



## Appeal of Planning Commission Decisions:

## AP 12-02 Water Treatment Plant Expansion

## AP 12-03 Pipeline Project

January 25, 2013







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January 25, 2013

Honorable Mayor Kovash and West Linn City Council Members  
City of West Linn  
22500 Salamo Road  
West Linn, Oregon 97068

Re: Appellant's Final Written Argument

Dear Mayor and Council Members:

This letter represents the Appellant Lake Oswego-Tigard Water Partnership's final written argument. After many public hearings coupled with a few thousand page record before you for review, the time has come for the Council to decide this case. We believe this case is about reliably providing drinking water to meet the needs of over 110,000 citizens living in West Linn, Tigard, and Lake Oswego. Access to clean water was needed in 1980, when the Council approved an expansion of this plant (as it did again in 1988 and 1996). We ask that you make this same finding today, that providing a safe and assured backup water system for the citizens of West Linn is consistent with the "overall needs of the community." CDC 60.070(A)(3).

We urge the Council to look to its code, criteria and the extensive record as the guide for your judgment on our application. The purpose of your code and its criteria is to ensure orderly and beneficial civic development while protecting the interests of applicants to exercise control over their private property. Popular opinion, no matter how vigorously expressed, cannot trump these fundamental interests if that opinion has no basis in demonstrable fact or professional judgment. Simply put, saying a project or its representatives are unpopular or unwelcome is not enough – whether the subject is race, gender, religion, or in this case a water treatment plant and its associated infrastructure.

### **Significant Benefits Provided**

The record has demonstrated our proposed water plant expansion and transmission pipelines will create the following significant benefits to the City of West Linn and its citizens.

- Our proposed expansion was identified as the preferred back up water supply option, and is indeed the cornerstone, of your 2008 Water Supply Master Plan because it offers the most redundancy and lowest cost. This confers overall benefits to the City.



- Partnering with Lake Oswego and Tigard defers or eliminates capital improvement costs that would otherwise drive residential and commercial water rates substantially higher. These savings constitute substantial overall community benefits as well.
- Connecting with and securing access to 53 million gallons of reservoir storage in Lake Oswego and Tigard at no cost to West Linn certainly confers overall community benefits.
- The evidence of professional civil engineers, architects, and landscaping and noise experts has demonstrated this project will provide a more reliable, safe and compatible water treatment and conveyance system. The plant site itself will afford the neighborhood with additional open space. This confers benefits as well.
- The Partnership will provide \$90,000 for the improvement of Mary S. Young Park while the construction of this project will have no impact on the public's ability to access and enjoy the park, as well as Willamette River beaches, public trails, and Cedar Island. This confers benefits to the overall community, and particularly to the Robinwood Neighborhood.
- Creating a new connection between Kenthorpe Way and Mapleton Drive gives students a closer connection to the Cedaroak Elementary School and will improve public safety with a new route for emergency vehicles and first responders. These are benefits to the overall community and particularly to the Robinwood Neighborhood.
- The Partnership agreed to negotiate a utility access fee with the City of West Linn. This could be made a condition of approval. This revenue is an overall benefit to the entire community.
- The City's short-term economy is enhanced by the jobs and temporary benefits of construction activity and its long-term economy is enhanced by the significant improvement in the City's water supply.

The City of West Linn is free to decline these benefits in favor of other but as yet unknown solutions to its water supply problem. Lake Oswego and Tigard, faced with the prospect of an aging plant and transmission infrastructure will look elsewhere to solve their water supply challenges, eventually retiring the Robinwood plant from service. Once this happens there will be no reason for the two cities to maintain the existing intertie with West Linn.

Rejecting the decision of the 2008 City Council to implement the preferred option described in your Water Master Plan that cost effectively addresses your water supply reliability problems means spending hundreds of thousands of dollars and untold hours of Council, staff, and citizen time over the coming years to develop a new plan. Whatever the outcome, however, a new plan will not make the manifest problems of West Linn's water system disappear – it would only recommend more expensive solutions that would provide inferior reliability and take longer to implement. Every West Linn citizen would be forced to shoulder much higher costs if the Partnership's proposal is not approved.

A new water master plan would inevitably include:



- Replacement of existing asbestos pipes underneath neighborhood streets and Highway 43 generating the same construction impacts opponents now claim cannot be adequately mitigated.
- Selection of a new site, in a West Linn neighborhood, for a replacement for the Bolton Reservoir.
- A new water supply pipeline at a cost of \$11.6 million.
- A new backup supply, including connectivity through neighboring jurisdictions, requiring land use and environmental permits and possibly right-of-way impact fees.

### **Conditional Use Criteria Fully Satisfied**

The Partnership's memo of January 7, 2013, provided a detailed point-by-point analysis of the conditional use criteria and comprehensive plan criteria that have been the focus of these proceedings. Our final written argument will not restate that case here. However, included with this submittal are detailed written responses as follows:

Tab 2:

- 2A Responses to legal objections
- 2B Responses to testimony and evidence received on January 14-15, 2013 before the City Council
- 2C Responses to Comprehensive Plan goals and policies and the CDC
- 2D Responses to written testimony submitted by Gary Hitesman on January 21, 2013 before the City Council

This analysis replies to the additional rebuttal materials and demonstrates that all applicable approval criteria are fully satisfied.

Attached as Tab 3 is an issue locator, which sets out those places in the record where particular issues and criteria may be found in our materials. Thus, if seismic or traffic issues are a concern, the Council may find where the applicant has addressed them.

### **Opponents Do Not Represent Majority**

This has been a hard fought battle. There is no doubt that our opponents have been effective but they are not, as presented in the record, the voice of West Linn or even the Robinwood Neighborhood. The record of the Council's proceedings over these past few weeks contains submissions or comments from a total of 113 West Linn residents. Ninety-four of these have been in opposition. While a majority of these opponents live or own property on Mapleton Drive, Kenthorpe Way or Nixon Avenue, it is a minority of residents on these streets who are in opposition to our proposals. With this limited data set we cannot reasonably discern what the majority of residents on these three streets, let alone across the city, would conclude about our project if presented with the facts. What we can reasonably discern from the record is that



opponents have not demonstrated they do either as they offer no credible independent survey data or meaningful testimony for the vast majority of West Linn residents.

The participation data, drawn directly from the record is telling. All anyone can say from the record is this. The silent and vast majority of West Linn's 25,000 residents, even those who live near the plant, have not taken the time to speak on this matter. Therefore they are relying on you, on the city's code, and on reasoned argument, backed by facts, to make a decision in their best interests.

More often than not, public decision-making is about the consequences of choices. The case before you represents just one of these moments.

### **Conclusion**

In closing, we return to three statements made as we began this hearing. "West Linn is at a crossroads," "the status quo – accepting an unreliable water system and the risks to public health and safety is not an option" and "at its core the opposition can be reduced to one statement – the plant should never have been approved – we did not want it then and because of the inconveniences associated with construction, we do not want it now."

All three of these things are well-demonstrated in the record and in the volume of public commentary in the media and in community events.

You and your City are at a crossroads. You can stand by your community code, plans, and forty years of decisions, and a partnership you know works. Or you could devote the next several years looking for what your own staff and experts tell you is a far less certain but vastly more expensive Plan B.

The status quo is not an option – for any of us. All our communities are now dependent upon a disintegrating and vulnerable infrastructure of intakes, pipes, and plants. You could capitalize on an opportunity to make a substantial upgrade to the reliability of your backup water system at no cost to West Linn ratepayers. Or you could bet the safety of your community on faith that no major earthquake will happen and Lake Oswego will continue to operate the decaying infrastructure that your intertie depends upon.

And finally, you can make a decision in the best interests of the City of West Linn and all of its citizens including those who oppose our application. Or you could enshrine "we don't want it" as the governing criteria of your Community Development Code.

The facts and expert testimony we have presented stand unchallenged except by assertions of opinion. It's up to you to choose your water future tonight. More than 100,000 people will live for decades with the consequences of what you decide.



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January 24, 2013  
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You have given our applications a fair hearing. We urge you to carefully weigh the facts and the consequences of your decision, concur with your professional planning and public works staff, and reverse the decision of the Planning Commission.

Sincerely,

Garvey Schubert Barer

By 

Edward J. Sullivan

Enclosures

## APPLICATION RECORD: ISSUES LOCATOR – JANUARY 25, 2013

The application records of both the Water Treatment Plant (WTP) and Finished Water Pipeline and Raw Water Pipeline (RWP/FWP) are extensive. Each application contains an Application Submittal Requirements Locator (Section 20 of the WTP application and Section 22 of the RWP/FWP application). The purpose of those locators was to link application materials to specific code criteria and Comprehensive Plan goals and policies. On September 27, 2012 the Partnership amended the two applications. Page 8 of the submittal package contains a table that identifies each section, page or figure that was amended.

The purpose of this matrix is to help decision makers find materials in the record that were presented or discussed during the City Council hearings. The table is organized around general themes. This Issues Locator does not contain any new evidence.

| Topic   | WTP<br>Location in record <sup>1</sup>   | RWP/FWP<br>Location in record   |
|---|--|---|
| <b>Procedure</b>                              |  |   |
| Waiver of requirements CDC 99.035(B) and (C). | Application Section 4 (Key Issues, Waivers Requested)  | August 7, 2012 Waiver request letter from Eric Day  |
| Withdraw & resubmit applications              | Final Written Argument January 25, 2013  | Responses to testimony and evidence raised before the City Council, 1/25/13)                    |
| Right-of-way fees                             | Responses to testimony and evidence received on January 14-15, 2013 before the City Council;     | Responses to testimony and evidence raised before the City Council, 1/25/13)                    |
| Expert testimony                              | Not Applicable   | Responses to testimony and evidence raised before the City Council, 1/25/13)                    |
| Transportation System Plan                    | Responses to Issues Raised before the City Council, Section I memo (1/22/13)                     | Responses to testimony and evidence raised before the City Council, 1/25/13)                    |
| Comprehensive Plan Policies                   | Application, Section 4; Responses to Comprehensive Plan goals and policies and the CDC (1.25.13) | Application Section 4; Responses to Comprehensive Plan goals and policies and the CDC (1/25/13) |
| <b>Site characteristics</b>                   |  |   |
| Exiting conditions & site analysis            | Application Section 21, Figures 3.0  | Application Section 19. Sheets 1A - 14  |
| Proposed site conditions                      | Application Section 21, Figure 3.0 (1/13/13)   | Application Section 19. Sheets 15-32  |



|                                 |  |  |
|---------------------------------|--|--|
| Pedestrian and auto circulation | Application Section 21, Figure 5.0 (1/13/13)   | Application Section 12 and Section 19, Figure 28   |
| Utilities                       | Application Section 21, Figure 5.0 (1/13/13)   | September 17, 2012 Utility memorandum from Pete Overson; Application Section 19, Figures 15-32   |
| Setbacks                        | Application Section 21, Figure 3.0 (1/13/13)   | Application Section 19, Figures 2-14   |
| Grading                         | Application Section 21, Figure 4.0 (1/13/13)   | Application Section 16; Section 19, Figures 15-27 Fn.1, May 12, 2012 Technical memorandum from Kennedy/Jenks Consultants; Updated Mary S. Young Figures                |
| Lighting                        | Application Section 21, Figure 5.5 (1/13/13)   | Not applicable   |
| <b>Need</b>                     |  |  |
| Intertie                        | Application Section 4 (Narrative), pp. 7-10 (August 20, 2012);                               | Responses to testimony and evidence received on January 14-15, 2013 before the City Council;   |
| Back up water supply            | Responses to testimony and evidence received on January 14-15, 2013 before the City Council; | Responses to testimony and evidence received on January 14-15, 2013 before the City Council;   |
| AC line                         | Not applicable   | Responses to testimony and evidence received on January 14-15, 2013 before the City Council;   |
| Open space                      | Application Section 21, Figure 3.0 (1/13/13)   | Not applicable   |
| M.S. Young Park improvements    | Not applicable   | Responses to testimony and evidence received on January 14-15, 2013 before the City Council;   |
| <b>Construction</b>             |  |  |
| Roads                           | Application changes memorandum, September 27, 2012   | Responses to testimony and evidence received on January 14-15, 2013 before the City Council; Application changes memorandum, September 27, 2012 Application Section 12 |
| Traffic                         | Application changes memorandum, September 27, 2012; Application Section 10                   | Responses to testimony and evidence received on January 14-15, 2013 before the City Council; Application changes memorandum, September 27, 2012                        |

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| Business impact   | Not applicable   | Application changes memorandum, September 27, 2012; Responses to testimony and evidence received on January 14-15, 2013 before the City Council)   |
| Safety and emergency access                             | Responses to Issues Raised before the City Council, Section VI memo (1/22/13); Application changes memorandum, September 27, 2012  | Application changes memorandum, September 27, 2012   |
| WTP Construction  | Application Section 21, Figure 6.0); Application changes memorandum, September 27, 2012  | Not applicable   |
| <b>Operational Health, Safety &amp; Welfare</b>         |  |  |
| Seismic   | Responses to testimony and evidence received on January 14-15, 2013 before the City Council); Application changes memorandum, September 27, 2012; Application Section 17 | Responses to testimony and evidence received on January 14-15, 2013 before the City Council); Application changes memorandum, September 27, 2012; Application Section 9                        |
| Chemicals   | Application Section 4, Key Issues Safety; Section 18, Hazardous Materials Management and Safe Operation Plan   | Not applicable   |
| <b>Natural resources</b>                                |  |  |
| Contours, slopes, drainage shown at one foot intervals. | Application, Section 21, Figure series 2   | Application Section 19, Figures 2-14   |
| Flood Management  | Not applicable   | Application Section 5; Section 19, Figures 12-14 & 25-27; Section 21 FIRM  |
| CDC 28, Willamette & Tualatin River Protections (WTRP)  | Not applicable   | Application Section 4 (Narrative); Section 5 (WRA and HCA memos); Section 19, Figures 25-27; Section 21, HCA map; Section 23; New Issues memo, January 25, 2013; Updated Mary S. Young Figures |
| CDC 32, Water Resource Area Protection (WRAP)           | Not applicable   | Application Section 5 (WRA & HCA memos); Section 7 (Arborist); Section 19, Figures 12- 14 & 25-27; and Section 20 (WL Figures); Section 21, HCA map  |

