

**WEST LINN CITY COUNCIL
FINAL ORDER ON REMAND
FROM LAND USE BOARD OF APPEALS
AP-12-03**

IN THE MATTER OF AN APPEAL OF A CONDITIONAL USE, CLASS II DESIGN REVIEW, CLASS II PARKS DESIGN REVIEW, FLOOD MANAGEMENT AREA, WATER RESOURCES AREA AND WILLAMETTE RIVER GREENWAY PERMITS FOR THE PROPOSED INSTALLATION OF A WATER TRANSMISSION LINE FROM THE CITY LIMITS UNDER THE WILLAMETTE RIVER, THROUGH MARY S. YOUNG STATE PARK TO THE CITY'S NORTHERN BOUNDARY BORDERING THE CITY OF LAKE OSWEGO VIA MAPLETON DRIVE AND HIGHWAY 43.

I. BACKGROUND FACTS

A. Project Description

The following project description is taken directly from the Final Order in AP-12-03:

In June, 2012, the Lake Oswego/Tigard Water Partnership (Partnership or applicant) submitted an application to install a 42-inch-diameter raw-water pipeline (RWP) that would begin in Gladstone on the Clackamas River, extend to the Lake Oswego Water Treatment Plant (WTP) in West Linn. The RWP would extend under the Willamette River via horizontal directional drilling (HDD) at an approximate depth of 60 feet. The boring would continue at a depth between 60 and 34 feet under the wetlands and streams in Mary S Young Park. Then the RWP would rise gradually toward the surface as it extends toward two Oregon Parks and Recreation District (OPRD) -owned lots (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.

The applicant proposes to transition to an open-cut trench on OPRD tax lot 200 at a depth of approximately 5- to 7-feet that would extend north and west along Mapleton Drive, terminating at the Lake Oswego Water Treatment Plant (WTP) at 4260 Kenthorpe Way. A Finished Water Pipe (FWP) leading from the plant 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, to its intersection with Highway 43 where it would then extend north in the Highway 43 right-of-way, in an open-cut trench, to Lake Oswego. Following construction, Mapleton Drive, Kenthorpe Way and affected portions of Highway 43 will be repaved to their existing width.

LUBA Rec. 180.

B. The City Council's Decision in AP 12-02 and 12-03

On December 10, 2012, the Partnership appealed the Planning Commission's decision to deny these applications. The City Council opened the public hearing on January 14, 2013, for public testimony. The matter was then continued until January 15, to give all parties an opportunity to submit further oral testimony. At the close of the hearing on January 15, the record was left open for all parties to submit additional written testimony until January 22. The record was then closed to all parties and the Partnership was given until January 25 to submit final written argument. The City Council reconvened on January 28 for the purpose of making a decision. As the City Council was deliberating, new evidence was presented that required the record to be reopened for an additional seven days to allow all parties to submit any additional written responses. The Council record consists of all materials submitted before the record was closed to all parties on February 4 and the Partnership's final written argument submitted on February 8. After discussion, on February 11, the Council voted to uphold the appeal and reverse the Planning Commission's decision. The Council adopted its Final Order on February 18, 2013.

C. The Land Use Board of Appeal's Decision and the City's Response

Lead petitioners Stop Tigard Oswego Project, LLC, (STOP) and William J. More, and their co-petitioners, filed notices of intent to appeal on March 11, 2013, creating Land Use Board of Appeals (LUBA) Case Nos. 2013-21, 2013-22, and 2013-23. LUBA issued its Final Opinion and Order (Opinion) regarding these consolidated cases on November 22, 2013. In LUBA's Opinion, LUBA remanded the case to the City and directed the City to:

1. Provide a meaningful opportunity for rebuttal of the Mayor's ex parte disclosure 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.
2. Conduct the proceedings required by CDC 99.180(B) and adopt appropriate findings.
3. Adopt findings that either address the Wilkerson Report, or explain why no further consideration of the Wilkerson Report and economic impacts is necessary.

After providing notice to all parties who participating in the initial preceding, on January 13, 2014, the City held a hearing to consider these three matters. Responses to each of these matters are contained in Sections IV and V.

II. INCORPORATION OF FINAL ORDER

The West Linn City Council's Final Order for AP-12-03 (Order), adopted on February 18, 2013, is incorporated into this Final Order on Remand (Remand Order), and all such findings and determinations in that Order are adopted except where the findings in this Final Order on Remand conflict with that Order. Where there is a conflict with the Final Order, the findings in the Final Order on Remand shall govern.

