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FAX Transmittal

DATE:	September 13, 2011
SENT BY:	Michael J. Lilly
TO:	Commissioners
COMPANY:	Planning and Sustainability Commission
FAX NUMBER:	503-823-7800
NUMBER OF PAGES (WITH COVER):	31

MESSAGE:

Re: Amendment to the Public Facilities Plan, Sanitary Sewer Element:
Fanno Pump Station Addition
Proposed Draft – Public Hearing September 13, 2011

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September 13, 2011

Planning and Sustainability Commission
1900 SW Fourth Ave., Suite 7100
Portland, OR 97201

By Facsimile and Hand Delivery

Re: Amendment to the Public Facilities Plan, Sanitary Sewer Element:
Fanno Pump Station Addition
Proposed Draft – Public Hearing September 13, 2011

Dear Commissioners:

My wife and I live in a home we have owned for 30 years at 8490 SW Cecilia Terrace, Portland, Oregon 97223. It is a few hundred feet from the new proposed pump station in this plan change. We will be within sight, sound, and smell of the pump station and its accompanying sewage spills if BES is able to obtain the permits needed for its construction.

We do not live within the city limits of Portland, and the proposed additional Fanno Pump Station is also outside the Portland city limits. Both our house and the site are in unincorporated Washington County. The facility proposed by BES impacts my home and neighborhood but does not provide service to it. Our sewer service comes from Washington County Clean Water Services.

I am an attorney, representing myself and my wife, and we are objecting to the proposed Comprehensive Plan Change because of its impact on us and our neighborhood. My objections are as follows:

1) The notice for this hearing was defective because it did not indicate the applicable approval criteria for the decision. This hearing should be conducted as a quasi-judicial hearing because it proposes a plan change that is limited to a discrete project.

2) The staff report, findings, and evidence do not address applicable approval criteria for the decision as set forth in City Code Section 33.835.040 B.

3) The proposal for a pump station is inconsistent with Portland **Comprehensive Plan Goal 11 Policy 1.4 Intergovernmental Coordination**. The staff's proposed findings indicate that this policy has been met merely because "...other governmental agencies were notified of this proposal and given a chance to comment." It is doubtful that this alone would ever be sufficient to constitute coordination, but in the context of this proposal it is particularly deficient.

BES is planning to site the pump station in the Garden Home area of Washington County. Because the new station will be in Washington County it must have land use approval from Washington County. BES already applied for such approval in 2010 and it was denied for a location immediately adjacent to the location now being proposed.

On June 14, 2010 the Washington County hearings officer turned down BES's application citing seven different deficiencies, including inconsistency with the Portland Public Facilities Plan. A copy of the Hearings Officer's decision is attached. It is a little difficult to imagine how a proposal could be more lacking in "intergovernmental coordination" than one that has already been rejected by the coordinating government. BES must provide findings supported by substantial evidence demonstrating how this new proposal will be more consistent with Washington County's land use regulations than the proposal that was already denied. Without such evidence and findings it is impossible for the City to make a finding that it is coordinating with Washington County.

4) The proposed plan changes are inconsistent with other portions of the Public Facilities Plan that would remain; and as a result, if the change is adopted, the Plan would be internally inconsistent. City Code Section 33.853.040 B requires changes to be consistent with the Comprehensive Plan. The proposed plan changes are also inconsistent with Section 33.853.040 B because, as explained below, they are inefficient.

When the first Fanno Pump Station was built, approximately twelve years ago, it was sized to be large enough to handle the flow of sanitary sewer from the West Hills storm water plus anticipated infiltration and inflow at full build out. BES obtained the Washington County approval for the first Fanno Pump based in part on a representation that the pump station would never need to be expanded.

As BES has admitted, the capacity problem with the Fanno Pump arises not because of sanitary sewage from homes and businesses, it arises because of "Infiltration and Inflow" – I & I – of storm water flowing into Portland's old and deteriorating sanitary sewage collection system. There is no capacity problem in the Fanno Basin except in times of heavy rain and run off.

Portland's existing Public Facilities Plan has a sensible solution for the I & I problem – **FIX THE DETERIORATING SANITARY SEWAGE PIPES** – This Solution is referenced and built into the City's existing Facilities Plan. Unfortunately it has not been implemented or even formally studied. Now BES

wants to ignore that solution in the existing Facilities Plan and instead apply a gigantic, expensive, temporary band-aid to the problem. Instead of fixing its collection pipes BES simply proposes to pump more combined sewage water. If this solution is approved, then in another ten years, BES will probably need to build a third pump station to pump the ever increasing flow, from the ever increasing infiltration and inflow of storm water, from the ever deteriorating sanitary sewer pipes in the West Hills. BES's solution is inefficient because it wastes money by building expensive new infrastructure instead of repairing old. The City also wastes energy by pumping ever increasing amounts of storm water instead of repairing its sanitary sewer collection system as provided in the current plan. The City has presented no findings and no substantial evidence to justify this disregard for the provisions of its current Facilities Plan for dealing with the storm water infiltration and inflow into its sanitary sewer collection system.

5) The proposal also violates Section 11.5 of the City Plan Policy and Objectives by imposing costs for public facilities on citizens who did not make the improvement, expansion, and construction necessary. In this case, the City is imposing a cost on our neighborhood residents by siting the facility in our neighborhood. That impact creates a cost to the homeowners in our neighborhood that they should not have to absorb.

Conclusion

This proposed amendment should not be recommended to the City Council for approval. Instead the Commission should recommend that it be returned to BES for further consideration, because of the lack of adequate findings and lack of substantial evidence in support of its existing findings.



Michael J. Lilly

Enclosure



Washington County
Department of Land Use and
Transportation
Current Planning Services
165 N First Ave, Suite 380
Hillsboro, OR 97124

NOTICE OF DECISION OF THE HEARINGS OFFICER

PROCEDURE TYPE: III

CPO: 3 **COMMUNITY PLAN:**
Raleigh Hills/Garden Home

LAND USE DISTRICT(S):
R-5 (Residential 5 units/acre)

PROPERTY DESCRIPTION:
ASSESSOR MAP NO.: 1S1 23AD & 1S1 23DA
TAX LOT NO: 201 & 200
ADDRESS: No Address Assigned
SITE SIZE: 2.4 acres and 0.05 acres

CASEFILE: 10-087-SU/D(INS)/FP

APPLICANT:
City of Portland
Bureau of Environmental Services
Attn: Dan Hebert
5001 N. Columbia Blvd.
Portland, OR 97203

APPLICANT'S REPRESENTATIVE:
Vigil-Agrimis, Inc
Attn: Susan Cunningham
819 SE Morrison Street, Suite 310
Portland, OR 97214

OWNER TAX LOT 201:
City of Portland -- By Erling T Soli
5001 N. Columbia Blvd.
Portland, OR 97203

OWNER TAX LOT 200:
Washington County Support Services -
Facilities
Attn: Teresa Wilson
Hillsboro, OR 97124

PROPERTY LOCATION: On the south side of
the Fanno Creek Trail, at the southern terminus
of SW 86th Avenue approximately 1,500 feet
south of its intersection with SW Scholls
Ferry Road.

PROPOSED DEVELOPMENT ACTION: Special Use and Development Review for the Expansion
of the Fanno Basin Pump Station Facility, and an Associated Flood Plain Alteration

DATE OF DECISION:

June 14, 2010

A summary of the decision of the Hearings Officer and supplemental findings are attached.

This decision may be appealed to the Land Use Board of Appeals (LUBA) by filing a notice of Intent to Appeal with LUBA within 21 days of the date of this decision. Contact your attorney if you have any questions in this regard.

For further information contact the Land Use Board of Appeals at 503-373-1265.

The complete case, including Notice of Decision, Application, Staff Report, Findings and Conclusions, and Conditions of Approval, if any, are available for review at no cost at the Department of Land Use and Transportation. Copies of this material will be provided at reasonable cost.

Notice to Mortgagee, Lien Holder, Vendor or Seller: ORS Chapter 215 requires that if you receive this notice it must promptly be forwarded to the purchaser.

