MONDAY, SEPTEMBER 30, 2024
6:00 PM
LAND USE PUBLIC HEARING MINUTES
HEARINGS OFFICER DANIEL KEARNS PRESIDING
SCAPPOOSE COUNCIL CHAMBERS
33568 EAST COLUMBIA AVENUE
SCAPPOOSE, OREGON 97056
&
ONLINE VIA MICROSOFT TEAMS

The meeting recording can be viewed here: https://youtube.com/watch?v=GMZpHTeYF0M

Call to Order

Hearings Officer Daniel Kearns called the September 30, 2024 land use public hearing to order at 6:00 pm.

Roll Call

Daniel Kearns	Hearings Officer
Laurie Oliver Joseph	Community Development Director
Chris Negelspach	City Engineer
N.J. Johnson	Associate Planner
Susan Reeves	City Recorder
Josh Soper	Legal Counsel
Garrett Stephenson	Applicant Team
Matt Sprague	Applicant Team
Brent Fitch	Applicant Team
Dave Cady	Applicant Team
Steve Puls	Applicant Team
Max Bondar	Applicant Team
Joel Haugen	Primary Opponent (provided testimony)
Shannon Hubler	Opponent (provided testimony)
Judy Haugen	(Named but did not provide testimony)
Monica Ahlers	(Named virtually but did not provide testimony)
Unnamed members of the audience	

New Business

Public Hearing - Buxton Ranch Planned Development and Subdivision Remand (LUBA Case No. 2023-01) (Local File # SB1-22, ZC1-22, CU1-22, SLDP (1-22, 2-22, 3-22, 4-22))

Daniel Kearns: Good evening, everyone. I'd like to call to order tonight's hearing. It's September 30, 2024. My name is Daniel Kearns; I am an Oregon land use lawyer and a hearings officer and will be presiding over this application on remand from the Court of Appeals and LUBA. This is *Haugen v. City of Scappoose*, LUBA No. 2023-001. The Scappoose City Council elected to remove itself from the process and have an independent land use hearings officer hear and decide this matter on remand from LUBA and the Court of Appeals. As most of you know, hearings officers are a common decision-making pathway, especially in jurisdictions that see a lot of appeals or particularly technical or legalistic land use proposals. My job is to take testimony, review the record, weigh the credibility of evidence, crystalize the legal issues, and render a decision. Before we get going, I will explain how I plan to proceed tonight, make a few statements required by State law to describe public participation rights and the schedule of events on how this will work. I have been appointed by the City Council to hear and decide this application on remand by reviewing the record from below, the applicant's materials on remand, along with all comments following remand, and then holding a public hearing to accept evidence and testimony as specifically directed by LUBA and the Court of Appeals in their remand orders. The entire record from the prior proceeding is part of the record before me. Ultimately, my job in this matter is to decide whether the application meets or does not meet the applicable approval criteria. Those are the standards from the City's Development Code and other standards that were in place on the date this application was submitted and those are the criteria that establish the outer limits of my authority in this case. I cannot be more stringent nor more lenient than those criteria allow. Rather, I am required to interpret them and determine whether they are met or not met, or whether compliance can be assured through conditions of approval. If the application demonstrates compliance with these standards, State law requires that I approve the application. The applicable approval criteria were listed and analyzed in the staff report that was issued prior to tonight's hearing, which also includes staff's recommended findings on each of those standards along with conditions of approval. A copy of the staff report can be obtained from the City's website and staff will provide a brief verbal report summary of that tonight. The issues before me in this remand are limited to those identified by the Court of Appeals and LUBA in their respective remand orders related to assignments of error #2, #3, #4 and #7 and nothing else. If any of you believe that other or different criteria apply, you must identify those standards and explain to me why you believe they apply. In deciding this proposal, I am required to render an impartial and unbiased decision. I believe that I am impartial and capable of rendering an unbiased decision based on the evidence in the record, the applicable criteria, and LUBA's and the Court of Appeals' remand orders. I have no business, personal, or familial relationship with any of the parties to this proceeding. What I know about this application is what I have gleaned from the record. If anyone wishes to question me about my potential biases, conflicts of interest, or ex parte contacts, you may ask those questions during the public testimony portion of tonight's hearing. Now some procedural statements required by State law: First, this is not the initial evidentiary hearing in this matter, but I will take testimony from anyone who wants to participate. The issues I will allow testimony on, however, are limited to those identified by the Court of Appeals and LUBA in their respective remand orders related to assignments of error #2, #3, #4 and #7 and nothing else. The applicant will be allowed 15 minutes for its presentation, as will the primary opponent, Mr. Haugen. I will allow anyone else who want to testify 3 minutes each. As I read LUBA's final remand order, new evidence is appropriate in response to the 2nd assignment of error and legal argument based on the existing record is appropriate in response to assignments of error #2, #3, #4 and #7. State law provides the following definitions for these operative terms: 1) "Argument" means assertions and analysis regarding the satisfaction or violation of legal standards or policy believed relevant by the proponent

