



Memorandum

Date: May 17, 2017

To: Russ Axelrod, Mayor
Members, West Linn City Council

From: Peter Spir, Associate Planner

Subject: AP-17-01 Review of Submitted Comments for Admissibility

Staff received the attached letter dated May 16, 2017, from Jennifer Bragar, an attorney representing the appellants, addressed to the Mayor and the City Council and is forwarding it accordingly.

With the advice of the City Attorney, to the extent the letter and attachments contain evidence, that evidence should not be considered since (a) the record was closed; and, (b) it includes new evidence that the Planning Commission had no access to. Those parts of the letter where counsel simply makes arguments objecting to our view of the scope and record, can be considered.



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May 16, 2017

BY EMAIL

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

Re: Harra Response to Staff May 12, 2017 Memorandums related to Review of Submitted Comments for Admissibility and Review of Oral Testimony for Admissibility - City of West Linn File No. AP-17-01

Dear Mayor Axelrod and Council Members:

This office represents the appellants, Jason and Jessica Harra (“appellants” or “Harras”) in the above file. Appellants retained counsel after the May 8, 2017 hearing on their appeal when procedural matters became confused and the public hearing was continued to May 18, 2017. The City Council decides whether to accept or reject testimony offered at a public hearing in quasi-judicial matters. These comments are offered to support the acceptance of all the testimony offered by appellants in this matter, as well as testimony from other members of the public related to the appeal.

At the May 8, 2017 public hearing, the record was left open with the understanding that it would be closed at some point on May 18, 2017. Therefore, these comments are timely submitted and we request that the information be included in the record.

The decision whether to accept or reject testimony is informed by the City’s Community Development Code, but ultimately is a decision where the City Council can exercise its discretion. Once the City Council determines the scope of the appeal, the City Council can then decide whether to accept or reject new evidence. It is reasonable for the City Council to give the appellants the benefit of the doubt in regard to the scope of the appeal and the requests made in the appeal statement because until now, they were unrepresented by counsel.¹ In order to do so,

¹ In fact, Jason Harra, followed the City’s instructions to use his own words in the appeal and not use legal jargon as advised,

“Use your own words. Most people are more comfortable and effective when using clear, direct language. Do not feel you need to use legal jargon when preparing your comments.”

the City Council must make specific findings regarding the scope of the appeal, whether new evidence is being accepted, and what testimony to accept or reject. The following comments and suggested findings will assist the City Council in making a decision that is based on a plausible interpretation of the Code and entitled to deference under the Oregon Supreme Court decision in *Siporen v. City of Medford*, 349 Or 247, 261 (2010). Once the scope of appeal is identified, the admissibility of testimony can be analyzed.

Further, these comments are made because City staff, by adopting the applicant's proposed analysis of the written and oral testimony, oversimplified a difficult analysis. While tables can assist in review of overarching concepts, determining whether to accept testimony requires the City Council to look specifically at the testimony to parse out whether any portion should be rejected. For the following reasons, all of the testimony submitted by the Harras and other participants should be accepted in the record.

I. Scope of the Appeal.

The applicant takes an improperly narrow view of the scope of the appeal. While the applicant focuses on the effect of traffic on the existing bike lanes, the appeal was drafted broadly to incorporate traffic concerns. First, the appellants stated, "The Planning Commission approval incorporates an Off-Site Traffic Mitigation with the addition of a north-bound left turn lane onto Arbor." This is a stand alone statement and concern. The adequacy of the Off-Site Traffic Mitigation is related to adequacy of the off-site transportation facilities, and requires a correct and valid Traffic Impact Analysis ("TIA"). The adequacy of the Off-Site Traffic Mitigation also relates to impacts on the existing bicycle lanes and this impact was expressly preserved by the appeal. In order to fully understand the impacts on existing bicycle lanes, the applicant also needs to have a correct and valid TIA. Further, the appellants also explained that they do not believe there is a sufficient plan in place to determine post-development congestion. While a represented party may have been more direct, the appellants raised enough information to alert the applicant and the City to their position that the City Council does not have enough information to approve this application.

These matters fall within the scope of the reconsideration that specifically states the scope of the hearing is to consider the adequacy of public facilities. Again, while the applicant would have that reconsideration limited to CDC 85.200(A), even that reference refers to the precatory language of the Code section before the Code describes specific requirements relate to streets in subsection A. The precatory language states:

"No tentative subdivision or partition plan shall be approved unless adequate public facilities will be available to provide service to the partition or subdivision area prior to final plat approval and the Planning Commission or Planning Director, as applicable,

finds that the following standards have been satisfied, or can be satisfied by condition of approval.” (emphasis added).

The revised (and original) notice of the appeal hearing accurately reflects this precatory language as applicable in its statement that the reconsideration would consider the adequacy of public facilities:

“[t]he appeal hearing that relates specifically to the scope of the reconsideration, which was 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).” (emphasis added).

Further, the notice uses the word “including” when it references specifically CDC 85.200(A), but did not limit the reconsideration solely to streets in subsection A because it did not include the word “solely” or “only” in the notice. This makes sense because the precatory language in CDC 85.200 cannot be read out of the Code.

In order to analyze whether the criterion can be met, the City Council must consider the definition of adequate public facilities under CDC 2.030:

“Adequate public facilities. Public facilities that must be adequate for an application for new construction, remodeling, or replacement of an existing structure to be approved are transportation, water, sewer, and storm sewer facilities. To be adequate, on-site and adjacent facilities must meet City standards, and off-site facilities must have sufficient capacity to (1) meet all existing demands, (2) satisfy the projected demands from projects with existing land use approvals, plus the additional demand created by the application, and (3) remain compliant with all applicable standards.”

Based on the definition, the City Council is required to consider the adequacy of transportation and storm sewer facilities.