10-087-SU/D(INS)/FP
Notice of Decision of Hearings Officer
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CASEFILE NUMBER: 10-087-SU/D(INS)/FP

SUMMARY OF DECISION:

On June 14, 2010 the Washington County Hearings Officer issued a written decision (Attachment "C") for Washington County Casefile No. 10-087-SU/D(INS)/FP. The decision of the Hearings Officer is as follows:

ORDER:

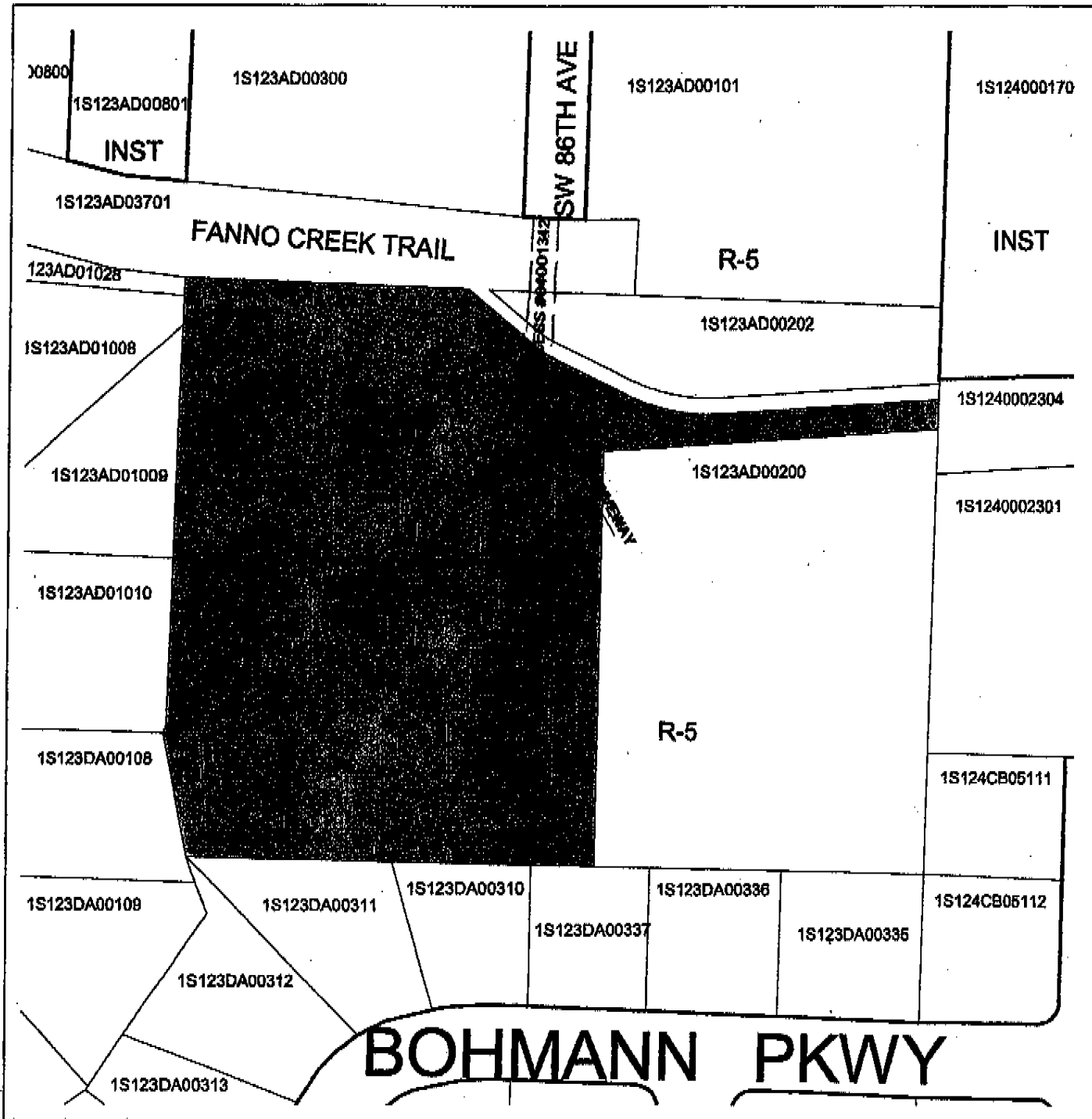
Approval of Special Use and Development Review for the expansion of the Fanno Basin Pump Station and the associated Flood Plain alteration is **denied**.

Attachments:

- A. Vicinity Map**
- B. Hearings Officer's Final Order**

ATTACHMENT A VICINITY MAP

TAX MAP/LOT NO. 1S1 23 AD 00201 & 1S1 23 DA 00200 CASE FILE NO. 10-087-SU/D(INS)/FP



 NORTH
  AREA OF CONSIDERATION

SCALE: 1" = 100'

SITE & SURROUNDING LAND USE DISTRICTS:

R5 (Residential 4-5 units/acre)
 INST (Institutional)

REVIEW STANDARDS FROM CURRENT OR APPLICABLE ORDINANCE OR PLAN

- A. WASHINGTON COUNTY COMPREHENSIVE PLAN
- B. APPLICABLE COMMUNITY PLAN (See Front of Notice)
- C. TRANSPORTATION PLAN
- D. WASHINGTON COUNTY COMMUNITY DEVELOPMENT CODE:
 - ARTICLE I, INTRODUCTION & GENERAL PROVISIONS
 - ARTICLE II, PROCEDURES
 - ARTICLE III, LAND USE DISTRICTS
 - ARTICLE IV, DEVELOPMENT STANDARDS
 - ARTICLE V, PUBLIC FACILITIES AND SERVICES
 - ARTICLE VI, LAND DIV. & LOT LINE ADJUSTMENTS
 - ARTICLE VII, PUBLIC TRANSPORTATION FACILITIES
- E. R & O 86-96 TRAFFIC SAFETY IMPROVEMENTS
- F. ORD. NO. 524, UNIFORM ROAD IMPROVEMENT STANDARDS
- G. ORD. NO. 69-1A, TRANSPORTATION DEVELOPMENT TAX
- H. R & O 07-20 DESIGN AND CONSTRUCTION STANDARDS

Casefile # 10-087-SU/D(INS)/FP
Attachment C - Hearings Officer's Findings, Conclusion and Order

BEFORE THE
LAND USE HEARINGS OFFICER
OF WASHINGTON COUNTY, OREGON

FINAL ORDER

CaseFile No. 10-087-SU/D(INS)/FP

Applicant: City of Portland Bureau of Environmental Services

Land Use Review: Special Use and Development Review for the expansion of the Fanno Basin Pump Station Facility, and an associated Flood Plain Alteration.

Land Use District: R-5(Residential 5 units/acre)

Hearing Date: May 3, 2010

I. ORDER

Approval of Special Use and Development Review for the expansion of the Fanno Basin Pump Station and the associated Flood Plain alteration is denied.

II. RECORD AND HEARING SUMMARY

1. The Hearings Officer received testimony and evidence on this application, Case File No. 10-087-SU/D(INS)/FP, at the public hearing on May 3, 2010. All exhibits and records of testimony regarding this application are filed with and maintained by Washington County Department of Land Use and Transportation.
2. The Hearings Officer made the statements required by ORS 197.763 and disclaimed any bias, conflicts of interest, or ex parte contacts with interested persons. The Hearings Officer disclosed that she had visited the site, summarized her observations, and invited participants to respond to her observations.
3. Wayne Hayson, Washington County Associate Planner, made a power point presentation, Exhibit H-2, to list the applicable criteria and summarize the Staff Report and Recommendation ("Staff Report"), Exhibit H-5, and submitted a file of letters received by the County prior to the hearing, Exhibit H-1. Mr. Hayson recommended approval of the application with conditions, based on the findings and conclusions in the Staff Report.
4. Dean Marriott, Director of the City of Portland Bureau of Environmental Services (BES), concurred with the Staff Report and accepted the proposed conditions of approval. Other City of Portland staff, outside legal counsel, and consultants presented evidence in support of the application, addressed legal issues and responded to concerns raised by residents of the surrounding neighborhood.

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5. Residents of the surrounding neighborhood raised concerns regarding:
 - a. Impacts on the quality of life and conflict with the character of the neighborhood from the visual impact of the new buildings, odors, noise, vibration, loss of vegetation, and construction staging;
 - b. Loss of property value;
 - c. Lack of protection for Significant Natural Resources;
 - d. Impacts on wetland/riparian values and wildlife habitat; and
 - e. Impacts from alteration of the floodplain.

6. Several legal issues were raised by, Michael Lilly, an Attorney representing himself as a resident of the neighborhood, and Tim Ramis, Attorney representing Mary Shaver who owns the home adjacent to the east, including assertions that:
 - a. The proposed development is not a permitted use in a Natural Resource Area, under Washington County Community Development Code ("CDC") Section 422;
 - b. The applicant has not provided substantial evidence showing that there is "insufficient buildable land" as required by CDC Section 422-3.3(6);
 - c. The existing facility is a non-conforming use, and the applicant has not provided substantial evidence showing that the proposed development meets the requirements for expansion of a nonconforming use under CDC Section 440;
 - d. The finding in the 1998 approval of the existing pump station that the use would not be expanded constitutes a "de facto" condition of approval that can only be changed through a modification of the 1998 approval; and
 - e. The applicant has failed to show that it is feasible to perform the required mitigation on-site.

