 at 11:00am.

Thank you

Sincerely,

REEVES, KAHN, HENNESSY & ELKINS

Peggy Hennessy

Peggy Hennessy

PH:blb
Enclosures
cc w/Enclosure (via Federal Express-Overnight Delivery):

Andrew H. Stamp; Attorney for Petitioners (LUBA Nos. 2013-021 & 022)
Megan K. Thornton; Attorney for City of West Linn
Edward J. Sullivan/Carrie A. Richter; Attorneys for Intervenor-Respondents
City of Lake Oswego and Lake Oswego-Tigard Water Partnership
Christopher D. Crean; Attorney for City of West Linn
Timothy V. Ramis; Attorney for Intervenor-Respondent City of Tigard

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BEFORE THE LAND USE BOARD OF APPEALS

FOR THE STATE OF OREGON

STOP TIGARD OSWEGO PROJECT, LLC ("STOP"), NORMAN KING, PETE BEDDARD, MICHAEL MONICAL, CAROL ELSWORTH, MARK ELSWORTH, SHANNON VROMAN, JENNE HENDERSON, LAMONT KING, THOMAS J. SIEBEN, GWEN SIEBEN, SCOTT GERBER, JAN GERBER, JACK NORBY, THOM HOLDER, GARY HITESMAN, REBECCA WALTERS, and DARRYL WALTERS, Petitioners, vs. CITY OF WEST LINN, Respondent, CITY OF LAKE OSWEGO, LAKE OSWEGO-TIGARD WATER PARTNERSHIP, and CITY OF TIGARD Intervenor-Respondents. LUBA Nos. 2013-021 and 2013-022	LUBA Nos. 2013-021, 2013-022, and 2013-023 (consolidated) PETITIONERS' MOTION TO FILE REPLY BRIEF IN LUBA No. 2013-023
WILLIAM J. MORE, CARL L. EDWARDS, LINDA S. EDWARDS, CURT SOMMER and ROBERT STOWELL, Petitioners, vs. CITY OF WEST LINN Respondent, CITY OF LAKE OSWEGO, LAKE OSWEGO-TIGARD WATER PARTNERSHIP, and CITY OF TIGARD, Intervenor-Respondents LUBA No. 2013-023	

REEVES, KAHN, HENNESSY & ELKINS
Attorneys at Law
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Portland, Oregon 97286-0100
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COME NOW Petitioners in LUBA Case No 2013-023, by and through their attorney, Peggy Hennessy, and move this Board pursuant to 661-010-0039 for an Order Allowing a Reply Brief to address new matters raised in the briefs of Respondent West Linn and Intervenor-Respondent Lake Oswego

DATED: September 30, 2013

REEVES, KAHN, HENNESSY & ELKINS

Peggy Hennessy, OSB #872505
Of Attorneys for Petitioners in
LUBA Case No. 2013-023

****

IT IS HEREBY ORDERED that Petitioners May File a Reply Brief in LUBA No. 2013-023.

DATED: October _____, 2013.

LAND USE BOARD OF APPEALS

By: _____

Title: _____

REEVES, KAHN, HENNESSY & ELKINS
Attorneys at Law
4035 SE 52nd Avenue
P.O. Box 86100
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(503) 777-5473 - FAX (503) 777-8566

CERTIFICATE OF FILING

I hereby certify that on September 30, 2013, I filed the original, plus four copies of this PETITIONERS' MOTION TO FILE A REPLY BRIEF and [PROPOSED] ORDER in LUBA Case No. 2013-023, together with four copies of PETITIONERS' [PROPOSED] REPLY BRIEF, with the Land Use Board of Appeals, DSL Building, 775 Summer Street NE, Suite 330, Salem OR 97301-1283 by FEDERAL EXPRESS OVERNIGHT DELIVERY

Dated this 30th day of September, 2013.

REEVES, KAHN, HENNESSY & ELKINS

Peggy Hennessy

Peggy Hennessy, OSB #872505
Of Attorneys for Petitioners
(LUBA Case No. 2013-023)

CERTIFICATE OF SERVICE

I hereby certify that I served the foregoing PETITIONERS' MOTION TO FILE A REPLY BRIEF and [PROPOSED] ORDER in LUBA Case No. 2013-023, together with two true copies of PETITIONERS' [PROPOSED] REPLY BRIEF on September 30, 2013, via FEDERAL EXPRESS OVERNIGHT DELIVERY to the following individuals to the following addresses:

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(LUBA Nos. 2013-021 & 022)

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Jordan Ramis PC
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Lake Oswego, OR 97035
Attorney for Intervenor-Respondent
City of Tigard

DATED this 30th day of September, 2013.

REEVES, KAHN, HENNESSY & ELKINS

Peggy Hennessy

Peggy Hennessy, OSB #872505
Of Attorneys for Petitioners
(LUBA Case No. 2013-023)

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BEFORE THE LAND USE BOARD OF APPEALS

FOR THE STATE OF OREGON

STOP TIGARD OSWEGO PROJECT, LLC ("STOP"), NORMAN KING, PETE BEDDARD, MICHAEL MONICAL, CAROL ELSWORTH, MARK ELSWORTH, SHANNON VROMAN, JENNE HENDERSON, LAMONT KING, THOMAS J. SIEBEN, GWEN SIEBEN, SCOTT GERBER, JAN GERBER, JACK NORBY, THOM HOLDER, GARY HITESMAN, REBECCA WALTERS, and DARRYL WALTERS,
Petitioners,

vs.

CITY OF WEST LINN,
Respondent,

CITY OF LAKE OSWEGO, LAKE OSWEGO-TIGARD WATER PARTNERSHIP, and CITY OF TIGARD
Intervenor-Respondents.

LUBA Nos. 2013-021 and 2013-022

WILLIAM J. MORE, CARL L. EDWARDS, LINDA S. EDWARDS, CURT SOMMER and ROBERT STOWELL,
Petitioners,

vs.

CITY OF WEST LINN
Respondent,

CITY OF LAKE OSWEGO, LAKE OSWEGO-TIGARD WATER PARTNERSHIP, and CITY OF TIGARD,
Intervenor-Respondents.

LUBA No. 2013-023

PETITIONERS' REPLY BRIEF
LUBA NO. 2013-023

Filed on Behalf of Petitioners
WILLIAM J. MORE, CARL L. EDWARDS, LINDA S. EDWARDS, CURT SOMMER and ROBERT STOWELL

SEPTEMBER, 2013

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LUBA Nos. 2013-021 & 022

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LUBA No. 2013-023

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I. INTRODUCTION

Petitioners file this [proposed] reply brief to address new matters raised in the Response Briefs of the City of West Linn (hereinafter, "WL Response") and the City of Lake Oswego (hereinafter, "LO Response") Petitioners' Reply Brief will focus on replies to West Linn's arguments relating to Mayor Kovash's *ex parte* contacts and the City Council's failure to vote on challenges to Mayor Kovash's impartiality. In addition, Petitioners will respond to Lake Oswego's attack on the credentials and qualifications of Petitioners' expert, Dr. Michael Wilkerson, as it relates to Respondent's obligation to adopt *Norvell* findings

II. ARGUMENT

A. Mayor Kovash's *ex parte* contacts had a bearing on a material issue and related to applicable approval criteria so the failure to adequately disclose the substance of the communications warrants remand.

West Linn relies on *Link vs. City of Florence*, 58 Or LUBA 348 (2009) to support its position that the subject of Mayor Kovash's *ex parte* communication does not affect the basis of the City's decision. WL Response at 9-10. In *Link*, LUBA found that

> [T]here must be some indication that the communication had something to do with the factual determinations or legal standards that govern approval or denial of the application. The goal of prohibiting undisclosed *ex parte* contacts is to ensure that land use decisions are based on information or evidence the decision makers receive within the public process, and are not based on legal arguments or evidence received outside the public process. *Carrigg v. City of Enterprise*, 48 Or LUBA 328, 333 (2004). *Link*, 58 OR LUBA at 353

In *Link*, one of the councilor's stated that "the crowd he has been in contact with has been very supportive of the annexation." *Link*, 58 Or LUBA at 352. This generic reference to support by a crowd can be distinguished from Mayor Kovash's actions in seeking out statements from neighborhood associations to controvert evidence in the record. In this case, Mayor Kovash's *ex parte* communications pertain to issues that were ***material considerations*** for both Councilor Jones and Councilor Tan when they made their January 28, 2013 announcements that they would be voting to deny the LOT applications.

As explained in the Petition for Review, Councilor Jones relied heavily on the neighborhood associations' opposition to the LOT project to support his January 28, 2013 position that the granting of the proposal ***fails to meet CDC 60.070 (A) (3)*** because it will **NOT** provide for a facility that is consistent with the overall needs of the community. Councilor Jones specifically stated:

> While the overall needs of LOT are being met it is clearly asserted by the Planning Commission that the overall needs of the community are not being met. That is, considering the totality of need West Linn and, in particular, communities inside West Linn will be made to suffer disproportionat[e]ly. This is supported by the record which states that 7 Neighborhood Associations voted, at one level or another, to support the Robinwood Neighborhood Association's opposition to these applications. LUBA No. 2013-023 Petition for Review at 23, *citing* R at 620B.

Neighborhood association support is directly relevant to the "overall needs of the community." Moreover, neighborhood support was a "material issue" that influenced both Councilor Jones' and Councilor Tan's January 28, 2013 announcements that they did not believe that LOT had satisfied the mandatory approval criteria. While Mayor Kovash did disclose the fact of two *ex parte* contacts, notwithstanding multiple requests, he refused to disclose the source of those contacts. Remand is required to provide for full disclosure of the substance of the communication and allow all parties a ***meaningful*** opportunity to respond.

B. The City Council's failure to vote on multiple challenges to Mayor Kovash's impartiality violated CDC 99.180 and prejudiced Petitioners' substantial rights.

In West Linn's response to Petitioners' Third Assignment of Error, West Linn attempts to rewrite CDC 99.180 (B) (3) by changing the word "shall" to "may." CDC 99.180 (B) (3) clearly states that ***"[a]ny challenge SHALL require that the hearing body vote on the challenge*** pursuant to subsection E." [Emphasis added]. Subsection E provides:

> E. Abstention and disqualification. Disqualification for reasons other than the member's own judgment may be ordered by a majority of the members of a hearing body present and voting. The member who is the subject of the motion for disqualification may not vote on the motion but shall be allowed to participate in the deliberation of the hearing body on that motion.

The first sentence of subsection E simply acknowledges that a member of the hearing body ***may*** disqualify him/herself based upon his/her own judgment (voluntary abstention); or, the voting members ***may*** disqualify the challenged member based upon a majority vote (disqualification). The word "may" pertains to the disqualification – not to the vote. The vote is mandatory ("shall"), but disqualification by the hearing body is permissive ("may"). The vote may be to deny the challenge, in which case there would be no disqualification.

The second sentence of subsection E allows the challenged member to participate in the deliberation regarding disqualification (e.g. member can argue against disqualification), but prohibits the challenged member from voting. Nothing in CDC 99.180 (E) takes away the ***absolute right*** of any affected part (as evidenced by use of the word "shall" in CDC 99.180 (B) (3)) to have the hearing body vote on a challenge to impartiality.

West Linn claims that "because the basis for the challenges questioned only the ***Mayor's judgment***, the City Council properly exercised its ***discretionary*** authority and declined to schedule a vote on the challenges." WL Response at 20. However, all challenges relating to bias, pre-judgment, personal interest, and other indications of impartiality are necessarily going to question the challenged member's judgment. These are precisely the challenges an affected party is allowed to bring under CDC 99.180 (B) (1).

The vote is mandatory under CDC 99.180 (B) (3). Disqualification is discretionary under 99.180 (E), but there is no discretion to eliminate the affected party's absolute right to have the hearing body vote on the challenge.

West Linn also contends that Petitioners' claim of prejudiced resulting from the City Council's failure to vote on the challenge to Mayor Kovash's impartiality is "merely speculative." WL Response at 22. The City goes on to admit that it can be assumed that

every member of the City Council who participated in the February 11 meeting influenced the outcome to some degree, including the Mayor. *Id.* This is precisely the point.

In order to show prejudice, Petitioners need not show that there would be a different outcome if the vote had been taken and the Mayor had been disqualified. There is sufficient evidence in the record to show that two votes were leaning toward denial as of January 28, 2013 (Councilors Jones and Tan) and the Mayor was leaning toward approval. If the City Council voted on the challenge to the Mayor's impartiality, the Mayor may have been disqualified and the ultimate outcome of the February 11, 2013 vote may have been to uphold the Planning Commission's denial of both LOT projects.

West Linn attempts to shift the burden to Petitioners to show that the vote would have resulted in disqualification of the Mayor. However, the point is that ***there was no vote*** Petitioners need not prove a hypothetical outcome to show that they have been prejudiced by the hearing body's failure to proceed with a mandatory vote on a properly raised challenge

C. Applicant's criticism of Petitioners' expert does not relieve Respondent of its obligation to address the expert evidence in its findings.

In their opening brief, Petitioners explained how the business community economic impacts are relevant to whether the LOT pipeline project meets CDC 60.070 (A) (3) regarding the need to show "consistency with the overall needs of the community." Petition for Review at 43. Lake Oswego responds by attacking Dr. Wilkerson's credentials and criticizing his report. LO Response at 21-22. Dr. Wilkerson holds a PhD in ***economics*** and is qualified to analyze the ***economic*** impacts of these kinds of construction projects on local businesses.

Relying on *Foland vs. Jackson County*, 61 Or LUBA 264 (2010) (***aeronautical*** engineer not recognized as an "expert" for purposes of analyzing safe and operational feasibility of a ***road*** design), Lake Oswego claims that Dr. Wilkerson is not a qualified traffic expert whose testimony requires any detailed response. LO Response at 25. However, Dr.

Wilkerson *is* a qualified expert in ***economics*** who presented evidence on the ***economic*** impacts of the LOI project on the business community. Thus, he is not disqualified under *Foland*.

Lake Oswego cites *Hines vs. Marion County*, 56 Or LUBA 333 (2008) and *Olson vs. City of Springfiled*, 56 Or LUBA 229 (2008) in support of its position that the City was not required to address the Wilkerson evidence because the approval criteria are subjective. However, those cases dealt with general concerns about possible interference – not expert testimony directed to a specific approval criterion. While the City need not address every issue raised, it must respond to specific issues relevant to compliance with applicable approval standards. *Norvell vs. Portland Area LGBC*, 43 Or App 849, 853, 604 P2d 896 (1979).

In this case, Dr. Wilkerson raised specific concerns and provided his expert opinion regarding the ***economic*** impact of the LOI project on the Robinwood business community. Lake Oswego claims that Respondent was not required to address the Wilkerson Report in its findings because CDC 60.070 (A) (3) does impose any limit on the extent of economic impact the LOI project is allowed to have on the business community. LO Response at 24. However, there need not be a precise limit or a quantifiably acceptable percentage of economic impact in the standard. The expert opinion regarding the extent of the ***economic*** impact on the business community is directly relevant to a finding of whether the LOI project is "consistent with the overall needs of the community." CDC 60.070 (A) (3). Under *Norvell*, West Linn was required to address those adverse economic impacts in its findings.

III. CONCLUSION

Based on the foregoing, this decision must be reversed or remanded.

Respectfully submitted this 30th day of September, 2013.

REEVES, KAHN, HENNESSY & ELKINS

Peggy Hennessy

Peggy Hennessy, OSB #872505
Of Attorneys for Petitioners (LUBA No. 2013-023)

CERTIFICATE OF FILING

I hereby certify that on September 30, 2013, I filed the original of this PETITIONERS' REPLY BRIEF, (LUBA NO. 2013-023), in Consolidated Case Nos. 2013-021, 2013-022 and 2013-023, together with four copies, with the Land Use Board of Appeals, DSL Building, 775 Summer Street NE, Suite 330, Salem OR 97301-1283 by FEDERAL EXPRESS OVERNIGHT DELIVERY.

Dated this 30th day of September, 2013.

REEVES, KAHN, HENNESSY & ELKINS

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(LUBA Case No. 2013-023)

CERTIFICATE OF SERVICE

I hereby certify that I served the PETITIONERS' REPLY BRIEF, (LUBA NO. 2013-023), in Consolidated Case Nos. 2013-021, 2013-022 and 2013-023 on September 30, 2013, by mailing via FEDERAL EXPRESS OVERNIGHT DELIVERY to the following individuals two true copies thereof contained in a sealed envelope with postage prepaid to the following addresses:

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BEH | Beery Elsner & Hammond LLP

August 6, 2013

SENT VIA FIRST-CLASS MAIL

Ms. Kelly Burgess
Land Use Board of Appeals
DSL Building
775 Summer Street NE, Ste. 330
Salem, OR 97301-1283

Re: *STOP et al. v. City of West Linn et al.*
LUBA Nos. 2013-021, 2013-022 and 2013-023 (Consolidated)

Dear Kelly:

Enclosed please find an original and four copies of the City of West Linn's Response Brief for filing in the above matter.

If you have any questions, please do not hesitate to contact me. Thank you.

Sincerely,

Christopher D. Crean

CDC/yh
Enclosures

cc: Megan K. Thornton
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BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

STOP TIGARD OSWEGO PROJECT, LLC ("STOP"), NORMAN KING, PETE BEDDARD, MICHAEL MONICAL, CAROL ELSWORTH, MARK ELSWORTH, SHANNON VROMAN, JENNE HENDERSON, LAMONT KING, THOMAS J. SIEBEN, GWEN SIEBEN, SCOTT GERBER, JAN GERBER, JACK NORBY, THOM HOLDER, GARY HITESMAN, REBECCA WALTERS, DARRYL WALTERS, Petitioners, v. CITY OF WEST LINN, Respondent, CITY OF LAKE OSWEGO, LAKE OSWEGO-TIGARD WATER PARTNERSHIP, and CITY OF TIGARD, Intervenor-Respondents.	LUBA Nos. 2013-021 and 2013-022
WILLIAM J. MORE, CARL L. EDWARDS, LINDA S. EDWARDS, CURT SOMMER, AND ROBERT STOWELL, Petitioners, v. CITY OF WEST LINN, Respondent, CITY OF LAKE OSWEGO, LAKE OSWEGO-TIGARD WATER PARTNERSHIP, and CITY OF TIGARD, Intervenor-Respondents.	LUBA No. 2013-023

CITY OF WEST LINN'S RESPONSE BRIEF

August 2013

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I. STANDING OF PETITIONERS

Respondent City of West Linn ("City") agrees that Petitioners have standing to pursue this appeal.

II. STATEMENT OF THE CASE

A. Nature of the Decision and Relief Sought

The City approved two land use applications submitted by the Lake Oswego-Tigard Partnership ("LOT") on behalf of the City of Lake Oswego and the City of Tigard. The first decision (AP-12-02) approved a conditional use permit and design review for the expansion of Lake Oswego's water treatment plant. The second decision (AP-12-03) approved a conditional use permit, design review and related permits for the installation of a raw water line from the Willamette River to the treatment plant, and a finished water line from the treatment plant to Lake Oswego.

The Petitioners in LUBA 2013-021 and 2013-022 (collectively referred to as "STOP"), appealed both decisions. STOP seeks an order of the Board remanding both decisions. STOP Pet. at 1.

The Petitioners in LUBA 2013-023 (collectively referred to as "More"), appealed only the decision in AP-12-03. More seeks an order from the Board reversing or remanding the decision. More Pet. at 4.

B. Summary of Arguments

The City's brief only addresses More's First, Second and Third Assignments of Error and STOP's First and Fifth Assignments of Error. For all other Assignments of Error in the opening briefs, the City joins the answering briefs filed Intervenor-Respondents City of Lake Oswego, Lake Oswego-Tigard Water Partnership and City of Tigard.

1. More First Assignment of Error

ORS 227.180(3) does not require remand when the substance of the *ex parte* communication has no bearing on an applicable approval criterion. Even if the

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communications were relevant to an approval criterion, the City complied with ORS 227.180(3) by disclosing the substance of the communication and allowing the parties an opportunity to respond.

2. More Second Assignment of Error

Petitioners have not demonstrated that the Mayor was biased in favor of the applications or that he departed from his role as trier of fact and advocated in favor of the applications.

3. More Third Assignment of Error

The City properly declined to vote on Petitioners' challenge to Mayor Kovash's impartiality because West Linn Community Development Code ("CDC") § 99.130.B requires the City Council to vote on a challenge to a City Councilor only for reasons other than the Councilor's judgment and Petitioners' challenge was based on allegations regarding the Mayor's judgment.

4. STOP First Assignment of Error

Petitioners did not raise the issue of the City's authority to impose a fee for use of the right of way below and cannot do so for the first time here. Further, Petitioners lack standing to assert the rights of another party. Finally, the City has home rule authority to impose a fee for use of public rights of way in the City that is not preempted by state law.

5. STOP Fifth Assignment of Error

Councilor Jones' communications with staff are not *ex parte* communications. Further, staff briefing the City Council regarding discussions with the applicant also does not constitute an *ex parte* communication.

C. Summary of Material Facts

With one exception, the City generally accepts both Petitioners' Statement of Material Facts. Where differences exist, they will be addressed under specific assignments of error. The exception is More's Statement of Material Fact No. 4 regarding the City

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Council decision, which omits a number of material facts and misstates others. The City writes separately here only to clarify those facts and provide a more complete picture of the proceedings below.

The Lake Oswego Tigard Water Partnership submitted two land use applications for permits necessary to expand its water operations. As noted above, application AP-12-02 was to expand Lake Oswego's existing water treatment plant, and application Ap-12-03 was for new water lines to convey water from the Clackamas River to the water treatment plant and from the treatment plant to Lake Oswego (the "Projects"). R. at 11222-11881; 8230-8794. On November 26, 2012, the Planning Commission denied both applications. R. at 2991. The applicant appealed the Planning Commission's decision on December 10, 2012. R. at 2949.

The City Council held public hearings on January 14 and 15, 2013. R. at 2905. At the beginning of the hearing on January 14, Mayor Kovash and Councilors Carson, Jones, and Tan (hereinafter "Councilors") stated that they had reported any *ex parte* contacts by sending an email to City staff that disclosed the *ex parte* contact and the substance of the communication; those emails were then included in the record by City staff. R. at 1452-1456. On January 14, the Mayor and Councilors stated that they were free of bias and, therefore, capable of making an impartial decision. R. at 1453. However, Councilor Frank previously heard and voted on the applications as a member of the Planning Commission and, for that reason, recused himself from the proceedings. R. at 1452-1453.

During the appeal proceeding alone, more than 1,600 pages of testimony were submitted into the record (R. at 844-1229; 1238-1332; 1458-1546; 1833-2097; 2185-2898), and the Mayor and Councilors were often approached by citizens attempting to discuss the Projects (R. at 1452-1453; 762; 366). The record was left open to accept written testimony until January 22 at 10:00 a.m. R. at 1237. In an effort to prevent further *ex parte* contacts after the record closed on January 22, a filter was placed on the Council's email that sent all

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subsequent emails regarding the Projects to a new mailbox, "LOTWP," and notified senders that the Council would not receive the email. R. at 710-729.

When the Council reconvened on January 28 (R. at 1237), Councilor Jones disclosed that he had received an email at his personal email address that he forwarded to his city address to be reviewed by staff (R. at 762). The email was originally caught by the filter when the sender, Dave Froode, sent the email to each Councilor's City email address before forwarding it to Councilor Jones' personal email address. R. at 710; 713. Councilor Carson and Mayor Kovash stated that they had not had any further *ex parte* contacts. R. at 762.

After the public testimony was complete, the Council prepared to ask questions of staff and the applicant. The Mayor cautioned the Council, staff and the applicant that the questions and answers should not elicit new evidence:

> So, since the record was closed on January 22nd, we are asking questions and we should not ask questions that require any new evidence. And having said that, uh, if we ask, inadvertently, a question that requires new evidence, be very cautious and tell us, and we, I think we would not then receive the answer. And there has been so much said over so many months that if someone asked the question that required something new, or wasn't in the record, please tell us. Because sometime we may be surprised at the things that are not in the record. Alright? Okay.

Index of Oversized and Difficult to Duplicate Documents to be Provided to LUBA at Oral Argument ("Index"), Video: 01/28/13 at 00:11:20. After the question and answer period, the Mayor closed the public hearing and the Council moved to deliberations. R. at 766.

The Mayor began the deliberations by explaining that he supported the Projects because the Projects met all of the criteria for approval. Index, Video: 01/28/13 at 00:57:38. Councilor Jones then explained his position that the applications failed to meet the "overall needs of the community" under CDC § 60.070(A)(3). R. at 766; 620B-620D. He pointed out that the record indicates that "seven Neighborhood Associations voted . . . to support the Robinwood Neighborhood Association's opposition to these applications . . . I can only assume that they voted to support the Robinwood Neighborhood not because they would

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suffer from the affects of this application but because they believed that the Robinwood Neighborhood would carry a disproportionate burden." R. at 620B.

Councilor Carson responded that the "overall needs" were met because the applicant had a plan to mitigate concerns, and the projects will provide significant benefits such as a seismically secure facility and a redundant water supply. R. at 766-767; Index, Video: 1/28/13 at 1:18:25. Finally, Councilor Tan expressed that she agreed with Councilor Jones' conclusion that the "overall needs of the community" requirement was not met by the Projects. Index, Video: 1/28/13 at 1:24:53. In addition to CDC 60.070(A)(3), Councilor Tan cited the conflicting expert testimony and her belief that the Projects did not comply with Comprehensive Plan, Goal 2, Land Use Policy 8, as grounds for denying the applications. R. at 767; Index, Video: 1/28/13 at 1:25:40.

After all of the Councilors announced their positions, the Mayor emphasized that any decision must be based on the approval criteria:

> As I said early on, this is a quasi-judicial hearing, and decisions must be based on applicable approval criteria. That's the goal. It's not always I think the case. I think I have heard tonight some decision criteria which are not in the code. I've also heard a lot of assumptions. And one of the things that this body and the Planning Commission should be very attuned to is information, where it comes from, how it's processed, and is it applicable. For example, I heard several times, and it is in, throughout the literature that LOT is opposed by seven neighborhood associations, and the assumption I heard tonight was that they were against this because it was bad for the community. I didn't make that assumption. I called them. I called two of them. The first one I called said, "Well, we have some minutes on that. I'll send them to you." What the minutes said was that they opposed LOT until there was better dialogue between Lake Oswego Tigard and neighborhood associations. They were keying on something else that was said, that there are some problems with the way this issue has been handled. And that's a problem. The other neighborhood association I called, I asked the neighborhood association president what the impact was, or what they heard. And he said, "Well, I can't send you minutes because we haven't had a meeting since last June or July." And I said, "Well what about LOT?" He said, "Never heard of it." That neighborhood association didn't have an opinion about LOT. And that should be bothersome to us. Index, Video: 1/28/13 at 1:27:15.

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Councilor Jones then made additional comments, including:

> We could use the intertie. We could use cooperation with Lake Oswego. What we've got going right now is a 2-2 Council vote, and if our attorney is correct, what's gonna happen is the record as completed by the Planning Commission, will go to LUBA if it's appealed to LUBA. Okay, now, I'm going to make a suggestion. It seems to me, and if you heard my discussion, I really have two areas, two areas, and maybe we can work on some conditions of approval that the applicant probably won't accept. Index, Video: 1/28/13 at 1:31:45; R. at 768.

Councilor Jones then requested staff develop conditions of approval that would require LOT to develop a business mitigation plan, compensation for residents' attorneys' fees incurred during associated condemnation proceedings, an evaluation of Nixon Avenue, and penalties for violations of the Construction Management Plan. R. at 768. Councilor Carson then requested that the City Attorney address the *ex parte* issue raised by the Mayor's conversations with the neighborhood associations (R. at 768), and the following exchange occurred:

City Attorney:	Those would constitute an ex parte communication. Were they disclosed in an earlier proceeding?
Councilor Jones:	I don't believe so.
Mayor Kovash:	They're on the website.
Councilor Jones:	Did you disclose the ex parte contact in an earlier proceeding?
Councilor Carson:	As one of the emails?
Mayor Kovash:	Umm, the whole record there is on who I talked to, so...
City Attorney:	In order for the error to result in reversal or remand, somebody would need to be able to demonstrate that it, it prejudices a substantial right. Is there something about that communication that informed your decision, that they were not allowed, they were denied the opportunity to respond to because they weren't aware of the communication. So, I'll need to look a little more closely at that and I should be able to get back to you after the break. Index, Video: 1/28/13 at 1:38:30.

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During the break, it was determined that the communications were not in the record and the Council reopened the record until February 4 to allows the parties an opportunity to respond to the communications, after which the applicant would be given until February 8 to respond to any new testimony. R. at 768. During the discussion of the motion, Councilor Jones explained, "this is one of these things we have to go through because we all didn't follow the rules." Index, Video: 01/28/13 at 1:42:00. To which Mayor Kovash responded, "No, just one of us didn't. Unbeknownst to him, so thank you, and it can be corrected." Index, Video: 01/28/13 at 1:42:29. The Council also directed staff to draft provisional language regarding a number of possible conditions of approval. R. at 769. Although each Councilor discussed his or her position regarding compliance with the applicable CDC provision as of January 28, no vote was taken. The record was held open through February 4, staff was directed to draft additional conditions of approval, and the hearing and deliberations were continued to February 11. R. at 768.

During the open-record period, the Mayor sent an email to the Assistant City Attorney stating: "[I] called two NA presidents regarding any meetings their NA's may have had concerning LOT. The substance of these contacts was disclosed at the January 28, 2013 Council Meeting." This email was placed in the record. R. at 660. City resident Dave Froode responded to the Mayor's comments in an email that explained that "[O]ne NA was inadvertently included in a letter that should not have been . . . [T]here were actually eight NAs that have voiced opposition in one form or another . . . But, not all had quorums or are active." R. at 368-369.

On February 11, the Council continued the hearing. R. at 259. Even after the Council determined it was necessary to reopen the record for written testimony to respond to the Mayor's *ex parte* communication, citizens continued to approach Mayor Kovash and Councilor Jones to discuss the Project. R. at 259; 366. Those *ex parte* communications were

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disclosed, and after a few brief questions were answered, the public hearing was closed. R. at 259-260.

Councilor Jones then moved to add five new conditions to the proposed conditions of approval. R. at 260; Index, Video: 02/11/13 at 00:10:56. After the motion passed and Mayor Kovash stated his position, Councilor Jones reiterated the sentiment that he had expressed at the January 28 meeting, "I woke up at 3 o'clock on Saturday morning and said, what possible conditions would work to make this work because if this doesn't work we're going to be dealing with asking our voters for a 30% increase in their water bill." Index, Video: 02/11/13 at 00:19:10. He then explained that his position had changed because of the additional conditions of approval, including modifications to the Intergovernmental Agreement for the intertie and limitations on the size of the clearwell. R. at 261.

Similarly, Councilor Tan determined that CDC 60.070(A)(3) was satisfied after reviewing the numerous benefits to West Linn, such as the emergency intertie and the receipt of Lake Oswego's abandoned waterlines along Highway 43, in conjunction with the mitigation efforts to lessen the burden on the Robinwood Neighborhood and businesses. R. at 261-262. The Council voted unanimously to overturn the Planning Commission's decision on February 11, and the Council's decision was adopted on February 18, 2013. R. at 262; 176.

D. Jurisdiction

The City agrees LUBA has jurisdiction over this appeal.

III. ARGUMENT

A. Response to More First Assignment of Error

Petitioners' first assignment of error argues that the City failed to comply with ORS 227.180(3) when, after disclosing his communications with two neighborhood associations and holding the record open to allow the parties an opportunity to respond, Mayor Kovash "failed and refused to disclose important information, including the identity of the people

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from whom he received the *ex parte* contact, the names of the neighborhood associations, the timing of the communications, and the authority of the speaker to communicate on behalf of a particular neighborhood association." More Pet. at 28. In effect, Petitioners are arguing that the Mayor failed to disclose "the substance" of the communication. For the following reasons, Petitioners first assignment of error should be denied.

1. The *Ex Parte* Communications Have No Bearing on the Applicable Approval Criteria.

ORS 227.180 (3) provides:

> (3) No decision or action of a planning commission or city governing body shall be invalid due to ex parte contact or bias resulting from ex parte contact with a member of the decision-making body, if the member of the decision-making body receiving the contact:
>
> (a) Places on the record the substance of any written or oral ex parte communications concerning the decision or action; and
>
> (b) Has a public announcement of the content of the communication and of the parties' right to rebut the substance of the communication made at the first hearing following the communication where action will be considered or taken on the subject to which the communication related.

Petitioners do not argue that Mayor Kovash failed to disclose the *ex parte* communications or that the City failed to allow them an opportunity to respond as required by the statute. Accordingly, Petitioners' argument is limited to the narrow issue of whether the Mayor disclosed the "substance" of the communication. However, for purposes of this assignment of error, it is immaterial whether the Mayor disclosed the substance of the communication because the subject of the communication has no bearing on any applicable approval criteria.

In *Link v. City of Florence*, 58 Or LUBA 348 (2009), LUBA held that the failure to disclose *ex parte* contacts that have no bearing on an applicable approval criteria or material issue does not warrant remand. In *Link*, the city approved two ordinances annexing and rezoning property. After the record was closed and during the city council's deliberations, one of the councilors stated "that the crowd he has been in contact with has been very supportive of the annexation." *Link*, 58 Or LUBA at 352. The councilor then went on to

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describe generally the nature of that support. Before LUBA, the petitioners argued that the councilor's *ex parte* communications with supporters of the proposed annexation violated ORS 227.180(3), particularly because the city failed to reopen the record to allow the petitioners to respond. In rejecting petitioners' argument, LUBA held:

> [I]n order to provide a basis for remand based on *ex parte* contacts, there must be some indication that the communication had something to do with the factual determinations or legal standards that govern approval or denial of the application. The goal of prohibiting undisclosed *ex parte* contacts is to ensure that land use decisions are based on information or evidence the decision makers receive within the public process, and are not based on legal arguments or evidence received outside the public process. *Carrigg v. City of Enterprise*, 48 Or LUBA 328, 333 (2004).

Link, 58 Or LUBA at 353.

In this case, Petitioners' entire assignment of error is premised on a discussion among the City Council regarding how many neighborhood associations opposed the land use applications. Petitioners had testified that seven associations opposed them, a position noted by Councilor Jones in his comments. Conversely, Mayor Kovash believed that at least two of the seven had not taken a position based on his communication with those associations. Regardless of how many neighborhood associations actually opposed the applications, Petitioners do not point to any applicable criteria that requires the City to make such a determination or otherwise explain how the issue relates to an applicable approval criterion.

The approval criteria and the findings upon which the City Council relied are set forth in detail in the final decisions and the Mayor's failure to respond to Petitioners' subsequent interrogatories does not magically elevate neighborhood support into an approval criterion. Elected officials will always be concerned about public support for or against a proposed development, and those concerns will find their way into the officials' public comments. Nonetheless, in this case, the fact that the City Council's larger discussion of the project and compliance with the applicable criteria included comments about the extent of neighborhood support does not make the measure of that support an applicable approval criterion. More

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salient are the Council's discussion of CDC 60.070.A(3) (overall benefit to the community); 60.070.A(7) (compliance with the comprehensive plan); compliance with the City's water master plan (increasing capacity of the intertie) upon which the decisions were ultimately based. R. at 198-200; 200-223; 212-213; 222-223.

Because nothing in the City development code requires the city to determine the number of neighborhood associations that support or oppose a quasi-judicial land use application, remanding the decision to allow additional evidence and testimony on the issue would have no bearing on the applicable approval criteria.

2. The City Complied with the Requirements of ORS 227.180(3) by Disclosing the Substance of the *Ex Parte* Communication and Allowing an Opportunity for the Parties to Respond

A local decision is not invalid due to *ex parte* communication provided the decision-maker discloses the substance of the communication and the parties are allowed an opportunity to respond. ORS 227.180(3). Here, at the close of the public hearing, the Mayor opened the deliberations by reiterating that the Council could consider only the applicable approval criteria. Index, Video: 1/28/13 at 1:27:15. The Mayor then reminded the Council not to reach a decision based on criteria that are not in the code and to scrutinize any assumptions when weighing the evidence:

> As I said early on, this is a quasi-judicial hearing, and decisions must be based on applicable approval criteria. That's the goal. It's not always I think the case. I think I have heard tonight some decision criteria which are not in the code. I've also heard a lot of assumptions. And one of the things that this body and the Planning Commission should be very attuned to is information, where it comes from, how it's processed, and is it applicable. For example, I heard several times, and it is in, throughout the literature, that LOT is opposed by seven neighborhood associations. And the assumption I heard tonight was that they were against this because it was bad for the community. I didn't make that assumption. I called them. I called two of them. The first one I called said, "Well, we have some minutes on that. I'll send them to you." What the minutes said was that they opposed LOT until there was better dialogue between Lake Oswego Tigard and neighborhood associations. They were keying on something else that was said, that there are some problems with the way this issue has been handled. And that's a problem. The other neighborhood association I called, I asked the neighborhood association

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> president what the impact was, or what they heard. And he said, "Well, I can't send you minutes because we haven't had a meeting since last June or July." And I said, "Well what about LOT?" He said, "Never heard of it." That neighborhood association didn't have an opinion about LOT. And that should be bothersome to us. (Index, Video: 1/28/13 at 1:27:15.)