Therefore, as far as the geological studies affect the adequacy of storm sewer facilities, those issues are also raised sufficiently in the appeal. The decision should be based on information about whether landslides will prevent the design and function of adequate storm sewer facilities to support the subdivision.

Based on the foregoing the scope of the appeal findings should state:

Proposed Finding regard Reconsideration and Appeal Scope. The scope of the appeal is whether adequate public facilities are available to serve the proposed use under CDC 85.200. The Community Development Code (“CDC”) 2.030 defines “adequate public facilities” to include transportation, water, sewer, and storm sewer facilities, and that adequacy means that on-site and off-site facilities must have sufficient capacity to meet the demands in the application. The appeal raises issues related to the adequacy of the off-site transportation facilities, including, but not

limited to, the impacts to existing bicycle lanes within the project's impact area. The appeal stated, "The Planning Commission approval incorporates an Off-Site Traffic Mitigation with the addition of a north-bound left turn lane onto Arbor." The City Council views this statement as a stand alone concern related to the traffic impacts on Highway 43. Further, the appellants also explained that they do not believe there is a sufficient plan in place to determine post-development congestion. The adequacy of the Off-Site Traffic Mitigation also relates to impacts on the existing bicycle lanes and this impact was expressly preserved by the appeal. In order to fully understand the impacts on existing bicycle lanes, the applicant also must show an accurate Traffic Impact Analysis ("TIA") to provide full information about adequate transportation facilities, including the bicycle lanes. This issue was preserved on appeal through the appellants' statement, "Nothing has been stated about how this will affect the existing bike lanes... There is very little room to retain bike lanes in both directions and carve out a left turn lane."

In addition, the appellants stated, "We do not believe that sufficient geological studies have been done on this parcel. There is a history of drainage issues and mudslides in the surrounding area that we believe have not been sufficiently addressed in the application." The City Council finds this statement raises enough specificity about drainage issues to place the applicant on notice that the appellants were raising issues related to the adequacy of the storm sewer facilities given the geology of the site.

II. The City Council has discretion to re-open the record to allow submission of additional written testimony.

Two code provisions provide the City Council with authority to allow new evidence. First, under CDC 99.250(A)(3)(c)(ii), the appellant may request the Council re-open the record. Second, under CDC 99.280(C), the Council has independent discretion to re-open the record on a limited basis to consider new evidence.

A. The appellants requested the Council to accept new evidence.

Once again, a broad reading of the appeal should be given when the appellants were unrepresented at the Planning Commission level and in filing the appeal. With respect to the adequacy of the transportation facilities (item 3 of the appeal), the appellants stated "We would like to see this addressed in a more substantial way." This statement was made about the adequacy of the Off-Site Traffic Mitigation, and about the impacts to the existing bicycle lanes. Further, in regards to item 4, the appellants formulated a question about the sufficiency of the traffic plan because they did not feel the record contained enough evidence to show that congestion was addressed. Under CDC 99.250(A)(3)(c)(ii), this statement and question were enough to alert the City Council that appellants were requesting the Council to re-open the record.

Further, Jason Harra clarified his intent to present new evidence in his April 25, 2017 e-mail to the Mayor and City Council members attached here for convenience as Exhibit 1. This request was made prior to the notice and revised notice being published on April 27, 2017. The applicant had ample notice that the appellants requested to re-open the record to information relevant to the approval criteria.

In fact, the record was re-opened and the Council accepted additional testimony and evidence and this was correct. This makes sense as an appeal under the City Code of a quasi-judicial decision includes a hearing and opportunity to appear. The City Council's rules reflect this permissive participation because the Code allows additional "written testimony and evidence" under CDC 99.250(A)(3)(c).

B. The City Council has the discretion to re-open the record on a limited basis to consider new evidence.

Under CDC 99.280(C), independent of the language in the appeal and CDC 99.250, the City Council can re-open the record and consider new evidence:

"The City Council has the authority to reopen the record to consider new evidence on a limited basis; specifically, if the Council determines that...

2. A factual error occurred before the lower decision-making body through no fault of the requesting party, that is relevant to an approval criterion and material to the decision."

The appellants clearly requested that new evidence be considered before and at the May 8, 2017 hearing and Jason Harra's testimony establishes that a factual error occurred through no fault of his.

After the public hearing closed before the Planning Commission, it became apparent to the appellants that the deliberations were based on the applicant's incomplete TIA. However, the appellants could not notify the Planning Commission of the error because the hearing had already closed. The appellants were not at fault for the error because the applicant prepared and submitted the traffic study. Jessica Harra observed that several times, a Planning Commissioner could not find the same numbers referred to by applicant's representatives Seth King or Matt Bell when they were discussing the TIA. Further, there was no mention of how the striping in the Off-Site Traffic Mitigation would work when part of the road is too narrow to accept the proposed mitigation.

Neither the Planning Commission, nor staff noticed that the applicant's traffic engineer did not stamp the TIA. This is a violation of ORS 672.020(2) that requires every final document prepared by a traffic engineer to be stamped and does not meet the requirements of CDC 85.170(B)(2). Thus, the Planning Commission did not base its decision on a final TIA. The City Council should not approve the reconsideration when, through no fault of the appellants, the applicant's traffic study does not meet the requirements and does not include necessary

information. The May 8, 2017 submissions by Jason Harra, including the letter from Rick Nys, specifically identify the problems with the traffic study.²

Further, the Planning Commission heard testimony about concerns related to the lack of space for the bus stop. Testimony on the appeal identified ADA accessibility concerns in connection with the limited space for the bus stop with the proposed mitigation. This testimony only crystallizes the concerns raised to the Planning Commission. The information related to ADA compliance is important and should be allowed in the record to establish that the transportation facilities are inadequate to meet the demands from this project.

