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LEGAL MEMORANDUM

TO: West Linn Planning Commission

FROM: Dan Olsen, Contract City Attorney

DATE: May 5, 2017

RE: **File No. DR-17-1 Two-Story Office Building**
Our File No. 50015-36839

This memo provides a short analysis of several of the legal issues raised at the April 19, 2017 hearing and in subsequent submittals.

1. **Ownership and control of the trees.** There is evidence suggesting that the tree closest to Willamette Falls Drive straddles the property line, the middle tree appears to slightly straddle the line and the farthest back tree is on the applicant's property although it is alleged that trunk leans over the adjacent lot. (Sutherland 4/26/17 submittal).

There is no Oregon law on the status of "boundary trees". Courts in approximately 21 states have held that such trees are owned in common and that both property owners must consent to removal. In some states, however, the rule is that a tree planted on one parcel that grows across a boundary line does not automatically become common property. Rather, it becomes so only if both landowners have a history of treating it as jointly owned either by agreement or conduct. *See e.g. Love v Klosky*, 2016 COA 131(2016), *Happy Bunch, LLC v Grandview North, LLC*, 142 Wash. App 81 (2007). The Washington Court of Appeals adopted the majority rule in part because of the Washington timber trespass statute. ORS 105.810, the Oregon timber trespass statute, is very similar. I think it likely that an Oregon court would adopt the majority rule.

At common law, branches or roots that cross a boundary line may be cut provided doing so does not destroy the tree. There is no Oregon case, but it is generally thought that this rule would be applied. Thus, each property owner probably can trim branches and roots on its side as long as

doing so does not materially damage the viability of tree. Whether this would extend to trimming the trunk is unknown.

2. **City authority/liability regarding boundary tree.** Concerns have been raised about whether the City is interfering with the neighbor's property rights if it approves a development plan that depends on removal of boundary trees. The flip side is whether the City may deny an application on the grounds that development would require removal of a boundary tree.

WLMC 8.570 A.1 exempts from the tree removal permit requirement, "any tree which has been approved for removal through the development review process…as part of the ultimate development of the site." CDC 55.100 B.2 provides that trees that are considered "significant" by the City Arborist…shall be protected pursuant to the criteria of subsections (B) (2) (a) through (f) of this section." It recognizes that "this code section will not necessarily protect all trees deemed significant."

The Code provides that projects on Type I and II lands "shall protect … all significant trees by limiting development in the protected area." Further, development of such lands "shall require the careful layout of … building pads … to avoid significant trees…" This clearly prohibits removal of significant trees on Type I and II lands.

In contrast, projects on non-Type 1 and II lands "shall set aside up to 20 percent of the protected areas for significant trees…up to 20 percent of the non-Type I and II lands shall be devoted to the protection of those trees by limiting development in the protected areas." Development "shall also require the careful layout of …building pads…to avoid significant trees … pursuant to this code." Finally, if "more than 20 percent" of the site has significant trees, "the developer shall not be required to save the excess trees, but is encouraged to do so."

The applicant asserts that preservation of any of the trees would take up more than 20% of the site (given the way tree protection areas are measured.). In other words, requiring preservation of any of the trees would exceed the authority to require that "up to 20%" of the site be preserved. If true, it is fairly clear that this criterion does not provide a basis for denial or conditioning to prohibit tree removal because it would require the developer to set aside more than 20% of the site. Nor could I find any Code provision providing a basis for denial on the grounds that a significant tree is on a boundary.

Review of a development application is limited to whether it meets the applicable Code standards. Approval of a development permit is a determination that the application is in

compliance with the Code. It is not a determination of ownership or private property rights and does not authorize the taking of a private property right. This is particularly true where, as here, litigation may be necessary to determine the scope and nature of the property rights. Should the applicant proceed, it is taking the risk that removal of some or all of the tree(s) constitute a "timber trespass" for which the applicant would have civil liability, including potentially treble damages and attorney fees. ORS 105.810.

I would, however, recommend that any approval include the following language:

> Approval of this application does not authorize the applicant or any other person to enter upon, remove or damage any other person's property. Any tree removal shall be at the applicant's sole risk.

3. Relationship between Chapter 55 'Design Review' and Chapter 58 'Willamette Falls Drive Commercial Design District'.

Counsel for Sutherland Properties, LLC. asserts that the application does not meet CDC 55.100 B.6.b which states that the proposed structure "scale shall be compatible with the existing structure(s) on site and adjoining sites." Further the design must respect and incorporate prominent architectural styles, rhythm of windows, scale etc. of "surrounding buildings". CDC 55.100 B.6.b states that "it is appropriate that new buildings should architecturally transition in terms of bulk and mass to work with, or fit, adjacent buildings." "Contrasting architecture shall only be permitted when the design is manifestly superior to adjacent architecture in terms of creativity, design and workmanship…." CDC 55.100 B.6.c. He asserts that Chapter 58 does not compel the size and design proposed and that it can be designed to comply with both Chapters.

The applicant asserts these provisions of Chapter 55 conflict with Chapter 58, and the latter controls. The Historic Review Board recommends approval of the proposed design as best implementing Chapter 58.