7. In response to several requests, the Hearings Officer held the record open following the close of the hearing, as follows: until May 10, 2010 for new evidence by any party; until May 17, 2010 for response by any party to new evidence submitted through May 10, 2010; and until May 20, 2010 for the Applicant's final argument.

8. Additional evidence was submitted by the Applicant and several other parties on or before May 10, 2010.

9. Additional evidence and argument was submitted by Susan Hudson on May 11, 2010. Ms. Hudson's submittal was late because she was unable to promptly contact the County to find out how to submit documents due to an incorrect phone number on the Staff Report. For this reason, the Hearings Officer accepted the submittal into the record.

10. An Objection to evidence provided by the Applicant on May 10, 2010 was submitted on May 14, 2010 by Michael Lilly. A response to that objection was submitted by the Applicant's attorney on May 14, 2010. The objection is addressed below.

11. Rebuttal was submitted by Michael Lilly and Tim Ramis, on or before May 17, 2010. Final Argument from the Applicant was received on May 19, 2010. The record closed on May 20, 2010.

Casefile # 10-087-SU/D(INS)/FP**Attachment C - Hearings Officer's Findings, Conclusion and Order****III. OBJECTION TO EVIDENCE.**

An objection was filed by Michael Lilly in a letter dated May 13, 2010 and received by the County on May 14, 2010. Mr. Lilly objected to documents submitted by the Applicant on May 10, 2010, asserting that the documents constitute a new or amended application that should go through a full hearing process. Mr. Lilly also objected that the documents were not made available to the neighbors or opposing counsel until May 11, 2010, when May 10th was "the last day that citizens were allowed to submit additional evidence."

As set out in the letter from Christe White, dated and received May 14, 2010, the evidence submitted by the Applicant on May 10, 2010 included some corrections, clarifications and some additions to the record. However, the evidence submitted through May 10, 2010 by the Applicant does not amount to an amended or new application.

Mr. Lilly, or any other person, had an additional week, until May 17, 2010, to submit a response to the new evidence submitted by the Applicant. In addition, pursuant to ORS 197.763(6)(c), a written request could have been made for time to submit additional evidence. The Hearings Officer would have been required to reopen the record. This option was specifically discussed before the close of the hearing. Mr. Lilly made no request that the record be reopened.

For these reasons, the Hearings Officer did not reopen or otherwise extend the period of time for receiving additional evidence or argument, and has received the Applicant's May 10, 2010 evidentiary submittal into the record.

IV. FINDINGS AND CONCLUSIONS**A. Background**

BES requests Special Use approval and Development Review for the expansion of the Fanno Basin Pump Station, and an associated Flood Plain alteration. The site currently contains an existing pump station and generator building approved in Casefile 98-022-SU/D(INS)/FP, and an emergency temporary pumped distilling system approved in Casefile 08-466-FP.

The subject property is located in the R-5 District. All surrounding parcels are designated R-5, with the exception of the Portland Golf Club which is designated Institutional District. Single family homes are located on all sides of the site, but access to the site from those properties is restricted due to the location of Fanno Creek which flows north to south along the west side of the site. Vehicular access to the unmanned station will remain from SW 86th Avenue.

The existing pump station was commissioned in May 2000, replacing five older wastewater pumping stations in the Fanno Basin. The pump station receives flow from the Fanno Interceptor sewer and conveys the wastewater through an approximately 17,000-foot long pressure line to a discharge structure located at SW 31st Avenue and SW Multnomah Boulevard, within the City of Portland. At that point, the flow enters the City's sewer system and is delivered to the Columbia Boulevard Wastewater Treatment Plant.

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The existing pump station is designed to pump a firm capacity of 24-cfs with three pump sets running, with the fourth pump set as an installed spare. On-going flow monitoring and Fanno Basin flow modeling conducted by the BES Systems Analysis section determined that the projected peak hour influent flows at the existing Pump Station will continue to exceed the 24-cfs firm capacity of the existing facility during storm events. The modeling results show that a firm pumping capacity of at least 40-cfs is required to capture and convey the peak influent flow that will be generated by a 5-year storm event in Fanno Basin.

The BES System Analysis identified several potential options to address the peak hour influent flow and pumping capacity issue. The applicant chose to proceed with the option that includes installing additional pumping capacity at the existing Fanno Basin Pump Station site, and upgrading the pressure line system. Negotiations with Clean Water Services and the Oregon Department of Environmental Quality resulted in a Mutual Agreement and Order that has committed BES to having the Pump Station on-line and able to reliably pump 24 cfs by August 2011 and expand to 40 cfs by November 2012.

The expanded pump station would consist primarily of a new pump station that will operate as the primary pump station, and two surge tanks that will protect the new force mains against damage from pressure transients. The pump station will include two 2-stage pump systems with space provided for a third 2-stage unit if required in the future. The pump station will be approximately 6,200 square feet and 25 feet tall. The finished floor elevation will be located at 206.5 feet, which is one foot above the delineated 100-year flood elevation. The surge tanks will be located in an open-roof, 20 feet tall, three-sided enclosure of approximately 4,100 square feet. These are the revised figures from the Applicant's May 10, 2010 submittal.

Based on the revised figures, the total area of new development will be 13,940 square feet. Total build out of the site, including the existing development, will be 33,107 square feet, representing about 33 percent of the site.

The entire development site is located within the 100 year flood plain associated with Fanno Creek. Two wetlands and two waters of the State (Fanno Creek and the man-made side channel) were identified on the property. Water Areas and Wetlands -- Fish and Wildlife Habitat associated with Fanno Creek exist across the majority of the site, with the exception of an area in the center of the site designated only as Water Areas and Wetlands, and a portion of the north western boundary which is not designated as a significant natural resource area.

B. The Nature of the Proposed Development for the purposes of determining the applicable review criteria.

The nature of the proposed development and the existing development on the site, whether it is a public utility, a primary use or an accessory use, has a significant impact in this review because the site has been mapped as in the flood plain and identified as an area of significant natural resources subject to Sections 421 and 422 of the CDC. Those regulations place significant limitations on the uses and structures permitted on this site.

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The Applicant and County have treated the proposed development as a permitted public utility for the purposes of the dimensional standards of the R-5 District. However, they have also identified the proposed pump station and surge tanks as "accessory structures" for the purposes of CDC Sections 421 and 422. The Applicant makes the further argument that the pump station can be approved as a permitted primary use as a part of the sewer pipeline itself, rather than as an accessory structure to the pipeline.

Other parties have contested the Applicant's and County's characterizations of the proposed and existing development, and have further asserted that the proposed development must be reviewed as an alteration of a non-conforming use under CDC 440, and that it must meet the criteria in CDC 207-5.7 for modification or removal of conditions.

Before it can be determined whether or not the proposed development meets the applicable approval criteria, or if it is even permitted on this site, it is necessary to determine how the development should be classified for the purposes of this land use review.

1. Public Utility under CDC 302-4.12.

The Staff Report points out that the proposed pump station expansion is permitted in the R-5 District through a Special Use and Development Review in accordance with the requirements of CDC 302-4.12. CDC 302-4.12 allows a "public utility" in the R-5 District through a Type III procedure, subject to the development standards of CDC 430-105.

The Staff Report also recognizes the proposed development as a public utility in that the dimensional standards of a permitted use in the R-5 District, set out in CDC 302-7, are applied to the proposal. The Staff Report identifies the applicable height standard as that set out in CDC 302-7.3A, which states: *"The maximum height for structures shall be thirty-five (35) feet except as modified by other Sections of this Code."* The Staff Report finds that the 25 foot height of the proposed pump station and the 20 foot height of the new surge tank structure will meet the maximum height requirement of CDC 302-7.3A. The Staff Report omits any reference to CDC 302-7.3B, which states: *"The maximum height for accessory structures shall be fifteen (15) feet except as modified by other Sections of this Code."*

The Staff Report is consistent with the Application which also treats the proposed development as a permitted use under CDC 302. On page 11 of Exhibit A-1, the Applicant concludes that the proposed 20 and 25 foot building heights meet the height limitations of CDC 302-7.3, and makes the following finding in relation CDC 302-7.3B:

"No accessory buildings are proposed as part of this project."

2. Accessory to the Pipeline for the purposes of CDC 421 and 422.

The Application and Staff Report point out that the entire site is located within the 100 year flood plain associated with Fanno Creek, and agree that any development on the site is subject to the requirements of CDC 421 for Flood Plain and Drainage Hazard Area Development. They also agree that CDC 422 applies to the proposed development, because Water Areas and

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Wetlands -- Fish and Wildlife Habitat associated with Fanno Creek exist across the majority of the site, and two wetlands and two waters of the State (Fanno Creek and the man-made side channel) were identified on the property.