In this instance, the Mayor was clearly using the testimony regarding the number of neighborhood associations that oppose the applications as an example of how evidence should be weighed and scrutinized rather than accepted at face value. Be that as it may, the precise issue presented by his comments was the number of neighborhood associations that actually opposed the land use applications. In response to testimony that seven associations formally opposed the applications, the Mayor stated that he had spoken with two of the associations, one of which had not heard of the applications and the other was concerned only with the way "the issue has been handled." Thereafter, as described above and consistent with the City practice of documenting *ex parte* communications in an email to staff, the Mayor sent an email to the City Attorney stating that he "called two NA presidents regarding any meetings their NA's may have had concerning LOT." R. at 660. The Mayor also sent an email to the City Planning Director describing the calls: "One was concerned that LOT treat WL citizens right and the other knew nothing about LOT." R. at 36. Both email were placed in the record and are consistent with the Mayor's comments during the January 28 public meeting.

On these facts, the Mayor clearly disclosed the "substance" of the communication for purposes of ORS 227.180(3). He reported with whom he spoke (the neighborhood association presidents), the subject of the conversation (opposition to the land use applications) and the substance of the conversations (neither had taken a position opposing the applications). Notwithstanding Petitioners' desire for a detailed accounting of the conversations, more is not required. The statute requires only the "substance" of the communications be disclosed and the record held open to allow interested parties an opportunity to respond. Here, because the City was concerned the communications were not

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previously disclosed, the Mayor disclosed the substance of the conversations and the record was held open for an additional seven days to allow interested parties an opportunity to respond. Significantly, while several Petitioners demanded the Mayor recuse himself for the belated disclosure of his communications with the neighborhood associations, only Dave Froode actually responded to the substance of the Mayor's comments.[1] R. at 368-69.

Because the City complied with the requirements of ORS 227.180(3), Petitioners' reliance on *Horizon Construction, Inc. v. City of Newberg*, 114 Or App 249, 834 P2d 543 (1992) is misplaced. In *Horizon,* a city councilor disclosed relevant *ex parte* communications after the record was closed and the city declined to reopen the record to allow the parties an opportunity to respond. As the Court noted in *Horizon*, "the city could have reopened and extended the proceedings" to allow the petitioner a meaningful opportunity to respond and the city's failure to do so required the decision to be remanded for additional local proceedings. In this case, the City did precisely what the statute and the decision in *Horizon* contemplate—it immediately reopened the record to allow the parties a meaningful opportunity to respond. And, as noted, the lone response simply substantiated the Mayor's comments.

For these reasons, LUBA should deny More's first assignment of error.

B. Response to More Second Assignment of Error

In their second assignment of error, Petitioners argue that Mayor Kovash impermissibly departed from his role as an impartial decision-maker by independently developing evidence which he then used to support the LOT land use applications. According to Petitioners: "[T]he Mayor's actions in conducting his own investigation to

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[1] Mr. Froode's response is addressed in the findings for both decisions: "Mr. Froode took advantage of this opportunity in his email of February 4, 2013 to say that one of the supposed opposition neighborhood associations did not, in fact, oppose and that those who did, did so 'in one form or another' (such as, perhaps, to urge further discussions). Moreover, he suggests that not all such associations 'had active quorums or are active' as well. The Mayor's point appears to be well-taken." Final Order AP-12-03, p.4, fn 2, Rec. at 183; Final Order AP-12-02, p.3, fn 3, Rec. 64.

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obtain evidence in support of the LOT Project, coupled with his failure to disclose the evidence until he could use it to manipulate the deliberation and timing for the final decision, does show that he was not acting as an impartial decision maker." More Pet. at 32. For the reasons set forth below, LUBA should deny the second assignment of error.

1. There is No Evidence the Mayor was Biased in Favor of the Applications

The core of Petitioners' argument is that the Mayor was biased in favor of the LOT Project and, acting on that bias, that he independently developed evidence to support the Projects which he intentionally and surreptitiously hid until he could use it to delay a decision. In doing so, Petitioners argue, the Mayor crossed the line from an impartial trier of fact to become an advocate for the Projects. More Pet. at 31-32. Petitioners' argument misunderstands both the facts and the law.

LUBA does not lightly infer bias. *Catholic Diocese of Baker v. Crook County*, 60 Or LUBA 157, 165 (2009). Bias may be found only where there is evidence of a strong emotional commitment by the decision-maker to a particular outcome. *Id.* at 166; *Oregon Natural Desert Association v. Harney County*, LUBA 2011-097, 2012 WL 1964616 (May 3, 2012). The question is whether the decision-maker failed to engage in the necessary fact-finding and apply the facts to the law and instead voted based on a predisposition for or against the application. *Claus v. Sherwood*, 62 Or LUBA 67, 74 (2010).

In this case, Petitioners entire claim of bias is based on dialogue in a City Council work session in which the Mayor attempted to keep the City Council focused on the subject of the work session, and the belated disclosure more than a year later of two *ex parte* communications the Mayor believed were already in the record. More Pet. at 15, 31-33. These disparate and disconnected facts fall far below the level necessary to demonstrate the Mayor was biased in favor of the Project.

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In *Halvorson-Mason Corp. v. City of Depoe Bay*, 39 Or LUBA 702 (2001), LUBA found a city councilor was irretrievably biased where there was evidence that the councilor actively opposed the development before and during his tenure on the city council, including writing letters that verged on personal attacks on the applicant. In *Friends of Jacksonville v. City of Jacksonville*, 42 Or LUBA 137, *aff'd* 183 Or App 581, 54 P3d 636 (2002), two city councilors were members of a church that filed a land use application. LUBA found that one of the councilors was biased and should have recused himself where there was evidence that, among other things, he had advocated in favor of the proposed use prior to his election, stated he did not believe he needed to be objective, and signed a petition in favor of the proposed use while a member of the city council. Conversely, LUBA found that the other councilor was not biased simply by virtue of being a member of the church. Similarly, in *Catholic Diocese*, LUBA held that a city councilor was not biased despite evidence that he attended a planning commission meeting with his wife who opposed the proposed development.

The facts of this case do not remotely rise to the threshold for bias established in *Halvorson-Mason* and *Friends of Jackson County*. The December 2011 work session was called for the purpose of providing the City Council with a general sense of the project and its effects on West Linn. When Councilor Cummings tried to broaden the discussion to include whether Lake Oswego actually needed more water, the Mayor reminded her that was not the subject of the meeting and that "we will get to those other questions" at a later date. More Pet. at p.15. This colloquy is nothing more than an example of a presiding officer maintaining control of a public meeting by limiting extraneous discussion and keeping the focus on the purpose of the meeting. It does not remotely show evidence of bias by the Mayor in favor of the Project.

Similarly, as shown above, the Mayor failed to disclose his *ex parte* communication with two neighborhood associations because he believed the substance of the communications was already in the record. When it was determined it was not, the record

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was immediately reopened and the parties allowed an opportunity to respond. Again, the belated disclosure of two *ex parte* communications followed by an immediate reopening of the record is not remotely evidence of a "strong emotional commitment" in favor of the Project.

2. The Mayor did not Independently Gather Evidence in Support of the Applications

Petitioners repeatedly assert that the Mayor contacted the neighborhood associations for the purpose of supporting the land use applications. More Pet. at 31-33. According to Petitioners, the Mayor "chose not to disclose [the communications] to his fellow decision makers unless or until he could use it to manipulate the public process" and, in doing so, "was acting as LOT's advocate." More Pet. at 32. Here again, neither the facts nor the law support Petitioners' argument.

The City is required to provide an impartial tribunal when reviewing and reaching a decision on a quasi-judicial land use application. *Fasano v. Washington County Commission*, 264 Or 574, 507 P2d 23 (1973). A city councilor is not expected to be free of all bias but must be able to set aside any such bias and "engage in the necessary fact finding and attempt to interpret and apply the law to the facts as they find them so that the ultimate decision is a reflection of their view of the facts and the law rather than the product of any positive or negative bias." *Wal-Mart Stores, Inc. v City of Central point*, 49 Or LUBA 697 (2005). In short, a city councilor sitting in a quasi-judicial capacity serves as an impartial trier of fact who must assess and weigh the evidence, determine the credibility of witnesses, and dispassionately apply the facts to the applicable law. Accordingly, a city councilor may not act as an advocate in a quasi-judicial proceeding while simultaneously voting on the final decision. *Wal-Mart Stores, Inc. v. City of Hood River*, LUBA 2013-009, 2013 WL 2390547 (May 21, 2013) ("where the potential decision maker participated as an advocate in his or her personal capacity in the very case that person is now being asked to decide . . . it is

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inappropriate for the former advocate to step forward and participate on the same panel he or she advocated a position before).

The heart of Petitioners' argument is that the Mayor "conduct[ed] his own investigation to obtain evidence in support of the LOT Project" and that, in doing so, became and advocate rather than an impartial trier of fact. More Pet. at 32. To support this claim, Petitioners rely on *Woodard v. City of Cottage Grove*, 54 Or LUBA 176 (2007) in which LUBA wrote:

> [I]t is highly unusual and at least potentially improper for a decision maker to independently seek out or attempt to obtain additional evidence outside the scope of a public hearing with respect to a quasi-judicial application pending before that decision maker. The role of the local government decision maker is not to *develop* evidence to be considered in deciding a quasi-judicial application, but to impartially consider the evidence that the participants and city planning staff submit to the decision maker in the course of the public proceedings.

Woodard, 54 Or LUBA at 186 (emphasis in original).

The problem with Petitioners' argument is that it mischaracterizes the nature of the Mayor's action. The Mayor was not attempting to "*develop*" new evidence to support or oppose the land use applications; rather, he was attempting to confirm the accuracy of information that was already in the record. Such an exercise is consistent with the role of the trier of fact who is required to assess the credibility and determine the weight of evidence that is presented to him. In this way, the Mayor's actions are no different than conducting a site visit to confirm descriptions of a development site, or looking up the background of competing traffic engineers to determine which traffic study should be given greater weight. As long as the site visit or background check is disclosed so that interested parties may respond to it, the decision-maker stays firmly within his role as an impartial trier of fact and does not cross the line into advocacy.

Certainly, there is a line beyond which determining the weight or credibility of evidence crosses over into developing new evidence. For example, in *Woodard*, a city

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councilor (Councilor Haskell) requested the city police chief provide "police logs" on three opponents of the land use application, then presented the logs to the mayor and other councilors at a meeting in his home. Thereafter, another councilor attempted to enter the logs into the record of the proceedings before the city council. On those facts, LUBA had no trouble concluding that Councilor Haskell was clearly developing *new* evidence to enter into the record in support of the applicant, rather than simply seeking to confirm the accuracy of testimony already in the record. In this case, Mayor Kovash's calls to two neighborhood associations to confirm whether they in fact opposed the land use applications falls well short of the egregious evidence-gathering and advocacy that was present in *Woodard*. Instead, the Mayor's actions are well within the scope of due diligence that should reasonably be expected of the trier of fact when assessing and weighing evidence that is already in the record.

For these reasons, LUBA should deny More's second assignment of error.

C. Response to More Third Assignment of Error

In their third assignment of error, More Petitioners argue that the City was required to vote on their challenges to Mayor Kovash's impartiality pursuant to CDC 99.180(B). More Pet. at 33, 35. Petitioners claim their substantial rights were prejudiced because of the Mayor's disclosure of *ex parte* contacts at the January 28, 2013, meeting, and because he "may well have influenced" the final decision on February 11, 2013. More Pet. at 36. Because CDC 99.180 does not confer an unlimited right to a vote by the City Council on a challenge to the Mayor's impartiality and the failure to do so did not prejudice Petitioners' substantial rights, LUBA should deny the third assignment of error.

1. WLCDC 99.180 Does Not Confer an Unlimited Right to a Vote

Petitioners argue that the City is "required" by CDC 99.180(B)(3) to conduct a vote on their challenges to Mayor Kovash. More Pet. at 35. CDC 99.180 provides in relevant part:

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> 99.180. B. Challenges to impartiality.
> 1. An affected party or a member of a hearing body may challenge the qualifications of a member of the hearing body to participate in the hearing and decision. The challenge shall state the facts relied upon by the challenger relating to a person's bias, pre-judgment, personal interest, or other facts from which the challenger has concluded that the member of the hearing body cannot participate in an impartial manner.
>
> 2. The challenged person shall have an opportunity to respond orally to the challenge. The challenge shall be incorporated into the record of the hearing.
>
> 3. Any challenge shall require that the hearing body vote on the challenge pursuant to subsection E of this section.
>
> * * *
>
> E. Abstention or disqualification. Disqualification for reasons other than the member's own judgment may be ordered by a majority of the members of a hearing body present and voting. The member who is the subject of the motion for disqualification may not vote on the motion but shall be allowed to participate in the deliberation of the hearing body on that motion.

Because CDC 99.180(B)(3) requires a vote on a challenge "pursuant to subsection E of this section," the provisions of subsections (B) and (E) must be read together. Subsection (B)(1) authorizes "an affected party" to challenge the qualifications of a member of the hearing body. When such a challenge is made, subsection (B)(3) directs the hearing body to vote on the challenge "pursuant to subsection (E)," which, in turn, states that the hearing body "may" order a member disqualified, but only "for reasons other than the member's own judgment."

Read together, provisions of CDC 99.180 do not create an unlimited or guaranteed right to a vote when a person files a challenge based on bias or impartiality. Instead, it authorizes the hearings body to act on a challenge and disqualify a member from continued participation in the proceedings but only for reasons that do not involve the member's exercise of his or her own judgment.

In this case, Petitioners' challenges clearly relate to their conviction that Mayor Kovash's judgment is clouded by his alleged bias in favor of the Project. Of the 17

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challenges that were filed, 15 assert that the *ex parte* contacts are evidence of the Mayor's bias, one calls for a vote on the challenges, and the other simply claims that the Mayor "is obviously impartial." More Pet. at 21, 34-35. None assert a basis for the challenge other than a subjective belief that the Mayor's bias prevents him from remaining impartial. Petitioners cite no other basis for disqualification that would allow the City Council to disqualify the Mayor under the provisions of CDC 99.180.

The authority granted to a hearings body under CDC 99.180(E) is not only limited, it is also discretionary—the hearing body "may" vote to disqualify a member if there is a basis for doing so other than the member's judgment. Here, because the basis for the challenges questioned only the Mayor's judgment, the City Council properly exercised its discretionary authority and declined to schedule a vote on the challenges.

2. The Failure to Vote on the Challenges Did Not Prejudice Petitioners' Substantial Rights

Petitioners argue that their substantial rights were prejudiced when the City declined to "address the disqualification request." More Pet. at 36. Petitioners first assert that a vote by the City Council at the January 28 meeting was postponed by the Mayor's disclosure of *ex parte* communications. *Id.* Second, Petitioners claim that the Mayor's continued participation "may well have influenced" the final vote on February 11. *Id.* Petitioners' arguments fail for a number of reasons.

Procedural error provides a basis for reversal or remand only if the error results in prejudice to Petitioners' substantial rights. ORS 197.835(9)(a)(B); *Ramsey v. Multnomah County*, 44 OR LUBA 722, 725 (2003);. *Stallkamp v. City of King City*, 43 Or LUBA 333, 351-52 (2002), *aff'd* 186 Or App 742, 66 P3d 1029 (2003); *Furler v. Curry County*, 27 Or LUBA 546, 550 (1994). Merely claiming or speculating that such harm may have occurred does not establish a basis for reversal or remand. *O'Shea v. City of Bend*, 49 Or LUBA 498, 502 (2005).

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Petitioners' first claim of prejudice is, frankly, baffling. Petitioners filed their challenges to the Mayor's impartiality during the open record period between January 28 and February 4, 2013. More Pet. at 21. But because the challenges were filed *after* the January 28 meeting, they could not possibly have affected the outcome of the meeting even if the Council subsequently voted on them. Petitioners do not explain how a vote of the City Council on a challenge under CDC 99.180 could have any affect on a meeting that occurred before the challenge was ever filed. Accordingly, the City's decision not to vote on Petitioners' challenges could not have affected Petitioners' rights at the January 28 meeting.

Moreover, with respect to Petitioners' claim that the failure to vote on their challenges affected the "stated vote" at the January 28 meeting, the record shows that the City Council never intended to vote that evening as demonstrated by Councilor Jones' comments made *prior* to the disclosure of the Mayor's *ex parte* contacts and the decision to reopen the record:

> Okay, now, I'm going to make a suggestion. It seems to me, and if you heard my discussion, I really have two areas, two areas, and maybe we can work on some conditions of approval that the applicant probably won't accept. (Index, Video: 1/28/13 at 1:31:45; R. at 768.)

As noted in the above Statement of Material Facts, Councilor Jones then requested staff develop conditions of approval that would require LOT to develop a business mitigation plan, compensation for residents' attorneys' fees incurred during associated condemnation proceedings, an evaluation of Nixon Avenue, and penalties for violations of the Construction Management Plan. R. at 768. From these comments, it is clear that Councilor Jones at least did not expect to vote that evening and intended to continue working on additional conditions of approval for consideration by the City Council. Accordingly, Petitioners' repeated assertions that the City Council would have voted at the January 28 meeting lacks support in the record.

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Petitioners also claim that they were prejudiced because the Mayor's continued participation "may well have influenced" the vote on February 11. More Pet.at 36. The first problem with this argument is that it is merely speculative. Petitioners claim only that the Mayor "may" have influenced the outcome of the February 11 meeting, but do not point to any specific facts to substantiate the claim or to show how the Mayor's participation prejudiced a substantial right. It can be assumed that *every* member of the City Council who participated in the February 11 meeting influenced the outcome to some degree, including the Mayor, but absent a showing of material harm to Petitioners, the mere allegation that a member of a hearings body participated in the proceedings and "may" have influenced the outcome is insufficient to substantiate a claim that Petitioners suffered prejudice to a substantial right. *O'Shea* at 502-503

More important, the core of Petitioners' argument, again, appears to be that the Mayor was biased and that by failing to vote on Petitioners' challenges under CDC 99.180, the City Council allowed the Mayor to exert a biased influence over the proceedings. The essential predicate of this argument is the allegation that the Mayor was, in fact, biased, which Petitioners have not, and cannot, show. The only facts Petitioners point to are the Mayor acting in his role as the presiding officer to control the discussion at a City Council work session in December 2011 (More Pet. at 13-14), and the belated disclosure of two *ex parte* contacts more than a year later at the January 28, 2013, public meeting. As explained above, these two facts fall far short of a cognizable showing of bias. Accordingly, even under Petitioners' interpretation of CDC 99.180, the City Council would have lacked any basis for excluding the Mayor from the proceedings.

Petitioners' bias argument also relies on the assumption that the other members of the City Council share Petitioners' view of the Mayor and would have voted to uphold the challenges, thereby excluding him from participating in the February 11 meeting. However, given that the members of the City Council declined to act on Petitioners challenges and are

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themselves authorized to challenge the participation of a member under CDC 99.180 but similarly declined to do so, it is unlikely the other members of the City Council share Petitioners' view of the Mayor alleged bias. On these facts, absent a showing of actual bias or that the remainder of the City Council likely would have voted to uphold the challenges and exclude the Mayor, the failure to do so is merely a procedural violation that did not prejudice Petitioners' substantive rights.

Finally, it is significant that CDC 99.180 does not require the City Council to hear public testimony or argument when voting on a challenge. Accordingly, other than the written statements in the challenges themselves, Petitioners would not have had the opportunity to testify regarding the Mayor's alleged bias, present additional evidence or additional legal arguments. Thus, Petitioners were not denied the opportunity to advocate in favor of the challenges.

For these reasons, LUBA should deny More's third assignment of error.

D. Response to STOP First Assignment of Error

In their first assignment of error, STOP Petitioners argue that the City lacks legal authority to impose an impact fee for use of the public right of way as a condition of approval. STOP Pet. at 15-27. For the following reasons, LUBA should deny Petitioners' first assignment of error.

1. STOP Failed to Raise the Issue Below

It is well established that the failure to raise an issue at the local level precludes an appeal to LUBA based on that issue. ORS 197.763(1), 197.835(3); *Pliska v. Umatilla County*, 240 Or App 238, 233-244, 246 P3d 1146 (2010); *Stewart v. City of Salem*, 231 Or App 356, 363–64, 219 P3d 46 (2009), *rev. den.* 348 Or 415, 233 P3d 818 (2010) (discussing "raise it or waive it" principle); *Vanspeybroeck v. Tillamook County*, 221 Or App 677, 691, 191 P3d 712 (2008) (failure to raise an issue to a local decision-maker precludes appeal to LUBA based on that issue.).

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Both decisions below impose the same "community impact fee" ("Fee") obligation on the applicant "for use of the public streets in West Linn." R. at 249. Condition 16 states:

> 16. Community Impact Fee. The applicant shall enter into an intergovernmental agreement with West Linn in lieu of a franchise or other licensing fee for use of the public streets in West Linn. The agreement shall require a one-time payment of $5 million to be used for West Linn water system improvements to meet the overall needs of the community.

Petitioners argue that "there is no legal authority for the City to charge an *ad hoc* impact fee to a developer" under various provisions of ORS 221 (organization of municipal government), ORS 223 (infrastructure financing), ORS 271 (disposition of public real property), or the "nexus requirement" in *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 107 S. Ct. 3141 (1987).[2] STOP Pet. at 17, 20-21, 24-25. However, at no time during the proceedings did Petitioners ever question the City's authority to impose such a fee, much less under any specific statutory scheme. To the contrary, to the extent Petitioners addressed the Fee at all, they argued that the City was not demanding enough. Petitioners' written materials address the "$5M right of way license fee." R. at 504. But rather than challenging the City's authority to impose the Fee, they argued that "[t]his is just a bad business deal, need to apply perpetual royalty in the neighborhood of 10-20% gross revenue share per year, for life of agreement." *Id.* Petitioners go on to assert that the City has a "fiduciary and ethical responsibility to negotiate BEST POSSIBLE DEAL for West Linn, not easiest deal." *Id.* (capitalization in original).

It is clear from Petitioners' own statements that they believe the City has authority to impose a fee for use of the public right of way within the city. Indeed, their only objection was that the City wasn't demanding a larger payment. Other comments in the record follow a similar theme. R. at 705 ("low ball offer"); 943 ("Is West Linn for sale?"); 1215 ("$5million is far too cheap); 2828 ("scant and quickly spent $5 million"); 2833 ("insist on

[2] Presumably as modified by the U.S. Supreme Court in *Koontz v. St. John's River Water Management District*, __ U.S. __, Docket No. 11-1447 (2013)

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more than the $5 million fish tossed at us by LO."). Nowhere in the record is there any evidence that Petitioners claimed that the proposed Fee for use of the public right of way violates the provisions of ORS 221, 223, 271 or the U.S. Constitution either generally or by reference to the specific statutes, and Petitioners do not point to any. *See also Bundy v. City of West Linn*, 63 Or LUBA 113 (2011) (constitutional provision at issue must be cited or the substance of the constitutional provision argued to the decision maker); *Larson v. Multnomah County*, 24 Or LUBA 629 (1993) (petitioner is required to raise constitutional claim during the local proceedings or waive the right to raise the issue at LUBA). Again, all of their testimony was to the contrary—that the City wasn't exercising its authority enough.

Having failed to raise the issue of the City's authority to impose the Fee for use of the right of way, Petitioners cannot now raise it for the first time at LUBA. *Pliska* at 233-244.

2. STOP Lacks Standing to Assert the Rights of a Another Party

It is also well established that a petitioner cannot assert the rights of another party. *Columbia Riverkeeper v. Clatsop County*, 61 OR LUBA 1996 (2010) (prejudice to another party is not a sufficient basis to warrant remand of the decision); *Gordon v. Polk County*, 50 Or LUBA 502 (2005) (petitioner may not seek reversal or remand based on prejudice to other persons); *Bauer v. City of Portland*, 38 Or LUBA 432, 436 (2000) (prejudice must be to petitioner, not a third party).

Here, the condition of approval imposes a payment obligation only on the applicants—LOT, Lake Oswego and Tigard. To the extent the condition affects a party's substantial rights, it only affects the cities and their respective ratepayors. Accordingly, only those parties may advance legal arguments that the condition violates their substantive rights.

Simply stated, STOP may not argue the cities legal rights on their behalf. Petitioners do not, and cannot, explain why the Fee prejudices their substantial rights in a manner that would allow them to assert the rights of the Lake Oswego and Tigard ratepayers who will have to pay the fee. Arguably, Intervenor-Respondents could have appealed the City's

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decisions on the basis that Condition 16 violates state or federal law, but Petitioners lack standing to do so.

3. The City Has Authority to Impose a Fee for Use of the Public Rights of Way in the City

Petitioners' argument that the City lacks authority to impose the Fee is based on a misunderstanding of the scope of local authority granted in the Oregon Constitution and West Linn's Charter. The appropriate inquiry is not, as Petitioners suggest, whether there is a statutory grant of authority. Rather, Petitioners must show an affirmative preemption of City home rule authority to impose the Fee. Petitioners have not pointed to any statute that preempts that authority.

a. The Community Impact Fee is a Fee for Use of the Right of Way

As a preliminary matter, Petitioners assert a list of potential bases for the Fee, including claims that it may be a Systems Development Charge under ORS 223.297 *et seq.* (STOP Pet. at 16-17), "some sort of ad-hoc development fee" (STOP Pet. at 17) or a franchise fee (STOP Pet. at 18), then decides it must be payment for an improper transfer for real property (STOP Pet. at 24-26). Despite the Petitioners' effort to make it so, the Fee is not complicated. The Fee is required as part of an intergovernmental agreement between LOT and the City for use of the public streets in the City and is "in lieu of a franchise or other licensing fee." As shown below, the City has authority to impose a fee for use of the rights of way, as it has done here. Petitioners' attempts to re-label the Fee are unsupported in the record and irrelevant as a matter of law.

b. ORS 221 Does Not Preempt City Authority to Impose the Fee

Petitioners argue the Fee is a franchise fee that the City lacks authority to impose because ORS 221.415 and 221.420 do not apply to municipal utilities. This position is based on a fundamental misunderstanding of the City's home rule authority. The City does not need express statutory authority to impose the Fee, nor does ORS 221 in any way preempt

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the City from impose the Fee (or a franchise fee for that matter) on Lake Oswego. The City has a home rule charter that expressly reserves to it "all powers which the Constitution, statutes and common law of the United States and of this State now or hereafter expressly or implied grant or allow the City, as fully as though this Charter specifically enumerated each of those powers." 1994 West Linn Charter Sec. 4.

Municipal home rule authority is rooted in two 1906 amendments to the Oregon Constitution. The primary purpose of the home rule amendments was "to allow the people of the locality to decide upon the organization of their government and the scope of its powers under its charter without having to obtain statutory authorization from the legislature, as was the case before the amendments." *LaGrande/Astoria v. PERB*, 281 Or 137, 142, 576 P2d 1204, 1208, *aff'd on reh'g* 284 Or 173 (1978). Recognizing the broad authority granted Oregon home rule jurisdictions, the Oregon Supreme Court has looked at the issue not as whether the city needs state authorization to act, but "[r]ather, whether state or federal law prohibits the city from doing so." *US West Communications, Inc. v. City of Eugene*, 336 Or 181, 186, 81 P3d 702, 705 (2003).

The proper analysis in this case, then, is to look at whether there is a statute that preempts the City's authority to impose the Fee. This is fundamentally different from Petitioners' argument, which incorrectly asserts that since municipal utilities are not subject to ORS 221.420, the City has no authority to impose the Fee. The correct analysis actually leads to the opposite result: Since ORS 221.420 does not apply on these facts, it cannot possibly preempt the City from imposing the Fee.

In fact, the statutes on which Petitioners rely expressly underscore the City's independent home rule authority to impose the Fee. In ORS 221.415, the Legislature "[r]ecogniz[es] the independent basis of legislative authority granted to cities in this state by municipal charters" and states its intention that ORS 221.420 "reaffirm the authority of cities to regulate use of municipally owned rights-of-way . . . ." *AT&T Communications of the*

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Pacific Northwest, Inc. v. City of Eugene, 177 Or App 379, 398, 35 P3d 1029 (2001), *rev. den., AT&T Communications of Pacific Northwest, Inc. v. City of Eugene*, 334 Or 491, 52 3d 1056 (2002) (noting with respect to telecommunications carriers that ORS 221.415 expressly recognizes the "independent basis" of municipal authority and that ORS 221.450 "expressly ... confirm[s] the authority of any city to charge telecommunications carriers for the use of local rights-of-way"). With this context, it is clear that ORS 221.420 "reaffirms" the City's existing authority to regulate its rights of way with respect to certain entities, and has no impact whatsoever on entities not covered by the statute.

In other words, there can be no "preemption by omission." To the contrary, "LaGrande/Astoria and its progeny require an expressly stated intent to preempt particular municipal enactments in order for a state statute to have that effect." *Thunderbird Motor Club*, 234 Or App 457, 471, 228 P3d 650 (2010). Accordingly, a court must begin its preemptive review with a presumption against preemption. *See id.* at 271. This is especially true in the area of local taxation and finance. *See LaGrande/Astoria*, 281 Or at 143.

Because ORS 221.415 and 221.420 do not apply to municipal utilities, it cannot and does not preempt the Fee. As the Legislature acknowledged in ORS 221.415, the City has "an independent basis of legislative authority" in its Charter, and Petitioners have shown no preemption of the authority to impose the Fee.

c. The Fee is Authorized by the City Code and Charter

Petitioner claims the City imposed the Fee "out of thin air" because they believe there is not an applicable ordinance authorizing the Fee. STOP Pet. at 19. This is false. The West Linn Municipal Code ("WLMC") clearly states that "[t]he City has jurisdiction to control public rights of way within the City and *may* regulate the use of rights of way by ordinance, franchise, license, permit or any combination thereof." WLMC 9.030 (emphasis added). Petitioners mistake the word "may" for "shall." This is not an exclusive list of the City's rights of way management tools. Nothing in this section prohibits the City from controlling

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the rights of way through an intergovernmental agreement and an associated fee, nor in any way restricts the imposition of fees for use of the rights of way. Here, the City has exercised its authority over the rights of ways by intergovernmental agreement and an associated fee, a power that is clearly within the scope of authority granted in the home rule charter and the terms of WLMC Chapter 9.

d. The IGA Required in Condition 16 Must Comply with Applicable Law

Having tried (unsuccessfully) to paint the Fee as an impermissible franchise fee, Petitioners go on to argue that the intergovernmental agreement must then be an impermissible perpetual franchise. STOP Pet. at 18, citing ORS 221.460. This position is unsupportable. First, Condition 16 does not address the duration of the intergovernmental agreement. Second, assuming arguendo the intergovernmental agreement is a "franchise" as Petitioners assert, then the City and Lake Oswego must comply with applicable laws, including any applicable limits on the duration of the agreement. Nothing in Condition 16 is inconsistent with ORS 221.460, and thus the condition is lawful on its face.

e. Because the Fee is Not Preempted, the City has Authority Under ORS 190

Petitioners claim the City and Lake Oswego lack the authority to enter into the intergovernmental agreement required in Condition 16 because the City lacks authority to impose the Fee. STOP Pet. at 23. As shown above, Petitioners' premise lacks legal support. The City has authority to regulate its rights of way and impose the Fee, and the cities have the authority to enter into an intergovernmental agreement to achieve that purpose. ("A unit of local government may enter into a written agreement with any other unit or units of local government for the performance of any or all functions and activities that a party to the agreement, its officers or agencies, have authority to perform." ORS 190.010.

f. ORS 271 Does Not Apply

Petitioners' argument that the City has conveyed an interest in its rights of way in violation of ORS 271.300 *et seq.* is not supported by the record. That statute applies where a

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political subdivision decides to "sell, exchange, convey or lease" real property. ORS 271.310(1). It is clear on the face of Condition 16, which states that there will be an intergovernmental agreement and an associated fee for using the public rights of way in the City, that the City has not agreed to lease the rights of way. One of the hallmarks of a property right, including a lease, is the right to exclude others. *See Dolan v. City of Tigard*, 512 US 374, 384, 114 S Ct 2309 (1994) (right to exclude others is one of the most fundamental property rights). It is readily apparent that the Condition does not and could not transfer such a right to Lake Oswego. In short, the City did not follow the terms of ORS 271.300 *et seq.* because the statute does not apply.

E. Response to STOP Fifth Assignment of Error

In their fifth assignment of error, STOP Petitioners argue that communications between Councilor Jones and city staff, and between city staff and LOT, constitute *ex parte* contacts under ORS 227.180(3) to which they were not allowed to respond and the decision should be remanded on that basis. STOP Petition at 46-50. For the following reasons, LUBA should deny the fifth assignment of error.

1. LUBA Should Disregard STOP's Fifth Assignment of Error Because it Relies on Facts That are Not in the Record

LUBA has repeatedly held that it will disregard those portions of a petition for review that are based on facts that are not in the record. *Mannenbach v. City of Dallas*, 25 Or LUBA 136, 138, *aff'd* 121 Or App 441 (1993); *Spiro v. Yamhill County*, 38 Or LUBA 133 (2000). In this case, Petitioners acknowledge that the fifth assignment of error is "premised on facts that are not in the record." Because it is based on evidence that is admittedly not in the record, LUBA should disregard the fifth assignment of error.

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2. Communication between a City Councilor and Staff are Not *Ex Parte* Contacts Provided New Evidence is Not Communicated

Communication between a city councilor and staff is not *ex parte* communication provided staff does not act as a conduit for new evidence that is not already in the record. ORS 227.180(4); *Richards-Kreitzberg v. Marion County*, 31 Or LUBA 540, 541, *aff'd without opinion* 145 Or App 603, 930 P2d 905 (1997); *McInnis v. City of Portland*, 25 Or LUBA 376 (1993), citing *Toth v. Curry County*, 22 Or LUBA 488 (1991).

Here, there is no evidence or allegation, and Petitioners do not argue otherwise, that the applicant used staff as a conduit to provide new evidence that was not already in the record. At most, Petitioners allege that staff was directed to draft conditions of approval proposed by Councilor Jones, then to "run the conditions by the applicant." STOP Pet. at 48. Thereafter, whether or not staff briefed one or more councilors on that discussion is of no consequence. Local staff routinely works with the parties (including an applicant) on staff reports and conditions of approval, then brief the governing body on those discussions. As long as no new evidence is provided to the governing body upon which the governing body relies in reaching a decision, such briefings do not constitute *ex parte* contacts that must be disclosed. *McInnis v. City of Portland*, 25 Or LUBA at 381-82.

In *Mcinnis*, the Portland City Council was considering a comprehensive plan amendment and zone change. Having missed most of an earlier hearing, one city councilor reviewed the extensive record and "received a personal briefing" from staff. *Id.* at 380. The petitioners argued that the councilor was influenced by information he received from the staff, which should have been disclosed and an opportunity to respond provided. LUBA rejected the argument, concluding:

> Here, there is nothing to suggest that the city staff briefed the city commissioner on anything other than the evidence already in the record. Nothing suggests the city staff impermissibly advocated denial of the proposal or did anything other than perform its role of providing administrative support to the city council.

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Id. at 382.

So too in this case. Even according to Petitioners' unsubstantiated facts, staff was directed on Saturday, February 9, by Councilor Jones to work on additional conditions of approval for consideration by the full City Council at the meeting scheduled for Monday, February 11. Thereafter, according to the news media cited by Petitioners, the City Manager was "in contact with both Jones and LOT officials in regard to the new conditions, and that other city staff, such as attorneys, dealt with drafting the conditions." STOP Pet. at 48. Significantly, Petitioners do not allege that any new evidence was presented to Councilor Jones or any other member of the City Council, or even that LOT was involved in drafting the conditions of approval, which were drafted by "other city staff, such as attorneys." There is no authority, and Petitioners do not cite to any, for the argument that informing an applicant that city staff is preparing additional conditions of approval and briefing members of the governing body on those discussions constitutes *ex parte* contacts for purposes of ORS 227.180(3). *See also Hunt v. City of Ashland*, 35 Or LUBA 467, 481 (1999) (staff recommendation regarding appropriate conditions of approval is not new evidence).

The only authority Petitioners cite regarding the treatment of *ex parte* contacts under ORS 227.180(3) affirms the City's position that "a decision-maker talking to staff outside of the public record is not an *ex parte* contact." STOP Pet. at 49 (citing *Richards-Kreitzberg*, 31 OR LUBA at 541, *Dickas v. City of Beaverton*, 16 OR LUBA 574, 581, *aff'd* 92 Or App 168 (1988)). However, in a footnote, Petitioners attempt to rely on a Lane County Circuit Court case that not only does not provide a basis for authority at LUBA but involved claims under Oregon's public meetings laws (ORS 192.610 to 192. 690), not *ex parte* communications under ORS 227.180 (3). STOP Petition at 48-49. As such, it provides no authority to support a claim under ORS 227.180(3). *See also Falls v. Marion County*, 61 Or LUBA 39 (2010) (LUBA will not consider an assignment of error that is presented only in a footnote).

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For these reasons, LUBA should deny STOP's fifth assignment of error.

IV. CONCLUSION

The City respectfully requests the Board denying all of Petitioners' assignments of error and affirming the City's decisions.

DATED this 6th day of August, 2013.

