

April 19, 2017

Seth J. King  
sking@perkinscoie.com

**VIA EMAIL**

D. +1.503.727.2024

F. +1.503.346.2024

Mayor Russell Axelrod  
West Linn City Council  
West Linn City Hall  
22500 Salamo Road  
West Linn, OR 97068

**Re: Upper Midhill Estates Subdivision  
City File Nos. SUB-15-03/WAP-16-03/AP-16-02/AP-17-01  
Applicant Letter in Response to Appeal**

Dear Mayor Axelrod and Members of the City Council:

This office represents Upper Midhill Estates, LLC (“Applicant”), the applicant requesting approval of a 34-lot subdivision and water resources permit for property located at 18000 Upper Midhill Drive, City File Nos. SUB-15-03, WAP-16-03, AP-16-02, and AP-17-01 (“Applications”), which the Planning Commission approved on reconsideration, subject to conditions. This letter responds to the appeal of the Planning Commission approval, which was filed by Mr. and Mrs. Harra. This letter is limited to argument (and cross-references to evidence that is already in the record) and does not include any new evidence.

For the reasons explained below, the City Council should take the following actions:

- Limit the appeal to the single issue that is properly within the scope of the appeal (Willamette Drive bicycle lanes);
- Reject other issues raised in the appeal statement or at the appeal hearing without reaching their merits because they are outside the scope of the appeal;
- Find that Applicant has adequately addressed the single issue that is properly within the scope of the appeal; and
- Deny the appeal and affirm the Planning Commission’s recommendation to approve the Applications, subject to conditions.

**1. The City Council should limit the appeal to a single issue (appellants' Issue 3 pertaining to bicycle lanes on Willamette Drive) because that is the only issue that falls within the scope of the appeal.**

The City Council has already determined that this appeal is not an opportunity to raise any and all issues about the proposed development. Instead, the scope of the appeal is limited in three important ways:

- The testimony and argument must fall within the scope of the reconsideration, which the City Council previously limited to the topic of “adequate public facilities, including traffic impact and influences and pedestrian improvements and safety that are related to CDC 85.200.A.”
- The appeal issue must be identified in the appeal statement, as required by West Linn Community Development Code (“CDC”) 99.280.D; and
- The appeal issue must have been raised below with sufficient specificity to allow the Planning Commission and the parties to respond. *Id.*

The City Council lacks the authority to consider testimony about other issues in this appeal. The City’s notice states the City will not consider such extraneous testimony:

“Testimony determined to be outside the scope of this appeal hearing will not be accepted.”

The appellants have identified four issues in the appeal statement. Applicant has prepared a chart (see next page) that identifies each issue in the appeal statement and whether it meets each of the three requirements to fall within the scope of the appeal hearing. If an issue meets a requirement, it is marked with a “Yes.” If not, it is marked “No.” In order for an issue to fall within the scope of the appeal hearing, all columns must be marked with a “Yes.” As identified below, only one issue (Appeal Issue 3 pertaining to Willamette Drive bicycle lanes) meets all three requirements. The City Council should find that the remaining issues fall outside the scope of the appeal and thus should be rejected without reaching the merits.

APPEAL ISSUE	WITHIN SCOPE OF RECONSIDERATION	IDENTIFIED AS APPEAL ISSUE	PRESERVED BELOW
1 – Failure to Address Timeframe for Development	No	Yes	Yes
2 – Need for Geological Studies	No	Yes	No
3 – Inadequate Consideration of the Impact of the Proposed Off-Site Mitigation on Willamette Drive Bicycle Lanes	Yes	Yes	Yes
4 – Long-Term Responsibility to Address Congestion, Drainage, Lighting, and Related Issues that May Arise After Development is Complete	No	Yes	No

**2. Response to Appeal Issues.**

Response to Issue 1 (Development Timeline): Residents preserved the issue of the development timeline by raising it below, and petitioners have identified this issue in the appeal statement; however, as Applicant testified in its March 22, 2017 letter to the Planning Commission, this issue is outside the scope of the reconsideration. Therefore, the City Council may not consider this issue on appeal and should instead reject it without reaching the merits.

In the event the City Council reaches the issue on the merits, CDC 89.010 provides that the developer has three years to implement the tentative plat before it expires, which will provide certainty to residents about the duration of the development phase. To the extent residents are concerned about the timeframe for constructing homes, the City Council should find that it is constrained by state law on this issue. Because the Applications propose a subdivision of land inside an urban growth boundary, only the City's laws in effect at the time the application was filed govern subsequent construction on the Property. ORS 92.040(2). At the time Applicant filed the Applications, the CDC did not regulate this issue (timeframe for constructing homes in an approved subdivision), and construction-related traffic does not fall within the scope of "adequate public facilities" in CDC 85.200.A. As a result, there is no legal basis to impose a time limit on when construction of homes must occur.

