Moore-Love, Karla

From: Stephanie Stewart <stewartstclair@gmail.com>
Sent: Wednesday, April 29, 2015 8:49 PM
To: Council Clerk – Testimony
Subject: LU 14-218444 HREN - comments from Appellant #2
Attachments: TysLetterToHLCJan7.pdf; MTNAAppealLetterAndReportFinal.pdf

Please confirm receipt of this email
Comments for the record and distribution
Case file: LU 14-218444 HREN

Dear Council Clerk:

Attached is the Mount Tabor Neighborhood Association's April 29, 2015, letter to Mayor Hales and City Commissioners Fish, Fritz, Novick and Saltzman with an appeal report regarding same. Also attached is Attorney Ty Wyman's letter to the Historic Landmarks Commission dated January 7, 2015. All items are to be included in the record and for distribution before the evidentiary hearing scheduled for May 28, 2015, at 2:00pm.

If you have any questions, please do not hesitate to contact us.

Sincerely,

Stephanie Stewart

Mt. Tabor Neighborhood Association (MTNA) land use

1121 SE 50th Ave; Portland, OR 97215

MOUNT·TABOR

NEIGHBORHOOD ASSOCIATION

Mt. Tabor Neighborhood Association
Comments
Appeal Case File LU 14-21844 HR EN
Submitted April 29, 2015

MOUNT·TABOR
NEIGHBORHOOD ASSOCIATION

April 29, 2015

Dear Mayor Hales and City Commissioners Fish, Fritz, Novick, and Saltzman:

We appreciate the chance to present our current position, within this land use review process, and we want to thank you in advance for reading the attached report. Hundreds of volunteer hours have gone into distilling thousands of pages of case file exhibits down to the items you see in this report, and we believe strongly that it will be worth your while to read this in its entirety.

It seems appropriate to start off by clarifying **what we are not asking the Council to do here**:

- **We do not ask you** herein to reverse the decision Council made in 2009 to disconnect the reservoirs. We disagree with that decision, to be sure, but we well understand that the question of whether or not to disconnect is not at issue in the land use review process.

- **We do not ask you** to overturn the HLC Decision in this case. We respect the care and thoughtfulness with which those volunteer Commissioners deliberated the issues, and we appealed their Decision only to gain equal footing with the Applicant in this forum. Indeed, were the Applicant to accept the approval conditions set forth by the HLC Decision, we would happily consider withdrawing our appeal.

The Applicant has asked you to weaken the protections that the Historic Landmarks Commissioners demanded for the unique assets at Mt. Tabor Park. We ask you, on the contrary, to strengthen those protections. The attached report explains our specific requests, but **here is a summary of the actions we request from you**:

1. Deny the Applicant's challenge to the clause in Condition B that protects constancy of the iconic views. Protecting that constancy is necessary to meet Approval Criterion 1.

2. Deny the Applicant's challenge to Condition E. Instead, respect the HLC mandate for historic preservation work at the historic Mt. Tabor reservoir site. Condition E is necessary to meet Approval Criteria 1, 2, and 9.

3. Correct the "scrivener's error" in Condition B, *i.e*., strike the incorrect "50%–75%" reference supplied by BDS staff during HLC deliberations, and replace it with "65%–85%," which is the range set forth by Applicant testimony (Exhibit H-51).

4. Clarify the language of Condition B, *i.e*., revise the current text – "the normal historic operating range" – to read "the normal historic operation range producing iconic views." This addition more clearly articulates the HLC's intent to protect the iconic, deep-water views on site. Clarification of this Condition helps the application meet Approval Criterion 1.

5. Limit the timeline of Condition E's preservation work, so as to be concurrent with the timeline of other project construction. As such we ask Council to shorten the completion deadline for the preservation work to May 2017. This change limits disruptions for the Park and its users, and thus better supports Approval Criteria 1, 2, and 9.

6. Strengthen the HLC's efforts to protect Tabor's historic assets. We ask you to require the Applicant to, within one year, craft a written, long-range preservation plan (including at least five years of budget projections) in concert with SHPO and under a Design Advice Review with the HLC, to be formally adopted before Council. This plan provides the legally required proof that the Application meets Approval Criteria 1, 2, and 9.

7. Direct the Applicant to 1) file for a Conditional Use Review before proceeding further; and 2) develop a plan to protect the site's existing Conditional Use status ("basic utility"). This change supports PCC 33.815.040 and Approval Criterion 9.

A land use appeal typically arises from a misalignment within the system, *e.g.,* code text that does not represent the policymaker's intent or neighbors' reasonable expectations. The misalignment here, we believe, is the Applicant's lack of seriousness about meeting the historic preservation criteria.

The Applicant's case here seems to be that preserving the historic resources at this site does not fit within its budget. Were a private-sector land developer to appeal the Conditions of a land use permit because "it's just too expensive to meet the criteria," it would be laughable. The Applicant can do better; in precisely this same context, in fact, we have seen it do far better at Washington Park. The attached report identifies the disparity in treatment between the historic resources at Mt. Tabor Park and those at Washington Park.

Appendix A reflects the promise the City made during the last Tabor disconnect discussion (2002–2004), to fund "park improvements" at Mt. Tabor so as to "maintain the aesthetic and historic values with the reservoirs." The promise was for some $14 million, and it was included in the Approved Budget for 2002–2003. This appeal asks you to honor that commitment to the aesthetic and historic character at Mt. Tabor, although at a far lower cost.

Additionally, the report includes as Appendix C the State Historic Preservation Office's (SHPO) response to the Applicant's appeal, in which SHPO rejects the Applicant's assertion of SHPO's "no adverse effect" finding as an argument against HLC's Approval Conditions. Appendix C also documents the warning issued by SHPO should the character of Mt. Tabor's historic sites not be maintained.

Management of the Tabor Disconnect land use review has fallen short of community expectations; indeed, it has fallen short of the City's own Public Involvement Policy. This project warrants a comprehensive plan addressing public processes, the preservation of historic character, and legacy plans – and it does not yet have any of that. The project also warrants a robust exploration of the Conditional Use alterations, and of the profound impact to the Park caused by the 20,400 square feet of new pipe corridor (which comes with planting restrictions that will affect the Park environment).

At 110 years in and counting, Mt. Tabor is a testament to visionary planning. It preserves a captivating story of American ingenuity from the Progressive Era, City Beautiful movement. As frontline stewards of a widely beloved public space, our community has for generations worked to protect and preserve this site on behalf of all the people of Portland. We seek long-term management strategies that honor the magnificence of the Tabor historic site, and we begin by addressing the management strategy for the Tabor Disconnect project.

Sincerely,

Stephanie Stewart and John Laursen
On behalf of the Mt. Tabor Neighborhood Association

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IN THEIR OWN WORDS

"I'm obviously not happy about how the site has been cared for, and will it get even worse when it doesn't have a purpose except to be beautiful?"

– Jessica Engeman, Vice-Chair, Historic Landmarks Commission, comments in this case

"That is one of the things that from a policy standpoint is disappointing, is that yeah we're talking about a small-scale project in terms of what you are presenting to us, but actually it is a large-scale project in the overall scheme of things. We're talking about Washington Park, Kelly Butte, Mt. Tabor. This is part of a whole broad-ranging thing, and so, why there wasn't enough money set aside to provide for at least adopting the maintenance report, or these other accessory type things that are a part of this bigger project. It is actually kind of baffling."

– Brian Emerick, Chair, Historic Landmarks Commission, comments in this case

"My hope is that trust can be built and that there will be a *mandate* – because there is a trust issue – there is a mandate for full funding to restore this beautiful park and historic property that we've got."

– Harris Matarazzo, Former Chair, Historic Landmarks Commission, comments in this case

THE MTNA'S PRIMARY ASSERTIONS

The report now in your hands provides evidence and support for the Mt. Tabor Neighborhood Association's primary assertions:

- The Code requires the Applicant to better plan the preservation of this portion of Mt. Tabor Park. Precedent requires the same: the Applicant provided significant protection of the historic resources at Washington Park. The disconnection of the Mt. Tabor reservoirs is the single greatest change to happen at this historic site since construction more than 100 years ago. This site warrants a carefully crafted proposal addressing the preservation of historic character and aesthetic through this monumental change, and beyond.

- The cost of complying with the Zoning Code is one of doing business. It is not negotiable, and applies as much to the Applicant as it does to a developer.

- The Project, adding 20,400 square feet of new pipe corridor in the Park, requires Conditional Use review. Again, precedent (*e.g.,* the Powell Butte Conditional Use Master Plan) supports such a conclusion.

THE CODE REQUIRES BETTER FROM THE APPLICANT

Mt. Tabor warrants a more carefully crafted application, similar to that at Washington Park

With a proposal as significant as this one to sever the reservoirs from their historic function, the community asserts the historic Mt. Tabor site warrants more thoughtful, comprehensive planning that addresses legacy plans and aesthetic preservation. The experts of the Historic Landmarks Commission agreed.