III. IMPARTIALITY CHALLENGES RAISED AT HEARING ON JANUARY 13, 2014

A person may challenge a Councilor's impartiality under CDC 99.180(B). Similarly, the Council rules allow for a bias challenge, but the Council Rules require such challenges to be "made prior to the commencement of the public hearing." The City accepted submissions to the record until January 8, 2014 at 5:00 p.m., allowing participants ample opportunity to submit bias challenges regarding any of the Councilors prior to commencement of the hearing. Notably, the City did not receive challenges to any councilor except the Mayor before the record closed on January 8, 2014.

On January 13, 2014, the Mayor immediately opened the public hearing at the beginning of the agenda item addressing the remand of AP-12-02 and AP-12-03. Although the Council did not discuss the timeliness of the challenges, only the challenge submitted by Alice Richmond to Councilor Carson's bias was submitted in a timely manner, prior to the opening of the hearing. The other bias challengers failed to raise the challenges to Councilors Jones and Tan until *after* commencement of the public hearing, the Council nonetheless agreed to hear each challenge, give each challenged member of the Council an opportunity to respond, and hold a vote for each councilor to determine whether each one could continue to participate.

Three participants made generalized statements of impartiality that applied to each of the remaining councilors, without reference to specific facts or evidence they believed supported the claim. One of the participants argued that the way the Council was conducting the hearing by itself was sufficient to establish the Council's bias. Another asserted that the entire Council was biased because it restricted citizens' access to individual councilors prior to filing of the applications. Finally, a participant argued that the Mayor had a "motive" for calling the neighborhood association presidents and his disclosures were an attempt to "persuade [the Council's] decision."

In challenging Councilor Jones' and Councilor Carson's lack of bias, Ms. Cummings submitted an email that Councilor Jones sent in February 2013 to Chris Jordan, copying Councilor Carson, that discussed proposed conditions of approval for the applications. Ms. Cummings argued that this email demonstrated bias on behalf of the Council. Ms. Cummings also read various definitions of "bias" and "ex parte" from Webster's Dictionary and argued that those definitions should apply.

As a general matter, the Council finds that the hearing procedures implemented during the City's initial review and on remand were consistent with state law and local requirements. Allegations of bias resulting from activities occurring or not occurring during the Council's initial review or before the applications were filed should have been made during the initial review of the application by the City Council. Thus, such allegations are not timely and cannot be used to challenge the bias or impartiality of councilors now.

As further described below, the Council expressly adopted the LUBA standard for bias as its standard for evaluating bias under the Council Rules and impartiality in the City Development Code. The City Attorney explained that the LUBA standard does not require the absence of all bias; rather, it requires that the decision-maker be able to set aside any bias and objectively apply the evidence in the record to the applicable criteria. The legal

question is whether the decision-maker has prejudged the application such that the resulting decision is not based on the evidence or criteria.

None of the challengers described any facts or evidence that can reasonably support a claim that any of the Councilors were biased. For the following reasons, the City Council rejects each challenge.

A. Challenge to Councilor Carson's Participation

Two citizens specifically challenged Councilor Carson's ability to remain unbiased based on her service and involvement on regional boards such as the Water Provider Consortium. Specifically, one of the citizens appeared to claim that Councilor Carson was using West Linn's cooperation with regional water providers to increase her standing on regional boards. As mentioned previously, another citizen claimed that the email Councilor Carson was copied on from Councilor Jones, indicated bias.

Councilor Carson responded to the challenge stating that she has not discussed the projects with the Regional Water Providers Consortium beyond what is already in the record. In addition, she stated that being a member of that board does not provide her with any reason to be biased with regards to these projects. None of the disclosed ex parte contacts in the record involving the Consortium have anything to do with the Wilkerson report, alleged bias or ex parte contacts of the Mayor. In addition, she stated that the particular neighborhood association meetings that were discussed as a result of the Mayor's ex parte contacts did not impact her decision on these applications.

After evaluating all of the evidence in the record and voting as required by Council Rules, the Council finds that Councilor Carson was not biased; therefore, she could continue to participate in the proceedings.

B. Challenge to Councilor Tan's Participation

There were no individualized challenges to Councilor Tan's participation. In response to the generalized challenges citizens made to her participation, Councilor Tan responded that with regard to Wilkerson report and the Mayor's impartiality, she was not biased or prejudiced, and she was impartial and could be fair.

After evaluating all of the evidence in the record and voting as required by Council Rules, the Council finds that Councilor Tan was not biased; therefore, she could continue to participate in the proceedings.

C. Challenge to Councilor Jones' Participation

In response to the challenges citizens made to his participation, Councilor Jones stated that with regards to Wilkerson, the Mayor's ex parte contacts, and impartiality, which were the subjects of the hearing, he was not biased and could make a fair decision.

