

May 1, 2018

**RE: Planning Action #2018-00154 – South Ashland Business Park Annexation and Ordinance 3154 Adoption Findings**

Dear Members of the City Council,

Ordinance 3154 (“Ordinance”) findings addressing adequacy of transportation facility related criteria (i.e., AMC 18.5.8.050.E, AMC 18.5.2.050.D, and OAR Division 12) rely on a technical and, in this case, inapplicable interpretation of the Transportation Planning Rule (TPR) in order to conclude that *“the proposed zoning map amendment does not significantly affect existing or planned transportation facilities.”*

Under AMC 18.5.8.050.E.1, “adequate transportation” (i.e., vehicular transportation) refers to the provision of paved streets along the frontage of, as well as areas adjacent to, the annexed property. This criteria does not appear to concern system-wide, capacity-related impacts of the proposed annexation. However, when addressing “adequate transportation” criteria under the AMC, the Ordinance (e.g., pages 16- 18) contains findings which include OAR 660 Division 12 criteria. The OAR 660-012-0060 criteria included in the Ordinance primarily concerns capacity-related issues associated with the proposed zone change. Although staff has not identified any statewide planning goals or OARs as applicable criteria, the applicant did (see Planning Commission file, Application Volume 1, page 9 of 72) and the Ordinance includes them.

The above facts establish that OAR 660 Division 12 is applicable approval criteria for this planning action. Additionally, LUBA has found that annexation decisions are governed by comprehensive plan annexation criteria or, if no such comprehensive plan criteria have been adopted, by the statewide planning goals. *Morsman v. City of Madras*, 45 Or LUBA 16 (2003). The City’s Comprehensive Plan appears to lack any annexation criteria, therefore the statewide planning goals, and OAR 660 Division 12 in particular, apply to this decision.

OAR 660-012-0060 requires that:

*(1) If an amendment to a functional plan, an acknowledged comprehensive plan, or a land use regulation (including a zoning map) would significantly affect an existing or planned transportation facility, then the local government must put in place measures as provided in section (2) of this rule, unless the amendment is allowed under section (3), (9) or (10) of this rule. A plan or land use regulation amendment significantly affects a transportation facility if it would:*

*(a) Change the functional classification of an existing or planned transportation facility (exclusive of correction of map errors in an adopted plan);*

*(b) Change standards implementing a functional classification system; or*

*(c) Result in any of the effects listed in paragraphs (A) through (C) of this subsection based on projected conditions measured at the end of the planning period identified in the adopted TSP. As part of evaluating projected conditions, the amount of traffic projected to be generated within the area of the amendment may be reduced if the amendment includes an enforceable, ongoing requirement that would demonstrably limit traffic generation, including, but not limited to, transportation demand management. This reduction may diminish or completely eliminate the significant effect of the amendment.*

*(A) Types or levels of travel or access that are inconsistent with the functional classification of an existing or planned transportation facility;*

(B) Degrade the performance of an existing or planned transportation facility such that it would not meet the performance standards identified in the TSP or comprehensive plan; or

(C) Degrade the performance of an existing or planned transportation facility that is otherwise projected to not meet the performance standards identified in the TSP or comprehensive plan.

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(9) Notwithstanding section (1) of this rule, a local government may find that an amendment to a zoning map does not significantly affect an existing or planned transportation facility if all of the following requirements are met.

(a) The proposed zoning is consistent with the existing comprehensive plan map designation and the amendment does not change the comprehensive plan map;

(b) The local government has an acknowledged TSP and the proposed zoning is consistent with the TSP; and...

