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Council Clerk
City of Portland
1221 SW Fourth Avenue, Room 140
Portland, OR 97204

AUDITOR 07/12/11 AM 9:22

Re: Case File: LU 10-200954 CU AD, Tualatin Valley Water District
Hearing Scheduled for July 14, 2011, 3:00 p.m.
Applicant's Pre-hearing Legal Argument

Dear Council Clerk:

This firm represents Tualatin Valley Water District ("TVWD" or "District"), applicant in the above-captioned land use proceeding. The Hearings Officer's decision in this matter has been appealed to the Portland City Council and is currently set for a hearing on July 14, 2011. This letter serves as the District's pre-hearing legal argument. Please include this letter in the appeal record distributed to the City Council.

I. Summary

The City Council should affirm the Hearings Officer's decision in this matter approving the District's request for a conditional use permit to replace two steel water tanks with a single concrete tank for water storage at the site.

The new water tank, an institutional use under the City of Portland's Zoning Code ("Code"), is compatible with adjacent residential development because it satisfies the development standards for such uses in a residential zone, which the City imposes for the specific purpose of maintaining compatibility. The replacement water tank has a Floor Area Ratio ("FAR") of 0.27, nearly half of the maximum allowable FAR of 0.5. The FAR standard is the only specific institutional development standard at issue in this appeal, and the appellant's interpretation of the FAR limitation that serves as the basis for the appeal is flawed.

Even if the City Council were to determine that the new tank is not compatible with the surrounding residential area, the Hearings Officer found that any impacts from the replacement tank have been sufficiently mitigated. That finding is not at issue in this appeal and the City Council can affirm the Hearings Officer's decision of compatibility on that basis alone.

II. Background

TVWD is the largest provider of public drinking water in Washington County, Oregon and the second largest provider in the state. The District's customers include private residents, local and regional governments, private businesses both large and small, fire protection districts, public and private pre-kindergarten, elementary, middle, and high schools, community colleges, and several significant regional industrial employers. The District participates with the City of Portland ("City") as a member of the Regional Water Providers Consortium and is also the City's largest wholesale water customer.

The Garden Home site at issue in this land use proceeding is a critical component of the District's public infrastructure system. The site is located on the northeast corner of SW Garden Home Road and SW 62nd Place. The site currently houses two welded steel tank reservoirs constructed in 1952 and 1962, each with a capacity of 500,000 gallons.

The existing tanks are nearly 50 and 60 years old and are showing their age in several respects. The tanks lack suitable foundations, do not meet modern safety requirements and codes, including seismic standards, and do not provide sufficient storage to meet the needs of the community. Each of these structures has been thoroughly evaluated, and TVWD has determined that replacement is necessary.

The replacement of the current tanks requires demolition of both of the existing structures and development of one single tank. The replacement tank will be constructed of pre-stressed concrete and will comply with all applicable building codes and safety standards. The site will also be upgraded with new water lines, vaults, and significant additional landscaping. Because the replacement of the existing tanks with the new tank involves an alteration to an existing institutional use in a residential zone, TVWD initiated the conditional use process that resulted in this appeal.

III. Hearings Officer's Decision

Following a public hearing and an extended open-record period for public comment, the Hearings Officer approved TVWD's request for a conditional use. Specifically, the Hearings Officer approved a conditional use for TVWD to demolish two water tanks and to replace those tanks with one water reservoir not to exceed 2 million gallons in storage capacity, as well as a minor adjustment to allow the vehicle access areas on the site to remain in gravel rather than impervious pavement.

The Hearings Officer also imposed four conditions as part of the approval. These conditions relate to: 1) specific site plan submittal requirements; 2) the visual appearance of the security fence, ensuring that it remains similar to the security fence around the existing facility; 3) requirements to use native species as part of the additional landscaping; and 4) an Emergency Notification Plan to provide emergency notice alerts to owners and occupants of real property around the site. *See* pp. 26-27 of the Decision of the Hearings Officer ("Decision").

In arriving at his decision, the Hearings Officer applied the approval criteria in Code Section 33.815.105 relating to conditional uses for institutional and other uses in the R Zone, Code Section 33.110.245 relating to specific development standards for institutional uses in the R Zone, and Code Section 33.805.040.A-F relating to adjustments.

IV. Appeal

The Ashcreek Neighborhood Association ("Ashcreek"), which participated in the hearing, has now appealed the Hearings Officer's decision. According to the Type III Decision Appeal Form submitted by Ashcreek and the Notice of a Public Hearing issued by the City, Ashcreek has identified two specific approval criteria that have not been met and which are the subject of this appeal:

1) "The proposal does not meet the provisions of Chapter 33.815.105 that it must be compatible with adjacent residential developments based on characteristics such as "... building scale and style..."; and

2) The proposal does not meet the allowable FAR as set forth in Chapter 33.110.246 [sic].