During the four hearings this case had in front of the Historic Landmarks Commissioners, the Commissioners expressed confusion and even frustration over the Applicant's approach to the Tabor Disconnect, a project that proposes the single greatest change to occur at this site since its original construction. The Commissioners emphasized the need for a holistic approach at historic sites. They expressed concern over the order in which the processes were being run for Tabor, and how this was denying the site the treatment that is considered best practice and denying the Commissioners the information they required to make solid recommendations. In their own words:

> "I'm pretty disappointed in the way that the City has handled this resource. It seems irresponsible to me to approve a disconnection without having a plan, public process, assignment of responsibilities, funding assurances, all of these things in place so that these remnants of the system will be protected and cared for into the future for stewardship." – *Carin Carlson*
>
> "I feel that this process has not been handled very well." – *Jessica Engeman*
>
> "I'm a little concerned that we don't have any of that [long term plans] before us because the Commission, to the extent that we may allow this, or part of this, or others will weigh in on it, this is the time where we could have a bigger understanding of the plan. To the extent that we would need to, to protect the historic site, be able to put some Conditions on it. And I'm wondering, so why we are at this point, it seems to me we're kind of premature." – *Harris Matarazzo*

"Without the process, and the plan, and the funding targeted, we have no assurance that our action today won't result in major loss of integrity." – *Carin Carlson*

"When these are disconnected, and this is no longer part of a system where it's being used as drinking water and has a function and revenues that are all tied in with its very inherent purpose, so that we have these huge, purpose-built, beautiful but no longer viable resources – and if there is no plan and there is no money. . . . I don't know how any community could feel comfortable with this. I'm at a complete loss." – *Jessica Engeman*

"Poor planning quality, and communication, that is obviously a major issue. . . . They should have had a game plan going forward, that would have been a lot better from a public stewardship perspective, and communication perspective." – *Brian Emerick*

"Again, if they'd gone through the process. . . . [Had] they had the public process and had the plan in place and all the ducks in a row, it would have been half the time." – *Carin Carlson*

Mt. Tabor demands aesthetic preservation efforts, similar to those at Washington Park

The Historic Landmarks Commissioners noticed and questioned the stark contrast between treatment of the historic site at Washington Park and the one at Mt. Tabor. Both Mt. Tabor Park and Washington Park have significant historic resources and an aesthetic to be protected after this major alteration of historic function. Yet, only Washington Park received the holistic review and preservation planning that is considered best practice for historic sites. In their own words:

"There was a very comprehensive look at *all* of the resources at that site [Washington Park]. I mean we were talking about lights and fencing and handrails, and restoration of outbuildings. And they really took all of our comments to heart, and we really saw it as a holistic piece . . . realizing that to keep the historic feel and aesthetic of the site, there was more work to be done to bring up the things that, like at Mt. Tabor, had been neglected." – *Jessica Engeman*

"I feel uncomfortable doing something that is in fact impacting the system, without having assurances as to how the remnants will be treated. . . . I'm not opposed to getting there, but the process should have been gone through. . . . [At Washington Park] they went through the process." – *Carin Carlson*

"I do not have enough information. . . . [There] needs to be some sort of plan, something that is going into the record, and I think that it needs, what the applicant is proposing needs to be more comprehensive. It needs to be more in line with what we saw at Washington Park." – *Jessica Engeman*

Referencing the Washington Park reservoir project's *voluntary* Design Advice Request: "I was really impressed with the level of detail and the level of input we were able to give, and I was kind of astounded with the things that they were asking us and the ability that they were giving us to weigh in." – *Caroline Dao*

The Applicant can provide better land use planning

The Mt. Tabor Neighborhood Association asserts that the Applicant is capable of better land use planning. In evidence of this claim, we direct you to the Applicant's approach to Washington Park's LT2 projects and their associated land use reviews (LURs). At Washington Park, the LURs included:

- 15 months of public work sessions during the design, to solicit and incorporate community goals;
- multiple public meetings during the design, to gather feedback to influence the project;
- a briefing with the HLC two years before filing (during project design);
- a voluntary Design Advice Review with the HLC, and a willingness to allow the HLC to influence many decisions great and small; and
- comprehensive planning that included LT2 utility construction, historic preservation, adverse effect mitigation, future use design/construction, and the funding for all of these items – all in one project.

Contrast this with the Applicant's treatment of the Mt. Tabor Park LUR, where the LUR:

- did not include a single public meeting or stakeholder group before the first filing in January 2014;
- violated – and in fact simply ignored – the City's Public Involvement Principles;
- was first filed (January 2014) as a more limited, Type II review, which limited public notification and public processes;
- was finally filed (September 2014) more appropriately as a Type III Review, but only in response to community intervention;
- ultimately added truncated public processes, but only after the community intervened;
- rushed the timeline and constrained the topics of the public processes, precluding the range of discussion normally due a project of this significance,
- resisted HLC input about best practices regarding the historic resource; and
- failed to plan for public processes, historic preservation needs, adverse effect mitigation, future use design and construction, or the funding for any of that.

Mt. Tabor's historic resources need better management

Mt. Tabor's historic assets need more thoughtful management than they currently receive. The Historic Landmarks Commissioners agree, and they openly discussed the Applicant's existing failures to safeguard this site's *historic character* and aesthetic (Approval Criterion 1), this site's *record of its time* (Approval Criterion 2), and this site's *essential form and integrity* (Approval Criterion 9).

The Commissioners found, in the absence of evidence to prove otherwise, that the resources should be expected to degrade even more rapidly, and suffer as much neglect and likely even more, once these resources are untethered from their historic, useful role in our city. In the absence of evidence, they were legally left with only two choices to assure that Criteria 1, 2, and 9 would be met: either 1) reject the application until more evidence is provided – *i.e.*, a preservation plan, a future-use plan; or 2) manage the future with significant Approval Conditions. Given the ample evidence of existing neglect (see photos in Appendix B), and given that the Applicant presents the future management plan as "more of the same," these Commissioners were legally bound either to reject the application or to create Condition E. In their own words:

> "One of the Criteria is: "The historic character of the property will be maintained and preserved. When I look at it *now* it's deteriorating. There's no plan to even maintain the deteriorated property. I have every reason to believe it will continue to deteriorate significantly." – *Harris Matarazzo*

> "The reservoirs have been allowed to deteriorate, with an old survey [the *Historic Structures Report*] and there is nothing really to indicate to me, to give me any confidence that in fact the reservoirs would be maintained in a way that we would all be proud of should they be taken offline as proposed.

There is a *huge* amount of deterioration there; it's just been neglected, and I have *no* confidence frankly, that it would be maintained in the way that it should be." – *Harris Matarazzo*

"The interpretation of the resource is only as good as what you can *see* of the resource. Its not only what people are telling you about the resources. It would be fantastic if the *Historic Structures Report* would be officially adopted by Water Bureau, so that its interpretation could continue." – *Kirk Ranzetta*

"There needs to be money set aside to be proper stewards of the resource – and to have both maintenance and also restoration going on there. I mean we're talking about a large-scale project that is happening citywide." – *Brian Emerick*

APPROVAL CONDITIONS B AND E ARE NECESSARY TO ENSURE COMPLIANCE WITH THE HISTORIC PRESERVATION CRITERIA

The Applicant asks you to relieve it from the burdens of Conditions B and E. We think it important to explain why the HLC placed these Conditions, and why they are essential.

It is tempting to think of conditions on a land use approval as simply a mechanism by which a decision maker can fulfill his or her wish list. As explained in Ty Wyman's January 7 letter to the HLC, however, conditions are a legal mechanism by which compliance with approval criteria is ensured.

Begin with the fact that PCC 33.800.060 requires the Applicant to show that the criteria "are met," not that they will be met at some unknown point in the future. The Oregon courts have filled in what this means.

In *Gould v. Deschutes County,* 216 Or App 150 (2007), the court considered a challenge to a land use approval. The Code required the applicant to provide "a resource protection plan to ensure that important natural features will be protected and maintained." Id., at 154. Though the applicant submitted no such plan, the county approved the application with a condition that the applicant submit one later. The court overturned the county's decision, deeming it insufficient to ensure that the conditioned plan would actually result in adequate mitigation.

The court reached its conclusion substantially in reliance on principles set forth in *Meyer v. City of Portland*, 67 Or App 274, 280-82, *rev den*, 297 Or 82 (1984). It summarized, 216 Or App at 161, the options for an applicant who cannot presently establish compliance with applicable criteria.

> If the nature of the development is uncertain, either by omission or because its composition or design is subject to future study and determination, and that uncertainty precludes a necessary conclusion of consistency with the decisional standards, the application should be denied or made more certain by appropriate conditions of approval.

This statement describes the parameters that govern the City's decision on the Project, and the HLC understood this. They also understood that the criteria that apply to the Project are very similar to those that applied to the applicant in *Gould*. *I.e*., PCC 33.846.060 requires the Applicant to describe a specific type of resource on the site, the effect its project will have on that resource, and the ways in which it will mitigate that effect in order to preserve the resource. Yet, like the developer in *Gould*, the Applicant told the Historic Landmarks Commission to wait on a mitigation plan to be developed through an undetermined process at an undetermined date. After many hours of on-the-record discussion, the Historic Landmarks Commissioners rejected this approach and

adopted Conditions B and E, making clear their conclusion that the Project could meet the City's historic preservation Criteria only through application of five approval Conditions.

The Applicant now asks the Council to delete Conditions B and E. Doing so would be unjustified.

