

**Soppe, Tom**

**From:** Ryan, Corinne F. (Perkins Coie) [CRyan@perkinscoie.com] on behalf of Robinson, Michael C. (Perkins Coie) [MRobinson@perkinscoie.com]

**Sent:** Wednesday, June 17, 2009 4:21 PM

**To:** Kerr, Chris

**Cc:** Soppe, Tom; handris@aol.com; Kirsten Vanloo; King, Seth J. (Perkins Coie); Robinson, Michael C. (Perkins Coie)

**Subject:** City of West Linn File Nos. PUD-09-01/SUB-09-01/WAP-09-02; Request to Delete Recommended Condition of Approval 11

**Attachments:** Babbitt Letter.pdf

Per Mike Robinson's request, attached is a copy of his letter addressed to Chair Babbitt and Members of the Planning Commission regarding the above-referenced.

Please contact Mike at (503-727-2264) if you have any questions. Thank you.

<<Babbitt Letter.pdf>>

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June 17, 2009

**VIA EMAIL**

Chair Michael Babbitt  
West Linn Planning Commission  
c/o City Planning Department  
22500 Salamo Road #1000  
West Linn, OR 97068

**Re: City of West Linn File Nos. PUD-09-01/SUB-09-01/WAP-09-02; Request to Delete Recommended Condition of Approval 11**

Dear Chair Babbitt and Members of the Planning Commission:

This office represents Icon Construction ("Icon"), the owner of the real property located at 19650 Suncrest Drive (the "Property") and the applicant in City File Nos. PUD-09-01/SUB-09-01/WAP-09-02 (collectively, the "Applications"). Icon is proposing to develop a six (6)-lot single-family subdivision on the Property. As part of the subdivision, Icon intends to dedicate a conservation area covering approximately 2.4 acres of the 3.8-acre site, including Fern Creek and its transition area to the homeowners association ("HOA"). This conservation area, identified as Tract B, is heavily wooded, steeply sloped and will be perpetually maintained as open space by the HOA. It will also include a dedicated recreational trail easement.

The applicant agrees with proposed Conditions of Approval 2 (requiring the applicant to work cooperatively with City to establish the location of 20-foot wide trail easement in favor of the public extending north to south through the site in Tract B), 14 (requiring the applicant to create a conservation easement on the entirety of Tract B); provided it is in favor of the HOA) and revised Condition of Approval 11 (requiring applicant to remove all Himalayan Blackberry, Garlic Mustard and English Ivy on the ground within proposed Tract A; however, it should be Tract B). This letter explains the legal basis supporting staff's recommended Conditions of Approval 2, 11 and 14.

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Perkins Coie LLP and Affiliates

**1. Condition of Approval 2, Public Trail.**

Condition 2 requires the applicant to work cooperatively with the City to establish the location of a 20-foot wide trail easement in favor of the public extending north to south through the site in Tract B. The trail location is consistent with the Parks Master Plan. As shown in **Exhibit 1** attached to this letter (Figure 6, City of West Linn "Park, Recreation and Open Space Plan Update," March 2007, Figure 6, Proposed Park System), Proposed Trail T-7 crosses this property along the riparian corridor from north to south and does not extend to the public street adjacent to the property on the west. Moreover, the active-oriented park shown on this site is not required to be dedicated to the public. Further, I have confirmed with the City of West Linn Parks Director Ken Worcester, both previously and again today, that he is comfortable with the recommended conditions of approval regarding the trail and the Tract B dedication.

**2. Condition of Approval 11, Removal of Invasive Species.**

The applicant has proposed, and the Planning Department has agreed to modify its recommendation regarding Condition of Approval 11 so that the applicant is required to remove specific invasive species in Tract B. The applicant finds this condition to be acceptable and consistent with the City's goal of having a viable and healthy Tract B.