As explained in more detail below, the Hearings Officer found that TVWD's application for a conditional use satisfied both of these criteria, and those findings were not in error.

V. Discussion

A. Compatibility Based on Building Scale and Style

Ashcreek's first basis for appeal, that the proposal is not compatible with adjacent residential developments based on "building scale and style," stems specifically from Code Section 33.815.105.B.2. The full text of that section reads:

> The proposal will be compatible with adjacent residential developments based on characteristics such as the site size, building scale and style, setbacks, and landscaping . . . .

The Hearings Officer made a specific legal finding "that the list of characteristics is not intended to be an exclusive checklist." Decision at p.18. That is, the characteristics listed in Code Section 33.815.105.B.2. are to be considered collectively and this criterion can be met if one of the characteristics of the proposed use is found to be incompatible with adjacent residential properties as long as the proposal "on balance" is compatible in light of the other characteristics.

1. The Hearings Officer did not err when he concluded that Code Section 33.815.105.B.2 imposes a balancing test.

First, Ashcreek has not challenged the Hearings Officer's legal conclusion that the compatibility characteristics listed in Code Section 33.815.105.B.2 must be considered "on

balance." Nor has Ashcreek challenged the Hearings Officer's findings that TVWD's proposal is compatible to adjacent residential developments with respect to site size, setbacks and landscaping. Thus, even if Ashcreek is correct and TVWD's proposal is not compatible with adjacent residential developments based only on "building scale and style," the Hearings Officer's conclusion should still stand because, on balance, the proposal is compatible with adjacent residential properties, and Ashcreek has not challenged the Hearings Officer's conclusions relating to the other applicable compatibility characteristics.

Even if Ashcreek were to have challenged the Hearings Officer's legal findings, it was not error for the Hearings Officer to determine that Code Section 33.815.105.B.2. imposes a balancing test. The code language states that compatibility is "based on characteristics ***such as*** the site size, building scale and style, setbacks, and landscaping." (Emphasis added). By including the phrase "such as" the Code contemplates that the listed characteristics are *examples* of compatibility characteristics and not specific characteristics that *must be* taken into account individually.

2. *TVWD's proposal is compatible with adjacent residential properties.*

The City's Single-Dwelling Residential Zone contains specific development standards for institutional uses like the proposed replacement water tank. Code Section 33.110.245 ("Institutional Development Standards"). The Institutional Development Standards have the following purpose:

> Purpose. The general base zone development standards are designed for residential buildings. Different development standards are needed for institutional uses which may be allowed in single-dwelling zones. **The intent is to maintain compatibility with and limit the negative impacts on surrounding residential areas.** Code Section 33.110.245.A (emphasis added).

The Hearings Officer found that TVWD's proposal to replace the existing tanks is compatible with adjacent residential development because it meets the Institutional Development Standards in Code Section 33.110.425. With one exception, discussed in more detail below, Ashcreek does not challenge the Hearings Officer's general conclusion that the replacement water tank is compatible with adjacent residential development based on the Institutional Development Standards, nor does Ashcreek dispute that legal conclusion that a development meeting those standards is deemed compatible with adjacent residential development.

Code Section 33.110.245 contains specific development standards for each of the characteristics listed in Code Section 33.815.105.B.2, except for building "style." Where that code section does not contain a specific development standard, the regular base zone development standards apply. Code Section 33.110.245.C. However, the regular base zone for Single-Dwelling Residential also lacks any specific development standard relating only to "style." Consequently, the requirement in Code Section 33.815.105.B.2 that compatibility should look to characteristics like "building scale and style" is divorced from any specific style-

related development standard, further supporting the Hearings Officer's conclusion that style is but one component of an overall balance that must be considered.

With respect to building "style" only, the Hearings Officer actually determined that TVWD's proposal is *not* compatible with adjacent residential development when that characteristic is viewed in isolation. However, the Hearings Officer concluded "when considering all of the characteristics listed in PCC 33.815.105.B.2 . . . that **on balance the proposed water tank will be compatible with adjacent residential development**." Decision at p.19 (emphasis added).

Although TVWD agrees with the Hearings Officer's legal conclusion that the compatibility characteristics must be viewed as a whole, the Hearings Officer erred when he found that the water tank is *not* compatible with adjacent residential development based on "style." That finding was based on the Hearings Officer's conclusion that the style of the water tank is not "physically similar" to the style of adjacent homes. Decision at p.18. However, the Code does not define "compatible" and there is no basis for equating that term with the phrase "physically similar." In contrast, Webster's Third New International Dictionary defines "compatible" as "capable of existing together without discord or disharmony." Webster's Third New Intern'l Dictionary, 463 (unabridged ed. 1981), and the Hearings Officer should have considered whether the replacement tank's style is capable of existing together with residential development regardless of whether it is "physically similar." *See, e.g. Clark v. Coos County*, 53 Or LUBA 325, 329 n.1 (2007).