Respectfully submitted,

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CERTIFICATE OF FILING AND SERVICE

I certify that on the date indicated below, I filed the original and four copies of the foregoing CITY OF WEST LINN'S RESPONSE BRIEF with the:

Land Use Board of Appeals
DSL Building
775 Summer Street NE, Suite 330
Salem, OR 97301-1283

by first-class mail, postage prepaid. On the same date, I served a true and correct copy of the same, by first-class mail, postage prepaid, on the following parties:

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I. STANDING

Intervenor-Respondent City of Lake Oswego (jointly known with the City of Tigard as the Lake Oswego-Tigard Water Partnership and hereinafter referred to as the "Partnership"), do not challenge Petitioners' standing to seek review of the challenged decisions.

II. STATEMENT OF THE CASE

A. Nature of the Land Use Decision and Relief Sought

Respondent City of West Linn (hereinafter "Respondent") approved two permit packages: one allowing for the construction of an expanded water treatment plant (WTP) and the second, for raw water and finished water pipelines conveying water to and from that plant. Petitioners Stop Tigard Oswego Project, LLC *et al* (hereinafter referred to as "STOP") and William J. More *et al.* (hereinafter referred to as "More") seek reversal or remand of these two decisions. However, LUBA should reject these requests and affirm the two decisions.

B. Summary of Arguments

Respondent and Intervenors have divided their response amongst three separate briefs. Respondent City of West Linn's Brief deals with the numerous procedural challenges raised primarily by More in their First through Third Assignments of Error, STOP's Fifth Assignment of Error as well as a response to STOP's First Assignment of Error. Intervenor City of Tigard's brief addresses STOP's First Assignment of Error. This brief, filed on behalf of the City of Lake Oswego, deals with the remaining assignments. The City of Lake Oswego hereby adopts, and incorporates by reference, Respondent and the City of Tigard Response Briefs.

As for STOP's Second and Third Assignments of Error, Respondent interpreted its Water Resource Area regulations, CDC Chapter 32, to apply only to areas that exhibit particular water resource characteristics, including those elements occurring underground. The proposed pipeline installation activities occur outside of, above, or below Water Resource Areas and will not "disturb" any water resource. Therefore, the mitigation obligations

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triggered as a result of a "permanent disturbance" under CDC 32.050(C) do not apply.

In response to STOP's Fourth Assignment of Error as well as a portion of More's Fifth Assignment of Error, Respondent's findings adequately consider and respond to the conditional use criteria contained within CDC 60.070(A)(1), to mitigate "adverse effects" and (A)(3), to provide a proposal that is "consistent with the overall need of the community." Respondent's findings explain and impose mitigation obligations such as a robust Construction Management Plan, including (1) limiting the Highway 43 work hours to between 8:00 pm and 5:00 am and requiring that the road be re-opened to allow for a fully functioning street during the other 15 hours per day; (2) limiting the length of the construction zone to 200 feet; and (3) maintaining at least one driveway or access for vehicles to every business that is operating during hours which overlap with nighttime construction hours. R. 193-194. In addition, the findings go on to require additional mitigation including additional business access signage as well as implementation of a "Shop Local" Marketing Plan, which was not challenged.

In response to More's Fourth Assignment of Error, Respondent's interpretation of "overall needs of the community," set out in CDC 60.070(A)(3) is plausible and therefore, is entitled to deference under ORS 197.829. Respondent's interpretation that the West Linn community does benefit from a proposed development that also benefits other communities is consistent with the express language of CDC 60.070(A)(3), its purpose and the comprehensive plan.

In response to the remainder of More's Fifth Assignment of Error, Respondent's finding that the pipeline is "consistent with the overall needs for the community" is plausible and supported by substantial evidence.

C. Statement of Material Facts

Petitioners statements of material fact focus on self-serving facts, ascribe particular motives to the Respondent's Mayor and City Council that are not supported by the record, mischaracterize the agreement requirements between Respondent and the Partnership entities,

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present argument, contain many facts that are irrelevant to resolution of the issues raised before LUBA, and fail to focus upon the evidence that Respondent relied on in finding that the applicable approval criteria are satisfied. Therefore, a much more abbreviated statement of those facts material to resolution of the issues raised is provided here.

On January 17, 2012, the Partnership filed Conditional Use and Design Review applications to expand Lake Oswego's existing water treatment plant ("WTP") on property zoned R-10, Single Family Residential. R. 77. The new plant would replace a 47-year old facility with obsolete and unreliable electrical, mechanical and treatment technologies with a state-of-the-art treatment facility that is energy efficient and designed to remain operable and usable after a magnitude 9.0 seismic event. The project would expand the plant's water treatment capacity from 16 million gallons per day (mgd) to 38 mgd with only a 9% increase in overall area occupied by the plant. R. 66.

The WTP expansion would be part of an updated water treatment and distribution system that begins in the City of Gladstone and ends in the City of Tigard. In June 2012, the Partnership submitted a number of applications including a Conditional Use, Design Review, Water Resources Area and Willamette River Greenway Permits for a water transmission line. A 42-inch diameter raw-water pipeline (RWP) would begin in the Clackamas River, in Gladstone, and would extend under the Willamette River via horizontal directional drilling (HDD) to the WTP in West Linn. The boring would continue at a depth between 60 and 34 feet under wetlands and streams in Mary S. Young (MSY) Park. App. p. 1. Then the RWP would gradually rise toward the surface as it extends toward two Oregon Parks and Recreation District (OPRD)-owned lots (i.e., tax lots 100 and 200 that are not part of Mary S. Young State Park) at the south end of Mapleton Drive, until arriving at the terminus of drilling operations/staging area on tax lot 200, 7-feet below grade, but outside the boundaries of any Water Resource Area. App. p. 2. From there, the pipe would be located in an open-cut trench on OPRD tax lot 200 at a depth of approximately 5- to 7-feet that would extend north and west

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along Mapleton Drive, terminating at the WTP. After installation of the pipe, the trench will be filled. R. 180.

A finished-water pipeline (FWP) leading from the WTP to destinations in Lake Oswego and Tigard would be installed via open–cut trench from the WTP to Mapleton Drive and then west at a depth of approximately 5- to 7-feet beneath Mapleton Drive, primarily in an open-cut trench, to its intersection with Highway 43 where it would then extend north in the Highway 43 right-of-way to Lake Oswego. R. 180. Trillium Creek and Heron Creek pass underneath Mapleton Drive within culverts. Using tunneling/boring methods, the pipeline will be located within the Mapleton Drive right-of-way but underneath the culvert carrying Trillium Creek. R. 8472. The pipeline will be laid within an open trench in Mapleton Drive well above the Heron Creek culvert. R. 8477. Following construction, Mapleton Drive, Kenthorpe Way and affected portions of Highway 43 would be repaved to their existing width. R. 180.

The WTP was considered by the Planning Commission during a series of hearings held in April and May 2012. The pipeline applications were filed in July 2012 so that the WTP and pipeline applications could be considered together, although these two development permit packages were never formally consolidated. In the fall of 2012, the Planning Commission voted to deny the two proposals. R. 62 and 182. The denial was based primarily upon a finding that the applications failed to provide sufficient "enhancement to the community that offset the impacts" as necessary to satisfy a conditional use criterion requiring that the proposal further the "overall needs of the community," CDC 60.070(A)(3). R. 62, 2994. On December 10, 2012, the Partnership appealed the Planning Commission's decision. In response to concerns raised by the Planning Commission, the Partnership included with its appeal further revisions to the plant proposal including removal of the existing Operations Building, reducing the overall building footprint and thus, reducing impacts to the surrounding neighborhood, as well as an offer to mitigate impacts in other ways. R. 63.

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In addition to reducing the overall WTP footprint, the Partnership identified additional benefits to West Linn flowing from an approval, a number of which are listed below as they are relevant to this appeal:

- Provide a reliable back-up supply of water to West Linn in furtherance of the 2008 Water Master Plan because it offers the most redundancy and lowest cost.
- Replace an existing 2003 intergovernmental agreement (IGA) between West Linn, Lake Oswego, and South Fork Water Board[1] (SFWB) that provides a non-specific quantity of emergency water that is unilaterally terminable, with a new agreement (adding Tigard as a party) that commits at least 4 million gallons per day (mgd) of emergency water and requires consent of all parties for termination and amendment.
- Eliminate capital improvement costs that would otherwise be required to achieve an equivalent level of water supply reliability, and in doing so reduce water rate increases for residents and businesses in West Linn.
- Connect with and provide access to 450 million gallons of reservoir storage in Lake Oswego and Tigard.
- Provide a more reliable water conveyance system than currently exists as demonstrated by professional civil and seismic engineers.
- Impose a utility access fee that would consist of a one-time payment of $5 million from the Partnership to Respondent to be negotiated through a separate user-fee agreement consistent with the conditions of approval.
- Replace and upsize existing asbestos cement waterlines owned by West Linn in Mapleton Drive, Kenthorpe Way, and Old River Road.
- Fund $90,000 worth of restoration and enhancement work within Mary S. Young Park. R.782-783, 841.

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[1] South Fork Water Board is an ORS 190 municipal water supply agency formed between the cities of West Linn and Oregon City.

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On February 18, 2013, following de novo hearings, the West Linn City Council voted to approve the WTP and pipeline applications with conditions of approval requiring among other things, the execution of a new IGA and payment of the utility access fee. These appeals followed.

III. JURISDICTION

The Partnership accepts Petitioners' statement of LUBA's jurisdiction as adequate for purposes of LUBA's review.

IV. RESPONSE TO STOP'S SECOND ASSIGNMENT OF ERROR – Respondent's interpretation of CDC 32.010, concluding that the horizontally drilled directional pipe located outside of water resource areas will not "disturb" water resource areas, was plausible. Therefore, such activities are not subject to mitigation requirements.

A. Scope of Review

In the context of a review of a governing body's interpretation of its own development code, as is the case here, LUBA applies the standard of review described in *Siporen v. City of Medford*, 349 Or 247, 259, 243 P3d 776 (2010), and determines that if the governing body's interpretation is "plausible," the interpretation must be upheld. LUBA does not overturn a city's interpretation of its own code, even if a petitioner or LUBA itself finds another interpretation more persuasive. *Id.* Rather, the question is not whether the City's interpretation is "correct" in some absolute sense of the term, as suggested by STOP's arguments, but instead, the question is whether the Respondent's interpretation is plausible under the "highly deferential" standard imposed by ORS 197.829(1) and *Siporen*. *Tonquin Holdings v. Clackamas County*, 247 Or App 719, 722, 270 P3d 397 (2012), *rev. den.* 352 Or 170, 285 P3d 720 (2012).

B. Response to Assignment of Error

1. Water Resource Area Regulation Generally.

CDC Chapter 32 sets out the steps that must be satisfied in order to develop property

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containing a mapped Water Resource Area (WRA). First, CDC 32.025 requires a permit in order "to fill, strip, install pipe, undertake construction, or in any way alter an existing water resource area."[2] The proposal was to "install pipe" on property containing existing water resource areas and therefore, a WRA permit was required and was obtained.

After the permit obligation is triggered, an applicant must identify "all water resource areas on the project site" including drainage ways, wetlands, and riparian corridors. CDC 32.050(A) and (E).[3] "Water Resource Area" is defined in CDC 2.030 to include:

> Any area that consists of a wetland identified in the West Linn Local Wetlands Inventory and the required transition and setback area around the wetland pursuant to Chapter 32 CDC, or any major or minor open channel drainageway identified by the most recently adopted West Linn Surface Water Management Plan and the required transition and setback area around the major or minor open channel pursuant to Chapter 32 CDC, except for small manmade open roadside drainage swales in residential areas, or any riparian corridor (not including lands adjacent to the Willamette or Tualatin Rivers)

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[2] CDC 32.025 provides:

> No person shall be permitted to fill, strip, install pipe, undertake construction, or in any way alter an existing water resource area without first obtaining a permit to do so from the decision-making authority, paying the requisite fee, and otherwise complying with all applicable provisions of this chapter.

[3] CDC 32.050 provides:

> No application for development on property containing a water resource area shall be approved unless the decision-making authority finds that the following standards have been satisfied, or can be satisfied by conditions of approval.
>
> A. Proposed development submittals shall identify all water resource areas on the project site. The most currently adopted Surface Water Management Plan shall be used as the basis for determining existence of drainageways. The exact location of drainageways identified in the Surface Water Management Plan, and drainageway classification (*e.g.*, open channel vs. enclosed storm drains), may have to be verified in the field by the City Engineer. The Local Wetlands Inventory shall be used as the basis for determining existence of wetlands. The exact location of wetlands identified in the Local Wetlands Inventory on the subject property shall be verified in a wetlands delineation analysis prepared for the applicant by a certified wetlands specialist. The Riparian Corridor Inventory shall be used as the basis for determining existence of riparian corridors.
>
> ***
>
> E. *The protected water resource area shall include the drainage channel, creek, wetlands, and the required setback and transition area.* (Emphasis added.)

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> and the required transition and setback area for the riparian corridor pursuant to Chapter 32 CDC.

In other words, a WRA is the natural feature coupled with a transition or setback area that is necessary for resource protection and to improve water quality. App. pgs. 3-4.

Once the WRA is identified, particular regulations of those areas are imposed when required by Chapter 32. For example, CDC 32.050(C) provides:

> C. Development shall be conducted in a manner that will *minimize adverse impact on water resource areas*. Alternatives which avoid all adverse environmental impacts associated with the proposed action shall be considered first. For unavoidable adverse environmental impacts, alternatives that reduce or minimize these impacts shall be selected. If any portion of the *water quality resource area is proposed to be permanently disturbed*, the applicant shall prepare a mitigation plan as specified in CDC 32.070 designed to restore disturbed areas, either existing prior to development or disturbed as a result of the development project, to a healthy natural state. (Emphasis added.)

2. Respondent's Interpretation That Mitigation Obligations Apply Only To WRAs is Plausible.

STOP argues that Respondent misinterpreted CDC 32.050(C) when it found that horizontal drilling to install a pipe between 34 to 60 feet underneath identified creek and wetland resources within MSY Park and beyond the boundaries of WRAs within the OPRD parcels will not cause a "disturbance" triggering mitigation. STOP characterizes Respondent's interpretation to be that WRAs and the regulations protecting them apply only to the surface of resources. Pet. p. 33, lns. 4-6.

STOP's argument represents a gross misunderstanding of Respondent's interpretation of the applicable standards that include the consideration of all impacts to water resources that extend below ground as well as on the surface based on uncontroverted expert evidence establishing identified WRA boundaries. In other words, the obligation to mitigate activities is limited to those activities occurring within the WRA itself. The findings making such an interpretation state:

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> WRA Disturbance – Chapter 32 limits the amount of disturbance allowed in a Water Resource Area (WRA). The evidence in the record establishes that using HDD construction methods well below (34 to roughly 60 feet) a WRA will have no effect on the resources protected by the WRA. Protected WRA's include the drainage channel, creek, wetlands, and the required setback and transition areas that exist above ground while the wetland component of a WRA can extend below-ground to a depth that is, "inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions." This definition provides a limit upon which to measure the below-ground extent of wetlands and therefore, WRAs. The applicant's plans demonstrate that their RWP alignment avoids WRAs by going around (beneath) them and containing impacts to WRAs in Mapleton Drive and Highway 43 to already disturbed areas of the right-of-way. Therefore, the disturbance limits contained in Chapter 32 do not apply. Rec. 188.

Respondent made absolutely no findings that its interpretation was limited to activities occurring only on the surface as STOP suggests. Rather, what Respondent's found, based on evidence in the record, was that WRAs do not extend all of the way down to the center of the earth simply because they manifest on the surface, as would be the result of STOP's reasoning. Respondent interpreted its code to conclude that in addition to limits to water resource areas occurring horizontally on the surface, there are similarly limits to the vertical depth of the resource as well. Such an approach is not only entirely plausible, it is correct given the language and structure of the CDC.

STOP states for the first time before LUBA that the WRA purpose statements of CDC 32.010(A) identifying underground benefits of resource protection such as "providing filtration, soil infiltration, and natural water purification, and stabilizing slopes to prevent landslides" support STOP's claim that a disturbance of a resource may occur underground. Even though this argument was not preserved on appeal, no party disputes that WRAs may include components such as soil filtration or purification qualities occurring underground. However, nothing in the CDC suggests that these underground benefits exist *ad inferos* in all cases for every resource area, and there was no evidence presented that they exist given the depths of the HDD drilling in this case. Rather than the map or the property boundaries, it is

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the resource itself and the transition area that constitutes the WRA and is subject to mitigation obligations if disturbed.

The CDC sections quoted above are particularly directed to the wetland, riparian and drainage resources (and setback areas) identified on the subject property by reference to maps and direct investigation rather than as identified on the City's Zoning Map or throughout an entire property, from property line to property line and extending *ad coelum et ad inferos*, as STOP argues. In fact, nothing in the text or context of the WRA regulations suggests that Respondent's interpretation limiting the disturbance obligation to water resource areas and their setbacks, rather than to the entire property, was in any way implausible or incorrect.

3. STOP's Allegations of Particular Disturbances Were Not Raised and Have Been Waived Under ORS 197.835(3).

As an introductory matter, within the over 11,000 page record, the only instance where STOP cites to the record as evidence of preservation of error is to the testimony of Kari Oakes at pages 1015-1016 in the Record. Ms. Oakes assertion was only that installation of a pipeline "by definition imposes a permanent disturbance" requiring mitigation. Other than a claim that installation of the pipe constituted a "disturbance" per se, no party challenged Respondent's interpretation that the activities proposed would not "disturb" any WRA.

Under ORS 197.835(3), a petitioner must demonstrate that the proposal's compliance with that criterion was raised below accompanied by statements or evidence sufficient to afford other parties an adequate opportunity to respond in order to raise a similar challenge before LUBA. *Bruce Packing Company v. City of Silverton*, 45 Or LUBA 334 (2003). Neither STOP, nor any other party challenged Respondent's reliance on a previous interpretation of the term "disturbance," nor did any party challenge the Partnership's expert evidence that the activities would occur outside of the WRA so as not to "disturb" them. *Slepack v. City of Manzanita*, 44 Or LUBA 301(2003) (Petitioner's evidentiary challenge to a city's conclusion that an applicable criterion is satisfied provides no basis for reversal or

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remand, where the challenge is based on petitioner's interpretation of what the criterion requires, and that interpretation was not presented during the local proceedings.) *Lofgren v. Jackson County*, 55 Or LUBA 126 (2007) (Arguments that the county road is inadequate are insufficient to raise an argument that the road cannot be improved without amending the county's transportation system plan.)

Lacking any facts in the record to support an assertion that installation of a lateral pipe 34-60 feet below ground will impact wetland or riparian area operations consistent with Respondent's interpretation, STOP inserts entirely new facts not found in the record regarding asserted difficulties in the filtration of *Giardia* and *E. Coli* resulting from soils found under natural resource areas. This new evidence should be disregarded and not considered by LUBA. *Spiro v. Yamhill County*, 38 Or LUBA 133 (2000); *Mannenbach v. City of Dallas*, 25 Or LUBA 136 (1993).

STOP goes on to suggest that it does not take a "PhD in hydrology" to understand the impacts if the pipeline springs a leak. STOP Pet. p. 36, lns. 1-11. No party asserted below that the pipeline encased within bedrock located underneath MSY Park could possibly leak or negatively impact wetlands or stream resources. Similarly, if there was any testimony below identifying concerns over hydrofracture of the bore hole during installation damaging WRAs, STOP fails to cite to it. If it was raised, there was no substantial evidence identifying what impacts would result. Any such evidence would have been met by a response by a qualified expert, such as the David Evans and Associates technical memorandums discussed below. Further, STOP for the first time includes an entirely conclusory statement that the "violent nature of the HDD process" will disturb water resource areas and that the type of rock subject to the boring is highly earthquake vulnerable. STOP Pet. p. 39, lns. 24-26, p. 40, fn. 22. Therefore, STOP cannot be heard to raise these new issues now.

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4. Respondent's Interpretation of "Disturbance" To Mean A "Change To The Physical Status" of the WRA is Plausible and is Supported by Substantial Evidence.

Although not raised as a substantial evidence question, STOP proceeds to identify a laundry list of ways it believes that HDD of a pipeline within bedrock underneath a WRA constitutes a "disturbance." Should LUBA decide that these arguments were properly raised, or presented here, Respondent's interpretation of the term "disturbance" is plausible and supported by substantial evidence. Substantial evidence is evidence a reasonable person would rely on in reaching a decision. *Younger v. City of Portland,* 305 Or 346, 360, 752 P2d 262 (1988); *Dodd v. Hood River County,* 317 Or 172, 179, 855 P2d 608 (1993).

STOP is correct that the CDC does not define the term "disturbance" but their argument stops short in failing to address the Planning Director's interpretation of "disturbance" in response to *Horsey v. West Linn* relied on by STOP. 59 Or LUBA 185 (2009). In *Horsey,* LUBA remanded an interpretation of "disturbance" limits to "development" within a WRA to exclude temporary activities such as site clearing and it failed to include underground storm drainage facilities within the calculation of the area to be "disturbed."

The Planning Director's interpretation (adopted by Respondent's Council) responding to LUBA's decision in *Horsey* provides:

> **Disturb:** man-made changes to the existing physical status of the land, which are made in connection with development that would result in the destruction, damage, or removal of vegetation; or the compaction or contamination of the soil, not including stormwater run-off or the routine maintenance of the property consistent with CDC Chapter 32. Rec. 8411.

This interpretation makes it clear that underground impacts such as the compaction or contamination of soil was included in its interpretation of the WRA standards. The interpretation that was made and applied in this case continues along this same trajectory; activities occurring outside of WRAs that do not "disturb" WRAs are not subject to mitigation.

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The only evidence, qualified or otherwise, regarding the function and extent of the identified resource areas was presented by the Partnership and includes detailed analysis of impacts to vegetation, wetlands, and soils, including soil contamination and compaction. The Partnership's technical memorandum concludes:

> It is important to note HDD has become a standard construction method that is designed to specifically avoid impacts to sensitive areas. Utilities of all types, such as Portland General Electric and NW Natural, routinely use HDD construction to avoid streams, rivers, wetlands, and sensitive upland areas. Projects that propose open cut construction in sensitive areas typically change the proposed construction method, at the urging of permit and resource agencies, during the permit review process.
>
> This technical memorandum identified that there are no significant impacts of the RWP HDD project component that might be considered by the planning department as 'disturbance' in MSY Park or in the two OPRD properties. R. 8415 and App. p. 11.

Relying in this evidence, the findings state:

> Section 6 of the applicant's proposal contains a technical memorandum prepared by ecologists from David Evans and Associates, which demonstrates that the HDD that will occur between 65- to 34-feet below the park and 7 feet below OPRD lots 100 and 200 and *will not disturb the soils, wetlands, and vegetation associated with nearby WRAs.* Consistent with CDC 32.050(C), the applicant has selected an alternative that avoids all adverse environmental impacts to the WRAs associated with the park and the two OPRD lots. R. 239. *(Emphasis added.)*

Although no Petitioner raises any challenge to the findings or substantial evidence regarding Respondent's decision, the record includes an explanation of the HDD boring procedure and explains that the risk is minor given the inclusion of a conductor casing and other techniques. This evidence was uncontested by any similarly qualified expert. After a lengthy discussion of the characteristics of the drilling fluid, the drilling method and the underground geographic features that will serve to reduce the risk of leaks, the report states:

> In summary there is a very low likelihood of hydrofracture occurrence. Measures will be in place to monitor and limit the extent of hydrofracture leakage should hydrofracture occur. Drilling fluids are comprised on non-toxic substance, most of which is water. Therefore, no impacts to groundwater resources are anticipated from the project. R. 8413, App. p. 9.

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It was appropriate for Respondent to rely on that evidence to conclude that HDD at the depths identified would not "disturb" any WRA and thus, no mitigation was required.

STOP concludes by asserting that the pipe itself constitutes a permanent disturbance, which under LUBA's decision in *Horsey v. City of West Linn* requires mitigation. However, as noted above and unlike the situation in *Horsey*, the term "disturb" was interpreted by the City to include development that would result in the "destruction, damage or removal of vegetation; or the compaction or contamination of soil." This definition is consistent with the CDC provisions, is not challenged by STOP any further than its failure to acknowledge the same, and most importantly such an interpretation of "disturb" is plausible.

5. Pipeline Construction and Staging Activities Occurring on the OPRD Lots Will Occur Outside of WRAs and Will Not Disturb Them.

With regard to the OPRD lots located north of MSY Park, the record shows that all of the staging, mobilizing, drilling and pullback activities where soil compaction will occur are located entirely *outside* the water resource and setback areas. R. 8369, App. p. 2. As noted above, the only evidence presented below by a qualified expert was that all disturbances, including soil compaction and vegetation removal will occur outside WRAs. Any other interpretation would subject all development on any property containing a mapped water resource to impact and mitigation restrictions even when development will not occur anywhere near the water resource area and as a result, will not "disturb" it in any way. It is STOP's interpretation that is implausible.

In conclusion, there is simply nothing in the text or context of the CDC water resource regulatory standards or the purpose statements to suggest that disturbance limits and mitigation obligations are imposed for activities that are outside of and do not "disturb" water resource areas. Rather, Respondent's interpretation that the regulations protect natural resources by restricting activities, even those occurring underground, that would "disturb" them is plausible and is entitled to deference. Respondent found that the activities proposed did not disturb

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WRAs and therefore, no mitigation was required. For these reasons, Respondent's decision should be affirmed on this assignment.

V. RESPONSE TO STOP'S THIRD ASSIGNMENT OF ERROR - Respondent properly interpreted and applied CDC 32.050 with regard to open trench pipeline installation along Mapleton Drive near Trillium and Heron Creek water resource areas.

A. Scope of Review

Again, LUBA applies the standard of review described above in *Siporen*. If the governing body's interpretation is "plausible," the interpretation must be upheld.

B. Response to Assignment of Error

In its Third Assignment of Error STOP argues that Respondent's interpretation of the term "disturb" as set out in CDC 32.050 was incorrect and therefore pipe installation within the asphalt-covered, improved right-of-way of Mapleton Drive running over Trillium and Heron Creeks required mitigation. Trillium and Heron Creeks currently run underneath Mapleton Road through piped culverts. The Partnership proposed to run the pipeline underneath the Trillium Creek culvert using tunneling/boring methods; then an open-trench will be used within Mapleton Drive before locating the pipe over the culverted Heron Creek. Rec. 8472 and 8477.[4] App. pgs. 16-17.

Again, CDC 32.050(C) provides in relevant part that "if any portion of the water quality resource area is proposed to be permanently disturbed, the applicant shall prepare a mitigation plan...."

Respondent's findings analyzing Heron and Trillium Creeks were correctly quoted by STOP and are contained here for convenient reference. They state:

> Testimony was submitted regarding the impact the pipeline would have on two WRA crossings on Mapleton Drive, namely Trillium Creek and Heron Creek. The 60 percent RWP and FWP alignment drawings in the record show the

[4] The record cites contained in the STOP brief do not identify the culvert, nor do they locate the pipe in relation to the culvert.

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> pipeline alignment through each of these two WRAs but by passing under these areas, there is no disturbance. With regard to Trillium Creek, the applicant proposed that the FWP be tunneled underneath the Trillium Creek culvert in the Mapleton Drive right-of-way to avoid any disturbances to this resource. Entry and exit bore pits for the pipeline tunnel will be located on either side of the creek, at a sufficient distance to ensure that there will be no surface impacts to the resource. The FWP alignment (as shown in the 60 percent alignment drawings) and the bore pits required for the tunnel will be completely located within areas already disturbed (i.e., pavement and parking) in the Mapleton Drive right-of-way. There will be no impacts on adjacent storm drainage channels, streamside vegetation, and water quality or water quantity as a result of the proposed pipeline installation. As for Heron Creek, the applicant has proposed that the RWP be installed over the top of the Heron Creek culvert via open-cut construction methods in the Mapleton Drive right-of-way to avoid any disturbances to this resource. The RWP alignment (as shown in the 60 percent alignment drawings) is completely contained within paved areas in the Mapleton Drive right-of-way. There will be no impacts on adjacent storm drainage channels, streamside vegetation, and water quality or water quantity as a result of the proposed pipeline installation. R. 239.

To reiterate, the starting point for Respondent's interpretation is that mitigation is only required if activities occur within a WRA so as to "disturb" them. The evidence presented was that proposed activities will occur outside WRAs. Further, the term "disturb," quoted above and applied, includes only activities that "result in the destruction, damage, or removal of vegetation; or the compactions or contamination of soil." These findings explain that the proposed pipeline installation, either boring under Trillium Creek, or open trench above the existing Heron Creek culvert, will not result in altering any vegetation, compaction or contamination of soil protected within the defined WRA, and there was no evidence presented to the contrary.

The definition of "disturb" provides that it is the "*proposed* man-made changes to the existing physical status of the land" that is the criterion for triggering mitigation requirements. The status of the land before the changes occur is only relevant to determining whether the proposal will change the area. In this case, Trillium and Heron Creeks have already been disturbed through their diversion to man-made culverts to allow for the installation of Mapleton Drive over the top. As such, the likelihood of further "disturbance" may be less or non-existent because the resource is fully encased at these points. In any event, so long as the

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proposed activity will not impact vegetation or soils contained within the WRA, as the record provides, no disturbance occurs and no further mitigation is required.

Finally, no evidence was submitted, beyond that provided by the Partnership, to suggest that installing a pipeline within an existing improved roadway, either below or above a water resource area that is already located within a man-made culvert, would in any way further disturb the natural resource qualities of these resources.

For these reasons, this assignment of error should be denied.

VI. RESPONSE TO STOP'S FOURTH ASSIGNMENT OF ERROR AND MORE'S FIFTH ASSIGNMENT OF ERROR, IN PART – Respondent's findings adequately consider and respond to the conditional use criteria CDC 60.070(A)(1) and (A)(3).

A. Scope of Review

Generally, findings must "(1) identify the relevant approval standards, (2) set out the facts which are believed and relied upon, and (3) explain how those facts lead to the decision." *Heiller v. Josephine County,* 23 Or LUBA 551, 556 (1992). Adequate findings are required only where they are essential to finding that the applicable approval criteria are satisfied. *Von Lubken v. Hood River County,* 24 Or LUBA 271, 284-285 (1992), *rev'd on other grounds,* 118 Or 126 (1993). *See also Meadow Neighborhood Assoc. v. Washington County*, 54 Or LUBA 124 (2007). Where findings are required but not provided, LUBA may affirm the decision where the record clearly supports the decision. ORS 197.835(11)(b).

B. Response to Assignment of Error

STOP, in their Fourth Assignment and More, in their Fifth Assignment argue that Respondent's findings are inadequate because in responding to two conditional use criteria they fail to consider certain impacts that installation of the pipeline in the Highway 43 right-of-way will have on adjacent businesses. STOP claims that impacts to adjacent businesses must be analyzed in order to satisfy CDC 60.070(A)(1), a conditional use criterion relating to mitigation of adverse impacts and More relies on CDC 60.070(A)(3) with respect to furthering the "overall needs of the

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community." Under either standard Petitioners' believe that Respondent erred by failing to make any findings addressing a 14-page Business Impact Report submitted by Michael Wilkerson, PhD, of Economic Market Analysis, LLC. R. 1308-1322. STOP asserts that in addition to the Wilkerson report, Respondent failed to address the numerous objections raised by others.

1. Factual Background.

Petitioners' assignments do not accurately and completely explain the evidence presented and the findings relating to business impacts or the role those impacts play in the evaluation of the applicable criteria. One of the consistent themes raised throughout the proceedings below was that all of the Highway 43 businesses were opposed because this project would cause "devastating harm" and be a "jobs killer." R. 476, 1023-1024, 1182, 1904, 2874, 3201, 4352.[5] Leaflets and petitions were distributed containing inaccurate and misleading information.[6] Although a uniform and unswerving element within the opponents' rhetoric below, these comments were consistently vague as well.

This steady drumbeat of the sky-is-falling opposition never provided any particular

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[5] These citations are the ones identified in STOP's brief as examples where "specific challenges" were made below. STOP Pet. p 46, lns 14-15 and fn. 25. These blanket statements are anything but "specific."

[6] The Record is filed with multiple copies of a petition circulated by STOP members and others that exaggerates the extent of the traffic impact. In relevant part, it provides:

> Loss of businesses and jobs due to the extensive highway construction and bottleneck traffic that it will create even with it being done in the evening as there will be 15,400 truck trips and 50,000 additional construction related vehicles on the road slowing down traffic. R. 4216-4236, 4263-4266, 4416-4428, 6901-6903, 7038-7063.

The Partnership responded:

> Pipeline construction along OR 43 will only occur between the hours of 8 PM and 5 AM. All businesses will have full access during non-construction hours. Alternative access is provided for most businesses during construction hours. The contractor will coordinate work activity with the few business with only one driveway during nighttime construction hours. The project will move approximately 50 feet per day along OR 43. The total increase in traffic volume along OR 43 due to project related construction is .2%. See "Response to West Linn CUP 12-02 and CUP 12-04 Public Comments on Construction Traffic Calculations," prepared by DKS Traffic Engineers, November 1, 2012. R. 2259.

For a more complete explanation of the factual errors in opponent testimony, *see* R. 2257-2260.

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explanation as to why the Partnership's Construction Management Plan (CMP) proposal, including: (1) working entirely at night; (2) keeping all travel lanes open during the times when most of the businesses on Highway 43 were open; and (3) requiring the contractor to maintain at least one access to each of the few businesses on Highway 43 that are open during construction, would be insufficient to meet the standard, or were not effective means of preventing impacts to area businesses. R. 8532-8561. In addition, the Partnership offered a letter from Bill Hawkins, a Construction Management Project Director from CH2MHill with pipeline and road construction project experience, noting that the proposed CMP "equals and in some cases, exceeds mitigation measures typically provided for projects of similar size and scope." More particularly with regard to the pipeline, the letter states:

> The RW/FW CMP addresses the limits to construction vehicle haul routes, traffic control strategies and temporary lane closures, pedestrian/bicycle access, emergency vehicle access, public transit circulation, residential/commercial driveway access, and night time working hours to minimize impacts to all users of the local streets and Hwy 43. R. 2244.

These conclusions were not challenged.

Further, no party provided any qualified, evaluative testimony responding to the Partnership's expert construction traffic generation studies which, after analyzing the amount of traffic generated from this project travelling along Highway 43, concluded that "impacts to capacity and access along Highway 43 would be minimal or that nighttime construction on Highway 43 would generate a maximum of ten additional truck trips per hour, having "negligible impacts to capacity." R. 2227.

During the second day of the City Council's two-day set of hearings to consider the appeal, Dr. Wilkerson testified and submitted his Report. R. 1308-1321. Dr. Wilkerson's credentials were not identified. The fact that he is employed by Economic Market Analysis, LLC, suggests that he is an economist with no particular expertise in evaluating the impacts to adjacent businesses or in evaluating efforts to mitigate such impacts resulting from utility pipe construction projects. Unlike the primary resource studies submitted by qualified experts for the Partnership, Dr. Wilkerson's

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Report consists of extrapolations taken from other secondary studies that bear no relationship to the subject fact set. The Report notes as much in stating: "there has not been an extensive amount of research conducted on assessing the economic impact to businesses due to road construction." Wilkerson goes on to discredit his own testimony noting that most studies are done on local highways, in small towns and relate to lane expansions rather than a pipe installation on a state-owned highway in a community that is an integral part of a large urban center. R. 1316.

STOP characterizes the Wilkerson Report as summarizing similar comparables, most particularly a study in Sweet Home where the work was done at night. However, in addition to the distinguishing features Dr. Wilkerson noted above, the work in Sweet Home dealt with the repaving of 7.5 km or 4.6 miles of roadway where the proposed project was accomplished in 200 foot intervals at a time. R. 1316-1318. Installation of the FWP in Highway 43 extends for 5,200 linear feet (or a little less than a mile) where progress will move forward at approximately 50 feet per night. R. 8535 & 8540. There is no indication that the ODOT repaving project required the type of robust CMP proposed here, that requires keeping at least one access to all operating businesses open or whether an additional "Shop Local" type marketing campaign was required, as is required for the Partnership's project.

None of the roadway construction projects cited by Dr. Wilkerson are comparable to the subject project because they did not require that roadways be fully functional, with no lane blockages, closures or detours for 15 hours per day during the entire construction period. In fact, other than dealing with construction within a roadway, there are very few similarities. Respondent thus correctly rejected the assertions in that Report.

Moreover, Dr. Wilkerson went on to provide revised traffic count calculations for traffic impact on Highway 43 and Mapleton Drive, even though he is not a licensed traffic engineer. R. 1313-1315. The Partnership responded to Dr. Wilkerson's Report noting his lack of credentials or training in measuring business impacts or traffic from this particular construction project. No qualified transportation testimony, aside from that of the Respondent or the

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Partnership, was provided.

Further, the Partnership's response explains that the Report's assumptions are incorrect. R. 812-813. Dr. Wilkerson's extrapolation that there would be 174 percent increase in traffic during the nighttime work hours on Mapleton Drive makes no sense when you consider that installing a pipeline in Highway 43 (the only nighttime work allowed) will have no impact on Mapleton Drive traffic volumes. Second, based on the traffic reports prepared by DKS Engineering, licensed traffic engineers, the 6 minute spacing of construction vehicles leaving the WTP would not result in gridlock during the day. R. 813, 2225-2231. These traffic reports were subsequently subjected to peer review and concurrence by Greenlight Engineering, another licensed traffic engineering firm. R. 2232-2241.

