

**WEST LINN CITY COUNCIL
FINAL DECISION AND ORDER
AP-23-02**

**IN THE MATTER OF AN APPEAL OF THE PLANNING MANAGER APPROVAL OF A
WATER RESOURCE AREA, TUALATIN RIVER GREENWAY, AND FLOOD
MANAGEMENT AREA PERMITS FOR TRANSPORTATION IMPROVEMENTS ALONG
FIELDS BRIDGE PARK AT 821 WILLAMETTE FALLS DRIVE (WAP-23-01/WRG-23-
01/FMA-23-01)**

I. Overview

Erich Lais, on behalf of the City of West Linn (Applicant), filed a development review application on January 5, 2023, and it was deemed complete on March 14, 2023. The proposal was a request for Water Resource Area (WRA), Tualatin River Greenway, and Flood Management Area permits to construct street improvements along Fields Bridge Park. The approval criteria for the application are West Linn Community Development Code (CDC) Chapters 11, 13, 27, 28, 32, and 99. Public notice was mailed March 15, 2023 and provided a 20-day comment period before the Planning Manager decision.

The proposal is to construct street improvements on the south side of Willamette Falls Drive adjacent to Fields Bridge Park. The proposed improvements will complement the street improvements to be installed on the north side by the West Linn-Wilsonville School District resulting from the City's approval of the new middle school that is currently under construction. The proposed street improvements would provide increased safety for pedestrians and cyclists along one of the City's busiest minor arterials. The proposed improvements would include grade-separated sidewalks and cycle-tracks to improve safety for all users.

Portions of the proposed street improvements will impact water resource areas associated with riparian wetlands, will impact the 100-year floodplain, and will impact the Tualatin River Greenway in West Linn. These impacts are required to be reviewed and mitigated per Chapters 27, 28, and 32 of the Community Development Code (CDC). The review and decision-making authority is found in CDC Chapter 99.060.A.1.o.,r., and t.

Seven public comments were submitted prior to the deadline, and included the following general concerns:

- The roundabout design was not approved earlier
- Illegal tree removal took place prior to the application
- DSL and USACOE permits should have been required
- An alternatives analysis should have been required

- A pedestrian sidewalk on south side of street is unnecessary
- The TSP does not allow a roundabout on a minor arterial
- The TSP restricts parking on a minor arterial
- The application should have required a Class II Parks Design Review

While some of the comments provided reference to certain provisions within the CDC, none of them identified any criteria applicable to the application which it failed to meet. The Planning Manager approved the application on April 20, 2023, with 15 Conditions of Approval, based on the applicable CDC criteria and the evidence submitted by the Applicant.

On May 4, 2023, Karie Oakes and Teri Cummings (Appellant) filed a timely appeal of the Planning Manager decision in accordance with CDC 99.250. The appeal submittal did not state the grounds for appeal, just that “certain criteria for approval of the permits were not met”.

The appeal hearing was held by the City Council on June 6, 2023. Written testimony was submitted prior to the comment deadline by the Applicant, Appellant, and the public. The meeting commenced with the legal proceedings read by Mayor Bialostosky and the City Attorney, Bill Monahan. Appellant Oakes challenged the impartiality of Councilor Erwin based on Councilor Erwin’s participation as a Planning Commission member in 2021 in a land use action that approved the West-Linn Wilsonville School District proposal for a new school, CUP-21-02. Appellant Cummings challenged the impartiality of all four sitting Council members (Mayor Bialostosky, Council President Baumgardner, Council Erwin, and Councilor Groner) based on the Council’s May 2, 2023 special meeting where Council considered a request by citizens that the City Council call up on its own motion, as permitted by CDC Chapter 99.160.C(2), the Planning Manager’s decision in WAP-23-01/WRG-23-01/FMA-23-01. Council discussed and declined to call-up the Planning Manager decision.

The Council Rules process, prescribed in Section D.1)a., was followed for challenges to the qualifications or impartiality of any councilor to participate in the discussion and decision. Following the Rules, each Councilor was individually given the opportunity to respond to the challenge made against them followed by other members of council voting to accept or deny the challenge lodged against them. Each of the challenges were denied by unanimous vote of the other three members of Council.

After the legal proceedings were complete, Planning Manager Darren Wyss made the staff presentation, followed by oral argument from the Appellant. This was followed by oral argument from the Applicant and then public testimony. Six members of the public commented and expressed general opposition to the application, and support for the appeal. The Applicant then had an opportunity for rebuttal, followed by a sur-rebuttal by the Appellant. The Appellant requested a continuance to respond to the Applicant’s reference to a memorandum submitted into the record by the Applicant’s attorney. The Applicant reserved its right to final oral argument until the continued hearing.

