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June 17, 2024

P18379-001

SENT VIA EMAIL

Mr. Joe Turner, Land Use Hearings Officer
c/o Dept. Land Use & Transp, Washington Co.
Public Services Building
155 N. First Ave, Suite 350, MS. #350-13
Hillsboro, OR 97124

Re: Brown Contracting Contractor Establishment Application
County Casefile L2400001-D(IND)
Fourth Open Record Period (Final Argument) Submission

Dear Mr. Turner,

This letter constitutes the applicant's fourth open record period submittal, and is intended to provide final argument only.

I. General Observations.

As an initial matter, we encourage the Hearings Officer to review the photographs and video we provided as part of our May 30, 2024 submittal. While a site visit would be more ideal, we do think the images and video provide a good perspective of the overall site.

This case showcases the types of common disagreements that occur when neighborhoods transition from rural residential to urban industrial. To wit, the opponents view this area as a rural residential area, and do not appreciate the non-residential development that is associated with the FD-20 designation. On the other hand, the applicant notes that the FD-20 is a holding zone. *See generally King v. Washington County*, 60 Or LUBA 253 (2009). In this case, the land is slated to become urban industrial / high-tech employment.

In his June 10, 2024 submittal, Mr. McClendon argues that "Brown should be in an industrial use District" and that "there are plenty of these areas in and around Washington County." *Id.* at p. 4. This is simply not true. Contractor establishments are allowed in the Rural Industrial District, but the supply of vacant R-IND land is extremely low. Contractor establishments are not allowed on Urban Industrial lands (both in Washington County and within the City of Wilsonville), and the cost of such land would be prohibitive in any event.

Contractor establishments are important to Oregon's economy, but they do not have many zones which they can call home. In Washington County, the FD-20 zone is their primary home; contractor establishments are extremely common in this zone. *See* Exhibits 12-16 to letter from Andrew H. Stamp dated May 16, 2024. Regardless of the outcome of this case, the neighbors will continue to be affected by urban growth as this community shifts from what used to be rural residential land to its future as urban industrial-zoned land. Given the fact that the surrounding vicinity is in transition, a balancing of interests is appropriate.

This case also showcases the struggles that landowners face when trying to understand the complex web of government regulation affecting land use. The neighbors perceive Brown Contracting as violating all measure of laws, from tree cutting laws to noise ordinances to air and water quality laws. But the reality is that Brown Contracting is largely in compliance with the applicable laws, with the exception of the fact that it has outgrown its initial special use permit.

Nonetheless, laws such as the county tree cutting ordinances are difficult to understand and apply. In many cases, the county does not even make all of the laws and maps that apply available, so there is really no way to research the applicable law without contacting county staff. The principle of due process does not allow that situation, yet it remains the only *de facto* way to determine what laws apply throughout Washington County.

The complexity of these laws also leads to misunderstandings. As an example, the neighbors and the City of Wilsonville mistakenly believed that Brown Contracting unlawfully harvested three acres of open space / wildlife habitat, but the truth is that only a trivial amount of potential "riparian habitat" was affected. The rest of the tree cutting Brown Contracting undertook was permissible. Nonetheless, the case generated a lot of needless hysteria because people could not figure out what was allowed versus what was prohibited.

This case also highlights the policy problems associated with regulating noise. Noise ordinances are complex and difficult to enforce: they are either too subjective to provide fair notice and a common understanding of what is prohibited, or they are too technical and scientific to be applied without paying professional engineers. In this case, we see the neighbors taking the position that virtually any noise that they can hear is a noise violation. They attempt to conduct DIY acoustics engineering sampling, the results of which are poor because they don't understand how the laws operate. However, testing completed by an *actual* acoustics engineer makes clear that Brown Contracting operates within legal limits – but of course at great cost to the applicant. Nonetheless, the complexity of the applicable laws causes misunderstandings, which lead to animosity and distrust amongst neighbors.

As one example, Mr. McClendon filed a noise complaint in June of 2022. On June 24, 2022, at 9:31am, Washington County Code Enforcement Officer Joseph Ramirez sent an email to Don Brown entitled "Noise Complaint." The email states:

> Hello Mr. Brown,
>
> Thank you for speaking to me today regarding the noise complaint on the property. There is no violation of noise ordinance occurring.

> *Vehicles loading or unloading, being moved, or being washed is not a violation of ordinance and is considered normal noise for the vehicles.* I have closed out the complaint on the property. Feel free to contact me with any questions.

See Exhibit 27 to letter from Andrew H. Stamp dated June 10, 2024. The email quoted above is consistent with a number of verbal conversations that Brown Contracting had with various WACO Code Enforcement staff. This email encapsulated Brown Contracting's understanding of their rights under the WCNO. However, in December of 2022, a Sheriff's deputy issued a ticket for violation of the WCNO to an employee of Brown Contracting. That case went to trial in the summer of 2023, where it was revealed that the Sheriff's deputy lacked even the most basic level of training needed to implement the code section controlling noise. *See* Exhibit 7 to the letter from Andrew H. Stamp dated June 3, 2024 (trial transcript of Sheriff Deputy Kibble). More importantly however, his interpretation of the WCNO was considerably at odds with the Code Enforcement Officer's understanding of the law. If even the people tasked with enforcement cannot get on the same page, of course the regulated public cannot be expected to understand the law.

This case also highlights how the transition from rural to urban uses can create a state of regulatory purgatory. For example, in this case the access road is owned by a city, but the land that fronts the road is under the county's zoning jurisdiction. This becomes problematic since most – if not all - of the development regulations are contained in the county zoning code, and the city zoning code simply does not apply. The city simply has no regulatory authority outside of its city limits. The city is frustrated that it cannot act as the review authority in this case. However, the problem is largely one of the city's own making; the use of cherry stem annexation, such as that used to annex Day Road, is not without its own set of disadvantages.

Finally, this case presents a situation where the city is aggressively seeking exactions from landowners and yet does not appear to have any training or understanding of the "unconstitutional conditions" doctrine. As a society, we expect police officers to understand the constitution, and it is equally important for land use planners to understand it. The city said they have "experts," and yet none have appeared. The city's position in this case amounts to nothing more than theft and extortion. This is unacceptable; we expect our local governments to act within the bounds of their authority, and not like criminal mob bosses.

In any event, with those policy considerations in mind, we turn to the approval standards.

II. Exceptions to Public Facility Standards.

As discussed in detail in our letter dated May 30, 2024, at pp. 11-25, the applicant seeks exceptions for four of the five "critical services," including municipal water, sewer, drainage / stormwater management, and access onto a local or neighborhood route. CDC 501-8.1. CDC 501-8.1(B)(2). The applicant also seeks exceptions to certain facilities and services that are considered "essential," such transit agency service, adequate level of arterial roads, and half-street improvements. These issues are detailed in our letter dated May 30, 2024, at pp. 25-34,

and we do not repeat them here other than to point out the flaws in the rebuttal points made by opponents.

We included five examples of cases where the county has approved exceptions for contractor establishments on FD-20 lands. *See* Exhibits 12-16 to letter from Andrew Stamp dated May 16, 2024. Some of these issues are discussed in more detail below.

A. Fire Protection Services.

The applicant discusses fire protection in its letter dated May 30, 2024, at p. 16. As noted, TVF&R has signed a SPL stating that they can serve the subject property. This is all that CDC 501-8.1(A) requires.

In his June 10, 2024 submittal, Mr. McClendon states that merely relying on TVF&R to put out fires is an "unacceptable risk for our neighborhood." One gets the feeling from his comments that Mr. McClendon is not well-suited for the rural residential lifestyle, and is better accustomed to much safer and quieter suburban life in Villebois or Charbonneau.

In any event, he complains, without evidentiary support, that the three 550-gallon fuel tanks will somehow cause a catastrophic fire that is beyond the capability of TVF&R to extinguish. He once again lies and says that the fuel tanks are "next to our mutual fence." In fact, they are centrally located on TL 309 – more than 350 feet away from his property line[1] and with two entire structures between the tanks and his house. This concern is utterly exaggerated and ridiculous, and certainly well beyond the scope of any approval criterion. TVF&R says that they can serve the area, and Mr. McClendon's opinion on that topic is irrelevant since he has no expertise in this area.

Mr. McClendon provides a video of something that he claims to be a "wildfire" that may have broken out near Brown's furthest west lot in September of 2020. There are no wayfinding landmarks in the video that provide a frame of reference of its location, or show that the fire was on Brown's property, and the video does not appear to be have any relevance to this case. The fact that he would submit this video does tend to support our conclusion that he is not a reasonable person with normal sensitivities.

The City of Wilsonville seeks to use a nearby fire hydrant within its city limits as leverage to force annexation. The city admits that there is a fire hydrant located in Day Road

[1]An enlarged version of the photo set forth above can be found at Exhibit 37 to our June 10, 2024 submittal.

that could physically service properties on the north side of Day Road. However, they state that annexation is required before the applicant can use the fire hydrant. In fact, in its May 30 and June 10 letters, the city renewed its objection to allowing an open-air pole building in the absence of city annexation. That argument makes no sense, as it is based on the incorrect premise that a city fire hydrant is the sole functional method of fire suppression and is required in order to build in the county. The city assumes that a fire hydrant is required prior to building a pole building, but provides no legal argument to support that theory. We discuss this issue in the letter from Andrew H. Stamp dated May 30, 2024, at pp. 13-17. As we noted, TVF&R submitted a service provider letter that states that "adequate fire protection is available to serve the proposed project, subject to review for conformance with the Oregon Fire Code during grading/building permit reviews." In other words, they will continue to serve the subject property. That is all that the law requires. *See, e.g.* Exhibit 16 to letter from Andrew Stamp dated May 16, 2024, at p. 20 (providing an example where the county accepted a SPL from TVF&R as meeting the standard). The fact that the city will not allow the extension of water service lines outside its boundary is not relevant.

Moreover, annexation is not an option for Brown Contracting because the city candidly admits that a "contractor establishment" use would not be allowed in the city. *See* May 15, 2024 letter from Miranda Bateschell, at p. 7. Therefore, annexation would preclude the continued use of the property as a contractor establishment. The city provides no reason for a denial of this Washington County application on the basis of fire protection services.