On the face of it, OAR 660-012-0060(9) provides a loophole to approve a zone change and annexation that:

1. Assumes that Independent Way - a project the City is currently seeking to fund through a federal grant and for which accurate cost estimates have not yet been completed - is already built; and
2. Will substantially increase turning volumes at Washington Street @ Ashland Street, a highly sub-standard intersection that is approximately  $\frac{1}{4}$  the minimum recommended distance from the southbound I-5 ramp terminal (350 feet as compared to 1320 feet) a situation that "can increase the potential risk of collisions," and that creates "potential vehicular conflicts and delay that may impact safety and traffic operations at the interchange," according to the June 2010 Draft Interchange Area Management Plan (IAMP)<sup>1</sup>; and
3. Relies on a transportation study that recommends that a trip cap be placed as a condition of approval on the proposed zone change while also assuming a level of development in the area that appears to be **approximately six times below** the level of development included in the City's Comprehensive Plan; and
4. Along with other contemplated (or pre-approved?) development in the area, has the potential to create the need for a very expensive intersection expansion at Tolman Creek Road @ Ashland Street and possibly a new I-5 interchange at Exit 14.<sup>2</sup>

In this case, the City cannot rely on the provisions within OAR 660-012-0060(9) for TPR compliance because their TSP is not TPR compliant. This conclusion stems from a technical argument in response to an equally technical conclusion that "the proposed zoning map amendment does not significantly affect existing or planned transportation facilities." That is, by reading the Ordinance, the fact that adequate transportation facilities don't exist doesn't seem to matter. It doesn't seem to matter that ODOT has concluded that, "we have... determined that this proposal will adversely impact the state's transportation facility." Bizarrely, ODOT wasn't even noticed for the Planning Commission hearing - for a decision on a road that they own! The City has the Draft Exit 14 IAMP on their website and uses some of its recommendations as

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<sup>1</sup> The June 2010 DRAFT I-5 Interchange 14 (Green Springs) IAMP is on the City's website at: <https://www.ashland.or.us/Files/Exit%2014%20Managment%20Plan%20Complete.pdf>

<sup>2</sup> Refer to attached Independent Way site plan and "Letter of Intent for Sale of Real Property" in Exhibit "A."

justification for several projects within its TSP, including the “Washington Street Extension”/Independent Way project (incredulously, a project that is “not development driven”). But that document doesn’t seem to matter either, as evidenced by the City’s unwillingness to adopt it. Apparently, the City has a predilection to pick and choose the information that suits it. In this case, what seems to matter is that the City is able to find a technical loophole in the TPR in order to make a claim that is, based on evidence in the record and elementary logic, false.

For example, some of the problems with the January 5, 2018 TPR Analysis include:

1. ODOT’s April 12, 2018 letter to the City states that, “*comments were sent to Sandow Engineering on February 14, 2018 regarding several concerns within the TIA. A final response from Sandow Engineering regarding the ODOT comments was never sent to ODOT.*” The City did not respond to this comment while the applicant’s representative said that ODOT “*did not have any issues*” with the TIA. It is reasonable to presume that ODOT suggested modifications to the methodology used in the analysis and that such modifications could have resulted in showing a greater level of impacts than were indicated in the January 5<sup>th</sup> document.
2. ODOT’s April 12, 2018 letter to the City states that “*the City of Ashland Transportation System Plan (TSP) was not developed using a transportation model which accounted for an increase in traffic generation from Tax Lot 2800 that would potentially occur under the proposed E-1 zoning.*” This comment probably reflects the fact that the population and employment assumptions included in the RVMPO model (and used by Sandow and the TSP) are inconsistent with population and employment projections included in the City’s comprehensive plan and the City’s Economic Opportunities Analysis, as acknowledged on page 60-61 and figures 5-1 and 5-2 of the City’s TSP. The Ordinance states that, “*the applicants note that existing average daily trips (ADT) for motor vehicles are at 345 and the applicants Transportation Impact Analysis (TIA) only anticipates them to grow to about 1,350 ADT by 2034.*” The Ordinance goes on to say that, “*staff further discussed that during the most recent Buildable Lands Inventory Update, the Washington, Jefferson, Benson and Crowman areas comprised 90 acres of the city’s 117.25 acres of buildable employment lands or roughly 76 percent. Staff suggested that the Washington/Jefferson/Benson employment area, much of which is outside the current city limits but within the Urban Growth Boundary (UGB), will see significant local job and housing growth in the near future. This area consists of approximately 45 acres, including the commercial/employment area along Ashland Street and Tolman Creek Road, and is the city’s second largest employment center after the downtown. These 45 acres developed to an approximate Floor Area Ratio of 0.35 and an employment density of 20 employees per acre will equate to approximately 686,070 square feet of building floor area and 900 employees ultimately being served in this vicinity.*” These two statements in the Ordinance are highly contradictory and should be a cause for concern by the City that the applicants have not used defensible assumptions in their analysis. Using the applicant’s trip generation assumptions and applying those proportionally to the City’s future employment forecasts as indicated in the above Ordinance language, the year 2034 ADT should not be 1,350 as stated by the applicant, but a figure over six times that amount ( $910 \text{ ADT} / 72,606 \text{ sf} = \text{approx. } 8,600 \text{ ADT} / 686,070 \text{ sf}$ ).
3. The City has used ODOT’s recommendation in the Exit 14 IAMP that left-turn movements in/out of Washington Street @ Ashland Street be restricted via an extended median as justification for funding of the Independent Way project. No such recommendations have been acknowledged or assumed in the TPR Analysis. Changing assumptions to include left-turn restrictions in/out of Washington Street will show greater impacts at the Tolman Creek @ Ashland Street intersection.