Council passed a motion of continuance that established:

1. The public hearing is continued to a date certain of June 20, 2023, at 6:00pm.
2. Additional evidence in written form can be submitted by 5:00pm on June 13, 2023.
3. Written rebuttal to new information can be submitted by noon on June 20, 2023.
4. No additional public testimony will be taken at the continued hearing.
5. The applicant has the opportunity for final oral rebuttal on June 20, 2023.

Additional written testimony (item 2 above) was submitted by the Applicant, Appellant, and the public within the established deadline. Within the Applicant's additional evidence submitted by June 13, 2023, the Applicant submitted a revised plan showing several small areas where planting for mitigation is proposed in place of one large mitigation area as shown in the initial plans. The revised plans were in response to questions from Council during the June 6, 2023 hearing which resulted in John van Staveren, senior scientist for Pacific Habitat Services (Applicant's Natural Resource Specialist), visiting the site to review whether changes to the plan were warranted. The revised plans were available for written rebuttal until June 20, 2023. The Applicant and Appellant submitted written rebuttal (item 3 above) within the established deadline. The information was provided to Council and entered into the record.

Council held the continued appeal hearing on June 20, 2023. The meeting commenced with the legal proceedings read by Mayor Bialostosky and the City Attorney, Bill Monahan. As part of the legal proceedings, there is an opportunity for anyone to challenge the impartiality of any member of the City Council or any ex parte contacts that took place after the initial hearing of June 6, 2023. Council members were asked whether they had any ex parte contacts to declare since the initial hearing. Council President Mary Baumgardner disclosed that she had an ex parte contact that day with John van Staveren, senior scientist for Pacific Habitat Services (Applicant's Natural Resource Specialist). She stated that the contact did not affect her ability to vote on the matter in an impartial manner and she planned to participate. Appellant Oakes, following the process established in Council Rules Section D. 4), rebutted the substance of Council President Baumgardner's disclosure of her conversation with Mr. van Staveren, and the substance of the contact. Council President Baumgardner added context of her communication as she noted that she called Mr. van Staveren seeking clarification of the map that was included in the record to identify the location of the restoration (mitigation) area. Mayor Bialostosky, following the process in Section D.4), allowed interested parties to rebut the substance of the communication. Ms. Oakes took the opportunity to rebut and asked questions of Council President Baumgardner including asking when the telephone call was made, what map was discussed, what the page numbers are in the exhibits where the maps are found, and who called who. Council President Baumgardner stated that she called Mr. van Staveren as the author of the report and the stated for the record where the documents discussed can be found - the maps are in the packet (pages 5-13 in the submittal packet) for June 13, 2023. After Council President Baumgardner completed her disclosure of the content and substance of the communication for the record, and responded to Ms. Oakes' questions, Ms. Oakes challenged Council President Baumgardner's disclosure and participation in the hearing. The Council Rules process prescribed in Section D.4). was followed. A motion was made to deny the challenge, it was seconded, followed by a vote by the three members of Council (not including the Council

President) to deny the challenge. The challenge was denied so Council President Baumgardner was allowed to continue to participate in the hearing.

The Applicant presented final oral rebuttal. The public hearing was closed, and deliberation proceeded. After discussion, Councilor Erwin made a motion to tentatively deny the appeal with modifications. The motion was seconded by Councilor Groner. Council President Baumgardner requested an additional modification related to a retaining wall design. Council recessed while staff and the City Attorney drafted an additional condition of approval for Council consideration. Councilor Erwin withdrew the motion, and the Applicant was given an opportunity to respond to the new condition of approval. The Applicant did not take issue with the proposed condition of approval.

Councilor Erwin made a motion to tentatively deny the appeal, upholding the Planning Manager decision, with the following modifications:

1. Safety barrier is added along retaining walls that exceed four feet in height; and
2. The on-street parking on Willamette Falls Drive is removed; and
3. Evaluate the design of the built environment (i.e. retaining walls) during the required redesign of the road improvements which will remove on-street parking; and
4. Adopt these conditions as amended and bring back findings on July 10, 2023

Councilor Groner seconded the motion. The motion passed with four votes in favor, and none opposed.

II. The Record

The record was finalized with the submittal of the Applicant's final oral rebuttal on June 20, 2023. The record includes the entire file for WAP-23-01/WRG-23-01/FMA-23-01 and AP-23-02.