B. Water & Sewer.

We briefly discuss the justification for an exception to the public water and sewer requirement in our letter dated May 30, 2024, at p. 13-15. The applicant submitted evidence that its septic system was approved in 2016 for 300 gallons a day. Although at the time it was envisioned that only 6-8 employees would be using the restrooms, the amount of effluent going into the septic system remains consistent with the 300-gallon limit. As a practical matter, the only effluent going to the septic system is the water from toilets, a hand washing sink, and perhaps a small amount from washing coffee cups. The applicant's owners and employees do not cook full meals or use the showers in the office building (a former residence), and therefore the septic system is not used in the same level of intensity as a normal residence.

Mr. McClendon states that "[t]hirty people flushing toilets daily alone would greatly exceed a normal residence." Eric McClendon submittal dated June 10, 2024, at p. 6. It would be a rare day that 30 employees are on site at the same time. Nonetheless, at 1.6 gallons per flush, which is far beyond how much water modern toilets typically use, 30 persons using the toilet once a day amounts to 48 gallons. While the applicant does not keep data on how many people use the toilet on a daily basis or how often they use the facilities, 30 employees using the facilities 3 times a day would still only add up to 144 gallons, less than half of the approved limit of 300 gallons per day. Additionally, unlike for a normal residence which is used every day, the septic system on TL 309 gets to rest on weekends and holidays, so it is only being used on a maximum of roughly 245 days out of the year.

Nonetheless, the applicant does not want to cause any septic failures and is willing to accept a condition of approval requiring the septic system to be inspected on an annual basis to ensure that it continues to function as designed. If the inspections revealed that the system was at risk of failure, the applicant could reduce water flows by installing high efficiency urinals and low flow sinks, etc.

Mr. McClendon asserts that the "new permit will also include three additional residences on wells drawing water from the same water source that the neighbors rely on." *See* Eric McClendon submittal dated June 10, 2024, at p. 6. There is no evidentiary support for the assertion that the wells share "the same water source." Moreover, the residential wells are not part of this application and have no bearing on meeting the approval standard set forth at CDC 501-6.1(A).

C. Stormwater Drainage.

The applicant discussed stormwater extensively in our letter dated May 30, 2024, at p. 17-21. We also included a "Preliminary Drainage Analysis & Stormwater Report," at Exhibit 18 to that same letter. The City of Wilsonville responds to Exhibit 18 in its June 10, 2024 letter by starting:

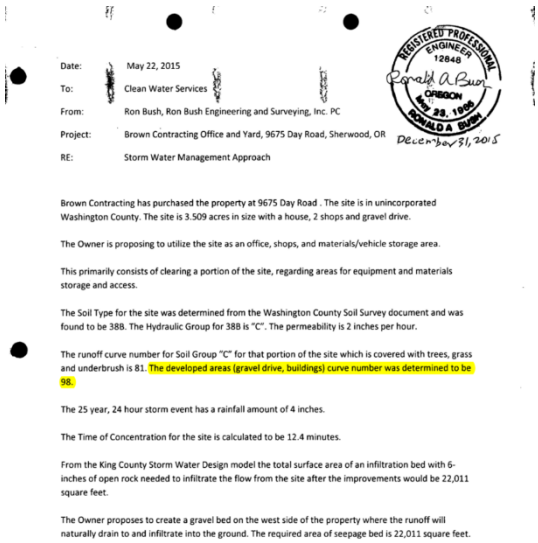
> "the AKS Report fails to account for the flows that existed before the applicant impermissibly paved its prior graveled area. The unapproved paved area allowed for any rainfall that would have previously been absorbed into the ground to run into the City public stormwater system."

The city's comment is not responsive to the information set forth in the applicant's letter dated May 30, 2024 and prior submittals. The records from Washington County show that the stormwater management system for the development on TL 309 was actually oversized, based on the following facts:

1. The "as-built" grading plan varies to some extent from the preliminary design approved by the Hearings Officer in 2015. The "as-built" grading plan indicates the final impervious areas consisting of concrete, gravel, buildings, etc., to be 1.88 acres. Exhibit 42 attached (this is an annotated version of the materials set forth in the May 15, 2024 materials submitted by Marie Holladay, AKS.) AKS reviewed those areas and concurs that they are accurate to the as-built grading plans. It is noted that the impervious areas listed also include the existing structures, asphalt/gravel driveway and parking areas. The county's standards would have allowed the stormwater runoff from those existing impervious areas to be released at their current developed state without detention. Nonetheless, the applicant's design captured that runoff and sent it to their new gravel seepage/detention beds, thereby over-infiltrating/detaining.

2. The impervious area entered into the stormwater modeling program was actually 2.1 acres, not 1.88 acres.

3. A curve number (CN) of 98 was used in the stormwater model to calculate runoff from all non-pervious surfaces. *See* materials from Ronald Bush, P.E. submitted by Marie Holladay, AKS, on May 15, 2024. The higher the number, the higher the runoff. Although most agencies identify gravel surfaces as impervious and assign a CN of 98, you can see from the SCS Curve Number table from the report that the gravel actually has a CN of 89. Again, this represents an "over design" of the stormwater system. This is the key piece of information that says that regardless of whether gravel or concrete actually exists on the ground, it was designed with the assumption that it was all going to be concrete.



Date: May 22, 2015

To: Clean Water Services

From: Ron Bush, Ron Bush Engineering and Surveying, Inc. PC

Project: Brown Contracting Office and Yard, 9675 Day Road, Sherwood, OR

RE: Storm Water Management Approach

REGISTERED PROFESSIONAL ENGINEER 12648 OREGON JULY 23, 1998 RONALD A BUSH

December 31, 2015

Brown Contracting has purchased the property at 9675 Day Road . The site is in unincorporated Washington County. The site is 3.509 acres in size with a house, 2 shops and gravel drive.

The Owner is proposing to utilize the site as an office, shops, and materials/vehicle storage area.

This primarily consists of clearing a portion of the site, regarding areas for equipment and materials storage and access.

The Soil Type for the site was determined from the Washington County Soil Survey document and was found to be 38B. The Hydraulic Group for 38B is "C". The permeability is 2 inches per hour.

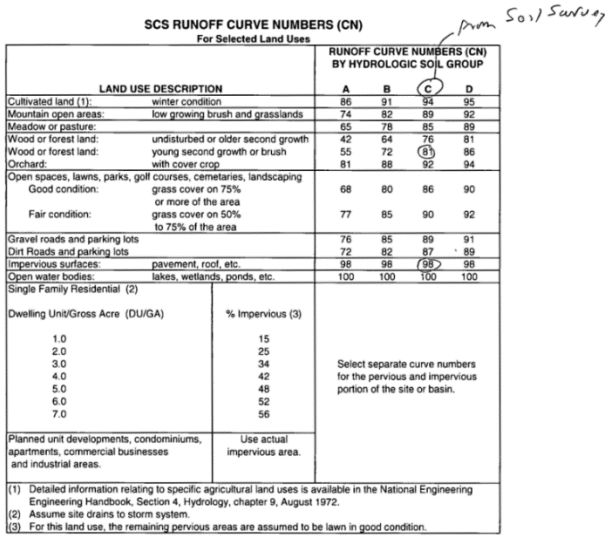
The runoff curve number for Soil Group "C" for that portion of the site which is covered with trees, grass and underbrush is 81. The developed areas (gravel drive, buildings) curve number was determined to be 98.

The 25 year, 24 hour storm event has a rainfall amount of 4 inches.

The Time of Concentration for the site is calculated to be 12.4 minutes.

From the King County Storm Water Design model the total surface area of an infiltration bed with 6-inches of open rock needed to infiltrate the flow from the site after the improvements would be 22,011 square feet.

The Owner proposes to create a gravel bed on the west side of the property where the runoff will naturally drain to and infiltrate into the ground. The required area of seepage bed is 22,011 square feet.



SCS RUNOFF CURVE NUMBERS (CN)
For Selected Land Uses

from Soil Survey

LAND USE DESCRIPTION		RUNOFF CURVE NUMBERS (CN) BY HYDROLOGIC SOIL GROUP A	B	C	D
Cultivated land (1):	winter condition	86	91	94	95
Mountain open areas:	low growing brush and grasslands	74	82	89	92
Meadow or pasture:		65	78	85	89
Wood or forest land:	undisturbed or older second growth	42	64	76	81
Wood or forest land:	young second growth or brush	55	72	81	86
Orchard:	with cover crop	81	88	92	94
Open spaces, lawns, parks, golf courses, cemetaries, landscaping					
Good condition:	grass cover on 75% or more of the area	68	80	86	90
Fair condition:	grass cover on 50% to 75% of the area	77	85	90	92
Gravel roads and parking lots		76	85	89	91
Dirt Roads and parking lots		72	82	87	89
Impervious surfaces:	pavement, roof, etc.	98	98	98	98
Open water bodies:	lakes, wetlands, ponds, etc.	100	100	100	100

Single Family Residential (2) Dwelling Unit/Gross Acre (DU/GA)	% Impervious (3)	
1.0	15	Select separate curve numbers for the pervious and impervious portion of the site or basin.
2.0	25	
3.0	34	
4.0	42	
5.0	48	
6.0	52	
7.0	56	
Planned unit developments, condominiums, apartments, commercial businesses and industrial areas.	Use actual impervious area.	

(1) Detailed information relating to specific agricultural land uses is available in the National Engineering Engineering Handbook, Section 4, Hydrology, chapter 9, August 1972.
(2) Assume site drains to storm system.
(3) For this land use, the remaining pervious areas are assumed to be lawn in good condition.

Furthermore, the construction plans and stormwater design were prepared by a licensed civil engineer, reviewed and approved by a licensed civil engineer at Washington County, and the actual construction was reviewed and accepted by a licensed civil engineer at both Washington County and the City of Wilsonville. Further, the City of Wilsonville confirmed that the applicant met whatever provisions the city was requiring based on the conditions of original land use approval. *See* Exhibit 4 to the letter from Andrew H. Stamp dated May 15, 2024[2].

The City of Wilsonville also has concerns related to stormwater, but their issues are more related to money – the city seems to think it can demand analysis and exactions from the applicant related to stormwater management. The city does not provide any *Nollan / Dolan* findings related to stormwater, so the Hearings Officer does not have a record on which he can base any stormwater-related exaction.

The city states that "[t]he storm system does not care if stormwater runoff is interim or even temporary; it has real and immediate potential impact to immediate downstream

[2] The city should have never had any role in approving the stormwater system, but apparently the applicant did not object to certain conditions during the original approval process. This time, we are objecting to any such conditions.

infrastructure that needs to be evaluated and, as necessary, mitigated." *See* Letter from Daniel Pauly, AICP, dated June 10, 2024, at p. 4. While we have no quarrels with that statement, we do not understand why the city assumes that upstream landowners are responsible for fixing capacity bottlenecks on land owned by downgradient landowners.