to a decision. “Argument” does not include facts; and 2) “Evidence” means facts, documents, data, or other information offered to demonstrate compliance or noncompliance with the standards believed by the proponent to be relevant to the decision. When you testify, please begin with your name and the city where you reside and limit your testimony to just the issues on remand as I have described them. These relate to a relatively small subset of the standards from the Scappoose Development Code, Comprehensive Plan, and other development standards adopted by the City that applied to the original application on the date it was submitted. My decision is limited to these criteria, which will be summarized by staff before public testimony begins so you should tailor your testimony to those criteria. If you believe that other or different criteria apply, you must identify those standards and explain why you think they apply. If you need additional time to prepare your comments, you can ask that the record be left open after tonight’s hearing. If you want that, you must make the request during the public testimony portion of the hearing while the record is still open and give me some justification as to why you want or need more time. Understand, however, that there are limited bases under Oregon law for keeping the record open after the hearing, and I will only keep the record open if there is a legally compelling reason to do so. My decision on this project will be City’s final decision, but that will not become final until the City Council implements it through the adoption of a suitable ordinance. Once that happens, the decision may be appealed to LUBA by anyone with standing. The City Council will not rehear the remand on this project, but will simply accept, modify or reject my decision. So in a sense, my decision, which will be issued in writing approximately 2 weeks after the record closes, will go to the City Council as a recommendation. The City Council will be the final decision maker in this case and that will come in the form of an ordinance adopted by Council. To appeal any aspect of my decision, you must participate either orally or in writing before the record closes and you must raise before me any issue you want to preserve for a subsequent appeal to LUBA. You must also present to me any evidence you want me to consider or which you want to rely upon in a subsequent appeal. Failure to raise an issue while the record is open with sufficient specificity to allow me or others to respond to the issue will preclude a subsequent appeal based on that issue. Failure by the applicant to raise constitutional or other issues related to proposed conditions of approval with sufficient specificity to allow me to respond to the issue will preclude an action for damages in circuit court. Let me describe the sequence of events for tonight’s hearing: First, we’ll have a staff report, which will be a verbal rendition of the written staff report that was issued prior to tonight’s hearing. Next, the applicant can make its presentation. Time will be limited to 15 minutes. After that, I will take public testimony from anyone in favor of the proposal. Those speakers will be limited to 3 minutes each. After that, I will accept neutral testimony or questions, again, limited to 3 minutes each. After that, I will accept testimony from anyone opposed to the proposal, beginning with the primary opponent, Mr. Haugen, to whom I will allot 15 minutes. All other individuals opposed will be limited to 3 minutes per person. After all public testimony, the applicant gets a final rebuttal, for which I will allow 10 minutes. The applicant may also submit written final rebuttal after tonight’s hearing, as State law allows. Under Oregon law, the applicant gets the last word in this proceeding because the applicant has the burden of proof – the burden of proving that the proposal meets all of the applicable approval criteria. At the end before I close the public testimony portion of the hearing, I will check to see if staff have any final advice to offer in response to tonight’s public testimony. I typically issue my decisions in writing approximately 2 weeks after the record closes so you should not expect a verbal ruling from me at the conclusion of tonight’s hearing. If you want a copy of my decision, make sure that you sign up with City staff. That’s it by way of a procedural run-down for tonight’s hearing. Does anyone have any questions about the process?

No questions were raised.

Daniel Kearns: We have a few folks online so I will turn to City staff for a briefer on how to participate virtually.

N.J. Johnson: If any of you are interested in providing testimony tonight, use the raise hand feature in Microsoft Teams.

No online attendees signed up to testify.

N.J. Johnson: For folks in the room, please make sure you complete this form and submit it to me if you would like to provide testimony tonight.

Daniel Kearns: If anyone has procedural questions as we go, please raise those so that everyone understands how to participate. With that, we'll take a staff report please.

Laurie Oliver Joseph: Good evening, Hearings Officer Daniel Kearns and interested parties. Tonight, I will summarize the staff report, state the issues on remand, the approval criteria that apply to the issues on remand, summarize the public comments received, staff's response to those comments, and provide staff's recommendation on the application. The applicant requests that the Hearings Officer affirm City Council's decision for approval of a 44-lot Subdivision, Planned Development, Conditional Use, and Sensitive Lands Development Permits for Floodplain, Wetlands, Slope Hazard, and Fish & Riparian Corridor, specifically in relation to items remanded by LUBA Case No. 2023-001. As a side note, David Weekley Homes initially requested approval for a 48-lot subdivision; however, the City Council authorized no more than 44 lots with a minimum square footage of 4,000 square feet as a condition of approval in its final decision in 2022. The site is located south of SW JP West Road and Captain Roger Kucera Way, described as Columbia County Assessor Tax Lot 3212-CB-00401. The City provided notice of the upcoming hearing to City departments and public agencies, including the City of Scappoose Engineering, Public Works, Police Department, Building Department and City Manager; Scappoose School District Superintendent; Scappoose Rural Fire District; Columbia County Public Works; Columbia River People's Utility District; Scappoose Bay Watershed Council; and Oregon Department of Fish and Wildlife. Agency and department comments that were received by the City, are included as Exhibits B (1-4) in the remand staff report. No concerns were raised in these comments. On September 20, 2024, notice of the Remand Public Hearing was mailed to property owners located within 300 feet of the subject site and to those who provided comments during the previous land use hearing. Notice was also posted on the property on September 17, 2024, and published in the local newspaper on September 20, 2024. As of 1:00 pm on the date of this report, no comments had been received by the public. However, two public comments were received on September 26th, which were placed online on September 27th with all other items from the record for this proceeding on the City's website, copies of which are on the back table. The public comments have been entered into the record and placed before the Hearings Officer, who was emailed the comments on September 27th. I will summarize these comments and staff's response to those comments towards the end of my staff report presentation. The staff report is narrowly focused on addressing the four distinct issues remanded by LUBA (Case No. 2023-001) to the City to address. The issues on remand are as follows: 1) Second assignment of error: LUBA determined that "The City must allow interested parties to respond to the