Ordinances are to be interpreted to implement the intent of the legislative body. To do so, one first looks to the text and context of the provisions, consider relevant legislative history and apply certain rules of interpretation. These include that more specific provisions control over general and that related provisions should be read together so as to give effect to all. There is no express provision indicating that Chapter 55 does not, at least to some extent, apply in the Willamette Drive Commercial District. The parties agree that Chapter 58 is more specific. Accordingly, the real issues are whether Chapters 55 and 58 conflict. If not, then it appears the

applicant must address both. To the extent that provisions conflict, the issue is whether the conflict reasonably may be reconciled or minimized. If not, the applicable provision of Chapter 58 would appear to control.

Purpose statements are not standards but provide guidance for applying standards. It seems reasonably clear that Chapter 55 is focused primarily on preserving the status quo by emphasizing compatibility. Chapter 58 seeks to encourage "rehabilitation and revitalization" of the Willamette Commercial District, "reinforce commitment to existing commercial buildings of the 1880-1915 period and complement the adjacent residential district" and encourage a sense of historic identity for the area and the City. It focuses more on creating a particular identity, e.g. the historic commercial district.

It appears that the adjacent bungalows are non-conforming. This does not necessarily mean that the Chapter 55 does not require them to be accommodated. But typically non-conforming structures are not favored, for example CDC 66.070 provides that if they are destroyed they must be rebuilt to current standards. Over time this could create some anomalies or difficulties in administering CDC chapter 58. For example, if one of the bungalows is destroyed, would its replacement be required to be compatible with the design of the proposed structure, which was altered to address the now gone bungalow?

Some problematic specific standards are:

CDC 58.090 C.1.a Front setbacks to be consistent with the "predominant building line". Staff interpreted "predominant" to mean the commercial structures, which are both the existing and the encouraged predominate building type.

CDC 58.090 C.1.b Lot coverage. This provision expressly requires consideration of impacts on "abutting residential and other uses." It does not reference abutting structures. So it could be read to be concerned more with whether an adjoining use would lose functionality or impacts on use rather than aesthetics or architectural compatibility.

CDC 58.090 C.3-4 Building height. Maximum 35', with the first story being a minimum of 10". Further, buildings "shall emphasize the vertical" with height ratio of 1.5 to 1. This seems inconsistent with typically residential bungalow styles, perhaps suggesting they should not drive design.

CDC 55.100 B.6.a states that proposed structures "shall be compatible with the existing structures" on "adjoining sites." It mandates "contextual design" which means respecting "prominent architectural styles, building lines, roof forms, rhythm of windows, building scale and massing of surrounding buildings." Again, the issue is whether it is possible to comply with the commercial, vertically oriented requirements of Chapter 58 if adjacent bungalow styling must be accommodated. Further, note that this provision references "prominent architectural styles" suggesting one may focus on the overall building types existing and encouraged in the Willamette Falls Commercial District. It also uses the term "surrounding" rather than "adjacent" buildings, again suggesting that focusing on more than the immediately adjacent residential structures is permitted.

CDC 55.100 B.6.b uses the term "should" and "appropriate", thus encouraging but not mandating transition in terms of bulk and width to fit adjacent existing buildings.

CDC 55.100 B.6.c is stronger, stating that "contrasting architecture shall only be permitted" under certain circumstances, such as if the design is manifestly superior to adjacent architecture…" But, again, Chapter 58 appears to mandate architecture that contrasts with residential bungalows. So one question is whether the design standards in Chapter 58 may fairly be read as adopting "superior design" standards for the Willamette Drive district.

Given these ambiguities, it is not possible to be certain how a court would interpret the CDC in this rather unusual and likely unanticipated factual context. Accordingly, the Planning Commission must make its best determination. If appealed, the City Council will consider the Planning Commission interpretation but has responsibility for code interpretation. Its interpretation will be given deference on review by LUBA and the courts provided it: "plausibly interprets its own land use regulations by considering and then choosing between or harmonizing conflicting provisions, * * * unless the interpretation is inconsistent with all of the 'express language' that is relevant to the interpretation, or inconsistent with the purposes of policies underpinning the regulations." *Siporen v. City of Medford*, 349 Or 247, 243 P3d 776 (2010; ORS 197.829(1).2

4. Authority of Historic Review Board

CDC Section 99.060 D.2 provides that Historic Review Board is a decision maker for certain applications involving historic resources but is authorized only to "Make recommendations to the approval authority specified in this section regarding the following:

c. Class I or Class II design review on a property within the Willamette Falls Drive Commercial Design District that is not a historic landmark or within the Willamette Historic District;

d. New construction within the Willamette Falls Drive Commercial Design District that is not a historic landmark or within the Willamette Historic District;

Accordingly, although the Planning Commission should consider the Historic Review Board's recommendation, it is only entitled to as much weight or deference as you deem appropriate and you are not bound by it in any way.

Please contact staff if you have questions or concerns regarding this advice that you would like to alert us to or discuss prior to the hearing on May 10.