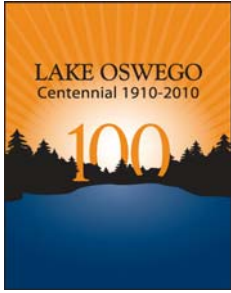
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| Land hazards: Seismic; Landslide areas, Areas having a high erosion potential.   | Responses to testimony and evidence received on January 14-15, 2013 before the City Council; Application changes memorandum, September 27, 2012  | Responses to testimony and evidence received on January 14-15, 2013 before the City Council; Application changes memorandum, September 27, 2012; Application Section 8 (Seismic & Geologic Hazards); Section 9 (Safe Operations); Section 15 (Flood); Section 16 (Grading); Section 17 (Stormwater); Section 20 (WL Figures) |
| CDC 56, Parks & Natural Areas  | Not applicable   | Application Section 4 (Narrative); Section 5 (Revegetation Plan); Section 21 (Figures)   |
| Trees  | Application Section 12 (Arborist); Section 21, Figures 2.0 & 2.5-2.12; Responses to testimony and evidence received on January 14-15, 2013 before the City Council; Application changes memorandum, September 27, 2012 | Application Section 7, Arborist Report; Responses to testimony and evidence received on January 14-15, 2013 before the City Council; Application changes memorandum, September 27, 2012  |
| Type I and II lands  | Not applicable   | Application Section 19, Figures 12, 13 & 14  |
| Applicable Goal 5 Resources  | Not applicable   | Application Section 19, Figures 2-14 and Section 20  |
| <b>Operational Compatibility</b>   |  |  |
| CDC 33, Stormwater Quality; CDC 34, Accessory Structures; CDC 38, Yard Area; CDC 40, Height (Repealed); CDC 42, Clear Vision Areas; CDC 44, Fences; CDC 46, Off-Street Parking, Loading; CDC 48, Access, Egress and Circulation; and CDC 52, Signs | Application Section 4 (Narrative), pp. 96-134 (August 20, 2012); Section 21, Figures 3.0-3.4 (circulation, parking & loading);   | Not applicable, See Application Section 17   |
| CDC 54 CDC, Landscaping.   | Application Section 21, Figures 12.0-12.4; Application changes memorandum, September 27, 2012  | Not applicable   |
| Architectural compatibility  | Responses to written testimony submitted by Gary Hitesman on January 21, 2013 before the City Council; Application Section 4   | Not applicable   |
| Compatibility between adjoining uses, buffering, and screening.  | Application Section 4; Section 21, Figure 12.0A & 13.0A (1/13/13); Responses to written  | Not applicable   |

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|   | testimony submitted by Gary Hitesman on January 21, 2013 before the City Council   |  |
| Engineered noise analysis and plan  | Noise Study Analysis Lake Oswego-Tigard Water Treatment Plant, Environ, August 8, 2012   | Responses to testimony and evidence received on January 14-15, 2013 before the City Council;   |
| <b>CDC 55.100, Design Review</b>  |  |  |
| Public transit  | Not applicable   | Application Section 12   |
| Streets; Transportation plan  | Application Section 21, Figure 7.0 (1/13/13); Section 4; Application changes memorandum, September 27, 2012; Responses to testimony and evidence received on January 14-15, 2013 before the City Council | Application Section 19, Figures 15-27; Application changes memorandum, September 27, 2012      |
| Drainage  | Application Section 21, Figure 6.0 (1/13/13)   | Application Section 17 exemption; Section 19, Figures 15-27                                    |
| Municipal water   | Application Section 16, Preliminary Stormwater Report; Section 21, Figure 5.0 (1/13/13)  | Application Section 19, Figures 15-27  |
| Sanitary sewers   | Application Section 21, Figure 5.0 (1/13/13)   | Application Section 19, Figures 15-27  |
| Solid waste and recycling storage area; Crime prevention and safety/defensible space;   | Application Section 21, Figure 3.0 (1/13/13)   | Not applicable   |
| Provisions for persons with disabilities  | Application Section 21, Figure 3.0 (1/13/13)   | Not applicable   |
| Signs   | Application Section 4  | Not applicable   |
| Utilities   | Application Section 4, Plan policies, Design Review; Section 21, Figures 5.0-5.4   | September 17, 2012 Utility Memorandum from Pete Overson; Application Section 19, Figures 15-27 |
| Refuse and recycling standards; Recycling and solid waste service areas; Special wastes or recyclable materials; Litter receptacles | Application Section 4; Application Section 21, Figure 3.0  | Not applicable   |
| Screening and buffering   | Application Section 4; Application Section 21, Figure 3.0 & 12.0A (1/13/13); December 12, 2012 Technical memorandum from   | Not applicable   |

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|--|---|---|
|  | Greenworks  |   |
| <b>CDC 99.038, Neighborhood coordination</b> | Responses to testimony and evidence received on January 14-14, 2013 before the City Council; LOWTP Meeting Facilitation Project Report, Letter from Greg McKenzie October 3, 2012; Application Section 8, Neighborhood Coordination; Good Neighbor Plan December 19, 2011 | Responses to testimony and evidence received on January 14-14, 2013 before the City Council; LOWTP Meeting Facilitation Project Report, Letter from Greg McKenzie October 3, 2012; Application Section 8, Neighborhood Coordination |

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<sup>1</sup> References to the WTP application sections refer to the amended application dated August 20, 2012.



## CITY OF LAKE OSWEGO

### LAKE OSWEGO TIGARD WATER PARTNERSHIP

4101 Kruse Way  
PO Box 369  
Lake Oswego, OR 97034  
503-697-6502  
[www.lotigardwater.org](http://www.lotigardwater.org)

January 25, 2013

Mr. Zach Pelz  
Associate Planner  
City of West Linn

Subject: AP 12-02 and 12-03: Responses to Comprehensive Plan goals and policies and the CDC

Dear Mr. Pelz:

Opponents have listed a number of Plan (Plan) goals and policies and West Linn Community Development Code (CDC) provisions that they claim are not satisfied by our proposals. In most cases, the opponents provide no explanation for why they consider these goals and policies applicable to our proposals, nor do they provide support for their assertions with facts or evidence sufficient to afford the Council and the Appellant adequate opportunity to respond to them. The Partnership (Applicant/Appellant) responds to these claims here, as we understand them, by either explaining why the Plan goal, policy, or regulation identified does not apply to our proposals or identifying where in the record these Plan policies were addressed.

## I. COMPREHENSIVE PLAN POLICIES

One of the conditional use permit approval criteria, CDC 60.070(A)(7) requires that:

*The use will comply with the applicable policies of the comprehensive plan.*

Opponents provide no greater detail, except for a laundry list, to *explain* why they believe particular goals and policies are not met.

Opponents have suggested that the Appellant has been overly selective in its compliance with the Plan goals and policies, seeking to limit itself to consideration of only the ones that it meets. Not all Plan policies apply; only the “applicable” ones need to be considered. Opponents provide no detail to support their assertion that Plan policies the Appellant has not addressed in fact are “applicable and should have been addressed. Determining which Plan policies apply to our proposals was first articulated by West Linn staff as part of the pre-application process. See for example the pre-application notes for the pipe pages 5-17. From there, the Applicant went through all of the goals and policies and evaluated which ones were applicable in its various staff reports. While it is possible West Linn staff may have omitted applicable Plan policies, the Oregon land use system places the burden on parties to set out and explain why other policies may be applicable – it is not sufficient to assert that other policies apply without an explanation for those assertions.

### **The Council Goals**

The Plan contains a preamble called “Council Goals” adopted in February 5, 2003 that appears before the table of contents page within the Plan. The Plan does not explain the role of these Council Goals but the Introduction portion of the Plan does contain instructions for using the Plan and states:

*The goals and policies contained within this plan have the force of law and the City is obligated to adhere to them in implementing the Plan. Additional information about City goals, policies, and recommended action measures follows.*

**Goal.** *A statement indicating a desired end or aspiration including the direction the City will follow to achieve that end. The City's goals must be consistent with the Statewide Planning Goals.*

**Policy.** *A statement indicating a definitive course of action to implement City goals. A policy may not be the only action the City can take to implement the goals. The City must follow relevant policies when developing other plans or ordinances that affect land use, such as public facility plans, zoning, and development standards.*

**Recommended Action Measure.** *A statement outlining a specific City activity, action, project or standard, which if executed, would implement goals and policies. Recommended action measures also refer to courses of action the City desires other jurisdictions to take regarding specific issues, and help define the relationship the City desires to have with other jurisdictions and agencies in implementing the Comprehensive Plan. These statements are suggestions to City decision-makers as ways to implement the goals and policies. Completion of projects, adoption of standards, or the creation of certain relationships or agreements with other jurisdictions and agencies will depend on a number of factors such as City priorities, finances, and staff availability.*

Nothing in the instructions or the substantive portions of the Plan makes any mention of the 2003 Council Goals contained within the preamble. It is the “Goals and Policies” contained within the substantive portions of the Plan that have the force of law and must be addressed in order to satisfy the conditional use criteria. If the City had intended the 2003 Council Goals to qualify as “applicable policies,” they would have been included within the introductory portions of the Plan as having the force of law and would have been specifically referenced within the substantive portions of the Plan.

At most, many of the Council Goals mirror various goals or policies contained within the Plan that are either addressed in this memorandum or elsewhere. For example, Council Goal #2 requires promotion of citizen involvement and establishment of policies that give neighbors control over their future. Goal 1 Citizen Involvement identifies goals and policies requiring that citizens be allowed to participate in land use proceedings and encourages neighborhoods to adopt neighborhood plans. The pipeline application addresses compliance with Goal 1 goals and policies on p. 30 of the application and the Robinwood Neighborhood goals are addressed on pgs. 48-50. Goal 1 goals and policies are addressed on p. 43 of the amended water treatment plant application and the applicable Robinwood Plan policies are discussed on pgs. 49-51.<sup>1</sup> For the reasons set out above, the Council Goals, if they apply, are met.

**Goal 2, Section 1, Policy 8 (Residential Development)** *New construction and remodeling shall be designed to be compatible with the existing neighborhood through appropriate design and scale.*

**Applicant Response:** Opponents have identified a definition of “compatible” to include “capable of orderly efficient integration and operation with other elements in a system with no modifications or conversion required.” The Applicant has addressed this policy at length in its narrative relating to CDC 60.070(A)(1)(b), requiring that the site size and dimensions be sufficient to provide: “Adequate area for aesthetic design treatment to mitigate any possible adverse effect from the use on surrounding properties and uses.” The Applicant has proposed a design that minimizes building footprint, maximizes open spaces, provides extensive landscape buffering, and structures exhibit residential design details. The Applicant has not sought to vary or modify any of the applicable regulations or Plan policies and has met, and exceeded, the setback requirements for this use. This policy is met.

**Goal 2, Section 1, Policy 8 (Residential Development – Policy)** *Protect residentially zoned areas from the negative impacts of commercial, civic, and mixed-use development, and other potentially incompatible land uses.*

**Applicant Response:** As noted by the Applicant in its presentations to the Council, by allowing major public facilities as a conditional use in the R-10 zone the development code recognizes that this use, including its construction traffic, access, and noise impacts, is not by its nature incompatible with residential uses.<sup>2</sup> The Applicant has gone to great lengths to protect the surrounding residential area from temporary and permanent impacts resulting from the proposed public facilities use including proposing a design that: (1) is only 9% larger than the existing plant, which was deemed compatible in 1980, 1988, and 1996, (2) complies with, and in some cases significantly exceeds, the setback requirements, (3) proposes a design that mimics the surrounding residential design detailing, (4) includes additional landscape buffering that far exceeds the tree replacement standards contained in the code, and provides for construction traffic mitigation. Additional protection is achieved through the mitigation proposed by the Applicant through site and facility design conditions to reduce glare, noise, traffic and other impacts to acceptable levels under the West Linn Development Code criteria, which implements the Plan. We also cite the Rich Farrington testimony to the Council to the effect that if the area were to be subdivided into allowable R-10 sizes for residential use it would be safe to state that the impacts to the neighborhood of the resulting homes would be far greater than the utility use

proposed. In fact, no expert evidence has been identified to suggest that this facility and its connecting pipelines will have any greater construction impacts in terms of traffic, noise, air pollution, or other impact that would be any greater than the development of residential homes. In fact, the post-construction impacts will be significantly less. This policy is met.

**Goal 2, Section 1, Policy 9 (Residential Development – Policy)** *Foster land use planning that emphasizes livability and carrying capacity.*

**Applicant Response:** This Plan policy is directed at city action when it adopts various land use regulations implementing the Plan rather than to the review of particular proposals to determine if they comply with the Plan and code. Cities use their development codes to regulate land use planning and West Linn has done so in this case by determining that major utilities are a conditional use. By following these codes, applicants know the rules by which they will be held accountable. By stipulating that public facilities are a conditional use within the R-10 zone, West Linn has decided that these uses can be made compatible through proper mitigation. The site and facility design conditions foster the planning envisioned under this policy, i.e., to make the proposed uses compatible with the residential area and to provide water service for the neighborhood, city and region, thereby advancing the carrying capacity of each of these areas.<sup>3</sup> Carrying capacity is usually associated with the capacity of land and facilities to accommodate development. In this case, we are providing an element of that carrying capacity itself. Further, the evidence from experienced and qualified civil, transportation, environmental, and geotechnical engineers, architects, landscape architects and planners, representing both the Applicant and the City’s own staff, have concluded that the proposed uses are compatible with values of livability and are supported within the city’s existing infrastructure carrying capacity. Finally, providing a safe and reliable redundant, emergency water source is essential to enhancing the livability of the City. To the extent that this policy applies, it is met.

**Goal 2, Section 3, Goal 4 (Mixed-Use Commercial Development – Policy)** *Protect surrounding residential areas from possible adverse effects such as loss of privacy, noise, lights, and glare.*

**Applicant Response:** This section applies to commercial mixed-use developments. The Background and Findings of this section highlight the small amount of land dedicated to commercial and business development within the city and note that efforts to expand the “employment or shopping opportunities” within the City could alter the “primarily residential character of the City.” The proposed use is not commercial or mixed use. Thus, these sections do not apply. To the extent they do apply, the plant and pipelines will not result in any greater loss of privacy, noise, lights or glare than could be expected to result if the land were developed with residences, which do not have similar design review requirements. See responses to Design Review standards in WTP amended application pgs. 58-90.