The applicant's stormwater drains into the Basalt Creek wetland prior to Basalt Creek reaching the city limits. *See* Preliminary Utility Plan Map, Exhibit 18 to the May 30, 2024 letter from Andrew H. Stamp. Based on the photography provided at Exhibit 24, it is apparent that water infiltrates into the ground and there are visible channels with defined beds and banks bringing water to the wetland. This is understandable, given that the Saum silt loam soils and the Quatama loam soils are well drained. *See* Id. at Exhibit 18 and 19. If drainage systems in the City of Wilsonville are inadequate to convey the flows in Basalt Creek, then the city is legally responsible to improve its conveyance system at its own cost. A down-gradient landowner must ensure that its conveyance system is sufficient to accommodate the floodwaters of an upgradient owner. Oregon law does not allow a down-gradient landowner to block or otherwise obstruct the natural flow of surface water, watercourses, or flood water, if doing so floods up-gradient property. *Esson v. Wattier*, 25 Or 7, 12, 34 P 756 (1893); *Mendenhall v. Harrisburg Water Co*., 27 Or. 38, 39 P. 399 (1895); *Hansen v. Crouch*, 98 Or 141, 193 P 454 (1920); *Wright v. Phillips*, 127 Or 420, 272 P 554 (1928); Butler v. Mass, 163 Or 201, 94 P2d 1116 (1939); *City of Kaiser v. Lake Labish Water Control Dist.*, 185 Or App 425 557 (2002).

In *Wellman v. Kelley*, 197 Or 553, 252 P2d 816 (1953), an upstream owner sued a downstream landowner who obstructed the Powder River in Baker County. The river had an established and well-defined ordinary flood water course in this area. The upstream owner was successful in prohibiting an adjacent downstream owner from obstructing that ordinary flood water course to the detriment of the upstream owner. The Oregon Supreme Court stated:

> In 56 Am Jur, Waters, 510 § 18, we find this cogent statement concerning the right of a lower proprietor to obstruct the natural flow of waters:
>
> > "* * * the obstruction of *the natural flow of a stream* is always done at the risk of being answerable in damages to him who sustains a loss thereby. Without the consent of the other proprietors who may be affected by his operations, an upper proprietor has no right unreasonably to interrupt or retard *the natural flow of water,* to the injury of lower owners, nor has a lower proprietor the right to throw the water back upon the proprietors above * * *." (Italics in original).

Id. at 566. The court went on to say that the same rule applies to surface waters, citing *Harbison v. Hillsboro*, 103 Or 257, 271, 204 P 613 (1922). *See also Wimmer v. Compton*, 277 Or 313, 560 P2d 626 (1977). *Accord*, 78 Am.Jur.2d 455-56, Waters §11.

In *Allen v. McCormick*, 193 Or 604, 238 P2d 220 (1951), the plaintiff's land was upgradient from the defendant's land. The defendant built a dam on Bear Creek,[3] located in Lane County. This caused the water levels of Bear Creek to rise and flood the plaintiff's upstream land. However, there were other factors in play with also contributed to the flooding, including (1) the presence of beavers which had created dams on plaintiff's property, and (2) flood waters caused an accumulation of brush and debris on plaintiff's property, which created an obstruction that held back waters. The trial court granted plaintiff's request for an injunction, but found that an award of damages was not appropriate because it was not possible to definitively state that damages were caused by defendant's actions. The Oregon Supreme Court affirmed.

In *Kahl v Texaco, Inc.*, 281 Or 337, 574 P2d 650 (1978), Texaco raised the level of its land in order to build a service station. However, due to the raising of the land and the faulty construction of a culvert, the new development caused surface water to back up and flood the property of an adjoining beauty college. Prior to the filling and raising of Texaco's property, surface water from the beauty college's land naturally drained across the corporation's land. In constructing the service station, the contractor raised the level of the corporation's land some five feet and built a cement retaining wall along the boundary of the beauty college's property. The contractor built a culvert in the wall without a catch basin. The faulty construction of this culvert allegedly caused substantial flooding of the beauty college's property after heavy rains. The primary issue before the court was whether the corporation was liable for the acts of its contractor. In this regard, the court held that the corporation could not relieve itself of responsibility where it knew that the work performed by the contractor would, in the natural course of things, result in the flooding of the beauty college's land unless certain precautions were taken, such as building a properly functional drainage culvert in its retaining wall.

Finally, in *Lanning v. State Hwy Comm'n*, 15 Or App 310, 515 P2d 1355 (1973),[4] a landowner successfully sued the Oregon Highway Commission for negligence after a flood event. The flood resulted in a considerable amount of slashings, tree trucks, and debris being carried down Thomas Creek. That debris collected up against the supports of the Schindler Bridge, creating what amounted to a dam. The water backed up and eventually flooded the home of the Lanning family, who lived approximately 100 yards upstream of the dam. The case was decided in favor of the landowners on a negligence theory, although in dicta the Court of Appeals noted that the plaintiffs could have also recovered based on a theory of inverse condemnation. Although the court did not expressly discuss drainage law concepts in its opinion, the entire theory of recovery was premised on the concept that a lower landowner cannot obstruct a watercourse and create a dam which results in injury to an upstream landowner.

The Oregon Highway Commission argued that the design of the bridge was defective, and because it had immunity from such defects, it followed that they owed no duty to plaintiffs to remove debris that accumulated under the bridge because of its design. Hearing none of that argument, the Court of Appeals stated:

[3] Lat 44°12'7.50"N, Long 123°18'4.32"W.
[4] Lat 44º 42' 42.98" N, Long 122º 46' 12.86" W

> We disagree with defendants' analysis. The fact that the design of the bridge was one of several causal factors leading to the damage to plaintiffs' property does not provide defendants with immunity for the negligent acts of their employees. The evidence in this case adequately supports the jury's finding that the agents were negligent in failing to recognize the seriousness of the danger posed by the accumulated debris and in waiting too long before taking action to alleviate such conditions. Given the facts of this case the question of whether these negligent acts were the proximate cause of the damage suffered by the plaintiffs was for the jury. *Allen v. Shiroma/Leathers*, 97 Or. Adv. Sh. 1665, 514 P.2d 545 (1973).

Id. at 319.

As previously mentioned, and regardless of the fact that site improvements are designed to restrict surface water runoff from leaving the site in a manner that meets or exceeds Washington County standards, Brown Contracting is allowed to accelerate water flows. As we previously noted in our letter dated May 30, 2024 at p. 19, Oregon law recognizes the acceleration principle as part of the drainage property right. *Garbarino v. Van Cleave*, 214 Or 54, 330 P2d 28 (1958).

Garbarino warrants careful attention. In 1953, Ann Garbarino owned a farm that included land that had previously been the bottom of Lake Labish. This lake was drained in the early 20th century pursuant to the Federal Swamp Land Act of 1860. The lowland lake soils from Lake Labish were extremely rich dark to black loam. In fact, they were said to be amongst the richest soils in the Willamette Valley and were prized for growing onions and berries. In the briefs to the Oregon Supreme Court, the lands that comprised the former lake bottom were referred to as "beaver-dam lands." By the 1950s, these beaver-dam lands were worth $1000 to $3000 an acre, making them the most valuable tillable land in Oregon by a considerable margin.

The Van Cleave property sits up-gradient of Ms. Garbarino's property.[5] In the fall of 1953, the Van Cleave family tiled their land in an effort to improve drainage. The Van Cleave family installed the tiles three to five feet deep, pursuant to the direction of a soil conservation commission engineer. However, by the first rainy season after the tiles were installed, Ms. Garbarino's land began to flood.

The tiles carried water in a northerly direction to two different locations. One of these locations was a drainage swale which had previously been an inlet of the former lake. This northerly swale drained surface water and shallow groundwater across Ms. Garbarino's valuable "beaver-dam lands." Further to the south, the tiles drained surface waters and shallow groundwater to a ditch located on the east side of a county road (55th Ave NE), where the water was carried north until it eventually emptied out onto Ms. Garbarino's "beaver-dam lands."

Ms. Garbarino argued that under *Levene v. City of Salem*, the Van Cleave family was liable to her because it failed to "act reasonably not to damage the lower owner." However, *Levene* addressed, in part, the *diversion* of water from a natural channel, a key fact not present in Ms. Garbarino's case. In finding against Ms. Garbarino, the Oregon Supreme Court noting that the modified civil law rule allows the up-gradient landowner to use natural drainage swales to rid its property of surface water. The court noted that the upgradient farmer needed to tile the property to use the land for its highest and best use.

Ms. Garbarino also argued that ORS 549.110 provided a remedy for the Van Cleaves insomuch as it created a process for them to build a drainage ditch across Ms. Garbarino's land. Of course, that argument was self-serving since the "remedy" would have required the Van Cleave family to pay Ms. Garbarino damages for the loss of land, as well as for a drainage right of way. The court found this to be inconsistent with the concept of a natural servitude. After all, why would someone be required to pay for something they already have by operation of law?

There are limits to the acceleration principle, particularly as related to urban areas.

[5] Lat: 45° 0'58.34"N, Long: 122°56'35.34"W. Note: the "Van Cleave" property is currently owned by Pan American Berry Growers, 6826 55th Ave NE, Salem, OR 97305.

Levene v. City of Salem, 191 Or 182, 191, 229 P2d 255 (1951) provides a good example of the "reasonableness" exception. Strictly speaking, *Levene* involves the diversion of water. However, there is definitely some "unreasonableness analysis" aspect inherent in the court's opinion, and I suspect that the result in that case would have been the same even if no diversion had been involved.

Levene presents a particularly sad set of facts. In *Levene*, the plaintiff owned a building[6] that was close to a natural watercourse. The watercourse traveled under State Hwy 99 via two 24-inch culverts. The plaintiff used the building as a veterinary hospital.

In the fall of 1947, the City of Salem Public Works Department undertook three separate storm water improvement projects, the net effect of which was to greatly accelerate the amount of water that was ending up in the watercourse next to the plaintiff's building. Even worse, one of the projects resulted in an out-of-basin diversion by rerouting to the north water that would have otherwise drained to the south. Over the next winter, the plaintiff's basement flooded four times. Tragically, on the second of these occasions, four dogs that were tethered in the basement drowned. The Oregon Supreme Court found the city's actions to constitute "active wrongdoing," which constituted both a trespass and a nuisance. The court noted that a municipality must follow the same rules as an upstream landowner, and "must act with a reasonable consideration for the rights of the lower proprietor" and may not cause an "unusual or unreasonable amount of water" to be emptied upon the lower owner. *Id*. at 191.