The Harras urge the City Council to exercise its discretion to re-open the record to accept additional evidence related to the adequacy of the transportation facilities. This evidence directly responds to relevant approval criteria on reconsideration, and any decision relying on the TIA should be based on accurate information, including correct background counts, detailed analysis of the Off-Site Traffic Mitigation, and data that supports the conclusions in the TIA.³ With this new evidence accepted in the record, the City Council should deny the application because the TIA does not contain necessary information to show that the City has adequate transportation facilities to meet the demands of the application, especially when combined with transportation facility impacts from other in-process developments in the surrounding area.

C. The applicant had adequate opportunity to respond and did respond to the new evidence.

The applicant complains that it did not have an adequate opportunity to respond to the new evidence. As Mr. Robinson, counsel for the applicant, stated at the end of the hearing, he knew that the City Council would not make a decision about what evidence would be allowed in until May 18, 2017. Yet, he agreed to summarize the applicant's final argument by May 11, 2017 and did so.

In the applicant's May 11, 2017 submission, the applicant claims that Jason Harra's letter (including Rick Nys' attached letter) should be omitted based on *Freedman v. City of Grants Pass*, 57 Or LUBA 385 (2008). However, that case is inapposite. In that case the intervenor included the traffic consultant's testimony after the record had closed as part of the intervenor's final written argument. *Id.* at 387. Here, the record remains open. The applicant is not prejudiced by the submittal and was given the opportunity to rebut the evidence. Moreover, the applicant does rebut the evidence in pages 6-11 of its May 11, 2017 letter. Therefore, even if it

² To the extent that the staff's May 12, 2017 memorandum regarding "Review of Submitted Comments for Admissibility" refers to emails from Jason Harra and Rick Nys P.E., Greenlight Engineering, submitted "subsequent to the hearing," these letters were sent prior to the beginning of the hearing and were presented by staff to the City Council directly during the hearing.

³ After appellant's opportunity to testify on May 8, 2017, the applicant's traffic engineer continued to present traffic numbers that are erroneous. Appellants' traffic engineer, Rick Nys P.E. will be in attendance at the meeting on May 18, 2017 to answer any questions related to these errors.

were improper to accept the evidence, the problem is solved because the applicant has been afforded the opportunity to respond under ORS 197.763. *Id.* at 393.

The applicant already requested a continuance of the hearing to learn what additional evidence the City Council would accept into the record. No further continuance should be afforded because the applicant had ample opportunity between May 8, 2017 and May 18, 2017 to submit additional evidence and argument during the open record period and took advantage of that opportunity.

Based on the foregoing, appellants propose the City Council adopt the following finding:

Proposed Finding: The appeal sufficiently raised the appellants' request that additional evidence be accepted at the hearing because the appellants' statements raised matters regarding the adequacy of the transportation facilities and that additional information would be required to show that the transportation facilities are adequate. First, the appellants stated under appeal item 3, "We would like to see this addressed in a more substantial way." This statement was made about the adequacy of the Off-Site Traffic Mitigation, and about the impacts to the existing bicycle lanes. Second, under appeal item 4, the appellants formulated a question about the sufficiency of the TIA because they did not feel the record contained enough evidence to show that congestion was addressed. Under CDC 99.250(A)(3)(c)(ii), the City Council finds this statement and question were enough to alert the applicant and City Council that appellants were requesting the Council to re-open the record.

Alternatively, the City Council exercises its discretion under CDC 99.280(C)(2) to re-open the record to consider new evidence on a limited basis because the City Council determines that a factual error occurred before the lower decision-making body through no fault of the requesting party, that is relevant to an approval criterion and material to the decision. As established under the scope of the appeal findings, the adequacy of the transportation facilities is an issue on appeal. The appellants have raised enough information to show that the TIA has incorrect and incomplete information about background traffic, and does not include the underlying data for the TIA conclusions. Further, the TIA has not been stamped and cannot be considered a final document under ORS 672.020(2) and does not meet the requirements of CDC 85.170(B)(2).

The new information that appellants request for inclusion in the record is limited only to the adequacy of the TIA, and the appellants did not submit the incorrect traffic study. Therefore, the City Council finds that the appellants were not at fault for the incorrect factual errors that the Planning Commission relied on to conclude that the transportation facilities were adequate to serve the proposed development. All new evidence related to the adequacy of the transportation facilities is accepted by the City Council, including Jason Harra's letter of May 8, 2017 attaching Rick Nys' letter of the same date, as well as their verbal testimony on May 8, 2017; Chris

Harris' verbal testimony; Gregory Ball's April 29, 2017 written testimony; and Keith Hamilton's May 7, 2017 written testimony.

The applicant was provided open record response time to the new evidence between May 8, 2017 and May 11, 2017, and submitted its response on May 11, 2017. Further, the applicant discussed at length its concerns about the 120-day deadline for a decision, and consistent with that discussion did not request a further extension of the open record period beyond the May 18, 2017 hearing.

- III. In the alternative, even if the City Council decides it will not accept new evidence, much of the Harras' testimony is proper argument on appeal.

Jason Harra submitted an 11 page letter on May 8, 2017 accompanied by a six page letter from Rick Nys with attached exhibits. The applicant's proposal, adopted by staff, suggests that the City Council reject all this testimony. However, most of the submission is argument based on the material in the record before the Planning Commission and is properly included the record.

If the City Council decides not to accept new evidence, then the only information that should be rejected from Jason Harra's letter is shown in the redacted version of the letter in the attached Exhibit 2. The Harras request that Exhibit 2 be accepted in the record, only if the City Council decides not to reopen the record to accept new evidence. The argument contained in Exhibit 2 contains ample reasons to discredit the TIA, even without the new evidence.

