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Electronic mail

Hearings Officer Jill Foster
Marion County Planning Division
c/o John Speckman, Associate Planner
5155 Silverton Road NE
Salem, OR 97305

RE: ZC 25-002: Applicant's Final Written Argument

Dear Honorable Judge Foster,

This firm represents Creative Electric, the applicant for the ZC 25-02 zone change to conform the zone for their property, to its commercial plan designation. Please include this applicant final written argument in the record of the above matter. This Final Written Argument incorporates by this reference the applicant's hearing PowerPoint and prior submittals.

Procedural Issues

The applicant has filed motions to strike certain city documents – one motion, the first, was filed to reinforce that documents at hyperlinks are not part of the record, and the other was filed to strike untimely submitted City documents from the record. We reiterate those motions here by this reference. To summarize, the well-established state and County rules that govern this proceeding are that after the hearing is closed but when the record remains open, the first 7-day period is a time when anyone can submit anything. The second period is limited to rebuttal only of the material that was submitted in the first period. And the final 7-day period is for the applicant to submit their final written argument. *Landwatch v. Lane County*, 75 Or LUBA 302, 307-08 (2017), *Grahn v. City of Yamhill*, 76 Or LUBA 258, 267-68 (2018).

The City and applicant submitted nothing of any substance in the first submittal period. Thus, the City's attempt to submit documents for the first period after that period closed, was fatal because it was untimely. Moreover, if the City's untimely submittal is viewed as a "response" for the second period, there was nothing to respond to in the second period. Which means it was not limited to rebutting material presented in the first period and so wholly inappropriate to be submitted in the second period for any purpose.

The City's May 29, 2025 submittal is similarly not a proper rebuttal. It is not a rebuttal at all to anything in the first period but rather is expressly stated to be a rebuttal to matters that occurred *at the hearing*. The second period is simply not available to rebut material presented during the hearing, as a matter of law. The applicant' respectfully requests that its motions to strake be granted.

Summary of the Merits

The proposal is for a zone change to conform the zone to the Commercial Plan designation that applies.

The proposal is limited to a zone change and does not seek approval for any "use" or any "development." Because no particular development is proposed, the standards that apply to "development" or concerning "use" approval are wholly inapplicable to this or any zone change.

The applicant voluntarily provided a site plan and conditions of approval to respond to city concerns. Those were not required, but the applicant can voluntarily be bound to them and has agreed to be bound by them.

The applicant does not seek annexation and has not sought access to City urban services and, concerning the latter, the only evidence is that the applicant's property can be safely and adequately developed with onsite septic, an onsite water well and with on-site stormwater control.

A zone change in the UGB is expressly allowed by the County's acknowledged land use regulations. The County's land use rules expressly state that denial of a zone change is to be avoided if conditions or limits can be imposed. They can be and should be here.

The City and staff essentially improperly claim that any zone change in the UGB is prohibited but cite no standard that supports that claim and there is none. Rather, under the express and acknowledged terms of the County's code, a zone change is expressly allowed if it meets County zone change standards. MCC 16.39.000, 010, 020 and 030. The applicable acknowledged regulations that apply are those the County's "urban" land use regulations, as distinguished from Chapter 17 which applies only to "rural" areas of the county. That is telling all by itself.

To respond to concerns by the City of Woodburn, the proposed zone change is limited by condition (or the County's Limited Use Overlay if that is preferred), to the uses that are now allowed in the UT zone plus one specialty trade contractor and the trade contractor's associated warehousing. Therefore, the proposed application of the CG zone **does not allow all CG uses**, only one specialty trade contractor and such trade contractor's associated warehousing. The proposal meets all applicable standards for a zone change.

It is respectfully submitted that the proposal should be approved.

Conditional Zone Changes are Expressly Allowed by the MCC

MCC 16.39.060 expressly authorizes conditional zone changes and MCC 16.39.070 imposes limits on conditions on zone changes. MCC 16.39.060(12) allows deferring allowed

uses until "the happening of certain events" citing "availability to the subject property of a certain level of service."

As authorized by MCC 16.39.060, the CG uses allowed under the proposed zone change are limited to those now allowed in the UT zone and the one specialty trade contractor and their associated warehousing, until such time as the property is annexed, City services are provided, and the City's commercial zone is imposed. Therefore, the proposed conditional zone change can be accompanied by required findings.

MCC 16.39.070(B) imposes a limit on conditions that are imposed on zone changes such that they not have the effect of limiting allowed uses to one owner. The proposal complies with that requisite both in terms of authorizing UT zone uses that are now allowed but also a category of industrial uses (specialty trade contractor) and their associated warehousing. The authorized uses are clearly not limited to one user or owner.

Accordingly, the hearings official has authority to impose and should impose the applicant's requested conditions that are designed to and do meet the concerns expressed by the City of Woodburn.