4. The trip distribution figures used by Sandow Engineering appear to minimize potential impacts at the Tolman Creek Road @ Ashland Street intersection. On page 17 of the TPR Analysis it is stated that, *"the development trips were distributed through the study area network using the existing observed travel patterns as a base with modifications as per reasonable origins and destinations."* Figure 5 shows 2019 pm peak hour westbound background traffic volumes at intersection #7 (Tolman Creek Road @ Independent Way) split roughly 30% southbound and 70% northbound on Tolman Creek. Figure 7 shows 2019 "build-out" (development-related) traffic at the same location split 40% southbound and 60% northbound. There is no explanation for the discrepancy, however, even a 30% southbound distribution at this location is not reasonable. The existing trip distribution in this area is heavily skewed by traffic generators such as the Ashland Tennis and Fitness Club and other businesses and employers that attract a relatively local clientele. Whereas, it is far more likely that a majority of the traffic to and from the proposed employment location will have an origin and destination that utilizes I-5/Exit 14 southbound (to) and northbound (from). A reasonable trip distribution assumption would be that PM peak hour traffic from the proposed development that does not make a right turn from Washington Street onto Ashland Street (and then onto I-5) will primarily be destined westbound on Ashland Street and will use the Tolman Creek Road @ Ashland Street intersection via the newly-built Independent Way. It makes no sense that PM peak hour traffic leaving the proposed employment site would have a destination using southbound Tolman Creek Road. Merely changing the trip distribution at this one intersection to reflect a more "real-world" analysis could have far more detrimental impacts on the Tolman Creek Road @ Ashland Street intersection than have been divulged. When this issue is considered in the context of the other *"approved but not completed IPCO development that was included as pipeline trips in the background"* conditions (see Exhibit "A"), concerns about the impacts on Tolman Creek Road @ Ashland Street are compounded.

So, in response to the City's technical claim that *"the proposed zoning map amendment does not significantly affect existing or planned transportation facilities,"* I offer the following technical argument:

OAR 660-012-0016 requires that:

*(2) When an MPO adopts or amends a regional transportation plan that relates to compliance with this division, the affected local governments shall review the adopted plan or amendment and either:*

*(a) Make a finding that the proposed regional transportation plan amendment or update is consistent with the applicable provisions of adopted regional and local transportation system plan and comprehensive plan and compliant with applicable provisions of this division; or*