After the Wilkerson comments were submitted, the Partnership responded further by committing to additional mitigation providing additional access signage for businesses impacted by construction and developing and implementing a Shop Local marketing campaign for local West Linn businesses. R. 310-315. Neither STOP, nor any other party objected to these independent transportation or construction plan reviews or asserted that the additional mitigation proposals were in any way inadequate.

2. Respondent's Findings.

Given this factual background, Respondent interpreted CDC 60.070(A)(1)[7] as requiring:

> the City to take the significant impacts associated with installation into account when determining whether the site size and dimensions provide adequate area to mitigate "any possible adverse effect[s] from the use on surrounding properties and uses." ...Thus, to approve the project the Council must determine that there

[7] CDC 60.070(A) requires:

> The Planning Commission shall approve, approve with conditions, or deny an application for a conditional use, except for a manufactured home subdivision in which case the approval standards and conditions shall be those specified in CDC 36.030, or to enlarge or alter a conditional use based on findings of fact with respect to each of the following criteria:
> 1. The site size and dimensions provide:
> a. Adequate area for the needs of the proposed use; and
> b. Adequate area for aesthetic design treatment to mitigate any possible adverse effect from the use on surrounding properties and uses.

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> is: (1) adequate area to mitigate any possible adverse effect from the post-construction use on surrounding properties and uses, and (2) there are adequate measures taken to mitigate for the possible adverse effects of the installation of the utility on surrounding properties and uses.[8] R. 192.

Respondent's findings then proceed with addressing particular impacts identified during the proceeding and measures required as part of imposing the CMP as mitigation. A number of these mitigation measures respond to concerns raised regarding economic and transportation impacts to neighboring businesses, including (1) limiting the Highway 43 work hours to between 8:00 pm and 5:00 am and requiring that the road be re-opened to allow for a fully functioning street during the daytime hours; (2) limiting the length of the construction zone to 200 feet; and (3) maintaining at least one driveway or access for vehicles to every business that is operating during hours which overlap with nighttime construction hours. R. 193-194. The findings go on to state:

> The City Council finds that the mitigation strategies listed above, if enforced through the imposition of conditions of approval, are an effective means of minimizing negative impacts to surrounding residents and businesses.

Respondent then went on to find that additional mitigation measures were necessary to address particular concerns, and as it relates to impacts to businesses, Respondent found:

> In addition, the applicant has proposed a business promotion plan to help keep the Robinwood Business district "Open for Business" during construction. This includes not only keeping all lanes of traffic and all accesses onto Highway 43 open during the business hours of 5 am to 8 pm, but also custom signage will be provided to help guide customers for those businesses that are open during construction hours. Although the City Council finds that this plan is a good start, retaining consistency with the overall business community requires an enhanced "Shop Local" Marketing Plan that must be approved by the Economic Development Director and distributed to the Robinwood Neighborhood Association, all businesses located along Highway 43 within the Robinwood neighborhood boundaries and the City Manager. Condition 18 is imposed to accomplish this objective. R. 196.

3. Legal Analysis

Petitioners do not object to these findings; in fact they make almost no mention of

[8] No party to the LUBA appeal challenges this interpretation. Rather, the question is whether the findings are adequate.

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them. Rather, Petitioners fault Respondent for failing to address the Wilkerson Report in particular. STOP asserts that Dr. Wilkerson was an expert and Respondent failed to make "*Norvell* findings" addressing Dr. Wilkerson or "any of the specific challenges" made by the West Linn business community. But, as noted above, other than possibly Dr. Wilkerson, the challenges raised by the business community and summarized above, were anything but "specific." More argues that rather than being a question of which expert to accept, Dr. Wilkerson's conclusions regarding net impacts on sales were ignored.[9]

The obligation to make detailed findings is imposed when a particular criterion requires such a detailed evaluation. For example, in *Hillcrest Vineyards v. Board of Comm, Douglas County,* 45 Or App 285, 293, 608 P2d 201 (1980), the court, relying on *Norvell,* found that the county could not conclude that land cannot practicably be farmed with a single finding that the land is not suitable for grazing without considering other farm activities. Similarly, in *Eckis v. Linn County,* 22 Or LUBA 27, 57 (1991), LUBA required *Norvell* findings to respond to evidentiary challenges responding to a criterion that set particular noise standards. The criteria at issue in these cases were specific and objective.

In contrast, the criteria identified by Petitioners involve judgment in the interpretation and the application of broadly worded standards. On a number of occasions LUBA has found that in cases of highly subjective criteria, including more particularly a finding of "greater public benefit," general concerns raised by opponents about possible interference with existing operations need not be addressed with any particularity within the findings. *Hines v. Marion County*, 56 Or LUBA 333 (2008) and *Olson v. City of Springfield*, 56 Or LUBA 229 (2008).

Respondent interpreted the CDC 60.070(A)(1) to require mitigation to offset impacts thereby implicitly allowing for some loss of business to result from construction. Unlike the applicable criteria in *Hillcrest Vineyards* or *Eckis,* CDC 60.070(A)(1) does not contain terms

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[9] As noted above, no study of the impacts of the pipeline construction on Highway 43 business sales was conducted.

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such as "prohibit" or "eliminate" impacts; rather they must be "mitigated," through no particular quantifiable standard. Respondent found that some amount of business impact was acceptable and would occur; therefore, it identified necessary mitigation and imposed conditions.

Although More's challenge to the findings refers to CDC 60.070(A)(3) with respect to "consistency with the overall needs for the community," there is no assertion that the criterion imposes any limit to the amount of economic impact to businesses on Highway 43, nor requires elimination of any such impact. In fact, there is none.

Therefore, the difference between destination businesses and impulse businesses, quantifying their numbers as they exist on Highway 43, or speculating what effect pipeline construction will have on one business type over the other are all largely academic when no criteria impose such obligations. Rather, Respondent interpreted the criteria to allow impacts only insofar as is "consistent with the overall needs of the community" and required mitigation where adverse impacts were identified. The findings identify the overall needs and the required mitigation and are therefore adequate.

Consider a comparable case, *Gould v. Deschutes County*, 59 Or LUBA 435 (2009). In *Gould,* a state agency letter stated that a cold groundwater spring would provide replacement water necessary for salmon habitat responding to a 'no net loss' criterion to address water habitat quality. The opponents' expert expressed concerns that the proposed mitigation would not be adequate. In response, the applicant disagreed with the opponents' expert but also offered an additional mitigation measure to provide additional stream flows. Opponents asserted that the proposed mitigation was insufficient because it would replace cold flows with warm water and would not compensate for withdrawals of cold groundwater. The hearings officer adopted findings that the additional water from the irrigation district was necessary as mitigation. However, because the hearings officer failed to respond to the opponent's contention that mitigation water would replace cool water with warmer water and without that

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analysis, the issue was remanded.

In the present case, just as in *Gould,* the record is replete with evidence from licensed transportation experts testifying that impacts to businesses on Highway 43 will be mitigated. R. 2225-2229, 2232-2236, 2244. STOP and others disagreed with this evidence, but the only particular evidence they provided was loss of business generally, not specifically, as described within the Wilkerson Report. The Partnership responded to the Wilkerson Report explaining why it was not reliable, and when the Respondent expressed additional concerns, the Partnership offered additional mitigation including a "Shop Local" plan. R. 279, 310-315. The additional mitigation including the "Shop Local" plan was never the subject of further challenge either by Dr. Wilkerson or anyone else. Respondent implicitly agreed that the Wilkerson Report was insufficient to find that the criterion was not satisfied, but nonetheless, included additional findings and conditions addressing mitigation.

Further, two key elements distinguish these two cases with regard to the level of findings required. In *Gould,* the criterion was specific and required little in the way of interpretative judgment; a 'no net loss' standard required findings of no net loss. The obligation to mitigate, the applicable criterion in this case, is general, broadly worded and entirely subject to interpretive discretion. Second, it was the questioning of the additional mitigation measures as insufficient that gave rise to a remand in *Gould.* In this case, neither Wilkerson, nor any others, challenged the additional mitigation measures. Respondent had no obligation to make detailed findings regarding any conflict in the evidence because it believed that it was resolved with further mitigation as identified.

Finally, should LUBA find that Respondent had an obligation to make findings that respond expressly to the Wilkerson Report, LUBA should affirm the decision because the evidence in the record clearly supports the decision. ORS 197.835(11)(b). As quoted above, the Partnership provided substantial evidence that impacts to Highway 43 businesses would be negligible, discrediting the Wilkerson Report and explaining how impacts to businesses from

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the pipeline and construction traffic will be mitigated. The Partnership's evidence also points out that although the Wilkerson Report was prepared by Dr. Wilkerson who is an economist holding a PhD, Dr. Wilkerson is not an expert in transportation or business market analysis, and his analysis was based on transportation circumstances that were not comparable to the qualified, detailed evidence presented by the Partnership. Therefore, the Report does not qualify as "expert" testimony requiring any form of detailed response. *Foland v. Jackson County,* 61 Or LUBA 264, 288 (2010).

Based on the foregoing, Respondent identified the mitigation measures necessary to offset the impacts provided as required by CDC 60.070(A)(3). STOP failed to challenge the proposed mitigation as it related to business impacts in any particular way. STOP's purported expert, Dr. Wilkerson, was discredited in terms of his qualifications to opine on the contested issued and resulting conclusions by the Partnership. That said, the Wilkerson Report did have some impact because it resulted in Respondent imposing additional conditions of approval, which were not challenged further. Respondent's decision should be affirmed.

VII. RESPONSE TO MORE'S FOURTH ASSIGNMENT OF ERROR – Respondent's interpretation of "overall needs of the community," set out in CDC 60.070(A)(3) is plausible and therefore, is entitled to deference under ORS 197.829.

A. Scope of Review

LUBA applies the standard of review described in *Siporen.* If the governing body's interpretation is "plausible," the interpretation must be upheld. Simply because another party or LUBA disagrees or believes that it is not the most correct interpretation, if it is "plausible," it must be affirmed.

B. Response to Assignment of Error

A criterion for granting a conditional use, CDC 60.070(A)(3), requires a finding that "the granting of the proposal will provide for a facility that is consistent with the overall needs of the community." More argues that the City's interpretation of "community" to "provide

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primary benefits to the jurisdictions of Lake Oswego and Tigard and substantially burdens the community of West Linn" is inconsistent with the plain language, the plan policies and regulations under ORS 197.829(1). More Pet. p. 37, lns. 5-6. The root of the error, according to More, is that Respondent relied too heavily on the term "overall" as modifying the term "community" rather than the express language where the term "overall" modifies the term "need." More Pet. p. 37, lns. 13-16.[10]

The findings interpreting CDC 60.070(A)(3) solely with regard to the term "community" state:

> The Planning Commission interpreted the term "community" to include the City of West Linn and a facility that is consistent with the community needs is one that "is designed and sized to serve the needs of the residents and land uses within the city." The primary purpose of the proposed pipeline is to serve Lake Oswego and Tigard rather than the overall needs of West Linn and this regional scale of the proposal indicates that the pipelines are not "of a scale to serve the community of West Linn." A number of opponents made similar claims.
>
> Although the City Council agrees with the Planning Commission in part, it interprets the term "community" more broadly. When words are not defined within the CDC, they are to be given the meaning set forth in Webster's Third New International Dictionary, which includes the following definition of "community"
>
> 1. A unified body of individuals: as
>
> a. State, Commonwealth
> b. The people with common interests living in a particular area
> c. An interacting population of various kinds of individuals
> d. A group of people with a common characteristic or interest living together within a larger society – the region itself
> e. A group linked by a common policy
>
> This includes consideration of the region, neighboring cities, West Linn as a whole and the neighborhoods and business community within West Linn. The "overall" needs of the community must look at what is the in the best interest of the community as a whole. Considering the term "community" in the context with "overall," this term does not suggest any exclusivity of necessity such that a use cannot serve the needs of West Linn while also serving the needs of Lake Oswego and Tigard, in addition to those of West Linn.

[10] At p. 38, lns. 7-14, More argues that the Partnership has not met its burden to show that the project is consistent with the "overall needs of the community" which appears to be an attack on the evidence presented and is therefore dealt with in the Response to More's Fifth Assignment of Error.

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> In order to identify which "overall needs" require protection, the Council considers the goals and values protected within the Comprehensive Plan. Thus, the "overall needs of the community" includes providing a clean and safe water supply that will benefit the City of West Linn as a whole as outlined in the Water System Master Plan. Protections for the Robinwood residents' and their need for quiet enjoyment is identified as a value in the Comprehensive Plan, Goal 2, Section 1, Policy 8, Council Goals 1, 2, 6, and 11 and the Robinwood Neighborhood Plan policy 3.9. The business owners' need to protect their businesses is identified in the Comprehensive Plan also as identified in the above-reference plan goals and policies. The Council finds that "consistency with the overall needs of the community" requires that no group or community within the City of West Linn is made to suffer to such an extent that these other needs, as identified in the Comprehensive Plan, are unduly compromised. R 198-200.

By way of introduction, rather than direct objections to the findings explaining Respondent's interpretation, More focuses instead on the Planning Commission's findings that the term "community" referred solely to the City of West Linn. However, a planning commission's code interpretation is not entitled to any deference and has no relevance to whether the *City Council's* interpretation is plausible. *Derry v. Douglas County*, 132 Or App 386, 390, 888 P2d 588 (1995).

The Respondent's findings make clear that the City Council did not reject the Planning Commission's interpretation; it expanded it based on: (1) the dictionary definition which suggests many different types of community without exclusivity, including one that would be so broad as to include everyone within the entire State; and (2) the term "overall" provides *context* for a concept that "community" need not be exclusive and that the "overall needs of a community" could benefit the City of West Linn as well as the communities of Lake Oswego and Tigard. In other words, there is no expression in the standard itself to suggest any exclusivity or primacy of benefits is necessary in order to satisfy the overall needs standard.

More seizes on Respondent's reliance on the dictionary definition of "community" when CDC 2.010(D) states that words that are not otherwise defined in the Code are to have the meaning ascribed by *Webster's Third New International Dictionary of the English Language, Unabridged.* More claims that Respondent's deviated from the dictionary

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definition to "rearrange words" that allows for a more broad definition of "community" than solely considering the residents of West Linn.

First, although there is dispute about whether the dictionary definition is very helpful, it does contemplate a wide variety of communities giving Respondent broad discretion to apply the standard. In *Hill v. City of Portland,* ___ Or LUBA ___ (LUBA No. 2012-036, 2012), where a term is not clear and the dictionary definition is also not particularly helpful, LUBA must affirm a plausible interpretation, even where a petitioner presents reasonably strong textual or contextual arguments. The same is true in this case except that More's arguments lack any textual or contextual support.

Second, Respondent did not rely entirely on the term "overall" as the sole basis for expanding its interpretation to find that there are benefits to West Linn while still benefiting other cities. Rather, Respondent noted that the Dictionary definition included many different types of "community" with no suggestion of exclusivity. Respondent further found nothing in the language of CDC 60.070(A)(3) requiring a finding that West Linn must be the primary or sole beneficiary of any use with any service to another jurisdiction being secondary. Under More's interpretation in order to locate a highly prestigious dance studio or a regional art museum, the applicant would have to show that a majority of the dance protégés or art connoisseurs would come from West Linn.[11] That is simply preposterous, and there is certainly nothing in the language of the CDC to support such an absurd result.

Finally, implicit in the Respondents interpretation is a consideration that utilities, by their nature, are connective. They work best when they link communities with other communities to provide necessary services at the lowest possible cost. Respondent understands that West Linn cannot exist in a bubble, as much as the Petitioners may wish that

[11] The Partnership researched City Council precedent interpreting the "overall needs of the community" for previous conditional use approvals. The new Fire Station 58 and Trillium Creek Elementary School were both constructed pursuant to conditional use approvals requiring consideration of CDC 60.070(A) when their service areas extend beyond the existing City boundaries. R. 2265-2267. City staff concurred with this analysis. R. 839.

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to be the case. More's argument is little more than the expression of a desire that Respondent had interpreted CDC 60.070(A)(3) differently, the way that the Planning Commission did, and as such, is not a basis for remand.

As discussed in greater detail in response to More's Fifth Assignment of Error below, the findings contain a long list of community needs, particular only to West Linn, that would be satisfied by approving the WTP and pipelines including: (1) providing a new, seismically secure, emergency water system as specified in the West Linn Water System Mater Plan; (2) paying a $5 million user fee that can be used to make additional West Linn water system improvements; (3) conveying existing abandoned pipes; and (4) installing a third water pump so that the intertie of the Partnership's new water system to West Linn's water system can be used to its maximum capacity. R. 199-200. These findings say nothing about the needs of Lake Oswego or Tigard. Therefore, to suggest that Respondent interpreted "community need" to not require that it serve the needs of West Linn is simply not true. Pet. p. 42 lns 11-12.

More points to nothing that makes Respondent's decision implausible. Statements by More that the interpretation is contrary to "the guidelines, requirements and spirit of West Linn's Comprehensive Plan" are not followed up with any particular references to what those guidelines or that spirit might be. Pet. p. 42, lns. 5-7. There are, in fact, no plan policies that West Linn must be the exclusive or primary beneficiary for a conditional use, and to find otherwise would be to insert language that does not appear in the regulation or the plan. Instead West Linn's Comprehensive Plan contains policies favoring multi-jurisdictional collaboration.[12]

In sum, CDC 60.070(A)(3) is sufficiently ambiguous and subject to the *Siporen* standard that allows for a determination that Respondent's interpretation of the "community

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[12] Goal 11, Policy 6 provides:

> Encourage cooperation and coordination between all public service agencies to maximize the orderly and efficient development and provision of all services.

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need" is plausible, and that determination should be affirmed.

VIII. RESPONSE TO MORE'S FIFTH ASSIGNMENT OF ERROR, IN PART – Respondent's finding that the pipeline is "consistent with the overall needs for the community" is plausible and supported by substantial evidence.

For their Fifth Assignment of Error, More argues that Respondent's findings addressing the "overall needs" standard of CDC 60.070(A)(3) are inadequate and not supported by substantial evidence. More's allegations regarding inadequate findings are directed to the Wilkerson Report discussed in greater detail in the Response to STOP's Third Assignment of Error above. More's objection goes on to allege that the benefits identified by Respondent as a basis for finding that the proposal furthered the overall community need were not supported by substantial evidence.

A. Scope of Review

Substantial evidence is evidence a reasonable person would rely on in reaching a decision. *Younger v. City of Portland*, 305 Or 346, 360, 752 P2d 262 (1988); *Dodd v. Hood River County*, 317 Or 172, 179, 855 P2d 608 (1993). Where LUBA concludes that a reasonable person could reach the decision made by the local government, in view of all the evidence in the record, the choice between conflicting evidence belongs to the local government. *1000 Friends of Oregon v. Marion County*, 116 Or App 584, 588, 842 P2d 441 (1992). That a petitioner may disagree with the local government's conclusions provides no basis for reversal or remand. *McGowan v. City of Eugene*, 24 Or LUBA 540, 546 (1993).

B. Response to Assignment of Error

Respondent's findings identify a number of "overall needs" with regard to its existing water system that are furthered by approving the Partnership's WTP and pipeline applications. These benefits include:

> With regard to the water system, the Planning Commission interpreted the term "overall needs" to mean that the conferred benefit must remain in perpetuity, for the life of the project. New pipelines and a plant enhance the

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> existing interconnectivity that is seismically secure when, as the Water Master Plan explains, the City of West Linn has a deficiency in its emergency supply capability. If it were possible for West Linn to obtain the necessary development permits, the cost for West Linn to install a new parallel transmission main across the river, the next best Water System Master Plan option, would be about $11.6 million which would provide far less redundancy and reliability. The Council finds that the provision of 4 mgd available until at least 2041 is a benefit that will last for 25 years or more, and it should be considered as an asset that helps to meet a need of the West Linn community for emergency water and it gives West Linn access to water from a system designed to be much more reliable than the system in place today. Condition of approval 17 requires execution of an intergovernmental agreement to ensure compliance with these findings.
>
> Further, the imposition of the community right-of-way use fee of $5 million dollars that the Planning Commission did not consider is a concrete benefit that the City of West Linn, its residents and its businesses, will enjoy in perpetuity. R-199-200.

More claims that Respondent's finding that approving the applications will result in a savings of $11.6 million dollars through the construction of a transmission line across the Willamette River is not contained within the Water System Master Plan (WSMP) and thus, is not supported by substantial evidence.

As More correctly states the WSMP identifies four approaches for addressing Respondent's water system capacity; but what More conveniently omits is that it also discusses the need for a reliable and redundant system. Only two of these options are relevant to the issue on appeal:

- Solution Approach B: Build back-up supply transmission from SFWB. At a cost of $8.0 million.
- Solution Approach C: Improve the emergency supply capacity and reliability of the Lake Oswego Emergency Supply Connection. At a cost of $2.2 million.

The WSMP goes on to recommend "Solution Approach C be pursued."

In an October 16, 2012 letter from an engineer with Murray, Smith & Associates (MSA), the company responsible for drafting the Respondent's WSMP, the cost savings are explained as follows:

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- The City's next best alternative to meeting backup supply reliability needs is to construct a new finished water transmission main at a cost of $11.6 M, not included in the WSMP CIP budget, and the reliability of this alternative is substantially less than offered by the full redundancy of LOTWP's new intake, pipeline and water treatment plant (WTP.) R. 317.

The MSA letter goes on to revise its initial $8 million estimate for building a backup supply transmission line over the Willamette River and states:

> The total cost of needed improvements associated with the parallel river crossing option, not recommended in the WSMP, to improve transmission system reliability (if IGAs for emergency supply are not secured) is summarized below.

Project	Estimated Project Cost (2012 Dollars)
Parallel Transmission Main – Division Street Pump Station to Willamette River	$ 2,140,000
Willamette River Crossing	$ 9,000,000
Parallel Transmission Main – Willamette River to CIP 65	$ 440,000
TOTAL	**$ 11,580,000**

Rec. 321. See also the explanation in response to City Council questions at R. 838.

More misreads both the Master Plan as well as the MSA letter that supports it. First, the discussion of $11.6 million is the cost of constructing Solution Approach B, a back-up transmission line from the South Fork Water Board, located across the Willamette River from Oregon City, revised to reflect current construction costs. It is Solution Approach B. Thus, More's statement that "none of the other proposed Solution Approaches mentions the installation of a new parallel transmission main across the [Willamette] River" is demonstratively false. Pet. p. 45, lns. 15-17.

The entire thrust of the explanation set forth above is that Respondent does not have to expend $11.6 million to build its own back-up supply transmission line across the Willamette River, when the Partnership is going to do it and the Partnership's project will provide the emergency water Respondent needs to proceed with Solution Approach C. Because Solution Approach C is possible, Respondent is able to realize the savings of not proceeding with Solution Approach B.

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If the intergovernmental agreements with Lake Oswego and Tigard could not be secured, as MSA states, the next best solution would be the expenditure of $11.6 million. MSA explains that the Respondent-built Willamette River crossing "is not recommended in the WSMP" because IGAs could be secured allowing West Linn to improve their emergency supply, capacity, and reliability through the City of Lake Oswego connection, Solution Approach C.

More supports a misreading of the MSA letter with further selective quoting from the WSMP suggesting that West Linn's water system retains sufficient line capacity and thus, there is no need for secondary Willamette River crossing. Pet. p. 46, lns 1-9. More entirely misses the difference between pipeline capacity and reliability. It is the latter condition that maligns West Linn. The WSMP explains this on page 5-7 where it states:

> The key elements of the City's supply source with the greatest vulnerability to complete loss of service are the SFWB's raw water transmission main and the City's finished water transmission main, especially the Willamette River crossing. Of these two (2) facilities, the finished water transmission main has the greatest vulnerability because of the risk and exposure of the I-205 bridge crossing. App. 18-19.

The evidence in the record is that Respondent has an unreliable and deficient water system. The options for fixing the well-documented deficiencies, as set out in the WSMP, are prioritized to either upgrade the intertie and execute agreements to obtaining emergency back-up water from Lake Oswego, or expend $11.6 million on constructing a Willamette River crossing along with necessary connective pipelines. Respondent's decision not to pursue the $11.6 million river crossing solution, which is the second option, according to the WSMP and the MSA letter, provides substantial evidence that a reasonable person would rely on to support its decision.

More goes on to challenge the evidence in the record supporting Respondent's finding that a new intergovernmental agreement (IGA) will confer any "new" benefit to the City of West Linn. Pet. p. 47, lns. 14-15, 23-24. More makes much of the ability of a party to

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unilaterally terminate or amend the IGA. More apparently overlooked the evidence that the Partnership agreed and the conditions of approval require the provision of a specified quantity of water, 4 mgd, be made available, and that the supply can be terminated only with mutual agreement by all of the parties as a benefit.

The pre-existing 2003 IGA made no mention for the provision of any particular amount of water to be supplied and allowed any party to unilaterally terminate. It states:

> 8. Quantity of Water to be Supplied. Upon agreement between the parties to make use of the intertie pursuant to Paragraph 3 of this Agreement, the Party supplying water shall endeavor to supply the maximum feasible quantity of water to the other Party, and take all reasonable actions necessary to accomplish the same, so long as such actions are not detrimental to the operation of the supplying Party's own water system.
>
> ***
>
> 16. Termination of Agreement. This agreement shall continue in effect until terminated by the parties with written notice of such intent to terminate provided to the other parties.... R. 9708.

As a comparator, More relies on a draft IGA that was submitted when this matter was pending before the Planning Commission which was not executed as part of this approval. Rather, it is condition of approval number 17 that requires the execution of a new IGA to be modified that is relevant here. The condition provides:

> 17. Intertie Agreement. The intergovernmental agreement between the applicant and the City of West Linn regarding the intertie shall be modified to provide that:
>
> a. the agreement shall not be terminated without the written consent of all parties.
>
> b. the agreement shall require written consent of all parties to amend paragraph 8 of the agreement relates to the quantity of water to be supplied.
>
> c. the intertie may be used for the benefit of all parties in perpetuity. R. 249.

More utterly fails to acknowledge Condition 17(b) requiring a particular quantity of water to be provided to West Linn, when none is currently provided nor why this IGA is not

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substantial evidence of a benefit.[13] The condition goes on to require the written consent of all parties to either terminate the agreement or to amend the agreement with respect to the amount of water to be provided. These conditions, when compared against the existing 2003 IGA provide substantial evidence of a benefit of increased water security for the residents of West Linn.

More continues relentlessly attacking the IGA by raising an entirely new issue relating to the validity of condition 17 because it does not include the consent of the South Fork Water Board. Aside from the fact that this challenge was not raised in the proceedings below, the condition does not amend the agreement, it requires the execution of a new agreement including the terms as identified. Further, it is the Partnership who must complete the conditions of approval, including amending the IGA to include South Fork Water Board, in order to proceed with its project. Where a proposed development requires authorization from a private property owner, no finding is generally required that it is feasible to obtain the permit or authorization, as long as such a permit or authorization is not precluded as a matter of law, and the local government imposes a condition of approval assuring that the required permit or authorization is obtained prior to final development approval. *Holbrook v. City of Rockaway Beach,* 58 Or LUBA 179, 182-183 (2009). Therefore, consent to the execution of a subsequently amended IGA by the South Fork Water Board is not necessary to include in a condition of approval.

Finally, More challenges the evidence underlying the imposition of a $5 million fee and claims that "the payment actually only benefits LOT and constitutes a great loss of future gross revenue to the City of West Linn." Pet. p. 48, lns 17-19. More proceeds to support this statement by identifying how other utility franchise fees are calculated within the City,

---

[13] In addition, the draft IGA submitted for consideration before the Planning Commission and quoted in More's brief includes the following addition to paragraph 8:

> Provided that Lake Oswego's supply facilities are expanded to a treatment capacity of 38 million gallons per day, Lake Oswego and Tigard can provide West Linn and Board with redundant water supply facilities and a reliable source of emergency water supply sufficient to meet West Linn's average day demand of 4 mgd through at least 2041. R. 5825.

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suggesting that $5 million is nothing more than chump change. More's challenge is not to the substantial evidence supporting the imposition of a $5 million fee as a benefit, but merely a disagreement that the fee imposed should have been a greater amount. More may view $5 million as pocket money, but Respondent found the fee reasonable and adequate.

Presumably More and STOP would prefer to take the approach conferred by Ben Franklin by "waiting until the well is dry, to learn the worth of water." However, the record shows that approving the Partnership's applications allows for the long-term provision of 4 mgd and emergency back-up water that Respondent does not currently enjoy, without requiring it to expend $11.6 million to build its own reliable and redundant supply across the Willamette River. The evidence further supports a finding that the installation of a new, seismically secure raw water pipeline confers a benefit to the community because the existing pipe "is highly vulnerable and has experienced multiple disruptions in service." R. 322. More does not object to these or other benefits which are evident throughout the record and include: upgrading the seismically vulnerable WTP, providing environmentally sustainable building amenities, supplying a public pedestrian trail connecting Kenthorpe Way and Mapleton Drive, as well as contributing $90,000 for improvements to Mary S. Young Park. R. 87, 278-280, 4478-4507. All of these represent evidence that Respondent reasonably relied upon to find that the proposals are "consistent with the overall needs of the community."

IX. CONCLUSION

For the reasons set out above, Respondent's decision should be affirmed.

DATED: August 6, 2013.

Respectfully submitted,

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BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

STOP TIGARD OSWEGO PROJECT, LLC ("STOP"), NORMAN KING, PETE BEDDARD, MICHAEL MONICAL, CAROL ELSWORTH, MARK ELSWORTH, SHANNON VROMAN, JENNE HENDERSON, LAMONT KING, THOMAS J. SIEBEN, GWEN SIEBEN, SCOTT GERBER, JAN GERBER, JACK NORBY, THOM HOLDER, GARY HITESMAN, REBECCA WALTERS, DARRYL WALTERS, Petitioners, v. CITY OF WEST LINN, Respondent, CITY OF LAKE OSWEGO, LAKE OSWEGO-TIGARD WATER PARTNERSHIP, and CITY OF TIGARD, Intervenor-Respondents.	LUBA Nos. 2013-021 and 2013-022
WILLIAM J. MORE, CARL L. EDWARDS, LINDA S. EDWARDS, CURT SOMMER, AND ROBERT STOWELL, Petitioners, v. CITY OF WEST LINN, Respondent, CITY OF LAKE OSWEGO, LAKE OSWEGO-TIGARD WATER PARTNERSHIP, and CITY OF TIGARD, Intervenor-Respondents.	LUBA No 2013-023

INTERVENOR-RESPONDENT CITY OF TIGARD'S RESPONSE BRIEF

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I. STANDING

Intervenor-Respondent City of Tigard accepts the statement of standing to bring this appeal by Petitioners Stop Lake Oswego Tigard Water Project, LLC, *et al.* (hereinafter "STOP" or "Petitioners"), with the exception of the constitutional takings claim alleged in STOP's Petition for Review LUBA No. 2013-021 & 2013-022 (hereinafter "*Petition*").

STOP lacks the requisite standing under federal standards to bring a claim to enforce the federal constitutional rights of the City of Tigard and the City of Lake Oswego (collectively hereinafter "Applicants" or "Project Partners"). At page 17, lines 19-25 of the *Petition*, STOP alleges that condition 16 exacts property inconsistent with Takings Clause of the U.S. Constitution. Oregon courts apply federal standing principles when adjudicating federal law issues, and consistent with these principles of judicial review the Land Use Board of Appeals (hereinafter "Board") should decline to extend standing beyond that allowed under federal standards to review Petitioners' federal constitutional issue. Such an extension of standing beyond that allowed to the state and federal courts would impair the parties' ability to obtain judicial review of the Board's decision on federal constitutional issues. Such a deprivation of the opportunity to appeal is inconsistent with the intent of the Oregon legislature when it granted the right to judicial review to "any party to a proceeding before the [Board]."

The *Petition* does not allege any facts which demonstrate STOP's standing to enforce the constitutional rights of the Project Partners, as is required under the Board's rules. OAR 661-010-030(4)(a). Accordingly, the Board should dismiss Petitioners' takings claim for lack of standing.

A. The Board Should Apply Federal Standing Requirements.

In ORS Chapter 197, the Oregon Legislature has established a very inclusive standing threshold for appealing the final land use decisions of local governments in Oregon. Under

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ORS 197.830(2) and (3), the prerequisite to standing before the Board is for a party to participate in the local proceedings, be adversely affected by the local land use decision, and to timely file a notice of intent to appeal. The legislature has also made it clear that the Board has the authority to consider constitutional questions. *See* ORS 197.835(9)(a)(E).

In contrast, Article III §2 of the U.S. Constitution establishes more significant limits on standing for the federal courts to hear constitutional issues, as only issues to that involve "cases" and "controversies," are considered justiciable. The 9th Circuit describes the Article III "case and controversies" standing requirement to necessitate that a party bringing an action have a personal stake in the outcome of a controversy, or has suffered some threatened or actual injury resulting from the putatively illegal action. *City of S. Lake Tahoe v. California Tahoe Reg'l Planning Agency*, 625 F.2d 231, 234 (9th Cir. 1980).[1] The Article III standing requirements are applied by Oregon courts when reviewing matters of federal law. *See Barcik v. Kubiaczyk*, 321 Or. 174, 200, 895 P2d 675 (1995) (Oregon Supreme Court reverses the Court of Appeals because it erred in applying state law to determine justiciability of a federal law claim).

Here, Petitioners, who are application opponents, argue that West Linn violated the Fifth Amendment rights of the applicants by imposition of condition 16 (*Petition*, p. 17, ll. 20-25). The Project Partners have taken no action to raise such an issue or to bring any claim or appeal to enforce their constitutional protections. Moreover, they do not agree that any taking of property is implicated by condition 16. The Petitioners have no stake in whether the challenged decision unlawfully "takes" property from Project Partners and Petitioners.

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[1] Article III standing requires, "such a personal stake in the outcome of a controversy' as to warrant [plaintiff's] invocation of federal-court jurisdiction and to justify exercise of the court's remedial powers. *Baker v. Carr*, 369 U.S. 186, 204, 82 S.Ct. 691, 703, 7 L.Ed.2d 663 (1962). The Art. III judicial power exists only to redress or otherwise to protect against injury to the complaining party, even though the court's judgment may benefit others collaterally. A federal court's jurisdiction therefore can be invoked only when the plaintiff himself has suffered 'some threatened or actual injury resulting from the putatively illegal action . . .' *Linda R. S. v. Richard D.*, 410 U.S. 614, 617, 93 S.Ct. 1146, 1148, 35 L.Ed.2d 536 (1973). *See also Data Processing Service v. Camp*, 397 U.S. 150, 151-154, 90 S.Ct. 827, 829-830, 25 L.Ed.2d 184 (1970)." *City of S. Lake Tahoe v. California Tahoe Reg'l Planning Agency*, 625 F.2d 231, 234 (9th Cir. 1980).

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would themselves suffer no Fifth Amendment injury if the constitutional rights of the Project Partners are infringed upon. Even if Petitioners allege some sort of taxpayer standing –and they do not – Petitioners are residents of West Linn, not the Project Partner cities, and would not even be indirectly impacted by West Linn's "taking" the property of the Project Partners without any compensation. As they have no interest in the purported constitutional taking, Petitioners lack Article III standing to bring a takings claim on behalf of the Project Partners. *Id.*, *see also McKinney v. Watson*, 74 Or. 220, 221, 145 P. 266 (1915) ("It is of no concern to the plaintiff that corporations or business concerns with which he has no apparent connection may suffer illegal exactions under an unconstitutional statute. Under such circumstances sound public policy and due respect to the legislative and executive departments restrain the courts from interference with the operation of a statute at the instance of a private suitor, unless it appears that his personal interests are at stake.")

The Board should decline to allow Petitioners to bring a federal constitutional claim without establishing federal standing. The Board is not strictly bound by federal standing requirements because it is not part of the executive branch, but the Board has the discretion to apply judicial principles in a manner consistent with the statutes governing Board review. *Just v. City of Lebanon*, 193 Or. App. 132, 144, 88 P.3d 312 (2004)[2]; ORS 197.805(1). As noted above, that a party must have Article III standing to bring a constitutional claim is a fundamental principle of judicial review. Petitioners lack Article III standing, yet they seek to jeopardize the interest of the Applicants in the Approval by using the Applicants' Fifth Amendment protections to Applicants' disadvantage. Such an inverted application of

[2] Certain principles enumerated in *Just* are applicable this appeal, but due to the factual distinctions between the circumstance in *Just* and the current case, the holding of *Just* is not controlling here. In *Just*, the court affirmed LUBA's decision to decline to require a showing of compliance with state standing requirements. *Id.* at 147. However, *Just* did not turn of federal issues that are as fundamental as the adjudication of rights under the U.S. Constitution. Other differences that should be noted are that the holding in *Just* was in large part dependent on the court's analysis of precedent that has since been repealed. *See Kellas v. Department of Corrections*, 341 Or. 471, 145 P.3d 139 (2006) (expressly abrogating *Utsey v. Coos County*, 176 Or.App. 524, 32 P.3d 933 (2001), solely on state law grounds). Finally, *Just* was a challenge to the standing of the party to bring an appeal to the Board, here the standing issue is only applicable to the specific constitutional claim.

