

June 6, 2018

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**VIA E-MAIL**

Mayor Brian Hodson  
Canby City Council  
222 NE 2nd Avenue  
Canby, OR 97013

RE: City of Canby File Nos. Appeal APP 18-01 of SUB 17-06/APP 17-03; Testimony  
by the Applicant

Dear Mayor Hodson and Members of the Canby City Council:

This office represents the Applicant, Icon Construction and Development, LLC ("Icon"). This letter summarizes my June 6, 2018 public hearing testimony to you. This letter contains no new evidence.

For the reasons explained in this letter, Icon respectfully requests that the Canby City Council (the "City Council") affirm the Canby Planning Commission's (the "Planning Commission") approval of the 82 lot Redwood Landing Subdivision by adopting Option 1 on City Council Packet Page ("Page") 10, "Use Density Transfer Formula (Noted in NRCP) and As Proposed By Applicant" and reject the appeal by the Appellant. For the reasons explained below, the City Council can find that the Applicant has satisfied the legal approval criteria for the Redwood Landing Subdivision and has addressed the five reasons that the City Council remanded the Subdivision to the Planning Commission for a second Planning Commission hearing.

In addition to the argument and evidence contained in this letter, I want to confirm the following:

- The entire Planning Department file constituting the record for this Application is physically before the City Council.
- The 120-day period in ORS 227.178(1) for a final City decision on this Application expires on June 22, 2018. The Applicant will grant an extension of the 120-day period in order to allow the City Council to make a final decision.
- The Applicant reserves all prior arguments made before the City Council and Planning Commission, including the classification of this Application as a "Limited Land Use Decision" as defined in ORS 197.015(12) and subject to ORS 197.195(1) and as a "Needed Housing" application as defined in ORS 197.303(1) and subject to ORS 197.307(4). Applicable versions of ORS 197.303(1) and 197.307(4) are those in effect on the date the Applicant submitted the Application in 2017.

- The applicable approval criteria are those found in Canby Zoning Ordinance (“CZO”) 16.13, “Plan Districts”, and CZO 16.62.020, “Standards and Criteria”.

## **2. Status of the Redwood Development Concept Plan (the “NRDCP”).**

Through three public hearings on this Application, the Applicant understands that the neighbors to this property object to the CZO’s density transfer provision that allows the average lot size of lots in the Redwood Landing Subdivision to be less than 7,000 square feet. CZO 16.13.010.D.2. It is obvious that the public would ask the City Council not to adopt the NRDCP again, given that opportunity. Thus, the Applicant is “stuck” between popular opinion about the effect of the NRDCP on lot sizes and the fact that the NRDCP is an adopted and acknowledged plan implemented by CZO Chapter 16.13 and the Redwood Landing Subdivision application is subject to those criteria in effect when it was submitted. ORS 227.178(3).

The Applicant wishes to focus on why it did what the City Council asked it to do in its Interlocutory Order and, consequently, why the Planning Commission approved the Redwood Landing Subdivision the second time. While the Applicant includes legal arguments explaining why the City Council should approve the Application, the Applicant wishes to focus on how the Applicant responded in good faith to the five issues in the City Council’s Interlocutory Order remanding the Application to the Planning Commission. The next section of this letter addresses those issues.

## **3. What the City Council Asked the Planning Commission To Consider.**

The City Council asked the Planning Commission to consider five issues (Page 50):

- To consider whether the Applicant demonstrated by substantial evidence that dedicated land in the Willow Creek riparian area was buildable and thus capable of transferring density to the Redwood Landing Subdivision;
- Whether the amount of density transfer was too great;
- Whether interior lots with “temporary turnarounds” located in easements were below the minimum lot size;
- The evidence of value for the City Council to consider regarding the amount of park land dedication to accept; and
- Whether the proposed street locations in the Application aligned with existing lot boundaries of adjacent property as required by CZO 16.13.C.7.

It is useful to summarize the lot and density information. The average subdivision lot size is 6,097 square feet. The maximum density for the Redwood Landing Subdivision is 93 lots. The Applicant previously proposed 89 lots. The Applicant on remand to the Planning Commission

reduced the subdivision to 82 lots. Eighty-two lots is well below the maximum density. The Applicant transferred just ten lots from the Willow Creek area (Page 53).

The Applicant revised its Application to address all five issues identified by the City Council.