Response to Issue 2 (Geological Studies): This issue is both outside the scope of the reconsideration and was not preserved below. Therefore, the City Council may not consider this issue on appeal and should instead reject it without reaching the merits.

Response to Issue 3 (Willamette Drive Bicycle Lanes): The appellants request additional information about how Applicant's interim off-site transportation improvements will affect bicycle lanes on Willamette Drive.

This issue falls within the scope of the reconsideration, residents raised the issue with sufficient specificity to allow the Planning Commission and the parties to respond, and the appellants identified the issue in their appeal statement. Therefore, this issue is properly before the City Council at the appeal hearing.

The Planning Commission approved the Applications, subject to Condition 3, which requires Applicant to complete off-site traffic mitigation, including interim improvements to Willamette Drive and a fair-share contribution to long-term improvements for this facility:

"To mitigate the traffic impacts from the proposed subdivision until the Highway 43 Multimodal Transportation Project is constructed, and prior to the issuance of a grading permit for the development site, the applicant shall construct their proposed interim solution as depicted in Figure 9 of Kittelson Associates' March 1, 2017, memorandum ('KAI Memorandum')

(Exhibit PC-5B) that includes restriping the highway with a northbound left turn pocket on the south leg of the intersection and a left turn refuge/storage area on the north leg of the intersection. The applicant shall also pay a proportionate fee in the amount of \$11,600 as Applicant's proportionate share contribution toward the long-term Highway 43 Multimodal Transportation Project."

Applicant's transportation engineer has stated that it is feasible to incorporate bicycle lanes into the design of the interim improvements. See Kittelson memorandum dated March 1, 2017, page 3.

Alternatively, the Oregon Department of Transportation ("ODOT") has jurisdiction over this segment of Willamette Drive and has stated that, as needed, it will consider deviations from design standards for Applicant's interim improvements that are consistent with design deviations granted for the Highway 43 Multimodal Transportation Project as a whole. See ODOT memorandum dated February 3, 2017, page 2. To the extent ODOT approves a design exception that affects bicycle lanes for the interim improvements, it will be the final decision of the agency with jurisdiction over this highway segment on the need for/sufficiency of bicycle lanes associated with the interim improvements. Accordingly, based upon the testimony from Applicant's transportation engineer and ODOT, the City Council can condition approval of the Applications upon providing bicycle lanes or, as needed, obtaining a design exception from ODOT from any bicycle lane requirement.

Further, the interim improvements will be temporary in nature. Applicant's transportation engineer testified to the Planning Commission that the long-term improvements for Willamette Drive are anticipated in 2020. ODOT testified that these long-term improvements will incorporate bicycle lanes. See ODOT memorandum dated February 3, 2017, page 1. Planning Commission Condition 3 requires Applicant to make its fair-share contribution to these long-term improvements, which will necessarily constitute Applicant's fair-share contribution to bicycle lanes associated with these long-term improvements.

For all of these reasons, the City Council should find that, as conditioned, the Applications address this appeal issue.

Response to Issue 4 (Post-Development Responsibility): The issue is both outside the scope of the reconsideration and was not raised below with sufficient specificity to allow the Planning Commission and the parties to respond. Therefore, the City Council may not consider this issue on appeal and should instead reject it without reaching the merits. As an aside, there are multiple measures that can ensure that development and use of the Property will meet applicable standards over time, including CDC Chapter 91, which requires a developer to post a bond to ensure required improvements are completed in a timely manner, and CDC Chapter 106, which establishes a process for enforcement of the City's land use regulations on specific sites.

### **3. Conclusion.**

For the reasons explained above, the City Council should take the following actions:

- Limit the appeal to the single issue that is properly within the scope of the appeal (Willamette Drive bicycle lanes);
- Reject other issues raised in the appeal statement or at the appeal hearing without reaching their merits because they are outside the scope of the appeal;
- Find that Applicant has adequately addressed the single issue that is properly within the scope of the appeal; and
- Deny the appeal and affirm the Planning Commission's recommendation to approve the Applications, subject to conditions.

Applicant has requested that City staff include a copy of this letter in the official record for this matter and place a copy before you prior to the appeal hearing in this matter. Applicant and its representatives will attend the City Council appeal hearing and are happy to answer any questions at that time.

Thank you for your careful consideration of this testimony and the Applications.

Mayor Axelrod and West Linn City Council  
April 19, 2017  
Page 7

Very truly yours,



Seth J. King

cc: Peter Spir (via email)  
Tim Ramis (via email)  
Megan Thornton (via email)  
Ryan Zygar (via email)  
Andrew Tull (via email)  
Matt Bell (via email)  
Michael Robinson (via email)