After evaluating all of the evidence in the record and voting as required by Council Rules, the Council finds that Councilor Jones was not biased; therefore, he could continue to participate in the proceedings.

IV. RESPONSE TO LUBA'S RULINGS ON PROCEDURAL CHALLENGES

A number of procedural challenges were raised during the Council's hearings in January and February of 2013. LUBA ruled on two procedural issues: A) ex parte contacts, and B) compliance with CDC 99.180(B). In order to comply with LUBA's rulings, additional findings are provided below.

A. Ex Parte Contacts

1. Background

STOP and others asserted that Mayor Kovash's statement at the January 28 hearing regarding discussions with two neighborhood association representatives outside the record does not comport with the disclosure requirements of ORS 227.180(3); therefore, he must recuse himself from participating in the decision. During the initial proceedings on review, the Council elected to respond to the Mayor's ex parte contact by leaving the record open for response. The Council finds that is exactly what the law requires. ORS 227.180(3) provides:

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.

The substance of the contact was placed in the record¹ and rebuttal was offered in the 7 day period provided.² During the open comment period, several parties objected that the Mayor's disclosure was inadequate and asked for more information.³ In addition, several

¹ The Mayor, according to his statement in the record of this case, said that he spoke with two people - One was concerned that "LOT treat WL citizens right" and the other "knew nothing about LOT." Mayor Kovash email dated February 5, 2013, LUBA Rec. 366. The Council finds that this disclosure is sufficient.

² 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 quorums or are active" as well. The Mayor's point appears to be well-taken.

³Footnote 3 of LUBA's decision sets out these additional questions as they were summarized by the More Petitioners:

1. With whom (by name) did these conversations occur?
2. When did the conversations occur, how and where?
3. Who initiated the conversations?

parties requested that the Mayor be disqualified from voting on the project due to his alleged lack of impartiality. LUBA Rec. 429; 466; 472.

Before LUBA, More restated these same objections and asserted that Mayor Kovash's statement at the January 28 hearing regarding discussions with two neighborhood association representatives outside the record did not comport with the disclosure requirements of ORS 227.180(3), and More requested that the Mayor "fully disclose the substance of his ex parte communications, followed by an opportunity for interested parties to respond to the ex parte communications...and [for the Council] to issue an appropriate new decision based upon all the evidence." More Petition for Review, 31. LUBA declined to go that far and only required that the Mayor provide a more detailed disclosure of his ex parte contacts and "provide a reasonable opportunity for participants to rebut the disclosure in light of that additional information." *Stop Lake Oswego Project, LLC et al. v. City of West Linn*, __ Or LUBA __ (2013); Slip op. 13.

2. Discussion.

These findings respond to ex parte issues raised by LUBA in two ways. First, the findings respond to LUBA's concerns about the Mayor's ex parte contacts. Second, these findings address the effect of the Mayor's recusal on the remand proceedings.

A) *LUBA's response to the Mayor's ex parte contacts.*

LUBA's response was twofold; LUBA interpreted: 1) the Council's discussion of neighborhood opposition to be relevant to CDC 60.070(A)(3), and 2) ORS 227.180(3) to require the decision-maker to respond to specific requests for additional information that are "reasonably necessary" for participants to rebut the disclosure.

First, while the Council did not believe that neighborhood association opposition or support was applicable to any criteria, LUBA mentioned that "Councilor Jones was prepared to vote against the project, based in part on testimony that seven neighborhood associations opposed it" and that "for whatever reason, the final decision-makers appeared to consider [it] to be relevant to the approval criteria," specifically CDC 60.070(A)(3). *Stop Lake Oswego Project, LLC et al. v. City of West Linn*, __ Or LUBA __ (2013); Slip op. 11.

CDC 60.070(A)(3) requires that the "granting of the proposal will provide for a facility that is consistent with the overall needs of the community." The Council

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4. What confirmation existed indicating that those speaking with the Mayor represented a neighborhood group?
 5. What persons were included in any such group?
 6. What were the specifics of the conversations—who said what?
 7. What was the sequence of questions, answers and comments?
 8. At any point, did the Mayor inform the other participants that such conversations were ex parte contacts, improperly occurring while the Council was actively considering land use appeals on the very topic to which the conversations related?
 9. Were the group representatives asked to submit their comments to the record in some documented form?
 10. Were any written communications or emails provided to or from these groups or their representative? If so, where are the copies available for public review?

interpreted that criterion to mean that “community” is not limited to the citizens of West Linn, and LUBA sustained the City’s interpretation. *Stop Lake Oswego Project, LLC et al. v. City of West Linn*, __ Or LUBA __ (2013); Slip op. 18. The Council properly explained its interpretation of CDC 60.070(A)(3) as part of its previous Order, and LUBA denied all assignments of error challenging that interpretation. The Council does not wish to alter its previous interpretation of CDC 60.070(A)(3) or its evaluation of the evidence presented. Rather, the Council further clarifies its interpretation to respond to LUBA’s discussion of the relevancy of neighborhood opposition or support.