The record in this matter includes the following statement from City Staff: "Water tanks and reservoirs are not uncommon features in any neighborhood and there are no aspects about the proposed upgrades that would create a jarring or out-of-place visual appearance incompatible with adjacent residential development." Staff Report and Recommendation at p.5. The record also contains evidence that the replacement water tank at issue in this proceeding is similar to other water tanks; specifically, the new tank is similar in style to the existing tanks in that it is a tall, hollow, cylindrical structure of approximately the same height. Based on this evidence, the Hearings Officer should have concluded that the style of the proposal is capable of existing together with the adjacent residential properties without discord.

Based on the foregoing, the City Council can affirm the Hearings Officer's conclusion that TVWD's proposal is compatible with adjacent residential properties because it meets the Institutional Development Standards and because, on balance, the development is compatible based on the specific characteristics set forth in Code Section 33.815.105.B.2. Even if the City determines that a proposal must be compatible with each characteristic in Code Section 33.815.105.B.2 individually, the City Council may nevertheless find that TVWD's proposal satisfies that requirement because, in addition to the specific characteristics reflected in the Institutional Development Standards (site size, scale, setbacks and landscaping), the record shows that the style of the proposed development is also compatible with adjacent residential developments.

3. *Even if TVWD's proposal is not compatible with adjacent residential development, it mitigates differences in appearance and scale.*

Even if the City Council were to deem TVWD's proposal incompatible with adjacent residential development pursuant to Code Section 33.815.105.B.2, which it should not, the failure to meet that criterion is not sufficient to reverse the Hearings Officer's decision. Code Section 33.815.105.B.2 is one of two alternative criteria an applicant may meet in order to demonstrate physical compatibility of the proposed use. That is, if an applicant cannot demonstrate actual compatibility with the types of characteristics set forth in Code Section 33.815.105.B.2, the applicant has the option to demonstrate that the "proposal will mitigate differences in appearance or scale through such means as setbacks, screening, landscaping, and other design features" as set forth in Code Section 33.815.105.B.3.

The Hearings Officer specifically concluded that Code Section 33.815.105.B.2 and Code Section 33.815.105.B.3 are alternatives to each other, each one sufficient on its own to satisfy the physical compatibility requirement. Decision at p.19. Ashcreek has not challenged the Hearings Officer's conclusion that these two code provisions are treated as alternatives, nor has it challenged the Hearings Officer's finding on page 19 of the Decision that "the proposal mitigates differences in appearance with landscaping, screening and other design features." On that basis alone, the City Council should affirm the Hearings Officer's decision.

The Hearings Officer based his mitigation finding on substantial evidence in the record. Specifically, the Hearings Officer relied on the photos, photo simulations and site plans TVWD developed, and which TVWD revised with input from the community. The photos and photo simulations are helpful to understanding the Hearings Officer's findings because they demonstrate the difference between the site's current conditions and the conditions that will exist after the existing tanks are replaced. Specifically, the Hearings Officer made a finding that a number of existing mature sequoia trees on the property will be preserved, the facility will be landscaped and behind a security fence with a black finish, the landscaping will meet the Code's landscape standards, and the site will include park-like amenities. Decision at p.19. Not only do the photos and photo simulations support the Hearing's Officer's mitigation finding, they demonstrate that the visual appearance of the site will actually be *enhanced*. The Hearings Officer therefore did not err when he concluded that TVWD has satisfied the requirements of Code Section 33.815.105.B.3.

Based on the Hearings Officer's unchallenged finding relating to Code Section 33.815.105.B.3, the Hearings Officer's decision relating to compatibility must be affirmed.

B. Floor Area Ratio

Ashcreek's second basis for appeal, that the proposal does not comply with the applicable FAR standards, stems specifically from Code Section 33.110.245.C, Table 110-5. As previously noted, Code Section 33.110.245.C establishes specific standards for institutional uses like TVWD's water tank in a Single-Dwelling Residential zone. As set forth in Table 110-5 of that

section, the maximum allowable FAR is 0.5 (i.e. no more than 0.5 ft. of floor area for every 1.0 ft. of site area is allowed).

TVWD's proposal satisfies the maximum FAR standard because the FAR for the proposal is 0.27, well within and almost half of the maximum allowable FAR of 0.5.

Although it is not clear on what specific basis Ashcreek will claim that the proposal does not meet the applicable FAR, based on testimony at the hearing it is likely that Ashcreek believes the FAR of the proposal is higher than 0.27 and more than the maximum allowable FAR of 0.5. For example, the written testimony of Ashcreek's Land Use Committee Chair (Exhibit H.22) posits that the FAR for the replacement water tank will be 1.06. However, that FAR is based on a flawed calculation.