CDC Sections 421-4, 421-5 and 421-6 identify the uses and activities permitted in flood areas. CDC 422-3.3A generally prohibits alteration of the vegetation or terrain of the Riparian Corridor or a significant water area or wetland, except as specifically provided in subsections (1) through (11). None of the uses listed in CDC 421 or the specific exceptions in CDC 422 include public utilities.

CDC 421-5.11 does allow construction of underground sewer lines and necessary accessory structures:

"Construction or major improvement or alteration of underground pipes and conduits, including sewer, water and gas lines, transmission and distribution lines for geothermal resources, gas and oil, underground electrical, telephone and television transmission and distribution lines, including necessary accessory structures and drainage systems."

In order for the proposed development to be permitted under CDC 421-5.11, the Applicant asserts that the Fanno pressure sewer line on the site is the "primary use" of the site, and the pump station and surge tanks are accessory to that use.

The Applicant points out that "primary use" is defined in CDC 106-171 as "the main use to which the premises are developed and the principal purpose for which the premises exist." The Applicant asserts that the pump station and surge tanks are accessory to the primary use of the pipeline, because:

"No pump station would be located on the site without the presence of the 24-inch pressure line. The main use and existing use of the premises is the sewer line itself. The principal purpose of the site under Section 106-171 is to house the pressure line. Without the pressure line in this location and at this site, no pump station would be needed or appropriate. Simply put, it is because the force line is present on the site as the primary use of the site, that a pump station is needed at all as a secondary and subordinate use." Applicant's Final Legal Argument, dated and received May 19, 2010, at page 3 ("Applicant's Final Legal Argument.")

CDC 106-5 defines an accessory building or structure as:

"A detached, subordinate structure, the use of which is customarily incidental to that of the dominant use of the main building, structure, or land and which is located on the same lot or parcel as the main building, structure or use."

The Staff Report and the Application assert that the proposed pump station and surge tanks are "accessory structures" to the sewer line which they argue can be permitted under CDC 421-5.11 and CDC 422-3.3.A(3) and (6).

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The argument that the proposed pump station and surge tanks are accessory structures or uses is inconsistent with most of the Application and Staff Report. At no time have either Planning Staff or the Applicant explained why, if the pump station and surge tanks are accessory structures, the 15 foot-height limitation for accessory structures does not apply. Nor do they explain why the Application specifically states that no accessory buildings are proposed. In addition, the Special Use Standards for Accessory Uses and Structures in CDC 430-1 are simply not addressed in the Application or Staff Report.

In addition to these inconsistencies, the argument that the proposed development is accessory to the existing pipeline conflicts with both the clear language and the intent of the relevant code provisions.

a. The proposed pump station and surge tanks are not "accessory structures".

- i. The proposed pump station and surge tanks are defined as a "public utility," in the CDC, and cannot also be an accessory use or structures under the terms of CDC 430-1.**

CDC 430-1 sets out special use standards for accessory uses and structures, and specifically states that: "*Uses identified elsewhere in this Code are not accessory uses.*"

A public utility is a use defined in CDC 430-105 as including the "disposal of sewage", and CDC 430-105.3 states that "[a] public utility service facility includes buildings, structures, and equipment within a fenced or otherwise enclosed area for the purpose of switching, regulating or controlling public utility services."

The proposed pump station and surge tanks are for the purpose of controlling and regulating the flow of sewage through the City's force main. As the disposal of sewage is identified as a public utility in CDC 430-105, and the proposed pump station and surge tanks constitute a public utility service facility as defined in CDC 430-105.3, both the proposed use and structures are identified in the CDC and cannot be considered an accessory use or structures for the purposes of being allowed under the provisions of CDC 421 or 422.

- ii. The pump station and surge tanks will not be "detached" from the dominant use.**

CDC 106-5 requires that the accessory structure be "detached" from the primary structure. CDC Sections 430-1.2 and 1.3 define "detached" for structures accessory to commercial, institutional, and industrial uses as having more than ten feet between the structures, or if closer than ten feet, the accessory building may not be connected to the primary building by a covered structure such as a breezeway. "Detached" is defined in Webster's Dictionary¹ as "not sharing a wall with

¹ References to "Webster's Dictionary" throughout this decision mean "Webster's Third New International Dictionary," copyright 1993, as CDC 106-1.3 requires the use of that dictionary for definition of any word or term that is not defined in the CDC.

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another building.” These definitions reflect the common understanding of the word “detached”, and clearly mean that accessory structures may not be physically connected to the primary structure.

The proposed pump station and surge tanks must be attached to the pipeline that is alleged to be the primary structure or they could not function for their intended uses. The Applicant confirms that the pump station, surge tanks and pipeline are all connected to each other:

“The existing force main is connected directly to the pumps located in the pump station....These new pumps will connect directly to the influent sewer and outgoing force mains. The surge tank facility will also connect directly to the outgoing force mains....Basically, the pumps serve as a direct connection or elbow in the sewer line between the sewage collected by gravity and the pressure lines which deliver this sewage east. They are an integral operational element of the sewer line and are a part of the sewer line. Without these stations the sewer line is not operational.” Applicant’s Final Legal Argument, at page 3.

After making this statement that the pumps and surge tanks are directly connected to the pipeline, the Applicant argues that the pipeline is detached from the sewer line because the attachment is underground and not visible. The Applicant asserts that the purpose of the requirement that the structures be detached is “to maintain a visual distinction.”

The Applicant does not provide any support for the conclusion that the intent of the code requirement for detachment is to maintain a visual distinction. Nothing in the language or purpose of the code provisions for accessory uses supports that interpretation. In fact, to adopt such a definition would negate the clear and usual meaning of that word. There is no reason to give the word “detached” any meaning other than its common meaning for the purposes of the code definition of accessory use.

In this case, the connection of the pipeline with the surge tanks and pump station emphasizes the fact that they are a single use, rather than dominant and accessory uses. Allowing these structures, which are directly and necessarily connected to the pipeline, would violate the clear language of the CDC and the intention of the requirement that accessory structures be “detached.”

- iii. The pump station and surge tanks will not be “subordinate” structures or “incidental” to the “dominant” use of the site.

CDC 106-5 requires that the accessory use or structure be “subordinate” and “incidental” to the “dominant” use. Those terms are not defined in the CDC. The relevant definitions in Webster’s Dictionary are as follows:

- Dominant is defined as “most determinative: holding ... preeminence in fulfilling a function or role.”
- Subordinate means “in a lower order, class or rank; holding a lower or inferior position.”

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- Incidental is defined as “subordinate, nonessential, or attendant in position or significance”, and “occurring as a minor concomitant.”

In McCormick v. City of Baker City, 46 Or LUBA 50, 59 (2003), LUBA relies on the Webster's Dictionary definitions of these words, and states:

“The question under ORS 197.829(1) is whether the city's interpretation of its code is consistent with the express language of the code, read in context.... Land use codes often define “accessory” uses with similar terms. There is no reason to believe that the city code gives those terms something other than their ordinary meaning.”

LUBA recognized the basic approach used by the City to determine if a proposed use is “accessory”, and described it as “comparing the nature and scale of the facility and the residential use to determine which is primary and dominant and which is incidental and subordinate.” The City had based its determination that the tennis facility was incidental and subordinate to the residential use on three considerations: 1) the seasonal nature of the tennis facility compared to the year round residential use; 2) players were not charged for use of the facility; and 3) no significant adverse impacts to adjoining properties.

LUBA criticized the City for exclusive reliance on those factors while ignoring other, more obvious considerations:

“There is no dispute that the tennis facility far exceeds the physical scope, scale and intensity of both the dwelling and the recreational needs of the dwelling's residents. There also seems no dispute that most of the structural and operational aspects of the tennis facility (the extra courts, bleachers, clubhouse, parking, RV camping, public tournaments and unrestricted public access) go far beyond the recreational needs of the residents and were designed and built to accommodate large, intensive public tennis events. The city's decision does not explain why, under its basic approach of comparing the nature and scale of the tennis facility and dwelling, it is permissible to rely on two factors to the exclusion of other, highly relevant considerations.” McCormick, at 58.

According to LUBA, the physical scope, scale and intensity of use are relevant, and in fact may override other factors. LUBA did not approve of relying on factors that: “allows a use that in almost all other parameters dwarfs residential use of the property.” LUBA concluded that: “We do not think the terms ‘accessory,’ ‘incidental’ and ‘subordinate’ are quite that elastic.” McCormick, at 59.

The Applicant argues that the sewer line is the dominant use because the pump station and surge tanks would not be necessary if the sewer line was not on the site, because the sewer line already exists on the site, and because the pump station will be used only “secondarily and episodically and only during ... peak conditions.” Applicant's Final Legal Argument, at page 5. The Applicant's reliance on those factors fails for two reasons: First, it is just as easy to argue, from the evidence in the record, that the pipeline would not exist if the pump station did not exist.