This limitation can be found in older cases as well. For example, in *Harbison*, the court noted in dicta that "due regard" must be observed "for the interest of the adjacent landowner so

[6] Lat 44°58'12.94"N, Long 123° 0'19.84"W

as to cause no unreasonable inconvenience." *Id*. at 273-4. In *Rehfuss*, the court stated that the up-gradient landowner must act "with prudent regard for the interests of such [down-gradient] owner." *Rehfuss*, 93 Or at 32. In adopting these limits to the acceleration principle, Oregon courts have added tort law concepts to the civil law rule.

In light of later cases such as *Garbarino* and *Gibson*, it is somewhat difficult to assess what is meant by the "unreasonable inconvenience / due regard" limitation. The *Garbarino* court seemed to express some frustration in these formulations, noting that "[n]one of the opinions give us a clue as to the exact meaning of this language or the extent of limitation, if any, imposed thereby on the right of the upland owner to accelerate the natural flow of surface water." *Garbarino*, 214 Or at 561.

One logical reading is that an upper landowner is not allowed to accelerate waters to the point that it causes flooding and unreasonable damage to the lower landowner. However, the *Garbarino* court seemed to reject that reasoning when it stated that "the opinions of the court do not measure the right or privilege [to drain surface water into natural channels] by the extent of the damage [to the down-gradient landowner]." However, in dicta, the *Garbarino* court suggested that "there may be circumstances under which the extraordinary acceleration of the flow of surface water in its natural channels may be enjoined."

It is true that, in general, the cases where down-gradient plaintiffs prevail generally present fairly extreme sets of facts. For example, in *Levene*, the City of Salem was found liable because it re-routed ditches in a manner that flooded a veterinarian's clinic, drowning four dogs in the process. The city's actions were considered to be active wrongdoing in part because the city never even bothered to consider how their actions would affect the ability of two 24-inch culverts to carry water downstream.

In *Senn v. Bunick*, 40 Or App 335, 94 P2d 837 (1979), *rev den*., 287 Or 149 (1979), a developer excavated his property for a subdivision without surveying property lines. In the process, his workers knocked over a fence, pushed dirt 25 feet onto plaintiff's property, and diverted a drainage ditch onto plaintiff's land, thereby causing flooding.

In *Volkoun v. City of Lake Oswego*, 335 Or 19, 56 P3d 396 (2002), the City of Lake Oswego increased a drainage basin from 1 acre to 6 acres, and in so doing, caused a very dangerous landslide on the Volkoun property in the vicinity of the piped system's outfall.

Other cases provide examples where no liability was found: in *Rehfuss v. Weeks*, 93 Or 25, 33, 182 P 137 (1919), the upstream landowner was not held liable for digging a ditch to drain his land, even though doing so damaged plaintiff's downstream land and orchard. In *Wimmer v. Compton*, 277 Or 313, 560 P2d 626 (1977), a landowner added fill to his land, which a neighbor thought was the cause of flooding on his property. However, the evidence at trial revealed that plaintiff's property had flooded prior to the time of the fill, and that other factors contributed to the flooding, such as lack of maintenance of a culvert and the presence of blackberries. A similar result occurred in *Nolan v. Martin Bros. Container and Timber Products Corp*, 236 Or 631, 390 P2d 175 (1964), where the plaintiff could not prove that defendant's act of raising the elevation of its land was the cause of floodwaters overflowing from a nearby river.

Thus, Oregon law is clear that upgradient landowners are not liable to downgradient landowners for natural flows or reasonable accelerated flows.

Putting aside the common law drainage issues discussed above, the city seeks solace in the Basalt Creek Concept Plan ("BCCP") by asserting:

> In the voluminous package submitted by the Applicant on May 30, which included the Basalt Creek Concept Plan, it is reasserted and confirmed that development draining to Tapman Creek "aka Basalt Creek" "will require evaluation of the conveyance systems at time of development" (see page 23 of Basalt Creek Concept Plan, page 145 of the May 30 PDF).

See Letter from Daniel Pauly, AICP, dated June 10, 2024, at p. 4. Thus, the city takes an out-of-context quote from a planning document to attempt to assert some sort of regulatory authority. That is weak for a number of reasons. First, the BCCP does not constitute approval standards for this application. ORS 215.416(8). Second, the actual quote has a different focus than what the city asserts. The BCCP states:

> * * * * *. Culverts to the south of the Planning Area are part of the City of Wilsonville stormwater system. The City of Tualatin has jurisdiction over the stormwater conveyance system to the north of the Planning Area. Culverts may need to be upsized to provide adequate capacity for runoff from new impervious areas, unless onsite retention or infiltration is required when the location of public drainage or the topography of the site make connection to the system not economically feasible.
>
> Basalt Creek itself flows to the south into Wilsonville as part of the Coffee Lake Creek Basin. Basalt Creek discharges into the Coffee Lake wetlands. Coffee Lake Creek flows south from the wetlands and combines with Arrowhead Creek before discharging to the Willamette River.
>
> <u>The City of Wilsonville's 2012 Stormwater Master Plan identifies capital improvement Project CLC-3 to restore a portion of the Basalt Creek channel, west of Commerce Circle, to increase capacity.</u> The master plan also identifies Project CLC-1 for construction of a wetland for stormwater detention purposes, north of Day Road, to serve an area that includes the Basalt Creek Planning Area. The July 2014 Updated Prioritized Stormwater Project List identifies CLC-3 as a mid-term project (6 to 10 years) and CLC-1 as a long-term project (11 to 20 years).

> *Locations where stormwater runoff from the Basalt Creek Planning Area could connect to existing stormwater infrastructure will require evaluation of the conveyance systems at time of development.* (Underline and italic added).

So the BCCP notes that the city has already identified a capacity deficiency in its conveyance system. *See* Exhibit 17 to letter from Andrew Stamp dated June 30, 2024 (Excerpts from 2024 Wilsonville Stormwater Master Plan). The city is already collecting SDCs to fund that project. It makes no sense for the city to demand the applicant to perform a "downstream analysis;" the city already has a master plan that has accomplished that exact thing and has a solution in place. The only thing that needs to be done now is that the city needs to upgrade its system to handle the flows coming from Tualatin and the Basalt Creek Planning Area. Furthermore, the full quote in italics above has a different focus than what the city cites it for. The quoted plan language will apply when the subject property is annexed and ultimate buildout is achieved.

III. Other City of Wilsonville Issues.

A. The City's Role as a "Service Provider."

The city begins its June 10, 2024 letter by pointing out that it is a "service provider," stating that it is its "primary role in this case." *Id.* at p. 2. The city never really explains why it believes this status as a "service provider" gives it any special privileges or elevated status. The city has no regulatory authority outside of its city limits.

The city admits that it obtained ownership of Day Road when it completed its cherry stem annexation of the Coffee Creek Correctional Facility in 2001. *See* City of Wilsonville Ord. 539, Nov. 21, 2001. The exhibits to this ordinance stated that the "[t]he main purpose of the proposed UGB amendment [adding Coffee Creek Correctional Facility and associated streets to the city] is to formally recognize the prison as an urban use and to count the prisoners in State and Federal reimbursement formulas."

The city seems to have an inflated view of its worth to the applicant when it states:

> The City owns and controls key infrastructure that is necessary to serve this subject property. Without City-owned infrastructure, the applicant would not have street access, would not have access to a fire hydrant, and would not have anywhere for stormwater to discharge.

See Letter from Mr. Daniel Pauly dated June 10, 2024, at p. 2. In response, the applicant notes:

- The applicant's five approach roads (a.k.a. driveways) predate city ownership;
- The applicant would have street access regardless of whether the city owns Day Road or not;
- The applicant does not need a fire hydrant, because TVF&R considers the land to be "un-hydrated" and will serve it with its brush trucks, which carry water on board, or other alternative methods;

- ❖ The applicant discharges its stormwater into Basalt Creek. The applicant would discharge its stormwater in the same manner regardless of the existence of the City of Wilsonville.

The truth is that the city is pretty much useless to the applicant. If the city wants to increase its "service" to the applicant, it should focus on fixing the plethora of potholes and rough patches in Day Road, and quit trying to steal the applicant's land.

B. Service Provide Letter ("SPL") & Notice Issues.

In their letter dated May 15, 2024, the City of Wilsonville complained that "no service provider letter was requested or received from the City of Wilsonville as the transportation provider." In our May 30th submittal, we combed through the CDC and demonstrated that the CDC does not require that the applicant obtain a service provider letter regarding critical or essential transportation services. The city never really explains why obtaining a service provider letter from the city is a legal requirement, and it is not apparent that it is. The city simply has not developed its argument sufficiently to provide fair notice of any such legal requirement.

County staff submitted evidence on June 10, 2024 showing that the City of Wilsonville was well aware of the application as early as January 10, 2024. The city therefore received adequate notice and opportunity to comment. The city complains that they "have been unfairly forced to play catchup ever since." Despite their generalized claims, the city does not demonstrate that they were prejudiced in any way by any lack of notice. The city managed to attend the May 16, 2024 public hearing and was given enough time to write comment letters on January 22, May 15, May 30, and June 10. The city even had their own traffic engineering firm write a technical memorandum. Granted, that memo suffers from a number of flaws, but city staff were afforded time to write it regardless. The city demonstrates no procedural error.

C. The City's Demand for Land Dedications and ROW Improvements: *Nollan/Dolan* findings and the Unconstitutional Conditions Doctrine.

The city demonstrated that it has no expertise in drafting *Nollan/ Dolan* findings.

The city's nexus analysis relies primarily on the fact that they have adopted legislative standards requiring exactions, which it wrongly concludes are exempt from *Nollan / Dolan*. That argument wasn't particularly good even before *Koontz v. St. Johns River Water Management Dist.*, 570 U.S. 595, 133 S.Ct. 2586 (2013), but it is definitely a loser in a post-*Koontz* world. *See Sheetz v. County of El Dorado,* 601 U.S. 267, 144 S.Ct. 893 (2024); *Hill v. City of Portland,* 293 Or App 283 428 P3d 986 (2018). We detailed these cases on pages 29-31 of our June 10, 2024 submittal, and we see nothing in the city's June 10th submittal that undermines our analysis. The bottom line is that a local government cannot legislate its way around *Nollan* and *Dolan,* and the city errs in thinking otherwise.