applicant's statement that "44 was the number of lots the applicant could make "pencil" while protecting the Creek and providing a minimum lot size of 4,000 square feet"; 2) Third assignment of error: The City must adopt written findings concerning whether a reduction in lots from 48 to 44 and requiring a minimum lot size of 4,000 square feet would make the project non-compliant with the applicable criteria for approval; 3) Fourth assignment of error: The City must adopt written findings that address whether the construction of stormwater ponds are a permitted use within the floodplain; and 4) Seventh assignment of error: The City must adopt written findings to adequately explain how the evidence in the record leads to the conclusion that the City Planner and City Engineer approved an exemption from the City's block length standards in Scappoose Development Code (SDC) Section 17.154.040 and to explain why the street is not a cul-de-sac, or if it is a cul-de-sac, adequately address the cul-de-sac standards. The third, fourth, and seventh assignments of error do not require the City to open the record for new evidence, only to adopt adequate findings demonstrating compliance with the applicable approval criteria related to those issues, which is already contained within the previous record. For that reason, the City will only consider new evidence related to the second assignment of error. Verbal or written arguments may be made regarding any of the assignments of error using information already in the record. Findings and conditions of approval for the current remand process are contained within the remand staff report. The approval criteria related to this remand are Comprehensive Plan Goals and Policies related to general goals for land uses and the suburban residential land use designation; Chapter 17.22 - Amendments to the Title, Comp Plan and Maps; Chapter 17.81 - Planned Development Overlay; Chapter 17.130 - Conditional Use; and Chapter 17.154 - Street and Utility Improvement Standards. I will now provide a summary of the submitted written public comments. Both written public comments received were from Mr. Haugen. The first comment and Item No. 1 from the second comment relate to whether or not the City Council has the ability to delegate their quasi-judicial decision-making authority to a hearings officer. Staff asserts that this is allowed, which was determined in conjunction with the City Attorney. The reasons for this are as follows: 1) There are no provisions within the Scappoose Municipal Code (SMC) or City Charter that govern the process for how a remand is handled, including a remand hearing; 2) SMC 2.04.170(A) - Miscellaneous, states, "Any procedural matter not covered by the Charter or by a rule adopted by the council shall be resolved by a majority vote of Council. The Council voted on June 12, 2024, by a majority vote, to delegate their quasi-judicial decision-making authority to a hearings officer; 3) The City also enjoys home rule authority under the City Charter Sections 4 and 5; and 4) Additionally, LUBA has previously found that, "A local government also enjoys considerable discretion in selecting the procedures it will follow on remand" *Siporen v. City of Medford* (2007). In regards to Mr. Haugen's second comment, 1) Mr. Haugen submitted the 2023 Stormwater Master Plan (SWMP) and Figure 2-4 to "identify stormwater approval standards relevant to whether the Buxton Ranch development complies with the Comprehensive Plan and land use regulations"; 2) The second assignment of error requires the City to allow parties to respond to the evidence that was entered by the applicant when the record was reopened during the December 12, 2022 City Council hearing in connection with the introduction of the condition of approval limiting the number of lots to 44 and increasing the minimum lot size to 4,000 square feet. This new evidence now being introduced by Mr. Haugen bears no relationship to that prior evidence and is outside the scope of the second assignment of error. Mr. Haugen's broad characterization of the scope of the remand on the second assignment of error would allow introduction of evidence to revisit every aspect of the application, which was clearly not LUBA's intent on remand. In short, the evidence being presented is not relevant to the issues on remand; 3) The evidence Mr. Haugen seeks to introduce also does not constitute standards or criteria applicable

to the application, because it was adopted by the City after the land use application in this case was submitted. The SWMP was adopted on May 15, 2023 via Ordinance 915. The Buxton application was submitted on February 23, 2022. Therefore, the 2023 SWMP is not applicable to the Buxton Ranch application in any way per ORS 227.178(3) - the Goal Post Rule since it had not been adopted yet when the Buxton Ranch application was first submitted; 4) Mr. Haugen misconstrues the purpose and effect of the SWMP and the maps in question. He has superimposed the project site onto Figure 2-4 incorrectly. The project site is located further west on site than depicted in Mr. Haugen's exhibit and states that since it is located within the area identified as floodplain and wetlands and since it is not within the hatched area labeled as developable, this means that the application is not consistent with the Comprehensive Plan and applicable land use regulations and should be denied; 5) However, the SWMP does not contain approval standards related to land use applications. The land use regulations and approval criteria related to storm drainage are contained in SDC 17.154.100. Findings were included in the Planning Commission staff report dated October 20, 2022 related to this criterion, which is included as Exhibit 3 to the applicant's remand narrative. The findings were accepted by the City Councill in their original decision and are not the subject of the current remand; 6) Figure 2-4, a planning level map in the 2023 SWMP, is not the governing floodplain or wetland map for the City in terms of regulating land uses, nor does the term "developable" on a planning level map relate to any criteria in the Development Code that would be recognized as enforceable to a specific land use application; 7) The flood insurance rate map (FIRM), approved by FEMA, is the official map the City uses to regulate floodplain development, as stated in SDC 17.84.030(B); 8) The applicant completed wetland delineations, approved by the Department of State Lands to determine the regulatory wetland boundaries on site, included as Exhibit 15 to the Planning Commission staff report; 9) The applicant completed a Letter of Map Revision (LOMR), approved by FEMA, to determine the current regulatory floodplain boundary, included as Exhibit 8 to the Planning Commission staff report; and 10) Staff's response to the submitted comments are entered into the record as additional findings and reduced to writing, which has been given to the Hearings Officer as well. Staff is also submitting a memo to the Hearings Officer tonight regarding the fourth assignment of error. I previously made the statement contained in the memo verbally during the December 5, 2022, Council hearing, which is included in the minutes for that meeting and is part of the record. However, the statement was not previously reduced to writing and included in the findings for approval, but the statement is entered now into the written record as additional findings to demonstrate that stormwater ponds are a permitted use within the floodplain. Copies of this statement are provided on the table at the back of the room. Based on the findings and conditions of approval as stated above, staff recommends approval of SB1-22, ZC1-22, CU1-22, SLDP 1-22, 2-22, 3-22 and 4-22.

Daniel Kearns: Just to be clear, the statement you spoke about from December 5, that's already in the record?

Laurie Oliver Joseph: It's in the record.

Daniel Kearns: Thank you. I'll take the applicant's presentation please.

Garrett Stephenson: Thank you and good evening, Mr. Kearns. My name is Garrett Stevenson, legal counsel for the applicant. I want to start by thanking staff for the staff report. I'm largely going to stand on my written materials that I submitted. I'm going to briefly touch on the issues here to prompt any

