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January 21, 2015

VIA HAND DELIVERY

Honorable Mayor Dan Holladay
and City Commissioners
City of Oregon City
625 Center Street
Oregon City, OR 97045

RE: AP 14-01/14-02 Beaver Creek Road LLC

Dear Mayor Holladay and City Commissioners:

This office represents the applicant in this matter, Beaver Creek Road, LLC. Please add this letter to the record in the above matter.

Two appeals are before the City Commission. One filed by an opponent of the project, and one filed by the applicant. This letter first addresses the applicant's appeal and then addresses the issues raised by the appellant.

Applicant's Appeal

Cross Basin Fee-in-lieu

The applicant has proposed to provide sanitary sewer service through a cross-basin connection into the Glen Oaks Basin rather than the Beaver Creek Basin. Presently, there is adequate capacity in the Glen Oaks Basin to serve the project. The project, however, will utilize capacity that the City has reserved for the full build-out of the Glen Oaks Basin. Full build-out of the Glen Oaks Basin is not anticipated for many years. The City has identified certain future improvements in the Glen Oaks Basin necessary to serve the project, to maintain long-term capacity in the Glen Oaks Basin and has identified the applicant's proportionate share of those improvements (the "Glen Oaks Improvements"). Because there will be sufficient capacity in the Glen Oaks Basin when the project is completed (and for the foreseeable future), the timing of construction of the Glen Oaks Improvements is unknown. The Glen Oaks Improvements are not required to be in place at the time of completion of the applicant's project, but will be completed at a later date as the Glen Oaks Basin approaches full build-out.

To be absolutely clear, the applicant is not contesting the requirement to pay a fee-in-lieu for the Glen Oaks Improvements, nor is the applicant contesting the amount of the fee-in-lieu. As required by Condition of Approval No. 37, the applicant will pay the fee-in-lieu in the amount of \$545,000. The applicant is merely requesting that if the City later determines that the Glen Oaks Improvements are not necessary due to the construction of alternate sewer

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improvements, and if the Glen Oaks Improvements are not constructed, that the applicant be entitled to a refund of the fee-in-lieu payment.

It is altogether possible that prior to construction of the Glen Oaks Improvements, the City or another developer could complete sewer improvements within the Beavercreek Basin which would serve the applicant's project and obviate the need for the Glen Oaks Improvements. At such time, the applicant's project would be disconnected from the Glen Oaks Basin and connected to the Beavercreek Basin sewer lines. In that case, it would not be equitable for the City to retain the fee-in-lieu payment for construction of improvements that were never completed. This would be especially true were the City to collect SDCs from the applicant, a portion of which are attributable to the Beavercreek Basin improvements, or impose an LID on the project for connection to the Beavercreek Basin improvements.

To address this situation, the applicant is merely requesting the ability to enter into a development agreement with the City which would provide for a refund or partial refund of the fee-in-lieu if the Glen Oaks Improvements are not constructed and the Glen Oaks Improvements are no longer necessary to serve the project.

The applicant proposes the following condition of approval. The applicant's proposed language is underlined:

37. The applicant shall pay fee-in-lieu of downstream improvements in the Glen Oak Basin required due to the cross basin connection. The amount of the fee-in-lieu shall be \$545,000 in accordance with the documentation provided in the "Public Works Engineering File Memorandum" (November 5, 2014). The payment of the fee-in-lieu may be made in connection with a development or other agreement with the City which may provide for a refund or partial refund of the fee-in-lieu payment if (a) the project is connected to improvements within the Beavercreek Basin sufficient to serve the project and (b) at the time of such connection the improvements in the Glen Oak Basin for which the fee-in-lieu has been paid have not yet been constructed.

The express intent of the above condition is only to provide a mechanism in the future for a return of the fee-in-lieu if the Glen Oaks Improvements are never completed and sufficient alternative improvements serving the Beavercreek Basin are constructed instead.

Location of New Sewer Connection

Condition No. 34 requires the applicant to connect to the existing sanitary system on Meyers Road, west of Beavercreek Road. The applicant had proposed making this connection within an easement off of Emerson Court in a location adjacent to Beavercreek Road. The applicant's selected connection point saves considerable money due to the relative difference in length of sewer line between the City's proposed location and the applicant's. The applicant is requesting that Condition No. 34 be amended to permit the applicant to make the connection at Emerson Court if, and only if, the City determines that such location is feasible and will not result in additional costs to the City. The location of the connection is entirely in the City's hands. If the applicant is unable to persuade the City Engineer, then the City can mandate the connection be as required by Condition No. 34. The manhole on Meyers Road and the manhole within Emerson Court both connect to the same 8" PVC line that runs down

Meyers Road and Sophia Court, so the impacts to the overall system are identical. The only question is whether the connection at Emerson Court is feasible due to depth and other engineering issues unrelated to the capacity of the 8" line in Emerson Court.

The applicant proposes the following condition of approval. The applicant's proposed language is underlined:

34. The applicant shall provide 8-inch sanitary sewer collection system in the existing and future public right-of-way with the connection to the existing collection system at the manhole located in Meyers Road at Emerson Court. A short section of the collection system shall be located in a 15-foot wide public easement that extends from the western end of "B" Street to the Beaver Creek Road ROW. The applicant shall have the option of making this connection within the easement off of Emerson Court if Public Works/Engineering Development Services Division determines such connection is feasible, will not result in additional costs to the City and approves such connection prior to the time of construction.