The city attempts to create a nexus between its demanded road exactions and road frontage. However, the amount of road frontage the applicant owns has nothing to do with any alleged "impact" caused or made worse by the expansion of the contractor establishment. The

city's argument is essentially that any landowner that owns land at a location where the city wants to widen a road must give up that land to the city, and the more frontage that landowner owns in relation to the total length of the road, the more land the city can take. The city's arguments fail at the most basic level.

The city also attempts to create a nexus by determining the ratio between the percentage of the square footage of Day Road it seeks from the applicant and the road's total square footage, and then relates that to a ratio of the applicant's trip generation as compared to the current (2022) road usage of Day Road. While that analysis might be relevant if this was a local access road with substandard ROW needed for basic local access, it simply proves nothing in terms of why the applicant should build the city a four-lane arterial intended to carry heavy freight and improve regional mobility. The city's "ADT ratio" argument lack any nexus to actual impacts, since the road currently functions within capacity limits.

In fact, the City of Wilsonville admits outright that that there is no capacity-related nexus between the proposed expansion of the contractor establishment and the need for additional travel lanes and bike lanes, etc. The city's transportation engineers (DKS) stated:

> The additional trips expected from the on-site modifications will change the current use at the site driveways and City/County intersections in the vicinity of the site. We don't expect the additional trips to result in capacity issues at City off-site intersections, however, the site accesses could see a significant increase in project trips. This increase in use is concerning with the safety issues previously identified related to access spacing and sight distance. (Emphasis added).

See Technical Memorandum, DKS, dated May 9, 2024, at p. 5. That much is obvious, as Day Road currently has a design capacity of 14,000 ADT, and is functioning well within that limit. *See* Memorandum from Melissa A. Webb, P.E. Lancaster Mobley dated June 7, 2024, at p. 6 (attached as Exhibit 29 to the applicant's June 10, 2024 letter). The city's own data defeats its capacity argument.

While the city makes a half-hearted attempt to tie the desired road improvements into safety issues, they never explain how adding an additional travel lane and a bicycle lane solves their identified safety problem. This is classic "nexus" problem under *Nollan*. The city's proposed *Nollan / Dolan* findings state:

> The amount of traffic, particularly industrial freight traffic, documented in the DKS Memorandum (Attachment 3), needs improved roads for safe transportation. Since the Development is a contractor's establishment with heavy equipment and vehicles, several of the projected trips for the Development will be freight trips. Trucks with trailers or other contractor equipment require a larger turning radius, take more time to complete a turn, and require more time to react to stopping and turning. Freight crashes also have

> the propensity to be more serious as to personal injury and property damage. Thus, when discussing vehicle trips below and safety concerns at specific intersections, the City places particular emphasis on safety considerations with freight trips utilizing and turning onto/off of Day Road. (Emphasis added).

See Exhibit A to Letter from Amy Pepper dated March 30, 2024, at p. 11-12. In response, Lancaster Mobley points out:

> Safety Concerns.
>
> The City's proposed improvements would be installed along approximately 500 feet of site frontage. The two lanes would need to merge down to one lane at the western-most property line. This puts site access driveways in the middle of the merging transition, which is a safety concern for three reasons. First, westbound drivers focused on merging safely may not be alert to vehicles pulling out of driveways ahead of them, which can lead to turning-movement collisions. Second, drivers focused on merging may not be alert to eastbound vehicles turning left into the site, which can also lead to turning-movement collisions. Lastly, drivers focused on merging may not be alert to vehicles slowing down in front of them to turn into site driveways, which can lead to rearend collisions.
>
> Currently vehicles making a left-turn onto SW Day Road from any of the site access locations cross one lane of traffic to a center two-way-left-turn median. Adding a second travel lane increases the time it takes for single unit trucks and passenger cars to make a left-turn out of a site access, as now there are two lanes to cross to make it to the center median. The addition of a second westbound travel lane would increase the recommended AASHTO intersection sight distance for both a passenger car and a single-unit truck: however, the required SSD standard as well as the Washington County sight distance standard would still be met.

See Memorandum from Melissa A. Webb, P.E. Lancaster Mobley dated June 7, 2024, at p. 5 (attached as Exhibit 29 to the applicant's June 10, 2024 letter). In other words, even if we were to assume that there is an existing safety problem, the city's desired solution (another travel lane and a bike lane) would only make the problem worse. Since the county cannot close all access to Day Road without providing an alternative, the city's desired roadway dedication and improvements suffer from a fatal nexus deficiency.

Furthermore, although the city's Development Engineering Manager states in her June 10, 2024 letter that the failure to meet the city's minimum sight distance requirement creates a "*safety hazard*," nothing in the record truly bears this out to be true. DKS certainly never states

that a "safety hazard" exists due to the current driveway spacing. Rather, it merely states the following:

> Access spacing was measured during a field visit on February 29th, 2024, at all 5 driveways to the tax lots owned by Brown Contracting. All access spacing measurements are shown in Attachment A. Based on the City's standards, the minimum access spacing on SW Day Rd (Major Arterial) is 1,000 feet and the desired spacing is 1,320 feet. None of the site access to the Brown Contracting properties meet the City's access spacing requirements. The applicant should work with the City to consolidate and/or remove access points, especially to the single-family residences on Tax Lots 310 and 311, to improve safety, minimize ingress and egress points to the site, and provide conformance as much as possible with the City's spacing standards. (Emphasis added, footnoted omitted)

See Technical Memorandum, DKS dated May 9, 2024, at p. 3. It doesn't take a degree in engineering to understand that less driveways will probably bring some marginal safety "improvement," but that is entirely different than stating that lack of strict compliance with city standards at this location creates a "safety hazard." This is the city exaggerating their own engineer's conclusions.

Beyond that, however, Lancaster Mobley studied the five (5) approach roads (a.k.a. driveways) in question to determine if a "safety hazard" does exist at this location. Lancaster Mobley reviewed five years of crash data and determined that two crashes were noted in the general vicinity. Lancaster Mobley concluded:

> Although crashes were reported near the intersection, none involved a pedestrian or bicyclist, or a collision resulting in a serious injury or fatality. No significant trends or crash patterns were identified at any of the study intersections. Therefore, no safety mitigation is indicated per the crash data analysis.

See Memorandum from Melissa A. Webb, P.E., Lancaster Mobley, dated June 7, 2024, at p. 3 (attached as Exhibit 29 to the applicant's June 10, 2024 letter). With this in mind, it is clear that the city's claim of a safety hazard is exaggerated and unsubstantiated. The only constitutional result is that the city gets nothing in the way of exactions for now beyond what the applicant already gave them in 2015, but can request again in the future when the ultimate buildout of the site is proposed after annexation.

We dissect the city's draft rough proportionality findings in our letter dated May 30, 2024, at pp. 40-49. The city's numbers and ratios are simply gibberish intended to fill up space on a piece of paper. Furthermore, nothing that the city submitted on June 10 2024 closes the evidentiary and analytical flaws in their prior submittal. Under these circumstances, the Hearings Officer has no basis for adopting the city's deeply flawed findings, and the record does not support the imposition of any exactions at this time.

Finally, we have pointed out that the U.S. Supreme Court recently held that *Nollan / Dolan* apply to legislatively enacted impact fees. *See Sheetz v. County of El Dorado*, 601 U.S. 267, 144 S.Ct. 893 (2024). We have documented in detail that both the county and the city collect SDCs and TDTs to build the Day Road arterial expansion. The city's plan is to require landowners to dedicate land and build the improvements for free so that the city and county can pocket the money and use it for other things. While that may have been common practice in the past, it comes to a screeching halt after *Sheetz.*

D. Access To Day Road.

The discussion set forth above also triggers a discussion about approach road access. To recap this issue, on page 6 of their May 15, 2024 letter, the City of Wilsonville stated that they would "not allow access to Day Road" if the applicant did not bow down to the city's unconstitutional demand to extort land for arterial expansion. In our May 30, 2024 letter, we pointed out in response that the city cannot close down ***all*** of the applicant's approach roads without providing just compensation. *Id*. at 22-23.

The city's June 10, 2024 rebuttal does not refute our assessment. Instead, the city raises a strawman by citing caselaw that says that the city, as the road authority, can close ***some*** access points without paying just compensation. Of course, whether the city or county can close down some access points is a completely separate issue which we never addressed or put in question. The city mischaracterizes our argument by claiming that we argued that the closure of ***any*** approach road is a taking. *See* Letter from Daniel Pauly dated June 10, 2024, at p. 4. We never made that argument, but the city devotes almost two pages arguing to defeat their own strawman. Perhaps they forgot that their original argument was that the city could close ***all*** of our approach roads, but we will accept their latest argument as a concession that they were wrong about that point.

If anybody is going to close down access driveways, it is the county that has jurisdiction over this land use applicant, not the city. The applicable standards are the county's, not the city's. Having said that, we do not see that the city has made a compelling case for the county to close any of the five access points on the subject property.

For its part, DKS (the City of Wilsonville's contracted on-call traffic engineer) is rather tepid in its conclusions pertaining to sight distance and safety. Reading their report, you get the feeling that DKS did not want to disappoint their client, but they also did not have strong feelings on the matter, either. DKS's conclusion was half-hearted at best:

> Because the site accesses are expected to see an increase in vehicle trips due to the proposed changes, DKS does have safety concerns with the increased number of slower, larger vehicles turning out of the project site onto Day Road, which is a high-speed arterial. Based on the findings in this memorandum, the following is recommended.
>
> - The applicant should work with the City to consolidate and/or remove some of the existing access points

> (particularly to the single-family residences) to improve safety and move closer to conformance with the City's access spacing standards.
> - The applicant shall confirm the existing sight distance at the project access points for both left turns and right turns exiting the site and left turns turning into the site, and provide mitigations for locations with inadequate sight distance.
> - Prior to occupancy, sight distance at any existing or modified access points will need to be verified, documented, and stamped by a registered professional Civil or Traffic Engineer licensed in the State of Oregon. (Emphasis added).

See Technical Memorandum, DKS dated May 9, 2024, at p. 6.

In response, Lancaster Mobley went back out to the site to re-analyze the sight distance on the property, applied the correct standards, and concluded that sight distance standards are met. *See* Memorandum from Melissa A. Webb, P.E., Lancaster Mobley, dated May 30, 2024, at p. 2-5 (attached as Exhibit 20 to the applicant's May 30, 2024 letter).