III. 120-Day Period

The Applicant extended the 120-day period in ORS 227.178(1) from July 7, 2023, to July 14, 2023, at the June 20, 2023 continued hearing. The City Council final decision was issued within the extended 120-day period.

IV. Scope of Review

The Appellant and Applicant agreed that the scope of the hearing was de novo.

V. Findings of Fact

- 1) The Overview set forth above is true and correct.
- 2) The Applicant is the City of West Linn.
- 3) The Appellant is Karie Oakes and Teri Cummings.
- 4) The Council finds that it has received all information necessary to make a decision based on the agenda reports, appeal application, the Appellant's oral argument, the

Applicant's oral argument, oral argument by the public, and evidence in the whole record.

1. Procedural issues raised in public comment and City Council hearings

- A.** The impartiality of Mayor Bialostosky, Council President Baumgardner, Councilor Erwin, and Councilor Groner was challenged by the Appellant during the June 6, 2023 appeal hearing. The Council followed its established Rules prescribed in Section D.1)a. in the Council Rules and denied each challenge finding that each member of Council was qualified to participate in the hearing and decision.
- B.** The ex parte contact disclosed by Council President Baumgardner and her impartiality was challenged by the Appellant Karie Oakes during the continued hearing on June 20, 2023. The Council followed its established Rules prescribed in Section D.4) to consider the challenge. Council President Mary Baumgardner disclosed that she had an ex parte contact that day with John van Staveren, senior scientist for Pacific Habitat Services (Applicant's Natural Resource Specialist). She stated that the contact did not affect her ability to vote on the matter in an impartial manner and she planned to participate. Appellant Oakes, following the process established in Council Rules Section D. 4), rebutted the substance of Council President Baumgardner's disclosure of her conversation with Mr. van Staveren, and the substance of the contact. Council President Baumgardner added context of her communication as she noted that she called Mr. van Staveren seeking clarification of the map that was included in the record to identify the location of the restoration (mitigation) area. Mayor Bialostosky, following the process in Section D.4), allowed interested parties to rebut the substance of the communication. Ms. Oakes took the opportunity to rebut and asked questions of Council President Baumgardner including asking when the telephone call was made, what map was discussed, what the page numbers are in the exhibits where the maps are found, and who called who. Council President Baumgardner stated that she called Mr. van Staveren as the author of the report and the stated for the record where the documents discussed can be found – the maps are in the packet (pages 5-13 in the submittal packet) for June 13, 2023. After Council President Baumgardner completed her disclosure of the content and substance of the communication for the record, and responded to Ms. Oakes' questions, Ms. Oakes challenged Council President Baumgardner's disclosure and participation in the hearing. The Council Rules process prescribed in Section D.4). was followed. A motion was made to deny the challenge, it was seconded, followed by a vote by the three members of Council (not including the Council President) to deny the challenge. The challenge was denied so Council President Baumgardner was allowed to continue to participate in the hearing. The Council finds that Council President's ex parte contact and disclosure of the contact and substance of the contact were adequate, so the City Council voted to deny the challenge allowing her to participate in the hearing and decision.

- C. The Appellant claimed the community’s substantial rights to participate were prejudiced by staff’s interpretation of the Council’s June 6, 2023 continuance motion to allow only the Applicant and Appellant the right to final written rebuttal by noon on June 20, 2023. The staff interpretation was within a note on process added to the land use development project file for the application, however that statement made at the close of the initial hearing did not place any limits on who had the right to rebut. All persons were provided a full and fair opportunity to submit evidence and argument to the City Council in the de novo hearing process. No community member attempted to submit rebuttal information that was denied, no one made a claim that they were denied the opportunity to submit rebuttal information, and no one asserted that their substantial rights were prejudiced. Instead, only the Appellant made the claim on behalf without identifying anyone who was denied an opportunity to submit rebuttal information. The Appellant had the opportunity to present their final written rebuttal to support the appeal. Therefore, no substantial rights to participate were prejudiced.

2. City Council Findings of Fact Approving the Application and Rejecting the Appeal

City Council hereby adopts the following Findings supporting approval of the Application and rejecting the Appeal based on the Incorporated Findings and the Application’s Substantial Evidence.