**3. Condition of Approval 14, Dedication of Tract B to the HOA.**

When a local government conditions development on a public dedication of part of the property, it is subject to a claim that the dedication requirement constitutes an uncompensated governmental taking of private property in violation of the Fifth Amendment as applied to states through the Fourteenth Amendment. *Nollan v. California Coastal Comm'n*, 483 US 825, 107 S.Ct. 3141 (1987); *Dolan v. City of Tigard*, 512 US 374, 114 S.Ct. 2309 (1994). The burden is on the local government to establish both an essential nexus between the exaction and the burdens imposed by the development, and the condition must be roughly proportional between the condition imposed and the impacts of the proposed development. *Id.* The first question to address the essential nexus factor is whether the public dedication requirement substantially advanced the same interests that land use authorities assert would allow them to deny the development altogether. *Skoro v. City of Portland*, 544 FSupp2d 1128 (2008).

**A. Essential Nexus.**

In *Nollan*, the government conditioned a permit to build a larger residence on beachfront property on the dedication of an easement allowing the public to traverse a strip of property between the owner's seawall and the mean high-tide line. The Court rejected the condition on the ground that there was no rational nexus between the condition and the end advanced as its justification. The Court stated as follows:

"It is quite impossible to understand how a requirement that people already on the public beaches be able to walk across the Nollans' property reduces any obstacles to viewing the beach created by the new house. It is also impossible to understand how it lowers any 'psychological barrier' to using the public beaches, or how it helps to remedy any additional congestion on them caused by construction of the Nollans' new house. We therefore find that the Commission's imposition of the permit condition cannot be treated as an exercise of its land-use power for these purposes."

*Nollan*, 483 US at 838-39.

Here, opponents argue that Tract B of the Suncrest Subdivision must be dedicated as public open space. However, they have failed to establish an essential nexus between the public dedication of Tract B and the burdens imposed by a six (6) lot single family subdivision, particularly where the applicants have agreed to preserve Tract B and its natural features through a conservation easement in favor of the HOA. To the extent that the interest in a public dedication of Tract B is to create an appropriate buffer between adjacent uses and to establish perpetual open space in order to mitigate the effects of increased density in the area, the applicant's conservation easement serves to advance these same interests. Therefore, the requirement to dedicate Tract B to the public has no essential nexus to the burdens imposed by this small residential development and would constitute an uncompensated governmental taking of private property.

#### **B. Rough Proportionality.**

In *Dolan*, the Court refined *Nollan*, holding that an exaction requiring dedication of private property must also be roughly proportional, both in nature and extent, to the impact of the proposed development. *Dolan*, 512 US at 391. In *Dolan*, the city conditioned an application to expand a store and parking lot on dedication of part of the property as a greenway that included a bicycle/pedestrian walkway. *Id.* The Court stated as follows:

"[T]he city has not met its burden of demonstrating that the additional number of vehicle and bicycle trips generated by petitioner's development reasonably relate to the city's requirement for a dedication of the pedestrian/bicycle pathway easement. \* \* \*

\* No precise mathematical calculation is required, but the city must make some effort to quantify its findings in support of the dedication for the pedestrian/bicycle pathway beyond the conclusory statement that it could offset some of the traffic demand generated."

*Id.* at 512 US 396-96.

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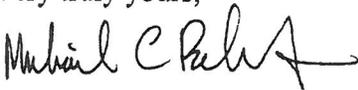
In this application, the opponents have failed to demonstrate how development of a 6-lot subdivision reasonably relates to the requirement to dedicate Tract B to the public, which represents approximately 2/3 of the entire project site. The nature and extent of such exaction has not been shown to be roughly proportional to the impact of the proposed development, particularly where the applicant's have agreed to preserve Tract B and its natural features through a conservation easement in favor of the subdivision's HOA.

**4. Conclusion.**

For the reasons described above, the applicant agrees with proposed Conditions of Approval 2, 11 and 14 (with the recommendation that Tract B be changed to Tract A in Condition of Approval 14).

Thank you for your consideration of the comments in this letter. The applicant respectfully requests that the Planning Commission approve this application with the recommended conditions of approval, including the change to Condition of Approval 14 as noted above.

Very truly yours,



Michael C. Robinson

cc: Mr. Chris Kerr, Acting Planning Director (via email)  
Mr. Tom Soppe, Associate Planner (via email)  
Mr. Mark Handris, Icon Construction, Inc. (via email)  
Ms. Kirsten Van Ioo, Emerio Design (via email)  
Mr. Seth King, Perkins Coie (via email)