Three of the five access points are residential driveways, which have nothing to do with the expansion of the contractor establishment. There is no history of systemic safety problems at these driveway locations. *See* Memorandum from Melissa A. Webb, P.E., Lancaster Mobley, dated June 7, 2024, at p. 3 (attached as Exhibit 29 to the applicant's June 10, 2024 letter). The two commercial driveways also do not create any sort of safety issue. Lancaster Mobley studied these driveways and concluded that sight distance is met, as noted above.

We believe that the closure of these driveways should be forestalled until ultimate buildout. As we have repeatedly noted, this surrounding neighborhood is experiencing change. Within twenty years or so, all of the current landowners will sell their land assets and incoming high-tech industrial uses will be built. It is likely that all of the landowners will want a frontage road to serve their industrial developments. Therefore, the city can worry about closing approach roads at that time. Or if a safety issue develops, the county always has the authority to require indentures of access and/or consolidation of access points. Now is not the time, however.

IV. Summary of McClendon Issues and Responses.

A. The McClendons Can Annex to the City of Wilsonville.

Mr. McClendon complains that the Brown Contracting is keeping him from annexing into the City of Wilsonville. *See* June 10, 2024 submittal at p. 6. It is true that after receiving such poor treatment by the city staff in this case, the applicant is in no hurry to annex. However, we see nothing in the city's code that would prohibit a cherry stem annexation of Mr. McClendon's property. The city annexed the Coffee Creek Correctional Facility via a cherry stem annexation in 2001, after all, which is the reason it is now the road authority for Day Road. If Mr.

McClendon is anxious to see his property taxes triple, then by all means, he should annex. However, this argument provides no basis for a denial.

B. The Applicant's Noise is Within DEQ and WCNO Limits.

In addition to the testimony provided at the hearing, we discuss issues related to noise extensively in the following submittals:

- Letter from Andrew H. Stamp dated June 10, 2024 pp. 11-27.
- Letter from Kerrie G. Standlee, P.E., DSA, dated May 14, 2024. which we intended to submit in advance of the hearing as an exhibit to our May 15, 2024 letter. The DSA letter was actually submitted on May 29, 2024 after we discovered our error in sending the wrong file on May 15.
- Letter from Kerrie G. Standlee, P.E., DSA, dated June 9, 2024. *See* Exhibit 38 to Letter from Andrew H. Stamp dated June 10, 2024.
- Memo to File dated July 1, 2023 (discussing the Noise Violation case).
- Exhibits 5, 6, and 7 to the letter from Andrew H. Stamp dated May 15, 2024 (providing general background information on noise).

The applicant is willing to accept a condition of approval requiring compliance with the WCNO and the DEQ rules related to noise.

Mr. McClendon expresses disagreement with the applicant's assessments and legal analysis in his undated letter submitted on June 10, 2024. Mr. McClendon showcases his propensity towards hyperbole and exaggeration when he states that "some days Brown Contracting is like the Indianapolis 500." *See* June 10, 2024 submittal at p. 6. That is a bold statement, given that the neighbor to the west, Ms. Patti Kief, states that the "trucks and vehicles traveling on SW Day Road produce more noise compared to the businesses and home in the surrounding area". Exh. 26 to Letter from Andrew H. Stamp dated May 30, 2024. Patti Kief is far more credible than Mr. McClendon.

In part, we believe that the McClendons simply demand too much in the way of solitude. Neither the DEQ standards nor the Washington County Noise Ordinance demand absolute silence. To the contrary, acceptable levels of noise will most certainly be audible. As we explained at the hearing, a normal conversation is roughly 60 dBA. *See also* Exhibits 5, 6 & 7 submitted on May 15, 2024 (scientific literature discussing general noise concepts and the levels of noise that are generally considered annoying or disputing). As Mr. Standlee demonstrated, the vehicles and equipment on the subject property operates well within DEQ and WCNO limits.

Interestingly, however, Mr. McClendon does not rebut any of the scientific data set forth in the letter from Kerrie G. Standlee, P.E., DSA, dated May 14, 2024. The DSA report constitutes unrebutted scientific evidence that a reasonable person would rely on to draw a conclusion. Mr. Standlee's analysis and conclusions are based on personal observation and multiple site visits, and also include opinion testimony that only an expert can provide.

Mr. McClendon's evidence consists largely of homemade videos taken from a cell phone camera. These videos do not have much evidentiary value because they are not date / time stamped, they are not taken in the correct measurement location, and do not have professionally corrected sound audio. Keep in mind that cell phones have parabolic microphones that can capture sound at a different level that it would be audible to the human ear. *See* Letter from Kerrie G. Standlee, P.E., DSA, dated June 9, 2024, at p. 9. These videos may demonstrate the *types* of sounds emanating from the subject property, but not the accurate sound level as heard by a human ear.

We don't think it is particularly useful to go through each one of the new videos submitted by the McClendons, as they seem to be cherry picked situations in any event. For example, in one video from August of 2022, Mr. McClendon complains about getting "yelled at and mocked" by employees in while he is in the course of filming them. The actual video is not clearly audible, and does not really make clear if the employees are engaging directly with Mr. McClendon or simply with each other. The owners of Brown Contracting have asked their employees to not engage with or otherwise antagonize the McClendons, at the risk of being immediately let go. But even if they are engaging with Mr. McClendon in that video, one wonders if this is a "chicken or egg" problem. People generally don't like getting filmed, and it is possible that the employees took offense to this behavior and responded in kind. Mr. McClendon would have probably gotten a better result had he taken a less aggressive and more mature approach.

Further note that in some of the McClendon videos, it is not always clear that sounds are emanating from the Brown Contracting property. Nor it is clear in some cases that the noise is even related to Brown Contracting business. As noted by Kerrie G. Standlee in his June 9, 2024 submittal, the Amazon site adjacent to Brown Contracting has been running an excavator for a long time. *See* Applicant's Exhibit 41, submitted on June 10, 2024 (Google Earth aerials dating from 2019 to 2024, which show continuous an ongoing excavation work on the Amazon property). The Amazon property is located at a higher elevation than the Brown Contracting site, and we believe that much of the noise that the McClendons hear emanates from construction occurring on that property. *See* photographs taken by Kerrie G. Standlee attached to his June 9, 2024 letter. Those construction-related noises will eventually subside as the Amazon site is brought down to its final grade. However, the Amazon site will remain a constant source of noise caused by back-up beepers and related vehicle noise.

Mr. McClendon presents a video entitled "Jun 08 2024, 9 52PM noise on lot in front of us at almost 10pm Saturday night," which shows some unspecified noise emanating from an unspecified location. It has zero evidentiary value. Brown Contracting had no employees working that evening. The sound might be from one of the residential tenants, but such noise would not be related to the contractor establishment. If anything, this video just tends to show that the neighborhood is loud. Moreover, Mr. McClendon stated that the noise occurred at 9:30 at night and admits that the noise might have been a tenant "firing up some sort of mower * * *." If that were indeed the case, WCC 8.24.020 would exempt such noise from the purview of the noise ordinance:

8.24.020 Exemptions.
Nothing in this chapter is intended to unreasonably restrict or regulate:
** * * * *.*
G. Lawn, garden or household equipment associated with the normal repair, upkeep or maintenance of property between the hours of seven am. and ten p.m.

Some of the videos do not show what Mr. McClendon claims they show, and some even exonerate the applicant. For example, one video he submitted on May 30, 2024 is entitled "Sep 19 2022, 613 AM revving in unscreened area.mov." This video demonstrates a truck warming up for the day. It is not "revving." Mr. Standlee recreated and measured this same action with this exact truck and found the resulting noise was well within the DEQ standards. *See* DSA letter dated May 14, 2024.

In his June 10, 2024 submittal, Mr. McClendon includes a video entitled "Smoke and noise." Although it is difficult to tell exactly what is going on, the video appears to be showing steam from a steam cleaner, which is similar to a power washer. Employees are seen wearing fluorescent yellow rain gear, which is common when operating the steam cleaner, as they get wet. Brown Contracting has not set or seen any fires on the property, and is not aware of any fires occurring on the property.

As noted in previous submittals, the McClendons have filed complaints against Brown Contracting for all measure of perceived injustices. They have also filed similar complaints against the Amazon parcel as well. In his latest submittal, Mr. McClendon complains that employees "launched golf balls into our yard on one occasion." Imagine the horror. Never mind the fact this singular event happened over 5 years ago. Brown Contracting ask the employees not to hit golf balls while on the property.

In summary, we do not see that the McClendon videos are particularly compelling. Approval of the application will allow Brown Contracting to move some of the storage away from the area where the sound wall is located. Nonetheless, as a further showing of good faith, the applicant is willing to extend the sound wall further to the east property line on TL 309 to shield the McClendon residence from sounds emanating in the vicinity of the two shop buildings. We do not think that extending the sound wall further to the west on TL 309 would have any appreciable benefit.

C. Ground Vibration.

We address the McClendon's allegations of "vibration" at two places in the record:

- Letter from Andrew H. Stamp dated June 10, 2024 pp. 27-28;
- Letter from Kerrie G. Standlee, P.E., DSA, dated June 9, 2024, at pp. 2-3. *See* Exhibit 38 to Letter from Andrew H. Stamp dated June 10, 2024.

The McClendons offer nothing in their June 10, 2024 submittal which demonstrates that CDC 423-7 cannot be met.

D. Water Quality.

Mr. McClendon makes an argument concerning water quality on page 6 of his submittal dated June 10, 2024. He complains that Brown Contracting "uses the stormwater drain as a washout area for all type of vehicles, including concrete trucks." Mr. McClendon does not tie the argument to any approval standard, and it is not apparent that there is an approval standard that addresses the issue. Beyond that, the applicant does not wash concrete trucks on the property as a general practice. *See* Declaration of Don Brown, Exhibit 39 to the Letter from Andrew Stamp dated June 10, 2024.

While it is true that vehicles are serviced and washed at the property, we do not see this as the sort of activity that would cause "chemicals to enter into the water table." Nonetheless, the applicant is willing to accept a condition of approval to conduct a review of the storm drainage system from a water quality standpoint to mitigate any water quality impacts. In this regard, the applicant seeks to one day sell the property to developers who appreciate the City of Wilsonville more than they do, and in this regard, it is important to Brown Contracting that the property not have contamination of any kind.

V. Conditions of Approval.

In our March 30, 2024, we expressed the concern that CDC 207-5.1 not be used to create a *de-facto* amendment or modification of an approval standard. We noted that the applicant is entitled to have their application judged by approval standards that were effective at the time the application was deemed complete. ORS 215.427(3). Using CDC 207-5.1 as an independent way to invent new limitations on development unrelated to actual approval standards violates ORS 215.427(3). Again, we do not question that CDC 207-5.1 provides authority to impose conditions related to and intended to ensure compliance with approval standards. Rather, our argument is simply that CDC 207-5.1 is not itself an approval standard, and does not authorize conditions independent from, and unrelated to, approval standards and legitimate planning purposes.