For Condition B, Water – These Commissioners carefully and thoughtfully added quantifiable metrics to Condition B to articulate compliance expectations. The first metric regarded water levels. The intention as discussed is to *preserve the historic character* and aesthetic of the site by protecting the iconic, deep-water views found on site. Photos, including Figure 1, were displayed and discussed. The HLC Commissioners searched for a metric that would ensure the reservoirs would be kept "aesthetically full" as in Figure 1. At somewhat of a loss for how to define this expectation for the water level, the Commissioners fell to the term "normal historic operating range" suggested by Bureau staff. In examining the deliberations, the terminology "normal operating range" can be seen as akin to "iconic operating range." With Condition B and the metric of "normal historic operating range," the Commissioners seek to protect the iconic deep-water views, so that they are consistently present at the site.

Figure 1

We appeal to Council to further clarify the language of Condition B so that it reads "normal historic operating range producing iconic views" where it now reads "normal historic operating range." This more simply ties compliance expectations to a visual standard – the iconic views. The last thing we want is to see the standard decided by a complicated formula that averages water level data over arbitrarily chosen stretches of time. It is the iconic views that the HLC Commissioners seek to protect with Condition B*,* rather than the operational data. And, given that the Applicant has in its own appeal sought to include recent operational data – which allowed Tabor reservoirs to sit empty for months and even years at a time – as part of the data for "normal historic operating range," the MTNA feels it is imperative that authorities clarify the compliance expectation, explicitly citing the iconic views.

Additionally, a "scrivener's error" caused the wrong figures to be written in to this Approval Condition – the "normal historic operating range" should read 65%–85%, as per Exhibit H-51, page 3 and not 50%–75% as written. **We appeal to Council to correct this scrivener's error, such that you strike the incorrect "50%–75%" text and replace it with the accurate "65%–85%."**

The second metric added to Condition B addresses the need to keep these iconic views *consistently present* at the site. The Applicant told the HLC Commissioners that the reservoirs will be drained/cleaned/filled with clean Bull Run water three to four times per year, in a process that takes one week each time. The Commissioners factored in those four turnaround weeks as described, *plus four extra weeks* to provide flexibility. They built in the figure "60 days" as a limit on empty periods, specifically to protect the constancy of these historic views. By the Applicant's own evidence, this is operationally workable. Both the State Historic Preservation Office (SHPO) and the Historic Landmarks Commission assert that these iconic views are essential to the aesthetic of this historic site; in turn, the *depth* of the water and the *constancy* of its presence need to be protected for Approval Criterion 1 to be met.

The Applicant asserts, in its appeal of this clause in Condition B, that SHPO's finding of "no adverse effect" is evidence that this clause is unnecessary. SHPO has responded to this appeal, directly contradicting that assertion and clarifying that local authorities such as the HLC are best at judging local criteria. From SHPO's response:

> "[If] the HLC wishes to place further conditions on this to ensure that it is done, such as a limit on the number of calendar days in a year that the reservoirs can be empty, as has been proposed, that is their prerogative. With a fuller understanding of local issues, we trust the local review authority to make informed and appropriate decisions based on the authority granted them by local ordinance. . . . If HLC feels it is important that this happen, our office trusts that decision. "

The Applicant asserts in its appeal of this clause of Condition B that it cannot "be assured of meeting future regulatory obligations for operation of what are considered 'high hazard dams.'" The Federal Energy Regulatory Commission (FERC) carefully inspects and regulates the dams on Mt. Tabor. All issues, from safety to emergency preparedness, are addressed and planned for under this regulation. There are no issues or regulatory obligations at these dams that make the 60-day limitation operationally unworkable. The Applicant cannot state today the effect of "future regulatory obligations" on the workability of this 60-day limit, and it should plan to address any future "unworkability" that might arise through a future review before the Historic Landmarks Commission.

We urge Council to deny the Applicant's challenge to the clause in Condition B that protects constancy.

For Condition E, fully implement the 2009 *Mt. Tabor Historic Structures Report* – BDS staff crafted this Condition in response to the HLC Commissioners' finding that the Applicant failed to prove it has adequately planned a future that protects *historic character*, *record of time*, and *form and integrity* (Approval Criteria 1, 2, and 9). The failure to provide these plans constitutes a significant legal failure of the Application.

The Historic Landmarks Commissioners repeatedly requested raw data from the Applicant, through which the Commissioners might be able to divine future management practices – they asked for an outline of legacy plans including roles and responsibilities, and letters of commitment from Water Bureau officials with budgeting power. The Applicant failed to add these items to the record for HLC to review. So, the HLC was left with only two choices: to reject the Application, or to try to manage the future through Conditions.

> "[We're] trying to manage the outcome of this review through Conditions, which isn't the ideal way. We'd like to have all the information, the discussion, and if we have Conditions that they are pretty minor. Well these are pretty major, so how do you balance having a Condition that is very clear and that is relatively easy to enforce *vs* having something that is pretty open-ended, and with certain language that may be open to interpretation." – *Jessica Engeman*

> "In the absence of evidence, it shouldn't fall to us to make a plan for what any entity, whether it's a private owner or government, as to what they should do. . . . I am particularly concerned that this could have been handled by mediation." – *Harris Matarazzo*

The 2009 *Mt. Tabor Historic Structures Report* is an existing survey commissioned by the Applicant for the historic assets on its Tabor property. Written by a respected preservation specialist, it provides a comprehensive assessment of all preservation responsibilities on site. It identifies long-range maintenance strategies for all assets. But it also identifies assets currently needing remedial preservation due to neglect – and it prioritizes those restoration needs as 1) those that have reached a crisis level (labeled short-term priority in the report) with a deadline of 2014; and 2) those that are of average urgency (labeled long-term priorities in the report) that can be addressed over the 10-year period between 2009 and 2019, as opportunities present themselves. It is an excellent start to any preservation plan.

The total cost to complete all items identified in the report is less than $2 million in 2009 dollars. This is a fraction of what is being spent on the preservation of historic character and aesthetic at Washington Park. All of the crisis (short-term) and urgent (long-term) restoration work at Mt. Tabor was to be completed no later than 2019 (10 years from the writing of the report). To date, the Applicant has completed $175,000 worth of the work; we have calculated that at the current rate of attack, this report won't be completed until 2066 – after most of us are dead.

The HLC found the Applicant's existing management inadequate to protect the resource and to meet the Approval Criteria, and without additional evidence (such as a written preservation plan) outlining a new management strategy, these Commissioners were compelled to spell out some amount of preservation practice for this site. Thus, they wrote Condition E, which requires full implementation, on a fixed timeline, of the last known survey of preservation needs for the site.

In its challenge to Condition E, the Applicant asserts that the mandate is unnecessary because the State Historic Preservation Office (SHPO) issued a "no adverse effect" finding for the Tabor Disconnect. As discussed above, SHPO rejects that assertion:

> "To suggest that State review should in any way impact, or trumps local review outcomes, is simply incorrect, and not supported by law or historic preservation best practice."
>
> "With a fuller understanding of local issues, we trust the local review authority to make informed and appropriate decisions based on the authority granted them by local ordinance. The same is true with regard to PWB official acceptance of the 2009 report. If HLC feels it is important that this happen, our office trusts that decision."

It is important to understand that SHPO's review is strictly limited to a review within state criteria, and that SHPO does not make a determination on this Applicant's ability to meet local land use laws. SHPO's review did not include the Approval Criteria before you today, nor did it hold the Applicant to the same documentation and evidence standard set by the local land use laws, which dictate the need for better plans, as in Condition E.

We urge Council to respect the HLC mandate for historic preservation work by upholding Condition E, and denying the Applicant's challenge to this Condition.

Furthermore, we appeal to Council to more closely constrain the timeline of this preservation work – to make it concurrent with the timeline of other project construction – and as such we ask Council to shorten the completion deadline to May 2017. The *Historic Structures Report* was intended to be implemented as soon as opportunities presented themselves – and with construction already disrupting the park, the opportunity presents itself. We urge Council to consider the impact that multiple summer disruptions have on the community's park experience and on City livability. It is possible here to group projects and therefore limit park disruption.

From their remarks, it appears the Historic Landmarks Commissioners viewed these Approval Conditions, especially B and E, as the *minimum* required to make this application palatable.

> "Right now, a couple thousand dollars of interpretive panels when you are having the resource fall down around you, really doesn't do anything for me. And frankly, there's a report, which is old, which hasn't been followed. All of those things [in the *Historic Structures Report*] need to be done, in order for me to even consider [approval]. You're talking about retaining the character of something that is deteriorating around us." – *Harris Matarazzo*

"I think the [Applicant's] proposed mitigation seems weak. Just looking back at precedence for what we've done for buildings, we ask private owners all the time to mitigate for small alterations. Sometimes we request lengthy lists of repairs and restoration efforts to make up for a *small* but significant impact. So, I'm wondering why the City should not be held to this, if not a higher standard. I am having trouble understanding how approving funding for interpretive materials is different from funding to implement some of these specific repairs. Why can we request one and not the other?" – *Carin Carlson*

"I don't think we're asking *enough* [of the Applicant]." – *Carin Carlson*

"Government needs to lead by example – and, frankly, individuals come before us wanting to do things to their properties, and I believe we've really held them to a much higher standard than we are in this case. We can't allow that to happen." – *Harris Matarazzo*

"I share the sentiment, especially from the Neighborhood Association point of view, that the approval outright couldn't be supported because not all the information was given. . . . More information should have been given." – *Caroline Dao*

"Look at this room. There is a lack of trust; that is why we are here today. We are being forced into a position we should not have to be in, because it should have happened all through mediation. . . . I think we do need to be specific. I think we need to lay out what the parameters are." – *Harris Matarazzo*

The Mt. Tabor Neighborhood Association asserts that Approval Conditions B and E are required to make this Application legally defensible, and that they alone may not be adequate. This Application is bereft of essential evidence, including the written plans that land use law requires as proof that the proposal will preserve *historic character*, *record of time*, and *essential form and integrity* (Approval Criteria 1, 2, and 9).