CONCLUSION

The applicant has not submitted an application that can meet the criteria for approval because the material in the record does not support a finding that adequate public facilities are available, particularly transportation facilities, and the impacts of landslides to storm sewer facilities design. The applicant threatens to proceed with another, more dense application that still must have adequate public facilities. The applicant argues that if either this application or the more dense application are denied its property may be subject to a taking. However, the R-4.5 zone allows for an array of uses, and the applicant can apply for another allowed or conditional use that would have less impact to public facilities and could be approved, thus still providing economic value in the property – a result that avoids a taking. The Harras request that you accept all the evidence and testimony submitted on appeal related to the preserved topic of adequacy of public facilities and deny the application because the transportation facilities cannot handle the demand from this project.

Sincerely,



Jennifer M. Bragar

TOMASI SALYER MARTIN

May 16, 2017

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JMB/dh

cc: Client
Mike Robinson
Tim Ramis
Peter Spir
Eileen Stein
Karen Mollusky

Spir, Peter

From: Jason Harra <jharra@gmail.com>
Sent: Tuesday, April 25, 2017 9:14 PM
To: Axelrod, Russell; Cummings, Teri; Perry, Brenda; Martin, Bob; Sakelik, Richard
Cc: Spir, Peter
Subject: Objection Re: Applicant Letter in Response to Appeal

Dear Mayor Axelrod and Members of the City Council:

In response to the communication sent from Seth King representing Upper Midhill Estates, LLC, via email on April 19, 2017, Re: Applicant Letter in Response to Appeal, I object to placing any of Mr. Kings limitations on our appeal. We understand the scope of our appeal and our argument will fall within the scope of reconsideration. I will follow up this email with a phone call to discuss "The appeal issue must have been raised below with sufficient specificity to allow the Planning Commission and the parties to respond." As we plan to present new evidence and argument to support our appeal. I am also requesting 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.

Thank you for your attention on this matter.

Regards,

Jason Harra

jharra@gmail.com

503-420-1052

17701 Hillside Dr.

West Linn, OR 97068

Cc: Peter Spir

I am asking the City Council to once again deny the application for Upper Midhill, LLC (the Applicant) to develop a 34-lot subdivision because there are not adequate public facilities. Specifically, the Applicant does not provide sufficient mitigation to meet all existing demands nor will it satisfy projected demands from projects with existing land use approvals, plus the additional demand created by the application. Further, off-site facilities will remain incompliant with some applicable standards.

Background: Inadequate Public Facilities and Applicant's Proposed Mitigation

The Applicant has proposed to build a 34-lot subdivision and off-site vehicle only traffic mitigation at the intersection of Hwy 43 and Arbor Dr. But the result of this development is increased automobile, bicycle and pedestrian traffic without the adequate public facilities to meet its demand. To approve the application, the Applicant is required, by CDC 85.200, to provide a burden of proof that adequate public facilities exist.¹

Upper Midhill, LLC, in its application, has proposed that it will mitigate the primary issue arising from the development by restriping Highway 43 to provide a two-way left-hand turn lane.

However, the Applicant's proposed mitigations are insufficient for several reasons. First, the Applicant's traffic analysis on which the proposed mitigation is based is critically flawed and biased in favor of the Applicant. The result is that the Applicant is not providing an accurate picture of the demand on these critical public facilities. Second, even if the Applicant was providing an accurate picture of the increased traffic, its proposed mitigation of restriping Highway 43 to provide a two-way left-turn lane is insufficient to address existing and projected demands. Third, the Applicant's proposed mitigation of restriping Highway 43 will further reduce already narrow pedestrian travel lanes the result of which is pedestrian facilities and other applicable standards. Finally, the Applicant's proposed mitigation of reducing traffic at Highway 43 and Arbor by utilizing side street connectivity creates dangerous conditions for pedestrians and cyclists on those side streets.

(1) Flawed Methodology used in Developer Traffic Analysis

Under CDC 85.200, Midhill has an obligation to "(2) satisfy the projected demands from projects with existing land use approvals, plus the additional demand created by the application." In order to do this, the Applicant has done a traffic analysis which claims to be accounting for the estimated trips generated from projects with existing land use approvals at Mary's Woods and

¹ CDC 85.200 provides: "**Adequate public facilities.** Public facilities that must be adequate for an application for new construction, remodeling, or replacement of an existing structure to be approved are transportation, water, sewer, and storm sewer facilities. To be adequate, on-site and adjacent facilities must meet City standards, and off-site facilities must have sufficient capacity to (1) meet all existing demands, (2) satisfy the projected demands from projects with existing land use approvals, plus the additional demand created by the application, and (3) remain compliant with all applicable standards.

For purposes of evaluating discretionary permits in situations where the level-of-service or volume-to-capacity performance standard for an affected City or State roadway is currently failing or projected to fail to meet the standard, and an improvement project is not programmed, the approval criteria shall be that the development avoids further degradation of the affected transportation facility. Mitigation must be provided to bring the facility performance standard to existing conditions at the time of occupancy."

the new duplexes on Willamette Dr.² but may not have provided sufficient proof of doing so. If the Applicant has not provided, for public review, the estimated trips generated from other projects in the region and their impact on the TIA this is unacceptable. The Applicant should deliver the trips generated in their original format so that its claims can be validated.

In addition, the Applicant has suggested that it has done the appropriate supplemental traffic counts³ but has not provided the supplemental traffic counts for City Council or public review, so it is again asking the City Council and the public to trust that they are properly applied to the analysis. This is unacceptable, the supplemental traffic counts should be provided in the same format as the original traffic counts done by Quality Counts in June 2015 "Appendix A Traffic Counts, Pages 84-95". Further, the public should have all mathematical formulas used to balance and seasonally adjust. Without this data, there is no way to verify that this analysis was done in accordance with approved methodologies without just "taking the word" of the Applicant.