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constitutional rights is the very sort of situation against which Article III guards [3] In this situation, the Board should apply Article III standing requirements to dismiss the constitutional claim

The application of Article III standing in this instance also allows the Board to review this appeal in a manner that is consistent its guiding statutes and the constitutional rights of the parties ORS 197 850(1) provides for "any party to a proceeding of the [Board]" to invoke judicial review. Any party invoking judicial review as to a question under the U S Constitution must demonstrate Article III standing *Barcik*, 321 Or at 200, *Just* 143 Or App at 147. Therefore, if the Board extends standing to make federal constitutional claims without a showing of consistency with Article III requirements, a party could be left without the remedy of judicial review as prescribed in ORS 197 850(1) due to the inability to demonstrate the requisite Article III standing before the Oregon Court of Appeals Such a deprivation of access to judicial review is also inconsistent with the federal constitutional right to judicial review of the actions of other branches of government *See Marbury v Madison*, 5 U.S 137, 173-180 (1803); *see also* 1 Annals of Congress 457 (1789), 5 Writings of James Madison 385 (G Hunt ed., 1904) (arguing for the adoption of the Bill of Rights before Congress, "If they are incorporated into the Constitution, independent tribunals of justice will consider themselves in a peculiar manner the guardians of those rights; they will be an impenetrable bulwark against every assumption of power in the Legislature or Executive; they will be naturally led to resist every encroachment upon rights expressly stipulated for in the Constitution by the declaration of rights") The right to judicial review of Board opinions is just such a constitutionally required check on legislative and executive authority, and must not be overlooked

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[3] The legislature was wise enough to forestall such occurrences in the operation of ORS 197 796, which limits the right to challenge accepted conditions of approval to the party upon which the condition is imposed.

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The Board has the discretion to apply federal standing requirements, and not to do so is inconsistent with sound principles of judicial review, including the very fundamental right to judicial review, embodied in federal constitutional doctrine and more specifically, ORS 197 850(1). To avoid allowing parties to use other parties' constitutional rights unfavorably, and to avoid the potential derogation of the right to judicial review, the Board should apply Article III standing requirements with regards to Petitioners' constitutional takings claim

Due to Petitioners' lack of Article III standing, the Board should dismiss the takings claim.

What takings claim

II. STATEMENT OF THE CASE

A. Nature of the Land Use Decision and the Relief Sought

Respondent City of West Linn (hereinafter "Respondent" or "City") approved two permit packages: one allowing for the construction of an expanded water treatment plant (WTP) and the second, for raw water and finished water pipelines conveying water to and from that plant Petitioners Stop Tigard Oswego Project, LLC et al (hereinafter referred to as "STOP") and William J More et al (hereinafter referred to as "More") seek reversal or remand of these two decisions LUBA should reject these requests and affirm the two decisions

B. Summary of Response.

This brief responds solely to STOP's first assignment of error. The responsive arguments include the following.

- The majority of issues raised in STOP's first assignment of error are not adequately preserved for appeal, are not yet ripe for review, or are otherwise beyond the scope of review.
- The City's Home Rule Charter provides the requisite authority to agree to the IGA anticipated by condition of approval 16.

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- Condition of approval 16 is consistent with the U S Constitution because it is accepted by the Applicants and does not implicate a Fifth Amendment taking
- Condition of approval 16 is consistent with and not preempted by state law, specifically the statutory requirements applicable to system development charges (ORS 223 297, *et seq*), to franchise fees (ORS 221 460), and to leases (ORS 271 310, *et seq*)
- Condition of approval 16 is not a bribe
- Condition of approval 16 is consistent with West Linn Municipal Code ("WLMC") 9 030, as it does not regulate the use of City streets
- The City plausibly interpreted the West Linn Community Development Code ("CDC") to consider the community impact fee as evidence of compliance with CDC 60.070(A)(3)

C. Summary of Material Facts.

The summary of material facts presented in the Response Brief for Intervenor-Respondent Lake Oswego is hereby included and incorporated herein, with the following facts specific to SIOP's first assignment of error

The West Linn City Council adopted Final Order No AP-12-03 (hereinafter, the "Approval"), which approves the joint application by the City of Tigard and the City of Lake Oswego (hereinafter "Applicants" or "Project Partners") for conditional use, design review, and water resource area approval to install a water transmission line. Rec 180-253 The Approval contains conditions of approval and is supported by findings of fact

One of the standards applicable to the Approval is CDC 60 070(A)(3), that requires the City to make findings that "The granting of the proposal will provide for a facility that is consistent with the overall needs of the community " The Approval includes thorough findings of compliance with this standard Rec 198-200

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Condition of Approval 16 describes an IGA that the Applicants must enter into with the City. The only terms of that IGA that are included in the condition are that the Applicants will pay a community impact fee to the City and the City will agree not impose future fees for the use of City right of way. No such IGA has been entered into at this time.

Condition of approval 16 was not objected to by the Applicants during the lower proceeding. Condition of Approval 16 is found at page 249 of the Record and states,

> "Community Impact Fee. The applicant shall enter into an intergovernmental agreement with West Linn in lieu of a franchise or other licensing agreement for the use of public streets in West Linn. That agreement shall require a one-time payment of $5 million to be used for West Linn water system improvements to meet the overall needs of the community."

III. JURISDICTION

Intervenor-Respondent City of Tigard accepts Petitioners' statement of jurisdiction.

IV. RESPONSE TO STOP'S FIRST ASSIGNMENT OF ERROR – Respondent has the authority to enter into the IGA referenced in condition of approval 16, and requiring such an IGA as a condition of approval is not illegal

A. Waiver

In this assignment of error, Petitioners proffer multiple arguments that were not raised during the local proceedings; these issues should not be considered by the Board. To preserve an issue for appeal, it must be raised while the record is open during the local proceedings, and must be raised with sufficient specificity to afford the parties to the hearing and the local decision maker an opportunity to respond. ORS 197.763(1); *Bruce Packing Company v. City of Silverton*, 45 Or LUBA 334 (2003). A review of the record indicates that none of the issues raised in this assignment were preserved, with two exceptions. First, the statement was made that the community impact fee was a bribe and second, that the community impact fee is inconsistent with ORS 221.460. However, the balance of the

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arguments made in STOP's first assignment of error are not adequately preserved, and are therefore beyond the scope of this appeal

The following arguments in the *Petition* are not adequately preserved for appeal

- CDC 60.070(A)(3) only considers whether "the facility" meets the needs of the community, and cannot consider the impact of the community development fee on the needs of the community. *Petition*, p. 16-17, ll 21-5
- Condition 16 is preempted by state system development charge statutes at ORS 223 297 *et seq* *Petition*, p 17, ll. 6-19
- Condition 16 is an exaction that affects an unconstitutional taking *Petition*, p 17, ll 20-25.[4]
- Condition 16 is inconsistent with WLMC 9 030 *Petition*, p 17-18, ll. 26-5; p. 19, ll 6-15
- Condition 16 requires a lease of public real property and is inconsistent with ORS 271. *Petition*, p 19-20, ll 16-3; p. 24-25, ll 3-23.
- If condition 16 requires a lease of public real property, the amount of the community impact fee is too low to meet the City's duty as trustee to the public for City streets *Petition*, p. 26-27, ll 5-17
- City authority to regulate its right-of-way can only come from the following sources, WLMC 9 030, ORS 221 410-490, and the community impact fee is inconsistent with those provisions *Petition*, p 20-22, ll 4-19
- City authority to regulate its right-of-way is limited by ORS 221 420(2)(a) to regulation of public utilities, electric cooperatives, people's utility districts,

[4] The Board applies additional scrutiny to whether a constitutional takings claim has been adequately preserved for appeal *See Bundy v City of West Linn*, 63 Or LUBA 113 (2011); *Larson v Multnomah County*, 24 Or LUBA 629 (1993) Also, ORS 197 796(3) further requires a party to raise a challenge to a condition of approval prior to appeal

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heating companies, or Oregon Community Power, but does not include municipally owned and operated utilities, such as the Water Project *Petition*, p 22, ll 7-19

- Because the City does not have authority to agree to the community impact fee, it cannot enter into an IGA that includes the community impact fee as a term *Petition*, p. 23-24, ll 1-2

It is the burden of the party advancing an argument to demonstrate that an issue was in the local proceedings with the specificity required by ORS 197 763(1) *Bruce Packing, supra*; *see also Olstedt v Clatsop County*, 62 Or LUBA 131 (2010). The *Petition* cites no evidence in the record that the above listed arguments and issues raised in this assignment of error were ever raised in the local proceeding, let alone with the requisite specificity to allow the City and Applicants to respond. Accordingly, the Board should disregard these arguments and issues as beyond the proper scope of the current appeal.

B. Scope of Review.

In addition to the above arguments that are defective due to waiver and lack of standing, Petitioners make another category of arguments that are not within the scope of this review because the arguments are either not ripe for consideration, or they exceed the scope of the Board's review of "applicable law" under ORS 197 835(9)(a)(D)

1. Ripeness.

The Board should disregard all of Petitioners' arguments that assert the illegality of the community impact fee or an IGA, including the community impact fee, because such arguments are not yet ripe Condition 16 sets forth the general framework for two terms to be included in an IGA, but does not specify additional terms and obligations that could be included in the anticipated IGA To date, the City and the applicants have not entered into any such IGA

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Because the actual terms and existence of the IGA mentioned in condition 16 are all speculative, there are no grounds for the Board to find that such an IGA is illegal. Most telling on this issue are the lengths to which the Petitioners go to try and characterize the community impact fee and what it is being exchanged for. Such attempts are futile because the nature of the community impact fee (SDC, franchise fee, lease, or other) is dependent on the terms of the IGA adopting the fee, such as the consideration exchanged for the fee and the manner in which the City can spend the proceeds from the fee [5]

Furthermore, even if the terms of such an IGA were known, no IGA was adopted by the City's land use decision that is the subject of this appeal. ORS 197.835(2)(a) confines the Board's scope of review to the record. Since the community impact fee is a potential term of a future IGA which is not included in the record, the future IGA and community impact fee are not properly included within the scope of this proceeding.

Of course, the nature of the community impact fee and all of the other terms of the future IGA will be known at the time of its adoption, if it is ever adopted. At such time, challenge to such a future IGA can be made through the appropriate channels. Accordingly, Respondents request that the Board dismiss all claims as to the legality of the future IGA or the community impact fee.

2. Applicable Law.

The first assignment of error alleges that condition 16 is inconsistent with local, state, and federal law, and requests remand under ORS 197.835(9)(a)(D) for improper construction of applicable law. *Petition*, p. 16, ll. 16-17. However, one of Petitioners' theories is that condition 16 is a bribe. Bribe giving in Oregon is a criminal matter and not a matter of land use. *See* ORS 162.015. Accordingly, the issue of bribery is so unrelated to the land use standards that are identified in ORS 197.015(10)(a)(A), that it does not constitute

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[5] See definitions of SDC, franchise fee, and lease, at sections IV.C.3.b,c and FN 14.

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"applicable law" reviewable by the Board under ORS 197 835(9)(a)(D) *See Carlsen v City of Portland*, 39 Or LUBA 93, 100 (2000) Accordingly, the Board must decline to review Petitioners' bribery argument because it is not within the scope of this proceeding

3. ***Siporen* Deference.**

As part of this assignment of error, Petitioners challenge the City's interpretation of its own development code to consider the community impact as evidence of compliance with CDC 60 070(A)(3) This provision of the CDC was specifically interpreted by the West Linn City Council, which adopted findings in support of that interpretation Rec. 198-200 The West Linn City Council's interpretation of its own Municipal Code is given deference by the Board and such an interpretation shall be upheld if it is plausible. *Siporen v City of Medford*, 349 Or 247, 259, 243 P3d 776 (2010) When reviewing an interpretation under the highly differential *Siporen* standard, the Board does not review for whether an interpretation is correct or better or worse that an different interpretation, but only if an interpretation is plausible. *Tonquin Holdings, LLC v Clackamas County*, 247 Or App 719, 722-23, 270 P3d 397 (2012).

Petitioners incorrectly argue an exception to *Siporen*, that deference does not extend to interpretations that are found to be inconsistent with state law. To the contrary, if plausible, the local interpretation must receive deference in all cases However, if an interpretation results in the local code being applied inconsistently with state law, the Board can remand based on that inconsistency As a practical matter, remand follows based on inconsistency with state law, but it is worth noting that the exception to *Siporen* deference that Petitioners attempt to carve out, does not exist

To summarize the scope of review issues raised above, the Board should discard the following arguments as outside the scope of this review.

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(1) The federal constitution based takings claim made by Petitioners, for which they lack standing (see section I)

(2) All arguments in the *Petition* that were not raised with sufficient specificity in the local proceedings. A list of such arguments is found in the preceding section IV A of this response brief.

(3) All arguments in the *Petition* that require the Board to determine the legality of an IGA that does not exist, and was not adopted as part of the Approval This includes all arguments alleging inconsistency of the community impact fee with state and federal laws, with the exception of ORS 221 460

(4) The bribery argument made by Petitioners.

STOP's first assignment of error is thereby left with two claims that are properly within the Board's scope of review;

(1) consistency of condition 16 with ORS 241 460, and

(2) plausibility of the City's interpretation of CDC 60 070(A)(3)

However, in an abundance of caution Respondents will respond as is best possible to Petitioners' defective arguments, but reiterate that such arguments are not properly before the Board, and are not grounds for remand or reversal of the Approval.

C. Response to Assignment of Error

1. The City's Home Rule Charter is the source of requisite authority to agree to the IGA anticipated by condition of approval 16.

In the absence of any specific constitutional or statutory limitation, the West Linn City Charter ("Charter") empowers the city council to enter into an IGA that includes the community impact fee As with most Oregon cities, West Linn has a general powers provision in its Charter which vests in the city council all powers not otherwise restricted by law The Charter also contains provisions specifying that its terms be liberally construed in

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allowing the City to have all of the powers needed to perform its local affairs. Charter §§ 4-6.[6] These general powers provisions of the Charter establish that no statutory authority is required to allow the City to perform affairs of local importance, as the Charter itself confers the authority, and the Oregon Constitution allows such grants of authority. *See e.g., AT&T Communications of the Pacific Northwest, Inc. v. City of Eugene*, 177 Or App 379, 388-89, 35 P3d 1029 (2001).

Petitioners have not demonstrated any constitutional or statutory limitation on the authority of the City to enter into an IGA that includes the community impact fee. Petitioners attempt to shoehorn the fee into various statutory contexts, alternatively defining the fee as an SDC, a franchise, and a lease. The following sections demonstrate that the community impact fee does not meet the statutory definitions of any of the Petitioners' preferred definitions and as such, is not subject to or expressly preempted by the associated statutory provisions. Because the fee is not inconsistent with the state law provisions identified by the Petitioners, it falls within the broad set of powers relegated to the City by its Charter. And since it is within the authority of the City to adopt the community impact fee the City may enter into an IGA that includes the community impact fee. ORS 190.010.[7]

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[6] West Linn Charter, Chapter II Powers, reads as follows:

"**Section 4. Powers of the City.**
The City shall have all powers which the Constitution, statutes and common law of the United States and of this State now or hereafter expressly or implied grant or allow the City, as fully as though this Charter specifically enumerated each of those powers.

Section 5. Construction of the Charter.
In this Charter the mention of a particular power shall not be construed to be exclusive or to restrict the scope of the powers which the City would have if the particular power were not mentioned. The Charter shall be liberally construed to the end that the City may have all powers necessary or convenient for the conduct of its municipal affairs, including all powers that cities may assume pursuant to the State laws and to the municipal home rule provisions of the State Constitution.

Section 6. Distribution of Powers.
Except as this Charter prescribes otherwise and as the Oregon Constitution reserves municipal legislative power to the voters of the City, all powers of the City are vested in the Council."

[7] ORS 190.010 "**Authority of local governments to make intergovernmental agreement.** A unit of local government may enter into a written agreement with any other unit or units of local government for the performance of any or all functions and activities that a party to the agreement, its officers or agencies, have authority to perform."

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2. Condition of Approval 16 is Consistent with the United States Constitution.[8]

Condition 16 does not impose an exaction that is subject to the constitutional standards expressed in *Nollan*,[9] and is consistent with the Fifth Amendment of the U.S. Constitution. Condition 16 does not implicate any constitutional issues because the condition is not contested by the Applicants and anticipates an exchange for valuable consideration, not a taking of property. In any event, the Board should decline to review this issue because it is presented in the *Petition* without any supporting legal argument and analysis.

a. The Board should not consider the constitutional takings issue because Petitioners provide no supporting legal argument.

The Board should decline to consider Petitioners' constitutional takings claim because it is not supported by legal argument. Numerous cases establish that "LUBA will not consider claims of constitutional violations which are unsupported by legal argument." *See Bowlus v. Multnomah County*, 23 OR LUBA 599, 602, FN3 (1992) and cases cited therein. Here, the Petitioners' constitutional claim is afforded a mere five lines and consists of a case citation to *Nollan*, a conclusory assertion that a violation exists, and no accompanying legal argument or analysis.[10] Since Petitioners' constitutional claim consists of a conclusory assertion unsupported by legal argument, it should not be considered by the Board.

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[8] The Board need only consider this issue in the event that Petitioners demonstrate that it is adequately preserved for appeal.

[9] *Nollan v. California Coastal Commission*, 483 U.S. 825, 107 S. Ct. 3141 (1987).

[10] Petitioners' constitutional claim reads in its entirety:
"If the 'Community Impact Fee' is considered to be some sort of *ad-hoc* development fee, then it violates the nexus requirement set forth in *Nollan v. Coastal Comm'n*, 438 U.S. 825, 107 S. Ct. 3141, 97 L. Ed. 2d 677 (1987). The City cannot simply demand that a developer pay a one-time 5 million dollar fee to help pay for water system improvements in change for the right to use city streets for water utilities, because there is no nexus between the impact and the exaction."

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b. Project Partners have accepted Condition 16, therefore by definition it cannot be a taking.

The basic flaw in Petitioners' takings argument is that the Fifth Amendment does not prohibit or limit government from receiving or accepting property of a consenting property owner. The City is free to purchase or be granted any amount of property, and so long as the property owner consents to the terms, no Fifth Amendment taking can occur. The fundamental policy behind *Nollan* and the entire line of exaction cases is to prevent extortionate or coercive government acquisition of property through imposition of conditions of approval in the development permitting process. *Koontz v. St. Johns River Water Management Dist.*, 133 S. Ct. 2586, 2596 (2013).[11] But, where property owners accept the terms of a condition of approval, the potential for coercion and the associated need for constitutional protections are eliminated and no taking can occur. Here, the Project Parties are the property owners and consent to condition 16. Accordingly, no constitutional taking is implicated.

c. Condition 16 does not impose an exaction, but instead anticipates an exchange for valuable consideration

Even if the Board finds that a the Fifth Amendment protections are applicable to consenting property owners, the City still has not imposed an exaction, and therefore *Nollan* remains inapplicable. *Nollan* requires that an exaction must serve a legislative purpose that has a nexus to the purpose of the criteria imposing the exaction. *Id.* An exaction is a condition of approval requiring the transfer of private property or money to the government without compensation. *Id.*; *Koontz, supra* (establishing that monetary exactions are also

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[11] "Extortionate demands for property in the land-use permitting context run afoul of the Takings Clause not because they take property but because they impermissibly burden the right not to have property taken without just compensation. As in other unconstitutional conditions cases in which someone refuses to cede a constitutional right in the face of coercive pressure, the impermissible denial of a governmental benefit is a constitutionally cognizable injury." *Koontz, supra* at 2596.

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subject to *Nollan*). Here, condition 16 exacts nothing because it requires no transfer of any interest in land to public ownership, nor payment in lieu of a transfer of interest in land to public ownership. Rather, condition 16 establishes the baseline terms for an exchange between the Applicants and the City whereby the Applicants pay the community impact fee for the City's agreement not to impose franchise or other license fees, and directs that the exchange be memorialized in an IGA between the Applicants and City. Rec. 249. As such, condition 16 clearly anticipates an exchange for valuable consideration, the type of which a local government and applicant are free to engage in, and any future IGA based on such an exchange will be bargained for by all parties. Bargained for agreements are well removed from the scope of exactions and the unconstitutional conditions doctrine as it has been applied by courts.

To summarize, condition 16 does not exact or take anything because it is part of a mutually accepted exchange for valuable consideration. Petitioners have no stake in that exchange, but seek to impose the rights of the Project Parties to undermine that exchange. This very disconnect is the source of the challenge to Petitioners' standing to raise this constitutional claim.

3. Condition of Approval 16 is Consistent with State Law.[12]

The City's authority to enter into an IGA that includes the community impact fee, consistent with condition 16, is not preempted by nor inconsistent with state law. Petitioners point to multiple statutory frameworks and assert that they limit the City's authority, but at no point demonstrate the intent of the state legislature to preempt the City's authority in this instance.

Specifically, the statutory requirements applicable to system development charges (ORS 223.297, *et seq.*), to franchise fees (ORS 221.460), and to leases (ORS 271.310, *et*

[12] With the exception of consistency with ORS 241.460, the Board only need consider these issues if Petitioners establish that they were adequately preserved for appeal.

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seq), do not preempt the City's authority to enter into an IGA that includes the community impact fee. In analyzing whether the action of a local government is preempted by state law, both local and state law should be construed to be consistent if possible, and clear intention to preempt is not expressed in state statute *See, LaGrande/Astoria v PERB*, 281 Or 137, 148, 576 P2d 1204 (1978) [13] When actually examined in the context of a preemption analysis, Petitioners' claims falls short

a. Condition 16 does not impose a system development charge and is not preempted by ORS 223.297 *et seq.*

Petitioners' first claim that the system development charge statute "is preemptive on the subject of impact fees to offset development impacts" *Petition*, p 17, ll 9-10. However, the system development charge statutes at ORS 223 297, *et seq*, belie Petitioners' argument The statute expressly defines the term "system development charges," and limits the application of the statute to charges that fit within that definition *See* ORS 223 299(4)[14]; *see also* ORS 223 297 (purpose of the statute is to "provide a uniform framework for imposition of system development charges") As such, it is clear that the intent of the legislature was to

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[13] "Outside the context of laws prescribing the modes of local government, both municipalities and the state legislature in many cases have enacted laws in pursuit of substantive objectives, each well within its respective authority, that were arguably inconsistent with one another. In such cases, the first inquiry must be whether the local rule in truth is incompatible with the legislative policy, either because both cannot operate concurrently or because the legislature meant its law to be exclusive It is reasonable to interpret local enactments, if possible, to be intended to function consistently with state laws, and equally reasonable to assume that the legislature does not mean to displace local civil or administrative regulation of local conditions by a statewide law unless that intention is apparent." *LaGrande/Astoria v PERB*, 281 Or 137, 148, 576 P2d 1204 (1978)

[14] ORS 223 299(4)(a) "System development charge" means a reimbursement fee, an improvement fee or a combination thereof assessed or collected at the time of increased usage of a capital improvement or issuance of a development permit, building permit or connection to the capital improvement "System development charge" includes that portion of a sewer or water system connection charge that is greater than the amount necessary to reimburse the local government for its average cost of inspecting and installing connections with water and sewer facilities
(b) "System development charge" does not include any fees assessed or collected as part of a local improvement district or a charge in lieu of a local improvement district assessment, or the cost of complying with requirements or conditions imposed upon a land use decision, expedited land division or limited land use decision

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establish an exclusive means for imposing system development charges, and not to preempt all local authority on the subject of impact fees to offset development impacts.

The community impact fee is not a system development charge. The statutory definition of system development charge specifically excludes the "cost of complying with requirements or conditions imposed upon a land use decision." ORS 223.299(4) and (b). Condition 16 is the source of the requirement to enter into the IGA including the community impact fee. Also, assuming *arguendo* that the community impact fee did not fall within this statutory exemption, the final use of the community impact fee is not yet established, as is necessary to determine if the fee is a system development charge. *See* ORS 223.299(2), (4). Condition 16 indicates that the fee be used for the water system improvements, which could easily include expenditures other than capital improvements and thereby not within the definition of system development charges.

As such, the community impact fee is not a system development charge, and ORS 223.297, *et seq.* does not have any preemptive effect beyond system development charges. Therefore, the community impact fee is not preempted by ORS 223.297.

b. Condition 16 does not impose a franchise fee and is not preempted by ORS 221.240.

Petitioners go to great lengths asserting that the community impact fee is, in fact, a franchise fee and subject to ORS 221.460. *See Petition*, pp. 17-19; ll. 26-5. At the outset of this analysis, it should be noted that the Oregon legislature has indicated a clear intent not to preempt local authority, stating at ORS 221.410(1) that "except as limited by express provision or necessary implication of general law, a city may take all action necessary or convenient for the government of its local affairs." This statement is consistent with the authority granted the City by the Charter, and given that Petitioners fail to identify any express statutory provisions that would clearly indicate the intent to limit the City's authority

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to enter in to an IGA that includes the community impact fee, the authority of the City is not preempted

Petitioners' arguments seem to infer that the IGA anticipated by condition 16 will grant a franchise for the applicants to use streets within the City Petitioners then assume that such a franchise will be indefinite in duration, and therefore would violate the 20-year limitation on franchises found at ORS 221 460 [15]

There is no indication that granting a franchise, license, or permit to the applicants is a requisite term to be included in the future IGA anticipated by condition 16 All that is required by Condition 16 is the payment of a community impact fee in exchange for forgoing future City fees, and the nature of the community impact fee is not dictated by condition 16 In support of the supposition that condition 16 requires a franchise Petitioners rely on *Whitbeck v Funk*, 140 Or 70, 74, 12 P2d 1019 (1932), which defines a franchise as conferring "the right to exercise powers or to do and perform acts which, without such grant, the person to whom it is granted could not do or perform." However, condition 16 requires no such grant be made, and there are already existing Lake Oswego pipes located under West Linn's streets, so no new authority need be extended. Finally, Petitioners' assumption that the duration of any terms of the IGA anticipated by condition 16 are known at this time, is without base as there is no evidence in the record of such duration of terms.

Based on the statutory intent not to limit local authority expressed at ORS 221 410(1), and the lack of any express term in condition 16 requiring a perpetual franchise, it is clear that the City can enter into an IGA that includes the community impact fee consistent with state franchise laws

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[15] ORS 221 460 states, "**Duration of franchises, privileges and permits** All franchises, privileges or permits for the use of the public highways, streets or alleys granted after June 5, 1931, by any municipal corporation shall not be granted for a longer term than 20 years, and shall be subject to the provision of ORS 221.470."

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c. Condition 16 does not involve a real property lease and is not preempted by ORS Chapter 271.

Petitioners go on to assert that "the only lawful avenue" for an IGA including the community impact fee is to couch the fee in terms of a real property lease under ORS 271.310. *Petition*, p. 24-27; ll. 6-16. Petitioners expend significant ink explaining how the community impact fee is not consistent with the lease related requirements of ORS Chapter 271, while failing to ever substantiate how state law dictates that the lease is the only available vehicle in which to comply with condition 16, and while overlooking that condition 16 does not foreclose a lease consistent with ORS Chapter 271 as an option for compliance with condition 16. Petitioners' premise that a lease is the only allowable method of complying with condition 16 relies upon the success of its other state law preemption arguments, which are demonstrated to be flawed by the above sections. Therefore, Petitioners' argument that condition 16 is inconsistent with ORS Chapter 271 fails because a lease is not required by condition 16 nor does the condition prevent the City and applicant from complying with ORS Chapter 271 in the event that a lease is pursued.

Petitioners' go on to make arguments about the role of the City as trustee over streets and the market value of a lease of such streets, all of which are based on the premise that the only available means by which condition 16 is legal is if it is a lease. Such arguments need not be reviewed by the Board because they are only applicable if the Board finds that the IGA considered by condition 16 must contain a lease. And even if the Board so finds, the terms of such a lease will be determined at the time of its execution.

d. Condition 16 is not a bribe.

The exchange for valuable consideration outlined in condition 16 is not a bribe and STOP's assertions to the contrary are unsupported and baseless. ORS 162.015 defines the crime of bribery in the State of Oregon as follows: "A person commits the crime of bribe

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giving if the person offers, confers or agrees to confer any pecuniary benefit upon a public servant with the intent to influence the public servant's vote, opinion, judgment, action, decision, or exercise of discretion in an official capacity." None of the elements of the crime of bribe giving are found in condition 16, and Petitioners cite no evidence supporting their accusation of bribery.

First, no public servant receives and pecuniary benefit from condition 16. The community impact fee that is described therein is clearly intended to be paid into the City treasury and not towards the personal benefit of any elected official or City officer or employee. Second, the only intent established by condition 16 is to engage in the agreed upon exchange of the community impact fee for the City's agreement not to impose future fees. As described in the condition, the agreed upon exchange would be formalized through future adoption of an IGA by the respective governing bodies of the Cities of Tigard, Lake Oswego, and West Linn. Each of the respective city councils will separately and independently decide to adopt or not adopt the IGA based on their own weighing of the benefits associated therewith, and there is no evidence that any member of any of the councils stands to gain any pecuniary benefit from that decision. For these reasons, condition 16 is not a bribe.

4. Condition of Approval 16 is Consistent with the WLMC 9.030.[16]

The City Charter and Municipal Code do not prohibit the City from entering into an IGA that includes the community impact fee. Petitioners assert that condition 16 is inconsistent with WLMC Section 9.030, which states as follows:

> "9.030 Restriction on Use of Rights of Way. The City has jurisdiction to control public rights of way within the City and may regulate the use of rights of way by ordinance, franchise, license, permit or any combination thereof."

[16] The Board only need consider this issue in the event that Petitioners demonstrate that it is adequately preserved for appeal.

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Petitioners' arguments assert that WLMC 9 030 limits the manner in which the City can regulate right of way In contrast to Petitioners' various arguments, WLMC 9 030 specifically calls out the City's authority and jurisdiction over its streets However, the debate about the extent of the City's authority is academic, as there are no terms in condition 16 that actually regulate the use of City right-of-way As such, condition 16 is not subject to WLMC 9 030, and no inconsistency exists

Even if the Board were to somehow find that condition 16 regulates City right-of-way, there still is no actual conflict between condition 16 and WLMC 9 030 Any regulation would have to be achieved by the terms of the anticipated IGA, and the parties can simply craft terms that are consistent with WLMC 9 030 Alternatively, the City could amend WLMC 9 030 prior to adoption of the anticipated IGA to alleviate any inconsistency Under either scenario, there is no current inconsistency with WLMC 9 030

5. The City Plausibly Interpreted the CDC to Consider the Community Impact Fee as Evidence of Compliance with CDC 60.070(A)(3)

The preceding arguments demonstrate that the City is authorized to enter into an IGA that includes the community impact fee, and that a requirement to do so is properly included as a condition of approval As such, condition 16 allows the City to rely on the community impact fee as evidence in determining compliance with CDC 60.070(A)(3).

CDC 60 070 allows condition use review based on various criteria, including CDC 60 070(A)(3), which reads as follows. "the granting of the proposal will provide for a facility that is consistent with the overall needs of the community " In finding no 10 of the Approval, the City has interpreted CDC 60 070(A)(3) to consider how the community impact fee affects the overall needs of the community, when determining compliance with that provision Rec. 199 In contrast, Petitioners argue that City erred in its interpretation of

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CDC 60 070(A)(3), as that provision should only consider whether the physical facility is consistent with the overall needs of the community, and does not consider any non-structural aspects of the application such as the community impact fee

The interpretation of CDC 60 070(A)(3) by the West Linn City Council is entitled to deference under *Siporen*, and must be upheld if it is found to be plausible In determining whether the City's interpretation is plausible, the Board first examines the text and context of the provision and then legislative history, to determine if there is an ambiguity If an ambiguity exists, the next step is to apply maxims of interpretation *State v Gaines*, 346 Or 160, 171–173, 206 P3d 1042 (2009). Here, the text and context demonstrate that it is plausible for the City to interpret CDC 60 070(A)(3) to include the community impact fee as evidence of compliance with that provision

The text of CDC 60 070(A)(3) supports a plausible interpretation that the City can consider the community impact fee when determining consistency of the overall needs of the community The first clause of CDC 60 070(A)(3), begins with the phrase "The granting of the proposal will ." The phrase embodies the applied for development "proposal," of which the facility is just one part. The City plausibly reads this criterion to consider more than just the "facility" in the structural sense, when determining consistency with the overall community needs. By discussing the granting of the proposal, the code anticipates a more comprehensive weighing of the *proposal* as a whole, inclusive of the facility, along with any associated physical improvements such as mitigation, buffering, and other provisions of the proposal such as fees, charges, and conditions of approval Council has – and indeed should – weigh all parts of the proposal against the community needs.

Petitioners' assertion that only the physical facility, and not the balance of the proposal, can be considered renders the first clause of CDC 60 070(A)(3) without meaning Had the City Council intended to enact an ordinance embodying the Petitioners' favored

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interpretation, the text could easily have been drafted to read that, "the proposed physical facility shall be consistent with the overall needs of the community." However, the City Council saw fit to include the first clause and the reference to approval of the entire proposal, and not just the physical facility. Petitioners ask the Board to overlook and omit the specific language that has been inserted in CDC 60.070(A)(3). Such a reading is inconsistent with ORS 174.010 (courts are "not to insert what has been omitted, or to omit what has been inserted"). Petitioners' flawed reading of the code does not undermine the plausibility of the City's interpretation.

The context of CDC 60.070(A)(3) also supports the City's plausible interpretation. The provision is one of many conditional use criteria that are uniformly applied to the permitting, altering, or enlarging of all conditional uses in the City. Other provisions provide criteria specific to certain conditional uses, such as CDC 60.090 and .100 which contain additional criteria for transportation facilities and other government facilities. However, CDC 60.070 is unspecific in that it applies to all conditional uses that are proposed for development in West Linn. Such an expansive potential set of circumstances under which CDC 60.070 is applied supports a broader reading of its provisions, and it would be arbitrary to consider only part of the development proposal to determine such a comprehensive concept as consistency with overall community need. The City has adopted such a broad interpretation as is supported by the code context and plausibly considers entire proposal, including the community impact fee, when considering consistency with the overall needs of the community.

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V. CONCLUSION.

For the above stated reasons, Intervenor-Respondent City of Tigard requests that the Board deny STOP's first assignment of error.

Dated this 6th day of August, 2013.

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CERTIFICATE OF FILING AND SERVICE

I hereby certify that on the date shown below, I filed the original and four (4) copies of the foregoing INTERVENOR-RESPONDENT CITY OF TIGARD'S RESPONSE BRIEF by first class mail, postage prepaid, on:

Oregon Land Use Board of Appeals
DSL Building
775 Summer Street NE, Suite 330
Salem OR 97301-1283

I further hereby certify that on the date shown below, I served a true and correct copy of the foregoing INTERVENOR-RESPONDENT CITY OF TIGARD'S RESPONSE BRIEF by first class mail, postage prepaid, on:

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BEFORE THE LAND USE BOARD OF APPEALS
FOR THE STATE OF OREGON

STOP TIGARD OSWEGO PROJECT, LLC ("STOP"), NORMAN KING, PETE BEDDARD, MICHAEL MONICAL, CAROL ELSWORTH, MARK ELSWORTH, SHANNON VROMAN, JENNE HENDERSON, LAMONT KING, THOMAS J. SIEBEN, GWEN SIEBEN, SCOTT GERBER, JAN GERBER, JACK NORBY, THOM HOLDER, GARY HITESMAN, REBECCA WALTERS, DARRYL WALTERS,
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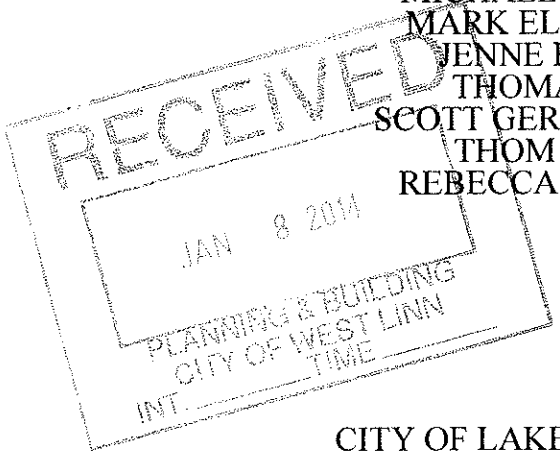

vs.

CITY OF WEST LINN,
Respondent,

CITY OF LAKE OSWEGO, LAKE OSWEGO-TIGARD WATER PARTNERSHIP, and CITY OF TIGARD
Intervenor-Respondents.

LUBA Nos. 2013-021 and 2013-022

WILLIAM J. MORE, CARL L. EDWARDS, LINA S. EDWARDS, CURT SOMMER and ROBERT STOWELL,
Petitioners,

vs.

CITY OF WEST LINN
Respondent,

CITY OF LAKE OSWEGO, LAKE OSWEGO-TIGARD WATER PARTNERSHIP, and CITY OF TIGARD,
Intervenor-Respondents.

LUBA No. 2013-023

PETITION FOR REVIEW
LUBA NO. 2013-021 & 2013-022

JULY 16, 2013

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CERTIFICATE OF FILING

I hereby certify that I filed the original of the **PETITION FOR REVIEW**, together with four copies thereof, with the Land Use Board of Appeals, DSL Building, 775 Summer Street NE, Suite 330, Salem OR 97301-1283, on July 16, 2013, by mailing to them by certified, return receipt mail, postage prepaid, addressed to the Board at the above address.