Appellant's Appeal

The appellant alleges that the City's decision violates the Oregon City Comprehensive Plan, the Oregon City Municipal Code, the Metro Code and State Law. The appellant's arguments provide no basis to overturn the decision of the Community Development Director.

As a starting point, the present application is a "limited land use decision," meaning that the proposed use is permitted outright on the subject property. The City's decision is limited to approval or denial of the application based on discretionary site and design standards that regulate the physical characteristics of the use. See ORS 197.015(12)(B). As a limited land use decision, neither the City's Comprehensive Plan nor any of its goals or policies apply to this application. ORS 197.195(1). Consequently, the appellant's arguments under the Comprehensive Plan have no bearing on this application and the City Commission is prohibited from applying the Comprehensive Plan to this application.

Beaver Creek Road Concept Plan

The appellant generally argues that the subject property, due to its inclusion in the Beaver Creek Road Concept Plan (the "BRCP"), cannot be developed until the BRCP is approved. The appellant's argument has no legal merit.

An overwhelming majority of the 453 acres in the BRCP was added to the regional urban growth boundary by Metro in 2002 and 2004. The subject property, however, was added to the City's UGB in 1979, predating Metro's Title 11 requirements applicable to urban reserve areas and areas added to the UGB. Thus, while the balance of the property within the BRCP area may be subject to Metro's Title 11 planning requirements, the subject property is not. Moreover, the subject property does not carry Metro's Title 4 Significant Industrial Lands designation. The Metro Code simply has no application to the present request. Indeed, the appellant has not identified with any specificity how a site and design review application would violate the Metro Code.

Even if the applicant's property were subject to Metro's Title 11 standards, approval of a site and design review application would not violate Title 11. Metro Code 3.07.1130 provides the standards for planning in areas added to the UGB, but for which no concept plan has been approved. Title 11 provides that local jurisdictions may not approve the following:

- A. A land use regulation or zoning map amendment that allows higher residential density in the area than allowed by regulations in effect at the time of addition of the area to the UGB;
- B. A land use regulation or zoning map amendment that allows commercial or industrial uses not allowed under regulations in effect at the time of addition of the area to the UGB;
- C. A land division or partition that would result in creation of a lot or parcel less than 20 acres in size, except for public facilities and services as defined in section 3.07.1010 of this chapter, or for a new public school;
- D. In an area designated by the Metro Council in the ordinance adding the area to the UGB as Regionally Significant Industrial Area:
 - 1. A commercial use that is not accessory to industrial uses in the area; and
 - 2. A school, a church, a park or any other institutional or community service use intended to serve people who do not work or reside in the area.

None of the above standards would prohibit the City from approving a site and design review application on MUC-zoned land. In short, the Metro Code provides no basis to overturn the City's decision. Other than merely referencing the Metro Code, the appellant has not provided any legal argument as to why the Metro Code would apply to the present site and design review application.

The appellant relies heavily on LUBA's decision affirming the City's annexation of 122 acres to the City—including the applicant's property—in 2008. See, *Grazer-Lindsay v. City of Oregon City*, 56 Or. LUBA 504 (2008). The appellant's reliance on *Grazer-Lindsay* is misplaced because LUBA's decision has no relevance to the present application. The primary question before LUBA in *Grazer-Lindsay* was whether it was permissible to annex 122 acres to the City prior to adoption of the BRCP. LUBA held that it was permissible to do so. LUBA did not hold or otherwise mandate that the BRCP be adopted before the applicant's property is developed. While portions of the 122 acres may have such a requirement due to the fact that such property is subject to Metro's Title 11 rules, the applicant's property carries no such restriction. Consequently, LUBA's decision has no influence on the present case.

2010 Zone Change

In 2010, the City approved a Comprehensive Plan Amendment and Zone Change for the subject property from Future Urban (FU) to Mixed Use Corridor (MUC). The 2010 zone change was not appealed and has been acknowledged by LCDC. Members of the Hamlet of Beavercreek opposed the rezoning application, arguing, among other things, that Metro's Title 11 regulations prohibited rezoning until adoption of the BRCP. The City rejected the opponents' arguments for the same reasons stated above, namely, that Title 11 does not apply to the subject property. The opponents did not appeal the City's decision and the decision is final. To the extent that the appellant or other opponents believe that the City should not have rezoned the property, they should have appealed the City's 2010 zone change. They did not and cannot now challenge the application of the City's acknowledged MUC zone. The MUC zone is acknowledged and the City has every right to approve a site and design review application on the property.

Statewide Planning Goals

The appellant argues that the City's decision violates Statewide Planning Goals 1 and 2. The Statewide Planning Goals have no application to a limited land use decision where the City's land use regulations and zoning maps have been acknowledged. The goals simply do not apply. ORS 197.175(2)(d); *Byrd v. Stringer*, 295 Or. 311, 316, 666 P.2d 1332 (1982).

Applicable Criteria

Approval or denial of the present application must be based on the standards and criteria in effect on the date the application was filed. Testimony, in turn, must be directed to the applicable standards and criteria. The appellant's testimony does not identify any relevant standard or explain why the applicant has not met its burden of proof with respect to an applicable standard. The appellant's testimony, therefore, falls far short of identifying any basis upon which to overturn the decision of the Community Development Director.

The applicant respectfully requests that the City Commission amend the decision of the Community Development Director to include the amended conditions proposed by the applicant and to deny the appeal.

Very truly yours,



Steven P. Hultberg

cc: Andrew Brand
City Attorney