"KAI testified that this adjustment was sufficient to account for trips in-process developments such as the new duplexes on Willamette Drive and the expansion of Mary's Woods. Id. Stated another way, if KAI had separately added in trips from in-process developments and assumed a two percent growth in area traffic, it would have resulted in double-counting of these background trips." (RECONSIDERATION, page 18)

Without access to the data used to account for trips in-process developments we should consider the KAI testimony invalid as the City Council cannot verify that they are accurate or unbiased in favor of the Applicant. Given current regional traffic growth in West Linn and other areas served by Highway 43, we can assume a one percent per year growth to be insufficient. With our safety at stake, the public deserves to know how different growth assumptions would impact the analysis. Without the raw data used in these assumptions, we cannot verify them as accurate.

Not only is the information provided by the Applicant incomplete, but it appears to be based on faulty assumptions as well. For example, the Applicant seems to suggest that it can account for only typical heavy weekday traffic and ignore new and atypical construction traffic generated by the development.⁴

² "This increase accounts for the new duplexes on Willamette Drive, which were under construction when the traffic counts were conducted, and the expansion of Mary's Woods, which is not expected to occur until after full build out of the proposed development." (RECONSIDERATION, page 18)

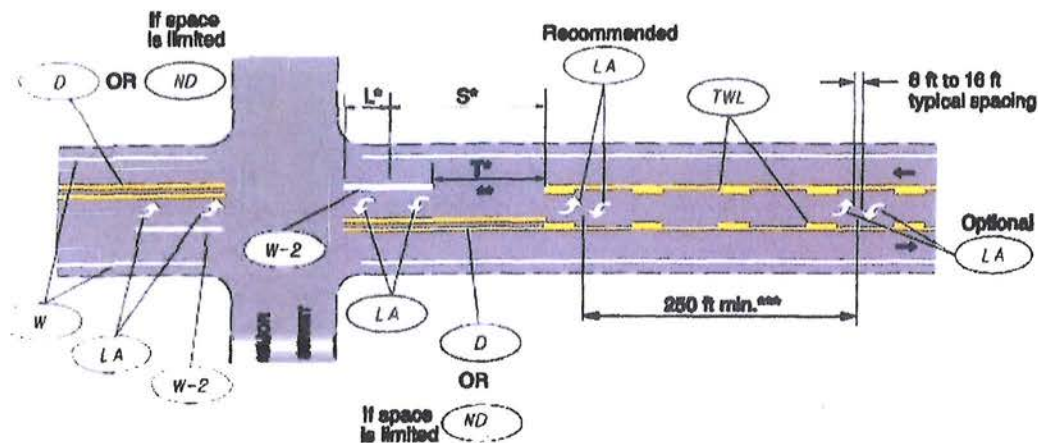
³ "Supplemental traffic counts were conducted at the study intersections in October 2016, while school was in session. The traffic counts were balanced and seasonally adjusted in accordance with the methodologies identified in the ODOT Analysis Procedures Manual (APM) to reflect peak traffic conditions within the study area." (RECONSIDERATION, page 18)

⁴ "The traffic analysis was prepared in accordance with City and ODOT standards and focused on total build-out conditions (i.e. residential homes fully built and occupied). As such, the traffic analysis included typical weekday heavy vehicle traffic captured in the traffic counts. While temporary construction traffic should be considered in the overall development process, it is typically handled as part of a construction management plan that can involve stakeholders." (RECONSIDERATION, page 18)

KIA's assertion that it can account for typical weekday heavy vehicle traffic and ignore the impact of new and atypical construction traffic generated by the development is unconvincing and further illustrates the biased nature of the analysis. The reality is that logging trucks leaving the development site will need to navigate a failing intersection. When was the last time there was this many logging trucks and other heavy machinery coming down Arbor Drive? I contend that a reasonable and neutral person would describe a situation where logging trucks, dump trucks, and other heavy machinery navigating the intersection of Highway 43/Arbor as 'Atypical', 'Irregular', or 'Unusual' traffic. Further, I assert that construction traffic should be considered because, in the real world, this added traffic impacts off-site facilities with each generated trip, in fact, much more than regular traffic.

(2) Restriping Highway 43 to provide a two-way left-turn lane (TWLTL) is insufficient to address increased traffic at an already failing intersection.

The Applicant proposes that, to mitigate the impacts of heavily increased traffic, it will restripe Highway 43 to provide for a two-way left-turn lane. Example below.



- * Refer to Figure 21 for L, S, and T dimensions.
- ** A reversing curve shall be used for crest vertical curves, horizontal curves, and multiple left turn lanes.
- *** Double arrows to be placed at even intervals, proportioned within block. Approx. distance (ft) between each set = 10 x posted speed in mph.

Figure 22b Typical Two-Way Left Turn Lane Layout at Major Intersections

A TWLTL does not come without limitations, especially when applied to a narrow and very busy intersection like Hwy43/Arbor.

The proposed mitigation plan does not meet the Oregon Highway Design Manual standards because it does not provide a continuous two-way left-turn lane and "will likely require Design Exceptions" (ODOT 1, page 4; ODOT 2, page 69). The methodology used to design the mitigation assumes that 100% of motorists will instinctively know how to do a two-stage turn when there is an "acceptable gap" in traffic.

Further, there is insufficient data to show that there will be enough "acceptable gaps" for the proposed mitigation to succeed in its purpose during the peak hours of operation. A simple drive through the intersection during peak hours will illustrate that gaps are extremely limited.