By:_____
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CERTIFICATE OF SERVICE

I hereby certify that on July 16, 2013, I served a true and correct copy of this **PETITION FOR REVIEW** on all persons listed below by first class mail:

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I. STATEMENT OF THE CASE

A. Nature of the Decision and Relief Sought

Respondent's Final Order dated February 18, 2013 granted an appeal, in its entirety, of the Planning Commission's December 11, 2012 denial of LOT's land-use application. The Applicant sought both a conditional use permit and a class II design review to enable LOT to accomplish a considerable expansion to its existing WTP as well as installing miles of pipeline within and through the City of West Linn. LOT's proposed pipeline will take 38 million gallons of water daily ("mgd") from the Clackamas River, and transport the water to LOT's water treatment plant located within a residential neighborhood of West Linn. Thereafter, the treated water is proposed to be transported from the WTP through both residential and commercial zones within West Linn until the water reaches its final destination in the Cities of Lake Oswego and Tigard. The February 18, 2013, Final Decision in AP 12-02 and AP-12-03 is provided at App 2-193.

Petitioners seek the remand of AP-12-02 / AP-12-03 for modifications necessary to meet the requirements of the Community Development Code ("CDC") and Comprehensive Plan.

B. Summary of Argument

Petitioners raise Six assignments of error ("AE"):

1. In the First AE, Petitioners argue that Respondent misapplied CDC §60.070(A)(3), which requires the decision-maker to make a finding that "[t]he granting of the proposal will provide for a facility that is consistent with the overall needs of the community." Respondent determined that this criterion requires the applicant to show that the facility will provide a list of "benefits" to the City of West Linn. Respondent proceeded to find that the standard was met, in large part because the applicant offered to pay $5 million dollars to the City of West Linn. Respondent couched this payment as a "Community Impact Fee" and imposed a condition of approval imposing the fee, even though the City has no Ordinance establishing for the payment such a "fee" upon land use applicants. Petitioners argue that the fee is nothing more than an

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unlawful System development charge or franchise fee, which cannot be imposed on LOT. As a result, a remand is needed to determine if the City Council will find sufficient community benefit to satisfy CDC §60.070(A)(3) in the absence of the $5 million dollar payment.

2. In the Second AE, Petitioners argue that Respondent misapplied CDC Chapter 32 by not requiring the applicant to mitigate for permanent disturbances it was making into the water resource areas ("WRAs") located in Mary S. Young Park and in certain adjacent land owned by the Oregon Parks and Recreation Dept. Respondent incorrectly interpreted its code such that an "alteration" or "disturbance" of a WRA only occurs if there is an impact *to the ground surface* of the WRA. Respondent finds that water pipes installed using horizontal directional drilling ("HDD") does not cause disturbance to the resource, and therefore otherwise applicable mitigation requirements are not triggered. Petitioners argue that the WRA is not limited to the surface of the WRA, and that the pipe itself, is, by its very nature, a permanent disturbance causing the need for mitigation. As a result, Petitioner argues that Respondent failed to invoke the mitigation requirements set forth in CDC Chapter 32.

3. The Third AE mirrors the Second AE, except that it addresses intrusions in the WRAs located on Heron Creek and Trillium Creek. Petitioners again argue that Respondent erred by failing to invoke the mitigation requirements set forth in CDC Chapter 32.

4. In the Fourth AE, Petitioners argue that the findings addressing CDC §60.070(A0(1) are inadequate as a matter of law, because Respondent failed to adopted so-called "Norvell findings" addressing any of the specific challenges to AP-12-03 made by the business community.

5. In the Fifth AE, Petitioners argue that the decision must be remanded because City Councilor Jones engaged in improper *ex parte* contacts that with the applicant. Jones admitted to Petitioner Scott Gerber that he had used staff as a messenger to "shop" proposed conditions of approval to the applicant for consent prior to adoption – all on an "off-the-record" basis. City Manager Chris Jordan admitted to the City newspaper that he had been in contact with both Jones

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and LOT officials in regard to the new conditions, and that other city staff, such as attorneys, dealt with drafting the new conditions.

6. In the Sixth AE, Petitioners incorporate by reference the assignments of error raised by the Petitioners in LUBA Case No. 2013-023.

C. Summary of Material Facts

1. Brief History of the Relationship of Lake Oswego and West Linn

Lake Oswego ("LO") holds senior water rights for the Clackamas River which allows it to withdraw 32 mgd. LO also has junior rights which allow it to withdraw another 6 mgd. Rec. 9331. To utilize these water rights, LO constructed a water treatment plant ("WTP") in 1967 in what is now the City of West Linn. In 1968, LO installed a 27-inch raw water pipeline ("RWP") from the Clackamas River, under the Willamette River to the WTP Rec. 9331; 9376. From the WTP, the treated water travels in a finished water transmission main ("FWP") ranging in size from 16 to 24 inches in diameter from the WTP down Mapleton Drive to Highway 43. The FWP then travels beneath Highway 43 until it reaches LO. Rec. 9437.

The existing WTP is located within the Robinwood neighborhood of West Linn and occupies approximately six (6) acres. LO expanded the WTP in 1980 to increase the plant's production to its current capacity of 16 mgd. Rec. 9331. As of 2007, the facility was in overall good condition, but because it's maximum capacity is only 16 mgd, LO determined that its WTP should be expanded to meet the ultimate demand of LO's water service area, as well as the subsequent combined demand of the Tigard water service area. Rec. 9331.

2. The Emergency Water System Intertie Between West Linn and Lake Oswego.

In 1984, LO, the City of West Linn and the South Fork Water Board[1] ("Board") contracted through an intergovernmental cooperative agreement ("Intertie IGA") for the construction,

[1] The South Fork Water Board is a water supply agency jointly owned and operated by the cities of Oregon City and West Linn. [Rec. Doc. 5822].

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operation and maintenance of an emergency water system intertie ("Intertie") between the water supply system of the Board, West Linn, and the water supply system of LO. This Intertie was subsequently constructed in WL in 1984 near the intersection of Old River Road and Kenthorpe Way. Rec. 9705.

In accordance with the Intertie IGA, WL also constructed a pumping station near the Intertie, the cost of which was shared by all parties. WL, however, is the owner of the Intertie facilities which includes the piping, valves, vaults, metering, instrumentation, control systems and appurtenant facilities. Rec. 9705.

The purpose of the pump station is to supply emergency water from the Lake Oswego distribution system into WL. The pumps station also provides emergency water to both LO and the Board. An emergency condition under which the supply can be used is defined as follows:

> An occurrence created by a failure of the water supply facilities of the Board, Lake Oswego or West Linn, or the occurrence of an event which jeopardizes the Parties' water quality, whereby insufficient supply to any of the water customers of the Parties could threaten the health or safety of those customers. Such failure includes failure or interruption in the operation of river intakes, raw and finished water pumping facilities, water treatment facilities, raw and finished water pipelines, reservoirs, and appurtenant facilities. Emergency conditions shall not include situations involving loss of water pressure or diminution in water volume in a water distribution system during periods of high demand if the system remains in a normal operational mode, and shall not include scheduled repairs or maintenance. Rec. 9706.

The existing terms between these parties to the Intertie IGA provide, in pertinent part, that the parties shall be able to amend all the provisions of the IGA, including the provision regarding the quantity of water to be supplied. Additionally, there is no expiration term for the use of the Intertie by any party. These terms specifically state the following:

> 8) Quantity of Water to be Supplied. Upon agreement between the parties to make use of the intertie pursuant to Paragraph 3 (which explains how water can be utilized) of this Agreement, the Party supplying water shall endeavor to supply the maximum feasible quantity of water to the other Party, and take all reasonable actions necessary to accomplish the same, so long as such actions are not detrimental to the operation of the supplying Party's

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own water system. Rec. 9708.

15) Amendment Provisions. The terms of this agreement may be amended by mutual agreement of the Parties. Any amendments shall be in writing, shall refer specifically to this agreement, and shall be executed by the Parties.

16) Termination of Agreement. This agreement shall continue in effect until terminated by the parties with written notice of such intent to terminate provided to the other parties. Notice to terminate must be provided at least 36 months prior to the effective date of termination. Termination of this agreement shall not affect the ownership status of the water system intertie facilities herein above described. Rec. 9709.

3. Brief History of Lake Oswego and Tigard Water Partnership ("LOT")

Lake Oswego ("LO") asserts that as of July 2007 demands for the existing water supply system for its residents were over 15 mgd and its capacity was only 16 mgd. In an effort to resolve this, LO contacted the neighboring City of Tigard ("Tigard") and together they retained an engineering company to develop and evaluate a Joint Water Supply System Analysis from which four (4) scenarios were developed. Rec. 9316.

These scenarios were developed to support alleged projected population growth and corresponding demands of the service areas of both LO and Tigard. The cities agreed that Scenario 4[2], which allowed LO to access 38 mgd with its junior and senior water rights from the Clackamas River, was best for both LO and Tigard. This reasoning was based solely on the considerable financial benefits Scenario 4 would provide to both LO and Tigard, which included the following:

1) An alleged savings to LO of $63 million in annual costs over the next 25 years and $23 million in one-time capital savings.

2) A rate increase to LO of 56% over the next 25 years instead of 148% increase that LO would face without a partner.

3) A rate increase for Tigard of only 113% over 25 years as opposed to not partnering with LO which would cause the rates to increase by 128%

---

[2] The parties were also provided with an alternate site upon which to build a new WTP that would be located in unincorporated Clackamas County. The noted advantages to that site included its remoteness and its distance from residential communities. Further the partnership could construct a new WTP without disrupting the existing WTP facility and the City of West Linn. Rec. 9384. The disadvantages however, included a maximum capacity of 36 mgd as opposed to 38 mgd that the West Linn WTP could provide with the projected expansion. Rec. 9384 (Table 2.7).

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-269%.

4) Securing more water rights for LO;

5) Constructing of an intertie between Tigard and the Washington County Supply that would save Tigard approximately $300,000.00 in annual operating costs; and

6) Alleged benefits to Tigard, LO and other water suppliers, including the city of West Linn who would all benefit from a regional system for emergency backup water. Rec. 9325-9327.

Subsequently, in 2008 the Cities of Lake Oswego and Tigard created a water partnership ("LOT") by entering into an intergovernmental agreement. Together they set out to implement Scenario 4, which is presently reflected in Respondent's approvals AP-12-02 and AP-12-03. Both of which erroneously allow LOT to dramatically enlarge the WTP and increase the size and capacity of both the RWP and FWP to the detriment of City of West Linn. Rec. 9316.

4. AP-03-12: LOT's Application for Raw Water and Finished Water Pipelines

In June of 2012, LOT submitted a land use application seeking to construct and install 1,500 linear feet of a below ground, 42" diameter, raw water pipeline ("RWP"), which would supply water to the WTP already located in West Linn. The installation of the RWP would begin at the Clackamas River, Rec. 180, located on the Southern boundary of the City of Gladstone. The portion of the pipe traversing under the Willamette River would be installed through the implementation of a horizontal directional drill method (HDD").[3] The pipe would continue under Mary S. Young Park, using the HDD technique, until it reaches the south end of Mapleton Drive in West Linn. From there, the pipeline would run along Mapleton Drive until it reaches the WTP which is located at 4260 Kenthorpe Way in West Linn. Rec. 8277-85.

From the WTP, 1,850 linear feet of finished water pipeline ("FWP"), now 48-inches in diameter, would follow the Mapleton Drive right of way below ground, westward to Oregon Highway 43 ("Highway 43"). The FWP would continue to run northerly, below ground along the right-of-way of Highway 43 to Lake Oswego. Rec. 8281. All of the pipeline running along

[3] Horizontal Directional Drilling is explained in detail below in No. 7.

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Mapleton Drive and Highway 43 would be installed via an open-cut trench. Rec. 8282.

The approval of both pipelines is subject to West Linn's Community Development Code Chapters No.: 56 (Parks Design Review); 27 (Flood Management Areas); 28 (Willamette River Greenway); and 32 (Water Resource Area). Additionally, the raw and finished pipelines must also comply with Chapter 60 of the Community Development Code ("CDC") and lastly all must also conform with West Linn's Comprehensive Plan and West Linn's Master Water System Plan.

5. Installation of the Raw Water Pipeline by Horizontal Directional Drilling

AP-12-03 will utilize the horizontal directional drilling ("HDD") method to install a RWP under two (2) lots owned by Oregon Parks and Recreation Department ("OPRD lots") and under Mary S. Young State Park ("MSY Park"), which is adjacent to and just south of the OPRD lots. There are a combination of six (6) water resources within MSY Park and the adjacent OPRD lots, all of which are protected and highly regulated by West Linn's Community Development, Code Chapter 32 ("C.32") Rec. 8534, 8397, 8411 & 8219.

LOT retained alleged ecological experts, David Evans and Associates, Inc., who prepared two technical memoranda ("DEA memos")[4] which explain when, where, and how the HDD process is to be implemented and what impacts and disturbances are, or are not, expected to be caused in terms of the C.32. Rec. 8392-8419. The DEA memos explain that the pipeline to be installed is 42-inches in diameter and 3,800 feet long. It will enter the ground at a hole drilled on the north OPRD lot which is located at the southeast end of Mapleton Drive, adjacent to the City of West Linn's Mapleton Pump Station and just north of MSY Park. From this hole, a tunnel will extend approximately 30 to 60 feet deep and commence at the OPRD property, through MSY Park and continue underneath the bed of the Willamette River to its east side where the tunnel will exit above ground at Meldrum Bar Park in Gladstone, outside of West Linn. Rec. 8534.

[4] The DEA memos identified all of the WRAs within LOT's pipeline site plan. In addition to MSY Park and OPRD lots, the memos included the Mapleton Drive and Highway 43 areas. The DEA memos also identify habitat conservation areas. This section of this Petition for Review, however, only discusses LOT's use of HDD within MSY Park and the OPRD lots with respect to WRAs and the standards imposed under §32.010 *et seq.*

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The HDD process begins with "mobilization" which occurs upon the OPRD property. Mobilization activities include tree removal, installation of tree protection fencing, installation of a temporary construction sound mitigation wall, implementation of erosion control measures, setup and positioning of the HDD construction equipment, and installation of the HDD conductor casing. These activities are estimated to take approximately 2 weeks and are to occur between 7:00 a.m. and 7:00 p.m. Monday through Friday and 9 a.m. and 5 p.m. on Saturday. Rec. 8534-36.

After mobilization, the first phase of HDD begins with a pilot bore drilled with a steerable bit which will travel the length of the entire installation area. The second phase of construction inserts a reamer through the pilot bore hole multiple times to increase the bore diameter to a size suitable to accept the designate pipeline. Bentonite drilling mud (also referred to as "drilling fluid") is then circulated and pumped into the bore hole throughout the pilot bore and reaming processes, which is intended to keep the bore hole open, allows the excavated material to be removed. Rec. 8537.

Once the bore hole operation is complete, LOT will commence the third phase of the HDD process known as the "pullback" phase. Here, the 42-inch RWP is pulled from the bore hole on the east side of the Willamette River with equipment located at the HDD entry staging area on the OPRD property near Mapleton Driver. The pipe will be pulled into the bore hole over a single 24-to 48-hour period, during which construction activities must occur around-the-clock to minimize the risk of the pipe becoming stuck within the bore hole. A special work-hour variance is required for this and LOT promises to notify local residents that they will be working 48 straight hours, at least 2 weeks prior to commencing the pullback operation. Rec. 8537.

After the pipe is installed for the complete length of the tunnel, the pipe will then be grouted in place. The entry and exit sites will then vacuumed, cleaned and restored. The heavy equipment will be disassembled and removed. These demobilization activities are anticipated to take approximately 1 week, and will mark the end of the HDD process. LOT has determined that the HDD process is so loud, it has volunteered to build a sound barrier wall to reduce the noise

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impact on the Robinwood Neighborhood. Rec. 8537.

DEA's technical memoranda promises that there is only a small risk associated with the HDD process, known as hydrofracture. This can occur when the drilling fluid pressure exceeds the strength and confining stress of the soil surrounding the bore hole. The excess pressure fractures the soil around the bore hole, allowing drilling fluid (a slurry of water and bentonite clay) to escape. The DEA memos further assert that this risk is limited to the first several hundred feet of the HDD alignment, from the entry location on the OPRD property near Mapleton Drive where the depth of the bore hole in relation to the ground surface could result in drilling fluid pressure exceeding the soil pressure. However, because the remaining distance of the HDD will be drilled through high-strength rock at a significant depth, the DEA memos state this creates a very low risk of hydrofracture. LOT further states that mitigation measures will be employed to ensure that hydrofracture does not occur. Rec. 8538.

Lastly, the DEA memos examine the HDD process in light of the approval standards and restrictive mandates of C.32. C.32's restrictions are triggered by construction, including the installation of utility corridors, within properties which contain protected water resources. Because C.32 seeks to prevent and/or reduce disturbances caused by construction, the DEA memos define the term "disturbance," and explain how the HDD process limits disturbance. The DEA firm quotes West Linn's Planning Director who opined the following in a memo he wrote in 2010:

> "Disturb: man-made changes to the existing physical status of the land, which are made in connection with development that would result in the destruction, damage, or removal of vegetation; or the compaction or contamination of the soil, not including stormwater run-off or the routine maintenance of the property consistent with CDC Chapter 32." Rec. 8411.

Using this definition as guidance as to what constitutes a disturbance, the DEA memos address the impact of the HDD process on vegetation, soil compaction, contamination and impact to wetlands. While the memos acknowledge that Chapter 32 of the West Linn's CDC applies, the

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memos fail to quote the express language of C.32. Ultimately the DEA memos determined that there is minimal environmental impact to MSY Park and the OPRD lots and further that the HDD process does not constitute a disturbance under C. 32, because the depth of the RWP allegedly avoids all water resources within both properties.

6. Installation of the Finished Water Pipeline and the Adverse Effects to Businesses On Highway 43.

Beginning from the WTP the Finished Water Pipeline ("FWP"), travels again down Mapleton Driver to Highway 43 and ends at the intersection of Mapleton and Highway 43 ("OR 43"). This FWP is 1,850 linear feet and 48-inches in diameter. Construction for these portions of pipeline will be performed by one contractor and will occur during work hours which are 7:00 a.m. to 7:00 p.m., Monday through Friday and 9:00 a.m. to 5:00 p.m. on Saturdays. The method of installation is "open-cut construction." Rec. 8535.

Open-cut construction will not exceed 150 feet on any given day. It will begin by the contractor bringing all the needed construction equipment and materials to the work area and saw cutting the pavement to a width of about 5-7 feet. A track mounted excavator will excavate the trench and the material created will be placed in a dump truck and hauled offsite for disposal. The trench will then be prepared to install the pipe which will be delivered and installed by the joints of each section being welded together and subsequently inspected and tested. The trench will then be backfilled up to the pavement section and a temporary asphalt will be installed until enough exists to replace with permanent asphalt pavement. Rec. 8538-39.

The duration of this construction is anticipated to last four (4) months during which 50 linear feet of pipeline will be installed per day. Final street restoration will be a separate construction activity which will follow several weeks after the daily pipeline activities are finalized. The contractor must abide by all public and emergency access required by Conditions 2, 4, 12, 13 and 15, Rec. 185-6; 195, which are in part also provided in LOT's Construction Management Plan. Rec. 8539.

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Construction upon Hwy 43 includes the construction of approximately 5,200 linear feet of 48-inch-diameter open-cut pipeline which will begin at the intersection of Mapleton Drive and Hwy 43 and will continue on Hwy 43 to the West Linn city limits immediately north of Arbor Drive. This construction will only occur during the nighttime hours of 8 p.m. to 5 a.m. allegedly to decrease traffic-related impacts and keep the construction duration to a minimum, Rec. 8535. This construction is anticipated to occur between June 2014 and August 2015 and last for approximately 5 months. Construction activities include mobilization, pipe installation, site restoration, and demobilization Rec. 8540.

The amount of construction-truck trip volume was calculated by LOT to be as follows:

1) Dump truck and large truck trip volume for the HDD process, explained above, will last approximately six (6) months and two (2) weeks and is estimated at twelve (12) average daily truck trips (ADTs) which includes the potential ten (10) ADTs for typical contractor activity. Rec. 8541.

2) However, during the pull-back period approximately 144 ADTs will occur over a continuous 24 to 48-hour period handle excess drilling mud. Rec. 8541.

3) The Mapleton Drive installation will cause approximately thirty six (36) ADTs of dump trucks. Rec. 8541.

4) On OR 43 there will be approximately 76 ADTs per day or eight (8) truck trips per hour during a typical 9-hour construction work period (8 p.m. to 5 a.m.). Rec. 8541-8542.

These construction phases are not cumulative. Traffic to the construction site will be routed from Interstate 205 (I-205) to Hwy 43 northbound to the construction area on Hwy 43 or Mapleton Drive. Construction traffic from the site will be routed from the construction area on Hwy 43 or Mapleton Drive via Hwy 43 southbound to I-205. Additional construction traffic will be routed from I-205 to OR 43 northbound to the construction area on OR 43 or Mapleton Drive. Construction traffic from the site will be routed from the construction area on OR43 or Mapleton Drive via OR43 northbound to McVey Avenue and then via Stafford Road to I-205. Rec. 8543.

LOT asserted below that there are 24 commercial driveways along the pipeline alignment

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on OR 43 in West Linn. Businesses or shopping centers with multiple access driveways, or an access driveway from a side street will not require additional coordination, because the construction zone will impact only one driveway at a time and side street access will be maintained at all times. Of the businesses that have only one access driveway on Highway 43, only two businesses may be impacted by the pipeline construction as a result of the 8 p.m. to 5 a.m. construction hours. These two businesses are Burgerville and Philadelphia's Steaks and Hoagies, which close at 11 p.m. and 9 p.m., respectively. LOT must maintain constant access to these two driveways during the period that construction work hours overlap with business hours outside of construction hours, full access to all commercial driveways will be restored. Rec. 8544-8545.

In addition to LOT's mitigation plans, the Robinwood Neighborhood Association ("RHA") prepared a mitigation plan, Rec. 473, and the Robinwood Shopping Center, LLC, submitted a financial impact report from Dr. Michael Wilkerson Rec. 1308-32, which explains and addresses destination business, impulse business, and the adverse economic impact with respect to impulse business that will stem from LOT's pipeline installation along OR43 under AP-03-12. Dr. Michael Wilkerson's report also explained the flaws in the methodology implemented by DKS analysis used when approving AP-03-12. Rec. 476-77.

Respondent found that LOT allegedly had taken "adequate measures * * * to mitigate for the possible adverse effects of the installation of the utility on surrounding properties and uses." Rec. 192. Respondent found that the following mitigation measures promised by LOT with its Construction Management Plan ("CMP") were, in part, adequate to address the adverse impacts and justify approval of AP-03-12:

> 1) Use of only two haul routes to and from the WTP and pipeline construction areas.
>
> 2) The haul routes are Hwy 43 and McVey/Stafford Rd to and from I-205.
>
> 3) Provide a 5-foot wide pedestrian and bicycle access way around the work zone.
>
> 4) Re-open and maintain fully functional streets (i.e., no road closures or

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equipment on the roadway) outside of work hours.

5) Maintain at least one driveway or access for vehicles to every business that has operating hours which overlap with nighttime construction hours.

6) Work with Tri-Met to provide continued public transportation service on Highway 43 and to maintain or relocate bus stops as required to maintain service.

7) Bus all craft-level workers to and from all construction work areas on Mapleton Drive, Kenthorpe Way, and Highway 43 to minimize traffic impacts.

8) Construction vehicle traffic to be approximately evenly split between Mapleton Drive and Kenthorpe Way to decrease the traffic impact on any single street.

Respondent also found that LOT's proposed business promotion plan to help keep the Robinwood Business district "Open for Business" during construction was a valid and sufficient mitigation measure. This plan will keep all lanes of traffic and all accesses onto Hwy 43 open during the business hours of 5 am to 8 pm. and provide custom signage to help guide customers to businesses that are open during construction hours. Further, Respondent also imposed the "Shop Local" Marketing Plan to be distributed by LOT to the Chair of the Robinwood Neighborhood Association, all businesses located along Highway 43 within the Robinwood neighborhood boundaries, and the City Manager. Rec. 196.

7. **The Basis for the City Council's Approval of AP-12-02 and AP-12-03.**

Respondent addresses some general concerns raised by West Linn residents and businesses about the impacts the construction would have on the community. The Council found that any impacts were temporary and sufficiently mitigated by LOT's series of details plans. Rec. 185.

Respondent went on to examine each construction stage and found that LOT's plan and methods met each and every approval criteria imposed by the CDC which included Chapters 60, 56 27, 28; and 32.

Respondent also identified the specific ways in which LOT's project benefits West Linn. Respondent recited the following to explain that AP-12-02 and AP-12-03 are consistent with the "overall needs of the community." Critical to the analysis of whether there was sufficient benefit to

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West Linn to overcome the extreme hardship that construction would impose on the City was a $5 million dollar cash payment that the applicant offered to the City to "sweeten the deal." Respondent asserted the following with regard to this $5 million dollar "fee" that it has imposed upon LOT:

> Further, the $5 million dollar fee for use of right-of-way within the city was not part of the proposal that the Planning Commission considered. This fee can be used for water system improvements to meet needs identified in the Water System Master Plan. These water system improvements will benefit the entire City of West Linn, including both residents and businesses.
>
> * * *
>
> Condition of Approval 16 is imposed to ensure the City and the Partnership execute an intergovernmental agreement securing this fee. To aid in meeting the needs of the Water System Master Plan, the applicant is also conveying its 24-inch transmission line along Highway 43, and other abandoned lines as required by Conditions of Approval 5 and 19. For the reasons stated above, the City Council finds that with additional conditions, the pipelines will be consistent with the "overall needs of the community."

Rec. 199-200. The City found that AP-12-02 and AP-12-03 provide benefits to the City of West Linn and the Robinwood neighborhood. Rec. 7311-3; 8283-5. Most of these items constitute mitigation, not benefits. Nonetheless, at the end of the day, the City Council found that it was only with additional conditions (including the $5,000,000 cash payment) that the pipeline would be consistent with the overall needs of the community.

II. PETITIONERS' STANDING.

Petitioners appeared and participated, by way of written and oral testimony, in the proceedings regarding AP-12-03 before both Respondent and the West Linn Planning Commission ("PC"). Based on the foregoing, Petitioners have standing to appeal to LUBA.

III. STATEMENT OF JURISDICTION

The City Council's final decision to approve a major utility is a statutory land use decision subject to LUBA's jurisdiction. ORS 197.015(10).

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IV. ASSIGNMENTS OF ERROR

A. First Assignment of Error

West Linn City Council Erred by Finding Compliance with CDC §60.070(A)(3) on the Basis of a Condition of Approval that Requires the Applicant to Pay a One-Time Ad Hoc Impact Fee in the Amount of $5 Million for the use of West Linn's Public Right-of-Way, Because this Type of Ad Hoc Impact Fee is Prohibited as a Matter of Law.

1. Issue.

CDC §60.070(A)(3) requires the decision-maker to make a finding that "[t]he granting of the proposal will provide for a facility that is consistent with the overall needs of the community." Although the concept of "benefits" is not directly used within Chapter 60, the concept nevertheless became a benchmark in the determination as to whether these two applications met the "overall needs of the community."

The Planning Commission discussed the term "benefit," and found it to be an appropriate standard to use to determine whether AP-12-02 and AP-120-3 complied with the approval criteria of Chapter 60. The City Council, in turn, also relied on the concept of "benefits" when evaluating CDC §60.070(A)(3). The City Council, however, determined that the application meet the overall needs of the community in part because the applicant agreed – at the last minute - to sweeten the deal by offering a one-time payment to the City in the amount of $5 million dollars. Cleverly labeled a "Community Impact Fee," the payment is imposed within Condition No. 16, which reads as follows:

> 16. Community Impact Fee. The applicant shall enter into an intergovernmental agreement with West Linn *in lieu of a franchise fee or other licensing fee* for the use of public streets in West Linn. That agreement shall require a one-time payment of $5 million to be used for West Linn water system improvements to the meet the overall needs of the community.[5] (Emphasis Addded).

Rec. 249.

Respondent asserts in its findings that the fee constitutes a "benefit" to the citizens of West

[5] Note that the city returns to the proper interpretation of "overall needs" as opposed to "needs of overall community" to attempt to justify the imposition of this purported impact fee.

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Linn under CDC §60.070(A)(3). The findings state:

> Further, the 5 million dollar fee for use of the right-of-way within the City was not part of the proposal that the Planning Commission considered. The fee can be used for water system improvements to meet the needs identified in the Water System Master Plan. These water system improvements benefit the entire City of West Linn, including both residents and businesses.
>
> * * * * *.
>
> For the reasons stated above the City Council finds that with additional conditions, the pipeline will be consistent with the overall needs of the community.

However, for reasons discussed below, the one-time fee is unlawful, and cannot be lawfully collected, let alone considered a "public benefit" that "meets the overall needs of the community" as that phrase is used in CDC §60.070(A)(3). Moreover, the city sets bad precedent by encouraging developers to agree to pay cash payments to the city general fund as an additional incentive to help get projects approved.

2. Standard of Review.

This assignment of error presents a question of state law and of ordinance interpretation. Petitioner alleges an error of law, and LUBA reviews for errors of law. ORS 197.835(9)(a)(D). The City is not entitled to deference to interpretations of its ordinance because its interpretation is inconsistent with both state law and the express wording of the City Charter and land use ordinances. ORS 197.829(1).

3. Argument.

As an initial matter, the implicit interpretation made by Respondent, that a 5 million dollar "impact fee" can constitute evidence that the overall needs of the community is met by the facility, is wrong as a matter of law. By the plain wording of CDC 60.070(A)(3), it is the *facility itself* that has to meet the overall needs of the community, not any associated bribe that might accompany the land use application. In a related context, LUBA recognized that the phrase "public need for a use"

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is a difficult matter to define. *Ruef v. City of Stayton*, 7 Or LUBA 219 (1983). Nonetheless, LUBA stated in *Ruef* that the focus is on the need for that *use*, not a need for the incidental benefits or mitigation (such as landscaping and buffering) that a proposed use may provide. For this reason, the City errs for considering the 5 million dollar fee to be a community benefit supporting a finding of overall need of the community.

Secondly, there is no legal authority for the City to charge an *ad hoc* impact fee to a developer. The very notion that a city can charge developers an *ad hoc* monetary "fee" in exchange for a development permit seems to be unprecedented in Oregon. Legislatively imposed impact fees are authorized by statute, ORS 223.297 *et seq*, and this Oregon statute is preemptive on the subject of impact fees to offset development impacts. In this regard, Respondent claims that the $5 million fee is intended to be used for "West Linn water system improvements." That falls within the definition an "improvement fee" as that term in used in ORS 223.297 *et seq*. ORS 223.299(2) defines an "Improvement fee" as "a fee for costs associated with capital improvements to be constructed." ORS 223.299(4), in turn, defines a "system development charge" as follows:

> (4)(a) "System development charge" means a reimbursement fee, an improvement fee or a combination thereof assessed or collected at the time of increased usage of a capital improvement or issuance of a development permit, building permit or connection to the capital improvement. * * * * *.

For this reason, the $5 million fee is an unlawful system development charge.

If the "Community Impact Fee" is considered to be some sort of *ad-hoc* development fee, then it violates the nexus requirement set forth in *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 107 S. Ct. 3141, 97 L. Ed. 2d 677 (1987). The City cannot simply demand that a developer pay a one-time 5 million dollar fee to help pay for water system improvements in change for the right to use city streets for water utilities, because there is no nexus between the impact and the exaction.

In this case, Respondent seems to be justifying the "impact fee" on the basis that it

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constitutes compensation "for the use of right of way within the city." Rec. 200. However, the City has limited authority to regulate and grant the use of its public right-of-ways ("ROW") in exchange for a fee. The permitted methods include the use of a (1) a franchise, (2) a permit / license, or (3) an intergovernmental agreement by way of local ordinance and state statute. West Linn Charter. 9.030.

Viewed in this light, the so-called "Community Impact Fee" is really nothing more than a franchise fee, despite any effort by the City to label it as something else. *Whitback v. Funk*, 140 Or 70, 73-4, 12 P2d 1019 (1932). In this regard, the label that the City places on the "fee" is of no consequence; the legality of the fee is determined by its nature, scope, and effect - not by any label attached to it. *Rogers Machinery, Inc. v. Washington County*, 181 Or. App. 369, 45 P.3d 966 (2002), *rev den.*, 334 Or. 492, 52 P.3d 1057 (2002), *cert den*, 538 U.S. 906 (2003) (Court ignored attempt by County to label a fee as a "tax."). The proposed fee meets the definition of a franchise fee as that term is understood in Oregon law. The West Linn Code even defines the term "franchise" in a manner that is directly on point:

> **9.010 Definition.** Franchise. A grant of authority by agreement and contract and ordinance allowing the use of public rights of way within the City for utility, solid waste and recycling collection, and similar purposes.

To make matters worse, the decision grants LOT the right to use streets in West Linn in perpetuity. However, the Oregon Supreme Court has held that a grant of a franchise in perpetuity is against public policy and is therefore void. *City of Joseph v. Joseph Water Works Co.*, 57 Or. 586, 111 P. 864 (1910), 112 P. 1083 (1911); *Newsom v. City of Rainier*, 94 Or 199, 185 P 296 (1919). Recognizing the holdings in *Joseph* and *Newsom*, the Oregon legislature has limited franchise fees and related permits and "privileges" to a 20-year duration. ORS 221.460. For this reason, both the condition of approval and the fee are void. *Compare Skydive Oregon, Inc. v. Clackamas County*, 25 Or LUBA 294, 308 (1993), *affirmed in part, remanded in part*, 122 Or App 342, 857 P2d 879 (1993) (discussion of impermissible conditions); *Wheeler v. Marion County*, 20

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Or LUBA 379, 385 (1990) (condition of approval must have some reasonable connection with the proposed project).

As a result, a substantial basis for the finding that the "overall need of the community" is met is also without legal merit. LUBA must remand the case to determine if the overall needs of the community are met without the illegal 5 million dollar fee.

The "Community Impact Fee" can also not be considered a "permit" or "license." By charter, the City of West Linn has the authority "to regulate the use of rights of way by ordinance, franchise, license, permit, or combination thereof." However, the City has not adopted any ordinance which we are aware that requires a permit or license accompanying a one-time "impact fee" on persons seeking to use right of way for public utilities. The City seems to think it can create and/or impose a fee out of thin air, but its power is limited by both the Charter and state law. At the very least, the City would need to first adopt an ordinance setting forth a licensing or permitting scheme. Any such scheme would need to contain standards that constrain the discretion of the official who issues the license of permit. *City of Portland v. Traymor*, 94 Or 418, 183 P 933 (1919).

Furthermore, as explained in detailed below, LOT is a municipally-owned utility which is expressly exempt by state statute from the type of regulation imposed by Respondent. Accordingly, the only lawful method under which the Respondent could receive $5 million from LOT in exchange for LOT's use of West Linn's public streets would be by a conveyance or lease under ORS 271.310.[6]

However, ORS 271.310 limits LOT's use of West Linn's ROWs to 99 years. For this

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[6] **ORS 271.310 Transfer or lease of real property owned or controlled by political subdivision; procedure in case of qualified title; notice; rules.** (1) Except as provided in subsection (2) of this section and subject to subsection (3) of this section, whenever any political subdivision possesses or controls real property not needed for public use, or whenever the public interest may be furthered, a political subdivision may sell, exchange, convey or lease for any period not exceeding 99 years all or any part of the political subdivision's interest in the property to a governmental body or private individual or corporation. The consideration for the transfer or lease may be cash or real property, or both.

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reasons, the grant of use of the ROWs in perpetuity in exchange for a one-time $5 million payment cannot qualify as a sale or lease. In any event, Respondent never followed the proper procedure for the sale or lease of West Linn's public property required under ORS § 271.310.

As mentioned above, Respondent's only legal authority to regulate the City's public ROWs comes from the West Linn Municipal Code ("WLMC") Chapter 9, entitled *Franchises* and from Oregon Revised Statutes §221.410-§221-490, entitled *Authority To Regulate Local Matters; Licensing And Taxation.*

In addition to defining what constitutes a franchise, Chapter 9 also provides the following:

> **9.020 Authority.** The City has the authority pursuant to Section 6 of the Charter[7] and ORS Chapters 221, 459 and 459A to issue franchises allowing the use of public rights of way for utility and other purposes. The City Council may grant exclusive or non-exclusive franchises for [lists services] and other services. Franchises shall be granted by a franchise agreement approved by ordinance.
>
> **9.030 Restriction on Use of Rights of Way**. The City has jurisdiction to control public rights of way within the City and may regulate the use of rights of way by ordinance, franchise, license, permit or any combination thereof.

WLMC 9.020 & .030.