**Goal 2, Section 3, Policy 4(e) (Mixed Use Commercial Development – Policy)** *Require that any redevelopment of existing land or buildings be completed in a manner which conforms to the adopted neighborhood plan.*

**Applicant Response:** As noted above, this goal applies to commercial mixed-use developments and does not apply to a major utility use. Additionally, as discussed in pgs 48-50 of the pipeline application, and pgs. 49-52 of the amended plant application, the proposals conform to the Robinwood Neighborhood Plan. Moreover, the pipe applications conform to both the CDC and the applicable neighborhood plans as well.

**Goal 2, Section 3, Policy 4(f) (Mixed Use Commercial Development – Policy)** *Integrates aesthetically pleasing commercial development with residential uses.*

**Goal 2, Section 3, Policy 6 (Mixed Use Commercial Development – Policy)** *Commercial development shall be planned at a scale that relates to its location in the district.*

**Applicant Response:** As explained above, these two policies are not applicable because this is not commercial development. Additionally if they did apply, the plant complies with all height and lot coverage limitations contained within the CDC. The plant has been designed using residential design detailing which works to further break down the scale. The structures have been largely set back from adjacent property lines with substantial landscape screening which again breaks up the massing and make the structure scale compatible with the surrounding residences. For these reasons, these two policies do not apply and to the extent that that the City Council finds that they do apply, they are met.



**Goal 2, Section 4 (Industrial – Background and Findings)** *West Linn does not contain any additional lands suitable for large-scale industrial development. There are no remaining undeveloped areas in the City of at least 10 acres in size, relatively level terrain, adequate public services (particularly transportation), and suitable buffering from the residential development that characterizes most of the City.*

**Applicant Response:** This section is not a City goal or policy, but is a finding directed at areas zoned for industrial development. The Applicant is not proposing an industrial development; therefore this statement does not apply. As noted above, the evidence presented indicates that the transportation system is adequate to accommodate these proposals, both during construction and afterward. See August 20, 2012 WTP application Section 4, pgs. 19-22 and DKS memorandum, Nov. 1, 2012. The landscape buffering proposed exceeds the minimum required by the West Linn Community Development Code and what would be provided if this area was developed for residential uses.

**Goal 6, Section 1 (Air Quality – Background and Findings)** *The primary source of air pollution within the city of West Linn is automobile and truck emissions. At this time there are no known major single (point) sources of air pollution in the city. However, it is important to be aware of existing or future industrial facilities which could be major point.*

**Applicant Response:** This background and findings statement is not a City goal or policy, but is a finding directed at point sources of air pollution. Although it identifies automobile and truck emissions, it sets no quantifiable limits for emissions. “Point source of pollution” is defined in the Comprehensive Plan to mean “A single, discrete facility or other source of air or water pollution such as a smokestack or sewage outfall pipe.” No quantifiable amount of air pollution has been identified as resulting from the operation of this plant or pipelines. As noted above, the proposed use is not an industrial facility, nor is it a point source of pollution. Therefore, these statements do not apply as a criterion for these applications.

**Goal 6, Section 1, Goal (Air Quality – Goal)** *Maintain or improve West Linn’s air quality.*

**Applicant Response:** This Goal contains no standards or limitations as to what is or is not required. As quoted above, a Plan goal is the “desired end or aspiration” that the City wishes to pursue which is implemented by the corresponding policies. The policies addressing air quality discuss coordinating with DEQ and other relevant agencies to reduce air pollution and requiring DEQ air quality permits where appropriate. The policies provide relevant context suggesting that this goal is directed entirely at City-initiated planning activities and where appropriate, encouraging the use of alternative transportation. These proposals will work to minimize vehicular emissions by bussing workers to the construction site. Further, the construction schedule has been condensed as much as possible to minimize the number of trips needed to complete the project. In any event, the project will meet all applicable air quality emission standards. To the extent the policy applies to these applications, this goal is met.

**Goal 6, Section 4, Recommended Action Measures 2 (Noise Control)** *Monitor and enforce conditions of approval for new development related to noise impacts.*

**Applicant Response:** This measure is a recommended action measure, directed at compliance after land use approval is granted and thus has no application to the conditional use approvals currently before the Council. To the extent it does apply, the construction management plan requiring follow-up noise testing along with the conditions identified by staff to ensure that noise impacts remain at or below applicable standards. Moreover, the Applicant has proposed a monitoring system for noise impacts during the construction process as part of its application. This policy is met.

**Goal 7, Goal (Areas Subject to Natural Disasters and Hazards)** *Protect life and property from flood, earthquake, other geological hazards, and terrorist threats or attacks.*

**Applicant Response:** The Applicant has gone to great lengths to prepare an application that thoroughly addresses flood, geologic hazards and homeland security risks to the use and site. The pipeline application addresses this goal at pgs. 37-38. The WTP application addresses seismic safety concerns in Section 4, p. 9 and Section 17. Seismic risks associated with the plant and pipelines have been evaluated by professional geologists and a peer review of those findings as well as an evaluation of the geologic conditions existing on the site have been independently reviewed by qualified experts. These experts have all concluded that the area coupled with construction and operation of a water treatment plan will be safe. The City of Lake Oswego is in full compliance with federal and state guidelines and rules relating to security of water treatment facilities. This goal is met.

**Goal 8, Goal 3 (Parks and Recreation)** *Assure the availability and the reasonable accessibility of recreational lands and facilities to all West Linn residents.*

**Applicant Response:** Installation of the pipeline through the use of horizontal directional drilling will have no effect on the ability of the public to access or use Mary S. Young Park, existing nature trails, Willamette River beaches or Cedar Island. See memo from Edward J. Sullivan dated Jan. 7, 2013, including exhibits. This goal is met.

**Goal 10, Goal 1 (Housing)** *Preserve the character and identity of established neighborhoods.*

**Applicant Response:** Robinwood Neighborhood has included a Lake Oswego owned and operated water treatment plant since 1967. That plant is as much part of the identity of the neighborhood, including the significant landscaping and open space that the plant provides, as the residential neighborhood itself. The design of the site and the plant has accommodated the design features of the neighborhood. As discussed in greater detail above, the character of Robinwood will not be diminished by allowing the construction of a new safer, more aesthetically compatible plant and pipeline. This goal is met.

**Goal 11, Policy 11 (Public Facilities and Services)** *Assure that costs for new infrastructure and the maintenance of existing infrastructure are borne by the respective users except when it is determined that improvements are of benefit to the whole community, or that a different financing mechanism is more appropriate.*

**Applicant Response:** The Applicant has not requested that West Linn contribute any funds to this plant expansion or pipeline upgrade project. Opponents assert that the additional cost will come from additional emergency 911 calls, security, and earthquake drills. This Plan policy is expressly directed to the capital costs associated with installing and maintaining public facility infrastructure. The evidence submitted shows that the City of West Linn will benefit by a more reliable system of backup and emergency water at no cost to the community. No evidence supports a claim that construction or operation of the plant or pipelines will increase the number of emergency service calls or earthquake drills. The Applicant will have to abide by the same safety and emergency response planning obligations set by state and federal law that currently exist and may exist in the future. This policy is met.

**Goal 11, Policy 13(c) (Public Facilities and Services)** *Adopt, maintain, and periodically update, as supporting documents to this Plan, a Public Facilities Plan for the development of public services and facilities in conformance with the policies of the Comprehensive Plan. The Public Facilities Plan shall include a summary. The summary, but not any other part of the Public Facilities Plan, is hereby incorporated as part of this Comprehensive Plan. The Public Facilities Plan Summary shall list the planned water, sewer, storm drainage, and transportation projects by title; shall provide a map or written description of the locations of the projects or their service areas; and shall list the service providers for each project. In establishing the priorities and preparing the CIP, the City will consider the following:*

\* \* \*

*c. The need to equitably distribute the cost based on the benefit received from the facility.*

**Applicant Response:** This policy is directed to city adopted public facilities plans such as the Water Master Plan. The need to distribute cost equitably based upon benefit from the facility is an issue that City's conform to when developing its Capital Improvement Plans (CIP's) or its Water Master Plan. This policy does not apply since no plan adoption is proposed. Additionally, the benefit to West Linn's waster system that it will receive will be at no cost to the City of West Linn, which is about as equitable of a distribution as there can be. To the extent it applies, this policy is met.

**Goal 11, Section 8, Policies 2-4 (Private Utilities and Telecommunications)** *Require that new development be served by underground facilities. Encourage undergrounding of existing facilities. Require utilities to remove abandoned facilities.*

**Applicant Response:** This section applies to private utilities and telecommunications. The Partnership is a joint effort of two municipalities and thus, this section does not apply. The Plan policies were also addressed in the Applicant's pipeline application on pg. 43 noting that the pipeline will be installed underground. Staff has included a condition of approval requiring the removal of abandoned pipelines and the Applicant will comply with that condition. As for electrical and telephone lines, this provision requires the undergrounding of new connections but contains more permissive language when it comes to existing electrical utilities. Thus, the existing overhead electrical and telecommunications along Mapleton and Kenthorpe do not need to be undergrounded to comply with this standard. Moreover, to avoid the inconvenience associated with piecemeal undergrounding efforts, the City allows for a payment of a fee in-lieu-of undergrounding. The Partnership will pay this fee. See WTP amended application p. 50. These policies are met.

## II. ROBINWOOD NEIGHBORHOOD PLAN

Opponents raised a number of neighborhood plan policies and this section and elsewhere in this response explains where these provisions were addressed in other documents or were met.

**Goal and Policy 1.1** *Provide a continuous bike lane along Willamette Drive.*

**Applicant Response:** The Applicant is proposing to repave disturbed road surfaces along Willamette Drive. As there is not a current bike lane along the disturbed portions of the roadway, the construction of a new bike lane has not been a requirement of the City of West Linn. Hwy 43 improvements, such as a bike lane could be made by the City of West Linn from the right-of-way licensing payment.

**Goal and Policy 1.3** *Beautify the length of Willamette Drive with a comprehensive and consistent streetscape.*

**Applicant Response:** The Applicant is proposing to repave disturbed road surfaces along Willamette Drive. The City of West Linn is not requiring the Applicant to develop and implement a comprehensive and consistent streetscape in this area. Hwy 43 improvements, such as a comprehensive and consistent streetscape could be made by the City of West Linn from the right-of-way licensing payment.

**Goal and Policy 1.4** *Provide a continuous bike lane along Willamette Drive.*

**Applicant Response:** The Applicant is proposing to repave disturbed road surfaces along Willamette Drive. As there is not a current bike lane along the disturbed portions of the roadway, the construction of a new bike lane has not been a requirement of the City of West Linn. Hwy 43 improvements, such as a bike lane could be made by the City of West Linn from the right-of-way licensing payment.

**Goal and Policy 3.3** *Provide appropriate pedestrian facilities along residential streets.*

**Applicant Response:** The action measures require providing sidewalks on streets near Cedaroak Elementary School as well as leading to and from Robinwood Main Street area. This proposal will provide a north – south connection through the plant site providing a more direct connection to Cedaroak Elementary from Mapleton. Further, the Applicant proposes to contribute to the city's overall sidewalk connectivity by providing sidewalks along both its Mapleton and Kenthorpe frontages. This policy was also addressed in the amended plant application at pg. 49 and the pipeline application at p.48. This policy is met.

**Goal and Policy 3.4** *Implement "green street" concepts for residential streets.*

**Applicant Response:** This Plan policy is addressed in the amended plant application at pgs. 49-50 and in the pipeline application at pgs. 48-49. An implementing measure requires the undergrounding of utilities along residential streets. As noted in the discussion of the Goal 11 Plan policy above, all piping will be placed underground. This policy is met.

**Goal and Policy 3.5** *Protect existing single-family neighborhoods from over-sized infill residences and neighboring commercial development.*

**Applicant Response:** A corresponding action item prohibits locating "commercial development" that places "unacceptable impacts" such as "traffic, noise, lighting, and building bulk upon existing residential neighborhoods." As explained above, this proposal is for a utility that is not a commercial development. As explained elsewhere, this plant will be compatible with the surrounding residential neighborhood. This policy does not apply to these applications.

**Goal and Policy 3.9** *Ensure that the Lake Oswego Water Treatment Facility on Kenthorpe Drive remains compatible with the surrounding residential areas and provides benefits to Robinwood's residents as well as those of Lake Oswego.*

**Applicant Response:** This policy is addressed in the amended plant application at pgs. 7-10 and 50-51. This policy is met.

## III. COMMUNITY DEVELOPMENT CODE STANDARDS

**104.020 Land Use Policy.** *From the effective date of the ordinance codified in this chapter, the West Linn Comprehensive Plan shall serve as the land use policy for the City, and shall govern the exercise of the planning and zoning responsibilities of the City thereafter.*

**Applicant Response:** The Applicant concedes that the “applicable comprehensive plan policies” are applicable to these two proposals through the conditional use criterion CDC 60.070(A)(7). The Applicant has addressed these applicable policies in its applications and in this memorandum. This code standard is met.

**106.010 Provisions of This Code Declared to be Minimum Requirements.** *In their interpretation and application, the provisions of this code shall be held to be minimum requirements, adopted for the protection of the public health, safety, and general welfare. Wherever the requirements of this code are at variance with other provisions of this code, or with the requirements of any other adopted City rules, regulations, or ordinances, the most restrictive or that imposing the higher standards shall govern.*

**Applicant Response:** This provision contained within the Enforcement section of the code provides that where a code provision conflicts with another code provision, city rule or other regulation, the more restrictive code standard shall apply. Opponents do not identify any code sections that they claim conflict with other standards. Rather, opponents would prefer the City Council use the terms “public health, safety, and general welfare” to create new heightened standards to which the Applicant must comply. However, the fixed goal post rule requires that the city apply only the regulations that are in effect when an application was filed. The terms “public health, safety and general welfare” cannot be interpreted to authorize the City to impose additional restrictions that are not contained within the applicable provisions of the adopted CDC or Comprehensive Plan. This code standard is met.