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The pipeline is a pressurized force main that would not exist if there were not a pump station to push the sewage through it. The record includes multiple statements by the Applicant that the pipeline and pump station are integral to each other, which is inconsistent with the conclusion that one is primary and one secondary in function.

Second, the Applicant totally ignores the fact that the size, scale and impacts of the proposed pump station and surge tanks overwhelm that of the buried pipeline with regard to the site and the surrounding area. The proposed pump station will be a 6,200 square foot building, 25 feet in height. The two surge tanks will be in an open-roof, three sided enclosure, with an approximately 4,100 square foot print and 20 feet in height. In addition, the exiting pump station will continue to be part of the facility on this site and must be taken into account as part of the "accessory" structures under the applicant's interpretation. The existing pump station is 6,530 square feet and about 25 feet tall. In terms of scale, the new structures by themselves, and even more so with the existing structure, more than "dwarf" the invisible, underground pipeline.

The impacts of the proposed structures seriously outweigh that of the pipeline. The pipeline is invisible and underground, and most of the impacts from the pipeline resulted from its construction. Those impacts have essentially disappeared in the ten years since it was constructed. In order to construct the proposed pump station and surge tanks, most of the vegetation on the site will be removed, the existing side channel will be relocated, and much of the site will be regraded. A significant portion of the site will be lost to natural resource values, and the entire site will be changed. Vegetation, wetland, flood plain and wildlife habitat values will be significantly and negatively impacted during and for seven to ten years following the construction, even with the proposed mitigation plan.

This is an impact well beyond what is common or acceptable for an accessory structure or use. The Oregon Court of Appeals has noted that by definition, accessory uses should "not alter the character of the area or be detrimental thereto." Friends of Eugene v. City of Eugene, 196 Or. App. 771, 776, 103 P.3d 643 (2004); Jagua v. City of Springfield, 193 Or. App. 573, 587, 91 P.3d 817 (2004).

The evidence in the record clearly demonstrates that the proposed pump station and surge tanks will not be "subordinate" or "incidental" to the "dominant" use of the site. They will be the dominant use, just as the existing pump station is currently the dominant use of the site. The size, scale and impacts of the proposed pump station and surge tanks thoroughly dwarf that of the pipeline, and to ignore those considerations would produce a result that is not consistent with the language and intent of the CDC provisions for accessory uses and the flood plain and significant natural resource regulations.

- b. Even if the proposed pump station and surge tanks are accessory structures, they cannot be allowed under CDC 422-3.3A.

CDC 422-3.3 prohibits new or expanded alteration of riparian and wetland areas, except as specifically allowed by that section:

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“Development within a Riparian Corridor, Water Areas and Wetlands, and Water Areas and Wetlands and Fish and Wildlife Habitat:

“A. No new or expanded alteration of the vegetation or terrain of the Riparian Corridor (as defined in Section 106) or a significant water area or wetland (as identified in the applicable Community Plan or the Rural/Natural Resource Plan Element) shall be allowed except for the following:

- (1) Crossings for streets, roads or other public transportation facilities.***
- (2) Construction or reconstruction of streets, roads or other public transportation facilities.***
- (3) Installation or construction of the following utilities: sewer and water lines, electric, communication and signal lines; and gas distribution and transmission lines.***
- (4) Wildlife viewing areas and recreation or nature trails.***
- (5) Bank Maintenance, restoration or stabilization, including riprapping for erosion control, of a river or other watercourse or body of water provided there is compliance with the requirements of Section 421-4.6. This use is not subject to Section 422-3.5 or Section 422-3.6.***
- (6) Detached dwellings and accessory structures on a lot of record, provided there is insufficient suitable, existing buildable land area to permit construction outside the riparian corridor (as defined in Section 106) or a significant water area or wetland (as identified in the applicable Community Plan or the Rural/Natural Resource Plan) and all required local, state or federal permits are obtained.”***

The Applicant asserts that the proposed structures can be allowed as accessory to the sewer pipeline under CDC 422-3.3, because the pipeline is allowed under Subsection 3.3A(3) and accessory structures are allowed under Subsection 3.3A(6). The applicant argues that the use of “and” in Subsection 3.3A(6) means that accessory structures for any primary use are allowed. The applicant explains that if the Code was meant to limit the permitted accessory structures to those accessory to dwellings, it would have said “dwellings and their accessory structures.”

Subsection 3.3A(6) would be more clear if it said “dwellings and their accessory structures.” However if the drafters wanted to allow accessory structures for all of the uses listed in Subsections (1) through (6), they would have clearly said so. There was no logical reason to hide that exception within one of the specific categories if it applies to all the categories.

The fact that it is possible to interpret Subsection (6) to allow structures accessory to any use, does not mean that is a reasonable interpretation of the language when it is taken in context.

“The legitimacy of an interpretation of a local plan and ordinance provision depends on its consistency with the terms of the provision, the context of the provision, and the purpose or policy behind the provision. Conversely, the validity of the interpretation of a local plan and ordinance provision is not determined solely by the reasonableness of an argument created to support it.” Church v. Grant County, 187 Or App 518, 524, 69 P3d 759 (2003)

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It is true that "and" means "in addition to", but when taken in the context of the particular sentence, the entire code section, and the intent of the regulations in CDC Section 422, it is clear that the exception in Subsection (6) is intended to be only for dwellings and structures accessory to dwellings.

The fact that County Planning Staff have apparently acquiesced in the Applicant's strained interpretation of this code provision, does not make it an interpretation of the local government that must be affirmed by LUBA under ORS 197.829(1).

As the proposed pump station and surge tanks are not accessory to a dwelling, they cannot be permitted under CDC 422-3.3A.

c. The pump station cannot be approved as a permitted primary use as a part of the sewer pipeline itself, rather than as an accessory structure to the pipeline.

The Applicant argues that: (1) the sewer pipeline is permitted under CDC 422-3.3A(3); and (2) the pump station and surge tanks are an operational element and integral part of the sewer line; so (3) the pump station and surge tanks are permitted under CDC 422-3.3A(3). Applicant's Final Legal Argument, at page 2.

Such an interpretation ignores the plain meaning of the words in the Code. CDC 422-3.3A(3) allows an exception for "installation or construction of the following utilities: sewer and water lines, electric, communication and signal lines; and gas distribution and transmission lines." (Emphasis added.) The plain language of this subsection clearly provides an exception only for the pipes and wires that are part of sewer, water, electrical, communication and gas distribution systems. If the drafters intended to include the entirety of those utilities, there would be no reason to include the word "lines" throughout the sentence.

Acceptance of the Applicant's conclusion that the pump station and surge tanks can be considered part of the sewer line for the purposes of CDC 422-3.3, would also logically require accepting that interpretation for the purposes of the exceptions to the Flood Plain regulations in CDC 421.5.11, which allows:

"Construction or major improvement or alteration of underground pipes and conduits, including sewer, water and gas lines, transmission and distribution lines for geothermal resources, gas and oil, underground electrical, telephone and television transmission and distribution lines, ..." (Emphasis added.)

This is an untenable interpretation of either code section that would open the door for any public utility to develop its full facilities in flood plains and areas of Significant Natural Resources. This is not consistent with the intent of the Code, or with the Statewide Land Use Goals that are implemented by the CDC.

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When the existing pump station was approved, that portion of the site was not located in the floodway, and the standards for development in a floodway in CDC Sections 421-7.1 and 421-7.4 were not applicable. Subsequent to the 1998 approval, FEMA remapped the floodway on the site so that a portion of the existing pump station is now within the regulatory floodway.

A Memorandum submitted by Tim Ramis and Damien Hall, dated and received on May 17, 2010, (hereinafter "Memo in Opposition."), at page 5, asserts that the change in the mapping makes the existing pump station a non-conforming use, and any alteration of a non-conforming use must meet the requirements of CDC 440. The Memo in Opposition also asserts that it is not possible for the Applicant to meet the criteria for alteration of a non-conforming use, even if an application had been filed for that land use review.

CDC 440-1 provides:

"A nonconforming use is a structure or use of land which does not conform to the provisions of this Code or Comprehensive Plan lawfully in existence on the effective date of enactment or amendment of this Code or Comprehensive Plan. It is the intent of this Section to allow and regulate existing uses and structures that were lawfully established and are not now in conformance with the applicable regulations of this Code."

As the FEMA mapping of the floodway is adopted by reference as part of the Code in CDC 421-1.1, any changes to that mapping are amendments to the CDC. However, the current floodway regulations do permit some development in the floodway. Consequently, the remapping of the floodway to include the existing pump station does not automatically make the existing pump station non-conforming.