The conditions are necessary to meet do meet the City's concerns – for example the City complains about the possibility of outdoor storage. The only way to deal with that is to forbid any outdoor storage when any use is proposed for County approval. Similarly, the City complains that the CG zone's unconditioned suite of authorized uses is too broad for their liking until the property is annexed to the City and City services are provided. The conditions restrict those uses to what is allowed now in the UT zone, which they City states it has no quarrel with, plus a specialty trade contractor and their associated warehousing. The only evidence, and in fact the wholly undisputed evidence in the record, is that the impacts from that one additional use type that the zone change would allow would be the same as or less than other uses that are allowed in the existing UT zone and that will continue to be allowable under the proposed zone change.

There is simply no possibility that the approval of the proposed zone change can result in any uses or impacts that the City says are objectionable before annexation and provision of City services.

Further, it is in the public interest to meet the City's concerns regardless of how unreasonable or inconsistent those concerns may seem to be. This is because the public's interest is in the application of the County's acknowledged land use standards which allow the proposed zone change when it meets all standards, as here, and go so far as to instruct the decisionmaker to approve a zone change with conditions if possible. MCC 16.22.010. The public interest is also served by avoiding expensive and resource consuming land use fights. As conditioned, it is next to impossible for the City to have any plausible basis to appeal the hearings officer's approval of the requested zone change to the Board of Commissioners or to LUBA.

Moreover, MCC 16.22 provides another way to limit allowed uses. Under MCC 16.22, instead of conditions on the zone change, the County is free to apply a limited use overlay zone. The procedure for doing so is specified in MCC 16.22.030. MCC 16.22.030 expressly states that the possibility of the application of the limited use overlay zone "is not necessary to mention in the hearing notice of a rezoning." MCC 16.22.010 expressly directs the hearings officer to use the overlay zone tool, "rather than deny a zone change". It further specifies that "the limited use overlay can be used to identify the appropriate uses" and can "delete objectionable permitted or conditional uses from the zone or to limit, modify or restrict a specific permitted or conditional use." That is what such an overlay zone if applied here would accomplish.

Per MCC 16.22.033(A), a limited use overlay must include findings that "no zone has a list of permitted and conditional uses where all uses would be appropriate." Here there is no zone that allows all UT uses and the CG specialty trade contractor use and associated warehousing.

Per 16.22.030(B) requires findings that "The proposed zone is the best suited to accommodate the desired uses." While no particular use is proposed, the applicant has made clear that it is its intention to eventually seek approval for a specialty trade contractor establishment and associated warehousing. The proposed CG zone with the limited use overlay is best suited to accommodate that use – in fact, there is no other zone that can do so.

Per 16.22.030(C) there must be findings that "it is necessary to limit the permitted or conditional uses in the proposed zone." As explained under a similar requirement for a conditional zone change, the City complains that the CG zone's unconditioned suite of authorized uses is too broad until the property is annexed to the City. In response, the applicant seeks to impose the limited use overlay that restricts uses to what is allowed now plus a specialty trade contractor and their associated warehousing. The only and the undisputed evidence in the record demonstrates, unequivocally, that the impacts from that one additional use type that the zone change would allow are either the same as or significantly less than other uses that are allowed in the existing UT zone. Accordingly, there is simply no possibility that the approval of the proposed zone change can result in any uses that the City says that it would find objectionable before annexation and provision of City services. Therefore, to meet the City's concerns, the limited use overlay zone must be imposed. Like with a conditional zone change, under a limited use overlay, it is next to impossible for the City to have any plausible basis to complain about the allowed uses following the proposed zone change.

Per MCC 16.22.030(D) imposition of the limited use overlay requires findings that "The maximum number of acceptable uses in the zone have been retained as permitted or conditional uses. The ordinance adopting the overlay zone shall by section reference, or by name, identify those permitted uses in the zone that become conditional uses and those permitted or conditional uses that are deleted from the underlying zone". The proposal here easily meets this. Findings would simply provide conforming findings along the lines specified below:

The overlay zone shall apply until such time as the subject property is annexed to the City of Woodburn when the City will apply its commercial zone to the property. Until the time of

annexation, the overlay zone shall be applied to the subject property and shall authorize the following uses:

> All of the uses permitted in the UT zone under MCC 16.13.010 (permitted uses) and MCC 16.13.030 (conditional uses).
>
> A single specialty trade contractor and such trade contractor's associated warehousing which is allowed under MCC 16.07.010(3) except that outdoor storage shall be prohibited.