The Council finds that broad, generalized statements of support or opposition by neighborhood associations, civic groups, individual citizens, or others to a development proposal are not relevant under any of the applicable code criteria, including CDC 60.070(A)(3). The Council interprets CDC 60.070(A)(3) to require more than a poll gauging whether public opinion generally supports or opposes a particular development project in the community. To interpret CDC 60.070(A)(3), even in part, on such generalized opposition or support to a project would relegate application of this criterion to nothing more than a popularity contest for every conditional use permit within the City. The Council rejects such an approach.

Thus, information in the record regarding the number of neighborhood associations that support, oppose, or were undecided on the project at the time of the hearing was not considered, and any such evidence submitted during the remand proceedings is specifically rejected from the record of this application. Moreover, the information that was disclosed by the Mayor due to his ex parte contacts was not relevant to this CDC 60.070(A)(3) and is also specifically rejected as part of the remand record.

Second, according to LUBA, the law does not provide for cross-examination of a decision-maker; however, ORS 227.180(3) requires a decision-maker to respond to specific requests for additional information or clarifications that are “reasonably necessary” for participants to develop rebuttal to material factual and legal assertions in the initial disclosure. *Stop Lake Oswego Project, LLC et al. v. City of West Linn*, __ Or LUBA __ (2013); Slip op. 12. LUBA stated that “at least some of the 10 questions” that participants submitted to the Mayor regarding his ex parte disclosure require a response, but did not require a response to all of the questions or specify which questions require answers.

For purposes of complying with LUBA’s direction on remand, the Mayor responded to some of the questions posed by participants. He responded to questions 1, 6, and 10 described in LUBA’s Opinion because answers to those questions could be “reasonably necessary” for participants to rebut material facts and legal assertions in the Mayor’s original disclosure. The other questions requesting details about the timing, location, initiating party, and representational authorization were not answered because those questions would not lead to material facts and legal assertions that could be rebutted. The Mayor’s answers were made available to the public and some testimony was received that was related to the responses the Mayor provided. However, the Council finds that the Mayor’s responses and testimony received are not relevant to any of the criteria for the reasons stated above and because of the Mayor’s recusal, discussed below.

B) Effect of the Mayor's recusal on remand proceedings.

By definition, an ex parte contact is a communication with a decision-maker made outside the record regarding a matter relevant to the decision. Thus, the Mayor's recusal impacts the remand proceedings because the Mayor is no longer participating or voting on the matters associated with the applications. The Council finds that the Mayor is no longer a decision-maker; therefore, any communications that he had outside the hearings process no longer constitute ex parte contacts. In addition, as noted above, the Council has already determined that even if the Mayor were to continue to participate in these proceedings, the content of those communications did not address a matter relevant to the decision because it was not related to any applicable criteria.

The Mayor's responses to the participants' questions were attached to the December 23, 2013, Staff Report (Mayor's Responses). Participants were allowed to submit written testimony addressing the Mayor's Responses anytime thereafter through January 8, 2014, at 5:00 p.m. or at the hearing on January 13, 2014. The Council finds the Mayor's responses are rejected and excluded from the record because those items are not relevant to any criteria. In addition, the Council finds that any testimony received, before or during the hearing, in rebuttal to the Mayor's Responses is also irrelevant, and such testimony shall also be rejected and excluded from the record.

The remand hearing was noticed as a "limited hearing" in which the Council would only be accepting testimony "directed specifically to the substance of the Mayor's responses to the questions as required by LUBA in its decision." The Council stated it would not allow testimony on the vote regarding the Mayor's impartiality or the Wilkerson Report. The Council found that there was sufficient evidence in the record for it to make a findings responding to the Wilkerson Report and a final determination on remand. Additional material related to rebuttal of the Mayor's ex parte contacts was submitted to the Council, both before and during the remand proceedings; however, additional testimony unrelated to these two issues was also presented.

Therefore, the Council rejects all testimony received, both before and during the hearing, as irrelevant for the reasons stated above or because it is beyond the scope of the limited hearing. As such, the Council excludes all testimony submitted into the record, except for the written ex parte emails intended for the Council that were caught in the City's email filter and included in the January 9, 2014, testimony packet submitted to the Council; however, the filtered emails were not considered by the Council because they were irrelevant to the limited issues on appeal. The Council also excepts from the general rejection of testimony, the February 9, 2013, email submitted as part of the impartiality challenges to Councilors Jones and Carson. This email is allowed to become part of the record for the limited purpose of evaluating the impartiality challenges to Councilors Jones and Carson, which were addressed previously in another part of this Remand Order.