WLMC 9.020 derives its authority from the Oregon Revised Statutes and the City Charter. However, the only grant of power that expressly addresses municipal power to regulate utilities within ROWs is found at ORS 221.410-221-470. Within these sections, the only applicable grant of authority pertinent to this matter is within ORS 221.415, ORS 221.420. These statutes provide the following:

> **ORS 221.415: Municipal rights of way: use by electric utilities; power of city to regulate and impose charges.**

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[7] The City of West Linn's Charter, Section 6., entitled *Distribution of Powers*, is a generalized grant of power to the City Council, but as explained herein, this power is confined and restricted as per the Municipal Code and the Revised Statutes. Section 6 provides the following:

> Except as this Charter prescribes otherwise and as the Oregon Constitution reserves municipal legislative power to the voters of the City, all powers of the City are vested in the Council.

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> Recognizing the independent basis of legislative authority granted to cities in this state by municipal charters, the Legislative Assembly intends by ORS 221.415 (Municipal rights of way), 221.420 (Municipal regulation of public utilities), 221.450 (Privilege tax on public utilities operating without franchise) and 261.305 (General powers of district) to reaffirm the authority of cities to regulate use of municipally owned rights of way and to impose charges upon publicly owned suppliers of electrical energy, as well as privately owned suppliers for the use of such rights of way.

ORS 221.415. *See also* ORS 221.420(1)(a)(c)&(d).[8] Of important note in ORS 221.420(1)(a) is

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[8] **ORS 221.420: Municipal regulation of public utilities.**

(1) As used in this section:

(a) *Public utility* has the meaning for that term provided in ORS§757.005 (Definitions).

* * *

(c) Council means the common council, city council, commission or any other governing body of any municipality wherein the property of the public utility is located.

(d) Municipality means any town, city or other municipal government wherein property of the public utility is located.

* * *

(2) Subject to ORS 758.025 (Relocation of utilities in highway right of way), a city may:

(a) Determine by contract or prescribe by ordinance or otherwise, the terms and conditions, including payment of charges and fees, upon which any *public utility*, electric cooperative, peoples utility district or heating company, or Oregon Community Power, may be permitted to occupy the streets, highways or other public property within such city and exclude or eject any public utility or heating company therefrom.

(b) Require any public utility, by ordinance or otherwise, to make such modifications, additions and extensions to its physical equipment, facilities or plant or service within such city as shall be reasonable or necessary in the interest of the public, and designate the location and nature of all additions and extensions, the time within which they must be completed, and all conditions under which they must be constructed.

(c) Fix by contract, prescribe by ordinance, or in any other lawful manner, the rates, charges or tolls to be paid to, or that may be collected by, any *public utility* or the quality and character of each kind of product or service to be furnished or rendered by any public utility furnishing any product or service within such city. No schedule of rates, charges or tolls, fixed in the manner provided in this

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its reference to ORS 757.005 for the definition of "public utility." ORS 757.005 provides in pertinent part the following:

757.005: Definitions

* * *

(1)(b) As used in this chapter, public utility does not include:

(A) *Any plant owned or operated by a municipality.* (Emphasis added).

ORS 757.005((1)(b)(A).

Respondent's power to regulate West Linn's ROWs is expressly limited under ORS 221.420(2)(a) to the regulation of public utilities, electric cooperatives, people's utility districts or heating companies, or Oregon Community Power. LOT clearly is neither an electric cooperative, people's utility district, heating company or part of Oregon Community Power. LOT, by definition, is not a "public utility." LOT is owned by the municipalities of Lake Oswego and Tigard, therefore in accordance with ORS 221.420 (1)(a), by reference to ORS 757.005, LOT is not a "public utility."

Notwithstanding the actions of the Respondent, the clear intent of the Oregon legislature is to empower City Councils to control how public utilities may be permitted to occupy their city's streets, highways or other public property and to also fix the rates, charges or tolls to be paid, or collected. However, this power does not extend to those utilities, like LOT's water pipeline approved by AP-12-02 and 03, which are *municipally owned and operated.*[9]

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paragraph, shall be so fixed for a longer period than five years. (emphasis added).

[9] The Oregon legislature enacted yet another statute that specifies a difference between municipally owned and privately owned water utilities. ORS 758.300 *et seq.*, addresses utility regulation, primarily by county and state owned utilities and provides in part, the following:

As used in ORS 758.300 to 758.320:

(1) "Commission" means the Public Utility Commission.

(2) "Community water supply system" means a water source and distribution system, whether publicly or privately owned, that serves more than three residences or other users to whom water is provided for public consumption, including but not limited to schools, farm labor camps, industrial establishments, recreational facilities, restaurants, motels, mobile home parks or group care homes.

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Moreover, while the Respondent asserted that it can impose the $5 million impact fee upon LOT through an IGA, parties to an IGA can only contract with respect to those matters which they *have authority to perform.* ORS §190.003; *see also Gunderson, LLC v. City of Portland*, 352 Or. 648, 658-59; 290 P.3d 803, 809 (2012) (holding that although the OR CONST Art. XI Sec. 2 empowers municipalities with authority to enact substantive policies in areas also regulated by state law, this does not permit a municipality to act in a manner "incompatible" with state law:"); Or. Op. Atty. Gen. OP-6444, 1992 WL 526788 (citing *Harrison v. Port of Cascade Locks,* 27 Or. App. 377, 556 P.2d 160 (1976) finding that a government lawfully cannot have "interests" that exceed the authority and powers conferred and duties imposed on it by law).

ORS 190.003 *et seq.*, regulates intergovernmental agreements.[10] While ORS 190.003 *et seq.*, grants Respondent vast authority to contract, neither this statute nor any other grant of power, enables Respondent to create terms or engage in obligations, via a contract, which it is otherwise precluded from doing under state and federal law. *Gunderson, LLC v. City of Portland, supra.* As explained in detail above ORS §221.420(2)(a)&(b) preclude the Respondent from regulating LOT because LOT does not fall into the exclusive list of entities subject to these regulations.

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(3) "Water utility" means any corporation, company, individual or association of individuals, or its lessees, trustees or receivers, that owns, operates, manages or controls all or a part of any plant or equipment in this state for the production, transmission, delivery or furnishing of water, directly or indirectly to or for the public, whether or not such plant or equipment or part thereof is wholly within any town or city. *"Water utility" does not include a municipal corporation.*

[10] ORS 190.003 provides:

> **Definitions for ORS 190.003 to 190.130**As used in ORS 190.003 to 190.130, unit of local government includes a county, city, district or other public corporation, commission, authority or entity organized and existing under statute or city or county charter.

ORS 190.010 provides:

> **Local government Authority; Intergovernmental Agreements.** A unit of local government may enter into a written agreement with any other unit or units of local government for the performance of any or all functions and activities that a party to the agreement, its officers or agencies, have authority to perform. The agreement may provide for the performance of a function or activity. * * *.

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Accordingly, the Respondent cannot - by terms of an IGA - require LOT to make a one-time impact fee of $5 million for use of West Linn's ROWs.

Oregon's Attorney General has examined issues regarding land use by municipally-owned utilities and determined that these utilities are considered to have the same legal standing as a person or corporation. Or. Op. Atty. Gen. 24 (Or.A.G.), 1962 WL 77397 (addressing questions with respect to municipally-owned utilities under ORS §758.010). Thus, the only lawful avenue available to the Respondent to charge LOT $5 million dollars for the use of West Linn's ROWs is ORS § 271.310, which provides for the transfer or lease of real property owned or controlled by political subdivision.

The definitions applicable to Chapter 271 are contained within ORS 271.005, which provides the following:

> As used in ORS §271.005 to 271.540:
>
> (1) Governing body means the board or body in which the general legislative power of a political subdivision is vested.
>
> (2) Governmental body means the State of Oregon, a political subdivision, the United States of America or an agency thereof.
>
> (3) Political subdivision means any local government unit, including, but not limited to, a county, city, town, port, dock commission or district, that exists under the laws of Oregon and has power to levy and collect taxes.

ORS 271.005 (1), (2)&(3).

ORS 271.310 provides in pertinent part, the following:

> (1) Except as provided in subsection (2) of this section and subject to subsection (3) of this section, whenever any political subdivision possesses or controls real property not needed for public use, or whenever the public interest may be furthered, a political subdivision may sell, exchange, convey or lease for any period not exceeding 99 years all or any part of the political subdivision's interest in the property to a governmental body or private individual or corporation. The consideration for the transfer or lease may be cash or real property, or both.
>
> * * *
>
> (4) Unless the governing body of a political subdivision determines under

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> subsection (1) of this section that the public interest may be furthered, real property needed for public use by any political subdivision owning or controlling the property may not be sold, exchanged, conveyed or leased under the authority of ORS 271.300 (Application and administration of ORS 271.300 to 271.360) to 271.360 (Lease requirements), except that it may be exchanged for property that is of equal or superior useful value for public use. Any such property not immediately needed for public use may be leased if, in the discretion of the governing body having control of the property, the property will not be needed for public use within the period of the lease. * * *.

ORS 271.310(1)&(4). Lastly, ORS 271.360 dictates all lease requirements under ORS 271.310, to require the following with respect to the payment of ad valorem taxes:

> Every lease entered into pursuant to ORS 271.310 shall be authorized by ordinance or order of the body executing the same and shall provide terms and conditions as may be fixed and determined by the governing body executing the lease. The lease may provide that the lessee shall pay ad valorem taxes assessable against the leased property, or that the political subdivision shall pay these taxes, in which latter event the anticipated amount of taxes shall be taken into consideration in fixing the rental charge.

ORS 271.360.

Respondent has not followed the requirements under ORS 271.310(1) because it has conveyed to LOT a perpetual interest in West Linn's ROWs when the statute expressly limits the time period under which LOT may maintain that interest is limited to 99 years. Accordingly, if LUBA agrees with Petitioners, then under ORS 271.310(4), the property should not have been sold, exchanged, conveyed or leased under the authority of ORS 271.300.

Moreover, the record is void of the requirements imposed under ORS 271.360, for clear terms and conditions between West Linn and LOT for LOT's use of West Linn's ROWs. The record is also void of any determination of how the ad valorem taxes will be assessed, another requirement under ORS 271.360. The only term that exist in the record is that LOT will pay $5 million for (the impermissible) perpetual use of the ROWs.

Thus, the terms of use under Condition No. 16 violate ORS 221.420(2)(a) (by regulating a public utility when there is no authority under Oregon Law to do so); ORS 190.010 (by contracting under an IGA for terms that the Respondent has no authority to do); ORS 271.310 (by conveying

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West Linn's ROWs in perpetuity when the time period is restricts to 99 years); and ORS 271.360 (by failing to impose terms a condition of the lease/conveyance terms including the specifics regarding payment of the ad valorem tax). Accordingly, Petitioners respectfully requests that LUBA remand Respondent's land use decision.

Lastly, Petitioners assert that under common law principals, public rights-of-way belong to the community. *Anderson v. Thomas*, 144 Or 572; 26 P2d 60 (1933); *Parker v. City of Silverton*, 109 Or. 298; 220 P. 139 (1923) (The public streets within the limits of an incorporated city or town are a part of the public highways of the state and belong to the whole people of the state."). Accordingly, the City serves in the role of a trustee when it manages the City's ROWs. A "Trustee" is defined as "[o]ne who, having legal title to the property, holds it in trust for the benefit of another and owes a fiduciary duty to that beneficiary." BLACK'S LAW DICTIONARY 1519 (7th ed. 1999) The duties of trustees have been said, in general terms, to be: 'to protect and preserve the trust property, and to see that it is employed solely for the benefit of the *cestui que* trust [beneficiary].'" II BOUVIER'S LAW DICTIONARY 3336 (3d ed. 1914). While the trustees possess general power to lease trust property, the lease is for the advantage and protection of the beneficiary. 90 C.J.S. Trusts § 472 (2002).

Furthermore, free-market compensation for the use of property is not only based on the cost of that property, but also on the value of the property to the user and the price of the nearest available substitute. Therefore, LOT's gross revenues are one acceptable way of measuring the value of the use of the ROWs. Thus, what should also be calculated when determining the value of the property, is the costs savings that LOT enjoys by using West Linn's ROWs. By LOT's own admission, in choosing to use the City of West Linn as its water treatment infrastructure, LOT enjoys the following:

1) An alleged savings to LO of $63 million in annual costs over the next 25 years and $23 million in one-time capital savings.

2) A rate increase to LO of 56% over the next 25 years instead of 148%

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increase that LO would face without a partner.

3) A rate increase for Tigard of only 113% over 25 years as opposed to not partnering with LO which would cause the rates to increase by 128% -269%.

4) Securing more water rights for LO;

5) Constructing of an intertie between Tigard and the Washington County Supply that would save Tigard approximately $300,000.00 in annual operating costs. Rec. 9325-9327.

Based on the foregoing and in the alternative, if LUBA finds that Condition No. 16 imposed by West Linn is not contrary to established law and therefore does not require reversal, then Petitioners respectfully request the LUBA remand this matter for the proper calculation of the true fair market value of the use of West Linn's ROWs (for 99 years). For such calculation Petitioners request that LUBA instruct the Respondent to take into consideration the self-proclaimed cost benefits gained by the Cities of Lake Oswego and Tigard, by using West Linn as their water treatment and transmission infrastructure. Petitioners also assert that the decrease in aesthetic changes that West Linn will suffer from both the permanent structures and the excessive disturbance from construction -will not be suffered by either (lessee) City and this too should be calculated into the cost or value of leasing and occupying West Linn's ROWs.

B. Second Assignment of Error.

The West Linn City Council erred in adopting LOT's assertions that the installation of the RWP beneath MSY Park and adjacent OPRD lots, by the use of horizontal direction drilling does not "impact" or "disturb" those properties and therefore does not trigger the restrictive construction conditions imposed by CDC §32.010 *et seq*.

1. Issue.

Respondent accepted LOT's explanation and conclusion, as set forth in the Facts section, *supra*, that the installation of approximately 900 linear feet of RWP by horizontal directional drilling ("HDD") within Mary S. Young State Park ("MSY Park") and adjacent Oregon

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Parks and Recreation lots ("OPRD lots"),[11] has no impact on and does not disturb the water resource areas ("WRA") located within those properties. Respondent further found that the HDD process avoids the need to conduct a mitigation plan under CDC §32.010 *et seq.*, Respondent specifically found the following:

> The applicant's proposal avoids impacts to the Willamette River and WRAs in Mary S. Young Park by tunneling beneath these areas. The record contains a technical memorandum prepared by ecologists which demonstrates that the HDD that will occur 65 feet below grade when it travels under the ordinary high watermark of the Willamette River and approximately 7 feet below grade, the shallowest depth of the bore, when it approaches the HDD staging area in the northern OPRD property-outside of all WRAs. Therefore, the HDD boring phase of the project will not disturb the soils, wetlands, and vegetation associated with nearby WRAs.

Rec. 187. Respondent further addresses the findings of LOT's technical memorandum with respect to the requirements under C.32 and ultimately, but incorrectly, conclude the following:

> WRA Disturbance -Chapter 32 limits the amount of disturbance allowed in a WRA. The evidence in the record establishes that using HDD construction methods well below (34 to roughly 60 feet) a WRA will have no effect on the resources protected by the WRA. Protected WRA's include the drainage channel, creek, wetlands, and the required setback and transition areas that exist above ground while the wetland component of a WRA can extend below-ground to a depth that is, "inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions,"[12] This definition provides a limit upon which to measure the below-ground extent of wetlands and therefore, WRAs.

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[11] LOT asserts that it "temporarily disturbs" the OPRD lots, but only with respect to vegetation. Accordingly, LOT provides a mitigation plan for re-vegetation of the lots. However, as explained below, LUBA has previously found that the construction process for the installation of pipeline is not a "temporary disturbance," but instead permanent in nature. Therefore, the length and width restrictions under §32.050(F) apply to LOT's HDD project to install the RWP within the OPRD lots (as well as MSY Park) *See Horsey v City of West Linn*, 59 Or LUBA 185 (2009).

[12] Here, Respondent provided Footnote. 4 which states:

> CDC 2.030, Wetlands: "Those areas inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs, and similar areas. Wetlands are those areas identified and delineated by a qualified wetland specialist as set forth in the 1987 Corps of Engineers Wetland Delineation Manual. Wetlands do not include those artificial wetlands intentionally created from non-wetland sites, including but not limited to irrigation and drainage ditches, grass-lined swales, detention facilities, wastewater treatment facilities, farm ponds, and landscape amenities."

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> The applicant's plans demonstrate that their RWP alignment avoids WRAs by going around (beneath) them and containing impacts to WRAs in Mapleton Drive and Highway 43 to already disturbed areas of the right-of-way. Therefore, the maximum disturbance limitations contained in Chapter 32 do not apply.

Rec. 188. As discussed below, Respondent erred as a matter of law.

2. Standard of Review.

This assignment of error presents a question of ordinance interpretation. Petitioners allege an error of law, and LUBA reviews for errors of law. ORS 197.835(9)(a)(D). ORS 197.829(1) states a rule of deference owed by LUBA to certain local government's interpretation of its land use policies. ORS 197.829(1) provides:

> "The Land Use Board of Appeals shall affirm a local government's interpretation of its comprehensive plan and land use regulations, unless the board determines that the local government's interpretation:
>
> "(a) Is inconsistent with the express language of the comprehensive plan or land use regulation;
>
> "(b) Is inconsistent with the purpose for the comprehensive plan or land use regulation;
>
> "(c) Is inconsistent with the underlying policy that provides the basis for the comprehensive plan or land use regulation; or
>
> "(d) Is contrary to a state statute, land use goal or rule that the comprehensive plan or land use regulation implements."

Pursuant to ORS 197.829, LUBA shall affirm a local government's interpretation of its own land use regulations if it is "inconsistent with the express language of the comprehensive plan or land use regulation[.]" ORS 197.829(1)(a). Whether a local government's interpretation is "inconsistent with the express language" of its own land use regulations "depends on whether the interpretation is plausible, given the interpretive principles that ordinarily apply to the construction of ordinances under the rules of *PGE v. Bureau of Labor and Industries*, 317 Ore. 606, 610-12, 859 P.2d 1143 (1993), as modified by *State v. Gaines*, 346 Or. 160, 171-72, 206 P.3d 1042 (2009).".

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Foland v. Jackson County, 215 Or. App. 157, 164, 168 P.3d 1238, *rev den,* 343 Or. 690, 174 P.3d 1016 (2007).

Stated another way, the "consistency with the express language" inquiry looks at the text of the plan provision or the regulation in question, as well as the context of other parts of the plan or regulation that are relevant to the textual meaning of that "express language." *Western Land & Cattle, Inc. v. Umatilla County*, 230 Or App 202, 209-10, 214 P.3d 68 (2009). In *Western Land*, the Court of Appeals stated that "[i]n determining whether a local government's interpretation of its land use plan or regulation is "inconsistent with the express language of the comprehensive plan or land use regulation" under ORS 197.829(1)(a), LUBA must apply the statutory construction principles in ORS 174.01013 and ORS 174.020(2)14 that are based on the "express language" of a provision."15 *Id.* at 210. *Western Land* further instructs that LUBA should "also apply other textual canons of construction in evaluating a local government's interpretation of its plan or regulation under ORS 197.829(1)(a)." *Id.* "Those canons include some rules applied in 'first level' *PGE* analysis, such as giving words of common usage their 'plain, natural, and ordinary meaning' and recognizing that 'use of the same term throughout a statute indicates that the term has the same meaning throughout the statute." *Id.*

3. Argument.

As explained in detail below, Respondent's interpretation of CDC §32.010 *et seq* is

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[13] ORS 174.010 provides:

> "In the construction of a statute, the office of the judge is simply to ascertain and declare what is, in terms or in substance, contained therein, not to insert what has been omitted, or to omit what has been inserted; and where there are several provisions or particulars such construction is, if possible, to be adopted as will give effect to all."

[14] ORS 174.020(2) provides that, in the construction of a statute, "[w]hen a general and particular provision are inconsistent, the latter is paramount to the former so that a particular intent controls a general intent that is inconsistent with the particular intent."

[15] Although ORS 174.010 and 020(2) pertain to "the construction of a statute," both LUBA and the Courts use them in the interpretation of local ordinances. *Ramirez v. Hawaii T & S Enterprises, Inc.,* 179 Or.App. 416, 425, 39 P.3d 931 (2002).

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inconsistent with the express language of Chapter 32. The requirements of CDC §32.010 *et seq.*, is triggered by *any* alterations, including the installation of a pipeline, that occurs within a "water resource area" ("WRA"). *See* CDC §32.025[16] (requiring permits for work in a WRA); *See also* CDC §32.050(F) (allowing utilities in WRAs when no other practical alternatives exists.); in a similar vein, CDC §32.020. Stated even more broadly, CDC §32.020(A) extends all of the requirements of Chapter 32 to *"properties"* upon which the protected water features, natural drainage ways, wetlands, riparian corridors, and/or associated transition and setback areas are located:

> **32.020 APPLICABILITY** A. This section applies to properties upon which a natural drainageway, wetland, riparian corridor, and/or associated transition and setback area, is located. For example, the subject property may be defined as one property that contains a wetland or creek plus an adjacent property of different ownership that includes the transition area or setback area. (Emphasis added).

Additionally, CDC §32.020(B) explains that a permit is always needed if there is any alteration of a water resource area:[17]

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[16] This is clear from the plain language of CDC §32.025 , which states as follows:

> **32.025 PERMIT REQUIRED**
>
> No person shall be permitted to fill, strip, install pipe, undertake construction, or in any way alter an existing water resource area without first obtaining a permit to do so from the decision-making authority, paying the requisite fee, and otherwise complying with all applicable provisions of this chapter.

CDC §32.025.

[17] While there are exceptions to the provisions of Chapter 32, located in subsections "C" and "D," those exceptions do not apply to the instant matter. The exceptions within Subsection "C" are the following:

> This chapter shall not apply to designated enclosed storm drains that appear in the most recently adopted West Linn Surface Water Management Plan, unless the enclosed storm drain is opened as a result of the proposed development. The provisions shall also not apply to small manmade open roadside drainage swales in residential areas, even if such roadside swales are identified as open channels by the most recently adopted West Linn Surface Water Management Plan. The provisions of this chapter also do not apply to drainage ditches and open channel improvements created in the interior of individual residential lots that are not identified on the Surface Water Management Plan Map.

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> B. The provisions of this chapter apply to all zones and uses within the City limits. No person, unless excepted by subsection C or D of this section, may clear, fill, build in, or alter existing water resource areas without having obtained a permit from the decision-making authority.

Lastly, subsection (C) explains that C.32 applies to development proposals that have water resource areas within their project boundary.

> C. The provisions of this chapter shall apply to development proposals that have water resource areas within their project boundary. Therefore, the actual wetland, creek, open channel, or stream does not have to be on the subject property under review. * * *.

While there is no definition of a "project boundary," the sentence in subsection (C) which immediately follows the term, "project boundary" states the actual wetland, creek, open channel, or stream does not have to be on the subject property under review" in order to trigger a permit requirement. CDC § 32.020(A)-(C).

The term "water resource area" is defined at CDC §32.050(E) and Table 32-1.[18] It includes "the drainage channel, creek, wetlands, and the required setback and transition area." Table 32-1 sets forth the amount of the setback and transition area in various situations. Thus, the provisions of C.32 are not just applicable when a construction project proposes to run pipeline directly into or

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CDC § 32.020(C).

Subsection "D" of §32.020 lists eleven (11) actions which are excluded from all of the provisions within C.32. None of the exceptions apply to AP-03-12. Accordingly, Petitioners do not address any of the eleven (11) within this Petition for Review.

[18] See also CDC §32010(A), which states that the "water resource area" includes "protected water features" and "associated vegetated corridors." CDC §32.010(A) reads, in pertinent part, as follows:

> **32.010 PURPOSE AND INTENT**
>
> This chapter has two primary purposes, which serve to accomplish different public policy objectives, but which have overlapping methods of meeting these purposes:
>
> A. Improve water quality and protect the functions and values of water resource areas that consist of protected water features and associated vegetated corridors. * * *.

CDC § 32.010(A).

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upon a water feature, such as a wetland, creek or riparian corridor, but also with the setbacks and transition areas.

At the core of Respondent's finding lies the premise that the HDD installation of the RWP "avoids impacts" to WRAs because the HDD "bores beneath" them. Rec. 188. Stated another way, Respondent views the alteration of a WRA as being limited to the impacts *to the surface* of the WRA. In this regard, LOT repeatedly asserted that its proposed plan to install the RWP within MSY Park and the OPRD lots does not directly impact or disturb any vegetation, wetlands, other specific water feature.[19] Respondent used the "no disturbance because of HDD" rationale to conclude that "the maximum disturbance limitations contained in Chapter 32 do not apply." Rec. 188.

However, the Code does not create an exemption to the mitigation requirements for utilities that happen to avoid surface disturbances by instead disturbing the soils *underneath* the surface. Rather, CDC §32.050(F) requires:

> F. Roads, driveways, utilities, or passive use recreation facilities may be built in and across water resource areas when no other practical alternative exists. Construction shall minimize impacts. Construction to the minimum dimensional standards for roads is required. Full mitigation and revegetation is required, with the applicant to submit a mitigation plan pursuant to CDC 32.070. and a revegetation plan pursuant to CDC 32.080. The maximum disturbance width for utility corridors is as follows: * * *. (Emphasis added).

Thus, CDC §32.050(F) states, with qualification, that mitigation plans are required when building a utility in or across a WRA. There are no exceptions for underground utilities using HDD. This is because, as discussed in more detail below, the soils located at a depth of 7, 20 or even 65 feet below the surface is as much a part of the protected resource as is the vegetation on the surface.

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[19] Respondent and LOT cite to the technical memorandum of its alleged ecological expert , David Evans and Associates, Inc., ("DEA memo") as proof that its HDD plan will not impact or disturb any water resource areas. The DEA memo asserts that the restrictive conditions of C.32 are not triggered because "[n]o impacts will occur within MSY Park.... and [n]o impacts will occur in areas mapped as WRA." Rec. 8400-1.

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In a similar manner, CDC §32.050(C) makes clear that a mitigation plan is required if "any portion" of the WRA is "permanently disturbed." CDC §32.050(C) provides:

> C. Development shall be conducted in a manner that will minimize adverse impact on water resource areas. Alternatives which avoid all adverse environmental impacts associated with the proposed action shall be considered first. For unavoidable adverse environmental impacts, alternatives that reduce or minimize these impacts shall be selected. If any portion of the water quality resource area is proposed to be permanently disturbed, the applicant shall prepare a mitigation plan as specified in CDC 32.070 designed to restore disturbed areas, either existing prior to development or disturbed as a result of the development project, to a healthy natural state. (Emphasis added).

The Code does not define the term "disturbance." Opponents argued below that placing a permanent pipe in the water resource area constitutes a "permanent" disturbance. Rec. 1015-6. Opponents noted that the concept of disturbance is not limited to impacts that occur on the surface of the resource. *Id.*

In *Horsey v. City of West Linn*, 57 Or LUBA 534, 537 (2008), the Board stated in dicta that "[i]t may be that the city could interpret "development disturb[ance]," within the meaning of CDC 32.090(A) to include only permanent disturbances to the surface of the water resource area, but the challenged decision does not adopt such an interpretation." However, in light of the express language of the Code, that would not be an "interpretation" at all. Rather, it would constitute adding what has been omitted, something that Oregon law forbids. ORS 174.010.

In this regard, the Code does not say: "If ~~any portion~~ *the surface* of the water quality resource area is proposed to be permanently disturbed, the applicant shall prepare a mitigation plan * * *. Rather, it says: "If *any portion* of the water quality resource area is proposed to be permanently disturbed, the applicant shall prepare a mitigation plan." Here, there can be no argument that "a portion" of the WRA is proposed to be permanently disturbed; the applicant admits that they are proposing to run two 4-foot diameter pipes *underground through* the WPA. There is no ambiguity: the ground underlying the surface of land within a WRA is in every sense a

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"portion" of the WRA. There is a fine line between *interpreting* code language and simply *making up* code language in the guise of an interpretation, and here, Respondent attempts the later. *Goose Hollow Foothills League v. City of Portland*, 117 Or App 211, 843 P2d 992, 995 (1992)("To amend legislation *de facto* or to subvert its meaning in the guise of interpreting it is not a permissible exercise.").[20]

The notion that the WRA is intended only to protect the "surface" of the WRA is further belied by the purpose statement set forth in CDC 32.010. The purpose statement is "context" which can clarify the legislative intent of the phrase "permanent disturbance" as used in CDC 32.050(C). *Warburton v. Harney County*, 174 Or App 322, 25 P3d 978 (2001).[21]

In *Warburton*, the issue was whether a "hunting, horseback, and trail ride guide training school" was a "public or private school." The applicant in that case argued that the Court need look no further than the text, and that they were clearly proposing a "private school." The Court disagreed with that approach, finding that as used in the EFU zone, the term "school" must be read in a more limited manner. Finding support for this position in the various "intent" sections associated with EFU zones, the court noted:

> While it is true that a policy statement, such as this one, should not provide an excuse for delineating specific policies not articulated in the statutes, such a general purpose statement may serve as a contextual guide for the meaning of a particular statute. *DLCD v. Jackson County,* 151 Or App 210, 218, 948 P2d 731 (1997), *rev. den.* 327 Or 620, 971 P2d 412 (1998).

Here, one of the express purposes of Chapter 32 (Water Resources Area Protection) is to improve water quality and the functions and values of water resource areas," which includes "providing filtration, soil infiltration, and natural water purification, and stabilizing slopes to

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[20] *See also Von Lubken v. Hood River County,* 104 Or App 683, 803 P2d 750 (1990), *on recons*, 106 Or App 226, *rev den*, 311 Or 349 (1991); *1000 Friends of Oregon v. Wasco County Court*, 299 Or 344, 703 P2d 207 (1985) (LCDC interpretation overturned as *de facto* amendment of its own rule).

[21] *See also State v. Kitzman*, 323 Or 529 920 P2d 134 (1996); *Miller v. Meisel Co., Inc.*, 183 Or App 148, 51 P3d 650 (2002)(statutory terms to be given "a broad construction commensurate with the statute's purpose."); *State v. Parker*, 299 Or 534, 704 P2d 1144 (1985).

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prevent landslides." CDC §32.010(A). Those are all concepts that involve the *subsurface* of the water resource area. As an example, water purification results from water infiltrating through sand and soil, because impurities and pathogens such as Giardia and E Coli are filtered out because they cannot physically fit through the spaces between individual soil particles. Groundwater is purified by the soil itself, and this process is not limited to waters ate the surface of the resourse.

Of course, it does not take a PhD in hydrology to figure out what will happen to the surface of the WRA if the HDD operation results in hydro-fracking that reaches the surface, or if the 4 foot diameter underground pipe springs a leak at some point in the future. But even if those events never occur, there can be no doubt that a 4-foot diameter pipe will have consequences on the WRA's ability to provide localized water filtration, soil infiltration, natural water purification, and stabilizing slopes to prevent landslides: the very presence of the pipe will alter the land.

Furthermore, mere avoidance of the water resource, itself, is not the intent and purpose of Chapter 32. All of Chapter 32's provisions expressly apply to *properties* within which water resources exist or flowed. Accordingly, Respondent has impermissibly narrowed Chapter 32's application and protections from *properties* containing WRAs to just the protected water features, themselves. This misconstrues and misapplies the provisions of Chapter 32 to an application contrary to their express purpose which is to improve and protect water resource areas by restricting the alteration of *properties* which contain protected water resource. Thus, Respondent improperly granted LOT a permit to install its RWP within MSY Park and the OPRD Lots, when the proper application of the express provisions of C.32, would prohibit LOT from installation of the RWP.

Respondent continued to misconstrue the application of C.32 throughout its multiple Findings of Fact. In Finding 30, Respondent alleges that LOT has proven that "[t]here are no wetlands in, or adjacent to the HDD work area..." Rec. 237-38. While that could be true, that is not the express intent of the provisions within C.32. As stated, §32.020(A)'s provisions apply to *properties* upon which water resources are located. LOT's own submission admits that MSY Park and the OPRD lots are properties upon which water resources are located. Rec.8404-05. Thus,

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contrary to Respondent's findings, the provisions in C.32 directly apply to the installation of the RWP regardless of the implementation of HDD within MSY Park and the OPRD lots.

In Finding 32, the Respondent examined the HDD under CDC §32.050(C). Respondent cited to the finding in LOT's Memo prepared by David Evans & Assoc. (*See* n19, *supra*) which stated that the HDD installation is in compliance with subsection (C), for the following reasons:

> [T]he HDD that will occur between 65-to-34-feet below the park and 7 feet below OPRD lots 100 and 200 and will not disturb the soils, wetlands, and vegetation associated with nearby WRAs. Consistent with CDC 32.050(C), the applicant has selected an alternative that avoids all adverse environmental impacts to the WRAs associated with the park and the two OPRD lots.
>
> * * *
>
> The mitigation requirements of Section 32.070 do not apply. The criterion is met.

Rec. 239-40. Respondent wrongly concluded that because the pipeline will be installed 65-34 feet below MSY Park and 7 feet below the OPRD lots, that there are no adverse environmental impacts to the WRAs within those properties. According to the City, the lack of adverse environmental impact justifies an exception to the mitigation requirement. However, "no adverse impact" *is not the standard* with respect to subsection (C). Instead the express standard is whether the water resource is "permanently disturbed." CDC §32.050(C). The pipe itself *is* the permanent disturbance. And, as discussed above, the specific Code provision dealing with utilities requires mitigation without any exception or qualification. CDC §32.050(F).

Although Respondent repeatedly asserts that HDD satisfies Chapter 32's criteria because "based on the evidence in the record there is no disturbance to MSY Park." Rec. 187, 188, 197, 213, 214, 219, 225, 228, 231, 233, 235, 239, 243. Respondent never defined or analyzed the term "disturbed." Yet, without any explanation of "disturbance" and without any analysis of the HDD process in relation to the definition of "disturbance," Respondent concluded that the HDD does not created a disturbance. Therefore, Respondent incorrectly concluded it should not require LOT to prepare a mitigation plan with respect to the HDD project through MSY Park and the OPRD lots.

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The meaning of the term "disturbed" as used in Chapter 32 has been examined by LUBA in *Horsey v City of West Linn*, 59 Or LUBA 185 (2009). In *Horsey,* a challenge was made in response to the City of West Linn's ("the City") approval of a water resource permit. When granting the permit the City did not consider sewer, water and other utility lines a "development," that, when installed, would "disturb" the protected water resource areas. The City asserted that it need not consider these utilities' lines because they constituted only a "temporarily disturbance" which resulted from construction. Thus, the City did not find the term "disturb" to include temporary disturbances of property during construction, so long as those areas would be returned to their pre-construction state. *Id.* at 187.

The Petitioners in *Horsey* argued that this definition of "disturbed" was inconsistent with the express language of C.32 as well as its plain and ordinary meaning. Petitioners cited Webster's New World Dictionary of American English, which defined "disturb" as: "to break up the quiet or serenity of; agitate (what is quiet or still)." *Id.* at 188. The *Horsey* petitioners asserted that the definition of the word "development" includes temporary construction activities such as "grading or site clearing, and grubbing in amounts greater than 10 cubic yards on any lot or excavation." Thus, the word "disturb" cannot reasonably be interpreted to include only "permanently developed" areas. As relevant to this context, petitioners also pointed to CDC §32.050(C), which requires a mitigation plan for any portion of the water resources area that is proposed to be "permanently disturbed." This demonstrates that the City does distinguish between temporary and permanent disturbances.

LUBA agreed with petitioners and further addressed the installation of an underground pipeline. LUBA noted that the City had previously ruled that "[s]torm water drainage facilities, even if underground, [came] within the definition of 'development' and therefore are included in the calculation of disturbed area [under C.32]." *Id* at 189. However, the record indicated that the development at issue also included permanently installed drainage lines, but no explanation as to why the storm drainage facilities were considered "development" that "disturb[s]" the water

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resources protection area, but drainage and underground utility lines, similarly installed, and likewise permanent, was not a "development" which constituted a disturbance. *Id.*

Like in *Horsey,* where the City wrongly found the installation of sewer and water utility lines within a WRA did not constitute a disturbance, Respondent is also wrong in finding no disturbance from the RWP installation within MSY Park and the OPRD. Presumably, the Respondent found the depth of the RWP installation within MSY Park to be a distinguishing factor between LOT's HDD installation and the customary water utility installation which existed in *Horsey.*

However, as explained above, the conclusion that the HDD process is so deep it will avoid impact and disturbance to wetlands and other water resources is flawed. Again, the purpose of Chapter 32 is not avoidance of the individual water feature itself, but instead Chapter 32 seeks to "improve water quality and protect the functions and values of water resources" by imposing restriction upon the entire *property* upon which a natural drainage way, wetland, riparian corridor, and/or associated transition and setback area, is located.

Similar to *Horsey,* where the City erroneously determined that no disturbance existed from the installation of a water utilities pipeline, because that merely constituted a "temporary disturbance" resulting from construction, Respondent is also erroneous in finding the mobilization/staging phase that will occur on OPRD lots is only a temporary disturbance on already disturbed land, and therefore, does not implicate the restrictions of Chapter 32. While Respondent accepts LOT's plan to re-vegetate, the OPRD lots will be trampled by the excessive tonnage of the HDD machinery. Since the permanent installation of the pipeline constitutes a disturbance under Chapter 32, LOT must also comply with the other restrictions provided by Chapter 32 with respect to the mitigation requirements for OPRD.