The hearings officer should apply either conditions, a limited use overlay, or a combination of the two to condition the use as the applicant has requested as follows:

- Until such time as City annexation and provision of City services, the uses allowed under this zone change approval are limited to those uses allowed as permitted, conditional and special uses in the UT-5 zone plus a single specialty trade contractor and such trade contractor's associated warehousing.
- Creative and its successors shall not object to annexation to the City.
- Creative and its successors will hook up to City water and sewer when it is available at the Subject Property,
- Creative will dedicate right of way along its Highway 99 frontage as shown on the submitted site plan, which shall be made an Exhibit to this approval decision. The applicant is not required to develop the subject property under the site plan. The applicant may develop the property with any of the uses allowed in the approved zone under this zone change, as conditioned. Rather, the site plan is provided and attached to the approval decision only to show the area of the required Highway 99 frontage land dedication which Creative has volunteered to provide.
- "Prior to the issuance of a building permit, the applicant shall execute and record, on a form approved by the City Attorney, or if the City Attorney does not wish to review and approve then by County Counsel, a Non-Remonstrance Agreement (Agreement). This Agreement shall apply to the subject property and shall:
    - Include a covenant running with the land, binding upon the applicant and all successors, which states that the applicant (and successors) will not object to the formation of, nor withdraw from, any local improvement district (LID) or other public financing mechanism established for the design, acquisition, and/or construction of street or right-of-way improvements benefiting the subject property.
    - Acknowledge that the applicant and successors will be responsible for payment of their equitable and proportionate share of the cost of any such improvements.

- Clarify that the obligation to pay arises if and when the improvements or LID are formed or constructed, and that the share allocated to the property shall be assessed in accordance with applicable laws and regulations.
- Be recorded in the office of the Marion County Recorder."

- Any driveway and parking spaces shall be paved consistently with the requirements of WDC 3.04.04 and 3.05.02F.

MCC Zone Change Criteria

The proposal meets the only standards that apply – the MCC approval criteria for a zone change outlined in MCC 16.39.050.

1. MCC 16.39.050(A) requires a demonstration that: "The proposed zone change is appropriate for the Comprehensive Plan land use designation on the property and is consistent with the description and policies for the applicable Comprehensive Plan land use classification." This standard is met because the proposed zone change conforms to the subject property's Commercial plan designation that applies. The proposal is also consistent with the applicable Comprehensive Plan land use classification. The land use classification is a County land use classification. The land use classification is an economic one as opposed to a housing, natural resource or other type of classification.

The applicable Comprehensive Plan that governs the County CG zone is the Marion County Plan. The Marion County Plan (MCP) specifies several economic development policies that govern the County's CG zone. The proposal is consistent with the County's economic element policies. In this regard, the MCP "Economic Element" contains nine "major economic goals". The proposal is consistent with all of them.

The proposal meets Economic Element(a), which states that it is a major economic goal of the County to ensure the "Provision of increased employment opportunities for all residents of the County." The proposal does that by providing the option for not only UT zone uses but also for a badly needed home base for specialty trade contractors who employe residents of the County in family wage jobs.

The proposal is consistent with Economic Element(b), which states that it is a major economic goal of the County to ensure the "maintenance of a strong agricultural economy." The proposal has no impact on this goal and therefore is consistent with it. The proposal does not detract from the agricultural economy because its impacts are deminimus on the only agricultural operator in the area which is across Highway 99. It allows uses now allowed in the UT zone and a single specialty trade contractor and associated warehousing only. The specialty trade contractor use has either substantially the same or fewer impacts than UT zone uses.

The proposal is consistent with Economic Element(c), which states that it is a major economic goal of the County to ensure the "Preservation of appropriate areas for timber production." The proposal has no impact on this goal and therefore is consistent with it because

there is no land anywhere near the subject property that is now in or appropriate for timber production.

The proposal is consistent with Economic Element(d), which states that it is a major economic goal of the County to ensure "Diversification of the economic base of communities, and expansion of seasonal employment opportunities to year-round status wherever possible." The proposal is consistent with this goal because it allows a variety of year round employment to include a type not now allowed on the property, providing diversification of the economic base of the Marion County community.

The proposal is consistent with Economic Element(e), which states that it is a major economic goal of the County to ensure "Provision of sufficient areas for future industrial land use." The proposal has no impact on this goal and therefore is consistent with it. The property and area are not now designated for industrial use and that is not changing one way or the other under the proposal.

"The proposal is consistent with Economic Element(f), which states that it is a major economic goal of the County to ensure "Development of a transportation system for the safe and efficient movement of persons and goods for present needs." The proposal is consistent with this goal because it provides the necessary dedication of land for Highway 99 to have its desired width, something that it does not now have.

The proposal meets Economic Element(g), which states that it is a major economic goal of the County to ensure "Coordination of planning and development of public facilities." The proposal is consistent with this goal because it provides a specific mechanism that does not now exist, to ensure annexation and connection to City services occurs when the City wants that to happen as opposed to the City having to deal with an objecting owner. The proposal is also consistent with this goal because it does not seek approval of nor does it require any connection to any City water or sewer before annexation occurs.

The proposal is consistent with Economic Element(h), which states that it is a major economic goal of the County to ensure "Development of a strong tourist economy in appropriate areas." The proposal has no impact on this goal and therefore is consistent with it. The same uses that could be developed on the property now, can be developed on the property in the future (until a new commercial zone is applied upon City annexation), with the one exception the proposal allows of an additional allowed use being provided – a specialty trade contractor and their associated warehousing. The area is not designated by the City or the County as an "appropriate area" for tourist related uses. The fact that there is a wrecking yard next door to the subject property makes it implausible in any case that the property could deliver any sort of benefit or addition to the tourist economy. Tourists are not going to want to hang out next door to a wrecking yard.