- A. The City Council incorporates the Staff Report to the City Council (the “City Council Staff Report”) prepared in advance of the June 6, 2023, appeal hearing, and the Planning Department Power Point presentation (the “Power Point”) presented at the June 6, 2023, appeal hearing.
- B. The City Council incorporates the Planning Manager decision dated April 20, 2023.
- C. The City Council incorporates the Applicant submittals dated June 6, 2023, and June 13, 2023, the Applicant’s Final Written Argument dated June 20, 2023, and the Applicant’s Final Oral Argument at the June 20, 2023 continued hearing, as its supplemental findings of approval.
- D. The above referenced documents are referred to in these supplemental findings as “Incorporated Findings”.

If there is a conflict between these Supplemental Findings and the Incorporated Findings, these findings shall control.

E. Supplemental Findings in Response to the Substantive Appeal Issues

1. The Roundabout

Some objectors claimed the roundabout design at the intersection of Brandon Place and Willamette Falls Drive was not approved and should not have been included with the application. The proposed roadway improvements, including contemplation

of a roundabout at the intersection, were adopted by City Council (Ordinance 1726, August 2021) as part of the West Linn Willamette Falls Drive 2021 Conceptual Design Plan (Plan). The Plan was adopted as Attachment B to the 2016 West Linn Transportation System Plan (TSP). The West Linn Community Development Code (CDC) defines Transportation facilities (Type I) *“are those which are designated in the adopted TSP or are part of an approved, active development order. Type I facilities are permitted uses in all zoning districts”*. The proposed improvements are adopted into the TSP, thus meeting the definition and are permitted outright by CDC Chapters 11.030(8) and 13.030(8). The roundabout design was also included in the approved middle school application as the intersection design (AP-21-02/CUP-21-02/DR-21-04/WRG-21-02/MISC-21-04/VAR-21-01/VAR-21-06/LLA-21-02). A specific condition of approval addressed marked pedestrian crossings/safety at the roundabout in the Planning Commission Final Decision and Order. The Council finds the roundabout is a permitted intersection improvement that was not subject to approval or design review as part of the Applicant’s application for Water Resource Area, Tualatin River Greenway, and Flood Management Area permits.

2. Tree Removal Prior to Filing Application

The Council finds the earlier tree removal was inadvertently authorized by City staff and appropriate mitigation will be undertaken per West Linn Municipal Code requirements. The tree removal did not prejudice the Applicant’s right to submit the application and seek approval of the required permits, nor impact the review of the application under the applicable criteria of the West Linn Community Development Code.

3. Significant Trees

The Council finds the Applicant correctly identified and mapped a significant tree grove associated with the locally significant wetland area. The Applicant correctly identified impacted trees to be removed from the significant and correctly applied CDC Chapter 32 to mitigate the impacts from significant tree removal.

4. Habitat Conservation Areas (HCAs)

The City Council finds that removal of on-street parking areas from the design of the street improvements for Willamette Falls Drive will result in compliance with:

- a. CDC Chapter 28.110.A(2) by narrowing the street improvements and the associated impacts thus resulting in the HCAs being avoided to the greatest degree possible; and
- b. CDC Chapter 28.110(L) by constructing the improvements to the minimum standards. The final improvements will result in the minimum standards for a Minor Arterial that align with the constrained cross-section found in the West Linn Transportation Plan. The constrained cross-section includes six-foot sidewalks and seven-foot cycle tracks on both sides of the street, with 12-foot travel lanes.

5. Mitigation Plan

The City Council finds the Applicant's mitigation plan prepared by Pacific Habitat Services, dated June 13, 2023, complies with applicable criteria in CDC Chapters 32.090 and 32.100. The mitigation plan will provide increased opportunity for plant survival and restoration of degraded habitat areas surrounding the locally significant wetland area of Fields Bridge Park.

6. Safety Issues

Some objectors expressed safety concerns with the roundabout, on-street parking, and retaining walls. The City Council finds the roundabout design and treatments provide adequate safety measures for pedestrians, bicyclists, and motor vehicle traffic. The Council decision removes on-street parking from the design and Council has conditioned the approval to provide safety barriers at all retaining walls exceeding four feet in height.

7. Balanced Cut/Fill in Floodplain

The City Council finds that removal of on-street parking areas from the design of the street improvements for Willamette Falls Drive will result in continued compliance with CDC Chapter 27.070(I). The eastern parking area to be removed required no fill within the flood hazard area. The western parking area to be removed will still require a full regrade of the roadway, including fill in the flood hazard area, to accommodate the design. The applicant has provided substantial evidence in the record that a balanced cut and fill will be achieved.

VI. Conclusion.

For the reasons contained herein, the City Council hereby rejects the appeal, affirms the Planning Manager decision, and approves the Application with the following conditions of approval from the April 20, 2023 Planning Manager Decision, as modified by conditions 16 to 18.