**A. The Applicant's evidence shows the buildable lands calculation.**

The Applicant addressed the first issue – identification of buildable land within the Willow Creek riparian area – by providing substantial evidence showing the buildable area (Page 56). The Planning Commission found at Page 23 that the Applicant had provided the substantial evidence necessary to allow the Planning Commission to find that the proposed transfer of density – 10 lots – was appropriate.

**B. The Applicant reduced the park land dedication area.**

The Applicant's density and buildable lands calculations for the park dedication are found at Page 53. The buildable lands map is at Page 59. The buildable lands calculation is explained at Page 43.

The Planning Commission also found that the second issue – the amount of proposed park land dedication – was satisfied. The Staff Report to the City Council points out that the City has required almost twice the amount of park land dedication from the Redwood Landing Subdivision than would normally be required (Pages 6-7). Further, were the City to purchase the property instead of allowing dedication and density transfer, the Staff Report at Page 10 points out that the 2.79 acres would cost the City at least \$617,700 based on a recent comparable sale. The cost may be more or less, depending on whether an appraisal is required and the Applicant does not waive its right to require an appraisal as described in the Staff Report at Page 9 under Option 3. This cost is for the ten lots transferred.

The Planning Commission found that it had the authority to allow park land dedication as proposed by the Applicant and, further, that the Applicant's park land dedication has been reduced from 6.54 acres to 5.29 acres. In fact, the Staff Report at Page 7 notes that dedication of the park land would be allowed.

In response to the City Council's concern about lot sizes, the Applicant reduced the number of proposed lots from 89 to 82. The average lot size is 6,097 square feet. CZO Section 16.13.010.D.1 expressly provides that lot sizes within the NRDCP may be averaged based on density transfer from areas within the Willow Creek riparian area.

**C. The Applicant increased the size of lots with temporary turnarounds.**

The Applicant addressed the third City Council concern which was the effect of temporary turnarounds on lot sizes at Page 44. The Applicant addressed the issue of temporary turnarounds and the reduction of lot sizes below the minimum lot size by providing additional lot area for the lots on which the temporary turnarounds are located.

**D. The Applicant aligned stub streets with property lines.**

The Applicant addressed the fifth issue of the City Council by aligning the stub streets with the property lines to the north and the Planning Commission found this issue satisfied (Page 23).

**E. The Applicant provided substantial evidence on value.**

Finally, the Planning Commission found that the Applicant addressed the value of the park land dedication by relying upon the evidence in the NRDCP as to value of developable land (\$100,000) and value of undevelopable land (\$2 per square foot), in those instances where an actual appraisal is not necessary (Page 44). In other words, an appraisal is not necessary under the CZO to determine value for the land (Page 7).

**F. Conclusion.**

The City Council can find that the Applicant's substantial evidence before the Planning Commission addressed the five issues identified by the City Council and the Planning Commission agreed, voting 5-2 to approve the Application a second time.

CZO Chapter 16.13, "Plan Districts", implements the NRDCP. CZO 16.13.010.A provides that its purpose is "to ensure the development within the North Redwood area are consistent with the land use pattern and transportation network established by the NRDCP. The North Redwood Plan District is also intended to provide some flexibility for new development in order to protect natural resources and emphasize the Willow Creek corridor as a community amenity."

The purpose of density transfer is to allow a property owner to dedicate the Willow Creek riparian area to public use and transfer the density to its development. In this case, and as not only approved by the Planning Commission but as twice recommended for approval by the Staff, the Applicant chose to use the density in the Willow Creek riparian area in its development in order to reduce the average lot size. The density transfer does not increase the density to be more than allowed in the entire developable area.

**4. What the Appeal of the Planning Commission's Decision Argues.**

The Appellant raised three arguments in its appeal:

- General arguments that the Applicant failed to satisfy the NRDCP;
- An argument that the Applicant failed to satisfy CZO 16.13.010; and
- An argument that the Applicant failed to satisfy CZO 16.120.030.D.

**A. Response to General Arguments.**

The City Council can find with respect to the Appellant's general argument that the NRDCP is not an applicable approval criterion. The NRDCP is part of the City's Comprehensive Plan and cannot be applied to this Limited Land Use application pursuant to ORS 197.195(1). CZO 16.13.010.A also provides that CZO Chapter 16.13 implements the NRDCP. Second, arguments regarding quality of life and property values are not relevant approval criterion and the Appellant cites to no relevant approval criteria for those arguments.