The proposal is consistent with Economic Element(i), which states that it is a major economic goal of the County to ensure "Achievement of a natural resource use pattern which provides for tomorrow's needs, today's needs and the protection of the environment." The

proposal has no impact on this goal and therefore is consistent with it. The subject property is not in an area with any sort of a "natural resource use pattern" now and given that it is in the City's UGB with no particular natural features on or around it, is not in any position to become a natural resource area.

2. MCC 16.39.050(B) requires a demonstration that: "Adequate public facilities, services, and transportation networks are in place, or are planned to be provided concurrently with the development of the property." Here, there is no dispute that the subject property can adequately be served by a private on site septic system and domestic well and storm water facilities. Similarly, there is no dispute that Highway 99 has no capacity or other limitations at the subject property.

3. MCC 16.39.050(C) requires a demonstration that: "The request shall be consistent with the purpose statement for the proposed zone." The proposal meets this standard. Applying the CG zone is appropriate because that zone's purpose (MCC 16.07.000) states that the CG zone will be applied in circumstances present here: "The commercial general zone is appropriate in those areas designated commercial in the applicable urban area comprehensive plan where the location has access to an arterial street or highway for transport of bulk materials and where impacts associated with permitted uses will not create significant adverse impacts on local streets or residential zones."

The subject property is designated Commercial in the applicable urban area comprehensive plan.

The property is located on Highway 99, an arterial street.

The impacts associated with permitted uses as a matter of law cannot create significant adverse impacts on local streets, because it has no impact at all on any local street.

The impacts associated with permitted uses as a matter of law cannot create significant adverse impacts on residential zones either, because there are no residential zones anywhere nearby. *See* Applicant's Hearing PowerPoint Slide 24.

Regardless, the impacts from the allowed uses under the proposal are no different than and as to the single CG zone use that will be allowed are significantly less than, uses allowed in the existing UT zone.

4. MCC 16.39.050(D) requires a demonstration that: "If the proposed zone allows uses more intensive than uses in other zones appropriate for the land use designation, the proposed zone will not allow uses that would significantly adversely affect allowed uses on adjacent properties zoned for less intensive uses." The proposal meets this standard because it does not allow uses that are more intensive than other zones appropriate for the Commercial land use plan designation. There is no dispute that the uses in the CR zone are more intensive than the proposed zone change here. However, County staff claims that the proposal will allow uses

that are more intensive than uses allowed in the CO zone. This is mistaken and is not supported by *any* evidence in the record.

The CO zone allows elementary and secondary schools, vocational schools, schools and educational services not elsewhere classified, public buildings and structures such as libraries, fire stations and public utilities, nursing care facility, public golf course, automobile parking, religious organizations, national security and international affairs and so forth. Those uses are far more intensive than the one new use introduced by the proposed CG zone. Further, per MCC 16.05.010(4), the CO zone allows all uses allowed under MCC 16.25. MCC 16.25 in turn allows as accessory uses *all of the uses that are allowed in the CR zone* (MCC 16.06.010). Thus, in the CO zone, general merchandise stores, food stores, eating and drinking places, hotels, gas stations, automobile deals etc are all allowed – so long as they are accessory to a MCC 16.05 use.

So for example, there could be automobile parking plus an accessory café, or a international affairs center and associated accessory retail store and café, or a vocational school teaching automotive repair and associated accessory car sale lot with fueling positions, and so forth. The claim that the CO zone does not authorize uses more intensive than proposed here under the conditional, limited zone change is simply implausible.

There are no other standards – the IGA is not a Standard or Criteria that Applies

Neither the City nor staff have presented anything that makes the "Urban Growth Coordination Agreement" (hereinafter for convenience called IGA), between the City and the County an approval standard for the proposed zone change. It is not a "standard or criteria" under ORS 214.427(3)(a).

The City claims that the IGA is a land use regulation that is applicable to this individual application for land use approval –a zone change -- merely because the IGA was adopted through a legislative process by both the City and the County. According to the City, legislative adoption of what is essentially a contract between the two entities makes the IGA applicable to individual quasi-judicial land use decisions. The City is mistaken and its conclusion does not follow from its own premises.

As the City itself acknowledges, the IGA "required the City and County to agree upon policies and procedures for amending the City UGB and was codified through revisions to both the City and County Comprehensive Plans." *Rebuttal at 2.*[1] In other words, the IGA by its terms is not a self-executing document. It represents an intergovernmental agreement on coordination and policy, but implementation of its terms requires legislative amendments to each jurisdiction's comprehensive plan and land use regulations. The County has made no such amendments.

[1] The City's May 29, 2025 rebuttal was untimely and improper. Applicant has requested it be stricken. But until it is, it provides support for the applicant's position that the IGA does not contain any standards that apply to this quasi-judicial land use application for a zone change.