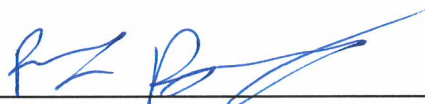
- 1. Site Plan, Elevations, and Narrative. With the exception of modifications required by these conditions, the project shall conform to the submitted plans, elevations, and narrative submitted in Exhibit PD-1.**
- 2. Engineering Standards. All public improvements and facilities associated with the approved site design, including but not limited to street improvements, driveway approaches, curb cuts, utilities, grading, onsite and offsite stormwater, street lighting, easements, easement locations, and connections for future extension of utilities are subject to conformance with the City Municipal Code and Community Development Code. The City may partner with the applicant to fund additional improvements as part of the project.**

3. **Balanced Cut/Fill Report.** The applicant shall provide the City with a stamped report from a certified professional engineer that documents the cubic yards of fill and its location versus the cubic yards of cut and its location. (Staff Finding 14)
4. **Metro HCA Map Revision.** The West Linn Planning Director shall submit the HCA Map Revisions, found in Exhibit PD-1, Plan Sheet 5D, to Metro within 90 days of approval of the project. (Staff Finding 30)
5. **Riparian Area Fencing.** The applicant shall install an anchored chain link fence at the perimeter of the on-site water resource area, per Exhibit PD-1, Plan Sheet LU6.0, for protection of the resource that is not proposed to have direct impacts from the project. The fence shall be installed prior to grading or development and shall remain for the duration of the project. (Staff Finding 53)
6. **Erosion Control Measures.** Full erosion control measures, as approved by the City Engineer, shall be in place prior to any grading, development, or site clearing. (Staff Finding 54)
7. **Pervious Materials.** The applicant shall use pervious materials for all pedestrian and bicycle infrastructure improvements located the “c” and “d” classifications (Exhibit PD-1, Figures 6D to 6H) unless a registered and licensed engineer submits findings demonstrating the pervious materials could not structurally support the axle weight of vehicles or equipment/storage load. (Staff Finding 45)
8. **Revegetation and Mitigation Plantings.** The applicant shall submit a final report documenting the revegetation and mitigation of WRA and HCA impacted areas were completed per Pacific Habitat Services Report dated June 13, 2023 in Applicant’s June 13, 2023 Council Submittal.
9. **Annual Monitoring Reports.** The applicant shall submit an annual monitoring report submitted by December 31st of calendar years 2024 through 2026 that documents planting survival rates. (Staff Finding 99)
10. **Mitigation Financial Surety/Monitoring Report.** In lieu of financial surety, the City, as applicant, shall be responsible for replacement of mitigation plantings within the first three years based on the annual monitoring reports. (Staff Finding 100)
11. **Mitigation Plant Mulching.** The applicant shall mulch new plantings a minimum of three inches in depth and 18 inches in diameter. (Staff Finding 109)

12. **Mitigation Plant Watering.** The applicant shall water new plantings one inch per week between June 15th and October 15th for three years following planting. (Staff Finding 109)
13. **Mitigation Plant Maintenance.** The applicant shall remove or control non-native or noxious vegetation throughout the maintenance period. (Staff Finding 109)
14. **Mitigation Planting Windows.** The applicant shall plant bare root trees between December 1st and February 28th and potted plants between October 15th and April 30th, or as guided by industry best practices. (Staff Finding 109)
15. **Plant Protection Fencing/Sleeves.** The applicant shall use plant sleeves or fencing to protect trees and shrubs against damage to plants, guided by industry best practices. (Staff Finding 109)
16. **Retaining Wall Safety.** Safety barriers shall be added along retaining walls that exceed four feet in height.
17. **On-Street Parking Removal.** The on-street parking on Willamette Falls Drive shall be removed.
18. **Design Evaluation.** Evaluate the design of the built environment (i.e. retaining walls) during the required redesign of the road improvements which will remove on-street parking.

VII. Order

The Council concludes that AP-23-02 is denied. The Council upholds the Planning Manager approval of WAP-23-01/WRG-23-01/FMA-23-01 based upon consideration of the entire Record, Findings of Fact, and Findings above.



RORY BIALOSTOSKY, MAYOR
WEST LINN CITY COUNCIL

7-10-23

DATE

This decision may be appealed to the Land Use Board of Appeals in accordance with the applicable rules and statutes.

Mailed this 11th day of July, 2023.

Therefore, this decision becomes effective at 5 p.m., August 1, 2023.