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1. If the Council should conclude that the City Council Goals from 2003 do apply, these standards mimic other plan policies that the Applicant has addressed either in this memo or elsewhere:

1. *Maintain and protect West Linn's quality of life and livability.* See responses to Goal 2, Section 1, Policy 9.

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6. *Promote land use policies, both locally and regionally, that are based on the concepts of sustainability, carrying capacity, and environmental quality.* See responses to Goal 2, Section 1, Policy 9.

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9. *Oppose urbanization of the Stafford Triangle and pursue policies that would permanently retain that area as a rural buffer between West Linn and neighboring communities.* See Jan. 7, 2013 response by the Applicant.

10. *Pursue City policies predicated on the assumption that growth should pay 100% of the cost impacts it creates.* See discussion of Goal 11, Policy 11.

11. *Assert through both planning and policy that compatibility with existing development should be a primary goal in West Linn's land use process.* See responses addressing Comprehensive Plan Goal 2, Section 3, Policy 6 and Robinwood Plan Goal and Policy 3.9

2. "Conditional Use" is defined in the Plan to include: "A proposed use of land which may be allowed after the City Planning Commission has determined that the proposed use is appropriate for the site, compatible with surrounding uses, is supported by City public facilities, and is of overall benefit to the community and meets all other relevant criteria." Utilities, major, are conditional uses in all zones affected by the plant and pipeline project. See CDC 11.060(9), CDC 14.060(14), and CDC 19.060(1).

3. "Carrying capacity" is defined in the Plan as:

*The level of use that can be accommodated and sustained with unacceptable damage to the environment, including air, land, and water quality, the transportation network, storm water management and overall quality of life.*



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January 25, 2013

Honorable Mayor Kovash and West Linn City Council  
City of West Linn  
22500 Salamo Road, #1000  
West Linn, Oregon 97068

Re: Responses to Legal Objections

Dear Mayor Kovash and Councilors:

This letter responds to certain legal issues presented orally and in writing, most particularly those raised by the two attorneys, Andrew Stamp and Jack Orchard, who testified before the City Council opposing these projects. These responses are based entirely on facts already contained within the record. In sum, these attorneys ask that you adopt different interpretations than what the plain language of the West Linn Community Development Code (CDC) and Comprehensive Plan require and to go beyond interpretations that the City had a practice of consistently applying before this case arose.

The Lake Oswego Tigard Water Partnership (Partnership or Appellant) asks that you reject these invitations by focusing on the fact that the provision public utilities are a unique type of use – they are by their nature connective, rather than insular, uses. The facilities and lines must be seen as a whole, instead of their discrete parts, in evaluating them in land use proceedings. The City's Water System Master Plan, testimony from a number of nearby water district personal and the Partnership experts all explained that a more reliable system is one containing multiple connections creating redundancies. Unlike a church, a school, or a police station that can operate as a discrete stand-alone unit, a water system must connect users together and as such, the impacts and the benefits will be more diffuse. The desire to create redundancies often results in imposing construction impacts on those who do not receive roughly proportional benefits. The CDC regulations and the plan policies acknowledge these exceptional circumstances in a number of ways, as discussed in greater detail below. The Partnership's plant and pipeline proposal satisfies these criteria and policies.

### **Changes to the Application Do Not Require Resubmittal**

The attorneys argue that revisions to the plant application amounts to a new conditional use application requiring that the City Council remand the matter to the Planning Commission for its consideration. Mr. Orchard claims that the Partnership has used its appeal to modify its proposal as a means to avoid the Planning Commission's review. However, the *removal* of the existing



Operations Building, and the *reduction* of the overall lot coverage and related construction impacts, resulted in very little change to the buildings proposed and ultimately the plant proposal remains even more consistent with the CDC 55 Design Review criteria.

The materials surface of the Administration/Operations Building has not changed.<sup>1</sup> Although the new combined Administration/Operations Building will be 34 feet tall and not 29 feet tall as reviewed by the Planning Commission, the existing Operation Building is 35 feet tall and the height limit within the R-10 zoning district is also 35 feet. Thus the height compatibility standard is satisfied. All of the architectural detailing on each elevation remains the same except for the North (Kenthorpe Way side) which will now include an architectural security wall, 9' 6" high that will extend between the eastern drive lane and the new Administration/Operations Building.<sup>2</sup> This is the same type of security wall reviewed by the Planning Commission. Additional landscaping between the security wall and the visitor parking lot will soften and, when mature, obscure the visual impact of the security wall.<sup>3</sup> These design changes are minor, do not alter any finding of compliance with applicable Design Review standards and neither attorney identifies any particular design standard that is not met to challenge the conclusion of staff and the applicant that the design criteria were met in the original application and are also met with the changes made to reduce impacts as set out in the current proposal before Council.

Rather, Mr. Orchard points to CDC 99.290(C), a permissive authorization for the City Council to remand a decision to the Planning Commission.<sup>4</sup> No party disputes that the City Council has this authority but it need not, and in this case, it cannot remand the decision and still satisfy its obligations under CDC 99.290(A) to act upon an appeal within 120 days or within the time extensions consented to by the Partnership.

Moreover, any changes to an application occurring during the proceedings is allowed so long as the parties have the opportunity to review and respond, and submit responsive testimony and, potentially, new evidence, regarding whether given the nature of the change the remaining

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<sup>1</sup> Figure 10.3. of December 10, 2012 Applicant submittal.

<sup>2</sup> Figure 10.0.

<sup>3</sup> Figure 12.0A.

<sup>4</sup> CDC 99.290(C) provides:

The approval authority may remand the matter if it is not satisfied that testimony or other evidence could not have been presented or was not available at the hearing. In deciding to remand the matter, the approval authority shall consider and make findings and conclusions regarding:

1. The prejudice to parties;
2. The convenience or availability of evidence at the time of the initial hearing;
3. The surprise to opposing parties;
4. The date notice was given to other parties as to an attempt to admit; or
5. The competency, relevancy, and materiality of the proposed testimony or other evidence.



elements of the application continue to comply with applicable approval criteria. *Conte v. City of Eugene*, \_\_\_\_ Or LUBA \_\_\_\_ (LUBA No. 2012-039, October 11, 2012). The Appellant revised the application in response to objections raised by the Planning Commission and submitted its amended application as part of its appeal in early December 2012. All parties had an opportunity to review the revised application and submit new evidence in response. No party is prejudiced by being denied a full and fair opportunity to review and comment on these proposed revisions.

Any claim that it is the Planning Commission that must impose conditions of approval in reviewing conditional use proposals per CDC 60.070(C) fails to understand that the Planning Commission is appointed pursuant to the Council's authority and has only those powers expressly delegated by the Council. City Charter 2.085. Thus, any act delegated to the Planning Commission by the City Council may be revised by the City Council in conformance with the requirements of the CDC, including the imposition of conditions. For these reasons, the Council need not remand this matter for further review by the Planning Commission.

### **The Current Site is Used as a Water Treatment Plant and the Proposal is to Expand the Existing Water Treatment Plant Use**

The attorneys and others have argued that this project represents a new proposal and it is not a restoration or expansion of an existing plant. Mr. Orchard argues that the project must be subject to the standards in place for new development.

The distinction between a new proposal and a restoration or expansion has no significance within the applicable code or plan policies. The site is currently used for a water treatment plant and it will continue to be used as a water treatment plant. The Appellant has not availed itself of any non-conforming use protections. Vacant land within the Robinwood Neighborhood or other R-10 zone could be put to any major utility use if the conditional use criteria of CDC 60.070 are satisfied. Thus, whether viewed as an expansion, restoration, or as new construction, the relevant inquiry is still community need, compatibility, and appropriateness for the site. In 2008, the Robinwood Neighborhood Plan concluded that the existing treatment plant was compatible with the surrounding residential areas and no testimony was presented during these proceedings that the existing plant is not currently compatible. Thus, if the current plant is compatible, the closer the new proposal can mimic the existing facility in terms of building size, design, location, and off-site impacts, the more likely the new proposal is compatible with the neighborhood. It is for this reason that the Appellant has consistently highlighted the minimal 9% increase in overall lot coverage, a design that emphasize residential-character detailing, locating the buildings as far away from neighboring properties as possible, and the reduction of construction impacts.

### **“Utilities, Major” as a Conditional Use**

Mr. Stamp is correct that conditional uses represent a “grey area” in which if the impacts from the proposed use are too intensive and cannot be adequately mitigated, it may be denied. The same is true of the conditional use permits before you on appeal.





However, what Mr. Stamp and Mr. Orchard fail to acknowledge is that the “utility, major” use is the only use defined in the CDC that includes within its scope construction activities, that have “a significant impact on the surrounding uses or the community in terms of generating or disrupting traffic, interfering with access to adjacent properties, creating noise or causing adverse visual effects.” No other category of conditional uses in the CDC characterizes that use as one having a “significant impact.” In other words, if the proposed water plant did not have a significant impact, it would not qualify as a major utility and not be subject to the Conditional Use requirements. The plant would be permitted outright as a minor utility. Impacts, even significant ones, are contemplated to occur as part of the use. This reading is consistent with Mr. Stamp’s assertion, that the drafters of the CDC wanted to give themselves as much flexibility as possible in allowing major utilities in all zones so rather than limiting the use based solely on the impacts, as would be the case considering whether the impacts from a 200 person church may be minimal compared to a 1000 person church, the impacts resulting from a major utility use are not only significant, they are presumed. As such, the focus of the inquiry must shift away from whether or how significant the impacts are to whether the mitigation is sufficient.

This is not to say that the impacts need not be mitigated; however they need not be completely eliminated in order to grant the request. Conditional Use criterion, CDC 60.070(A)(1)(b) requires that the proposal *mitigate* adverse impacts through a variety of aesthetic treatments. CDC 60.070(C)(2) authorizes the imposition of conditions to *minimize* environmental impacts through various design treatments.

Through a detailed construction management plan, a business promotion plan, extensive landscaping including overplanting of trees, fencing and substantial setbacks from abutting properties, publically accessible open space on the Mapleton side of the plant, a pipeline that is directionally drilled to avoid natural resource impacts near the river and in Mary S. Young Park, a commitment to conduct regular community meetings and to retain the services of an ombudsman, all required through conditions of approval, the temporary construction impacts will be mitigated and minimized to a level that exceed industry standards.<sup>5</sup>

### **The Role of Precedent**

Mr. Stamp argues that the City Council is not bound by previous interpretations of the same code provisions and thus is free to adopt a new interpretation. Again, the Appellants agree with Mr. Stamp’s assertion as far as it goes, but Mr. Stamp fails to say is that although the City Council has broad interpretive discretion, that interpretive discretion is not unlimited. Interpretations, once given, remain the policy of the city unless an adequate rationale is presented for departing or discarding it. *Holland v. City of Cannon Beach*, 154 Or App 455, 962 P2d 701 (1998).

The Planning Commission’s decision adds a whole host of unexplained new interpretations into the mix.<sup>6</sup> For example, the number of people testifying in opposition to a project could lead to a

<sup>5</sup>

Bill Hawkins, CH2MHill Construction Management Plan, Ex. D to Partnership Jan. 7, 2013 submittal.



finding that the project does not adequately benefit the community regardless of its merits. Although this approach may be appropriate in the legislative context, it is not appropriate for a quasi-judicial proceeding where compliance is not based on a popularity contest. Neither is community benefit gauged entirely on whether there is a perceived need for the use based on testimony of nearby property owners who may not like that use. A private applicant desiring to open a day care center that caters to children with special needs would be prohibited unless the center served primarily special needs children from West Linn. Nor may an application be evaluated more stringently depending on the amount of benefit to the immediate vicinity. As a practical matter, how would the City enforce such a condition in any event? Imagine a church approval with a condition that more than 50 percent of the parishioners must be residents of West Linn. These interpretations lead to absurd results undermining a system premised on obtaining land use approvals based on standards that are knowable at the outset and consistently applied.

The Partnership's point about precedent is not that the Council does not have the power to make a new interpretation but that the basis for adopting a new interpretation must be explained and that it could be used to prevent other public utilities and services that help others, while at the same time, helping West Linn. One of the foundations of land use planning is providing a system where everyone knows what is required to comply with the rules. A more predictable and reliable way to identify the needs of the community would be to rely on the West Linn Water Master Plan, a support document for the City's Comprehensive Plan, intended to identify West Linn's water needs and objectives for the long term. This Plan explains the importance of maintaining the regional connectivity provided by the existing intertie and the emergency supply of water the Partnership wishes to provide. This proposal furthers that objective.

### **The Needs of the Community**

Mr. Stamp goes on to say that the most important thing is avoiding a precedent that other jurisdictions are entitled to site their major utilities outside of their own boundaries. This statement suggests that it is the ends and not the means that is driving the opponents' preferred interpretation. Try as they might, this interpretation is inconsistent with the plain language of the "needs" criterion and not plausible. The South Fork Water District treatment plant which serves as the primary water source for the City of West Linn is located in a residential zone in the City of Oregon City. A 54-inch diameter pipe on SW 109<sup>th</sup> and 110<sup>th</sup> in Beaverton serves the Tualatin Valley Water District rather than Beaverton and a 60-inch pipe on SE Ellis, SE Rex, SE 49<sup>th</sup>, SE

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<sup>6</sup> Mr. Stamp asserts that these new interpretations find their roots in the scale of impacts proposed. There is no support in the record for such a conclusion. Rather, as the Community Need Comparison, Exhibit H to the Partnership's Jan. 7, 2013 proposal shows, construction of Trillium Creek Elementary School represented a comparably sized building, presumably with comparable construction impacts, where the school will serve Stafford students as well as students from West Linn.



Raymond and SE 59<sup>th</sup> in Portland also serves the Tualatin Valley Water District rather than Portland.<sup>7</sup>

CDC 60.070(A)(3) requires a finding that “the granting of the proposal will provide for a facility that is consistent with the overall needs of the community.” The Planning Commission’s interpretation focused on the term “community” interpreting it to mean primarily benefiting the citizens of West Linn. Mr. Stamp argues that “community” should be interpreted more narrowly in that “community” means those Highway 43 businesses and Robinwood residents most directly affected by the construction impacts. Both of these interpretations overlook the express language of the provision requiring only that the facility is “consistent with the *overall* needs of the community.” The “overall” needs of the community must look at what is in the best interest of the community as a whole. This term does not suggest any *exclusivity* of necessity such that a use cannot serve the needs of West Linn while also serving the needs of Lake Oswego and Tigard, in addition to those of West Linn.