How does the proposed mitigation work when there are vehicles waiting in the turn lane and vehicles waiting to enter Highway 43 from Arbor? What happens when there are vehicles waiting on both sides of Arbor and both Highway turning lanes? These types of situations will happen relatively frequently during peak hours and, while they should result in fewer rear-end collisions, they may result in more turning type accidents due to the unusually high volume of traffic at this intersection. The answer from the accepted methodology is that, due to forecasted optimal use of the two-stage turn, these situations won't impact the level of service and capacity.

What happens to the level of service (LOS) and capacity (v/c) of this intersection if fewer than 100% of motorists instinctively know how to use the TWLTL? What happens during peak traffic hours when traffic is backed up for hundreds of feet north of the intersection and there are no acceptable gaps for long periods of time? I assert that a significant number of motorists will prefer to wait for an adequate gap on both sides of travel instead of attempting a two-stage turn.

I assert that a significant number motorists do not want to make other drivers think "is this person turning in front of me, or will they actually wait?" when attempting a two-stage turn.

In addition, the proposed mitigation plans are also unclear as to which ODOT Traffic Line Manual striping standards will be used. It is logical to assume that different striping plans will impact utilization of the TWLTL. The methodology applied does not allow you to vary the utilization of the TWLTL and is logically flawed or open to different interpretations.

The problem with accepting the proposed mitigation and its underlying assumptions regarding use of two-stage turns is that we cannot test them as variable inputs and check the results. Instead, we must hope that all motorists perform robotic like homogeneous two-stage turns to get real world results to match their model. What is more troubling is that even when you apply these unrealistic assumptions, the intersection barely meets standards and will easily fail if any of the following occur: (1) two-stage turns are not optimally done, (2) KIA incorrectly gathered or incorrectly applied resampled traffic counts (like their first attempt), or (3) regional traffic growth adds more volume than capacity.

A reasonable person would agree that we should not make our current and future problems even worse by adding more Eastbound traffic down Arbor Drive onto Northbound Hwy 43, which leaves the future motorists only once choice, a local street called Upper Midhill Drive.

Proposed Mitigation Impact on Side Streets Facilities

Upper Midhill Dr. is the only side street which provides connectivity to the existing signalized intersection at Highway 43/Marylhurst Dr and public park facilities (Upper Midhill Park) and **is classified as a local street**. The section of Upper Midhill between Arbor Dr. and Marylhurst Dr. measures 16 feet wide in many sections, subjecting users to inadequate **8 feet travel lanes** and **no sidewalks**. The proposed development is projected to generate additional traffic on Upper Midhill Dr. How can a reasonable person construe these existing public facilities as adequate? How can you justify sending more (future demand) trips down this street? Well KIA would have you believe that it is easily justified by ignoring the width of travel lanes and lack of sidewalks and instead focusing on the vehicle trips per day associated with a "local street".

"The streets that connect the proposed development to OR 43 are sufficient to accommodate existing vehicle traffic and traffic generated by the proposed development, particularly the segment of Upper Midhill Drive located north of Arbor Drive and the segment of Arbor Drive located east of Upper Midhill Drive. **As local streets, these streets are designed to accommodate up to 1,500 vehicles per day. With the proposed development, these streets are projected to accommodate less than 900 vehicles per day. Therefore, there is sufficient capacity along the existing street network to accommodate a significant increase in traffic beyond the proposed development.** The segment of Upper Midhill Drive located south of Arbor Drive is narrow; however, as described in a previous response letter, it is sufficient to accommodate existing vehicle traffic and traffic generated by the proposed development, which is expected to be less than 10 vehicles per day, including one vehicle during the morning and one vehicle during the evening peak hour. With the proposed development, this segment of Upper Midhill Drive is projected to accommodate less than 300 vehicles per day." (RECONSIDERATION, page 18)

West Linn Community Development Code 85.200 Approval Criteria defines roadway standards as follows:

"3. Street widths. Street widths shall depend upon which classification of street is proposed. The classifications and required cross sections are established in the adopted TSP.

The following table identifies appropriate street width (curb to curb) in feet for various street classifications. The desirable width shall be required unless the applicant or his or

her engineer can demonstrate that site conditions, topography, or site design require the reduced minimum width. For local streets, a 12-foot travel lane may only be used as a shared local street when the available right-of-way is too narrow to accommodate bike lanes and sidewalks."

City of West Linn Roadway Cross-Section Standards

Street Element	Characteristic	Width/Options
Vehicle Lane Widths (Typical widths)	Minor Arterial	11 - 12 feet
	Collector	10 - 12 feet
	Neighborhood Route	10 - 12 feet
	Local	10 - 12 feet

In addition, there are no sidewalks on Upper Midhill Dr. to provide residents with safe travel to and from the existing park facilities. As a matter of fact, children must walk in the street if they wish to walk from the proposed new development to Upper Midhill Park. Is this adequate?

Sidewalk standards are defined below:

Sidewalks (Typical widths)	Minor Arterial	6 feet, 10 - 12 feet in commercial zones
	Collector	6 feet, 8 feet in commercial zones
	Along Cycle Track	6 feet, 10 - 12 feet in commercial zones
	Neighborhood Route/Local	6 feet (4 - 5 feet in Willamette Historical District), 8 feet in commercial zones

West Linn Community Development Code 85.200 Approval Criteria is very clear in stating that if the purposed development will require access to the signalized location at Highway 43/Marylhurst Dr then adequate public facilities must be available, which is not the case as Upper Midhill Dr. is not "compliant with all applicable standards".

"No tentative subdivision or partition plan shall be approved **unless adequate public facilities will be available to provide service to the partition** or subdivision area prior to final plat approval and the Planning Commission or Planning Director, as applicable, finds that the following standards have been satisfied, or can be satisfied by condition of approval."