Further, the Council determines that the Jones email was part of its deliberative process, but that it does not support an allegation of bias, prejudice of the applications, or a disposition towards approval that was made regardless of the evidence. Moreover, the Council concludes that this email was not a prohibited ex parte contact because it was a communication with staff and another councilor as part of the deliberation process, dealt with policy and not new facts, and was made public as part of circuit court proceedings contemporaneous with the LUBA proceedings that resulted in the remand now before Council.

B. Impartiality pursuant to CDC 99.180(B).

On remand, the Council must vote on the Mayor's impartiality and adopt the appropriate findings. The Community Development Code 99.180(B) and 99.180(C) require:

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.

C. Disqualification. No member of a hearing body may participate in a discussion of the proposal or vote on the proposal when any of the following conditions exist:

1. Any of the following have a direct or substantial financial interest in the proposal: the member or member's spouse, brother, sister, child, parent, father-in-law, mother-in-law, any business in which the member is then serving or has served within the previous two years, or any business with which the member is negotiating for or has an arrangement or understanding concerning prospective partnership or employment.
2. For any other valid reason, the member has determined that participation in the hearing and decision cannot be in an impartial manner.

To evaluate the Mayor's alleged impartiality under CDC 99.180(B), the Council finds that it is necessary to: 1) establish interpretations for the application of CDC 99.180(B), and 2) conduct a vote on the Mayor's impartiality under CDC 99.180(B).

1. Interpretations for application of CDC 99.180(B).

The Council determines that it would be beneficial to establish: 1) the meaning of impartiality, 2) that because the basis for the bias challenge is included in the

challenge, no other public testimony is required, and 3) that CDC 99.180(B) does not require a vote of the Council when the challenged decision-maker recuses himself.

First, the Council finds that a member of the decision-making body is “impartial,” as required under the CDC, if the member: A) has not prejudged the application, and B) does not have a personal interest in the application or outcome. The Council finds that the terms “bias” and “prejudgment” in CDC 99.180(B)(1) are functionally equivalent and require a demonstration that the member of the hearing body cannot set aside any bias or prejudgment and objectively review the evidence and apply the applicable criteria to the evidence in the record to reach a decision. To establish bias or prejudgment, the person challenging the decision-maker’s impartiality has the burden of: 1) showing that the decision was not reached by applying the evidence presented to the applicable criteria, or 2) that the decision-maker exhibited personal bias. The standard for evaluating impartiality shall be the same standards that LUBA would apply in directly addressing a bias claim under LUBA precedent.

The Council also finds that the term “personal interest” in CDC 99.180(B)(1) requires a direct, not just potential, pecuniary benefit or detriment to a decision-maker or someone in the decision-maker’s family. The Council finds that personal interest is equivalent to an “actual conflict of interest” under Oregon Government Ethics Statutes, and whether a decision-maker has an actual conflict of interest shall be determined by applying the Oregon Government Ethics Commission staff opinions, advisory opinions, and other applicable case law. Overall, the Council finds that the person challenging the member’s participation due to impartiality must demonstrate the bias, prejudgment or personal interest is of sufficient magnitude that the member “cannot participate in an impartial manner.”

Second, the Council determines that once the challenger states the facts relied upon for challenging the impartiality of the decision-maker under CDC 99.180(B)(1), no additional testimony is required. The CDC is clear that after the challenger states the facts relied upon for the challenge, the “*challenged person* shall have an opportunity to respond orally to the challenge.” CDC 99.180(B)(2) (emphasis added). Thus, there is no requirement to take testimony from the public before the Council votes on the challenge.

The Council finds that the facts relied upon for the challenge were sufficiently disclosed and included in the record. LUBA Rec. 428-429; 463-466; 467-472. Therefore, it is not necessary for the Council to take any additional testimony before resolving the challenge to the Mayor’s impartiality.

Third, the Council determines that if the challenged decision-maker recuses himself after the challenge is made, a vote on the impartiality is not required because the member is no longer part of the decision-making body.

2. Impartiality vote pursuant to CDC 99.180.

The Council finds that it is not necessary to vote on the impartiality challenge to the Mayor because the Mayor has recused himself. Nonetheless, in an abundance of caution, and in order to comply with LUBA's Opinion, the Council deliberated and voted on whether the Mayor was impartial under CDC 99.180(B).

Participants raised challenges to Mayor Kovash's ability to participate in the hearing in an impartial manner because he called two neighborhood association presidents, received information that was not in the record, and did not disclose the ex parte contacts at the earliest possible time. LUBA Rec. 428-429; 463-466; 467-472.