To be in conformance, the existing pump station would have to meet the requirements of CDC Sections 421-7.1 and 421-7.4:

"421-7.1 Development proposed to encroach into a regulatory floodway adopted and designated pursuant to FEMA regulations shall demonstrate through hydrologic and hydraulic analysis, performed in accordance with standard engineering practice by a registered civil engineer, that the cumulative effect of the proposal, when combined with all other existing and anticipated development within the basin based upon full development of the basin as envisioned in the applicable Community Plan or the Rural/Natural Resource Plan, will not result in any increase in flood levels within the community during the occurrence of the base (regional) flood discharge. Notwithstanding this provision, development that would result in such an increase may be approved if the County, at the sole expense of the applicant, first obtains FEMA approval in accordance with 44 CFR Ch. 1, Part 65 (October 1, 1990 edition, or its successor). No increase to the flood plain elevation shall be permitted unless the area in which the rise will occur contains no structures and the owner of such property signs a written

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acceptance of any increase in the flood plain elevation. These properties are not required to be part of the application for the proposed development."

"421-7.4 Encroachments into a floodway shall be designed so as to minimize the risk that the encroachment will catch substantial debris or otherwise significantly impede floodwater flows. Designs may include, but are not limited to, adequate sizing of openings, secured breakaway bridges, diverters or spacing of supports."

As no part of the proposed pump station or surge tanks will be located within the currently mapped floodway, the Application and Staff Report did not address these criteria. The Applicant argues that these criteria are met, pointing out that the floodplain analysis for the new pump station considered the impacts and presence of the existing pump station on the floodplain elevations, and that the analysis concludes that: "The result of this comprehensive site analysis was a finding of no net increase in floodplain elevations." Applicant's Final Legal Argument at pages 8-9.

Based on this finding, there is substantial evidence in the record that there will be "no net increase in floodplain elevations" which meets the requirements of CDC 427-7.2, where there will be no encroachment into the floodway. However, it is not clear if this is the same as showing there will be no "increase in flood levels within the community," as is required under CDC 427-7.1 where there will be encroachment into the floodway. Generally, where different language is used in a code, it is assumed that a different meaning was intended.

There is also no evidence in the record addressing the requirements of CDC 421-7.4. It is not a given that any design changes would have been required if the existing pump station had been reviewed under this criterion. There simply has been no such review, so there is not substantial evidence in this record supporting a conclusion that the requirements have been met.

It is not possible, in this proceeding, to make a determination of whether or not the existing pump station conforms to those requirements. As it is not clear whether or not the existing pump station is a non-conforming use, it is not known whether the proposed pump station and surge tanks must be reviewed as an alteration and/or expansion of a non-conforming use.

However, there has been no application for an alteration or expansion of a non-conforming use at this time. If the Applicant makes such an application in the future, a determination can be made in that review proceeding as to whether or not the existing pump station is a non-conforming use, and what code provisions would apply to review of an expansion or alteration of the use.

D. "De facto" Condition of Approval

The Memo in Opposition, at page 9, points out that the 1998 Staff Report recommending approval of the existing pump station states that the use and facility would never be expanded. The Opposition Memo asserts that "representations by applicants, even if not formally included in the conditions of approval, are de facto conditions of approval if they are relied on to meet

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specific approval criteria." Consequently, the Applicant must apply for review and approval of the entire facility or to have the condition modified under CDC 207-5.7.

The Memo in Opposition cites Frankland v. City of Lake Oswego, 267 Or 452, 473, 517 P2d 1042 (1973). In that case, the plaintiffs filed an injunction against the builder of an apartment complex in Lake Oswego because the apartments did not conform to the architectural sketches that were submitted as part of the Planned Unit Development approval. The Court held that:

“***under the ordinance a developer must submit sketches of actual structures to be built, and that he is thereafter bound by these plans and may later change them only by complying with the appropriate procedures delineated by the ordinance.”

The 1998 Staff Report, at page 29, states only that:

“The applicant has indicated that no expansion of the proposed sewer pump station will be necessary since the 24 inch pressure line should be adequate to serve future development in the Fanno Creek basin.”

There is nothing in the 1998 Staff Report or the Decision of the Hearings Officer in that case that indicates there was any significant reliance on the Applicant's expectation that there would be no future expansion of the site. The available record indicates that the approval was based on the conclusion that the development of the site, as proposed at that time, met the applicable approval criteria.

The assertion that the use would not be expanded in the future does not provide the level of a detail as the drawings that were relied upon in Frankland, and there is no evidence that there was any significant reliance on that assertion. There is no indication in the Frankland decision, that the Court of Appeals would attribute the same degree of commitment to such an assertion as was imposed from the required submission of drawings for a PUD approval under the Lake Oswego ordinance. For these reasons, the assertion that there would be no future expansion of the facility on the site does not amount to a condition of approval of that decision.

D. CDC 403 Development within the UGB.

The site is located within the UGB, so the additional standards of CDC 403-3 apply to this development application. The residents of the surrounding neighborhood have objected that the proposed development should be denied under CDC 403-3.1 because it is a Type III development and:

- “A. The proposed development will have significant adverse impacts on property values in the area;
- “B. The proposed development will unduly conflict with the character of an area not otherwise in transition;...”

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At the hearing, many parties asserted that the proposed development would have a negative impact on property values in the surrounding neighborhood. A report, completed by Michael Nuss/Nuss Valuations, Inc., was submitted and concludes that the construction of the expansion to the Fanno Basin Pump Station "will create and has already created 'significant adverse impact' on value for the properties bordering the pump station site." (Attachment to Exhibit H-4, at page 6.) A letter was also received on May 3, 2010, from Stan Houseman, who is a resident of the neighborhood and a professional realtor. He describes impacts on recent sales and agrees that the proposed project is already having a negative impact on property values.

The Applicant submitted a Property Valuation Report completed by Donald Palmer/FirstService PGP Valuation, Inc. That report concludes that the proposed sewer pump upgrade will have a negligible impact on nearby property values. Exhibit H-14. Mr. Palmer also completed a Review of Report Prepared by Michael Nuss. (Attachment 9 of the Applicant's May 10, 2010 Submittal.) This included convincing evidence that a recent sale of a Hummer home adjacent to the site was not significantly adversely affected by the fact that there had been a proposal made for expansion of the Fanno Basin Pump Station.

However, the totality of the information provided by all the experts does not provide substantial evidence supporting a conclusion one way or the other regarding the impact of the actual development on property values. The reports are based on different methodologies, differing assumptions and, not surprisingly, reach differing conclusions. In their final arguments, Mr. Lilly and the Applicant assert that their expert's evaluation is the most reliable information, and explain why the other's report is not credible. This battle of the experts points out the difficulty in evaluating impact on property values, and does not provide substantial evidence for an ultimate conclusion regarding whether or not the proposed development will have a significant adverse impact on property values in the area. Consequently, the proposed development should not be denied on that basis.

2. Unduly Conflict with the Character of the Area.

In this case, the character of the area includes the residential character of the R-5 zoned neighborhood, and the flood plain and riparian areas identified on the site.

The site and surrounding neighborhood is in the R-5 District and the surrounding area is in residential use, except for the Portland Golf Club to the northeast of the site. Public utilities, such as this pump station and electrical substations are permitted uses in the R-5 District and are not uncommon in residential areas. The CDC recognizes the potential for adverse impacts and, therefore, requires that any proposed public utility meet not only the general development standards for the District, but also the special use standards in CDC 430-105. The criteria in CDC 403-3.1 further protect a neighborhood from a proposal that will have unreasonable impacts even though it is listed as potentially a permitted use.

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The Applicant asserts that the proposed development will not unduly conflict with the single-family residential character of the area because a Construction Management Plan² will eliminate excessive impacts during construction, and the Landscape and Flood Plain Restoration Plan³ will ultimately leave the site with 67 percent landscaped open space and exceeding all setback requirements for the R-5 District. The Applicant also asserts that there is already a pump station on the site, so the addition of this new pump station and surge tanks will not change the character of the area.

Residents of the area assert that proposed development will have an excessive negative impact on the residential neighborhood due to noise, odors, vibration, removal of existing mature vegetation and replacement with inadequate plantings, and the visual impacts from the location of a large, industrial type building within 40 feet of the property line.

Noise

The new pump station is being designed with specific acoustical measures that will limit sounds to no more than 40 dba at the property boundary, which satisfies the State, County and City of Portland noise regulations. City of Portland regulations are actually more restrictive than the County regulations. This is substantial evidence that there will be no excessive impacts from noise.

Odors

Residents have reported detectable odors from the existing pump station when it was operating. The proposed development will include a new odor removal system designed to provide greater than 98 percent gas removal efficiency. The Application points out that such filters are used in other pump stations around the metro area and have been very effective in controlling odor. The Applicant has provided substantial evidence that there will be no excessive impacts from odors.

