

September 21, 2015

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**VIA EMAIL**

Mr. Charles Kidwell, Chair  
Oregon City Planning Commission  
221 Molalla Avenue, Suite 200  
Oregon City, OR 97045

**Re: City of Oregon City File Nos. ZC 15-02 and TP 15-03; Request by Icon Development and Construction, LLC for Approval of Pavilion Park III Subdivision and Zoning Map Amendment**

Dear Chair Kidwell and Members of the Oregon City Planning Commission:

**1. Status of Hearing and Record.**

This office represents Icon Development and Construction, LLC ("Icon"), the Applicant. This letter constitutes the Applicant's final written argument to be submitted to the City of Oregon City (the "City") by Monday, September 21, 2015 at 12:00 p.m. The Planning Commission closed the public hearing and the evidentiary record at the conclusion of testimony on September 14, 2015 but left the record open for the Applicant's final written argument.

**2. Applicant's Request.**

The Applicant respectfully requests the Planning Commission approve the requested applications but not include recommended conditions of approval 8 (staff report at page 2) and 10 (staff report at page 3) because, for the reasons explained below, the two (2) conditions of approval are not supported by relevant provisions of the Oregon City Municipal Code ("OCMC") and constitute a taking of Applicant's property because the off-site exactions are neither roughly proportional to the impacts of the application nor do they represent an essential nexus for which the City has met its burden of proof.

In the alternative, if the Planning Commission decides not to delete conditions of approval 8 and 10, the Applicant requests that the Planning Commission adopt the condition of approval under heading 5 below.

**3. The two (2) conditions of approval are inconsistent with and do not implement OCMC 16.12.095.B, "Water System".**

OCMC 16.12.095.B provides,

**"The applicant shall design and install a water system to serve all lots or parcels within a land division in accordance with the City Public Works Water System Design Standards, and shall connect those lots or parcels to the City's water system. All applicants shall execute a binding agreement to not remonstrate against the formation of the local improvement district for water improvements that benefit the applicant's property. *Applicants are responsible for extending the City's water system to the development site and through the applicant's property to allow for the future connection of neighboring undeveloped properties that are suitably zoned for future development.*"** (Emphasis added.)

The City argues that condition of approval 10 requiring a water line extension on McCord Road and a water line extension on Leland Road are justified, in part, by OCMC 16.12.095.D. The City's rationale does not justify the extension of the two (2) water lines on the basis required by OCMC 16.12.095.B that they serve "neighboring undeveloped properties that are suitably zoned for future development." In fact, **Exhibit 1** (part of slides shown by the Community Development staff to the Planning Commission at the September 14, 2015 public hearing) shows that the properties along McCord Road and Leland Road are developed.

The OCMC does not define "undeveloped". Its common and unambiguous meaning is that undeveloped properties are those having no development on them. **Exhibit 1** demonstrates that the neighboring properties to the site are developed. To the extent that the Community Development staff argues that the properties are undeveloped, such an argument is inconsistent with the plain language of OCMC 16.12.095.D.

For this reason, the Planning Commission may not impose condition of approvals 8 and 10 because the water lines are not intended to serve "neighboring undeveloped properties that are suitably zoned for future development." On this basis, the Planning Commission must approve the application without conditions of approval 8 and 10.

#### **4. The Leland Road line extension is unnecessary to serve the development site.**

The Planning Commission can find based on the argument and evidence submitted by the Applicant that the Leland Road water line extension is unnecessary to serve Lot 16, or any other lot of the proposed Pavilion Park III Subdivision. Mr. Bruce Goldson testified that the water line can be extended from existing City water lines serving the remainder of the subdivision via a private easement to Lot 16. He also testified that to the extent the City argues that this is not possible because water and sanitary sewer lines may not be in the same easement, relevant Oregon Administrative Rules do not prohibit water and sanitary sewer lines in the same easement. Further, Mr. Goldson testified that the Clackamas River Water District does not object to serving Lot 16 which is contrary to the City's finding of fact at page 16 of the staff report.

