

Memorandum

VIA E-MAIL

To: Mr. Mike Anders, Lennar Northwest, Inc.
From: Michael C. Robinson
Date: November 15, 2021
Subject: Autumn Sunrise; Analysis of Legal Basis for Oregon Department of Transportation (“ODOT”) Requested Condition of Approval Requiring Proportional Payment for I-5 and SW Elligsen Road Interchange Improvements.

1. Question.

Can the City of Tualatin (the “City”) impose ODOT’s requested condition of approval on the subdivision application (the “Application”) decision (the “Decision”) requiring the Applicant to contribute 4.1% of the estimated construction cost of the future improvements to the I-5 and SW Elligsen Road interchange (the “Interchange”) based on the Subdivision’s vehicle trips through the Interchange?

2. Short Answer.

No, because the impact on the Interchange by the Subdivision’s vehicle trips is not relevant to any applicable approval standard or guideline, there is no causal connection between the small number of the Application’s vehicle trips through the Interchange, the failure of the Interchange’s mobility standard of 0.85 and the failing Interchange is a pre-existing deficiency not caused by the Application.

3. Relevant Facts.

The Application will add additional vehicle trips to the Interchange. The ODOT Comment states that the Application’s Traffic Impact Analysis (the “TIA”) shows that the Interchange will exceed the 1999 Oregon Highway Plan’s (the “OHP”) mobility standard of 0.85 volume to capacity (“v/c”) for the southbound off-ramp (the northwest corner of the interchange) during morning peak hours and “all subsequent scenarios” (it is unclear what ODOT means by the comment in quotation). The Interchange is an unfunded 2018 Regional Transportation project (the “RTP Project”). The Comment notes that the RTP Project states that the Interchange is already congested (a pre-existing deficiency) and that the RTP Project is likely to be constructed

between 2026 and 2040, well after the Subdivision's completion. The Comment also states that the Application's vehicle trips will be about 4.1% of the southbound off-ramp vehicle trips and, on this basis, requests that the City impose a condition of approval requiring the Applicant to contribute its proportional share of 4.1% of the RTP Project's estimated cost of \$1.063 million. The Comment does not attribute the Interchange's failure to the additional trips from the Subdivision.

The Application is a request for a tentative residential subdivision within the City. The Interchange is located outside of the City and the City's Transportation System Plan (the "TSP") Planning Area (the "Area") boundary because the Interchange is south of the Area's south boundary. TSP Page 2; *See also* TSP Figure 1, Page 13 not showing the Interchange in the TSP's Functional Classification Plan not a Regional Roadway project, TSP Table 9, Page 36 not listed as a Major Arterial, TSP Page 18; and not shown in the Regional Street Urban Upgrades, TSP Table 5, Pages 26 and 29. The Interchange is not part of the City's transportation infrastructure. The Application site is not adjacent to the Interchange and does not require an ODOT approach permit nor any Miscellaneous Permit concerning ODOT right-of-way other than a Miscellaneous Permit for a connection to ODOT's drainage facilities unrelated to the Interchange's capacity.

The Application is a *Limited Land Use decision* because it is a tentative subdivision within the Portland Metropolitan Urban Growth Boundary (the "UGB"). ORS 197.015(12). The Application is not an amendment to the City's land use regulations, the Tualatin Development Code (the "TDC"), or to the Tualatin Comprehensive Plan (the "TCP"). A Limited Land Use decision is subject to ORS 197.195(1) requiring comprehensive plan policies, including the TSP, to be properly incorporated into the TDC before the TCP or the TSP can be applied to the Application. *Oster v. City of Silverton, 79 Or LUBA 447 (2019)*. The Application is also a *Needed Housing* application as defined in ORS 197.303(1)(a) and is subject to the clear and objective standards, procedures and conditions requirements in ORS 197.307(4) and (6) and 227.173(2).

The City's notice of public hearing lists the relevant City approval standards and guidelines found in TDC Chapters 32, 33, 36, 41, 51, 73B, 74 and 75 and TCP Chapter 3. The Notice does not list TCP Chapters 8 ("Transportation") or 9 ("Public Facilities and Services," which does not include transportation facilities). The Oregon Transportation Planning Rule (the "TPR"), OAR 660-012-0060, is not applicable to the Application because the Application is not an amendment to the TDC or the TCP.

The OHP is also not an applicable approval standard because OHP Policy 1.F, "Highway Mobility," applies only to post-acknowledgment plan amendments (OHP Page 28) and OHP Policy 1.B, "Land Use and Transportation," only requires coordination between the City and ODOT but coordination is a process whereby the City must allow ODOT to comment on the Application and must consider but is not required to adopt ODOT's recommended condition of approval. ORS 197.015(5), definition of "coordinated" requiring accommodation of the Comment as much as possible but not requiring the City to agree with ODOT.

4. Analysis of Legal Basis for Condition of Approval.

The condition can be required based only on either a relevant approval standard or guideline, or a causal connection between the Application and the failure of the mobility standard, neither of which is present in this Application.

A. TPR and OHP.

Neither the TPR nor the OHP contain standards that the City may apply to impose the condition of approval. OHP Policy 1.B requires that the City coordinate with ODOT on the Application but does not require a substantive result nor that the City agree with ODOT.

B. TDC.

TDC 36.120(4)(a)-(i) contain the approval standards for a tentative subdivision application.

TDC 36.120(4)(a)(ii) applies only to City infrastructure standards. TDC 31.050 defines “City” as the City of Tualatin and thus excludes ODOT facilities from any standard applying to City infrastructure. The City’s transportation infrastructure requirements are found in the TSP but the TSP does not include the Interchange because it is not listed in any of the TSP elements and is outside of the TSP Planning Area boundary.

TDC 36.120(4)(c) applies only to City infrastructure and the Interchange is not City infrastructure.

TDC 36.120(4)(d) requires that the street system in and adjacent to the Subdivision conform to the TSP. The Interchange is not adjacent to the Subdivision nor is the term “conforms” clear and objective. No applicable TSP element requires that the Application to demonstrate compliance with the OHP mobility standards.

TDC 36.120(4)(c) applies to the street system adjacent to the Subdivision. The Interchange is not adjacent to the Subdivision.

TDC 36.120(4)(g) requires the Application to mitigate the transportation system consistent with the approved TIA. The transportation system, based on the TSP, does not include the Interchange but even if it does, the TIA does not show that the Subdivision causes the southbound off-ramps to fail since the RTP Project acknowledges that the Interchange is already congested nor does the Comment identify a causal connection between mobility standard failure and the additional vehicle trips from the Subdivision.

C. TCP.

TCP Chapter 8 contains no standards that require the Application to mitigate pre-existing conditions at the Interchange.

Memo to: Mr. Mike Anders, Lennar Northwest, Inc.

November 15, 2021

Page 4

D. Summary.

No applicable approval standard or guideline requires that the Application mitigate pre-existing deficiencies at the Interchange which is not a City transportation facility and is not adjacent to the Subdivision and where no relevant ODOT permit is required.

5. Conclusion.

The City is not required to include the condition as a condition of approval because ODOT has not identified a relevant legal standard nor a causal connection between the impact of the Application's vehicle trips and the need for the condition of approval.

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