We appeal to Council to further the efforts of the Historic Landmarks Commission, and we ask you to require the Applicant to, within one year, craft a written, long-range preservation plan (including at least five years of budget projections) in concert with SHPO and under a Design Advice Review with the HLC, to be formally adopted before Council.

SHPO'S COMMENTS UNDERMINE THE APPLICANT'S APPEAL

As we noted above, SHPO rejects the assertion that the "no adverse effect" finding from them is an argument against the HLC's Approval Conditions (SHPO's full response attached in Appendix C). SHPO explains that local laws are appropriately more rigorous:

"It is almost universally the case that local regulation is more restrictive than state law, with more powers to intervene, regardless of the city or state we are discussing. In reality, the reviews should be different, otherwise they would be duplicative and a waste of time."

SHPO clarifies that the parallel reviews done at SHPO and at the local level reasonably produce different results:

"[We] expect the HLC to reach decisions based on application of local ordinance, and not to be influenced by SHPO review of the same project under entirely different laws. It is expected that in some cases, SHPO review of a project may result in a finding of no adverse effect, while local review of the same project under local ordinance reaches a different conclusion. *To suggest that State review should in*

any way impact, or trumps local review outcomes, is simply incorrect, and not supported by law or historic preservation best practice." (emphasis added)

SHPO expresses support for whatever measures the HLC finds necessary:

"If HLC feels it is important that this happen, our office trusts that decision."

And they express support for protections for the historic structures:

"Finally, I would like to be very clear that our office supports all processes, regulations, or projects that result in positive outcomes for the preservation of historic resources. While our role in influencing outcomes is limited by the regulations that empower our office, we would support any plan to restore, maintain, and preserve in perpetuity historic resources, regardless of our regulatory authority."

SHPO also clarifies that its original finding of "no adverse effect" is dependent on water:

"Regarding the SHPO's position about water levels in the Reservoirs, our concurrence with a finding of No Adverse Effect was clearly contingent upon the project proponent following through with the scope of work provided to our office for review. Among those were the proposal (from PWB) that the reservoirs be maintained with water in them at normal operating depth, draining them only for routine maintenance and cleaning. This is reflected in my email to Eileen Brady, who also contacted our office with the same question. Here is a brief excerpt of my response:

'Our office found no adverse effect based on the latest proposal from Water Bureau, which includes the retention of water in the reservoirs as a condition of approval. If the project does not result in the retention of water in the reservoirs, we would be able to re-open the case and find an adverse effect at that point. This has been made clear to Water Bureau, and is implicit in our finding.'"

THE APPLICANT MUST FUND THE PROJECT TO THE EXTENT NECESSARY TO PRESERVE HISTORIC RESOURCES

The expense of complying with the Code is a cost of doing business for every applicant

The Applicant seeks to avoid spending money on its historic preservation responsibilities at the Mt. Tabor site by casting these expenses as too great and as somehow disproportionate to the proposal. The MTNA notes that Code compliance costs are non-negotiable expenses, which private party applicants regularly must absorb as fixed, baseline costs.

The budget can be proportionate to the site's needs

The Applicant asserts that the attention paid to preservation work at the Washington Park reservoir site is so vastly different from the attention paid to preservation work at the Mt. Tabor Park reservoir site because the budgets allocated to the two sites are so vastly different, and that these budgets and their associated plans are beyond its control.

This characterization is misleading. During the years the Applicant was building LT2 strategies and budgets (under Commissioner Leonard) City Council largely relied on and adopted the Applicant's recommendations for

those strategies and budgets. These have been largely within the Applicant's control. There are massive changes happening at multiple sites within this city all as a result of one federal rule (LT2). These projects are all part of the one, larger LT2 project, and Portland's LT2 response is approaching $800 million in expenditures. The Applicant's reaction to the LT2 rule involved a comprehensive compliance plan, with each piece clearly understood and crafted in concert with all other pieces. The implications of each individual site project were considered and planned from soup to nuts . . . *except at Mt. Tabor*, where the Applicant moved forward without addressing public involvement, or historic aesthetic, or the future use, or the budgets for any of these essential parts to this site project.

The overall expense of the LT2 mandate should provide the mitigation scale and budget to be *spread among* impacted sites according to the site needs and harm done. Disconnecting the Tabor reservoirs from their historic function is the single greatest change to happen at this site since their construction a century ago. Yet, the Applicant has justified the disparity between the funding for preservation and mitigation at Washington Park and Mt. Tabor Park thus: if viewed in isolation, the slice of the LT2 construction happening on Tabor – disconnecting and capping a limited number of pipes – costs relatively little, so the Applicant will not offer a preservation and mitigation budget for Mt. Tabor. But damage to the Mt. Tabor historic site is far greater than the cost of capping some pipes, and the funding should not be so arbitrarily scarce. Protection of the nationally recognized resources at Mt. Tabor is not being appropriately addressed.

Furthermore, the Applicant has sliced and diced into separate work packages the *multiple* LT2-driven projects happening on Mt. Tabor (hydro plant disconnect, Tabor Disconnect, Tabor Adjustments W01524, Tabor PS Improvements W01757, Tabor "future use", etc.). This partitioning of several aspects of the same project has contributed to an unnaturally narrow review of impacts at this site, and this in turn has driven inadequate planning and funding.

The Historic Landmarks Commissioners agreed that this project was indeed part of a large and expensive initiative, and also agreed that the relative preservation and mitigation budgets should be scaled to the overall LT2 initiative and site need. In their own words:

> "That is one of the things that from a policy standpoint is disappointing, is yeah we're talking about a small-scale project in terms of what you are presenting to us, but actually it is a large-scale project in the overall scheme of things. We're talking about Washington Park, Kelly Butte, Mt. Tabor. This is part of a whole broad-ranging thing, and so, why there wasn't enough money set aside to provide for at least adopting the maintenance report, or these other accessory type things that are a part of this bigger project, it is actually kind of baffling." – *Brian Emerick*

The real cost of filling and cleaning Mt. Tabor's reservoirs

In a face-to-face conversation with David Shaff, the Director stated that water in Bull Run was essentially free to the Water Bureau, and in fact plentiful and on a natural course to the river anyway; he asserted that the drain/clean/fill process would merely dam up some water for a while in the reservoirs on its eventual way to the river. The drain/clean/fill process, which takes one week without overtime, is already being done twice per year and the costs are already in the budget. In an *Oregonian* article dated April 18, 2014,[1] Director Shaff outlines the cost as follows: $722 in chemicals + $0 for the water (it is free) + the cost to dump (reportedly not charged to

[1] Melissa Binder, "Portland Reservoir urination case: Prosecution, cleaning and cost," Oregonlive.com, April 18, 2014, http://www.oregonlive.com/portland/index.ssf/2014/04/portland_reservoir_urination_c_1.html#incart_story_package (accessed March 19, 2015).

the bureau if done responsibly) + the normal wages of the workers assigned to the task (not really an additional charge, given their wages are already in the budget) = "a few thousand dollars."

Here are a few further observations about the cost of the drain/clean/fill process. First, leaving these historic basins empty subjects them to freeze-thaw damage and other degradation, the cost for which is not currently known: keeping water in the reservoirs may very well prove to be the lowest-cost maintenance plan. Second, even if the reservoirs were to be left empty, they would nevertheless require periodic cleaning lest they become eyesore receptacles for graffiti and debris. Third, let's remember that these costs represent a placeholder in a budget; the cleaning work is performed by the Applicant's employees already on the ratepayer payroll, and according to a BES spokesperson in the above-referenced article, the dumping impact is no different from an extra "light rain fall" which BES's budget is prepared to absorb.

The ratepayer lawsuit cloud

It has been suggested the effect of the recent ratepayer lawsuit may be to disallow preservation spending at Mt. Tabor. We remind the Council that the test established by Judge Bushong for qualifying expenses to be paid by ratepayer funds is that the expenditures must be "reasonably related" to Water Bureau business. Unlike the historic preservation work the Water Bureau paid for at the old waterfront McCall's Restaurant building (a building not related to Water Bureau business), the historic structures at Washington Park and Mt. Tabor Park reservoir properties have been owned and operated as core water utility features for more than 100 years. These sites are absolutely "reasonably related" to Water Bureau business. And, as the City requires its Bureaus to maintain their major capitol assets, these expenditures are mandated.

If the Applicant intends to assert that it can fund historic preservation and park amenities for the property at Washington Park, which it has owned and operated for more than 100 years, and the Applicant then makes the opposite argument at Mt. Tabor Park, which is also clearly property that it has owned and operated for more than 100 years, then the Applicant unwittingly undermines the legitimacy of the City's expenditures of ratepayer dollars at Washington Park.