It is obvious that public facilities are inadequate to provide for existing or future transportation demand on Upper Midhill Dr. Future trips generated by the proposed development will compound this problem further, maybe not in terms of total volume as opined by KIA and classified by City Code but certainly in terms of pedestrians, cyclists and motorists being forced into sharing a dangerously narrow pathway. Because public facilities are not "compliant with all applicable standards available" and neither the city nor the Applicant have plans to satisfactorily address West Linn Community Code 85.200, the application should be denied.

Proposed Mitigation Impact for Cyclists and Pedestrians

The proposed mitigation will result in further narrowing already narrow bike and pedestrian lanes on Highway 43 to 5 ½' (Application Reconsideration, page 32). The northern leg of the intersection is not wide enough to accept even these widths and will likely need to be narrowed **below 5 feet**, which will require even more **exceptions to safety standards**.

The proposed mitigation is not consistent with the Oregon Highway Design Manual, the West Linn Comprehensive Plan,

The proposed mitigation may increase the risk of serious injury to a pedestrian or cyclist until the long-term facility improvements are in place,

I fully support the efforts taken on behalf of the City of West Linn working in conjunction with ODOT to drastically improve the public facilities available to cyclists and pedestrians. However, the Applicant plan does not provide for adequate transportation facilities to accommodate existing and future cyclist and pedestrian demand.

Summary

There has been a pattern of mistakes that err on the side of the Applicant and I personally question the neutrality of the professionals working on behalf of the Applicant. The Applicant is claiming that we can rely on his expert testimony, but there is reasonable doubt about the neutrality of his experts, if not a clear conflict of interest for certain parties involved and how they interpret "adequate public facilities." If we cannot trust the data used to generate the TIA, we cannot trust the proposed mitigation. When considering the mitigation, we must consider its impact on ALL modes of transportation.

The city should not accept a short-sighted solution from the Applicant if it means compromising on safer facilities for cyclists and pedestrians. There is certainly more room to argue each side, but I believe it is the duty of the council to err on the side of public safety rather than a developer's personal financial gain. I feel confident with more focus, more resources, and further evidence being presented, the threat of a higher density and overall more dangerous plan can be mitigated. We may be in for a long battle that could reach as high as the Oregon Supreme Court. That is ok. I would forever regret not addressing these issues if somebody is tragically injured. I purpose the City deny the application and work with the community and the Applicant on a safer plan that meets both existing and future public facility demand. Here are a few options.

- The Applicant waits for the Multimodal Transportation Project which includes adequate bike and pedestrian facility to be completed.
- Due to the rather high cost for all parties to bring existing facilities up to adequate capacity, it may be in the best interest of all parties to discuss a transfer of ownership of the property from Midhill to the city. I am sure this is not budgeted, but neither is bringing our existing facilities on Upper Midhill Dr. and Arbor Dr. compliant with all applicable standards.
- The city and Midhill enter into conversations to reduce the number of trips generated by the proposed development while bringing facilities up to safety standards.

Thank you,

Jason Harra

17701 Hillside Dr.
West Linn, OR

REFERENCES

RECONSIDERATION (3/1/17)

https://westlinnoregon.gov/sites/default/files/fileattachments/planning/project/10331/2017_03.01_applicants_reconsideration_submittal.pdf

ODOT 1

ODOT Response 4/6/16

https://westlinnoregon.gov/sites/default/files/fileattachments/planning/project/10331/letter_from_odot_and_additional_testimony.pdf

"The mitigation concept as proposed **does not meet ODOT's Highway Design Manual**; the three lane section will have to extend from the proposed northbound Arbor Drive to the existing southbound left-turn lane at Shady Hollow Way, creating a

continues two-way left turn-lane that includes bike and sidewalk along this section of the highway."

ODOT 2

ODOT Response 2/3/17

https://westlinnoregon.gov/sites/default/files/fileattachments/planning/project/10331/2017.03.01_applicants_reconsideration_submittal.pdf

"ODOT supports the proposed mitigation concept to improve mobility standards and address safety issues at this intersection. **However, in order to construct this turn lane to ODOT standards**, Midhill would need to extend the three lane section from Arbor Drive to Shady Hollow Way, creating a continuous two-way left turn-lane that includes bike lanes along this section of the highway."

CDC – West Linn Community Development Code, Chapter 85.200

<http://www.codepublishing.com/OR/WestLinn/CDC/WestLinnCDC85.html#85.200>



May 8, 2017

West Linn City Council
22500 Salamo Road
West Linn, OR 97068

RE: City of West Linn FILE NO. SUB-15-03, WAP-16-03

Greenlight Engineering has been asked by our client, Jason Harra, to evaluate the transportation related impacts of the proposed 34 lot subdivision proposed at 18000 Upper Midhill Drive in West Linn, Oregon. We have completed a review of the application materials and have visited the site. We offer the following comments.

Executive Summary

The application fails to provide the necessary evidence to support approval of the project for the following reasons:

- Highway 43/Arbor Drive interim mitigation is not an improvement for bicyclists, pedestrians, and transit and disabled users
- The traffic impact analysis (TIA) fails to account for the cumulative impacts of approved development in the area
- The TIA's assumed growth rate of 1% per year is not based on evidence
- The TIA fails to provide the raw traffic count data of October 2016 traffic counts

Highway 43/Arbor Drive Interim Mitigation is Not an Improvement for Bicyclists, Pedestrians, and Transit and Disabled Users

The proposed interim improvements at the Highway 43/Arbor Drive intersection are detailed on Figure 9 of Kittelson and Associate's March 1, 2017 letter. The improvements consist of restriping the existing pavement at and around the intersection to allow for the construction of a northbound and southbound two way left turn lane to better accommodate automobile mobility and safety.