*(b) Adopt amendments to the relevant regional or local transportation system plan that make the regional transportation plan and the applicable transportation system plans consistent with one another and compliant with applicable provisions of this division. Necessary plan amendments or updates shall be prepared and adopted in coordination with the federally-required plan update or amendment. Such amendments shall be initiated no later than 30 days from the adoption of the RTP amendment or update and shall be adopted no later than one year from the adoption of the RTP amendment or update or according to a work plan approved by the commission. A plan amendment is "initiated" for purposes of this subsection where the affected local government*

*files a post-acknowledgement plan amendment notice with the department as provided in OAR chapter 660, division 18.*

*(3) Adoption or amendment of a regional transportation plan relates to compliance with this division for purposes of section (2) if it does one or more of the following:*

*(b) Adds or deletes a project from the list of planned transportation facilities, services or improvements or from the financially-constrained project list required by federal law...*

The Rogue Valley MPO has adopted or amended the Regional Transportation Plan (RTP) twice since the City's adoption of their 2012 TSP. In each of these RTP revisions (2013 and 2017) the \$4.6 million Clear Creek Drive Extension project is included on the financially-constrained project list. However, the City's TSP *does not* include this project within their financially-constrained project list (Table 14-3 in the TSP). Rather, the Clear Creek Drive Extension project is included in the "Preferred Plan" section of the TSP (project #R24, Table 10-3) which includes projects that *are not financially-constrained*.<sup>3</sup> Therefore, per OAR 660-012-0016(3), the City's TSP is not in compliance with the TPR and the City cannot rely on OAR 660-012-0060(9) for findings of transportation facility adequacy.

In order to have standing to appeal under ORS 197.830(3), a person must be "adversely affected" by the appealed decision. The foregoing arguments establish that, through the approval of Ordinance 3154, the City of Ashland is knowingly allowing the degradation of its transportation facilities to levels identified as of public safety concern by the Oregon Department of Transportation. Further, through the approval of this annexation and others that could use an identical rationale under OAR 660-012-0060(9), the City is making a de-facto commitment to subsidize new development through the construction of street, intersection and/or I-5 interchange projects, an endeavor that will consume all of the City's transportation revenue for many years to come. Such a decision is a violation of public trust and runs contrary to stated goals in the City's adopted plans, including the TSP.