After evaluating all of the evidence in the record, and voting as required by CDC 99.180(B) and (E), the Council finds that the Mayor is impartial. The Mayor was not biased, did not prejudice the application, and did not have a personal interest in the outcome. Accordingly, the Council finds that the Mayor is impartial and could have participated in the proceedings if he had not recused himself.

V. APPROVAL CRITERIA AND FINDINGS ON REMAND

The findings supporting the City Council's Final Order are based on the staff report dated October 17, 2012, and the findings supporting the City Council's Final Order on Remand are based on the staff report dated December 23, 2013, which are restated largely here, along with additional findings responding to particular procedural objections raised during the proceedings, which are addressed above. The applicable standards are identified in italics, followed by the City Council's findings. The findings are based entirely on evidence contained within the record.

LUBA sustained one assignment of error regarding the findings in our previous two decisions - the fact that the economic evidence submitted by Dr. Wilkerson was not addressed in the original findings in AP 12-03, with regard to the pipeline. While the Council thought that the Wilkerson Report was not credible, particularly in light of the Partnership's evidence, the findings failed to explain why the Wilkerson Report was not credible. That issue is addressed by the following supplemental findings. The findings are based entirely on evidence contained within the record.

A. Background

CDC 60.070(A)(1) requires a finding that there is "adequate area for aesthetic design treatment to mitigate any possible adverse effect from the use on surrounding properties and uses." As part of its previous decision, the City Council found that major utilities are distinctly different from other conditional uses, and the Council interpreted this standard to require a showing that there 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. LUBA Rec. 192.

No one challenged this interpretation of CDC 60.070(A)(1) at LUBA. Further, LUBA agreed that mitigation, rather than elimination of impacts, was a plausible

interpretation of this code section. *Stop Lake Oswego Project, LLC v. City of West Linn* Slip op. 33-34. The code section requires the Council to determine whether adequate measures can be implemented to mitigate possible temporary adverse impacts on surrounding uses during construction of a buried pipeline. During the Council's initial review, it identified a number of mitigation measures that, if implemented, will provide adequate mitigation of temporary impacts. These measures include:

- Limiting the construction work to nighttime hours of 8:00 pm and 5:00 am when few businesses are open and the roads are lightly traveled.
- Limiting the construction zone on Highway 43 to 200 feet.
- Providing access to all businesses that have operating hours which overlap with nighttime construction hours.
- Maintaining fully functional streets (i.e., no road closures or equipment on the roadway) outside of work hours. LUBA Rec. 193-194.

B. Discussion

When considering the appeal of the Planning Commission's decision at the public meeting on January 15, 2013, the City received oral and written testimony prepared by Michael Wilkerson, Ph.D. of Economic Market Analysis, LLC. Although the exact nature of Dr. Wilkerson's qualifications and expertise was not presented, his testimony was based on his review of "published literature on the subject of construction impacts to businesses – destination and impulse." LUBA Rec. 1308. There is no information in the record that suggests that Dr. Wilkerson lives, works or owns a business in West Linn or has served in any capacity as an analyst for a West Linn business. Similarly, there is no information in the record regarding his expertise or credentials that qualify him to provide expert testimony about the efficacy of various measures to mitigate impacts resulting from utility pipe construction projects.

Dr. Wilkerson's report begins by listing the businesses along Highway 43 within the construction zone, claiming that of the 53 businesses identified, 22 of them or 42% have hours that conflict with the proposed construction hours.⁴ He suggests that nearly half are likely to be impacted. LUBA Rec. 1311-1313. The defect with this analysis is that it fails to acknowledge that two of the businesses identified as conflicting, Oh Teriyaki and Liquor,⁵ close at 8:00 pm, the time when construction work may commence, creating no conflict. Three more of these businesses, Body Heart Soul Massage, the UPS Store and Kaady Car Wash, close at 8:30, resulting in a very small 30-minute overlap between construction and business hours. Finally, three other businesses, McDonalds, Wal-Mart and

⁴ The Overview section of the report contains a statement that the projects failed to include an "Environmental Impact Study" identifying any potential impact to business as a result of construction work. Other than this statement, this objection is not further developed making it impossible for the Council to respond. Moreover, the Council finds no regulatory requirement to complete an Environmental Impact Study, nor is it necessary to comply with the applicable City standards.

⁵ This is the name given to the business as listed in the report. LUBA Rec. 1313.

Burgerville, rescinded their initial objections to this project suggesting that the mitigation identified in the construction management plan satisfied their earlier concerns.