Vibrations

Residents reported serious problems from vibrations during the construction and operation of the existing pump station. The Applicant has explained that different construction techniques will be used for the construction of the proposed pump station and surge tanks, so there will not be a recurrence of the vibration problem that occurred with the previous construction. In addition, the new pump station is being designed to isolate vibrations or shaking within the structure when the pumps are operating. The Applicant has provided substantial evidence that there will be no excessive impacts from vibrations.

Removal of vegetation and regrading of the site

The Applicant asserts that the proposed pump station will be architecturally consistent with the existing building on the site, and the building design will meet all requirements for building height, bulk, landscaping and setbacks for a permitted use in the R-5 District.⁴ Exterior walls

² Pages 5-7 of the Application, as supplemented by Section 1 of the Applicant's May 10, 2010 submittal.

³ Landscape and Flood Plain restoration plan is described in pages 56-69 of the Application, and in the Natural Resource Assessment in Section 5 of the Application. The specifics of that plan are modified by the plans submitted by the Applicant on May 10, 2010.

⁴ As previously discussed, if defined as accessory structures rather than a permitted public utility, the proposed buildings will not meet the code requirements for height.

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facing the surrounding residential neighborhood will continue the red brick surfaces to match the existing building. The roof will be a flat "green roof," complying with current City of Portland sustainability policies. For these reasons, the Applicant asserts that the proposed development will have no significant negative impact on the residential character of the area.

The Applicant's Final Argument does not specifically address the removal of vegetation and regrading of the site in relation to impacts on the character of the area. However, the submitted plans show that 106 trees greater than 6 inches dbh will be removed along with most of the other vegetation on the site. Following construction, the undeveloped portions of the site will be planted with 619 trees and 2,436 shrubs, that are a combination of evergreen and deciduous species that will provide screening year round. The Applicant states that the proposed landscaping is beyond what is required by the County Type 2 Screening and Buffering Standards, and, within seven to ten years, will provide wildlife habitat and a visual buffer between the pump station and the adjacent neighbors.

The residents of the neighborhood object to the "oversized, industrial building;" pointing out that it will be visible from adjacent properties and the recreational pathway that is adjacent to the site, and that it is not consistent with the residential and natural, open space character of the area. They argue that the landscaping and mitigation plan is also not adequate to replace the wetland and wildlife values currently provided by the site.

The proposed buildings are not significantly different in size or design from other non-residential buildings that are regularly allowed in residential neighborhoods, such as schools, churches, electrical substations, etc. And the Applicant has made efforts, such as using the brick facing, to minimize the impact of the buildings. The undue impacts on the residential character come largely from the fact that the proposed revegetation of the site will not actually provide screening for 7 to 10 years. It is also not clear from the record whether there are enough evergreen trees included to provide year round screening even once the vegetation matures.

The new and existing structures will be highly visible for many years because the existing mature, multi-storied, dense vegetation on the site will be completely removed in order to accomplish the proposed development. In addition, because the man-made side channel will be relocated to the southern edge of the site, it will not be possible to include substantial vegetation along that boundary.

The proposed development will also have significant negative impacts on the flood plain, riparian areas and wildlife habitat on the site. The existence of the flood plain, riparian areas and wildlife habitat define the character of this site and area as much as the residential zoning and development that surrounds the site, and these aspects of the site are specifically protected by the Washington County Code.

The final Grading Plan provided by the Applicant in the May 10, 2010 submittal shows that the entire site will be cleared of vegetation and largely regraded. This is necessary in order to site the new structures and driveways totaling 35,758 square feet, and to balance the cut and fill in the 100-year floodplain so as not to cause an increase in water elevations during storm events.

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The proposed grading modifications include: relocation of a side channel of Fanno Creek, creation of a flood plain bench along Fanno Creek, and changes needed to accommodate the new facilities. Specifically, the grading will include:

- Permanent excavation for the pump station;
- Temporary excavations for trenching for installation of buried process piping, water service, electrical duct banks and other similar utilities, and subsequent placement of trench fill after the utility has been installed;
- Temporary mass excavation as needed to provide working space for construction activities with subsequent replacement of fill to re-create the existing site grade, configuration, and topographical characteristics;
- Excavation for the re-location of the side channel; and
- Excavation of the flood plain along Fanno Creek.

In addition, the banks along Fanno Creek will be largely denuded of vegetation in order to augment the flood plain and place the brush bundles and logs that are intended to stabilize the banks and improve fish habitat. The clearing and regrading of the site will have significant temporary impacts on Fanno Creek due to erosion and temperature increases from the lack of vegetation to shade the water.

The character of this site includes the flood plain, wetlands and wildlife habitat that currently exist. The level of vegetation removal and regrading that is necessary for this development make clear how inappropriate the proposed use is for this site. The new buildings cannot be placed on the site without having to relocate an existing waterway, and without extensive excavation to augment the flood plain to compensate for location of the buildings in that flood plain. The scale and scope of change to the site is beyond what is reasonable and appropriate for an area of flood plain, wetlands and wildlife habitat. The inappropriateness of the proposed development is reflected in the fact that it is not permitted under the CDC 421 and 422 regulations for development in the flood plains and significant natural resource areas.

Although the Applicant has proposed an extensive landscaping and mitigation plan, the screening may not be adequate year round, and it will be 7 to 10 years before the mitigation provides the intended visual screening or the improvements to the natural aspects of the site.. That is simply an excessive impact on the site and the surrounding neighborhood.

The Applicant points out that the existing pump station is already part of the character of the area, so this expansion of that use will not change that character. However, the existing pump station was placed on the site without completely removing the vegetation on the site or relocating the side channel, as is currently proposed. The existing structure and site improvements are substantially smaller than those currently proposed. Many of the mature trees and vegetation were left on the site, and surround the building so that more of a visual screen remained following the previous construction, and the riparian and wildlife values were much less impacted. The proposed expansion requires a level of change to the site that is significantly beyond the previous development of the site.

The Applicant has not provided substantial evidence in the record that the proposed development will not unduly conflict with the character of the area.

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CDC 405-1.4 requires that "Land within the Flood Plain, Drainage Hazard Area or riparian zone" will be preserved as open space, except as otherwise provided by CDC Sections 421 and 422. As discussed, the proposed public utility is not allowed under the provisions of CDC Section 421 and 422. This site is completely within the flood plain. Under the CDC open space requirements, this site must be preserved as open space. Developing approximately 33 percent of the site with buildings and driveways is not preserving the site as open space.

CDC 405-2 requires that "Site Planning and development shall avoid disturbance of identified open space resources." The proposed development, will add 13,940 square feet of development, which almost doubles the area removed from open space.

The existing development was approved in 1998 without challenge to LUBA or the Courts. That development is not being reviewed for land use approval in this proceeding. However, in terms of looking at the impact on open space, the total area lost must be considered. The total development will permanently remove 33 percent of the site from open space, and seriously interfere with the open space values on the entire site for many years, in violation of this code provision.

F. CDC 430-105. Special Use Standards for Public Utility in the R-5 District.

CDC 430-105.4 states that approval of a public utility shall be based upon a study submitted by the applicant which includes: "The need for the facility, present or future; and how the facility fits into the utility's Master Plan;..."

1. Need for the facility:

The record includes substantial evidence that the Fanno Basin Pump Station does not currently have the capacity to pump the peak influent flow currently produced during storm events. This lack of capacity has and could continue to produce overflow discharges into Fanno Creek. The Applicant has shown that the proposed expansion of the existing pump station will provide the needed capacity.

The Applicant has also described the alternatives considered by BES, and provided some explanation for why the option to expand the existing pump station was chosen. In a Service Provider Letter included in the Application, CWS reports that the proposed expansion was chosen because:

***additional property acquisition was not required, the operations were simplified by locating the expansion at the existing facility, was the most cost effective, reduced the risk of overflow discharges into Fanno Creek, and provides redundancy during dry weather flows."

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Several parties have asserted that there are other alternatives for resolving the problems identified by the Applicant. Some prefer one of the other alternatives identified, but not chosen by the Applicant. Another proposal is that the City reduce the amount of flow to the Fanno Basin Pump Station by making repairs that would stop storm water from entering the sewage pipes, so that additional pumping capacity would not be needed.

The record does not include substantial evidence that the proposed development on this site is the only or even the best alternative for resolving the overflow discharge problem. However, this approval criterion does not require that the Applicant show that this facility on this site is the only or even the best way to meet the identified need. This criterion requires nothing more than that the Applicant submit a study demonstrating that there is a need for the facility. There is no further standard provided for how the identified need should be evaluated for the purposes of approving or denying the proposed utility facility. The Applicant's submittal is adequate to show that there is a problem that could be resolved by the proposed development on this site.