questions that you may have for the applicant and in furtherance of that, we've got quite a team here for you tonight. With me is Matt Sprague, who's the project planner. Brent Finch is the project engineer. And then we've got Dave Cady, Steve Puls, and Max Bondar from David Weekly Homes in case you have any questions of them. But as this is, from our standpoint, purely a legal proceeding that does not require new evidence on our part, I'm guessing you probably do not. There are 4 assignments of error that through LUBA and the Court of Appeals, trickled down to us that we're here to take care of tonight. Assignments of error #2 and #3 address the change that was made at the December 5, 2022 hearing to require the applicant to reduce the project scope from 48 lots down to 44. That was imposed as a condition of approval under ORS 197.522(3), which, as you know, gives the right to the applicant to recommend a condition of approval if it looks like approval will not be forthcoming. This was to address SMC 17.81.050(C)(3), which is a mechanism in the City's Code that allows you to obtain up to I believe 25% additional density if you're going through the plan development application process. In this instance, some 56% of the site is being reserved for open space and in order to do that, we used the plan development process so that we could cluster the homes outside of the open space and as far away from the Creek as possible. Originally, the application took advantage of that 25% allowance, although certainly not fully. The base zoning of the R-1 zone if you calculate just based on the area of the property, allows a maximum density 46 lots. We came in at a very small amount over that, which is allowable under the code, at 48 lots. However, the Council expressed some concerns with that level of density and we reduced it down to 44 lots, which is 2 lots less than the standard density allowed in the R-1 zone. LUBA originally denied the second assignment of error on the basis that our acceptance of that condition, in particular my testimony that the applicant could make that pencil, was not evidence pertaining to the criteria. The Court of Appeals disagreed and in its assignment of error that was passed then down to us from LUBA, decided that we needed to reopen the record to allow testimony in response to the reduction in lots from 48 to 44. A related assignment of error is assignment of error #3, which concerns findings regarding a 44-lot project as opposed to a 48-lot project. When we originally looked at this, we had reasonable assumptions, as did City staff, that from an impact standpoint, a 44-lot project would be less impactful than a 48-lot one. And that concerns things like maximum amounts of impervious surface, the number of homes being built, the assumptions in the traffic study, and those sorts of items. We originally won the third assignment of error at LUBA but the Court of Appeals assigned this as an error, basically taking the position that we needed to have some additional or corrected findings and conditions of approval on the decision that explained how a 44-lot subdivision would still work. LUBA originally said because the petitioners in that case had not argued that we failed to meet any criteria with a 44-lot project, there's really nothing more to say but the Court of Appeals disagreed. You have in my August 8th written materials is a list of findings and conditions of approval that we believe needed to be updated based on a 44-lot project instead of a 48-lot project. Any questions so far, Mr. Kearns?

Daniel Kearns: You've provided your proposed revisions to the original decision that correspond with your arguments now on remand that respond to the remand order?

Garrett Stephenson: Correct, we did the best we could to go through the findings that were in the staff report that was adopted as the City's findings and make sure that those correlate to a 44-lot project to demonstrate that it can still meet the criteria. My position is that since this was adopted as a condition of approval, we need not completely change the project; we just need to be able to show that complying with that condition is reasonably feasible. The intent of our proposed findings is to

demonstrate how a 44-lot subdivision can still meet the criteria as well as a 48-lot subdivision can. This does take SMC 17.81.050(C) out of play since we no longer need the density bonus. Assignment of error #4 concerns SMC 17.84.040(B) and this is not an assignment of error that's subject to new evidence but when the application came in, one of the things it proposed and still proposes is an extension of Eggleston Lane. In order to provide sufficient stormwater capacity for Eggleston Lane, we needed to provide adequate detention and treatment. One of the ways that David Weekly Homes proposes to do that is to use a stormwater planter and staff supported that. However, one of and I think a portion of another of those stormwater planters are located in the existing 100-year special flood hazard area. If the project is approved, it will not always be in the flood hazard area because under our approved CLOMR from FEMA, once the grading is completed, those areas will be lifted out of the 100-year floodplain. However, staff determined that this was allowable under two theories in addition to those articulated in the staff report. One of those is the allowance under 17.84.040(B)(3) that concerns the installation, reconstruction, or improvement of underground utilities or roadway improvements, particularly sidewalks, curbs, streetlights, and driveway aprons. They also explain that this is allowable under SMC 17.84.040(B)(8) as a public works project. The Community Development Director's testimony that she quoted and inserted into her memo that she discussed earlier has a verbatim discussion of this. In simple terms, in that area of Scappoose, there is no publicly owned stormwater infrastructure; it is privately owned subject to public easements as this will be too. Staff's proposed interpretation of this, which the Council agreed with, was that because these function in every way as a public facility treating stormwater from a public road, they could be considered public works projects and therefore, allowable under 17.84.040(B) and our written materials explain this in more detail, but I'm happy to answer any questions you have on it.

Daniel Kearns: Where are you in the FIRM amendment with FEMA?

Garrett Stephenson: We have our we have our conditional letter of map revision that was actually approved before we submitted the application. That means once we are allowed to start work out there, we would go in and do the grading, elevate the site that we're developing above the floodplain, and once that is concluded, the City will inspect that and then we would apply for a letter of map revision from FEMA, which basically confirms that the work we've done matches the assumptions in their CLOMR. This is a condition of approval, which means we can't build phase two until the LOMR issues. Phase one is already outside of the existing mapped special flood hazard area.

Daniel Kearns: Is the CLOMR in the record?

Garrett Stephenson: It is. The last assignment of error that we need to deal with is number 5, which is the block length standards. This one, to me, is the simplest to deal with under SMC 17.154.040(C), the City can allow exemptions to block length standards for a number of reasons. In this case, we can't meet the block League standard because Eggleston Lane directly abuts on wetland and riparian buffers just to the south. In order to be able to cluster the way we need to, it's impossible to meet those block length standards there. We don't want to push that road into the wetland areas at this time. They're at the very edge of the property.

Daniel Kearns: Preservation of this protected resource is the compelling reason for this overlength request?

Garrett Stephenson: Correct, it's the edge of the property and as you say, protecting those resources. The idea is at some point in the future that if the property to the south develops, you may have somebody wanting to connect through to Eggleston Lane, but that at this point, there is no connection on the other side of that wetland and riparian area for us to connect to and so it didn't make sense in this case to push through. What we have at the end is a pretty standard hammerhead turnaround for fire apparatus. We do not propose a cul-de-sac. The code section I quoted to you specifically gives discretion to the Community Development Director to determine whether or not that exemption should be allowed. The findings, in LUBA's view, did not contain a positive enough statement that we had that exemption secured. In this instance, Laurie's staff report explains why City staff believe that exemption is warranted here. In our view, that ends the matter.

Daniel Kearns: Once the FIRM maps are revised, will any portion of the development be within the floodplain?