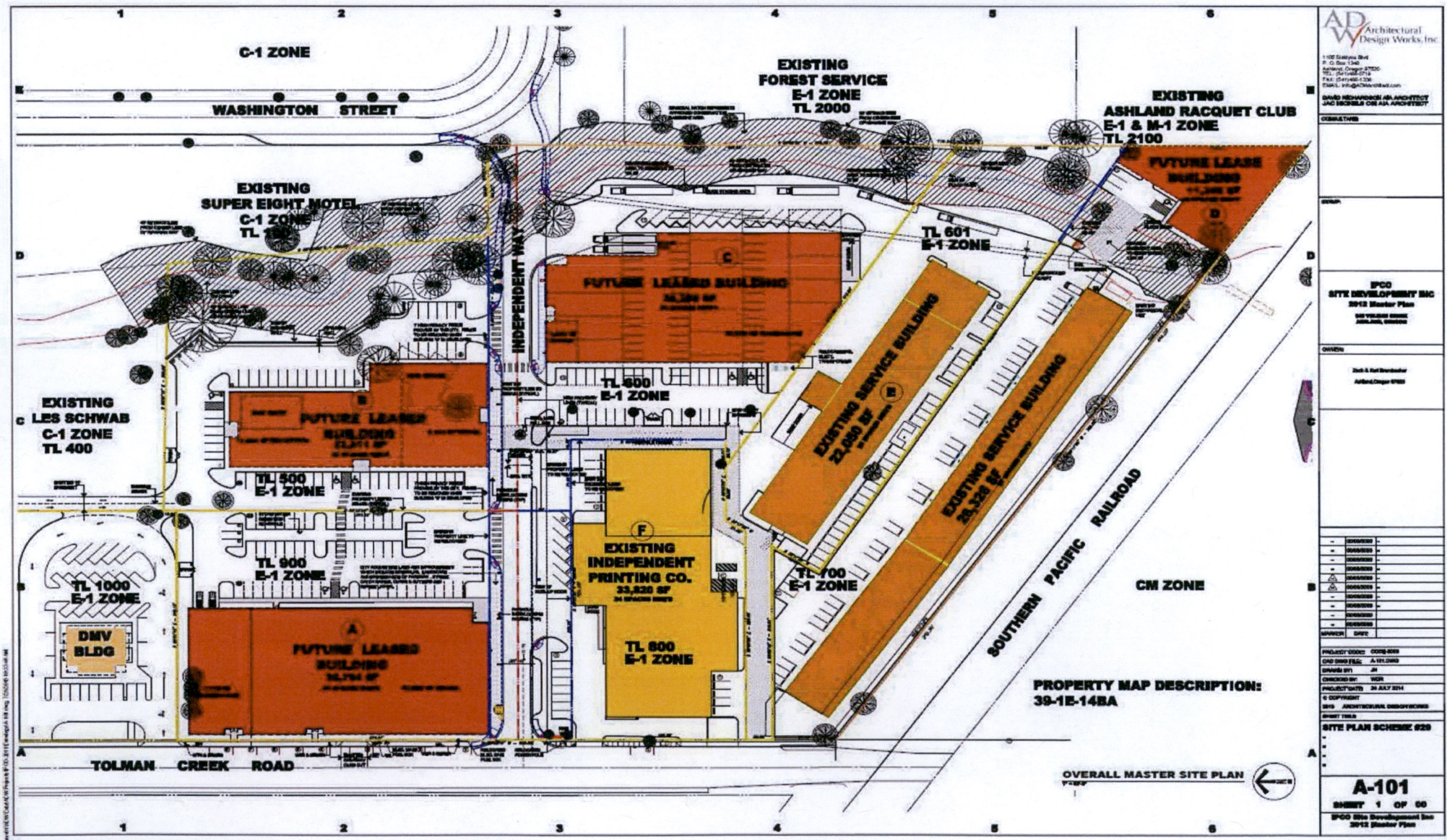
Sincerely,

Craig Anderson  
575 Elizabeth Ave.  
Ashland, OR 97520

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<sup>3</sup> See Exhibit "B"

# Independent Way



<b>Project #:</b> R25		<b>Washington Street Extension to Tolman Creek Road</b>		
<b>Description:</b> Extend Washington Street to Tolman Creek Road consistent with the IAMP Exit 14 Access Management on Ashland Street (OR 66). <b>This is a City funded project; not development driven. Right-of-way costs are not included in the cost estimate.</b>				
<b>Category:</b> Roadway	<b>Functional Classification:</b> Neighborhood Collector	<b>Time Frame:</b> 0-5 years	<b>Engineering and Construction Cost:</b> \$1,055,000	
<b>Project Goals Met:</b>				
Create a Green Template <input type="checkbox"/>	Improve Safety <input type="checkbox"/>	Facilitate Economic Growth and Maintain Small Town Character <input checked="" type="checkbox"/>		Balance Mobility and Access <input checked="" type="checkbox"/>
<b>Project Location:</b>				
<p>Sources: USGS, ESRI, TANA, AND</p>				
<b>Project Image:</b>				
<p>Side Walk 8'-10'</p> <p>Planting Strip 5'</p> <p>Parking 8'</p> <p>Travel Lane 10'</p> <p>Travel Lane 10'</p> <p>Parking 8'</p> <p>Planting Strip 5'</p> <p>Side Walk 8'-10'</p> <p>6" Curb</p> <p>Neighborhood Collector, Commercial - ROW 63' - 67' (Parallel Parking on Both Sides)</p>				

**LETTER OF INTENT FOR SALE  
OF REAL PROPERTY**

December 13, 2012

IPCO Development  
640 Tolman Creek Road  
Ashland, OR 97520

Re: Purchase of Property for Right of Way between Washington Street & Tolman Creek Road

Dear Messrs:

By this letter, City of Ashland ("Buyer"), presents the manner in which it and IPCO Development ("Seller") agree Buyer may acquire certain real property from Seller as described herein. The parties recognize that the transaction will require further documentation and approvals, including the preparation and approval of a formal agreement setting forth the terms and conditions of the proposed purchase (the "Purchase Agreement"); nevertheless, they execute this letter to evidence their intention to proceed in mutual good faith to complete work required to negotiate terms of a Purchase Agreement that are consistent with this letter.