Based on the above evidence, the City has not met its burden of proof to demonstrate that there is an essential nexus or rough proportionality between the impact of the development of Lot 16 and the need for the extension of the water line in the Leland Road. The purpose of condition of approval 10 is to serve other areas, not undeveloped areas (finding at page 17 of the staff report under OCMC 16.08.030.B) and the record contains no evidence by the City that the water line will serve undeveloped properties.

Further, the Water District Master Plan is not an approval criterion under ORS 197.195(1).

Additionally, the record contains no substantial evidence of an impact that justifies condition of approval 8 or 10 based on water quality, the benefits of "looping" the water line system, fire protection, or water pressure. The Planning Commission must find there is no benefit from the extension of the water lines required by condition of approval 8 and 10 because water quality, water pressure, fire protection and the need to "loop" the water lines are neither current problems that are cured by the two (2) conditions of approval nor do they create a benefit because these conditions are not present and will not be exacerbated by the application.

Mr. Goldson testified that water pressure is appropriate and meets and exceeds minimum standards and will not be enhanced by the water line extensions required by conditions of approval 8 and 10.

The Clackamas Fire District has not identified a need for the extension of either water line. The findings at page 23 of the staff report under OCMC 16.08.030.B.7 conclude that the Fire Department has no "noted concerns". Additionally, the Applicant read a portion of an email from Mike Boumann of the Clackamas Fire District to Darren Gusdorf representing the Applicant in which Mr. Boumann wrote Mr. Gusdorf:

**"Thanks for the email and info. I spoke with the Fire Marshall and he was not aware of any pressure or flow issues in that particular area either but I left a message with OC public works because they would have a better info on that. (I have not heard back) I did notice on our maps the McCord coverage isn't very good and if you travel SE on Leland the hydrant cover is not ideal either." (Read in its entirety at the September 14, 2015 Planning Commission hearing.)**

The City did not submit any additional evidence demonstrating a lack of fire protection that would be cured by the extension of either of the water lines.

Lack of substantial evidence to meet the City's burden of proof that require the off-site exactions means that the City has no legal basis to support the imposition of conditions of approval 8 and 10. It also means that the City Engineer is without authority to require either condition under OCMC 16.12.085.A (staff report at page 28), or OCMC 16.12.095.B (staff report at page 30).

Finally, the City's proportionality analysis and memorandum from the City's Attorney's office dated September 14, 2015 does not provide the necessary substantial evidence nor does it provide the correct proportionality test. The proper analysis is between the need to serve Lot 16 and the impact of two (2) substantial water line extensions, neither of which can be justified in terms of impacts of the subdivision, or benefits to the subdivision or the City. Based on the correct analysis, the value of Lot 16 (estimated to be between \$50,000 and \$60,000) is not proportional to the cost of even the Leland Road water line extension's estimated cost of approximately \$56,000.

The findings at staff report pages 16 and 17 do not contain substantial evidence correlating to the City Attorney's proportionality memorandum, nor do they justify extension of either water line to serve undeveloped properties.

## **5. Proposed Condition of Approval.**

The Applicant can agree to revised conditions of approval 8 and 10 if the City agrees to split the cost of the two (2) water lines after System Development Charge ("SDC") credits have been applied. The conditions should be worded so that if the City Commission cannot appropriate the funds, the Applicant is not responsible for performing the conditions.

The condition of approval could provide as follows:

**"If the City Commission agrees to pay one-half of the cost of the McCord Road and Leland Road water line extensions, not including the upsizing costs which are subject to SDC credits, the Applicant shall install the water lines."**

## **6. Conclusion.**

For the reasons contained in this letter, the Planning Commission must find that the City has failed to meet its burden of proof to submit substantial evidence demonstrating that conditions of approval 8 and 10 are roughly proportional to the impacts of the subdivision and, alternatively, the conditions of approval are not warranted by relevant OCMC provisions. The Applicant respectfully requests that the Planning Commission approve the applications but delete conditions of approval 8 and 10.

Charles Kidwell, Chair  
September 21, 2015  
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Very truly yours,



Michael C. Robinson

MCR:sv  
Enclosure

cc: Ms. Laura Terway (via email) (w/ encl.)  
Mr. Darren Gusdorf (via email) (w/ encl.)  
Mr. Bruce Goldson (via email) (w/ encl.)  
Mr. Rick Givens (via email) (w/ encl.)