THE PROJECT REQUIRES A CONDITIONAL USE REVIEW

According to PCC 33.815.010, specified uses "are subject to the Conditional Use regulations because they may . . . change the desired character of an area. . . ." The Project is such a case, changing the character of an area. As such, it requires Conditional Use review.

Put briefly, all interested parties recognize that the Project will affect conditional uses. They also recognize that the Code requires alterations to such uses in excess of specified thresholds to obtain a new Conditional Use approval. The disagreement is whether the record establishes that the Project will not exceed those thresholds.

The Applicant asserts that its Project does not require a Conditional Use review. It submits, however, insufficient evidence to support such a conclusion, and the record supports a contrary conclusion.

The Applicant's comment that waterworks "facilities at Mount Tabor . . . are not accessory to the park uses" is a *non sequitur*. The Project site (Mt. Tabor Park) is currently home to not one but two discrete conditional uses – the waterworks (a "basic utility"), and various Mt. Tabor Park facilities. Each use has operated there for many years, and will continue to do so after the Applicant completes the Project.

The park and the waterworks have peacefully coexisted on Mt. Tabor for more than 100 years. However, with this Application, the Applicant asserts a change in management policy for the land over its utility pipes on Tabor.[2] While trees and water pipes have intermingled on Tabor for the entire lifespan of the park, according to the Applicant, they will no longer be allowed to do so. This waterworks' policy change directly affects the character of the area as a naturally forested park. With this Application, the Applicant proposes to lay 3,400 square feet of new pipe, bringing with it a 20,400-square-foot pipe corridor which the Applicant insists will now and forevermore be restricted from having trees planted on it. This proposal increases development of the basic utility use in a way that directly impacts the naturally forested character of the park. This warrants a formal, public, Conditional Use discussion. The community questions whether the Water Bureau should find a different route for its new pipe.

Additionally, Conditional Use review is necessary to establish compliance with PCC 33.846.060.G. As the Applicant acknowledges, such compliance requires demonstration that the disconnection is reversible. The reservoirs are presently an approved Conditional Use (as a "basic utility"). Pursuant to PCC 33.815.050, the disconnection jeopardizes that status, such that reversibility is premised on a future Conditional Use approval. The Applicant can only establish reversibility by obtaining Conditional Use approval presently.

Ty Wyman explained at length in his January 7 letter to the HLC how the Conditional Use chapter of the Zoning Code applies to the Project. We attach his letter and incorporate his arguments herein by this reference. Put briefly, PCC 33.815.040.B.1 sets forth the circumstances in which alteration of an existing Conditional Use requires a new Conditional Use approval.

The record shows that the Project fails to address two of the thresholds set forth at PCC 33.815.040.B.1.

1. The Applicant must show that the Project complies with the development standards of the Zoning Code. PCC 33.815.040.B.1.b. As suggested by staff, the HLC Decision acknowledges that the record does not contain evidence demonstrating compliance with all applicable development standards, but offers to defer demonstration of such compliance to a future process. Decision at p. 29 ("The plans submitted for a building or zoning permit must demonstrate that all development standards of Title 33 can be met, or have received an Adjustment or Modification via a land use review prior to the approval of a building or zoning permit.") The City may defer a finding of compliance with applicable criteria only by (1) finding that such compliance is feasible and (2) ensuring that it will provide notice and opportunity for hearing at a future date where such feasibility can be addressed. *Gould*, 216 Or App at 161.

2. Under PCC 33.815.040.B.1.d, the Project is subject to Conditional Use review if it "increase[s] exterior improvement area by more than 1,500 square feet." The Code defines "exterior improvement area" as "[a]ll improvements except buildings or other roofed structures." The zoning code does not define the word "improvements," so we look to the dictionary. See PCC 33.910.010 ("[w]ords used in the zoning code have their normal dictionary meaning unless they are listed in 33.910.030 below"). Of the six definitions of "improvement" set forth in Dictionary.com, two are applicable here: 1) "a bringing into a more valuable or desirable condition, as of land or real property; betterment"; and 2) "something done or added to real property that increases its value."

The staff report describes the Project as twenty discrete work tasks in eleven different areas of the site. None of these tasks appear to construct a building or roofed structure. It seems reasonable to assume that all of the work described in the application would bring the land into a more desirable condition, thus constitute an "improvement." Why else would the Applicant undertake it? It is also obvious that the

[2] Assertion is made on pages 30 and 97 of Application.

combined area of that work is greater than 1,500 square feet. The Applicant proposes to install 850 linear feet of 4-foot-diameter pipe. (Final Findings and Decision at page 4.)[3] That alone is 3,400 square feet of exterior improvement area to the site.

The HLC did not delve into the Conditional Use issue. Two considerations make this unsurprising:

1. The HLC is not generally familiar with Conditional Use review, which typically falls under the jurisdiction of the Hearings Officer; and

2. The Commission clearly had plenty of other issues to deal with in this Application.

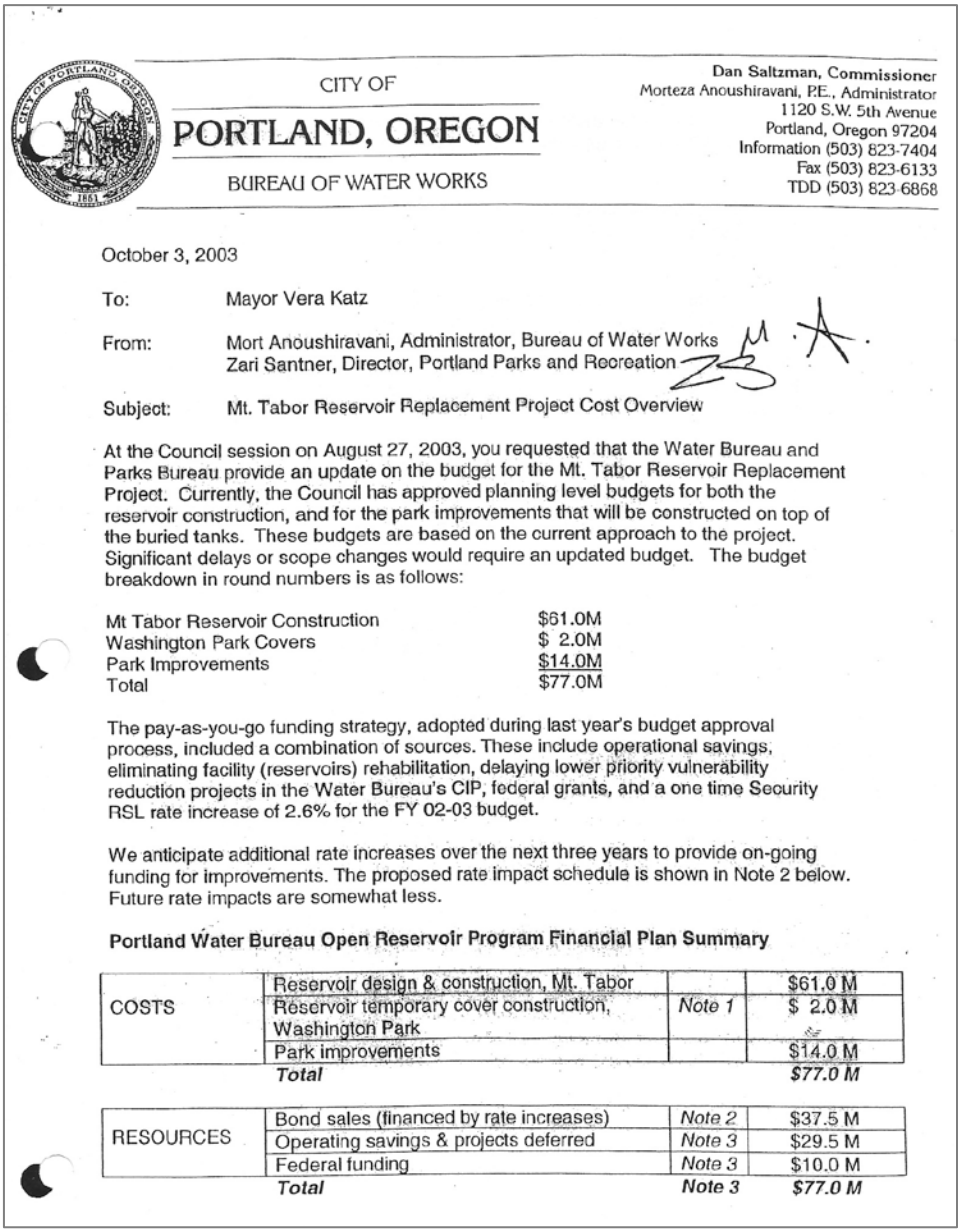
As a final note, the foregoing Code criteria implement policy set forth by this Council. As noted above, that policy is that major change to the character of an area warrants Conditional Use review. Bolstering the conclusion that the Project constitutes such a major change is the fact that other significant waterworks projects (*viz.,* the Powell Butte Conditional Use Master Plan) have undergone Conditional Use review. We appreciate the work of the HLC. Conditional Use review, however, is a necessary step to fully address the Project's long-term impacts on Mt. Tabor Park.

We appeal to Council to direct the Applicant to 1) file for a Conditional Use Review before proceeding further and 2) develop a plan to protect the site's existing Conditional Use status ("basic utility").

[3] The BDS generated Staff Reports all cite 850 linear feet as the total pipe length being constructed; the Applicant cites "about 1,000 feet" on page 81 of Application and "950 linear feet" on pages 134 and 145 of Application.