This expectation is expressly stated in the IGA. For example, the IGA provides that:

> "In order to promote consistency and coordination between the City and County, *both the City and County shall review and approve amendments of the Woodburn Comprehensive Plan that apply to the Urban Growth Area.* Such changes shall be considered first by the City and referred to the County prior to final adoption. *If the County approves* a proposed amendment to the Woodburn Comprehensive Plan, *the change shall be adopted by ordinance and made a part of the County's Plan.* IGA at 3 (emphasis supplied).
>
> "Whenever the County proposes an amendment to its zoning map or regulations for lands within the Urban Growth Area, the County shall provide notice and request for comments on the proposed amendment to the City at least 20 days before the County's initial evidentiary public hearing." IGA at 7.
>
> "If a proposed use is not specifically identified in the Marion County Urban Zone Code, and the County is proposing an interpretation classifying the use as permitted in the applicable zone under the interpretation provisions of the Zone Code, the County shall give the City an opportunity to comment before the County makes a final land use decision." IGA at 9.
> "To facilitate coordination between the City and County, the Woodburn Comprehensive Plan has been amended to incorporate applicable policies and guidelines found in the Marion County Urban Growth Management Plan." IGA at 10.

The Agreement also requires "the County shall adopt a rural resource zone." IGA at 11.

Each of these provisions confirms that the IGA sets out a framework for future action. The agreement itself does not have the force of law as a land use regulation until its provisions are formally adopted through comprehensive plan or code amendments.

This distinction is reinforced by state law. Under ORS 197.015(11), a "land use regulation" is defined as:

> "any local government *zoning ordinance*, *land division ordinance* adopted under ORS 92.044 or 92.046 or *similar general ordinance* establishing standards for implementing a comprehensive plan." ORS 197.015(11) (emphasis supplied).

ORS 197.175(2) further provides that local governments must:

(a) Prepare, adopt, amend, and revise comprehensive plans in compliance with statewide planning goals;
(b) Enact land use regulations to implement their comprehensive plans;

(c) Make land use decisions in compliance with either the goals or acknowledged plans, depending on the status of acknowledgment.

It is therefore insufficient for the City to claim that the IGA qualifies as a land use regulation merely because it was adopted legislatively. While both intergovernmental agreements (IGAs) and land use regulations may be adopted through legislative action, the procedures and legal consequences differ significantly. For example (by no means exclusive):

- IGAs under ORS chapter 190 do not require public notice, evidentiary hearings, or opportunity for appeal.
- Land use regulations, by contrast, must follow strict procedural requirements, including:
    - Submission of the full proposed text to DLCD prior to adoption (*OAR 660-018-0020(2)-(3)*);[2]
    - A public evidentiary hearing before the local decision-maker (*ORS 197.610*);
    - Notice to affected parties and the Department of Land Conservation and Development (DLCD) (*OAR 660-018-0050*);
    - Public participation as required by Statewide Planning Goal 2 (*OAR 660-015-0000(2)*);
    - Submission of the full final text to DLCD after to adoption (*OAR 660-018-0040(3)*); and
    - Opportunity to appeal (*ORS 197.620*), among others.

When two or more local governments are required by coordination agreements to adopt mutually agreed changes to comprehensive plans or land use regulations, all of the above procedural requirements still apply, including joint notice to DLCD. OAR 660-018-0021(1).

Once adopted, the local government must provide DLCD with a copy of the final decision and the amended text of the comprehensive plan or regulation. OAR 660-018-0040(3).

In sum, the IGA does not, by itself, impose land use obligations on the approval of individual land use applications. To convert its provisions to land use obligations on individual quasi-judicial land use applicants in the County, the County must enact the desired through post

[2] "Before a local government adopts a change to an acknowledged comprehensive plan or a land use regulation, unless [an emergency exception applies], the local government shall submit the proposed change to" DLCD, OAR 660-018-0020(1), including "[t]he text of the proposed change to the comprehensive plan or land use regulation implementing the plan, as provided in section (3) of this rule[.]" OAR 660-018-0020(2)(a). "The proposed text submitted to comply with subsection (2)(a) of this rule must include all of the proposed wording to be added to or deleted from the acknowledged plan or land use regulations. A general description of the proposal or its purpose, by itself, is not sufficient." OAR 660-018-0020(3).

acknowledgement amendment procedures for adopting or amending comprehensive plans or implementing regulations. Without this step, the IGA remains a coordination framework, not a land use regulation.

However, even if we pretended otherwise, and the applicant strongly objects to the same, then all of the standards to which the City or County points in the IGA, pertain to the "urban area" which as we explain below, does not include the subject property. Moreover, many pertain to "development" and the proposal is not for "development." It is just a zone change – no more and no less.