The Planning Commission interpreted the term “overall needs” to mean that the conferred benefit must remain in perpetuity, for the life of the project. New pipelines and a plant enhance the existing interconnectivity that is seismically secure. The Partnership has made representations through its proposed intergovernmental agreement, something that could be incorporated as a condition of approval, that the Partnership will provide a back-up supply of 4 million gallons per day to West Linn at no cost for the next 30 years. This is an undeniable benefit when Lake Oswego has acknowledged throughout this process that it may not be able to provide West Linn with any emergency water unless the Partnership is allowed to expand its production of finished water.

Further, this language does not appear to place any special significance in terms of benefit offsetting for those residents who might bear a greater burden in terms of construction impacts. Mr. Stamp, Mr. Orchard as well as the Planning Commission, proffer an interpretation that determining “need” requires “a balancing between the degree of impact versus the amount of benefit.” However, this type of *quid pro quo* is not found in the language of the applicable criteria. As noted above, such an interpretation would act to remove the “overall” language out of the standard entirely that requires consideration of the community as a whole.

Second, such an interpretation conflates the “community need” inquiry of CDC 6.070(A)(3) with the compatibility criteria of CDC 60.070(1) and (A)(2) along with the Robinwood Neighborhood Plan benefit provision of Goal 3.9 to require overall net benefit that is not found on the face of the Code or the Plan and does not fit the engineering and geographic realities of siting major utility systems that again must be connected to each other.

The conditional use and plan criteria make no mention of balancing impacts against benefits. There is no indication that these criteria were to be read together. CDC 60.070(1), the overall

<sup>7</sup>

See the Partnership’s Powerpoint presentation dated October 25, 2012.



community need standard, is satisfied by a finding that this proposal will work to provide clean water to the citizens of West Linn. The compatibility and suitability criteria of CDC 60.070(1) and (A)(2) are satisfied by construction management plan and a business promotion plan that will mitigate impacts and a building and site design that is compatible with the surrounding residences and maximizes open space. The benefits for Robinwood neighborhood include, among other things, a new pedestrian trail through the site, the beginning of sidewalk connectivity through the neighborhood, and improvements to Mary S. Young Park. Compliance with these standards does not import any sort of equivalence amid the various criteria.

Public services, and especially utilities that must connect creating a network, will very rarely satisfy the sliding scale of impacts against benefits that the Planning Commission proposed and the attorneys endorse. Unless every person is going to have their own water, electricity and heat source serving only their individual houses and businesses, an absurd but logical result of the Planning Commission's decision, some are going to have to shoulder a greater burden at some times so that others in the community or even the region may benefit from sharing together in a well-connected, redundant utility system. Anything that an applicant does to lessen that impact will be viewed by those impacted as nothing less than mitigation because they will still shoulder the inconvenience resulting from construction. This is the nature of living in a city where utilities and services interconnect and they are most often located in areas that are most developed. For example, Highway 43 is a state highway connecting the business core of Lake Oswego, West Linn and Oregon City. If one city proceeds with any public improvement, it is likely to reverberate through all of the businesses along this corridor. Consider that the construction of a future Bolton Reservoir will impact the immediate neighbors of the facility more than others in more distant parts of the City but these neighbors will not realize any greater benefit to offset the impact, other than having clean water.

### **The Site is Suitable for a Water Treatment Plant and Compatible with the Surrounding Residential Neighborhood**

The Planning Commission concluded that the site was not suitable due to potential for seismically induced liquefaction and lateral spreading of soils causing slope failure. In response, the applicant obtain two independent peer review evaluations. Professor Scott Burns of Portland State University concluded that the evidence of landslides in the area occurred as part of the Missoula Floods, approximately 15,000 calendar years ago and has endured a substantial number of earthquakes since. A small historic landslide to the east of the plant occurred as the result of heavy rainfall in 1996, resulting in a slide of less than 200 cubic yards of material. These less than 200 cubic yard slides occur often, as some opponents noted in their testimony, but such events will not affect the pipeline or treatment plant.<sup>8</sup> Dr. Steven Dickenson of New Albion Geotechnical, Inc. reviewed the liquefaction and lateral spreading studies concluding that ground displacements have been well identified and will be appropriately mitigated. No party challenged these conclusions.

<sup>8</sup>

Exhibit C to Partnership's letter of Jan. 7, 2013.



### **The Applicable Comprehensive Plan Policies are Satisfied**

The Planning Commission concluded that this proposal was inconsistent with Goal 2, Section 1, Policy 8 of the Comprehensive Plan which provides: “Protect residentially zoned areas from the negative impacts of ...other potentially incompatible uses.” The Planning Commission concluded that the temporary 32-month construction period and the permanent scale, design and operational scope of the plant would not be compatible.

Before the Planning Commission, the Partnership proposed a consolidated site design that resulted in a 12% increase in the overall footprint of structures. The Partnership is now proposing to remove the operations building, reducing the overall footprint by an additional 3%. The net result is a plant footprint that is approximately only 9% larger than the existing plant. This change also reduces overall construction duration from 32 months to 28 months. Inconveniences to pedestrians and vehicles travelling or accessing properties along Mapleton Drive will extend for only a three-month period rather than 32-months as the Planning Commission found. The current plant design is sterile, cold, and institutional in appearance, which the neighbors have testified, and earlier West Linn decisions found, is compatible with the neighborhood. The proposed design is much softer, incorporating residential design elements and materials.

All of the qualified expert testimony submitted into the record, coupled with the Partnership’s long-standing record for safe operations at this site, suggests that all industry-standard safety precautions will be taken in terms of the use of chemicals; pipe removal, installation, facility upgrades, and operation will be done in a way that protects the neighbors as well as their property.

The Planning Commission identified Council Goals 1,2, 6 and 11 as part of its basis for denial. Responses to these particular objections are identified within Tab 2(2C) Responses to Comprehensive Plan Goals and Policies and the CDC and are not restated here.

### **Limits to Highway 43 Improvement Obligations**

Mr. Stamp and others have argued that replacement of the pipeline within Highway 43 requires compliance with CDC 60.090, setting forth additional criteria for “transportation facilities” including analyzing whether the project complies with the Transportation Planning Rule, the City’s Transportation System Plan (TSP) and other standards. Opponents argue that compliance with the TSP requires full street vehicular and pedestrian improvements along the length of Highway 43. Mr. Stamp goes on to identify a series of Robinwood Neighborhood Plan standards identifying certain Highway 43 amenities that are consistent with the roadway design as contained within the City’s TSP.

The Appellant’s water pipeline does not qualify as a “Transportation facility.” “Transportation facilities” is defined in CDC 2.030 to include:



Facilities and amenities are used for transporting people and goods. Typical uses include streets, highways, sidewalks, transit stops and stations, bicycle and pedestrian facilities, bike lanes, and operation, maintenance, preservation, and construction of these facilities. See CDC Chapter 02, Definitions, transportation facilities.

Although one could conclude that the conveyance of water for public consumption is a “good” that is transported through the pipeline, the examples contained within this provision suggest that these types of facilities are those that transport goods above-ground and was not intended to apply to utilities. To conclude otherwise would subject any private or public utility provider, including the City of West Linn, which maintains lines running within or underneath Highway 43 or other city right-of-way to a full and complete roadway upgrade as a result of repairing or replacing a line.<sup>9</sup> The Transportation Planning Rule, and all of Goal 12, which is implemented by these provisions, specifically excludes water systems. OAR 660-012-0005(30).

Further, triggering roadway upgrades as a result of this pipeline replacement proposal would run afoul of the rough proportionality limitations under the 5th Amendment established in cases such as *Dolan v. City of Tigard*, 512 US 374 (1994) and basic principles of fairness guaranteed by the Due Process Clause of the 14th Amendment of the US Constitution identified by the US Supreme Court in *West Linn Corporate Park v. City of West Linn*, 349 Or 58 (2010). Additionally, to the extent that such protections are not constitutionally guaranteed, rough proportionality limitations are acknowledged by the City in CDC 60.070(c)(7), a conditional use criterion requiring transportation improvements only “when a traffic analysis indicates the application should contribute toward” them. The applicant’s traffic analysis indicates that the level of service thresholds for Highway 43 will not be altered by this proposal and thus, the transportation impacts from this proposal do not justify imposing any Highway 43 improvement upgrades.<sup>10</sup>

### **Right-of-Way Use Fees**

Some opponents have asserted that the proposed right-of-way use fees exceed the limits of ORS 221.260 and have not been approved by the Lake Oswego or Tigard City Councils. ORS 221.260 only applies to franchises, which is not the function of the right of way use fee. The Partnership understands that identifying the limits or terms for an appropriate right-of-way use fee is entirely within the control of the City of West Linn. Should West Linn impose such a fee, the city councils of the Partnership entities must then determine whether to proceed with the

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<sup>9</sup> The legal doctrine of ejusdem generis applies here:

Under the doctrine of ejusdem generis, a nonspecific or general phrase that appears at the end of a list of items in a statute is to be read as referring only to other items of the same kind. *Vannatta v. Keisling*, 324 OR 514, 533, 931 P2d 770, 782 (1997).

<sup>10</sup> Jan. 7, 2013 Partnership letter, Ex. C, pgs. 1-4.



January 24, 2013

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project with such a condition imposed. Just as with every land use approval, it will be up to the owner or applicant to decide whether to proceed with a project once an approval is received.

### **Conclusion**

Based on the foregoing, the Partnership asks that you acknowledge that major utilities are treated differently in the CDC than other conditional uses. This is because utilities, including the Partnership's water system expansion proposed here, respond to an overall need of the citizens of West Linn as well as the citizens of Lake Oswego and Tigard. The Partnership has done everything in its power to minimize and mitigate the undeniable impacts resulting from construction and leaving the West Linn City Council to determine whether a right-of-way use fee should also be imposed to further enhance the overall benefit. Once construction is complete, the Robinwood residents will enjoy greater pedestrian amenities, an improved Mary S. Young Park, a safer neighborhood, as a result of the installation of seismically secured water lines, and where the neighbors realize an increased in their property values resulting from the vast reduction in transportation impacts and greater amount of open space than would be the case if the area was occupied by residences.

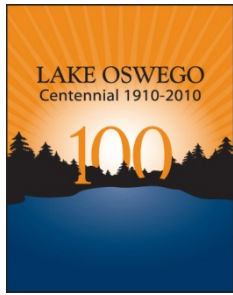
Thank you for considering this request.

Sincerely,

Garvey Schubert Barer

By

Edward J. Sullivan



## CITY OF LAKE OSWEGO

### LAKE OSWEGO TIGARD WATER PARTNERSHIP

4101 Kruse Way  
PO Box 369  
Lake Oswego, OR 97034

503-697-6502  
[www.lotigardwater.org](http://www.lotigardwater.org)

January 25, 2013

Mr. Zach Pelz  
Associate Planner  
City of West Linn

Subject: AP 12-02 and 12-03: Responses to testimony and evidence received on January 14-15, 2013 before the City Council

Dear Mr. Pelz:

During the recent land use hearings, the City Council heard testimony regarding the following issues:

- I. Impact of construction on Highway 43 businesses**
- II. Back up water supply**
- III. Roads**
- IV. Project need**
- V. Natural resources**
- VI. Compatibility: Site and neighborhood**
- VII. Process: Neighborhood outreach**

The applicant responds to these issues below.

#### I. IMPACT OF CONSTRUCTION ON HIGHWAY 43 BUSINESSES

**Assertion:** The construction impacts from the pipeline project will be detrimental to local business and are a “jobs killer.”

**Response:** As the Partnership has acknowledged throughout this process, it is impossible to construct public works projects without temporary impacts to the public and the public and private uses of land adjacent to the public works site. Construction of the plant and pipeline will produce temporary inconveniences and has the potential of impacting Highway 43 businesses that operate between the hours of 8 PM and 5 AM if not mitigated by the practices outlined in the construction management plan. Construction will not adversely impact businesses operating during normal daytime business hours.

The Partnership has created and submitted into the record a state-of-the-art construction management and impact mitigation plan to reduce public inconvenience and to minimize business impacts. Our submissions are the work of registered and licensed engineers, planners and architects. We provided our project design and plans to third party experts for additional review and submitted the peer review reports into the record.



Project opponents retained Dr. Michael Wilkerson to provide expert testimony that businesses will be adversely and irreparably harmed by the proposed construction project. The Partnership agrees there is a potential for harm, which is precisely why the Partnership has developed its construction management and business promotion plans.

Dr. Wilkerson's report represents the sole example of expert opinion presented by opponents during these entire proceedings. Dr. Wilkerson failed to present a resume or other professional credentials in his report. His materials do not suggest he has any apparent training or previous experience in measuring business impacts of construction projects similar to the one we have proposed. He has not provided or referenced economic models demonstrating the scope or extent of the potential economic impact of the applicant's proposed project.