Dr. Wilkerson's report suggests the businesses located on Highway 43 are impulse businesses, which he broadly defines as susceptible to loss of business during construction. However, Wilkerson failed to provide specific analysis about West Linn Highway 43 businesses, basing his studies solely on anecdotal information or inappropriate comparisons to dissimilar projects. Dr. Wilkerson does not define basic terms such as "impulse buyer" or provide any relational analysis from these other studies, given the hours that Highway 43 businesses are open, rendering this data inconclusive at best. Moreover, only two Highway 43 businesses are open 24-hours, and one of those businesses, Wal-Mart one of the largest retailers in the area, withdrew its opposition to the project. Therefore, the Council finds this testimony to contain unscientific and insufficient comparisons.

The Wilkerson Report goes on, again summarizing third party reports, drawing upon dissimilar comparisons to other projects to which this Council finds no direct link.⁶ For example, a project in Sweet Home, Oregon, dealt with the repaving of 7.5 km or 4.6 miles of roadway with no indication that the overall construction zone was limited. LUBA Rec. 1316-1318. Installation of the finished water pipeline 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 within a construction zone of no more than 200 feet. LUBA Rec. 193; 8535 & 8540. It is not clear whether ODOT was required to provide access to all businesses that have operating hours which overlap with nighttime construction hours during the repaving in Sweet Home. The Sweet Home study contains no data on loss of sales and the data pool was small due to "technical failure and measurement errors." LUBA Rec. 1317. The Council finds the Sweet Home Report description is not helpful in evaluating potential temporary adverse effects of the proposed pipeline project and adequate mitigation measures under the City's conditional use criteria. This is the only report from an Oregon project that might have been useful if it were comparable.

Where data on loss of sales is provided, the projects cited by the Wilkerson report occurred in distant locations without any analysis of how these communities are comparable. Even the scope of the construction projects identified in the two cities in Texas and in Florida are much larger and much more intrusive projects than the pipeline proposed in this case. The project in Caldwell, Texas consisted of a 2.3 mile long highway expansion extending over a period of two years. The highway rehabilitation project in Houston, Texas covered 11.6 miles occurring over three years. The Florida Department of Transportation Study analysis focuses on four road construction projects that all lasted approximately two years. LUBA Rec. 1318-1320.

⁶ Wilkerson's reference to an article from the *Oregonian* that a business owner in NE Portland was forced to close because of the road construction associated with the streetcar is anecdotal and lacks sufficient data as to the scope and intensity of the project for this Council to draw any particular conclusion.

The pipeline in Highway 43 from Mapleton Drive to the West Linn city boundaries will extend for less than one mile and is projected to take 5 months. LUBA Rec. 813. The Council concludes that the Texas and Florida reports, like the Sweet Home Report, do not reflect projects that are comparable to the one before the Council in this case and for which the Applicant has presented specific, credible evidence with respect to anticipated temporary adverse impacts and mitigation measures. The Council finds the expert testimony and evidence presented by the Partnership to be more reliable than Dr. Wilkerson's work.

Dr. Wilkerson goes on to discredit his own testimony noting that most construction impact 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. LUBA Rec. 1316. *See also* West Linn City Council Meeting, January 15, 2013 at 02:04:07-02:05:03. Dr. Wilkerson acknowledges that the research literature is, in fact, very limited. According to his testimony, "there has not been an extensive amount of research conducted on assessing the economic impact to businesses due to road construction." LUBA Rec. 1316. The outcomes of these studies vary widely, according to Dr. Wilkerson's own testimony, depending on the season and a broad disparity of business owner perceptions as to the extent of the loss.

The Wilkerson Report contains revised traffic count calculations for traffic impact on Highway 43 and Mapleton Drive, even though Dr. Wilkerson is not a licensed traffic engineer. LUBA Rec. 1313-1315. The Partnership responded to Dr. Wilkerson's Report with evidence noting his lack of credentials or training in measuring business impacts or traffic from this particular construction project. LUBA Rec. 812-813. No one provided qualified transportation testimony aside from the Partnership. On the other hand, the Partnership's transportation reports dealt with temporary adverse impacts of this project and their mitigation. LUBA Rec. 2225-2241; 8570-8630. For example, Brian Copeland, a licensed traffic engineer with DKS Associates, provided additional analysis of traffic impacts and found that the additional average delay encountered by vehicles passing through intersections along Highway 43 will increase by four seconds or less as a result of construction activities. LUBA Rec. 2225-2241. Given the nature of the businesses affected, the time of day and week in which construction would occur, the short length of incremental construction, and the construction management plan, signage and "shop local" plan, the Council concludes this conditional use criterion is met with the imposition of Conditions 2, 15, and 18, derived from the expertise contained in the Partnership's reports and the expert advice of our City staff.