Further, if we are going to pretend that the proposal is one for "development" to which the applicant again strongly objects, then the ORS 214.416(8) codification rule applies per the definition of a "permit" in ORS 215.402(4), allowing the County to apply here only those standards that are codified in the County's "zoning ordinance or other appropriate ordinance or regulation" and that the County "shall relate approval or denial" to the County's codified rules. The IGA is not that and neither is the City of Woodburn's code or plan. The IGA provides no basis whatsoever for denial of the application.

The IGA's "Urban Growth Area Policies" do not Apply to the Subject Property

As a precaution and without waiver of the applicant's position that the IGA is wholly inapplicable to the proposed zone change, we address here that, even if the IGA could contain applicable standards, it does not lead to denial of the proposal.

First and foremost, the IGA provisions cited by the City and County staff do not apply to the proposed zone change because they expressly apply only within the "Urban Growth Area." The "Urban Growth Area" is in turn, expressly defined as "the area between the city limits and the Urban Growth Boundary." IGA p 1. A close reading of the IGA reveals that distinction was wholly intended. The point of the IGA was to resolve a periodic review issue with LCDC concerning the establishment of the UGB in the first place and its amendment. This is because LCDC's approvals of the UGB had gone to the court of appeals twice based upon industrial land issues and the "market choice" methodology that the City used to justify its UGB amendment a methodology that LCDC had embraced, and the court decided the UGB amendment had been inadequately justified. LCDC in turn remanded to the City and County to give the UGB amendment another shot in a manner that conformed to the court's remand directives. *1000 Friends of Oregon v. LCDC,* 280 Or App 444 (2014) ("we conclude that LCDC did not adequately explain the reasons that led it to conclude the city's UGB amendment complied with applicable law."), *1000 Friends of Oregon v. LCDC*, 237 Or App 213 (2010).

The IGA established a UGB on remand, established some going forward policies that the two entities agreed to reflect in governing documents.[3] In this regard, the IGA expressly states it was designed to "approve a new land use decision" responding to LCDC's "remand order." IGA, p 1. The fourth "WHEREAS" on the IGA's first page, clause lays out the different areas

[3] The County code was never amended to do so.

and policy concerns that the IGA applies to: (1) that a UGB was adopted in "Response to Remand", (2) "together with policies and procedures for amending the Urban Growth Boundary", (3) for "revising City and County Comprehensive Plans within the [UGB] and outside the city limits", (4) "a coordination process for county land division and land use decisions within the Urban Growth Area (i.e. the area between the city limits and the [UGB]". None of the first three apply – the proposal does not adopt a UGB, does not amend a UGB and does not amend any comprehensive plan.

The question then becomes whether the proposal is subject to the IGA's provisions about the "Urban Growth Area" which is expressly defined in the IGA as "the area *between* the City limits and the [UGB]", but not *within* the UGB. The subject property is *within* the UGB. It is not in any area *between* the City and the UGB and therefore the subject property is not in the "Urban Area". Therefore, it is obvious if not tautologically clear that the standards that expressly apply only to the Urban Growth Area are not applicable to the subject property.

In addition to the express words making this plain, other interpretive maxims reinforce that the words mean what they say in the IGA. In this regard, the IGA clearly knows how to distinguish between the UGB and Urban Growth Area. And, that is strong evidence corroborating that the different words used in the IGA are intended to have different meanings.

A telling example that this is so, is on p 5 pertaining to "Amendments to the Urban Growth Boundary and the Urban Growth Area." Clearly the UGB and Urban Growth Areas are different things being called out separately concerning amendments.

Another example is that policy 6, IGA p 3-4 explains that "the area outside the [UGB] shall be maintained in rural and resource uses" and that certain of those areas "outside the [UGB]" are "designated the Urban Reserve Area" and are "subject to the requirements in Section 6 below."

All of the IGA provisions that the City and County staff report seek to apply to persuade the hearings officer to deny the proposal, apply only to the "Urban Growth Area." None provide a basis for denial because the property is not in the Urban Growth Area, pure and simple.

Even if we Pretend the IGA is a Standard or Criteria, or Codified Land Use Rule or Land Use Regulation (it is none of these) and Pretend that the Property is in the "Urban Growth Area" (it is not), the IGA does not Lead to Denial

Without waiving that the IGA does not apply here and that IGA provisions applicable to the Urban Growth Area do not apply to the subject property, even if you pretend otherwise, the IGA still does not lead to denial of the proposal.

First, it is well established that "whereas" clauses are not "standards and criteria" that apply. They are aspirational statements that do not require anything. The City's request that the hearings officer apply IGA "whereas" clauses to deny should be rejected.

Second, the proposal either complies with or at least is consistent with all "Coordination Policies and Procedures" at p 3-4 of the IGA, as demonstrated below. Neither the City nor County staff argue any others apply.