If the community and the City Council believe that the NRDCP should be amended, then the City Council has the authority to do so and those amendments would apply to applications submitted after those amendments are effective. However, it would be unfair to apply standards other than those in the CZO to this Application.

**B. Response to lot size and density argument.**

The Appellant states that it is unsatisfied by the Applicant's modification of the size of park land dedication and the resulting density transfer and that the amount of park land dedication is "disproportionate" to the subdivision acreage. Nevertheless, CZO 16.13.010.D, "Lot Area Exceptions and Lot Size Averaging", provides:

**"The following exceptions to the City's lot size standards and lot size averaging provisions will be allowed for developments in the North Redwood Plan District."**

There is no dispute that the Redwood Landing Subdivision is within the NRDCP. The phrase "will be allowed" means it is mandatory and lot area exceptions and lot size averaging must be allowed if requested. The Appellant argues that CZO 16.13.010.D.1 is permissive because it uses the word "may" but this is an incorrect reading of that standard. The correct reading is that an applicant is not required to transfer density from a park dedication area to a subdivision area; that is why CZO 16.13.010.D.1 uses the word "may". However, if an Applicant chooses to use density transfer and lot size averaging, as is the case here, CZO 16.13.010.D is a mandatory standard requiring that the Planning Commission allow such density transfer and lot size averaging, provided the resulting average lot size is not less than 5,000 in the R-1 zone, which is the case with the Redwood Landing Subdivision. CZO 16.13.010.D.2 provides that "the average lot size shall not be less than 5,000 square feet in the R-1 zone." An average lot size of almost 6,100 square feet satisfies this standard.

The Appellant points out that the Planning Commission noted that they could not address the Appellant's concerns without amending the NRDCP. This is correct because of the "Goal Post Rule" in ORS 227.178(3). The Appellant's arguments regarding the amount of land do not contravene the mandatory language in CZO 16.13.010.D and the purpose statement in 16.13.010.A, as well as the mandatory requirement in 16.13.010.C.10 providing that the park and open space corridor along Willow Creek "shall be provided through required land dedication for parks". In fact, the Applicant has reduced the amount of park land dedication from its original

proposal (6.54 acres to 5.29 acres). Finally, no approval standard requires the “proportionate” analysis that the Appellant urges.

The CZO is plain and unambiguous that transfer of density is allowed because the Willow Creek riparian area must be dedicated as a park under CZO 16.13.010.C.10 and lot size averages may be reduced below the 7,000 square foot minimum in the R-1 zone, provided that the average lot size is not less than 5,000 square feet. The Applicant has fully complied with this requirement.

#### **C. Response to CZO 16.120.030.D.**

The Appellant argues that the Application violates CZO 16.120.030.D, “Dedication Procedures”. CZO 16.120.030.D is not an applicable approval criterion under either CZO Chapter 16.13 or CZO 16.62.020. Therefore, it is not a basis for the decision. If the City Council adopts Staff Report Option 3 at Page 10, the Applicant will request an appraisal to establish value (Page 9).

The Appellant argues that CZO 16.120.030.D prohibits system development charge credits for land other than trails within a flood plain. The Appellant misreads this standard. The standard refers to land dedication requirements and how much land shall be credited for development, not the amount of system development charge credits. In other words, the Appellant improperly reads CZO 16.120.030.D as a standard for system development charge credits when the plain and unambiguous language provides that it applies to credits for land dedications for trails. CZO 16.13.010.C.10, on the other hand, expressly provides that the park and open space corridor along Willow Creek, as identified in Figure 7 of the NRDCP, “shall be provided through land dedication for parks.”

CZO 16.13.010.C.10 is more specific because it applies to Willow Creek, whereas CZO 16.120.030.D is a general standard. The specific provision controls over the general provision. Further, CZO 16.13.010.B provides that CZO Chapter 16.13 controls over conflicting provisions. Moreover, the Appellant has cited no prohibition on the City following the NRDCP for valuation of buildable and unbuildable lands within the Willow Creek riparian area.

#### **D. Conclusion.**

For all of the above reasons, the Applicant respectfully asks the City Council to affirm the Planning Commission, reject the appeal and approve the Redwood Landing Subdivision with the forty-eight conditions of approval contained in the Planning Commission decision.

#### **5. Legal Arguments.**

Because the Applicant is required by Oregon law to preserve issues in the event of an appeal, the City Council should consider these legal arguments in making its decision:

- This Application is a Limited Land Use Decision and the City has not expressly incorporated provisions of the NRDCP into its land use regulations, the CZO. The NRDCP may not be used as an approval criterion for the Application. ORS 197.195(1).