The Applicant has also repeatedly asserted that the need for the proposed development is shown by the fact that BES has signed an agreement with CWS and DEQ to expand the Fanno Basin Pump Station by a certain date.⁶ There has been an implication that the land use application must be approved because of this agreement. However, the Applicant cannot, by contracting with another party, commit the County to approving a development permit that does not meet the requirements of the County Code. The land use application can only be approved if all applicable approval criteria are met.

2. Fit with the Utility Master Plan:

The Staff Report, at page 23, reports that the Fanno Basin Pump Station operates under the City of Portland's Public Facilities Plan (July 1999) ("PPFP"), but does not make any findings as to how the proposed pump station expansion fits into the PPFP.

The Application, at page 71, states that the development of the existing pump station meets the objectives of the BES sewerage master plan, and reasserts that there may be overflow discharges into Fanno Creek if additional capacity is not provided. The Applicant also submitted two pages from the PPFP, which discuss how the development of the existing pump station fits into that plan. (Attachment 4 of the Applicant's May 10, 2010 submittal.)

Mr. Lilly submitted a complete copy of the PPFP with his May 17, 2010 submittal and asserts that the proposed expansion is not consistent with the PPFP. He points out that the PPFP does not even mention the expansion of the Fanno Basin Pump Station. He argues that the PPFP supports the statements made by the City at a previous neighborhood meeting, that the need for the expansion results from unanticipated infiltration and inflow of storm water and ground water into its sanitary sewer pipes. Mr. Lilly concludes that the solution that is consistent with the PPFP would be to repair the pipes, rather than expand the Fanno Basin Pump Station.

⁶ Portland/CWS Fanno Creek MAO No. WQ-NWR-09-046, Attachment 7 of the Applicant's May 10, 2010 submittal.

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The language of this code provision does not specify how to evaluate an Applicant's explanation of how the proposed facility fits into the facility master plan, but it does require at least some evidence regarding the relationship between the proposed facility and the master facility plan. The record contains only repeated evidence that there is an overflow discharge problem at the existing facility and the expansion would provide the capacity to prevent that problem. In light of the fact that the PFPF does not even mention expansion of the Fanno Basin Pump Station, the Applicant needs to more adequately explain how the proposed expansion is consistent with the PFPF.

F. Approval Criteria under CDC 422.**1. CDC 422-3.3(6).. "Insufficient buildable land"**

If the proposed development could be permitted under CDC 422-3.3, the plans would need to meet the requirement in Subsection 3.3(6) that there be a showing that: "there is insufficient suitable, existing buildable land area to permit construction outside the riparian corridor(as defined in Section 106) or a significant water area or wetland (as identified in the applicable Community Plan or the Rural/Natural Resource Plan),....." The Memo in Opposition asserts that the Application has not addressed this requirement and therefore cannot be approved, even if the proposed development is an accessory use permitted under that code section.

The Memo in Opposition asserts that this requirement "on its face, is not limited to the site," and does not allow the Applicant to show only that there is not sufficient suitable buildable land area within the site. According to this memo, it would be difficult for the Applicant to show this requirement is met because: "There are clearly buildable lands under which the force main runs which are not in a riparian corridor or significant water area or wetland."

The Applicant points out that "the entire site contains either a wetland and water area or a water area and wetland and fish and wildlife habitat area," and cites the pages in the application providing the evidence to support this conclusion. Applicant's Final Legal Argument, at page 6. (Emphasis in the original.) If Subsection (6) allowed the proposed pump station and surge tanks as accessory structures to the pipeline allowed under Subsection (3), there is substantial evidence in the record, as cited by the Applicant, to support a conclusion that there is insufficient, suitable, existing buildable land area on the site to permit construction of those structures.

It is unlikely that this requirement was intended to require a showing that there was not sufficient suitable land beyond the limits of the lot of record in question. Certainly for a dwelling, the logical and reasonable reading of this provision would limit it to the area of the lot of record. The fact that this argument has even been raised points to the difficulty of trying to stretch the exception in Subsection (3) to apply to accessory uses for anything other than dwellings.

2. 422-3.6. - Mitigation Plan

If the proposed use could be permitted as an accessory use to the sewer pipe line under CDC 422-3.3(3) and (6), as asserted by the Applicant, it would also have to meet the requirements of CDC 422-3.6, which provides:

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"For any proposed use in a Significant Natural Resource Area, there shall be a finding that the proposed use will not seriously interfere with the preservation of fish and wildlife areas and habitat identified in the Washington County Comprehensive Plan, or how the interference can be mitigated."

The Applicant has provided a mitigation plan with the application for development. The Application stated that the mitigation plan was going to be implemented in part on-site and in part off-site. The off-site mitigation would be on land not currently owned by the Applicant and not part of the land use application. However, at the hearing and in written materials submitted after the hearing, the Applicant clarified that all of the mitigation required by CDC 422 will be provided on-site.

I. Summary of Findings and Conclusions

One of the significant challenges in reviewing this land use application has been that the Applicant has attempted to define the proposed use and structures differently, depending on the code provisions being applied. After careful consideration, it has become clear that under any of the proposed definitions of the proposed use and structures, the Application cannot be approved.

The Staff Report and Application initially identify the proposed development as a public utility that is a permitted use in the R-5 District under CDC 302-4.12. The development standards for that District permit structures up to 35 feet in height. The Staff Report and Application make findings that the proposed structures, at 25 and 20 feet in height, meet this requirement.

Both the Staff Report and Application then acknowledge that the site is in the flood plain and has wetlands and fish and wildlife habitat associated with Fanno Creek, so that any development is subject to the provisions of CDC 421 and 422. Because CDC 421 and 422 do not list public utilities as permitted uses, the Staff Report and Application assert that the pump station and surge tanks are "accessory" to the sewer pipe line that is on the site.

This identification of the proposed structures as "accessory" relies on very strained interpretations of the CDC, and would set very bad precedent for future implementation of the County Code. First, the Application, in response to the requirement that accessory structures are limited to 15 feet in the R-5 District, specifically states that no accessory buildings are proposed. This directly contradicts the later assertions that the pump station and surge tanks are accessory to the pipe line. Second, characterizing the proposed buildings as "accessory" uses or structures directly conflicts with both the language and intent of several provisions of the CDC. In addition, the proposed structures are 20 and 25 feet in height, so they cannot be permitted in the R-5 District even they are determined to be accessory structures.

The evidence in the record supports the initial description provided in both the Application and the Staff Report, that the proposed use is a public utility. Because a public utility is defined as a permitted use in the CDC, it cannot also be defined as an accessory use under the clear language of CDC 430-1.

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The definition of accessory structures requires that they be "detached" from the primary structure. The pump station and surge tanks will be, in the Applicant's own words, "directly connected" to the sewer pipeline. The Applicants argument that the structures are detached from the pipeline because the connection is buried and invisible is unconvincing and has no support in the language or intent of the applicable CDC provisions.

The size, scale and impacts of construction of the proposed structures completely dwarfs that of the pipeline, so that, using the common understanding of the code language, the pump station and surge tanks will not be "subordinate" or "incidental" to the pipeline. The pump stations, surge tanks and pipeline are each elements of a public utility. These elements function together as a single use. None of the elements is dominant, subordinate or incidental to the others.

Even if the proposed pump station and surge tanks could be defined as accessory structures, they could not be permitted under CDC 422-3.3A. The meaning of that code provision, when read in context, is that only structures accessory to dwellings can be developed as an exception to the prohibition on new or expanded alteration of the vegetation or terrain in riparian areas. The proposed pump station and surge tanks are clearly not accessory to a dwelling.

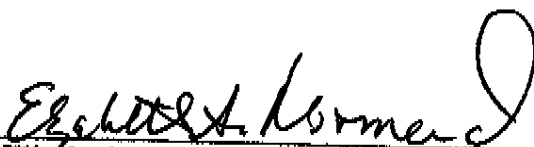
The Applicant makes another alternative argument, asserting that the pump station and surge tanks are an integral part of the pipeline, and can therefore be approved under the provisions that allow pipelines in the flood plain or riparian areas. This interpretation directly conflicts with the specific language in CDC 421-5.11 and 422-3.3, and would be in derogation of the intent of those regulations and the Statewide Land Use Goals that are implemented by the regulations.

The competing expert evidence in the record does not justify denial of the application due to a significant adverse impact on property values. However, there is substantial evidence in the record that the proposed development will unduly conflict with the character of the area. There are also other code provisions that are not met by the proposed use. Consequently, even if the use could be permitted as an accessory or permitted use in the flood plain and significant natural resource areas, under CDC 421 and 422, failure to meet other applicable approval criteria would still preclude approval of the application.

V. DECISION

The Special Use and Development Review for the expansion of the Fanno Basin Pump Station Facility, and the associated Flood Plain Alteration cannot be approved.

Dated this 14th day of June, 2010.



Elizabeth A. Normand
Hearings Officer