Garrett Stephenson: No lots. There will be a public trail within the floodplain that the City's requested to connect up to the Veterans Park trail but I believe that's permitted outright in the code anyhow. Those will be the only improvements taking place in the special flood hazard area and any other park-like things that ultimately the City wants to see there but there would be no structures. The idea is that by clustering this away from the Creek, we're able to essentially do this through a cut. This is not a CLOMRF, which stands for fill. This is a standard CLOMR, which means we maintain a cut fill balance within that mapped floodplain. When the project is concluded, a lot of that cut is going to be elevated up; that's where the roads, development, and homes are going to be. We phased it so that the portions of the site that are already outside of the existing floodplain are phase one. We can go through and develop those now without the CLOMR and LOMR. Portions of phase two are those areas that we intend to essentially raise out of the floodplain and remap it. Those homes cannot be constructed until we have FEMA's final LOMR in hand.

Daniel Kearns: The phasing lines that are in the proposal are still phasing lines that you're proposing based on what you described the phases are?

Garrett Stephenson: We discussed this with staff and if any lot shifts a bit, those lots are going to be included in phase two. This would be a reduction of lots potentially in phase one. We're essentially trying to safe harbor this so that if a lot shifts into phase two, no construction on that lot will take place, regardless of whether it's fully or only partially out of the floodplain, until we obtain the LOMR.

Daniel Kearns: Thank you very much. Does anyone wish to testify in favor of the proposal?

No one responded to testify in favor.

Daniel Kearns: Does anyone have neutral testimony or questions?

No one responded to testify in neutrality or ask questions.

Daniel Kearns: We'll now begin with testimony in opposition, starting with Mr. Haugen.

Joel Haugen: Good evening, Mr. Kearns. Welcome to Scappoose. My name is Joel Haugen. I am a citizen in the City of Scappoose. I live at 52363 SW Jobin Lane and have lived in the city for 46 years. I have committed a lot of time to improving the City and served as Chair of the Planning Commission and a volunteer City Councilor for 7 years between the years of 2015-2022. I strongly object to this development and have been joined by many members in the community. The development is located in what has been clearly identified as wetlands and floodplain and is not suitable for development. If the project is constructed, it will have poor outcomes for the region's stormwater drainage, flooding, and to the City's stormwater systems. The project will cause poor outcomes to the surrounding neighbors, whose drainage systems will be impacted. The project will also cause poor outcomes to the people who eventually purchase the housing because their properties will flood more often and be subject to poor drainage and higher maintenance and insurance costs, if they can obtain flood insurance at all. I, along with many members of the community, have hired land use attorneys to help make the case that this development should not be allowed to proceed in the floodplain and wetland and should be denied. It has been expensive but our community and our region are worth it. We have been successful to date, as the courts have found error after error with the City's review and approval of the ill-conceived development. Today, I will present additional information demonstrating why the application should be denied. 1) Lack of proper authority for a hearings officer. With no disrespect to Mr. Kearns, who I hear is a reputable and experienced municipal law attorney, Mr. Kearns is not an authorized approval authority under SMC 17.162.090. The City code specifies that only the planner, Planning Commission, or City Council are approval authorities for quasi-judicial land use hearings, making your role unauthorized and making this hearing invalid. Thus, I request that the Hearings Officer deny the application based on procedural error or remand it for reconsideration by a valid approval authority; 2) Second and third assignments of error. As background, the Court of Appeals and LUBA remanded review of this application and required the City to allow parties to provide evidence related to the developer's statement and also the City's condition of approval related to that statement. At the City Council's public hearing for this matter, the Court of Appeals opined that the City Council indicated that they did not believe the development complied with the Comprehensive Plan and applicable land use regulations. As a result, they asked the developer to consider ways in which it could reduce the number of lots and increase the lot sizes to see if that caused the development to so comply. The developer responded by saying "44 was the number of lots the applicant could make 'pencil' while protecting the Creek and providing a minimum lot size of 4,000 square feet". The City issued a condition of approval based on that statement and never explained how the condition of approval to reduce the number of lots to 44 and increase the lot size to 4,000 square feet complied with the Comprehensive Plan and land use regulations. The Court of Appeals remanded the approval to LUBA and the City, requiring closer consideration of this process. As identified in the third assignment of error, there was never evidence presented into the record as to why if 48 lots does not meet the applicable regulations, 44 lots does. Simply reducing the number of lots to 44 is not sufficient to meet the City's development standards, particularly concerning land use impacts, environmental preservation, and neighborhood principles. The reason there is no evidence in the record is because 44 lots at 4,000 square feet does not make the application comply with the Comprehensive Plan and applicable regulations. I will present some of the reasons for this lack of compliance. If I had more resources, I would present more. A) Stormwater Master Plan and Stormwater Drainage Plan. As shown in the Stormwater Master Plan, Figure 2-4, the subject development is sited in the floodplain and wetlands and not on developable land. The City indicated that the underlying development did not adequately protect the natural resources and sought ways to condition the development to make it comply with underlying land use