- The Application meets the definition of “Needed Housing” in ORS 197.303(1). Therefore, subjective standards may not be applied to the Application under ORS 197.307(4). CZO 16.13.010.D.1 is subjective.
- The Appellant failed to pay the appeal fee for the second appeal. No provision in the CZO authorizes an appeal without the required fee. The Interlocutory Order is not a final decision and no party was required to challenge the City Council’s direction that the appeal be accepted without an appeal fee. While the Applicant appreciates the City Council’s reason for providing for a waiver of the appeal fee, the Applicant asks that the City Council understand that it must raise any issue which it wishes to preserve in the event of an appeal to LUBA.
- CZO 16.10.010.D is mandatory because it uses the word “will” and CZO 16.10.010.D.2 does not undercut this mandatory standard since the use of the word “may” is meant to provide an applicant with the option of transferring density. Additionally, CZO 16.120.040 gives the Planning Commission the final authority to determine acceptance of park land dedication.

## **6. Conclusion.**

The Applicant understands the neighbors’ unhappiness with the Redwood Landing Subdivision’s lot sizes. However, this Application meets the CZO approval standards that the City adopted for developments within the NRDCP area. It would be unfair to move the goal post now, well after the Application was submitted. Further, all of the evidence in this record shows that this development of the lot sizes have no adverse impacts on traffic, stormwater, public facilities or public services.

Much of the testimony against this application has to do with how the NRDCP was adopted but this should not be a basis for this decision since the City Council did adopt the NRDCP and implement it through the CZO.

The Applicant asks that the City Council approve this Application and allow the Applicant to rely on the CZO as it existed on the date the Application was submitted. Community issues that suggest that the NRDCP should be amended can be addressed in a subsequent process and applied to future applications in the NRDCP.

Very truly yours,



Michael C. Robinson

MCR:jmh

Cc Mr. Mark Handris (*via email*)  
Mr. Darren Gustdorf (*via email*)  
Mr. Rick Givens (*via email*)  
Mr. Bruce Goldson (*via email*)

Mayor Brian Hodson

June 6, 2018

Page 8

Mr. Bryan Brown *(via email)*

Mr. Joe Lindsay *(via email)*

Mr. Rick Robinson *(via email)*

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June 4, 2018  
Mr. Bryan Brown  
Planning Director  
City of Canby  
22NE 2<sup>nd</sup> Avenue  
Canby, OR 97013

Glen J. France  
President  
Postlewait Estates HOA

Re: Redwood Landing (SUB 17-06, APP 17-03)

Dear Bryan:

On behalf of Postlewait Estates Homeowners Association comprised of 50 single family homes directly across N. Redwood Street from this proposed development I, Glen France, the HOA Board President submit the follow testimony to the Canby City Council and Mayor regarding the appeal APP 18-01 (of Sub 17-06/APP 17-03 Remand Order Modification of Redwood Landing).

### **Appeal Criteria**

We believe the appeal criteria for the City Council to overturn the Planning Commission's decision has been met in that:

- Good planning concepts were not met:
  - This extreme density transfer creates an in balance of low density housing in the designated R-1 Zone of this concept plan area. In effect, eliminating the majority of R-1 as 90% of the lots are planned as R-1.5.
  - By not creating an HOA, the developer is shifting the burden of maintaining the neighborhoods common area landscaping and bioswales to the City and provides no long-term maintenance vehicle for the wall along Redwood Street. Good planning would require an HOA, as a condition of approval, so the cost of maintaining common areas would be split between the residents of the HOA rather than the burden being shifted to the City.
- The Commission did not consider all the information pertinent to this case in that options #2 and #3 before you this evening were not presented to the Planning Commissions for their consideration.

### **Our Position**

Postlewait Estates HOA has submitted into the record and we continue to put forth:

- We strongly oppose this extreme density shift from low to medium density far exceeding the expectations of most everyone involved.
- Creation of an HOA for this development is warranted and necessary for good long-term health of this development.
- We have described in detail the benefits of an HOA, such as: maintaining and increasing property values, building a stronger sense of community, and allowing the common areas to be maintained by an HOA. These are elements embodied within "good planning".

We believe not requiring an HOA and allowing this extreme density shift, will have significant negative impacts on Postlewait Estates, and other subdivisions surrounding this development.