Unfortunately, the improvements provide benefits only to automobile mobility and safety, but are a detriment to pedestrian, bicycle, transit and disabled user safety. There has been no discussion or analysis of impacts to these users by the applicant.

There are currently bike lanes on Highway 43 near Arbor Drive with no separate pedestrian facilities. These bicycle facilities are shared by pedestrians, cyclists and transit users. There are bus stops located on the northwest and southeast corners of the intersection. The interim improvement proposal suggests the restriping of bicycle

facilities to 5 ½ feet wide in some locations, significantly narrowing the existing width in several locations to a width below ODOT standard. According to the ODOT Highway Design Manual, the minimum bike lane width along Highway 43 is six feet wide.

On the southeast corner of the intersection, at the location of a Tri-Met bus stop, pedestrians, bikes and transit users will all share a space just 5 ½ feet if the proposed improvement is constructed.

In addition, pedestrians, cyclists, transit users will all need to share a much more narrow space than currently exists and which does not meet standard in order to accommodate the impacts of this proposed development. As there is no identified funding for the ultimate Highway 43 improvement, this situation could exist for many years if the interim improvements are approved for construction.

In their March 1, 2017 letter, Kittelson argues that “[p]edestrians and bicyclists wanting to access OR 43 will be able to continue to use the College Hill Place-Marylcreek Drive connection to the OR 43/Marylbrook Drive intersection, which is served by local transit service”. While that connection does exist, it is wholly inconvenient for most of the existing neighborhood that utilizes the Highway 43/Arbor intersection for pedestrian,

¹ <https://www.access-board.gov/guidelines-and-standards/buildings-and-sites/about-the-ada-standards/ada-standards/chapter-8-special-rooms-spaces-and-elements#810%20Transportation%20Facilities>

bicycle and transit access. This connection is unlikely to be utilized by those destined to the south on Highway 43 or by those that would need to travel out of direction to use this connection nor does it provide any benefit to bicyclists traveling south on Highway 43 as they would still need to travel via the narrowed bike lane on Highway 43.

Section 85.170(B)(2)(e)(1)(C) of the West Linn Community Development Code requires that “[w]hen a Traffic Impact Analysis is required, approval of the development proposal requires satisfaction of the following criteria:

The proposed site design and traffic and circulation design and facilities, for all transportation modes, including any mitigation measures, are designed to:

- (1) Have the least negative impact on all applicable transportation facilities; and
- (2) Accommodate and encourage non-motor vehicular modes of transportation to the extent practicable; and
- (3) Make the most efficient use of land and public facilities as practicable; and
- (4) Provide the most direct, safe and convenient routes practicable between on-site destinations, and between on-site and off-site destinations; and
- (5) Otherwise comply with applicable requirements of the City of West Linn Community Development Code”

The application fails to provide any evaluation of items 1-4 with regard to the impacts of the proposed mitigation at Highway 43/Arbor Drive.

The TIA Fails to Account for Background Traffic

The TIA fails to account for the impacts of several developments in the nearby area that have been approved but are not yet constructed. CDC 02.030 requires “[t]o be adequate, on-site and adjacent facilities must meet City standards, and off-site facilities must have sufficient capacity to (1) meet all existing demands, (2) **satisfy the projected demands from projects with existing land use approvals**, plus the additional demand created by the application, and (3) remain compliant with all applicable standards” (emphasis added).

Nearby projects that would have an impact on the study intersections include:

- Mary's Woods expansion located at Marylhurst to the north of the Highway 43/Arbor intersection
- Shady Hollow Village located to the south of the Highway 43/Arbor intersection

approved development in the area _____ has occurred since the October 2016 traffic counts or will occur along Highway 43.

Additionally, as the TIA assumes a 1% growth/year is applied equally over each of the study intersection movements, the TIA is unreliable as it does not specifically load the study intersections for approved developments appropriately. For instance, while the Highway 43/Marylhurst intersection will experience an increase in _____ weekday PM peak hour due to the Mary's Woods expansion, they are mostly turning movements into and out of the subject driveway. However, the TIA for this subdivision project generally analyzes these extra trips as through movements through the intersection rather than the turning movements that will actually occur.

The TIA's Assumed Growth Rate of 1% Per Year is Not Based on Evidence

On page 3 of their March 1, 2017 letter, Kittelson opines that the assumed 1% growth/year added to the existing counts at the study intersections accounts for all regional and local growth. The assumed 1% growth per year equates to "31 additional vehicles during the weekday PM peak hour." The Kittelson reports fail to provide any information regarding where the assumed 1% growth is derived from.

*Source: ODOT, Transportation Volume Tables

**Source: Key Data Network, May 2017 count

Additionally, the applicant provides no evidence that their assumed build-out year of 2018 is able to be met.

The TIA Fails to Provide October 2016 Traffic Counts

The March 1, 2017 Kittelson letter references traffic counts that were collected in October 2016. However, the letter fails to include evidence of the raw traffic counts nor the calculations that were utilized in seasonally adjusting the raw traffic counts as reported.

Conclusion

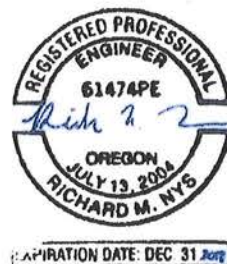
The land use application fails to provide substantial evidence, or in some cases any evidence at all, to support the conclusion that the applicant demonstrated compliance with the transportation related requirements necessary to approve this land use application.

Should you have any questions, feel free to contact me at 503-317-4559.

Sincerely,

Rick Nys

Rick Nys, P.E.
Principal Traffic Engineer



Experience and Experience

I am a Professional Engineer (P.E.) registered in the State of Oregon. I hold a Bachelor of Science degree in Civil Engineering. I have over seventeen years of experience in traffic engineering and transportation planning.