- A.** Dr. Wilkerson's report is cursory and generalized. It is based on studies that shed little or no light on the question of how Highway 43 businesses may be affected by the proposed project.
  - 1. Dr. Wilkerson cites to a *preliminary* report of a 2005 Florida study and two business impact studies in Texas but provides no facts to suggest that the projects studied in Florida or Texas were of a similar size and scope to what is currently proposed.
  - 2. Dr. Wilkerson cites a 2001 report from ODOT. The purpose of this study was to review the use of signage as a technique to mitigate adverse impacts on business during roadway construction near Sweet Home, OR and on Oregon Route 58.
  - 3. None of the roadway construction projects cited by Dr. Wilkerson required, as ODOT requires of the applicant's project, that roadways be fully functional, with no lane blockages, closures or detours for 15 hours a day during the entire construction period.
  - 4. Dr. Wilkerson cites the December 2012 Oregon economic forecast to demonstrate Oregon can look forward to continued slow growth. This report is a quarterly general economic forecast and has no apparent connection to this particular proposal nor does it provide an evaluation of how it will impact Highway 43 businesses.
- B.** Four of the most significant businesses that are open during the evening construction period provided testimony that they do not oppose the project. This evidence is more reliable than Dr. Wilkerson's speculation based on other projects that may or may not be of similar size or scale.
  - 1. The Partnership did not ask these businesses to support or even approve of our construction project. We merely asked that they understand our construction management plan would mitigate its impact. At least three of these companies, McDonalds, Burger King and Wal-Mart stepped back from earlier testimony opposing the project.<sup>1</sup>

This testimony contradicts the testimony of Mr. William More, owner of the Robinwood Shopping Center. Mr. More stated on the record, "All of our tenants, and all of the businesses that I know of on Highway 43, are strongly against this proposal even with the road work being done at night." <sup>2</sup> The record shows Mr. More's two anchor tenants, Wells Fargo Bank and Wal-Mart, say they are not opposed. Two of Mr. More's employees and the daughter (we believe) of one of those employees made representations about overwhelming opposition among Highway 43 businesses. These claims are not substantiated in the record through written submissions or credible research data.<sup>3</sup>
  - 2. The record contains letters or signed petitions from business owners stating opposition to the project and suggesting it will damage their businesses. Several of these letters are from owners whose businesses are closed when construction will take place on Highway 43 or whose hours of business operation do not significantly overlap with the nighttime construction period. For example, Mr. Goldfarb, owner of the UPS Store located at 19363 Willamette Drive, placed a letter of opposition into the record. The UPS store operates from 8:30 AM to 6:30 PM on all weekdays except Monday. On Monday, Mr. Goldfarb's

business operates until 8:30 PM. Given this schedule of operations, UPS Store business hours will overlap with the allowable construction period by ½ hour one day per week.<sup>4</sup>

- C. Dr. Wilkerson's revised traffic count calculations for traffic impact on Highway 43 are not correct and there is no indication in his materials that he is a licensed traffic engineer capable of conducting a professional traffic impact study.

1. In his report, Dr. Wilkerson, has compared baseline traffic to the increased construction trips over a common daily time period. On page 7, Table 2, Dr. Wilkerson concludes there will be a 174 percent increase due to construction traffic during nighttime working hours of 8:00 pm to 5:00 am on Mapleton Drive.<sup>5</sup>

This is a demonstrably incorrect statement; the proposed construction plan does not involve nighttime construction work on Mapleton Drive. Mapleton Drive construction traffic, whether from the pipeline or WTP construction, will occur only during daytime hours. Furthermore, nighttime construction work on Highway 43 will only occur during the 5-month open-cut pipeline construction period, which will occur over 129 construction workdays, not the 270 days assumed by Dr. Wilkerson.

2. The evidence provided by licensed traffic engineers reveals that during peak construction period, construction vehicles will depart the treatment plant on average every 6 minutes *during construction hours*. This does not, however, mean gridlock as some opponents and Dr. Wilkerson have contended. To put this in perspective, based on the scaled maps, timing, and spacing of vehicles contained within the record, vehicles driving north on Highway 43 from the plant will reach Marylhurst University or beyond, before a following truck leaves the treatment plant. If construction vehicles alternate north and south, construction traffic could be even more widely separated.

#### End notes to Section I.

1. Wells Fargo Bank maintains a 24-hour ATM machine, as does U.S. Bank. See letters submitted to the record by these and other continuously open businesses.
2. William More, Letter to the Planning Commission. Oct. 25, 2012.
3. The partnership submitted documents, including petitions, blogs, letters to the editor, and other materials circulated or supported by Mr. More and his organization, STOP, LLC, to persuade West Linn business owners and citizens to sign opposition petitions. We conclusively demonstrated the information given to West Linn citizens about our project and the city's own Water System Master Plan is misleading and in many instances false.
4. <http://www.theupsstorelocal.com/4182/>
5. Michael Wilkerson, Ph.D., West Linn Business Impact Report – Highway 43. January 11, 2013. pp.6-8.

## II. BACK-UP WATER SUPPLY

**Assertion:** West Linn has other options for provision of back up water.

**Response:** West Linn's alternatives for a reliable emergency and back up water supply equivalent to what it can achieve through the Partnership are all more expensive and are subject to greater regulatory and land use uncertainty.

The record demonstrates the Lake Oswego system cannot provide West Linn with certainty that water will be available unless the Lake Oswego Tigard Partnership is allowed to expand its production of finished water. Design of the expanded facility to modern seismic codes will further add to overall system reliability. The record also demonstrates that there is no intersystem connection between either South Fork Water Board or West Linn and the Bull Run system owned by the City of Portland.

- A. Absent the Partnerships proposed improvements to its plant and pipelines and absent continuance of the long standing relationship with Lake Oswego for emergency and back-up water supply, West Linn will be forced to secure other partnerships for back up supply and undertake more expensive upgrades to its supply system. The City's choices already noted in its 2008 Water System Master Plan are:

1. Build a new transmission line across the Willamette River to connect to the South Fork. As shown in the Water Master Plan, this alternative would, however, not provide a fully redundant system or access to alternate sources of water.
  2. Build a new 8.4 million gallon (MG) Bolton reservoir. This would, however, not provide a fully redundant system and no site has been identified for such a reservoir within West Linn.
- B.** The options above will be expensive and all mean West Linn would have to navigate numerous regulatory requirements in other jurisdictions. At a minimum, West Linn would expend hundreds of thousands of dollars to secure right of way, state, and perhaps federal environmental and other conditional use permits. Additionally, jurisdictions could enforce conditions and possibly assess fees on any utilities built within their boundaries. These costs are all in addition to design and construction costs.
- C.** Cooperation with the Partnership allows West Linn to build a down-sized Bolton Reservoir in its current location.

### III. ROADS

**Assertion A:** Eric Jones asserted on January 14, 2013 that the project would shut water off to Mapleton residents for 8 hours per day for 6-7 weeks and that his mother's medical conditions would not tolerate this.

**Response:** Mr. Jones' implicit assumption is that the existing 6-inch asbestos cement (AC) pipe in Mapleton Drive will be shut down daily for the 6-week duration required to replace it with a new 8-inch ductile iron line. However, as shown on project plans in the record, the new pipe and service lines will be installed on a parallel alignment. The applicant believes this can be done without taking the existing pipe out of service until the final changeover is made, likely in a single work shift.

**Assertion B:** Eric Jones further stated on January 14, 2013 that replacement of the AC line would probably result in asbestos contamination of air and water.

**Response:** The applicant does not propose a connection, temporary or otherwise, between the new ductile iron line and the existing AC line. As such, there would be no potential for asbestos contamination of drinking water.

To ensure construction worker safety, removal of the AC pipe must be done in accordance with DEQ rules, OAR 340-248, and OSHA regulations. These regulations require, among other things, keeping the pipe material wet to prevent release of fibers.

**Assertion C:** Yvonne Davis stated on January 14, 2013 that a mid-size dump truck has a 12-foot mirror-to-mirror width and that with a one-foot buffer and only 19 feet of pavement all other traffic has only six feet.

**Response:** ORS 818.080 limits the width of all vehicles to 8'-6" maximum. Thus, there is room for construction equipment and other vehicles to pass safely by each other on Mapleton Drive.

### IV. PROJECT NEED

**Assertion A:** Testimony before the City Council on January 14, 2013 included two assertions relative to performance of the system during an emergency that coincided with a power outage: 1) with no power generation, during an outage the intertie would be of little emergency use, and 2) the proposed WTP upgrade does not include a generator, so again, no water could be delivered to West Linn during a power outage if there were an emergency need.

**Response:** The combined problem of a power outage and an emergency in the West Linn water system requiring water from the Partnership is addressed by the following:

- A.** After replacement of the Bolton Reservoir, West Linn's own emergency storage reservoirs can provide, by gravity, nearly two days of average day water demand. Most power outages are of shorter duration.

- B.** If the proposed facilities are constructed, the Partnership's combined total of over 50 million gallons of elevated storage can provide water by gravity back to the West Linn distribution system.
- C.** If the proposed facilities are constructed, the Partnership's intertie with Portland can provide emergency supply by gravity to Tigard, Lake Oswego, and West Linn.
- D.** The Partnership is addressing its power reliability/redundancy needs through dual power feeds to its water intake and treatment plant from two separate PGE substations.
- E.** West Linn's intertie pump station is configured to be powered by a portable generator. Should West Linn decide that additional reliability is needed, it could decide to install a permanent dedicated generator at the site, or to install a second utility feed, as the Partnership is doing.

**Assertion B:** Cheryl Keicher asserted on January 14, 2013 that alternatives such as the Tempest Environmental portable treatment unit could meet West Linn's need for reliable backup water supply.

**Response:** Opponents have not presented evidence to show a portable treatment unit is equivalent to a full backup water supply needed by the City, especially in view of the West Linn Water Master Plan.

**Assertion C:** There is no need for the project; LO has overstated its need for water and Tigard has access to water from Portland.

**Response:** As already stated in appellant's testimony, Lake Oswego water demands routinely exceed the 12 million gallons per day (mgd) of reliable capacity available from its water supply and treatment facilities.

The Carollo report documented that the combined water demands of Lake Oswego and Tigard would approach 45 mgd.<sup>1</sup> The report noted that Lake Oswego's existing water rights would be insufficient to supply all of Tigard's future needs and would require Tigard to seek additional water from a future source, unless Lake Oswego, through conservation efforts, could reduce its water demands. The report estimates that if Lake Oswego could achieve and sustain a 25% reduction in water demands, the existing water rights of Lake Oswego along with modest use of Tigard's ASR would be sufficient to meet the long term supply needs of both cities.<sup>2</sup>

Notwithstanding the need for the project due to the age, condition, and seismic vulnerability of Lake Oswego's water supply facilities, the two cities have entered into a contract to expand and modernize Lake Oswego's supply facilities to meet each city's long-term water needs. Both cities have successful conservation and demand management programs in place, but there are no data, facts, or evidence entered into the record to support the assertion that enough water can be conserved by the two cities to avoid the need for the project.

#### **End notes to Section IV.**

1. Table 1.11 pages 1-19, Joint Water Supply System Analysis, Draft Report, Carollo Engineers, July 2007.
2. Table 4.3, pages 4-5; Joint Water Supply System Analysis, Draft Report, Carollo Engineers, July 2007.

## **V. NATURAL RESOURCES**

The Partnership's application materials addressed all environmental regulations including CDC 27, Flood Management, CDC 28, Willamette and Tualatin River Protection; CDC 32, Water Resource Area Protection; Goal 5 Resources; and WLMC Chapter 5.465, Trees. West Linn Planning staff concluded that our materials adequately addressed all applicable CDC and municipal code requirements pertaining to natural resource protection.

**Assertion A:** Digging the clearwell will alter the aquifer under the WTP site. Nixon Avenue has had many slides so do not put a 2 million gallon clearwell on the WTP site.

**Response:** The WTP site contains a layer of perched groundwater approximately 25 feet below grade. There is no aquifer under the WTP site. Shannon & Wilson, Inc. Geotechnical and Environmental Engineering Consultants, addressed this concern in the record, as summarized below.

The clearwell excavation will reach a depth of 35 feet below surface grade. Intermediate depth structures will be approximately 15 to 24 feet below grade. The Shannon & Wilson report anticipates that that groundwater control will be accomplished by means of a slope drainage protection layer, a clean rock layer (excavation drainage layer) at the excavation bottom, perimeter drainage collection ditches, and continuous pumping from engineered sumps as the excavation proceeds below the groundwater (interim sumping).

These measures will protect the clearwell excavation and pipeline installation and will not significantly alter the movement of the perched groundwater layer beyond the project site. In other words, excavation for the clearwell and pipelines will have no effect on existing seepage along the Nixon Avenue right-of-way.<sup>1</sup>

**Assertion B:** Construction activity at the HDD site will generate noise that will adversely affect recreational users on the Willamette River.

**Response:** Although West Linn exempts construction noise from the noise limits during daytime hours, the Partnership contracted Environ, a respected acoustical consulting firm, to evaluate noise generation at the HDD site. West Linn City Council repealed quantitative noise limits in CDC 55 by Ordinance No. 1604 on September 26, 2011. Therefore, the quantitative noise standards established by the Department of Environmental Quality (DEQ) in the Oregon Administrative Rules (OAR 340-035) apply to this project. Environ applied the standards for noise from commercial and industrial land uses near noise sensitive receivers, such as residences. There are no similar standards for boats on a river.

For noise sensitive receptors, such as residences, OAR 340-035-0035 establishes a daytime upper end noise standard of 55 dBA at L50 and a nighttime standard of 50 dBA at L50. The L50 statistical noise descriptor is the sound level exceeded 50% of any 1-hour period.

A sound of 50 dBA is comparable to light auto traffic at 100 feet; 60 dBA is comparable to a conversation at three feet or a large air conditioner at 20 feet; and a dBA of 70 is comparable to automobiles at 50 mph or a vacuum cleaner at three feet. By comparison, a motorcycle at 50 feet or a lawnmower at three feet produces 100 dBA.

Considering the constant and/or common noise sources (including average truck trips), the Environ model estimated sound levels at the three residences nearest to the HDD site and determined that the dominant facility noises (drilling rig power unit, generator and soil separation plant) would generate a constant noise level of 63 to 68 dBA. For short term or intermittent noises, the model-calculated sound levels at the nearest residences north of the portal at a range of 61 to 79 dBA due to the use of the crane and vector truck.

The Environ report recommended a series of noise mitigation measures, including a noise wall, which the Partnership will require of their contractor and which West Linn staff recommends as a condition of approval. With these noise mitigation measures in place Environ predicted that constant noise levels at the nearest residences would range from 55-68 dBA and that intermittent noises would range from 61-67 dBA for crane use and from 68-76 dBA during the few times the vector truck is used.<sup>2</sup>

**Assertion C:** Cutting trees will result in loss of bird habitat.

**Response:** West Linn regulates habitat areas through CDC 32, Water Resource Protection Area and individual trees through application of Municipal Code 5.465, Trees. In addition, West Linn has generated a Goal 5 inventory of open spaces. The West Linn Comprehensive Plan does not contain any plan policies or code requirements related to protection of unregulated bird habitat.

The Partnership contracted with Tree Care Unlimited to prepare a tree inventory and protection plan, consistent with WLMC 5.465, for both the WTP and pipeline projects. The Partnership also contracted with David Evans and Associates to conduct an evaluation of potential disturbances at the HDD site. The project will remove six significant trees at the WTP site and 19 regulated trees at the HDD site. All trees impacted by the pipeline installation will be protected as if they are Significant Trees. The application materials demonstrate, and the West



Linn City Arborist found, that the mitigation proposed for removing these trees exceeds the city's minimum mitigation requirements.