regulations. The adjustment from 48 lots to 44 lots and increase in lot size to 4,000 square feet does not mitigate the environmental or infrastructural impacts adequately. This is what is required by ORS 197.522(3) to approve a nonconforming development. Siting a project on wetland and floodplain and not on developable land does not comply with applicable regulations. The application should be denied. B) Hydrology and Outdated Data. To the extent the City is going to use the applicant's hydraulic calculations to justify that the development complies with the Comprehensive Plan and applicable regulations, those calculations are based on outdated FEMA flood insurance data from 1987 and rainfall data from 1973, failing to account for modern climate conditions and flood risks. Therefore, it must base its hydraulic calculations on current FEMA calculations and maps. Additionally, FEMA's current suspension of new CLOMR-F and LOMR-F applications raises further concerns about the flood safety and accuracy of the development's hydrology assessments. The evidence being used to support the application is outdated and stale. The City cannot reasonably base an approval on outdated information 3-5 decades old. The City must delay or deny approval until such time that it or a third-party commissions a hydrology study on updated information or require the development to provide an updated hydrology study, and delay any review until that information is presented. C) Hydrology Letter. Today I received a letter from a national expert hydrologist by the name of Roger Sutherland. *Reading from Mr. Sutherland's letter*[1]*:* "I'm going to focus my remarks on the foolishness of allowing massive filling in the floodplain adjacent to a flood-prone waterway based on peak flows and water surface that don't even reflect the significant increases due to the development that has been allowed and will continue to be allowed in the future. The Scappoose Stormwater Master Plan (SSMP), published in May 2023 and developed by Brown and Caldwell, didn't even develop a model of the entire Scappoose watershed, so the SSMP has no idea of the current and future flood risk associated with continued development in that watershed. The most significant flood risk to Scappoose, including the downtown area, is this waterway and how it will respond to the increase in impervious surfaces associated with urbanization and the potential impacts of climate change, which suggest Oregon rainfall intensities and depths will increase. A comprehensive model is needed before a decision should be reached on this proposal for a development that could potentially do so much reversible harm! This proposed development would not be allowed anywhere in the Portland Metropolitan area since they have had a regulation in place since 1990 that any fill allowed within the designated 100-year floodplain must be offset by the same amount of floodplain storage lost in the allowed fill. One can't simply dig a hole since the floodplain storage needs to be connected to the waterway, and it needs to be hydraulically effective across the range of flood elevations which is usually associated with the 2-year to the 100-year floods. We now know that filling in floodplains immediately adjacent to waterways is not a good idea since it leads to increased flooding when the peak flows of that waterway increase due to urbanization. […] Flood Insurance Rate Maps (FIRMs) are based on the levels of urbanization that existed when the flood insurance study (FIS) was developed, which, in many cases, like that for the City of Scappoose the FIS is decades old. The fact is that FEMA spends very little money on developing the peak flows used in a study. If they exist from some previous creditable modeling efforts, they will be used, but generally, the peak flows are based on a gauge data analysis. When a gage does not exist on the waterway of interest, a peak flow transfer equation is used based on some other watershed and the drainage area comparison between the two. This technique has exhibited considerable error when checked with detailed modeling, especially for urbanized watersheds. That is the case for Scappoose

[1] *Note: Roger Sutherland's letter can be found at* *https://www.scappoose.gov/sites/default/files/fileattachments/city_council/page/21688/roger_sutherland_pe.pdf*.

Creek, so no hydrologic model of the entire watershed has been developed. So, we don't know how accurate the peak flows used in the FIS for Scappoose Creek are in establishing the Base Flood Elevations (BFEs) or the 100-year return interval flood elevations. Another issue that should be addressed is that FEMA recently suspended reviewing and processing any Conditional Letter of Map Revisions based on fill (CLOMR-F) applications. A CLOMR-F developed for Buxton Ranch Development led to the issuance of a Letter of Map Revision (LOMR) for this development. The reason for the suspension is that FEMA has been sued over the concept of CLOMR-Fs that allow massive filling in the floodplain without considering the potential impacts on endangered species like Salmon in the waterway. FEMA was sued decades ago for the concept of a regular CLOMR without these issues being addressed, and it has been standard practice for well over a decade to essentially obtain a biological opinion as part of the CLOMR submittal that certifies there will not be a "taking of Salmon" before the CLOMR can even be processed. Somehow, the plaintiffs thought the CLOMR issue was resolved with the previous lawsuit, not realizing that CLOMR-Fs are separate from regular CLOMRs in FEMA's world and must be litigated separately. So, it is almost sure that any CLOMR-Fs in the region moving forward will have the same biological opinion requirement for CLOMRs that has been in place for over a decade. Technically, the LOMR for this development was issued before the lawsuit was litigated and does not apply. So, it will likely be one of the region's last CLOMR-F to LOMR ever issued. Is that what you are planning on telling the residents of Scappoose who are flooded out in the future by Scappoose Creek that you approved this bad idea development based on a technicality? Don't be complacent in believing that the extreme flooding in the southeast won't ever happen here. Creditable studies show that to be different. […] So, for all these reasons I have listed in this pro bono letter, it would not be in the best interest of the residents of Scappoose to approve this development at this time. Let us not make the same old mistakes made by those in the past who came before us. We now know the right thing to do is to develop a comprehensive hydrologic model of the entire Scappoose Creek watershed and address these worrisome issues I have raised. Establish future flood return flood elevations based on these model results. Then, with these results in hand, decide whether to allow this development to move forward and, if it does, how many lots it should be limited to. I understand that a proposal to do exactly that has been recently developed and submitted by arguably the state's best full-time water resources engineering consulting firm. That granting organization is the Columbia River Restoration Fund (CRRF), and a decision on a potential grant award is expected in the next few months. Finally, for the record, the Buxton Ranch properties proposed for this development are listed in the SSMP as Flood Plains and Wetlands, NOT developable lands." I would also like to raise some additional concerns with bias in the decision process. The City staff report appears biased in favor of the developer, as it concurs with all applicant assertions without adequately considering opposing views or alternative design solutions. The staff's waiver of block length and connectivity standards for the developer further reinforces this bias. I would like to request that the City hire an independent land use expert, such as someone with the credentials of you, Mr. Kearns, to provide the City with an independent evaluation of whether the application complies with the Comprehensive Plan and applicable regulations, including all relevant federal flood plain assessments. That independent evaluation could then be the subject of a remand hearing, using an "approval authority" authorized in City code. 3) Environmental and public safety concerns. The dense floodplain development poses significant environmental risks, particularly to flood safety and local ecosystems. A comprehensive independent study of the Scappoose watershed is necessary to assess the full impact of the project, including its potential effects on local habitats, flood risks, and public safety. The application should be delayed or denied until an independent study is completed and presented for review. 4) I am requesting the record remain open for an additional 7

days to allow further evidence and written testimony to be submitted. Please keep this record open. In conclusion, the second assignment of error invites parties to rebut the developer's statement that 44 lots at 4,000 square feet is what is financially feasible. The third assignment of error requires that the City to demonstrate how the 44-lot modification to the development makes the development comply with the Comprehensive Plan and applicable land use regulations, when a development with 48 lots does not. The City cannot do that because neither a 48-lot development, nor a 44-lot development may be built in the floodplain and wetland, on land designated as "not developable." Reducing the number of lots and increasing the lot size does not satisfy the required Comprehensive Plan requirements and applicable regulations. I request that the application be denied for the following reasons: 1) The hearings officer is not authorized to preside over the hearing. Only City Council is so authorized; 2) The development is sited in floodplain and wetlands and does not comply with the Comprehensive Plan and applicable regulations and the conditions of approval do not cause the development to come into compliance as required in ORS 197.522(3); 3) If hydrology data is being used to provide evidence about the development's compliance with the Comprehensive Plan and appliable regulations, that evidence is outdated by 30-50 years and cannot be relied on; 4) There are other stormwater management issues; and 5) The staff report is biased and should be reconsidered with an independent reviewer. For my final remark, thank you for your time and I appreciate your attention to the detail. Again, I'd like to have the record remain open for 7 days please.