Further, the Partnership's response demonstrates that Wilkerson's assumptions are incorrect. LUBA Rec. 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 because 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 the Applicant's traffic engineers, DKS Engineering, the 6-minute spacing of construction vehicles leaving the water treatment plant would not result in gridlock during the day. LUBA Rec.

813; 2225-2231. These traffic reports were subsequently subjected to peer review by Greenlight Engineering, another licensed traffic engineering firm, which concurred with the findings. LUBA Rec. 2232-2241.

Finally, Dr. Wilkerson claims that the general economic climate must be considered in evaluating the impact to Highway 43 businesses and relying on a December 2012 Oregon economic forecast, West Linn should expect further slow growth. However, as noted by the Partnership, this economic report is a quarterly general economic forecast that has no apparent connection to the timing or scope of the construction proposed, nor does it relate to how construction will impact Highway 43 businesses. LUBA Rec. 812. The Council did hear testimony from trade unions that construction will bring jobs and additional purchasing activities into the community. LUBA Rec. 718-719, 1071-1073. This evidence is credible and will likely increase nearby local shop, restaurant and service provider revenue during the construction period. So, even taking the economy into account, the Council does not find that the Wilkerson Report is sufficiently credible to undermine the evidence regarding transportation impacts submitted by the Applicant. Accordingly, the Council finds that the identified limitations on construction work in Highway 43 are sufficient to mitigate the temporary impacts under WLCDC 60.070(A)(3).

After the Wilkerson comments were submitted, the Partnership responded by committing to additional mitigation measures to provide additional access signage for businesses affected by the construction that is designed to keep the Robinwood Business District "Open for Business" during construction. Finally, the City Council also imposed Condition 18, which requires the Applicant to develop and implement a "Shop Local" marketing campaign for local West Linn businesses. LUBA Rec. 193-194; 310-315.

During the weeks after this evidence was submitted and the record remained open, neither STOP nor anyone else objected to the Applicant's independent transportation and construction plan analysis or asserted that the additional mitigation measures were in any way insufficient.

C. Conclusion

After reviewing the Wilkerson Report and all related evidence in the record, the Council concludes that it does not support the conclusion that the mitigation strategies proposed are inadequate and that businesses will be severely and adversely impacted by the proposed pipeline construction on Highway 43 for the following reasons:

- None of the roadway construction projects cited by Wilkerson are comparable to the Applicant's project because there is no evidence of any requirement to retain fully functional roadways, with no lane blockages, closures or detours for 15 hours per day during the entire construction period for the projects in Sweet Home, Oregon, Texas or Florida.
- The Wilkerson Report consists of extrapolations taken from secondary studies that bear no relationship to the facts of this project. 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.”

- The Wilkerson testimony categorizes businesses along Highway 43 as impulse businesses but then does nothing to support this conclusion other than to speculate about how these businesses will be impacted. No data or studies were presented by Wilkerson to support this assertion.
- There is no evidence that any of the projects cited by Wilkerson had undertaken, let alone required, mitigation similar to that imposed by the West Linn conditions of approval.
- The Applicant provided licensed traffic engineers, construction management experts and other credentialed experts to address Wilkerson’s unsupported assertions about traffic loads. These experts provided traffic count analysis specific to Highway 43 and Mapleton that contradict Wilkerson’s conclusions. The record does not contain evidence from Wilkerson or others that undermines the Applicant’s experts.

The City finds the Wilkerson testimony is not as reliable or credible as the licensed traffic engineers and construction management experts who this Council finds have particular expertise in evaluating and mitigating impacts caused by a construction project. Further, the City finds the Wilkerson testimony entirely inconclusive in its assertions of traffic and business impacts. In particular,, rather than reliance on Wilkerson’s inexpert speculation, the Council finds statements made by others, such as Bill Hawkins, Director of Construction Management Practice at CH2MHill with over 30-years of experience, to be credible and compelling. Mr. Hawkins concluded the Construction Management Plans provided by the Partnership represent “a comprehensive and sound approach to impact mitigation that equals and in some cases, exceed mitigation measures typically provided for projects of similar size and scope.” LUBA Rec. 2245.

This and other expert testimony and evidence submitted by the Applicant is sufficient to establish that impacts to businesses from the project, while not non-existent, will be sufficiently mitigated to satisfy the requirements of CDC 60.070(A)(1).

ON THE BASIS OF THE ABOVE FINDINGS, the Council approves this Remand Order. This decision may be appealed to the Land Use Board of Appeals under the applicable rules and statutes.

Jody Carson
Jody Carson, Council President

1/15/14
Date

This decision was mailed on January 14, 2014.