The difference between the Hearings Officer's finding (FAR = 0.27) and Ashcreek's calculation (FAR = 1.06) is based on Ashcreek's arbitrary determination that the replacement water tank has four-and-a-half "stories" or "floors." In reality, the replacement water tank has only one floor.

As the Hearings Officer correctly noted, the Code defines FAR in terms of "floor area." Code Section 33.910. The definition of "floor area," however, refers more to which exterior portions of a building are or are not included in the measurement of floor area and does not define "floor" or refer to the number of "stories" a building might have. Code Section 33.910. Because the Code relies on the dictionary meaning of undefined words, the Hearings Officer concluded that "'floor,' in the context of 'floor area' is best described as the 'base level of a room' and 'the lower inside surface of a hollow structure.'" Decision at p.8. Based on that definition, the Hearings Officer correctly concluded that the replacement water tank has only one floor and, therefore, the FAR for the proposal is 0.27.

In contrast to the Hearings Officer's conclusion, Ashcreek argued that "floors" or "stories" are based on an arbitrary number and that a "floor" or "story" exists for each ten feet, or portion thereof, of a structure's height. Thus, based on the 46 foot height of the replacement water tank, Ashcreek asserts that the replacement tank has four-and-one-half "floors."

First, Ashcreek's assertion is not grounded in any code provision or other applicable standard. Ashcreek has provided no legal authority to support the conclusion that a hollow structure has multiple floors solely because it is more than ten feet in height.

Second, the record does not include any evidence that a standard floor height for an institutional structure, or any structure, is ten feet.

Third, Ashcreek's assertion ignores the purpose of the FAR calculation. FAR standards impose limits on the "intensity" of a use. For example, the Code's development standards in the Commercial Zone state the following with respect to FAR:

> Purpose. **Floor area ratios (FARs) regulate the amount of use (the intensity) allowed on a site.** FARs provide a means to match the potential amount of uses with the desired character of the area and the provision of public services. FARs also work with the height, setback, and building coverage standards to control the overall bulk of development. Zoning Code Section 33.130.205.A. (emphasis added).

That stated purpose of an FAR makes sense in the light of the practical application of an FAR limit. That is, a building that has twice as many stories is more likely to have twice the intensity[1] of its intended use, because the extra stories provide more area on which activities can occur.

The record in this matter demonstrates, and Ashcreek does not dispute, that the replacement water tank does not require daily employees, it creates negligible traffic, and it does not have typical hours of operation, because the use of the site is a very passive one that involves the storage of water. *See* Applicant's Final Written Argument To The Hearings Officer, Exhibit H.53, p.8. The intensity of the use based on those characteristics does not change with the height of the water tank, and the intensity of the use would be the same whether the tank were 20, 30 or 40 feet tall. Therefore, assigning extra "floors" to the replacement tank based solely on height in order to calculate a higher FAR as Ashcreek suggests does not further the underlying purpose of an FAR limit.

Finally, Ashcreek's interpretation of the Zoning Code would have far-reaching consequences that the City Council should find unacceptable. An interpretation that results in calculating the number of floors that exist in a structure based solely on the structure's height would severely limit the design and utility of any structure subject to FAR limits. For example, an atrium with a 20-foot ceiling over a single floor might become impossible to approve because that portion of the structure would have double the FAR than if the City uses actual floor area to make the calculation. Even a simple increase in ceiling height from 10 to 12 feet for aesthetic purposes, under Ashcreek's interpretation, would increase the FAR calculation by 20% and potentially keep an otherwise appropriate development from being approved. More closely related to this application, the City's own water tanks in residential neighborhoods might become impossible to upgrade or replace because they, too, would be subject to the same interpretation of having multiple floors.

VI. Conclusion

The City Council should affirm the Hearings Officer's decision. TVWD's proposed replacement water tank is compatible with adjacent residential development. To the extent the replacement water tank will have any impact on the surrounding area, those impacts will be mitigated through extensive landscaping and buffering, and the future site will be even more

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[1] The Zoning Code defines "intensity" as "[t]he amount or magnitude of a use on a site or allowed in a zone. Generally, it is measured by floor area. It may also be measured by such things as number of employees, amount of production, trip generation, or hours of operation. See also Density." Zoning Code Section 33.910.

compatible with the surrounding area than the current site is. The City should also reject Ashcreek's interpretation of the Code with respect to FAR and affirm the Hearings Officer's findings that the replacement water tank contains only one "floor" and, therefore, that the FAR of the proposal is well beneath the maximum allowable FAR for this use.

Very truly yours,

Tommy A. Brooks

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