Mr. McClendon takes issue with our concern on pages 1-2 of his June 10, 2024 submittal. He views CDC 207-5.1 as serving as its own independent approval standard. He states that "no case directly holds that [CDC] 207-5.1 must be tied to the CDC."

Various LUBA cases have set standards for conditions of approval, including the following:

- conditions must reasonably further a legitimate planning purpose. *Benjamin Franklin Dev. Inc., v. Clackamas County*, 14 Or LUBA 758 (1986)
- conditions must be reasonably related to the proposed use. *Wheeler v. Marion County*, 20 Or LUBA 379, 385 (1990)
- conditions must be supported by substantial evidence, which is to say that there must be evidence in the record leading a reasonable person to conclude that

"considering the impacts of the proposed development, there is a need for the condition to further a legitimate planning purpose." *Sherwood Baptist Church v. City of Sherwood*, 24 Or LUBA 502, 505 (1993).

- ❖ conditions cannot affect property not subject to the application, even if that property is in common ownership. *Goodman v. City of Portland*, 19 Or LUBA 289, 295-8 (1991); *Olsen Memorial Clinic v. Clackamas County*, 21 Or LUBA 418 (1991)
- ❖ conditions cannot require the landowner to relinquish a previously granted entitlement. *See Olsen Memorial Clinic v. Clackamas County*, 21 Or LUBA 418 (1991); *Wheeler v. Marion County*, 20 Or LUBA 379, 385 (1990).

As noted by ORS 215.416(8)(a), the "[a]pproval or denial of a permit application shall be based on standards and criteria which shall be set forth in the zoning ordinance * * *. CDC 207-5.1 is not written as an independent approval standard. Rather, it is both a delegation of authority and a limitation of authority, which is to say that a condition cannot be imposed if it is not "designed to protect the public from potential adverse impacts of the proposed use or development or to fulfill an identified need for public services within the impact area of the proposed development." If it was intended to be an independent mandatory approval standard, then it would not be written in permissible terms. By definition, mandatory approval standards use mandatory language.[7]

Furthermore, in *Applebee v. Washington County*, 54 Or LUBA 364, 401-2 (2007), LUBA treated CDC 207-5.1 as an express limitation on a delegation of authority. LUBA noted that under CDC 207-5.1, any condition must relate to "adverse impacts of the proposed use or development." The county tried to use CDC 207-5.1 as an authority to address alleged code violations related to an unrelated permit. LUBA rejected that argument as being inconsistent with the express limitation on the delegation of authority.

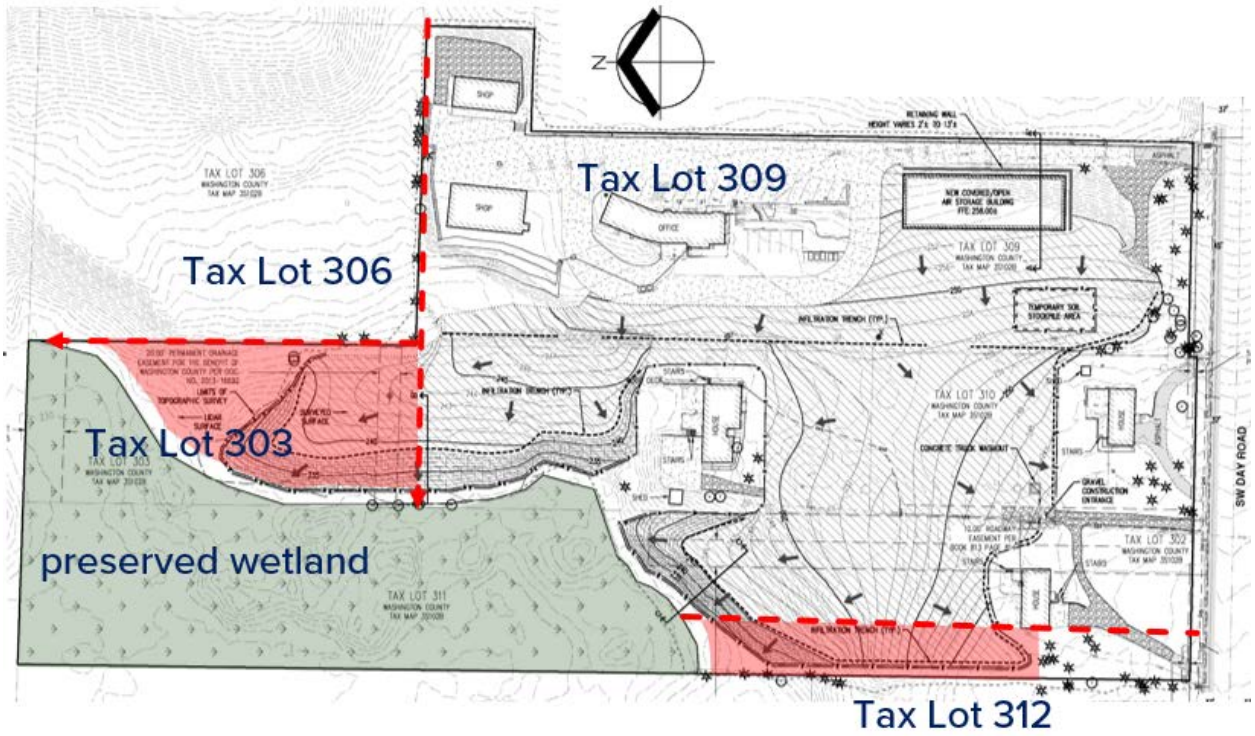
In *King v. Washington County*, 60 Or LUBA 253 (2009), LUBA notes that "a condition of approval must further some legitimate planning purpose" *Id*. at 260 (citing *Davis v. City of Bandon City*, 28 Or LUBA 38, 48 (1994)). LUBA then states that "reducing conflicts with adjoining uses as required by applicable approval criteria is certainly a legitimate planning purpose." *Id*. This statement is certainly consistent with our position, which is that the conditions must be tied to an approval standard in *King*. The county did in fact tie the condition at issue to an approval standard. However, LUBA held that the condition did not actually further the objectives that were the subject of the approval standard. LUBA stated:

[7] *See generally Stephan v. Yamhill County*, 21 Or LUBA 19 (1991); *Von Lubken v. Hood River County*, 19 Or LUBA 404 (1990). For example, where a comprehensive plan provision is worded in mandatory language – such as when the word "shall" is used – and is applicable to the type of land use request being sought, then LUBA will find the standard to be a mandatory approval standard. *Compare Axon v. City of Lake Oswego*, 20 Or LUBA 108 (1990) (Comprehensive plan policy that states that "services shall be available or committed prior to approval of development" is a mandatory approval standard); *Friends of Hood River v. City of Hood River*, 67 Or LUBA (2013), *aff'd in part, rev'd in part on other grounds*, 236 Or App 80, 326 P3d 1229 (2014). Conversely, use of aspirational language such as "encourage" "promote," or statements to the effect that certain things are "desirable" will generally not be found to be mandatory approval standards. *Id.; Neuschwander v. City of Ashland*, 20 Or LUBA 144 (1990); *Citizens for Responsible Growth v. City of Seaside*, 23 Or LUBA 100 (1992), *aff'd w/o op*. 114 Or App 233 (1993).

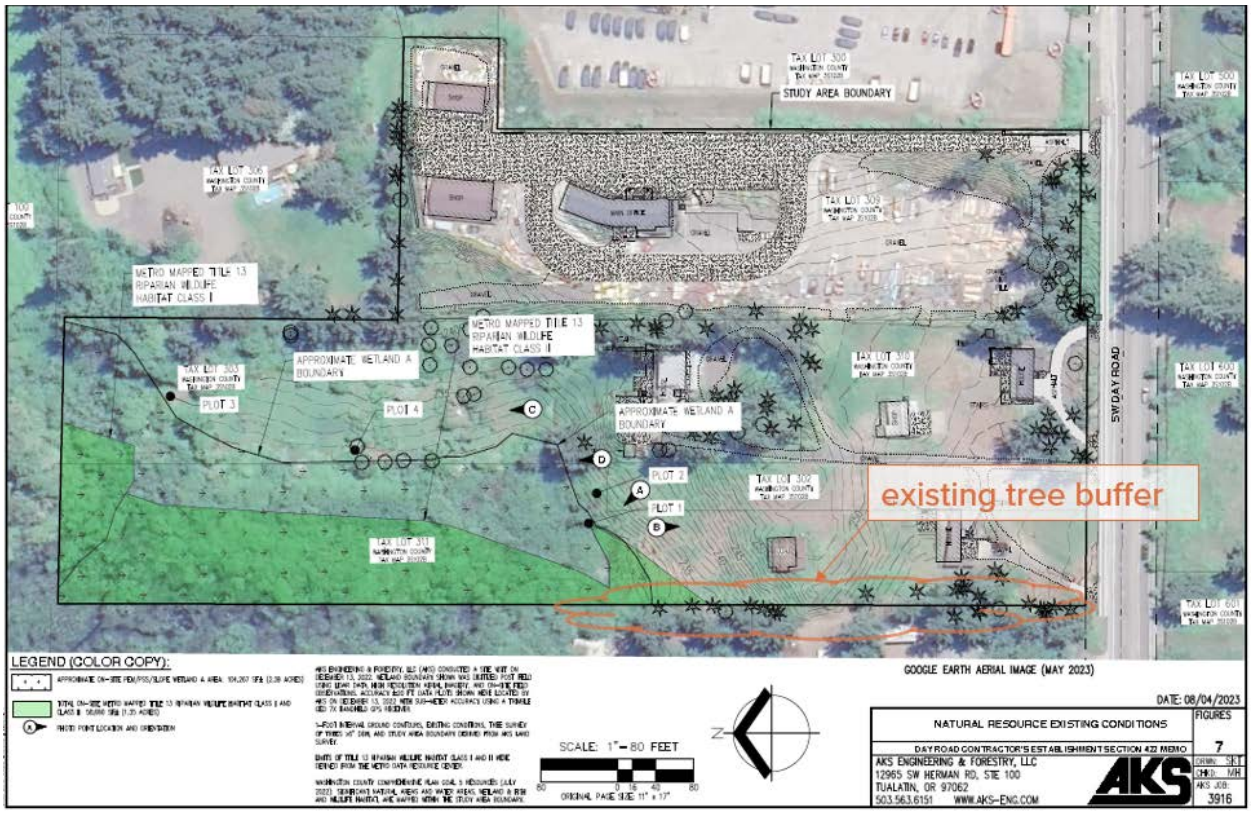
> "that remand is necessary for the hearings officer to adopt findings, supported by substantial evidence, explaining why the condition is needed to ensure compliance with applicable approval criteria, or otherwise serves a legitimate planning purpose."

