Dear Ms. Rolfe and Ms. Dibble:

Please forward the following to the parties:


In her October 22, 2013 letter, Ms. McCaffree has requested the opportunity to respond to the letter from Richard Allan, dated October 14, 2013. It is my understanding that Mr. Allan’s letter was timely submitted during the rebuttal period for case number HBCU-13-04. I have been informed that although the letter was timely submitted via email, it was not posted on the County’s website until October 21, 2013. Apparently, this was due to the fact that the letter was submitted by email to Ms. Rolfe and the specific email account at issue was not checked in a timely manner. As a result, Ms. McCaffree and other parties did not have an opportunity to respond within the one week period allotted for responses.

Note: This was an avoidable error, and it would be helpful to all involved if, in the future, staff can develop contingency plans to address this situation.

In light of the error discussed above, the hearings officers agrees to reopen the record for an additional 7 days, until close of business on Nov. 1, 2013, for the sole purpose of responding to Mr. Allan’s October 14 letter. The record shall not be reopened to respond to or rebut any other information previously submitted. The applicant shall be granted 7 days (i.e., close of business on Nov 8, 2013) to submit final written argument. Presumably, the applicant can use its final argument to rebut comments submitted during this final “ad-hoc” rebuttal period.

With regard to Ms. McCaffree’s October 24th letter, it is important to understand the following: I clarified at the hearing for HBCU-13-04, via questioning, that the applicant does not seek to make any changes to the conditions of approval for the 2010 decision. Although HBCU-13-02, if approved, would result in the modification of one condition of approval of the 2010 decision related to the “import vs. export” issue, HBCU-13-04 only seeks approval of two alternative alignments (i.e., the so-called “Branschmid” and “Stock Slough” routes). HBCU-13-04 does not seek a modification of the 2010 approval per se. Nonetheless, because HBCU-13-04 would be a new approval just for the two alternate alignments, that approval will need its own set of conditions of approval. Obviously, the prior approval would provide a good template on which to build a set of conditions for the new route.

At the hearing on Sept. 20, I asked the parties whether all or only some of the conditions in the 2010 approval should be used when formulating the conditions for the two alternate alignments. I asked that question because I sensed that some of the conditions were “geographic specific” or “zone specific” and would not therefore apply to the two re-alignment areas. On the other hand, other conditions previously imposed were, due to their global nature, equally applicable to the alternative routes. Applicant’s counsel said that they would look at that issue and provide a recommendation. Certainly, other parties could have just as easily addressed the issue as well.
As reflected in Mr. Allan’s letter dated October 14, 2013, the applicant believes, not surprisingly, that some of the conditions of approval are not applicable because those conditions relate to geographic areas or zones outside of the boundaries of the realignment area. Mr. Allan’s letter sets forth the applicant’s proposal regarding which conditions should apply to the two alternate alignments.

To the extent that Ms. McCaffree or other parties believe that the applicant incorrectly seeks to exclude other specific conditions that were previously imposed by the County in Order No. 10-08-045PL and 12-03-018PL, then the hearings officer would value that input. Likewise, since the applicant has proposed to modify some of the language of prior conditions for use as new conditions related only for the alternative alignment, a critique of those modifications is also fair game. However, this is undoubtedly a very narrow topic, and it does not seem that new evidence is required to rebut the specifics of Mr. Allan’s letter.

Lastly, in Ms. McCaffrey’s October 24, 2013 letter, she seeks to have the hearings officer exclude Mr. Allan’s letter on the grounds that it contains “new evidence.” I understand Ms. McCaffree’s confusion, as this topic is inherently difficult to articulate. However, the Allan letter does not contain new “evidence” as that term is defined in state law. See ORS 197.763. Rather, the letter is responsive to my request made at the hearing, to ferret through the prior conditions of approval and opine on which conditions have relevance to the alternative alignments. If anything, I was simply asking the applicant (and other parties) to do some of the “grunt” work in developing appropriate conditions of approval for this specific application. Typically, this sort of “grunt” work could be included in the staff report and perhaps, given the circumstances, even in the land use application. Nonetheless, that did not occur in this case, as far as I have been able to tell. By seeking input from the applicant and others, I was seeking to avoid the situation where the County imposed conditions that had no relevance of the alternative alignment or were worded in a manner that created unnecessary ambiguity or controversy down the road.

Thank you for your attention to this matter.

Andrew

Andrew H. Stamp
Attorney at Law
Kruse-Mercantile Professional Offices, Suite 16
4248 Galewood Street
Lake Oswego OR 97035

Tele: 503.675.4318
Fax: 503.675.4319