Furthermore, Respondent dismisses the obvious disturbance created by the violent nature of the HDD process. Explained in detail in the Facts section, *supra*, each of three (3) stages of the HDD process pose the possibility of permanent damage the WRAs in MSY Park and/or the OPRD

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lots. The first phase, mobilization/staging, will take approximately 2 weeks and includes tree removal, installation of tree protection fencing, installation of a temporary construction sound mitigation wall, setup and positioning of the HDD construction equipment and HDD conductor casing. Rec. 8536. This has the potential to cause the following:

> Within [the OPRD lots], soil compaction could occur from the use of heavy equipment and/ or the use of inappropriate grading techniques when fill is placed over the RWP to fill the open trench cut. Some soil compaction is likely during construction.

Rec. 8414.The second stage involves drilling a pilot bore with a steerable bit which will travel the length of the entire installation area. A reamer will then be inserted through the pilot bore hole multiple times to increase the bore diameter to a size suitable to accept the designated pipeline [42" diameter]. Drilling fluid will then be circulated and pumped into the bore hole throughout the pilot bore and reaming processes which is intended to keep the bore hole open to allow the excavated material to be removed. Rec. 8537.

Thus HDD has the great potential to create hydrofracture which occurs when the drilling fluid pressure exceeds the strength and stress of the soil surrounding the bore hole. The excess pressure fractures the surrounding soil and the drilling fluid (said to be only water and bentonite) escapes into the surrounding soil. Rec. 8538. According to LOT this will most likely be minimized because most of the HDD will be through high-strength rock.[22]

The last stage of the HDD process is the "pullback" phase. Here, the 42-inch RWP will be pulled from the bore hole on the east side of the Willamette River with equipment located at the HDD entry staging area on the OPRD property near Mapleton Drive. The pipe will be "pulled" into the bore hole over a single 24-to 48-hour period, during which these construction activities

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[22] LOT has further not disclosed the potential impact of the HDD process through this rock in relation to MSY Park's rating as "high earthquake vulnerability." This rating is common knowledge and is also easily accessed within West Linn Natural Hazards Mitigation Plan ("NHMP"), which is public record. In fact, members of the City Council were on the steering committee for the NHMP and participated in drafting and developing the Plan. Although the current members may not have been on the committee, certainly the current members of the Council are imputed with this knowledge.

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will occur around-the-clock to minimize the risk of the pipe becoming stuck within the bore hole. Rec. 8537.

Certainly, since LUBA determined in *Horsey II* that the customary installation of a utility pipeline within a WRA is a "disturbance" under Chapter 32, then the violent, lengthy installation process that will occur through the HDD installation of the RWP within MSY Park and the OPRD lots also constitutes a "disturbance." As such this process triggers the mitigation requirements.

Because the Respondent found otherwise, but did so without correctly interpreting the law and without adequately performing the analysis for findings set out in *Larvik v. City of La Grande*, 34 Or LUBA 467 (1998), Petitioners respectfully request that LUBA remand the decision for further findings and analysis on this topic.

C. Third Assignment of Error.

Respondent Erred by Not Requiring a Mitigation Plan pursuant to CDC §32.050 and CDC §32.070. Respondent's Error Results from its Failure to Properly Interpret the Phrases "any Portion" and "Permanent Disturbance."

1. Issue.

CDC §32.050(C) provides:

> C. Development shall be conducted in a manner that will minimize adverse impact on water resource areas. Alternatives which avoid all adverse environmental impacts associated with the proposed action shall be considered first. For unavoidable adverse environmental impacts, alternatives that reduce or minimize these impacts shall be selected. <u>If any portion of the water quality resource area is proposed to be permanently disturbed, the applicant shall prepare a mitigation plan</u> as specified in CDC 32.070 designed to restore disturbed areas, either existing prior to development or disturbed as a result of the development project, to a healthy natural state.

See also §32.050(F) (Requiring mitigation plans for utility work in WRAs. Opponents argued that the "60% alignment drawings" submitted by the applicant in September of 2012 show that pipeline would have an impact on two water resource areas. Rec. 6824-5; 8745; 8748. Similarly, opponents argued that the bore under Mary S. Young Park required mitigation. Respondent's

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findings state, in relevant part:

> Testimony was submitted regarding the impact the pipeline would have on two WRA crossings on Mapleton Drive, namely Trillium Creek and Heron Creek. The 60% alignment RWP and FWP drawings in the record show the pipeline alignment through each of these two WRAs, but passing under these areas, there is no disturbance. With regard to Trillium Creek, the applicant proposed that the FWP be tunneled underneath the Trillium Creek culvert in the Mapleton Drive right-of-way to avoid any disturbances to this resource. Entry and exit bores pits for the pipeline tunnel will be located on either side of the creek, at a sufficient distance to ensure that there will be no further surface impacts to the resource. The FWP alignment (as shown on the 60% alignment drawings) and the bore pits for the tunnel will be completely located within areas "already disturbed" (*i.e.* pavement or parking) in the Mapleton Drive right-of-way. There will be no impacts on adjacent storm drainage channels, streamside vegetation, and water quality or water quantity as a result of the proposed pipeline installation. As for Heron Creek, the applicant has proposed that the RWP be installed over the top of the Heron Creek culvert via open-cut construction methods in the Mapleton Drive right-of-way to avoid any disturbances to this resource. The RWP alignment (as shown in the 60 percent alignment drawings) is completely contained within paved or developed areas in the Mapleton Drive right-of-way. There will be no impacts on adjacent storm drainage channels, streamside vegetation, and water quality or water quality as a result of the proposed pipeline installation.
>
> The mitigation requirements of Section 32.070 do not apply. The criterion is met.

Rec. 239-40.

As discussed below, Respondents err by implicitly interpreting the code in two separate manner. First, Respondent implicitly finds that the horizontal directional drilling operation will not result in "permanent disturbance" to the WRA so long as there are no "surface impacts" to the resource. Secondly, Respondent implicitly finds that the Code provides an exception to the mitigation requirement when the applicant proposes to disturb areas in the Water Resource Area "(WRA") that are "already disturbed" or "developed." These interpretations are inconsistent with the express wording of the Ordinance.

2. Standard of Review.

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This assignment of error raises an issue of ordinance interpretation. Petitioners allege an error of law, and LUBA reviews for errors of law. ORS 197.835(9)(a)(D). The rules pertaining to deference set forth in ORS 197.829(1) apply, unless stated exceptions are triggered.

3. Argument.

Petitioner incorporates the arguments set forth in the Second assignment of error.

In addition to the arguments set forth above, Respondent errs by implicitly interpreting the Code as providing an exception to the mitigation requirement when the applicant proposes to disturb areas in the Water Resource Area "(WRA") that are "already disturbed" or "developed." There is simply no language in CDC Chapter 32 that supports the notion that areas that "already disturbed" or "developed" provide an exception to the mitigation requirements. CDC §32.050(C) does suggest that options that avoid adverse environmental impacts are preferred, and it does stand to reason that areas that are already disturbed or developed would be preferable locations for additional permanent disturbances when concerned to more pristine natural areas. However, the fact remains that both CDC §32.050(C) & (F) require mitigation if there is a "permanent disturbance." There is no language in the code to suggest that land within a WRA that is "already disturbed" or "developed" can be used as a location where additional disturbance is inflicted on the WRA without consequence.

In light of these concerns, the City erred by not requiring a mitigation plan to restore other disturbed areas on or off site to a "healthy, natural state." CDC §32.050(C).

D. Fourth Assignment of Error.

Respondent failed to adopt adequate findings on the issue of traffic mitigation measures, because the findings do not address, let alone acknowledge the conflicting expert testimony and evidence raised by Petitioners.

The Planning Commission found, among many things, that the pipeline application did not meet CDC§60.070(A)(1) and CDC §60.070(A)(3). CDC§60.070(A)(1) requires a finding that: "The site size and dimensions provide: (a) [a]dequate area for the needs of the proposed use; and (b) [a]dequate area for aesthetic design treatment to mitigate any possible adverse effect from the

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use on surrounding properties and uses. CDC §60.070(A)(3) requires a finding that "[t]he granting of the proposal will provide for a facility that is consistent with the overall needs of the community."

Respondent interpreted CDC §60.070(A)(1) in conjunction with the Code's definition of "major utility," such that the approval criteria requires consideration of construction-related impacts on the community. Rec. 192. ("Thus, to approve the project, the Council must determine that there * * * are adequate measures taken to mitigate for the possible adverse effects of the installation of the utility on surrounding properties and uses.")

Respondent accepted LOT's assertion that its traffic mitigation plans are adequate to address the significant adverse economic impact its pipeline installation will have upon those businesses located near and along Hwy 43. Rec. 195. Respondent fashioned a condition of approval, number 21, which requires that LOT agree to the following:

> 21. Shop Local Marketing Plan. Prior to the issuance of any City right-of-way permits for work required in conjunction with the proposed pipeline on Highway 43, the applicant shall receive approval of a "Shop Local" Marketing Plan from the City's Economic Development Director. This Plan shall require implementation of the business retention strategies found on pages 62-70 and 164 of Exhibit 'E' prior to the beginning of construction on Highway 43. The Marketing Plan shall be distributed via regular mail to the Chair of the Robinwood Neighborhood Association, all businesses located along Highway 43 within the Robinwood neighborhood boundaries, and the City Manager.

Rec. 249.

However, Respondent never addressed the economic impact concerns raised during the public hearings and posed in the West Linn Business Impact Report prepared by Michael Wilkerson, Ph.D. (hereinafter "Wilkerson Report" or "Report").

The Wilkerson Report provides a general explanation of how businesses are historically impacted by road construction similar to that which West Linn will endure under AP-03-12. The explanation is based on studies performed by the Department of Transportation or other government agencies in Oregon and other states, all of which examined traffic counts, surveyed

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business owners and reviewed their tax records, before and after the road construction. Those studies found that despite all mitigation efforts, *even those similar to the mitigation plan proposed by LOT*, there were net losses to businesses located adjacent to road construction areas. Rec. 1308.

The Wilkerson Report further explained that there are two (2) categories of businesses. These are: (1) "destination" businesses such as doctors' offices and insurance brokers; and (2) "impulse" business, such as markets, restaurants and retail stores. Rec. 1311. Because destination business cannot be easily substituted they typically retain their client/customer bases and construction traffic has a negligible impact on their overall viability and net income during construction periods. Rec. 1311.

In contrast impulse businesses are such that they allow a customer to easily change their habits to avoid any inconvenience. Rec. 1311. In one study performed by Oregon DOT, traffic counts were recorded for impulse businesses prior to and during road construction. The construction was performed at night only, just as LOT's traffic mitigation plan intends. Even with nighttime construction, there was a net decrease in traffic by 63.9% for a fast food restaurant and 59.3% for a retail store.[23] Rec. 1317.

In addition to traffic counts, the Wilkerson Report explained that the DOT also surveyed business owners and residents to measure the perception of the impact. Of 28 business owners surveyed, 58% of them thought that they lost some business due to the construction. Of the residents surveyed, 59% stated that they experienced difficulty getting into and out of businesses adjacent to the road construction. Rec. 1318.

The Wilkerson report went on to discuss the results of multiple other studies that examined sales data and net decreases in gross revenue. Rec. 1318-9. Additionally the Report discusses study results involving traffic mitigation efforts such as prohibiting left turns in certain areas and also ensuring at least one area of egress and ingress were left accessible for a business. All studies

[23] The Wilkerson Report explains that the report relied on was for a smaller community and further that the study did have some technical and measurement errors. Rec. 1317.

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found that regardless of the mitigation efforts, there was an adverse effect on impulse businesses Rec. 1319-22.

LOT's construction plans along OR.43 and its corresponding traffic mitigation plans are detailed above in Section II, C.6. As shown, LOT's Construction Management Plan and its two (2) DKS reports never address issues pertaining to West Linn's destination and impulse businesses along the areas of OR.43 subject to the pipeline installation. Further LOT never addressed the issues of net decrease in sales, decrease in gross revenues, or decrease in traffic counts all of which West Linn's businesses will suffer. Rec. 8539-61; 7708-20.

While the Respondent is empowered to choose which evidence in the record is most credible and which it will rely upon when making its final ruling, if there is conflicting, believable evidence in the record and that evidence creates an issue as to whether, or not, there is compliance with applicable approval criteria, then the Respondent is required to address the conflicting issues within its findings. *Norvell v. Metro Area LGBC*, 43 Or App 849, 604 P2d 896 (1979).[24] Respondent never adopted so-called "Norvell findings" addressing any of the specific challenges to AP-03-12 made by the West Linn business community, where those challenges raised issues as to whether, or not, AP-03-12 meets the applicable approval criteria under the CDC.[25] Under *Norvell* and its progeny, a remand is warranted to address these issues.

E. Fifth Assignment of Error.

Councilor Jones Violated Applicable Law by Engaging in Undisclosed *Ex Parte* Contacts with the Applicant by Using Staff as a Messenger to Shop A Proposed Set of Conditions of Approval to the Applicant In Order to Gain their Acknowledgement and Acceptance of the Conditions Prior to the Final City Council Public Meeting on the Topic of these Two Land Use Decisions.

Note: This assignment of error is premised on facts that are not in the record. Petitioners will be

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[24] *See also Eckis v. Linn County*, 22 Or LUBA 27, 57 (1991)(citations omitted). *Hillcrest Vineyards v. Board of Commn, Douglas County*, 45 Or App 283, 293, 608 P2d 201 (1980).

[25] See such challenges in the record at; Rec. Doc. 476, 845, 1024, 1032, 1124, 1182, 1244, 1904, 2874 3201 and 4352 and 1308-1322.

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seeking a Motion For Evidentiary Hearing and, as part of that request, will ask to depose the elected officials and staff involved in this matter due to unlawful, undisclosed *ex parte* contacts that the decision-maker and staff have admitted having with the applicant. OAR 661-010-0045(1) provides:

> Grounds for Motion to Take Evidence Not in the Record: The Board may, upon written motion, take evidence not in the record in the case of disputed factual allegations in the parties' briefs concerning unconstitutionality of the decision, standing, ex parte contacts, actions for the purpose of avoiding the requirements of ORS 215.427 or 227.178, or other procedural irregularities not shown in the record and which, if proved, would warrant reversal or remand of the decision. The Board may also upon motion or at its discretion take evidence to resolve disputes regarding the content of the record, requests for stays, attorney fees, or actual damages under ORS 197.845.

LUBA has stated that the Board's practice and preference in most cases is to address motions under OAR 661-010-0045 after the parties have submitted briefs on the merits. *Horizon Construction, Inc. v. City of Newberg,* 25 Or LUBA 656, 662 (1993); *Citizens Concerned v. City of Sherwood,* 20 Or LUBA 550, 555-56 (1991). Out of respect of those cases, Petitioners will defer filing the Motion for Evidentiary Hearing until after the briefs are filed.

Councilor Jones engaged in *ex parte* contacts with LOT on or about Saturday, February 9 and Sunday, February 10, 2013. As part of these *ex parte* contacts, the West Linn City Council sought and received concurrence from the applicant on LOT's willingness to accept five proposed conditions of approval. Councilor Jones engaged in these communications for the express purpose of potentially changing his vote.

Petitioner Scott Gerber had a phone conversation with Councilor Mike Jones on February 19, 2013, one day after the written decision was issued. In that conversation, Councilor Jones admitted to Mr. Gerber that he woke up at 2 am Saturday morning, February 9, 2013, and started working on the five conditions of approval that he eventually presented to the public at the February 11, 2013 public hearing. He further stated that after reducing the proposed conditions to

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paper, Councilor Jones at some point during the next morning called City of West Linn planning staff and presented the conditions to them. He instructed staff to run the conditions by the applicant, LOT, to make sure they were acceptable to the applicant. Staff then dutifully "worked with LOT staff through the weekend," and at some point prior to the meeting, LOT agreed to accept the five conditions. Councilor Jones specifically told Scott Gerber that LOT had communicated to the West Linn City Council via City of West Linn staff. The responsive information was transmitted to Mayor Kovash, Councilor Jones and the other City Councilors prior to the meeting. Thus, by the time of the public hearing, the entire West Linn City Council knew that LOT was going to accept the five proposed conditions of approval.

In the April 25 2013 on-line edition of the West Linn Tidings revealed more details about the whole sordid affair. App-1. The City Manager, Chris Jordan, *admitted* to the newspaper that he acted as the carrier pigeon or "go –between" between Jones and LOT by relaying messages between the decision-maker and the applicant. All of this was done for the purpose of swaying Councilor Jones' vote! The Tidings article states:

> Over the course of the two weeks, Jones worked with city staff to add more conditions of approval to the projects that would sway his vote to approval. City Manager Chris Jordan said he had been in contact with both Jones and LOT officials in regard to the new conditions, and that other city staff, such as attorneys, dealt with drafting the new conditions.
> By the morning of the [Feb. 11, 2013] city council meeting, councilors had received a copy of Jones' proposed conditions of approval for their review prior to the meeting.
> "That's the way the process works, and that's the way process should work," Jordan said, saying he talked with each of the councilors many times over the course of the application process.
> Legally, councilors can interact with city staff and with each other one on one as long as they are not trying to negotiate votes.[26]

[26] In light of the Circuit Court decision in *Dumdi v. Handy*, it is no longer accurate to suggest that one-on-one meetings between Council members for te purpose of discussing and deliberating towards a decision is acceptable practice. *See Dumdi v. Handy*, Lane County Cir. Ct. Case No. 16-10-02760, Findings of Fact and Conclusions of law dated Jan. 18, 2011. Public meetings laws can be violated by serial meetings (aka: "walking quorums"). A serial meeting occurs when sequential meetings are held, each between less than a quorum of the public body's members, that when taken together, would constitute a meeting subject to the Public Meetings Law.

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App. 1. Incredibility, the City Manager seems to see nothing wrong with subverting *ex parte* contact laws and public meeting laws by acting as the secret squirrel messenger to facilitate off-the-record deliberations between decision-makers and the applicant.

Both the statute and LUBA case law make clear that a decision-maker talking to staff outside of the public record is not an *ex parte* contact. ORS 227.180(4); *Richards-Kreitzberg v. Marion County*, 31 Or LUBA 540, 541 (1996); *Dickas v. City of Beaverton*, 16 Or LUBA 574, 581, *aff'd* 92 Or App 168 (1988). However, the policy underlying that principle only goes so far, and clearly the City has crossed the line in this case. A decision-maker cannot use staff as a *messenger* to communicate back and forth with the applicant. Doing so is no different than sending a direct email or having a phone conversation with one of the parties to the case. What the Councilor Jones and Chris Jordan did in this case is no different than if a LUBA Board Member used LUBA staff to communicate *ex parte* with one of the attorneys of record in the case on matters pertaining to the merits of the legal arguments in that attorney's briefs. This case presents the same kind of serious breach of protocol.

This Board has repeatedly held that the burden is on petitioners to demonstrate how they have been prejudiced by procedural errors.[27] In this case, Petitioners have a right to an impartial

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See Dumdi v. Handy, *supra*; *Blackford v. Sch. Bd. of Orange County*, 375 So.2d 578, 580 (Fla.Dist.Ct.App.1979) (successive meetings between school superintendent and individual school board members violated Florida's Sunshine Law); *State ex rel. Cincinnati Port v. City of Cincinnati*, 668 N.E.2d 903, 906 Ohio 1996) (a public body cannot circumvent public meeting law by setting up back-to-back meetings consisting of less than a majority of its members with the same topic of public business discussed at each meeting).

Other states have held that communications by serial one-on-one telephone and serial emails can violate public meeting law, even when the statute in question did not formally address the issue. *Compare Stockton Newspapers Inc. Redevelopment Agency*, 214 Cal. Rptr. 561, 171 Cal App 3d 95 (Cal App 3 Dist 1985) (series of telephone calls between individual members and attorney to develop collective commitment or promise on public business violated Brown Act); *Hitt v. Mabry,* 687 S.W.2d 791, 796 (Tex.App.1985) (injunction restraining board of trustees from arriving at a decision affecting the district by way of private, informal telephone polls, or conferences of the board members.); *Wood v. Battle Ground School Dist.*, 107 Wn App 550, 564, 27 P3d 1208 (2001) (emails sent to a quorum constituted a violation of the public meeting law); *Del Papa v. Bd. of Regents of the Univ. & Cmty. Coll. Sys.*, 114 Nev. 388, 956 P.2d 770, 778 (1998) (use of serial electronic communication by quorum of public body to deliberate toward or to make a decision violates state open meeting law).

[27] As an example, in *Forest Park Estate v. Multnomah County*, 20 Or LUBA 319, 331 (1990), LUBA declined to sustain petitioner's claim of prejudice because, although petitioner contended that its written and oral responses were impaired because a staff report was issued late, petitioner failed to "identify any ways in which its written and oral

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tribunal. A decision-maker seeking out and receiving communications from the applicant undermines the legitimacy of the entire process and is a strong indication of bias. *Tierney v. Duris, Pay Less Properties*, 21 Or App 613, 536 P2d 435 (1975). An impartial decision-maker would not seek to secretly communicate outside of the public meeting process, but would instead communicate with the applicant by re-opening the record and holding a new session wherein public testimony is received. Petitioners are prejudiced by the fact that Councilor Jones voted on a matter that he may not have been impartial, as indicated by his actions in communicating in secret with the applicant.

In light of these allegations, the proceedings were tainted beyond repair and decision must be remanded.

F. Sixth Assignment of Error

Petitioner hereby Incorporates by Reference all Five of the Assignments of Error Raised by Attorney Peggy Hennessey in the Petition for Review filed on 16 July 2013 in LUBA Case No. 2013-023.

VI. CONCLUSION

Based upon the foregoing, Petitioners respectfully request that this Board remand the matter with instruction that the West Linn City Council follow the express language of the code, regulations and state statutes established by the City of West Linn and the State of Oregon.

Respectfully submitted this 16th day of July, 2013.

ANDREW H. STAMP, P.C.

_____

Andrew H. Stamp, OSB No. 974050
Attorney for Petitioners

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responses would have been different or more complete if the staff report had been available earlier." *See also Apalategui v. Washington County*, 14 Or LUBA 261, 267, *aff'd in part, rev'd in part* 80 Or App 508 (1986).

ANDREW H. STAMP, P.C
Attorney at Law
4248 Galewood Street
Portland, Oregon 97035
(503) 675-4318 - FAX (503) 675-4319

Pelz, Zach

From: Thornton, Megan
Sent: Monday, December 16, 2013 8:17 AM
To: Pelz, Zach
Subject: FW: Ex-parte dislosure related LOT

Zach,

Here is another ex parte communication disclosure.

~Megan

Megan Thornton, Assistant City Attorney
Administration, #1663

From: Tan, Jennifer
Sent: Saturday, December 14, 2013 9:04 AM
To: Thornton, Megan
Subject: Ex-parte dislosure related LOT

Hi Megan,
Over the past week LOT topic has come up when I was with the following people. LOT discussion was limited. I did not learn anything new about LOT that I did not already know before talking to the following people. I was not biased by anything that was mentioned.
Kerry Sovde
Kelly Larsen
Becky Brody
Todd Jones
Don Kingsborough
Lorie Griffith
Vicki Handy
Bob Martin
Ray Kindley
Kris Olson
Sumi Kim
Beth Rice
Eila Chapel
Lisa Chang
Pam Nicolson
Julie Garcia
Glen Friedman
Tina Decker

City of West Linn
100 Years
1913 - 2013

Councilor Jennifer Tan
jtan@westlinnoregon.gov
West Linn City Councilor
22500 Salamo Rd
West Linn, OR 97068
P: (503) 657-0331
F: (503) 650-9041
Web: westlinnoregon.gov

Pelz, Zach

From: Kerr, Chris
Sent: Wednesday, November 27, 2013 4:18 PM
To: Pelz, Zach
Subject: FW: Happy Thanksgiving from the City of West Linn!

Fyi

Chris Kerr, Economic Development Director/Interim Planning Director
Economic Development, #1538

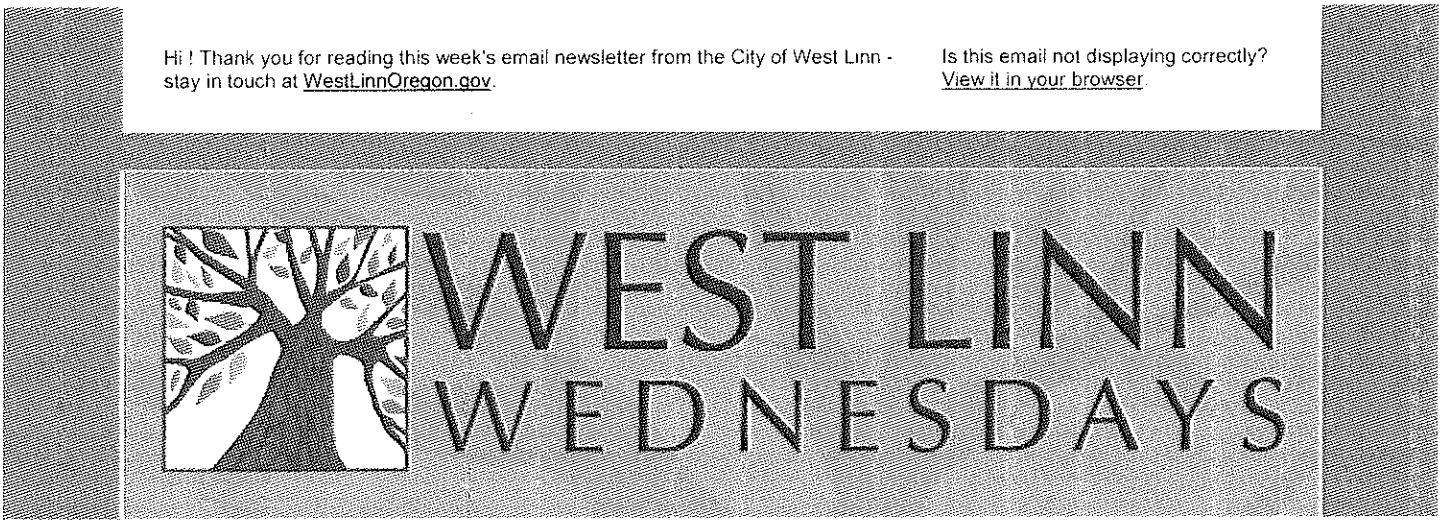
From: Gail Holmes [mailto:gholmes927@aol.com]
Sent: Wednesday, November 27, 2013 11:06 AM
To: Webmaster
Cc: Carson, Jody; Kovash, John; Frank, Thomas; Tan, Jennifer; Jones, Michael; Kerr, Chris
Subject: Re: Happy Thanksgiving from the City of West Linn!

I wish I could, my heart is still breaking over the lack of concern the City of West Linn has in the safety and welfare of my friends in Robinwood.

Sent from my iPad,

Gail Holmes
Willamette

On Nov 27, 2013, at 10:57 AM, City of West Linn <webmaster@westlinnoregon.gov> wrote:

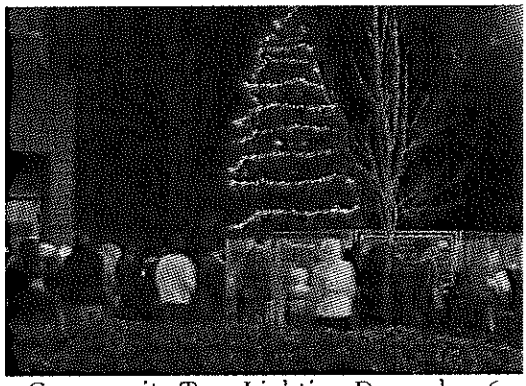


Happy Thanksgiving!

The City of West Linn wishes you a safe, happy, and relaxing holiday weekend.

Register Now for the Ugly Sweater Dash

Join the City on December 14th at 9 am for a 5k run to benefit the West Linn Food Pantry. Entry fee is $25 plus 2 cans of food.



Community Tree Lighting December 6

This year's Tree Lighting is next Friday, at 6:00 pm outside City Hall. Santa will be making an appearance on an antique fire truck!

Holiday Parade on December 14th

The City's Holiday Parade starts at 10 am on the 14th and there is still time to register to participate. See you there!

Neighbors Helping Neighbors

Saturday December 14th is also Neighbors Helping Neighbors where volunteers will be helping neighbors in need! Be on the lookout for another volunteer day in 2014.

follow on Twitter | friend on Facebook | forward to a friend

Our mailing address is:
City of West Linn
22500 Salamo Road
West Linn, Oregon 97068

Add us to your address book

Pelz, Zach

From: LOTWP
Sent: Tuesday, December 03, 2013 7:43 AM
To: Pelz, Zach
Subject: FW: November Update from Councilor Mike Jones

Ex parte

From: Mike Jones [mailto:michaelkjones@comcast.net]
Sent: Wednesday, November 27, 2013 10:19 AM
To: Jones, Michael
Subject: FW: November Update from Councilor Mike Jones

From: Bonoffs [mailto:bonoffs@comcast.net]
Sent: Wednesday, November 27, 2013 10:02 AM
To: Mike Jones
Subject: Re: November Update from Councilor Mike Jones

Hi Mike, I hope all's well, appreciate you sending this along. I continue to believe the process was flawed and ultimately not in the best interests of the City of West Linn. The need for an emergency source was not debatable. But the lack of a meaningful alternatives analysis process on the part of Lake Oswego - and the lack of demand for that by West Linn, particularly in light of technical issues raised by the planning comission, was shocking for a project of this magnitude. We may have gotten to the same place, but we all would have been able to take some comfort in knowing that the range of impacts was fully considered, and that it was truly the best available option for both cities. I do appreciate your efforts and sincerity throughout a very trying period. Thank you for that.

Mike

----- Original Message -----

From: Mike Jones
To: Mike Jones
Sent: Wednesday, November 27, 2013 9:06 AM
Subject: November Update from Councilor Mike Jones

From the Desk of Councilor Mike Jones
November 2013
City of West Linn

A TIME TO GIVE THANKS

We have so much for which to be thankful. I hope all of us take a few minutes over the next days and remember all the blessings that we have. We live in a great Community with great neighbors and I try to appreciate that every day.

I would like to forward the City's Press Release regarding the Land Use Board of Appeals' decision about the Lake Oswego/Tigard Water Project:

"WEST LINN – The State of Oregon Land Use Board of Appeals released its final opinion on a case involving the City of West Linn and the Lake Oswego-Tigard Water Partnership ("LOT").

In February of this year, the West Linn City Council unanimously approved conditional use permits and design review applications that authorized the expansion of the Lake Oswego water treatment plant, located within the City of West Linn, and the installation of new water lines, which serve the plant. These two decisions were appealed by 22 property owners and the group STOP, LLC. The Council's consideration of the LOT water projects included a total of 13 different Planning Commission and City Council meetings and produced a record that is over 12,000 pages long. The final decisions passed by the Council approving the projects were 192 pages in length and included 188 distinct Findings of Fact.

The LUBA opinion agreed with the Council that there was substantial evidence that the LOT water projects met the needs of West Linn. This validates and affirms the Council's decision that the project benefits the City as a whole. In its 36 page opinion LUBA found fault with two procedural errors in the City's process:
1. Although the Council reviewed and considered a 12 page report provided by an economist during the Council hearings, the Final Order prepared by staff and attorneys did not include a finding regarding it.
2. The Mayor needed to provide some additional information about brief conversations he had with two citizens, and the Council needed to vote to allow the Mayor to continue to hear and decide on the appeals.
The LUBA opinion determined that there was no evidence of any other ex parte contact by Councilors.
The City is pleased with LUBA's decision and will address the procedural issues at an upcoming public hearing. The minor changes to be addressed to the application required by LUBA's decision will not impede the City's greater access to a safe and reliable source of emergency water for our community."

Please "Forward"

If you'd like to send this update to others in West Linn it would be appreciated. If you don't want to receive this update please just email me at mjones@westlinnoregon.gov.

mjones@westlinnoregon.gov
503.344.4683 (Phone and Fax)
503.432.6560 (Cell)
><(((('>. . . ><(((('>. . . ><(((('>. . . ><(((('>. . . ><(((('>. . . ><(((('>. . . ><(((('>. . .
Save the Salmon

Before you print, think about the ENVIRONMENT 

Pelz, Zach

From: Thornton, Megan
Sent: Monday, January 06, 2014 1:23 PM
To: Tan, Jennifer
Cc: Pelz, Zach
Subject: RE: Ex-parte dislosure related LOT

Councilor Tan,

Thank you. I will forward this to Zach to include in the record.

~Megan

Megan Thornton, Assistant City Attorney
Administration, #1663

From: Tan, Jennifer
Sent: Monday, January 06, 2014 1:20 PM
To: Tan, Jennifer; Thornton, Megan
Subject: RE: Ex-parte dislosure related LOT

Hi Megan,
I have additional people to add to the list below. Again, LOT discussion was limited. I did not learn anything new about LOT that I did not already know before talking to the following people. I was not biased by anything that was mentioned.
Randall Fastabend
Sara Frazier
Rod Clark

Thank you.
Jenni

City of West Linn
100 Years
1913 - 2013

Councilor Jennifer Tan
jtan@westlinnoregon.gov
West Linn City Councilor
22500 Salamo Rd
West Linn, OR 97068
P: (503) 657-0331
F: (503) 650-9041
Web: westlinnoregon.gov

From: Tan, Jennifer
Sent: Saturday, December 14, 2013 9:04 AM
To: Thornton, Megan
Subject: Ex-parte dislosure related LOT

Hi Megan,
Over the past week LOT topic has come up when I was with the following people. LOT discussion was limited. I did not learn anything new about LOT that I did not already know before talking to the following people. I was not biased by anything that was mentioned.
Kerry Sovde
Kelly Larsen
Becky Brody
Todd Jones
Don Kingsborough
Lorie Griffith
Vicki Handy
Bob Martin
Ray Kindley
Kris Olson
Sumi Kim
Beth Rice
Eila Chapel
Lisa Chang
Pam Nicolson
Julie Garcia
Glen Friedman
Tina Decker

Pelz, Zach

From: LOTWP
Sent: Tuesday, December 03, 2013 7:43 AM
To: Pelz, Zach
Subject: FW: Moving forward

Ex parte

-----Original Message-----
From: Scott Gerber [mailto:jumpin@cmn.net]
Sent: Sunday, December 01, 2013 7:58 PM
To: Tan, Jennifer
Subject: Moving forward

Councilor Tan
Well, the story continues. First, I would like to say that I admired the stance that you and Councilor Frank took in voting against the recent Intertie IGA. I appreciate that the two of you recognized that the wording of that agreement was not consistent with the conditions of approval. It is unfortunate that the rest of the council was so easily convinced that this IGA as written was adequate. West Linn's loss.
Although my position with you and the rest of the council has been an adversarial one, I do recognize that you are under significant pressure to do what is right for all the citizens of West Linn. While you may have been convinced that the LOT project is the best course of action, I strongly disagree, and as such have had to do what I could to stop it. I am not by nature a contentious person, but I am firm in my convictions. Most of all, I believe in the public process. I believe you have been given poor advice and guidance since the beginning of this process when the whole ex parte thing was misinterpreted and the people's voice was shut down.
As you know, LUBA has remanded to the council on certain issues. Councilor Tan, I do believe that you strive to do what is right and it is because of this that I am writing you now. The original appeal was greatly flawed. The mayor knowingly disregarded the public process and the council as a whole failed to hold him responsible. It wasn't like he made a mistake. He was asked to comply with legitimate requests to follow the public process and he refused. Following this, the council refused to follow protocol when they did not examine issues of bias and requests for his recusal.
Regardless of how you may have been advised at the time, I believe you are aware now of how the project opponents were disdained in the process as it occurred back in February. I urge you to take a good unbiased look at what transpired. I do not see how you can ignore the abuse of the public process and just rubber stamp this through. I strongly feel that the council decision has to be negated and either remanded back to the Planning Commission decision or started anew.
I have no doubt that you will be advised differently. In fact, I would think that any course of action that would impede this project would be frowned upon. It is too far along. Will that make it acceptable for you to approve the abuse of the public process that took place during the hearing?
LOT is on the fast track. They are completely committed and assume that the West Linn Council is in their pocket. Lawyers rule the day and they have the fire power to fight anything they don't like. I am sure you read the recent article which proclaimed that they would defend OPRD against any claims made by the heirs of Mary S. Young. Did you wonder about that? Did you know that Mary's grandson had heard about what was going on and is not happy about it? Did you know of this stipulation in the original deed:

"Without limitation, neither this property nor any previously granted property by the undersigned to the state shall be used for water conditioning, pumping, or any other similar purposes."

Small wonder that they might be concerned as they are in direct violation of this. Mary's grandson shared this with me, but he does not have the funds to fight it.

I bring this to your attention as just one more example of what is inherently wrong with all of this. LOT bullies their way through anything that causes them problems, and I am sure they will do the same with this remand. Is The West Linn City Council totally under their thumb?
Please give all of this your consideration as this process moves forward. I don't envy your position, but it is one you have sought out. There is no way out that will satisfy everyone. Why am I appealing to you? Certainly you owe me nothing. However, I believe you do owe the people of this city and I believe you are perhaps the only one involved in this who might place integrity and respect for the public process above achieving the desired results. Ultimately your decision should be one that you believe wholeheartedly is the right one.
I would be happy to sit down and discuss this or other thoughts you may have on how to deal with this.
Respectfully,
Scott Gerber
Sent from my iPad

Sent from my iPad