- RE: Policy 1, there is no dispute that the County retains responsibility for regulating land use until such time and lands are annexed to the City.
- RE: Policy 2 and 3, no one claims the processes identified were not followed.
- RE: Policy 4, the proposal is consistent with the "Woodburn Comprehensive Plan" and the "County's land use regulations." The staff report identifies City plan policies G-1 as problematic. We do not understand that there is a dispute about the proposal's compliance with any other City plan provision – the City certainly does not cite anything. The County staff report goes through the City plan policies staff thinks are relevant, at pages 12-14.
    - RE: G-1-1 – it simply does not apply. It imposes obligations on the City about managing its growth and coordinated population projections. It has nothing to do with the proposal.
    - RE G-1.12 acknowledges that the County has responsibility for regulating land in the UGB until they are annexed to the City and that such land is considered to be "available over time for urban development." There is nothing about the proposed zone change that is inconsistent with this policy.
    - RE: G-1.14, requires that all land use actions in the urban growth area and outside the City limits "shall be consistent with the City's Comprehensive Plan and County Land use Regulations." The proposal is entirely consistent with the City plan and the County land use regulations.
    - RE G-1.17 states that "The County shall not allow urban uses within the [UGB] prior to annexation to the City unless the City agrees in writing." The first obvious problem with this provisions is that the County is not allowing urban uses if it approves this proposal; rather it is allowing a zone change. It is not approving any use. Approval of any uses will happen in a separate process.

      However, regardless, the proposal does not allow any "urban use" whatever that may mean. The proposal allows all of the uses that are now allowed in the UT zone and allows one additional use – specialty trade contractor and associated warehousing – concerning the latter, there is no dispute that use would have fewer impacts than the uses that the UT zone allows. Further, there is no proposal to connect, and no possibility to connect, to any City water or sewer. There is absolutely nothing about the proposal that can translate into an "urban" use. It is simply impossible for the proposal to authorize an "urban use" when its impacts are less than the intensive uses allowed in the *existing* UT zone and will use exactly zero City public facilities.

      Moreover, the term "urban use" is undefined and neither the County nor City have ever been able to come up with a meaning for the term. It is especially meaningless given the subject property is already within an UGB and so is by

definition under every state statute, goal, rule or case addressing what "urban" means, considered "urban" land that is necessarily available for "urban" land uses. *See DLCD v. Jackson County*, 151 Or App 210 (1997) (if a use is allowed under applicable state laws, it cannot be considered an unlawful use under Goal 14). Even the County code considers the land to be "urban" nesting all the governing regulations in the "urban" segment of the County's land use rules, (Chapter 16), versus the "rural" ones (Chapter 17).

As such, the term "urban" in this context is so vague and ambiguous that applying it to deny the proposal deprives the applicant of any way to know what it is that is expected of it for approval, contrary to ORS 215.416(8) – which applies if the proposal is considered seeking approval for the development of a "use. Further, it grants unfettered discretion contrary to the constitutional due process guarantees provided by the 14th Amendment to the federal constitution. Anderson v. Peden, 284 Or 313, 326, 587 P2d 59 (1978); *Renaissance Development Corp. v. City of Lake Oswego*, 45 Or LUBA 312 (2003). Such standards fail to provide sufficient guidance to applicants and the public about what is required to secure approval, thus inviting arbitrary decision-making. And that violates the federal due process clause.

And if the term "urban" in this context is not impermissibly vague, it is utterly unintelligible and violates the unintelligibility principle and may not be applied on that basis as well. *LandWatch Lane County v. Lane County*, 335 Or App 543 (2024).

Finally, the staff and apparent City position concerning this plan provision is absurd and cannot be a correct interpretation of the local rules because they essentially claim that their view of it means that no zone change can ever be allowed. And that is contrary to the County's acknowledged land use regulations that expressly allow zone changes and in fact under the limited use overlay *tell the hearings officer to avoid denial* by imposing restrictions so to approve requested zone changes– just as is proposed here. Such an interpretation of the IGA or City plan that eviscerates the implementation of an acknowledged governing County land use regulation cannot be adopted as lawful or plausible.

The City suggests it might find a zone change on the property from UT to EFU acceptable, but the County's EFU zone has no place in the UGB. The EFU zone is a Goal 3 implementing zone which is for rural land – meaning for land that is OUTSIDE of UGBs.

Regardless, nothing in the County's acknowledged land use rules governing zone changes contains any prohibition on zone changes to any zone when the request otherwise complies with the County zone change standards, as here. Neither County staff nor the City are permitted to make rules up. They must apply the

rules that were adopted and codified by the County governing body. When they do that, approval is appropriate.

- RE:G-1-18, this provision talks about conversion of land "within the boundary to urban uses shall be based *upon consideration* of orderly provision of public facilities and services." (Emphasis supplied). This provision has the same problem using the term "urban" as discussed above and that discussion is incorporated herein by this reference. But regardless, this provision is not a mandatory standard in any case but rather calls for "consideration" of a factor. And even if a "consideration" could be viewed as a standard, "considering" the "orderly provision of public facility and services" his met here because there is no disorder in the provision of public facilities and services proposed in this case. Rather, the property will rely on-site septic and a domestic well and is required per the requested conditions of approval to connect to city water and sewer when it is available at the property. That is about as orderly as one can imagine.