Appendix A – The City's Commitment

In the 2002–2004 discussion to disconnect Tabor's open reservoirs, Portland's City Council recognized the importance of protecting Mt. Tabor's historic character and aesthetic through changes at the reservoir site. As such, City leaders made a commitment to the community to dedicate $14 million in spending for "park improvements" to "maintain the aesthetic and historic values with the reservoirs." Below, we offer a letter from the Water Bureau that references this financial commitment to those "Park Improvements" included in the 2002–2003 Approved Budget. MTNA asks you to honor that commitment to the aesthetic and historic character at Mt. Tabor.



CITY OF
PORTLAND, OREGON
BUREAU OF WATER WORKS

Dan Saltzman, Commissioner
Morteza Anoushiravani, P.E., Administrator
1120 S.W. 5th Avenue
Portland, Oregon 97204
Information (503) 823-7404
Fax (503) 823-6133
TDD (503) 823-6868

October 3, 2003

To: Mayor Vera Katz

From: Mort Anoushiravani, Administrator, Bureau of Water Works
Zari Santner, Director, Portland Parks and Recreation

Subject: Mt. Tabor Reservoir Replacement Project Cost Overview

At the Council session on August 27, 2003, you requested that the Water Bureau and Parks Bureau provide an update on the budget for the Mt. Tabor Reservoir Replacement Project. Currently, the Council has approved planning level budgets for both the reservoir construction, and for the park improvements that will be constructed on top of the buried tanks. These budgets are based on the current approach to the project. Significant delays or scope changes would require an updated budget. The budget breakdown in round numbers is as follows:

Mt Tabor Reservoir Construction	$61.0M
Washington Park Covers	$ 2.0M
Park Improvements	$14.0M
Total	$77.0M

The pay-as-you-go funding strategy, adopted during last year's budget approval process, included a combination of sources. These include operational savings, eliminating facility (reservoirs) rehabilitation, delaying lower priority vulnerability reduction projects in the Water Bureau's CIP, federal grants, and a one time Security RSL rate increase of 2.6% for the FY 02-03 budget.

We anticipate additional rate increases over the next three years to provide on-going funding for improvements. The proposed rate impact schedule is shown in Note 2 below. Future rate impacts are somewhat less.

Portland Water Bureau Open Reservoir Program Financial Plan Summary

COSTS	Reservoir design & construction, Mt. Tabor		$61.0 M
	Reservoir temporary cover construction, Washington Park	*Note 1*	$ 2.0 M
	Park improvements		$14.0 M
	Total		***$77.0 M***

RESOURCES	Bond sales (financed by rate increases)	*Note 2*	$37.5 M
	Operating savings & projects deferred	*Note 3*	$29.5 M
	Federal funding	*Note 3*	$10.0 M
	Total	***Note 3***	***$77.0 M***

Appendix B – Neglect and Non-Historic Additions

Examples of Neglect

The most dramatic example of current and ongoing neglect can be seen at Reservoir 1. The reservoir wall has been left to deteriorate almost beyond repair on the south elevation. Here, the iron rebar has been left exposed and as a result, the concrete has spalled away in large chunks, leaving even more iron exposed and inviting further deterioration.

Much of the raised decorative diamond pattern has been lost. The wall cap has been lost in places and more is lost every day. The concrete sits in chunks on the ground. Much of this south wall will need to be reconstructed.

Other examples of neglect include the lack of periodic cleaning to remove damaging mold on the reservoir walls and neglect in patching holes in the masonry.

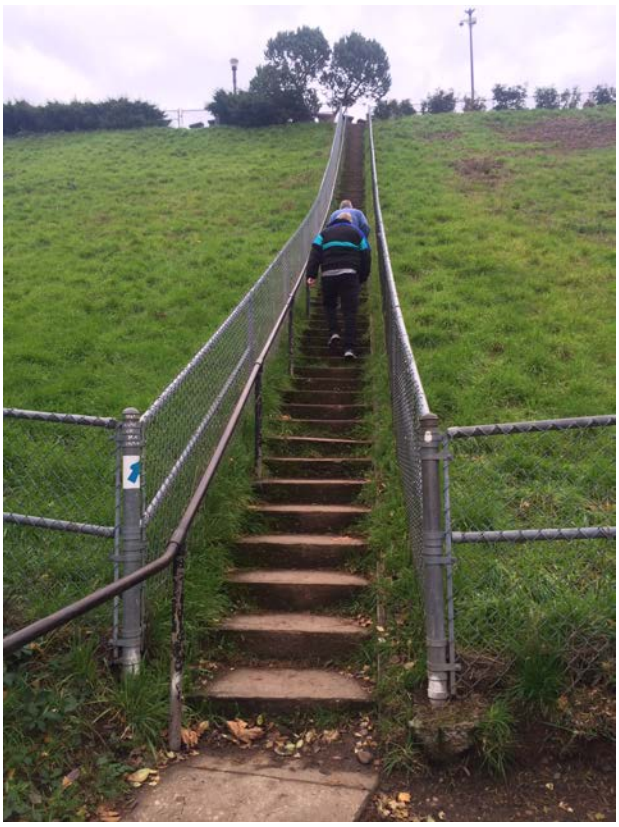
Examples of non-historic additions

Where there was once aesthetically appropriate, historic lighting like this:

The Applicant has introduced into the historic district, strip-mall lighting like this:

Multiple rows of uncamouflaged, modern metal conduit have been carelessly attached along the entire perimeter of the historic reservoir walls. The conduit is neglected and quite possibly serves no purpose. This photograph of the rusted conduit and exposed wiring speaks to the disregard shown by management practices at Mt. Tabor:

This chain link, non-historical fencing occupies prime visual real estate in the historic district. It showed up unannounced and has been an eyesore in the historic district for years.



Appendix C – SHPO's Response to the Applicant's Appeal

Here is the State Historic Preservation Office (SHPO) response to the Applicant's appeal of the HLC Decision. SHPO rejects the Applicant's assertion that SHPO's finding negates the HLC's need to place Conditions on their Approval; they clarify authority; they clarify the requirements of their finding of "No Adverse Effect."

…….

From: ALLEN Jason * OPRD <Jason.Allen@oregon.gov>
Date: Friday, March 20, 2015 at 12:46 PM
To: Stephanie Stewart <stewartstclair@gmail.com>
Cc: "Starin, Nicholas" <Nicholas.Starin@portlandoregon.gov>, "Carter, Tom" <Tom.Carter@portlandoregon.gov>
Subject: RE: response to appeal? SHPO# 14-0107

Hello Stephanie,

Thank you for attaching the appeal language. I appreciate your questions. The questions you pose below are relevant to all parties involved, and I have received similar questions from others. In order to provide the same information to all those involved, I have copied this email to Nicholas Starin from the Portland City Preservation Planner and Tom Carter from the City of Portland Water Bureau. Any one receiving this email should feel free to forward it to whomever may be interested.

First, to address the question of the parallel reviews, ours under state law, and HLC's under local ordinance. These two regulations and the regulatory bodies that are empowered by them (SHPO by the state law, and HLC by the local ordinance) are entirely different. It is almost universally the case that local regulation is more restrictive than state law, with more powers to intervene, regardless of the city or state we are discussing. In reality, the reviews should be different, otherwise they would be duplicative and a waste of time. If one accepts the theory that democracy is best served when the most specific laws are decided at the most local level possible, with state and federal laws being more general in their application, it follows that local preservation regulation would be more specific (and even more restrictive) than state law.

We would also point out that the City of Portland is a Certified Local Government, which is a federal program designed to encourage local oversight of historic preservation issues. To be a CLG, a city must have local preservation ordinances that are enforceable, have a historic landmarks committee that meets certain qualifications. The State's role in the CLG program is limited to providing funding pass-through funding and providing technical assistance and general support. We do not get involved in questions of application of, or results of local review. We also do not get involved in questions that are outside of our professional qualifications, such as local land use law. Because Portland is a CLG, we expect the HLC to reach decisions based on application of local ordinance, and not to be influenced by SHPO review of the same project under entirely different laws. It is expected that in some cases, SHPO review of a project may result in a finding of no adverse effect, while local review of the same project under local ordinance reaches a different conclusion. To suggest that State review should in any way impact, or trumps local review outcomes, is simply incorrect, and not supported by law or historic preservation best practice. They are two separate processes that should be allowed to play out independently.

Regarding the SHPO's position about water levels in the Reservoirs, our concurrence with a finding of No Adverse Effect was clearly contingent upon the project proponent following through with the scope of work provided to our office for review. Among those were the proposal (from PWB) that the reservoirs be maintained with water in them at normal operating depth, draining them only for routine maintenance and cleaning. This is reflected in my email to Eileen Brady, who also contacted our office with the same question. Here is a brief excerpt of my response:

> "Our office found no adverse effect based on the latest proposal from Water Bureau, which includes the retention of water in the reservoirs as a condition of approval. If the project does not result in the retention of water in the reservoirs, we would be able to re-open the case and find an adverse effect at that point. This has been made clear to Water Bureau, and is implicit in our finding."