Daniel Kearns: Did you hear staff's response to your comments today?

Joel Haugen: I did.

Daniel Kearns: I don't have any additional questions. I think I understand your position on all the points you've raised. Thank you. Up next to testify is Judy Haugen.

Judy Haugen: I no longer wish to testify.

Daniel Kearns: Okay. Next up is Shannon Hubler.

Shannon Hubler: Mr. Kearns, can I have 5 minutes for my testimony?

Daniel Kearns: I'll give you 5 minutes.

Shannon Hubler: Thank you, sir. My name is Shannon Hubler. I live on Felisha Way here in Scappoose. I am a stream ecologist by profession for about 27 years and I've been recognized as an expert in stream ecology and the assessment of biological condition in streams and rivers. I would like to start by showing that I've made multiple maps[2] here. I've overlaid the FEMA maps within Google Earth and they show very crude estimates of the Buxton retaining wall, which I'm calling by definition further in the paper a levee; it will act as a levee to deflect floodwaters. By my estimate, that's about 129,000 cubic feet of floodwaters that are cut off from FEMA recognized 500-year floodplain, so beyond the 100-year floodplain right where the retaining wall levee is being built. Where do those floodwaters go when you

[2] *Note: Shannon Hubler's map exhibits can be found at* *https://www.scappoose.gov/sites/default/files/fileattachments/city_council/page/21688/shannon_hubler.pdf*.

get more than a 100-year flood, which as we know is currently underestimated? They get pushed into the Creek. Those increased flows get deflected from that retaining wall/1-sided levee so the other parts of the city and the streams are not protected. This will result in increased erosion, increased bank failures and increased sedimentation. This will result as impacts to threatened endangered salmon in the Creek. Riparian restoration projects by the Scappoose Bay Watershed Council are already in effect. Those will be put at risk by increased erosion, bank failures, and sedimentation. In essence, as outlined in assignment of error #2, the retaining wall and the application will not protect the Creek. It doesn't matter how many homes you put there; you can put one home on that lot and build that flood wall levee but it won't protect the Creek. Now we can move on to the errors made by the City. Let's talk about specific City Municipal Codes. Sensitive Lands–Fish and Riparian Corridor. Look at the purpose; it says the purpose is to protect and restore water bodies, protect and restore the hydrologic ecological functions, protect habitat for fish and other aquatic life. SMC 17.130.050(C) requires the protection and preservation of watercourses, such as the local stream reach, habitat areas, the riparian and in stream, drainage areas, and the downstream reaches in Scappoose Bay. SMC 17.84.220 - Variances to flood damage prevention states "When dealing with a flood hazard, there is very little margin for error." That's true. "All flood hazard variances are deemed to be a major variance as defined in SMC 17.134." "Variances shall only be issued upon a determination that failure to grant the variance would result in exceptional hardship to the applicant and outweighs the risk associated with the variance." I don't see a hardship explained in the application. They could put 20 houses outside of the floodplain and make millions of dollars so I'm not sure where the hardship comes in. SMC 17.134.030 "Criteria for granting a variance. Major variances shall satisfy all criteria (A) through (E): A. The proposed variance will not be materially detrimental to [*code language not included*] other properties in the [*code language not included*] vicinity." These flood waters above the 100-year floodplain will be pushed to the east and downstream. They will increase flooding into existing properties in the vicinity of this project. "C. Existing physical and natural systems, such as but not limited to [*code language not included*] drainage," We've already gone over that; that's the downstream area where this will all contribute to "[…] or parks". There are two parks immediately downstream in this project that will be flooded at higher levels due to this project, this one-sided levee.

Daniel Kearns: Thank you. There is a lot to go through in this, so I'll need to digest that. Mr. Stevenson has the right to rebut this as well. Does anyone else wish to testify in opposition?

No one else responded to testify in opposition.

Daniel Kearns: Mr. Stephenson, you have copies of the testimony submitted tonight. You still have the right to submit your written rebuttal to this testimony 7 days from tonight, but you also have the right to make some verbal remarks tonight.

Garrett Stephenson: I want to start with the request to leave the written record open for new evidence. I don't see that granting that request is warranted in this case. Most of the discussion I've heard tonight was a repeat of discussions that were held in front of the City Council and the Planning Commission in 2022. As this is going to relate to my main point on what we heard, I don't believe any of it is terribly responsive to the question in assignment of error #2 and #3, which concerns the difference between a 48-lot project and a 44-lot project. At this point, Mr. Haugen and the public have had, in my opinion, more than adequate time to make their case on these issues. City Council considered all of the

floodplain impacts here and found that the project still warranted approval under this under the City's special flood hazard ordinance and that approval is not on remand from LUBA or the Court of Appeals so I would request that you deny the request for an additional 7 days of open record. As far as Mr. Haugen's testimony is concerned, he's raised issues about a plan that was adopted in 2023 and apparently prepared on September 22nd, 2022. However, our application was submitted long before that. It was deemed complete right around that time but it was first submitted, I believe, in March 2022 so it's simply not applicable land use criteria, even assuming that the stormwater design manual supplies any land use regulations. I have no comment on the objection to your ability to decide the decide the case tonight, except to refer back to what staff has said about the City Council's authority under its home rule and Charter. There was a lot of testimony about why the project somehow is not consistent with a FEMA process and there was a mention in there about FEMA not processing CLOMRFs. We don't have a CLOMRF here we have a standard CLOMR; CLOMRFs go on a different track. As far as the evidence that Mr. Haugen has submitted, I don't believe any of it is responsive to the narrow question on remand, which is the difference in the impact on the criteria between a 48-lot subdivision and a 44-lot subdivision in the same area. I'm going to object to inclusion of any of it in the record. I don't believe it's responsive. Again, the question of whether or not the project meets the City's flood hazard standards has been asked and answered; it's not on remand in this case. As for Mr. Hubler's testimony, I have the same objection. I don't believe that we are empowered to rehash flood issues that were decided and not remanded. There was a lot of testimony about a variance and how we don't meet a variance standard. I want to make it clear for the record that we're not requesting a variance to the special flood hazard area regulations and so I don't believe that any of that testimony is relevant, nor do I believe that any of the testimony on the Conditional Use Permit is relevant because the Conditional Use standards were not a component of the remand from LUBA. That concludes my oral presentation and oral rebuttal. I'm happy to answer any other questions you have. We would again ask that you deny the request for an additional 7 days of open record period and allow 7 days for final written argument so I can go through the materials I was given tonight.