The proposed terms and conditions include, but are not limited to, the following:

1. **Property.** Buyer will purchase from Seller all interests and rights, owned or used by Seller in connection with an approximate 55 feet wide strip of private property between Washington Street & Tolman Creek Road as further described in Exhibit A, (the "Property"). The Seller acknowledges that the Buyer intends to establish this property as a dedicated right-of-way ("ROW") through the current IPCO Development property. This new ROW would parallel and offset approximately 10 feet to the north of the centerline of the existing Washington Street ROW.
2. **Consideration.** The consideration (the "Purchase Price") will be established pursuant to appraisal by an appraiser selected and paid by the Buyer and subject to reasonable negotiations with Seller. Buyer will not assume any other liabilities or obligations of Seller over other property adjacent to or previously part of parcel or lot through which the Property, as a right-of-way, runs, and Seller will indemnify and hold harmless Buyer against all such other liabilities and obligations.
3. **Purchase Agreement.** The transaction will be subject to the negotiation and execution of a definitive Purchase Agreement with terms satisfactory to Seller and Buyer. The Purchase Agreement will contain representations, warranties and covenants, conditions that are reflected in the IPCO Development conceptual site plan scheme #14 (11-13-13) Exhibit A (attached) and will include without limitation the following:
  - (a) The Buyer proposes, subject to planning approval, to build, own, and maintain this approximately 700 feet long, 28 feet wide paved road with curb, "park row", and 8 feet wide sidewalks on the north side of street. Buyer agrees, subject to Planning approval, to allow seller to credit park row landscape for sellers required landscape associated to any future



development on said property. In addition, buyer will install irrigation system and pay water bill in public park row.

- (b) The Buyer will construct and maintain a stream crossing structure over Hamilton Creek, to support the new roadway and sidewalk. The crossing structure will be designed to meet or exceed the most current storm water quality mitigation requirements and standards. Riparian restoration of the creek bed and banks will be included to the maximum extent practicable.
- (c) The Buyer will relocate existing utilities as required, without diminishing utility services quality to the development, including water pressure, electric power, and sewer service line to property line at a location designated by the property owner with proper access to all locations. This shall not be charged back to seller.
- (d) The Buyer will assist the development to adjust the location of the existing conservation easement across private property to the match the new FEMA flood map and Ashland Water Resources Protection Ordinance boundaries. If allowed by FEMA, the Buyer will allow building E as shown with parking at the southeast corner with utility and road access over that area.
- (e) The Buyer, subject to Planning approval, will allow the development to use any land recovered and to use the area over the existing pipe culvert, as deemed appropriate by FEMA, and allow the development to clean out and maintain blackberry and weed infested areas and use these areas for landscape credits.
- (f) Assist the development in preparing a master plan that will include parking and driveways in specified locations to be formally submitted for planning review through the City's planning process. The associated City planning costs will be paid by the Buyer. The Buyer anticipates that the process will include the following steps:
  - a. Submit pre-application for Preliminary Site Layout.
  - b. Draft conservation easement boundary adjustment & delineate "water protection zone."
  - c. Draft right-of-way dedication survey documentation.
  - d. Obtain property owner concurrence RE: ROW dedication & easements.
  - e. Obtain Planning approval for variances.
  - f. Obtain City Council approval RE: ROW dedication & easements.
  - g. Engineering Design & Permitting.
  - h. Planning Approval for Environmental Constraints.
  - i. Site Plan approvals.
- (g) The Buyer agrees to work with the Seller during engineering phase of project to ensure final grades will accommodate ingress and egress on the Seller's driveways in order to minimize impacts of steep grades as much as possible.
- (h) The Seller can continue to drain storm water into Hamilton Creek as long as current state, federal and local storm drain regulations are met.