West Linn does not regulate generic bird habitat one might find in a residential zone. However, the Partnership will voluntarily plant more than 300 trees at the WTP site and will leave approximately 60% of the WTP site as undeveloped landscape open space. In addition, the Partnership will contribute \$90,000 towards enhancement projects in Mary S. Young Park, which the city of West Linn will use for habitat enhancement projects and to improve public access into the park. Anticipated improvements include:<sup>3</sup>

1. Restore 10 acres of vegetation in prominent areas,
2. Extend the bridge to Cedar Island to span high water,
3. Restore 2 acres of vegetation along river bank, and
4. Improve the main trail to the Willamette River.

#### **End notes to Section V.**

1. Shannon & Wilson, Inc. Seismic and Geologic Hazards and Mitigation memorandum, August 2012.
2. Noise Study and Summary of Potential Noise Mitigation for Willamette Boring Entrance Activities, West Linn, OR, Environ, June 2012 and Noise Study — Lake Oswego/Tigard Water Treatment Plant, Environ, August 2012.
3. Tree Care Unlimited memoranda dated January 2012 and April 2012 and Horizontal Directional Drill (HDD) Disturbance Evaluation, David Evans Associates, June 2012.

## **VI. COMPATIBILITY: SITE AND NEIGHBORHOOD**

The Partnership's application materials addressed the conditional use criteria in CDC 60.060 relating to site suitability as well as the design requirements of CDC 55 and the Robinwood Neighborhood Plan. West Linn Planning staff concluded that our materials adequately addressed all applicable site suitability and neighborhood compatibility criteria.

**Assertion:** Members of the public suggested that the proposed project is not compatible with the neighborhood because the proposed activities do not square with the definition of compatible, i.e., "being capable of orderly efficient operation with no modification."<sup>1</sup>

**Response:** The West Linn CDC does not define the term compatible. When the CDC does not define a word it relies on the definition of words as provided in Webster's Third Dictionary.<sup>2</sup> Webster's defines the word compatible as: "capable of existing together in harmony."

To determine whether uses are compatible, West Linn relies, in large part, on whether a proposal satisfies the applicable criteria in CDC Chapter 55, Design Review. The Partnership's professional architects and landscape architects prepared plans based on their survey of plant materials and architecture typical in the Robinwood neighborhood.<sup>3</sup> The design team revised their plans several times as direct result of neighborhood feedback.

West Linn staff found that the design proposals satisfy the applicable design review criteria. Neighborhood materials, neighborhood feedback, and staff conclusions that it satisfied CDC 55 guided the proposal. Therefore, the proposed WTP is capable of existing together in harmony with the neighborhood, as it has done for 45 years.

#### **End notes to Section VI.**

1. Compatible, definition (2). <http://www.thefreedictionary.com/compatibles>
2. "Words not specifically defined herein shall have the meaning specified in Webster's Third New International Dictionary of the English Language, Unabridged." CDC 02.010(D).
3. CDC 60.060 is addressed in the initial plant application at pgs. 27-44, in the amended plant application at pgs. 36-53, and in the pipeline application at pgs. 27-56. CDC 55, Design Review, is addressed in the initial plant application at pgs. 45-86, in the amended plant application at pgs. 54-95, and in the pipeline application at pages 57-71.

## VII. PROCESS — NEIGHBORHOOD OUTREACH

**Assertion:** “The reason it got off to a bad start was terrible public relations policy that bullied, butchered our city’s process and stole all of our time. It is due to the actions and performance of the Partnership staff over the previous 12-18 months.” – *David Newell, testimony 1-15-13.*

**Response:** The Partnership’s “public relations policy” was to have open, regular communications about the project with affected stakeholders. Neighbors were given many opportunities to share information, discuss process, and build consensus around design, construction mitigation and communications. The Partnership, like Mr. Newell, was hopeful that these unprecedented and extraordinary efforts would have been more productive. These opportunities listed in the record (WTP Application, Section 8), are cited below.

### A. Good Neighbor Plan

The Partnership’s commitment to coordinating with the neighborhood in anticipation of the plant and pipeline construction cannot be overstated. The plant is in the midst of a residential neighborhood and must be compatible with it. A majority of the pipeline will be constructed in roadways abutting residential uses, but will be invisible following construction. As one of the largest property owners in the neighborhood and a long term neighbor ourselves, we know how important it is to continue being a good neighbor.

The Partnership and the Robinwood Neighborhood Association collaborated to develop a Good Neighbor Plan (Plan) to guide facility and site design, construction, and operation for the upgraded plant. The Plan reflects a good faith effort and commitment by both parties to ensure that the plant remains compatible with the surrounding area and a good neighbor. All of the statements in the Plan are there at the suggestion of neighborhood residents. Plan statements and agreed upon design and construction mitigations were arrived at as a result of:

1. Neighborhood Plan meeting discussions (2),
2. Robinwood Neighborhood Association Meetings (12),
3. Surveys of neighborhood residents (2),
4. A neighborhood tour of the Wilsonville Water Treatment Plant,
5. A design workshop,
6. A WTP open house,
7. Individual neighbor ‘backyard meetings’ (14 abutting and adjacent property owners),
8. West Linn required neighborhood meeting, and
9. Multiple meetings with a West Linn-hired facilitator to see if additional common ground could be found.

While the City of West Linn’s code only requires an applicant for a conditional use permit to hold one public meeting, we offered many different opportunities and experiences to ensure the neighbors’ concerns and aspirations were consistently understood and considered. These are not the efforts of a bully — no badgering and intimidation — but a sincere partner making every effort at neighborly inclusion and communications. We consistently attempted to align the process with the goals, resources available, and the importance of the outcome.

### B. West Linn-hired Planner for Robinwood and Great Neighbor Committee List of Mitigations

As Mr. Newell’s testimony also mentioned, other opportunities were provided to the neighborhood by the City of West Linn, including the hiring of a City of West Linn paid planning consultant to assist the RNA in making requests regarding mitigations. The City-hired planner, D.J. Heffernan, made the following statement in his October 10, 2012 report, submitted to Chris Kerr, and subsequently to the Planning Commission. “The revised site plan addresses many of the concerns that neighbors and the RNA raised with the original plan, including increased setbacks, underground electrical infrastructure, reduced noise from truck deliveries during operations,

additional landscaping and screening to reduce lighting glare and obscure buildings and less on-site water storage.”

The Robinwood Neighborhood Association (RNA) also created a “Great Neighbor Committee” (GNC). The GNC goal was to develop ‘mitigations’ desired by the neighborhood for the plant and pipelines. Their proposed mitigations, goals, and selection criteria for mitigations were submitted to the Planning Commission during its hearings in spring and fall 2012. The Partnership agreed to a large majority of these requests. The GNC’s mitigation *goals* included the following numbered elements (paraphrased). Subheadings include how we believe our applications meet those goals:

New development should:

1. Result in a safer community

**Response:** Plant and pipelines will be designed and built to withstand a CSZ 9.0 earthquake. Currently the pipeline is not designed or constructed to any seismic standard and a prior seismic upgrade to the plant is not sufficient to withstand the anticipated 9.0 event.

2. Not interfere with the easy conduct of our daily lives or access to our commons.

**Response:** As stated in prior Partnership testimony, pipeline installation will result in one 12-hour disruption to driveway access. While 150-foot long segments of Mapleton Drive will be closed during the day, it is not a dead end road so an alternate route is available to all residents. Following construction the “commons” will be improved: a newly paved roadway, 3+ acres of accessible open space at the plant site on both Mapleton and Kenthorpe and improved pathway access through Mary S. Young Park, removal of invasive species, replanting with native species, and improved access to Cedar Island.

3. Preserve the residential character of Robinwood, with abundant foliage and tree canopy, inconspicuous structures and narrow, winding rights-of-way.

**Response:** All above ground structures will be well screened with foliage. More trees will be planted than are required. Screening with a ‘good neighbor’ fence on some frontages will also be constructed. Taller trees are proposed in some areas to ensure that glare will not be an issue for neighboring residents.

4. Preserve the quiet and peaceful nature of the neighborhood.

**Response:** Following construction, only five additional vehicle trips per day will occur on Kenthorpe Way. This number is far fewer than that which would result from 23 new homes which could be constructed on the site, as mentioned in the West Linn staff report. There will also be no lime silo on site and no lagoon scraping following construction. These were two noisy activities sited by neighbors during the GNP process. The plant upgrade will also remove the existing CO2 tank from the site.

5. Not adversely affect the monetary value of our homes or the health of our business community.

**Response:** Context sensitive design, removal of dilapidated housing on Mapleton, enlarged and attractive open spaces, resurfaced roadways and new waterlines that improve water quality and fire suppression capabilities are all amenities that should improve home values.

6. Should be visually screened to minimize adverse visual impacts.

**Response:** See (3) above

7. Provide other tangible benefits to the neighborhood and the City ‘in return for our largesse,’ if it does not primarily benefit the Robinwood neighborhood and the City of West Linn

**Response:** West Linn has never required that a benefit flow primarily to West Linn or a single neighborhood and it should not be required now. That list of benefits was provided in its final form by the applicant in its oral and written presentations to the City Council and supersedes all previous



lists. Those benefits include road improvements to Mapleton and Kenthorpe, a reliable and safe water supply to the City, a use fee for public roads, removal of asbestos pipes. These are significant benefits to both the neighborhood and the City.

8. All meetings between developers and government entities should be accessible to the public.

**Response:** The Partnership has previously testified that the public and the City of West Linn are welcome to attend meetings with ODOT and the Partnership where project planning is discussed.

### **C. West Linn-Hired Facilitator**

The City of West Linn brought in Greg McKenzie last spring, a West Linn facilitator, to identify additional common ground between the Neighborhood and the Partnership. He conducted several large group, small group, and individual meetings with neighborhood residents. Mr. McKenzie submitted his observation to the Planning Commission on October 3, 2012.

### **D. Comments from Greg McKenzie Report (Exhibit PC-7)**

“Lots of people wanted some individual and small group time with the facilitator, but none really stepped forward at the general neighborhood meetings identifying themselves as representatives of the group. This lack of unifying leadership within the neighborhood group proved to be a substantial challenge in moving forward with the series of meetings planned for this facilitation.”

**E. Greg McKenzie question to group:** “What would it take to restart the conversation with the LOT Partnership?”

Responses:

- Don’t want the plant in West Linn
- Don’t trust Lake Oswego staff
- Don’t trust West Linn staff
- Don’t trust West Linn City Council
- Look at the RNA mitigation plan seriously
- Help solve West Linn water problems
- Want more money (\$90K is insulting (possibly referring to MSY Park improvements) – adequate compensation for size of project)

### **F. McKenzie observations**

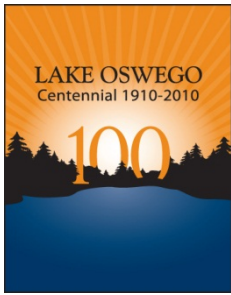
1. “Disruption of the proceedings seemed like a game for a few of the individuals in the neighborhood group. They were forever complaining about process or challenging the facilitator to gain control of the meetings”
2. “During the facilitation process LOTWP enhanced its proposals in response to the RNA mitigation list.”
3. “However, the consultant’s overall impression is that many in the neighborhood, while united by a cause and belief that LOTWP had not been listening to them, seem challenged by the task of organizing in a meaningful way to participate in conversations with LOTWP as a group.”
4. “The neighborhood group also had a difficult time reaching consensus when LOTWP proposed solutions to some of their mitigation ideas.”

5. “From the consultant’s observations, many points seemed to be agreed, but the RNA/GNC representatives either did not have the authority or a belief that they represented enough of their neighbors to agree to proposals.”
- G. The Partnership made one final attempt to address neighbor concerns following the completion of Mr. McKenzie’s work and prior to consideration by West Linn’s Planning Commission. Partnership representatives organized two additional meetings with neighbors and city staff. The two meetings focused on the creation of a protocol for ongoing communications between the neighborhood and the Partnership. The Robinwood representatives agreed that a document prepared by the Partnership reflected their views but failed to agree to its contents. The Partnership submitted the document into the Planning Commission proceedings as suggested conditions of approval.
- H. All properties within the Plat of Maple Grove are encumbered by restrictive covenants - two of which do not allow fences over four-feet in height and limit development only to family dwellings. To waive those restrictions requires approval of 75% of Plat property owners. In 1995, West Linn initiated and was successful in securing waivers from then existing property owners, including Lake Oswego, for construction of its Mapleton Drive wastewater pump station. A waiver of those specific covenants is necessary for the Partnership’s use of its Plat properties for plant expansion. Despite offers of compensation based on two certified appraisals, Lake Oswego has been unable to secure enough waivers to reach the 75% threshold and was left no option but to secure the removal of the two restrictions through its eminent domain authority. The City has mediated and negotiated settlements with many property owners and continues to work towards a settlement with the remaining owners through their legal representative.

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## CITY OF LAKE OSWEGO

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January 25, 2013

Mr. Zach Pelz  
Associate Planner  
City of West Linn

Subject: AP 12-02 and 12-03: Responses to written testimony submitted by Gary Hitesman on January 21, 2013 before the City Council

Dear Mr. Pelz:

This memorandum represents the Lake Oswego Tigard Water Partnership's (Partnership) response to the assertions raised by Mr. Gary Hitesman regarding architectural compatibility in a 24-page memorandum to the City Council dated January 21, 2013. Mr. Hitesman is a non-active architect in Oregon and California. (See Gary Hitesman, Project List, page 105-106 of record materials received by the City of West Linn prior to 10 am on January 22, 2013.) We have elected to consider his comments regarding architectural compatibility carefully. The format of this response follows Mr. Hitesman's memorandum and responds in order to each and every assertion made.

The two central points of Mr. Hitesman's many assertions and arguments are that: (1) West Linn staff created findings that misconstrue West Linn code regarding architectural compatibility; and (2) removal of the existing Operations Building and the addition of a stormwater facility in its place will create additional noise and glare impacts that are not adequately mitigated. We respectfully disagree with both these assertions.

