EXHIBIT Y

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File No. 22-038 CPA/ZC/SUB/SAP/TREE (Bull Run Terrace); Applicant's Response to Updated Condition B

Stephenson, Garrett H. <GStephenson@schwabe.com> Mon, Nov 21, 2022 at 3:36 PM
To: "Kelly O'Neill Jr." <koneill@ci.sandy.or.us>, Planning <planning@ci.sandy.or.us>
Cc: Jeff Aprati <japrati@ci.sandy.or.us>, Josh Soper <josh@gov-law.com>, Dave Vandehey <dave.vandehey@rolltideproperties.com>, Tracy Brown <tbrownplan@gmail.com>

Kelly:

As you know, this office represents Roll Tide Properties Corp. I understand that you and Dave Vandehey had a good discussion this morning about Condition B. To be on the safe side, I wanted to register a protective objection against a certain component of that condition, which requires dedication of the parkland within 180 days and not as part of the subdivision plat. Among the primary reasons for this, as I explain below, is the ongoing sewer moratorium that could significantly impact our development timing, and we think that this condition should be revised to reflect this.

Please place this email into the record on the above-referenced casefile and place it before the Council.

The Applicant objects to the last sentence of revised Condition B (which we received only last Thursday afternoon), which provides as follows:

> "The applicant shall dedicate the proposed 1.755 acres of parkland to the City through a dedication deed process, separate from the subdivision plat process. Prior to dedication, the applicant shall provide a Phase I Environmental Assessment for Tract A. This dedication shall occur within 180 days after approval of Ordinance No. 2022-27."

The parkland dedication is required under SDC 17.86. SDC 17.86.10.A. provides as follows:

> "The required parkland shall be dedicated as a condition of approval for the following:
>
> 1. Single-family and duplex building permits;
>
> 2. Tentative plat for a subdivision or partition;
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> 3. Design review for a multi-family development or manufactured home park;
>
> 4. Design review for a multi-family development accessory to commercial or industrial development; and,
>
> 5. Replat or amendment of any site plan for multi-family development or manufactured home park where dedication has not previously been made or where the density of the development involved will be increased."

The Code requires parkland dedication only in connection with residential development, and plainly does not support a requirement to dedicate land as a condition of a plan amendment/zone change and in a manner unrelated to the timing of completion of the final plat or other "residential development."

The proposed requirement also raises practical problems. First, the City has imposed a six-month sewer connection moratorium. Res. 2022-024. Financing for the Bull Run Terrace project is unlikely to be available until the moratorium has expired, as neither investors nor banks will typically lend on a project that cannot connect to sewer when the financial commitments are made.

Second, depending on market conditions, it may take more than 180 days for the Applicant to achieve the financing necessary to make the project work. If the project cannot be financed within the 180-day period set forth in the condition, the dedication will not occur. Thus, the 180-day deadline serves to put the project at unnecessary timing risk and as a consequence, put the City's desired parkland at the same unnecessary risk.

If the City Council wishes to impose a specific timeframe not associated with the subdivision itself during which parkland dedication must occur, the Applicant requests that Condition B be revised as follows:

> "The applicant shall dedicate the proposed 1.755 acres of parkland to the City through a dedication deed process, separate from the subdivision plat process. Prior to dedication, the applicant shall provide a Phase I Environmental Assessment for Tract A. This dedication shall occur within 180 days after approval of Ordinance No. 2022-27 or within 180 days after the termination of any development moratoria, whichever occurs last."

Finally, tying the parkland dedication to an arbitrary timeframe after the effective date of the zone change likely violates the 5th Amendment of the US Constitution. Requiring a landowner to dedicate its private property rights or pay money for public improvements in exchange for development approval is a compensable taking unless there is an "essential nexus" between the condition and the government interest. *Nollan v. California Coastal Com*., 483 U.S. 825, 836–37 (1987). Additionally, such exactions must be "roughly proportional" to the expected impacts caused by the proposed development. *Dolan v. City of Tigard*, 512 U.S. 374, 391-395 (1994) (emphasis added). The City carries the burden of proof to demonstrate that the proposed public improvements have the required nexus, and must make an "individualized determination" of rough proportionality and "some effort to quantify" a project's impacts to support its conclusions. *Dolan*, 512 U.S. at 391.

As written, Condition B turns on the plan amendment/zone change proposal and is "separate from the subdivision plat process." The plan amendment/zone change itself does not allow the proposed development; the subdivision plat and subsequent design reviews are required for constructions of any residential units. Rather, the plan amendment/zone change is a *predicate* for future development. As a result, the City is unable to find that a requirement to dedicate and improve the parkland within six months of the plan amendment/zone change has an "essential nexus" or is "roughly proportional" to the plan amendment/zone change itself, which if divorced from the residential development proposed in the application, causes no physical impacts whatsoever.

Obviously, this constitutional issue arises only if the final plat is not recorded, but I am required under ORS 197.796(b) and ORS 197.797(5)(c) to raise the issue. For this reason, the Applicant accepts this condition to the extent it must do so under ORS 197.796(1), but also reserves its rights to the remedies under that statute.

Best regards,

Garrett

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