4. **Access.** To permit Buyer to conduct its due diligence investigation, as long as this letter remains in effect, Seller will permit Buyer and its agents to have reasonable access to the Property for purposes of surveying and planning for the use and design of the Property.
5. **Conditions to Closing.** The closing of the transaction will be subject to certain conditions, including without limitation the following:
  - (a) Funds for the purchase of said land are subject to the buyer successfully securing a grant to purchase the Property.
  - (b) All required approvals, consents, and authorizations of state and federal regulatory authorities shall have been received.
  - (c) All required consents of third parties shall have been received.
  - (d) Buyer shall have completed a due diligence review of the property and its title of Seller satisfactory to Buyer in its sole discretion.

The Buyer, as the City, may be required to make land use and/or building code decisions affecting development of the subject Right-of-Way and related property according to local and state laws. The Parties therefore acknowledge that the Buyer cannot and does not promise or guarantee any particular planning or building code decision or result as part of or as a condition of achieving the purposes of this letter of intent.

6. **Negotiations with Others.** Until January 1, 2018, the date on which the parties anticipate that a Purchase Agreement will be executed, Seller will not offer its stock or assets to, entertain offers for them from, negotiate for their sale to, or make information about them available (for purposes of sale) to, any third party.
7. **Conduct of Business; Interim Operations.** As long as this letter remains in effect, Seller will use its best efforts to conduct its business in a reasonable and prudent manner in accordance with past practices, to preserve its existing business organizations and relationships with its employees, customers, suppliers, and others with whom it has a business relationship, to preserve and protect its properties, avoid any and all liens, and to conduct its business in compliance with all applicable laws and regulations.
8. **Closing Date.** The closing date under the Purchase Agreement will be the date agreed upon by the parties.
9. **Effect of This Letter.** This letter sets forth the intent of the parties only, is not binding on the parties, and may not be relied on as the basis for a contract by estoppel or be the basis for a claim based on detrimental reliance or any other theory; provided that paragraphs 6 and 7, and this paragraph 9 will be enforceable in accordance with their terms. With the exceptions of paragraphs 4, 6, 7, and this paragraph 9, the parties understand that no party shall be bound until the Purchase Agreement has been negotiated, executed, delivered, and approved by the partners or shareholders of Buyer and Seller, as the case may be.

**10. Termination of Negotiations.** This letter may be terminated at any time by either party giving written notice to the other. After notice is given, the parties shall be bound only by paragraphs 6, 7, and 9.

If this letter sets forth your intent to proceed in good faith substantially in the manner outlined in this letter, please sign a copy of this letter and return it to Buyer. This letter of intent shall be of no further force and effect if it is not signed by Seller and returned to Buyer by the close of business on 12/13, 2012.

Very truly yours,

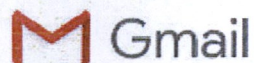
By: 

Buyer

Accepted and agreed to:

By: 

Seller



Craig Anderson <craig.ashland@gmail.com>

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## 2012 TSP Amendments

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Scott Fleury <scott.fleury@ashland.or.us>  
To: Craig Anderson <craig.ashland@gmail.com>

Mon, Apr 30, 2018 at 7:20 AM

Craig,

I think you are referencing project R24 in table 10-3, which in 2013 has a project cost of \$2,505,000. To my knowledge the TSP was never amended to move R24 from the preferred plan to the fiscally constrained plan.

Let me know if you have any other questions.

Thanks,

Scott A. Fleury, Deputy Public Works Director  
City of Ashland, Public Works  
20 East Main Street, Ashland OR 97520  
(541) 552-2412, TTY 800-735-2900  
Fax: (541) 488-6006

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