If CDC 207-5.1 operates as an independent approval standard, then the only requirement would be that the condition was "designed to protect the public from potential adverse impacts of the proposed use." LUBA clearly did not limit its discussion to that point, however.

In any event, the most concerning condition is Proposed Condition II(A). We discuss this condition at page 35 of our May 30, 2024 letter. To recap, this proposed condition seeks to prevent Brown Contracting from using the northern reach of TL 303 where that abuts the McClendon property. As Mr. McClendon notes in his rebuttal, the county staff attempted to tie the condition to CDC 422-1, and in particular, the wetlands. However, if the real goal were to protect wetlands, there would be no legitimate planning purpose in making the "east-west lot line between tax lots 306 and 309" the demarcation line between where grading can take place and where it cannot. There is just as much wetland south of that line as there is north of it. Stated another way, if the goal were to protect the wetland, then we would expect the condition to impose some setback as measured from the wetland. But this condition seeks only to make the portion of the TL 303 adjacent to the McClendon property a "no disturbance area" that has nothing to do with wetlands and everything to do with the McClendons. Moreover, that is an extremely draconian condition, which in essence results in a partial taking of the applicant's land.



If the goal is to mitigate "adverse impacts of the proposed use or development" upon adjacent property owners, then the Hearings Officer can propose less draconian solutions such as a sight obscuring fence, vegetative hedge barrier, or sound wall.



The same is true with regard to the portion of the proposed conditions that seeks to impose "no encroachment on Tax Lot 311 west of the west facade of the existing dwelling." We provided a series of images that show the border between TL 311 and the lot to the west, TL 312. The images show that most parts of the border are already heavily vegetated.

With regard to proposed Condition III(B)(4), we ask that the Hearings Officer modify the a six-foot-tall sight obscuring fence as an alternative:

> *The applicant shall provide a sight obscuring fence* having a minimum height of six feet along the west property line of Tax Lot 311 in a manner that does not interfere with intersection sight distance standards for nearby driveways and shall otherwise extend from the right-of-way north to the wetland boundary.

Likewise, Condition IV(C) should modified as follows:

> C. Complete all required on-site improvements, including but not limited to the sight-obscuring fence having a minimum height of six feet along the west property line of Tax Lot 311, and obtain

final sign-off by Project Planner, Paul Schaefer. Please contact staff a minimum of 48 hours in advance of the requested final Current Planning inspection.

With regard to proposed Condition III(B)(5), which requires a building permit and variance for the proposed sound wall "prior to final approval…." The applicant asks that the Hearing Officer decouple this proposed condition from the rest of the approval by moving the condition to Section VII. That way, it moves forward on its own timeline and process, rather than tying up the remainder of the approval.

We object to Condition III B(9), and respectfully request that the Hearings Officer delete it in its entirety. As previously noted, the CDC does not require the applicant to obtain a "Service Provider Letter" ("SPL") from the City of Wilsonville for transportation. If the Hearings Officer believes the site access is problematic, then the time to address that is as part of this case. We do not see the City of Wilsonville as having any regulatory authority over this case, and we need no services from them. If this condition remains, we suspect that it will result in years of litigation, and nothing is to be gained from that.

V. Conclusion.

We again thank the Hearings Officer for talking the time to listen to this case. We believe that the applicant meets the approval standards to expand the existing contractor establishment, and the application should be APPROVED with both the stipulated conditions agreed to with staff in the first open record period submittal, and the requested modified conditions as set forth herein and in our second open record period submittal. We ask that the hearing officer reject conditions proposed by the City of Wilsonville and the opponents.

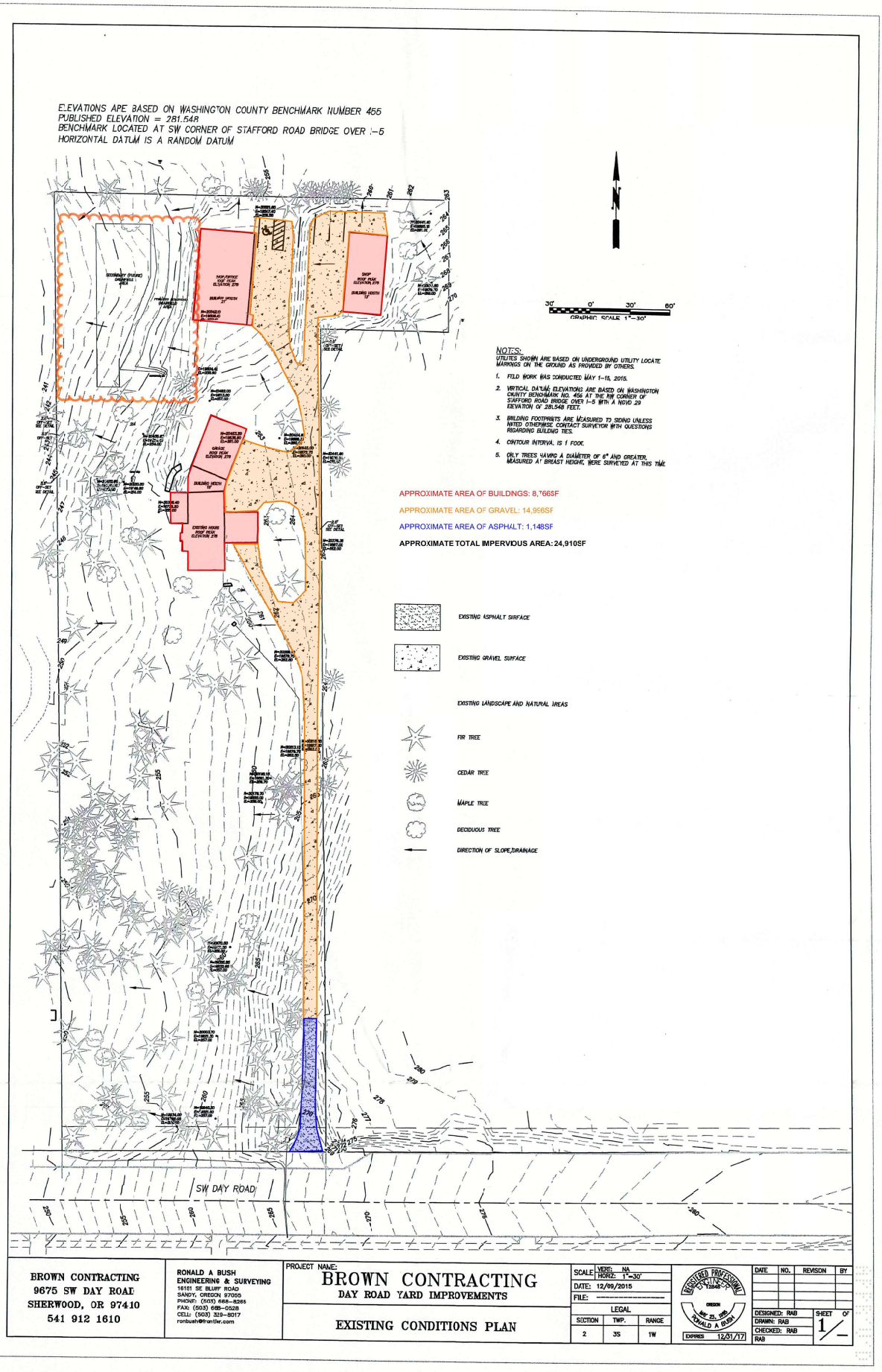
Sincerely,

VF Law

/s/ *Andrew H. Stamp*

Andrew H. Stamp
Of Counsel

AHS/nbro
Enclosure
cc: Client
AKS Engineering & Forestry, LLC



COPY For Reference only

RECEIVED
Apr 06 2016
Washington County
Building Services

(Initial impervious area)

30' 0' 30' 60'
GRAPHIC SCALE 1"=30'

(As-built plans impervious area)

ELEVATIONS ARE BASED ON WASHINGTON COUNTY BENCHMARK NUMBER 455
PUBLISHED ELEVATION = 281.548
BENCHMARK LOCATED AT SW CORNER OF STAFFORD ROAD BRIDGE OVER I-5
HORIZONTAL DATUM IS A RANDOM DATUM

BROWN CONTRACTING
9675 SW DAY ROAD
SHERWOOD, OR 97410
541 912 1610

RONALD A BUSH
ENGINEERING & SURVEYING
16151 SE BLUFF ROAD
SANDY, OREGON 97055
PHONE: (503) 668-8265
FAX: (503) 668-0528
CELL: (503) 529-8017
ronbush@frontier.com

PROJECT NAME:
BROWN CONTRACTING
DAY ROAD YARD IMPROVEMENTS

GRADING AND DRAINAGE PLAN

SCALE	VERT: NA HORIZ: 1"=30'
DATE:	12/09/2015
FILE:	----------

LEGAL

SECTION	TWP.	RANGE
2	3S	1W

REGISTERED PROFESSIONAL ENGINEER 12648 OREGON MAY 23, 1995 RONALD A BUSH
EXPIRES 12/31/21

DATE	NO.	REVISION	BY

DESIGNED: RAB
DRAWN: RAB
CHECKED: RAB
RAB

SHEET 2 OF —

EXISTING BASINS MAP

BROWN CONTRACTING, INC.
WASHINGTON COUNTY, OREGON

PRELIMINARY NOT FOR CONSTRUCTION

JOB NUMBER:	3916
DATE:	6/13/2024
DESIGNED BY:	DJS
DRAWN BY:	CDH
CHECKED BY:	BRB

1 OF 1

TAX LOTS 302, 303, 309, 310, AND 311
WASHINGTON COUNTY TAX MAP 3S102B

AKS ENGINEERING & FORESTRY, LLC
12965 SW HERMAN RD, STE 100
TUALATIN, OR 97062
503.563.6151
WWW.AKS-ENG.COM

ENGINEERING • SURVEYING • NATURAL RESOURCES
FORESTRY • PLANNING • LANDSCAPE ARCHITECTURE

(Existing basin map)