With that having been said, if the HLC wishes to place further conditions on this to ensure that it is done, such as a limit on the number of calendar days in a year that the reservoirs can be empty, as has been proposed, that is their prerogative. With a fuller understanding of local issues, we trust the local review authority to make informed and appropriate decisions based on the authority granted them by local ordinance. The same is true with regard to PWB official acceptance of the 2009 report. If HLC feels it is important that this happen, our office trusts that decision.

Finally, I would like to be very clear that our office supports all processes, regulations, or projects that result in positive outcomes for the preservation of historic resources. While our role in influencing outcomes is limited by the regulations that empower our office, we would support any plan to restore, maintain, and preserve in perpetuity historic resources, regardless of our regulatory authority.

Cheers,
-Jason

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January 7, 2015

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c/o Amy Bacher
Bureau of Development Services
1900 SW Fourth Avenue, Suite 5000
Portland, OR 97201

Re: Mt. Tabor Reservoir Disconnect
Our File No.: ROH7-1

Dear Sir or Madam:

As you know, this firm represents Brian Rohter and Eileen Brady in this matter. Following up on testimony that we provided at the Dec. 1 hearing, this letter responds to PWB's Dec. 23 submittal and explains the following ways in which the application errors:

1. Condition B must ensure that "the historic character of the property be preserved," but fails to do so;

2. Condition C must ensure that each historic resource "remain a physical record of its time, place, and use," but fails to do so; and

3. The application fails to demonstrate compliance with conditional use criteria, as is required by PCC 33.815.040.B.

Given these errors, the Commission is under no obligation to craft conditions necessary to approve the application. Should it choose to do so, we ask that you revise the conditions proposed by PWB.

The foregoing errors stem from PWB's fundamental misunderstanding about the following principles, which guide this quasi-judicial process:

- PWB alone (not BDS or Portland residents) has the burden of proof;
- PWB may not defer that burden to some undefined future process; and

- Because PWB has not met its burden, the Commission may either amend the proposed approval conditions or simply deny the application (and tell PWB to start over).

Accordingly, we begin by clarifying these principles.

PWB has the burden of proof here. PCC 33.800.060 reads as follows:

> The burden of proof is on the applicant to show that the approval criteria are met. The burden is not on the City or other parties to show that the criteria have not been met.

PWB may not defer that burden to some undefined future process. PCC 33.800.060 requires PWB to show that the criteria "are met," not that they will be met at some unknown point in the future. This principle is a matter of state law. Cases have clarified the nature and extent of this burden, and the ability of an applicant to defer meeting it.

In *Gould v. Deschutes County,* 216 Or App 150 (2007), the court considered a challenge to a land use approval. The applicable zoning code required the applicant to describe (a) wildlife resources on the site, (b) the effect the project would have on those resources, (c) the methods the developer would employ to mitigate adverse impacts on the resources, and (d) "a resource protection plan to ensure that important natural features will be protected and maintained." Id., at 154.

The applicant in *Gould* submitted no mitigation plan. The county nonetheless approved the application based on (a) a conclusion that it was feasible for the applicant to prepare a wildlife mitigation plan, and (b) a condition that the applicant prepare such a plan.

The criteria that apply to PWB's project are very similar to those that applied to the applicant in *Gould.* PWB must describe a specific type of resource on the site, the effect its project will have on that resource, and the ways in which it will mitigate that effect in order to preserve the resource. Yet, like the developer in *Gould*, PWB tells the Commission to wait on a mitigation plan to be developed through an undetermined process at an undetermined date.

The court in *Gould* overturned the county's decision, deeming it insufficient to ensure that the conditioned plan would actually result in adequate mitigation. The court reached this conclusion substantially in reliance on principles set forth in *Meyer v. City of Portland*, 67 Or App 274, 280-82, *rev den*, 297 Or 82 (1984). The *Gould* court summarized, 216 Or App at 161, the options for an applicant who cannot presently establish compliance with applicable criteria.

> If the nature of the development is uncertain, either by omission or because its composition or design is subject to future study and determination, and that uncertainty precludes a necessary conclusion of consistency with the decisional standards, the application should be denied or made more certain by appropriate conditions of approval.

The foregoing statement of the law sets forth the parameters that govern the Commission's decision. If the Commission finds that PWB has not met its burden of proof (demonstrating compliance with all applicable criteria), then:

1. It is under no obligation to craft approval conditions necessary to ensure such compliance, rather it may simply deny the application. *See also, Caster v. City of Silverton*, 54 Or LUBA 441, 454 (2007) (holding that nothing obligated the city to "take the initiative to propose conditions of approval" or develop the evidentiary record that might be needed to impose such conditions).

2. It may choose to approve the application subject to either:

   a. conditions that ensure compliance with the applicable criteria. See PCC 33.800.070 (specifically allowing the city to impose conditions of approval "to ensure that a proposal conforms to applicable PCC requirements").[1]

or

   b. a future public hearing at which PWB would have to demonstrate compliance with the applicable criteria. *Gould*, 216 Or App at 161; *see also Hodge Oregon Properties, LCC v. Lincoln County*, 194 Or App 50, 55-56 (2004) (county could defer a finding of compliance with applicable criteria only without finding those conditions feasible or providing notice and opportunity for hearing where the issue of feasibility can be addressed).[2]

---

[1] PCC 33.800.070 is authorized by ORS 227.175(4), which reads as follows:

> The application shall not be approved unless the proposed development of land would be in compliance with the comprehensive plan for the city and other applicable land use regulation or ordinance provisions. The approval may include such conditions as are authorized by ORS 227.215 or any city legislation.

[2] Cases other than *Gould* have also described the use of approval conditions. See, e.g., *Barge v. Clackamas County,* 39 Or LUBA 183, 188–189 (2000) (upholding a condition imposed to assist in enforcing continued compliance with land use standards).

PWB's attitude toward placement of conditions on approval of the application has evolved over the course of this process. However, PWB fails to recognize (much less heed) the foregoing parameters.

In its original application, PWB requested approval without conditions.[3] Recognizing that the application did not demonstrate compliance with all criteria, the staff report proposed conditions to ensure such compliance. At the Dec. 1 hearing, PWB voiced agreement in principle with these conditions. With its Dec. 23 submittal, PWB specifically acknowledges the need for approval conditions. However, it rejects the language proposed by staff, and proposes its own.

Notwithstanding PWB's evolution in recognizing the failings in its application, the position stated in PWB's Dec. 23 submittal fails as a matter of law. Specifically, PWB's proposed Condition B would allow it to circumvent PCC 33.846.060.G.1[4] and proposed Condition C fails to ensure compliance with PCC 33.846.060.G.2.[5]

PCC 33.846.060.G.1 and Condition B. PWB would have the Commission rewrite Condition B as follows:

> Following completion of the disconnection, Reservoirs #1, #5, and #6 must continue to hold water within the normal historic operating range for each reservoir until City Council directs otherwise, allowing for empty periods for maintenance, cleaning, to address system operational requirements, to maintain security, regulatory compliance, or for the safety of workers, the water system, or the public.

For the reasons described above, this proposed condition must ensure compliance with PCC 33.846.060.G.1. It fails to do so.

PCC 33.846.060.G.1 requires "preserv[ation]" of the historic character of the property. The water retained in the reservoirs may not be historic. However, with its proposed Condition B, the water bureau appears to recognize that the vistas created by that water are historic. We agree, and ask the Commission to ensure that that water remains.

---

[3] Based on the foregoing discussion of the law, PWB thus asserted that the application alone ensured compliance with all applicable criteria.

[4] "The historic character of the property will be retained and preserved. Removal of historic materials or alteration of features and spaces that contribute to the property's historic significance will be avoided."

[5] The historic resource will remain a physical record of its time, place, and use. Changes that create a false sense of historic development, such as adding conjectural features or architectural elements from other buildings will be avoided.

PWB's proposed clause "until City Council directs otherwise" is unlawful, however, because it would provide way to evade compliance with PCC 33.846.060.G.1 in the future. We respect the authority of the City Council, but nothing authorizes it to summarily waive compliance with a zoning code standard. It may no more do so for PWB than it may for a private-sector developer.

If this application is approved with conditions, BDS staff will have original jurisdiction to enforce them. To the extent such enforcement comes into dispute, BDS staff or the applicant can have this Commission reopen this application.[6]

If PWB wants the Council to relieve it of its obligation, it can either amend the designation of the reservoirs as historic resources or it may amend PCC 33.846.060.G.1.

PWB's failure to comprehend the obligations that PCC 33.846.060.G.1 places on it is highlighted at p. 5 of the Dec. 23 submittal. There, PWB responds to citizen comments that it "*does not take care of these resources and therefore must be compelled to do so.*"

> The current proposal – not the allegation of insufficient care – is the subject of the land use review. PWB is entering information in to the record showing that the 2009 Mount Tabor Historic Structures Report is the maintenance and restoration plan that has guided its work in caring for the historic resources that it owns. The City has unofficially adopted this report and has been following its recommendations. During the hearing, staff mistakenly indicated that the work on Gatehouse 1 was the only work that has been done. That statement was in error and Attachment A is the tabular summary from the 2009 report which has been revised with additional columns showing what work has been done.

Notwithstanding ample opportunity to do so, PWB does not refute the multiple allegations that it has inadequately cared for the historic resources on the site. Rather, it says, in essence, that such lack of care is irrelevant. This response is unsatisfactory.