- RE: IGA Policy 5, this policy cannot apply because no changes are proposed to any plan.
- RE: IGA Policy 6 the subject property is not outside the UGB. This policy cannot apply.
- RE: IGA Policy 7 – this policy talks about promoting logical and orderly development within the Urban Growth Area in a cost effective manner. It also says that the County "shall not allow uses requiring a public facility provided by the City" in the Urban Growth Area before annexation. This policy by its terms does not apply regardless of the Urban Growth Araa problem discussed above. The proposal is not for either "development" or for a "use." It is for a zone change.

  Regardless, even if the proposal were for a "use" or for a "development" it is logical – applying the commercial zone to commercially designated property. It is orderly because the allowed uses are consistent with what is allowed right now adding just one more use type that there is no dispute has fewer impacts than uses allowed right now under the existing UT zone. It is also orderly to conform the zone to its plan designation because the subject property is in an area with an intensive junkyard next door on one side and an intensive construction company on the other, and all of these including the subject property, is directly on Highway 99. The subject property and allowed uses under the proposed zone change do not *require* any public facility. Rather, ***the only*** evidence in the record is that uses or development that can be allowed on the property under the proposed zone change can be adequately served by on-site water, septic and on-site storm water. They do not *require* any City service. Period.
- RE: IGA Policy 8 – this policy states that City sewer and water shall not be extended beyond the UGB. This policy does not apply regardless because it is talking about what happens outside of the UGB. The property is in the UGB.
- RE IGA Policy 9, this policy, reasonably read, says that annexation decisions shall be based upon applicable annexation policies in the City plan. There is no proposal for annexation. The proposal is a zone change for land in the county and that will remain

that way. This provision does not apply. If one reads this policy as the County staff and the City apparently do to mean that there can be no zone changes in the UGB, only annexations – first it does not say that, and second such a reading is implausible, and third, such a reading is contrary to the terms of the County's acknowledged regulations governing this zone change. Such a reading also is gibberish and violates both the vagueness and intelligibility rules discussed above and incorporated herein by this reference.

- RE: IGA Policy 10, it simply says that the City shall discourage extension of public facilities into the UGB. It is not a mandatory standard that applies to anyone but the City. Further, there is no proposal to seek the extension of any City public facility intro the UGB. This policy is wholly inapplicable.
- RE: IGA Policy 11, this simply says that the City is the provider of public water, sewer and stormwater facilities within the UGB. No one quibbles with that statement. The policy has no applicability to the proposed zone change. Regardless, by condition it is clear that any development on the property so long as it is in the UGB will connect to on-site septic, a domestic well and on-site stormwater facilities.

The proposal complies with all IGA policies even if they applied – which they do not.

More About the Urban Issue

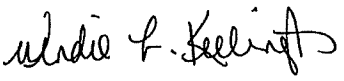
We explain above that the "urban" issue is irrelevant and if shoehorned into relevance it does not have, introduces a standard so vague and unintelligible as to be inapplicable as a matter of law. We point out here only that if the term "urban" has any intelligible and non-arbitrary meaning at all in this case, that it must mean that the proposed zone change will not introduce any uses that require public water or sewer facilities or that have any greater intensity of use than ones permitted now. Under that lens, there is no "urban" problem with the proposed zone change.

No one disputes that as conditioned, the proposed zone change will only allow uses that have the same or fewer impacts than uses now allowed in the UT zone. There is also no dispute that the allowed uses under the zone change will not require or be allowed to connect to public water or sewer. Rather, the only evidence in the record is that any allowed use will be required to be and can feasibly be entirely reliant upon onsite water wells and septic system. With there being no dispute that the uses possible under the proposed zone change are either equivalent to in intensity or less intensive than uses now allowed in the existing zone, as a matter of law the proposed zone change cannot introduce a level of use that cannot now occur and so the proposed zone change cannot result in an "urban use" when the existing UT uses are not considered "urban." The cases and administrative rules dealing with the "urban" question are uniformly talking about uses outside of the UGBs and emphasize that urban uses are characterized by their significant infrastructure demands and the intensity of their impacts on surrounding land. There is no case anywhere that remotely supports the idea that allowing a new low-impact use as can happen under the proposed zone change, that is independent from urban-scale services (public water and sewer), can qualify as an urban use.

State statutes and administrative rules similarly distinguish between "urban" and "rural" uses primarily by considering infrastructure requirements, intensity, and impacts. ORS 197.015(26) defines "urban services" as including public sewer and water systems and typically associates these services with "urban uses." ORS 197.752 emphasizes that urban uses are those dependent upon urban facilities and services. But here, where all uses that can be allowed under the proposed zone change can function independently without urban services means that none of the uses that will be allowed can be considered urban.

It is respectfully submitted that the proposal meets all relevant standards and should be approved, with the requested conditions. Thank you for your consideration.

Very truly yours,



Wendie L. Kellington

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