## I. CODE INTERPRETATION CDC 55.100(B)(6)

**Assertion:** Mr. Hitesman points out (p. 3 of 24) that CDC 55.100(B)(6)(b) requires that, "The proposed structure(s) scale shall be compatible with the existing structure(s) on site and on adjoining sites. Contextual design is required." Mr. Hitesman argues that the proposed landscaping and fencing is not context sensitive and that the proposed fence and screening height, which he asserts will be predominantly 14 feet tall, that the "layering" violates CDC 42, Fences.

In response to the staff Finding NO. 40 (p. 19 of 24) relating to CDC 55.100(B)(7)(i), Mr. Hitesman argues that the public was only shown "A" design and were offered no studies that proved significant efforts had taken place," and that the design was driven by the limitations and demands of engineering.

**Response:** CDC 55.100(B)(7)(i) states that, "These architectural standards shall apply to public facilities such as...treatment plants..." The term "these standards" refers to the architectural standards found in CDC 55.100(B)(7), the Transportation Planning Rule. The code further recognizes that, "Many of these facilities, due to their functional requirements, cannot readily be configured to meet these architectural standards." This subsection then goes on to state that a design should be "sympathetic to surrounding properties by landscaping, buffers, and all reasonable architectural means."

Simply said, when one reads both code subsections together and applies that reading to the facts presented, as staff did, it is clear that the proposed design is "sympathetic" to the surrounding properties, particularly by means of landscaping, buffering, and architectural design.

Regarding fences, CDC Chapter 42 pertains to Clear Vision Areas, the focus of which is to provide clear sight lines at driveways and intersections. There is no mention of layering in CDC 42. Section 21,, Figure 14.0 of the WTP application shows that all Good Neighbor perimeter fences are to be six feet tall except where they run into the front and rear yard setbacks, consistent with CDC 42.020. Other fences such as the Visual Screen, Low Site Wall and Split Rail fence will not be located within the setback or atop a retaining wall and are not subject to the height limitations in CDC 44.

## II. ARCHITECTURAL PROPORTIONALITY, SCALE, AND FORM

**Assertion:** Mr. Hitesman asserts that, “The proposed structures do not conform to the existing building articulation, scale and form that occur in the neighborhood,” and that, “Proportionally, the proposed plant does not conform to scale and articulation.” (p. 5 of 24) The thrust of the argument is that buildings are square and that the windows and doors are vertical rather than being more horizontal; that there is insufficient transition from the central core of the WTP to the perimeter, as required by CDC Chapter 24; and that the new design is not a “manifestly superior” design.

**Response:** All of these assertions relate to CDC 55.100(B)(6), Architecture. Mr. Hitesman asserts that, “The length and height of the Plant buildings not only are proportionally twice as big, there is little done to transition as stipulated by Chapter 24.” (p. 7 of 24) CDC Chapter 24 applies to Planned Unit Developments, which the WTP project is not; therefore, his proportionality argument falls flat. Mr. Hitesman also asserts, without any supporting evidence, that the newer two story houses in the neighborhood are “about 17 feet (or less) to the eave.” (p. 7 of 24) The CDC measures height to the top of the roof, not to the eave, and buildings in the R-10 zone must comply with a 35-foot height limit. As the staff report found, all of our buildings are within the required height limit.

As staff reported, our proposed materials are brick, a material used in the neighborhood, and horizontally articulated siding. As our narrative points out (WTP application Section 4, Central Issues, 3, Visual Impacts and Section 4, Design Review), our design team surveyed the neighborhood and elected to use materials found in the neighborhood and to stress the horizontality of neighborhood buildings by using horizontal siding.

## III. REMOVAL OF THE EXISTING OPERATIONS BUILDING

**Assertion:** Mr. Hitesman states that, “The revised plans do not show the reconfigured Administration/Operations Building or the stated new storm water retention pond.” (p. 9 of 24) Demolition of the existing building will allow glare from WTP lights to create off-site glare. Removal of the existing building results in an inadequate buffer between the interior of the processing facilities and Kenthorpe Way or neighboring properties. (p. 9-10 of 24)

**Response:** The Partnership revised Figure 5.5, Full Illumination Lighting Plan, to reflect the removal of the Operations Building. The figure shows that neither the deck lighting nor the visitor parking area will create glare beyond the property line. Revised Figures 12.0A, Planting Plan, and 11.00, Planting Legend and Notes, show that the Partnership will plant five, 6 to 7-foot tall coniferous trees and three medium sized deciduous trees between the filter deck and the visitor parking lot. In addition, the tree protection area between the parking area and Kenthorpe Way, which consists of mature trees and landscaping as well as new plantings, will provide a substantial vegetative screen. Staff found that this screening was adequate to buffer the 35-foot tall Operations Building and lights; this same screening will shield Kenthorpe Way from the intermittent use of lights on the filter deck. The mature vegetative screen between the parking lot and the residence to the east is unchanged.

Revised Figure 3.0 shows that the filter deck and ozone contractor will be set back 121 feet from the edge of the Kenthorpe Way right-of-way. The free-standing and wall-mounted filter deck lights and ozone contractor lights will be 10 feet above the floor of the deck which is approximately 10-13 feet above grade. (WTP Application, Section 21, Figures 5.0-5.12.) All lights are compact florescent type, fully shielded, and operated manually. Plant personnel will only turn on the lights when they are working at night in the immediate area. Thus, the filter deck lights and ozone contractor lights will be used infrequently and will be fully screened when in use. (WTP Application, Section 13, Outdoor Illumination Study.)

## IV. STAFF FINDINGS: NOS. 24 – 31, 34, 36, 37, 39, & 42

(as identified in the record)

**Assertion Finding NOS. 24-31:** The primary assertions by Mr. Hitesman for each Finding are:

**NO. 24** The design does not reflect the dominant architecture of West Linn. The application does not address the ‘hole’ left by demolition of the existing building.

**NO. 25** The design is not compatible and lacks contextual design.

**NO. 26** There is no transition of bulk and mass. The retention pond does not have mass, bulk or steps.

**NO. 27** The criteria are vague. The design is not “Manifestly Superior.” The project is “so small.”

**NO. 28** The project is not to scale as related to the use. The project accommodates equipment and not users. The path across the parking lot is scaled for safe operation of vehicles, not people, and there is little else to accommodate “walking patrons or users.”

**NO. 29** The project is not designed to human scale. It is possible to enhance the streetscape.

**NO. 30** There are only two roof forms rather a variety of roof forms.

**NO. 31** The 35-foot tall buildings and security walls do not encourage pedestrian use. The landscaping will take too long to mature. The site layout does not invite plant personnel to ‘stroll after a busy day at the office or work.’”

**Response:** All of Mr. Hitesman’s assertions regarding Findings 24 to 31 relate directly to CDC 55.100(B)(6), Architecture. As discussed in Section I above, CDC 55.100(B)(7)(i) provides that while these standards do apply to public facilities, the City has determined that in the context of the Transportation Planning Rule, a public facility can be “sympathetic” to the surrounding properties by use of “landscaping, buffering and reasonable architectural means.”

**Regarding the individual assertions:**

**NO. 24** Revised Figure 3.0, 12.0A, and 13.0A in the record show how the ‘hole’ is filled with an irrigated, landscaped stormwater facility.

**NO. 25** Mr. Hitesman does not provide any evidence to support his claim. Staff is correct, Exhibit PC-3, Section 4, page 54 demonstrates how the design is drawn from the neighborhood context.

**NO. 26** Subsection 55.100(B)(6)(c) states that “it is appropriate” for buildings to architecturally transition, or step down, in terms of bulk and mass. Staff is correct that our materials demonstrate that our buildings carry local cues as to patterns, materials, and lines in transition to the neighborhood. As staff points out, our building elevations descend in gradient from 35 feet at the north end to 20 feet at the south end of the site.

**NO. 27** CDC 55.100(B)(6)(d) states that contrasting architecture shall be allowed only when the design is: (1) “manifestly superior” to adjacent architecture in terms of creativity of design, (2) is adequately separated from other buildings by distance and screening, or (3) is part of a development on a site large enough to create its own style. As staff correctly points out, the proposed architectural design is derived from neighborhood design cues and materials. The form is both functional and sympathetic to the neighborhood. And, the site layout makes ample use of extensive landscaping and buffering that screen the WTP from surrounding properties. Because the design is both compatible and sympathetic to the neighborhood, it is not contrasting architecture requiring a “manifestly superior” design. To suggest that the WTP must also be a “manifestly superior” design, an arguably vague term, misreads the code.

**NO. 28** CDC 55.100(B)(6)(e) attempts to create human scale in residential as well as non-residential architecture. Staff found that few neighborhood buildings place their main entrance at the edge of the front yard setback. Staff agreed that our use of a prominent entryway, multiple windows, varied surfaces textures and tones create a sense of human scale. In addition, the clearly marked sidewalk from Kenthorpe Way to the primary entrance invites pedestrians into the complex.

**NO. 29** CDC 55.100(B)(6)(f) applies to commercial and office buildings. Throughout his memo Mr. Hitesman refers to the WTP as an industrial use and building. Yet here, he identifies this public facility is an office building. One cannot have it both ways. Staff is correct to find that this subsection applies only to commercial and offices uses, and that this facility is exempt because it is a public facility.

**NO. 30** CDC 55.100(B)(6)(g) encourages variation in rooflines, it does not require variety. Mr. Hitesman focuses only on the shed roofs. However, staff found that our applications materials, WTP application Section 21, Figures 10.0 – 10.8, demonstrated a variety of roof forms such as flat roofs – with and without parapets, shed roofs, gable roofs, skylights, and green roofs.

**NO. 31** CDC 55.100(B)(6)(h) requires consideration of micro-climates for building users, pedestrian, and transit users. Transit does not serve Kenthorpe Way. Revised Figure 12.0A illustrates how our proposal makes extensive use of landscaping, provides pedestrian access across the site, and creates a pedestrian link between Kenthorpe Way and Mapleton Drive.

**Assertion Finding NO. 34:** Mr. Hitesman states that the Administration/Operation Building is “an auxiliary use or an Office Development.” He claims that the project does not incorporate “pedestrian transparency” and that it focuses too much on an automobile oriented use. (p. 16 of 24)

**Response:** Staff correctly concluded that CDC 55.100(B)(7)(a) is not applicable because it applies to commercial and office development and that our project, as a public facility use, is neither. Mr. Hitesman repeatedly characterizes the project as an industrial use, but here, where it serves his interests he claims that the WTP is an office development. In the event that the City Council determines that this section is applicable, Section 4 of the WTP application shows that when the WTP is fully operational it will generate fewer than 20 average daily vehicle trips. Section 21, Figure 3.0 shows that the site contains bicycle parking, a pedestrian link to Kenthorpe Way to the primary entrance, sidewalks along both frontages, and a pedestrian link between Kenthorpe Way and Mapleton Drive.

**Assertion Finding NO. 36:** The author suggests that the proposed pedestrian path is “not a direct route”, that a more direct route between Kenthorpe Way and Mapleton Drive across the site is possible, and that the “quiet reflective area” is in plain view of an unscreened “industrial complex.” (p. 17 of 24)

**Response:** CDC 55.2100(B)(7)(e) requires that paths shall provide direct pedestrian routes between building and rights-of-way and that they shall be clearly identified. The Pedestrian and Vehicle Circulation Plan, WTP application Section 21, Figure 7.0, identifies the location of path signage. Staff correctly found that the pedestrian paths are “attractive to use and provide direct access through a parking area.” In these respects, the WTP facility is consistent with the Transportation Planning Rule.

**Assertion Finding NO. 37:** The author asserts that the new entry is no longer as close as possible to Kenthorpe Way and that the architectural security wall and “industrial infrastructure” render the main entryway unidentifiable as the main point of access. (p. 17 of 24)

**Response:** CDC 55.100(B)(7)(f) requires that one entrance be as close as possible to the main street on which the facility is located. Section 21, revised Figure 3.0 shows that the new Administration/Operations building, following the plane of the existing Operations Building, will be 121 feet from the Kenthorpe Way right-of-way edge.

**Assertion Finding NO. 39:** Mr. Hitesman asserts that the proposal does not apply the height-to-width ratio rule of the Transportation Planning Rule and that the rule, if applied correctly, would result in the Administration/Operations Building providing a better buffer for the processing facilities behind the building.

**Response:** Staff points out that that CDC 55.100(B)(7)(i) allows a public facility to use landscaping, buffering and reasonable architectural means to provide a “sympathetic” design when strict adherence to the TPR design standards is not practicable. In this case, staff found that applying the height-to-width ratio based on the existing 144-foot setback would create buildings that are nearly 50 feet tall. The R-10 zone has a 35-foot height limitation. The reading of the TPR rule that Mr. Hitesman suggests would require moving the Administration/Operations building much closer to Kenthorpe Way, and ignores the flexibility allowed for public facilities under CDC 55.100(B)(7)(i).

**Assertion Finding NO. 40:** Mr. Hitesman asserts that the neighbors were “shown ‘A’ design” and that the applicant did not offer studies showing that significant design efforts were made. (p.19)

**Response:** This Finding relates to CDC 55.100(B)(7)(i). See the response in Section II above.

**Assertion Finding NO. 42:** Mr. Hitesman asserts that the proposed buffers have not been proven to reduce noise and that with more hardscape, noise is more likely to occur. He suggests that the visual buffers are not compatible



with the existing neighborhood and that the proposed buffering devices “fail to prove compatibility, extent and adequacy.”

**Response:** This assertion relates to CDC 55.100(C), Compatibility between adjoining uses, buffering and screening. WTP application Section 21, revised Figure 3.0 shows the extensive tree protection areas around the perimeter of the site. Revised Figure 12.0A illustrates the extent of the proposed landscape buffers. The memorandum “Noise Study Analysis Lake Oswego-Tigard Water Treatment Plant” prepared by Environ and dated August 8, 2012, demonstrates that the proposed buffering and noise mitigation measures will be effective. In addition, West Linn Code allows the City to require, as a condition of approval, that within one year after the facility becomes operational the Partnership shall undertake a noise analysis. If the analysis finds that WTP operational noise levels exceed adopted DEQ day- and night-time standards, the City may require the Partnership to take immediate steps to mitigate the noise levels to adopted state standards.

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