PCC 33.846.060.G.1 requires "preserv[ation]" of the historic character of the property. As such, in order to approve the application, the Commission must conclude that the applicant will provide ongoing care for the historic resources. The record here gives no one any confidence that PWB will do that.

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[6] Alternatively, a third party may ask the City's Land Use Hearings Officer to consider the matter pursuant to the code enforcement process.

Is it reasonable to believe that PWB will change its ways, and start maintaining the historic resources? Based on the foregoing response, the answer is clearly "no." Put bluntly, PWB has built no credibility, either in its past performance or in its testimony before this Commission.

Lastly, we note that PWB's acknowledgement that it has not cared for the historic resources on the site belies its mission to work in the public trust. In other words, the Commission has every right to expect better from a public sector applicant than it would get from a private sector applicant (which is responsible to shareholders). Yet, it gets none.

Given the foregoing points of law and credible evidence that the applicant has not cared for the reservoirs, we request that Condition B read as follows:

> Following completion of the disconnection, Reservoirs #1, #5, and #6 must continue to hold water within the normal historic operating range for each reservoir. The reservoirs must be maintained (as capable of holding such water) and cleaned, and may be emptied (partially or fully) for periods necessary to do so or to address system operational requirements, to maintain security, regulatory compliance, or for the safety of workers, the water system, or the public.

PCC 33.846.060.G.2 and Condition C. PWB proposes that Condition C be replaced with the following:

> The City of Portland shall develop an appropriately scaled interpretation program that tells the history of the Mt. Tabor Reservoirs and the Bull Run water delivery system, including the proposed disconnection, within 5 years of the project's completion.

This proposal also fails.

As noted, an approval condition must ensure compliance with applicable criteria. The criterion applicable here reads as follows:

> The historic resource will remain a physical record of its time, place, and use. Changes that create a false sense of historic development, such as adding conjectural features or architectural elements from other buildings will be avoided.

The Bureau's proffered condition fails to ensure such compliance.

The reservoirs can remain a record of their time only if they are capable of being reconnected as a backup water system. PWB seems to acknowledge this,

asserting that the cut and plug process it proposes is "reversible." However, the bureau has not by any reasonable measure described a cost or timeline or policy process for reversal.

PWB proceeds (on p. 5 of the Dec. 23 submittal) to note citizens' comments that "[o]utside agencies should be enrolled to supervise PWB actions." The bureau responds as follows:

> The proposed project is regulated by the City's Zoning and Building codes and will meet the requirements of those codes, subject to enforcement by City officials. Other agencies do not have jurisdiction.

The intent of PWB's assertion here is unclear. However, as noted above, entities other than PWB (including this Commission) will have authority to enforce the decision that comes out of this process.

Failure to Address Applicable Conditional Use Criteria. I noted at the hearing that PWB fails to demonstrate compliance with PCC 33.815.040.B, which governs alteration of existing conditional uses. Under that criterion, development that supports a conditional use may be materially altered only pursuant to a conditional use review.

On this issue, PWB fails to:

1. acknowledge that the site has not one, but two, conditional uses;

2. correctly cite the thresholds for review of the one conditional use that it acknowledges; and

3. correctly apply the thresholds that it does cite.

These failures add up to an application that is not sustainable under legal review. Indeed, correct application of the conditional use criteria requires PWB to demonstrate that its project will not alter park/open space uses on the site.

PWB acknowledges that these criteria apply. The application (p. 82) addresses them as follows:

> Within the OS zone, uses in the "Basic Utilities" category that are accessory to a park use are allowed (Section 33.100.110). Other "basic utilities" uses are allowed to be a primary use only as a conditional use (Section 33. 100.100 and Table 100-1). The PWB facilities at Mount Tabor are part of the City's water supply system and are not accessory to the park uses. In fact, the earliest water facilities on site predate the creation of Mount Tabor Park and the park was built around the reservoirs.

> Because the reservoirs and other water system facilities were constructed prior to the adoption of the zoning code, they have status as an automatic existing conditional use (Section 33.815.030). Subsequent changes or alterations to the facilities have the potential to trigger a conditional use review.
>
> The Conditional Uses Chapter, Section 33.815.040.B, outlines the circumstances under which alterations to an existing conditional use trigger a new conditional use review. The proposed improvements do not trigger a new review because:
>
> 1. They will not increase existing floor area by more than 1,500 square feet,
>
> 2. They will not increase exterior improvement area by more than 1,500 square feet,
>
> 3. They do not increase the site area, and
>
> 4. They will not affect permanent parking. Conditional uses apply generally to permanent changes. Temporary changes are treated differently in LURs.
>
> Therefore, a Conditional Use Review is not required.

PWB fails to demonstrate that the proposal meets all of these grounds for exemption. Instead, it just baldly asserts that "[t]he PWB facilities at Mount Tabor are part of the City's water supply system and are not accessory to the park uses." Application at p. 82. To the contrary, the project appears to increase exterior improvement area by more than 1,500 square feet.

PWB neither describes the exterior improvement area of the project, nor provides calculation of the extent of that area. PCC 33.910.030 defines exterior improvements as:

> All improvements except buildings or other roofed structures. Exterior improvements include surface parking and loading areas, paved and graveled areas, and areas devoted to exterior display, storage, or activities. It includes improved open areas such as plazas and walkways, but does not include vegetative landscaping, synthetic turf, natural geologic forms, or unimproved land.

The zoning code does not define the word "improvements," so we look to the dictionary. See PCC 33.910.010 ("[w]ords used in the zoning code have their normal dictionary meaning unless they are listed in 33.910.030 below"). Of the

six definitions of improvement set forth in Dictionary.com,[7] two are applicable here: 1) "a bringing into a more valuable or desirable condition, as of land or real property; betterment" and "something done or added to real property that increases its value."

We believe it manifest that (a) all of the work described in the application would bring the land into a more desirable condition, and (b) the combined area of that work is greater than 1500 square feet. Thus, the project is not exempt from condition use review.

Furthermore, as I mentioned at hearing, PWB's foregoing recitation of PCC 33.815.040.B is materially incomplete. In fact, an alteration is exempt from condition use review only if it does all of the following:

a. Complies with all conditions of approval;
b. Either:
    i. Complies with the development standards of this Title, or
    ii. Violates the development standards of this Title, but an adjustment or modification to the development standards has been approved through a land use review;
c. not increase the floor area by more than 1,500 square feet;
d. not increase the exterior improvement area by more than 1,500 square feet;
e. not result in a net gain or loss of site area; and
f. not result in an individual or cumulative loss or gain in the number of parking spaces.

PWB's recitation omits subsections a. and b. above.

PWB's failure to demonstrate compliance with PCC 33.815.040.B.b, alone, warrants denial of the application. Staff offers PWB an escape hatch, allowing it to defer demonstrating compliance with applicable development standards to a future process. Jan. 2 staff report at p. 23. ("The plan submitted for a building or zoning permit must demonstrate that all development standards of Title 33 can be met, or have received an Adjustment or Modification via a land use review prior to the approval of a building or zoning permit.")

As noted above, the case law authorizes such deferral only with a significant caveat. Namely, the Commission may defer a finding of compliance with PCC 33.815.040.B.b only on the condition that interested parties be given notice and the opportunity to be heard when that finding is to be made.

[7] Accessed on Jan. 5, 2015.

PWB's failure on this issue is not limited to this technical point. Compounding its failure to address the conditional use criteria of the code, and of more importance to the community, PWB ignores the park facilities on the site.

The site (Mt. Tabor Park) has (at least) two primary uses. As the application asserts, the water supply system is categorized as a "basic utility," which is allowed as a conditional use in the OS zone. Featuring parking areas and recreational fields, the park use on the site is clearly subject to conditional use review too.

"When the primary uses of a development fall within different use categories, each primary use is classified in the applicable category *and is subject to the regulations for that category*." PCC 33.920.030.B (emphasis added). Thus, by undertaking development on a site that includes park conditional uses, the application must address regulation of that use (as well as the water supply use).

PWB fails completely on this score. The application asserts that "[t]he PWB facilities at Mount Tabor . . . are not accessory to the park uses." The applicant supports this conclusion by asserting that "the earliest water facilities on site predate the creation of Mount Tabor Park and the park was built around the reservoirs." Assuming, for purposes of argument, that it is true, this assertion is not dispositive. *I.e.*, that one use of a site predates another use of the site does not render the latter use accessory.

PWB effectively takes the position that the project does not alter any park/open area use (much less a conditional use aspect of such a use). Given the impacts that the project (as originally proposed) would have on vistas, this position cannot stand.

Contrast PWB's failure to address the Mt. Tabor conditional use issues with its treatment of Powell Butte. There, it undertook a conditional use master plan to resolve use of the park well into the future. As to Mt. Tabor, PWB is content to just kick the can down the road; a cynic would even believe it content to demolish park assets and historic resources by neglect.

In conclusion, we reiterate that nothing compels the Commission to approve this application, to fashion conditions that can ensure compliance with the historic resource review and conditional use criteria. In fact, given the paucity of the record that PWB has created, we believe that some issues in the application must necessarily come back before the Commission for public hearing. Rather than continue a process so destined for continued public dispute, we recommend that the Commission ask the bureau to work with selected stakeholders to produce a consensus plan.

We appreciate your consideration and look forward to addressing your questions and comments.

Very truly yours,

Ty K. Wyman

TKW:car
cc: Eileen Brady and Brian Rohter
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