Daniel Kearns: You haven't really submitted any new evidence.

Garrett Stephenson: I have not.

Daniel Kearns: You submitted argument. The first new evidence that I've seen in all of this came in tonight.

Garrett Stephenson: Right.

Daniel Kearns: As I understand, Mr. Haugen's argument disputes that 48 lots met the approval criteria and he also asserts that 44, similarly, doesn't meet the approval criteria.

Garrett Stephenson: Yeah, I think that's right. The way I conceived of LUBA's remand is they're looking for whether the condition of approval requiring a reduction in density from 48 to 44 lots would violate any of the approval criteria and in my view, that doesn't turn on the accuracy of the flood modeling, the correctness of the City's special flood hazard area code, or any of those other things.

Daniel Kearns: So you dispute his assertion that that calculus reopens the whole smorgasbord of

approval criteria?

Garrett Stephenson: Correct. As we noted both before the City Council and as I explained earlier, the City Council did not find that the area of disturbance violated any of the approval criteria and that includes the grading plan, public works plans, and floodplain modification plans. They believed all of those plans met the approval criteria. The one thing they didn't like was the density and they didn't like that we were asking for a density increase through the plan development process. I think it would be a little easier to conceive of, frankly, if we were going from a 44-lot subdivision to a 48-lot subdivision because, intuitively, if you're increasing the number of lots, that's going to have more impacts than that you need to evaluate. This has been a little bit difficult for me to wrap my brain around because we're reducing the number of lots. In my view, the simplest way to think about it is that the City Council ultimately wished to deny our density increase request and we accepted a condition that had that effect. I don't think that either the City Council, LUBA, or the Court of Appeals threw open this as a door to allow a complete litigation of all of the information that we went through back in 2022 – a completely new discussion about floodplain regulations, all of which the City Council decided that we met and we're not issues on appeal at LUBA.

Daniel Kearns: Even if one could construe it that way, your argument is that the findings that the City Council adopted demonstrate that those criteria were met.

Garrett Stephenson: Yeah. In the case of this special flood hazard area criteria, the only issue there that's on appeal is the interpretation of what the allowable uses are in the special flood hazard area, which is assignment of error #4. That is something that is not open to reconsideration on an evidentiary basis. That was the only issue concerning flood and flood hazards that made its way to LUBA. And of course, we were remanded on that in the initial LUBA decision. What LUBA said is not that we need to reopen the record on that issue or any other issue related to flood hazards, but that we needed to adopt findings explaining what staff explained to the City Council on December 5, 2022. Intuitively, what I expected to hear tonight as it regards new evidence concerning the difference between a 44-lot subdivision and a 48-lot subdivision–understanding the disturbance area, retaining walls, roads literally don't change–is perhaps an attempt to talk about why some of the land division or zoning standards were not met, but I didn't hear any of that. That, to me, is the most applicable in in terms of issues in that zone of interest.

Daniel Kearns: Is it true that nothing has changed between then and now in terms of impacts to floodplains, flood issues, wetlands? Even though the lots have been reduced, the size of the lots soak up the excess space so that the lines delimiting the development are the same, correct?

Garrett Stephenson: Correct. Arguably, a reduction in lots reduces the amount of impervious surface, reduces the load on the stormwater infrastructure, and it reduces the number of trips generated out of the project. But in all other respects, the project is identical to the one that the City Council approved. And to editorialize a little bit, that's why we believed a condition reducing the number of lots was appropriate. City Council did not like the density and the easiest way to deal with that problem was to reduce the number of lots and not reopen design to every other issue. The City Council obviously was comfortable with that.

Daniel Kearns: I think I understand your position and Mr. Haugen's testimony was very illuminating to me tonight because I think his theory is that the remand order with the evaluation of 44 lots reopens all the approval criteria.

Garrett Stephenson: Yeah, and obviously I disagree but I appreciate your questions and I have nothing more to add.

Daniel Kearns: Thank you. I'll turn it back over to staff. You've heard it all tonight. Any parting advice based on the testimony you heard come in?

Laurie Oliver Joseph: I do want to confirm that there was no floodplain variance requested by this application so criteria related to that do not apply here. Aside from that, we will rest with the findings and conditions of approval as presented in the remand staff report tonight.

Daniel Kearns: That concludes tonight's public testimony portion. I have before me Mr. Haugen's request that the record be kept open for the submission of additional evidence and argument. I'm going to deny that because under State law, you would have a right if new evidence came in but the applicant hasn't even submitted new evidence in this remand proceeding. What you've submitted is pretty substantive and I think that everyone has had a fair and full opportunity to submit new evidence in response to the remand order and argument with regard to the issues – the legal issues that were part of the remand order. I'm going to close the record tonight. The weird thing under State law is it assumes that the applicant's final rebuttal is something that comes in after the record closes so the applicant has 7 days from tonight to submit final written argument but no new evidence. It is the end of the day on Monday, September 30th so the applicant has until 5:00 pm on Tuesday, October 8th. Email that to the Community Development Director. That concludes tonight's hearing and we'll expect final written rebuttal from the applicant by the close of business on Tuesday, October 8th and approximately 2 weeks after that, my decision will come out, which will then be forwarded to the City Council for its consideration. As I mentioned, they have options to accept, reject, or modify what I submit but there won't be a public hearing on this before the City Council. Anyone who wants a copy of my decision, or anyone else's, make sure you get your information to the Community Development Director. Thanks to all of you for participating.

Adjournment

Daniel Kearns adjourned the meeting at 7:22 pm.

Daniel Kearns

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Hearings Officer Daniel Kearns

Attest:

N.J. Johnson

_____

Associate Planner N.J. Johnson