### **Condition of Approval Requiring an HOA**

In the Applicant's rebuttal at the last public hearing before the Planning Commission, the Applicant said they would "consider an HOA" due to the valid points Postlewait Estates made during the hearing. We were pleased to hear this statement. We followed up after the hearing to learn what the Applicant had decided.

We want to submit for the record a letter from Rick Givens to Postlewait Estates dated May 8, 2018 trying to justify why the Applicant believes an HOA is not needed. They are in effect refusing to create an HOA to maintain this common area. In the letter, Mr. Givens states the City of Canby and the few homeowners living along N. Redwood will maintain the common area improvements along N. Redwood St.

Good planning looks to the future to ensure proper maintenance of common areas over time. The developer will be long gone when the landscape, wall and bioswales along Redwood Street need to be replaced and/or repaired. These costs are not minor. Without an HOA the City, and these few homeowners, carry the entire burden of these costs when all the residents within Redwood Landing should share the burden.

Postlewait Estates does not want our tax dollars to go toward maintaining other neighborhoods common areas when we, and many other neighborhoods in town, pay to maintain our own common areas. Postlewait Estates even pays to maintain our own wetlands/open area that is located within our neighborhood. Does the City's budget have the funds to properly maintain this Redwood Landings common area? If not, then you must create an HOA for this development.

The developer has made it clear they will not add an HOA into their CC&R's if the City does not require it. Therefore, it is up to you, tonight to add the creation of an HOA as a Condition of Approval.

We have many positive examples throughout the City of HOA's taking good care of their common areas. (e.g. Willow Creek, Tofte Farms, Dismore Estates II, Northwoods, Timber Park, Vine Meadows, etc.) We also have eyesore examples throughout the City where common areas are not being properly maintained because it has been left up to the City and individual property owners simply because no HOA was provided for within those CC&R's.

The cost to Icon to create an HOA is minimal, while the long term positive impact for the community is substantial. Please add to the Conditions of Approval that an HOA is to be created within the CC&R's to allow for the long-term maintenance of the common areas (wall, improvements along N. Redwood St., signage, neighborhood mailboxes, etc.)

### **In Support of Option #2**

Postlewait Estates believes Option #2 is an excellent compromise, allowing the City of have the full 5.3 acre park while maintaining the low density development in the R-1 designated zone. While the density transfer seemed to be a good idea in concept, the end result is simply unacceptable. We appreciate the City staff bringing forth this option for our consideration this evening. As mentioned above, this option was not presented to

the Planning Commission. This pertinent information is a solution that Postlewait Estates strongly supports.

**Conclusion**

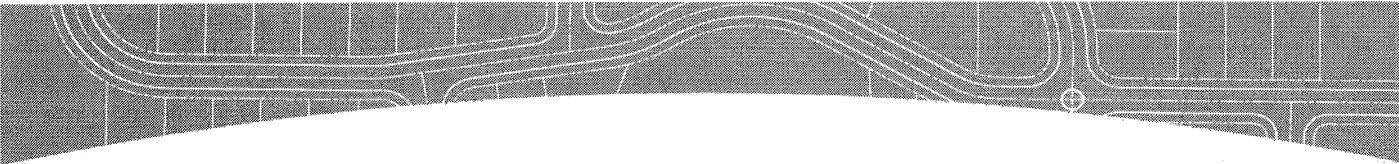
In conclusion, we implore you to overturn the Planning Commissions decision, adopt option #2 and add a Condition of Approval for an HOA to maintain the common areas along North Redwood Street. Thank you for the opportunity to speak to you this evening, and for your consideration, we appreciate the tireless hours you expend in behalf of our community.

Sincerely

A handwritten signature in cursive script that reads "Glen J. France".

Glen J. France President  
Postlewait Estates HOA





May 8, 2018

Mr. Glen France, President  
Postlewait Estates HOA  
Via Email

**Rick Givens**  
**Planning Consultant**  
18680 Sunblaze Dr.  
Oregon City, Oregon 97045

Dear Mr. France:

Thank you for the opportunity to address your concerns regarding landscaping and maintenance for the Redwood Landing frontage on N. Redwood Street. The plan for the street improvement along N. Redwood Street includes widening the pavement to Clackamas County collector street standards, construction of a curb, provision of a 4.5' planter strip between the curb and construction of a sidewalk within the right-of-way.

As you may know, City of Canby development standards encourage the use of a Low Impact Design for streets that incorporates a rain garden system in the planter strip. This system and plantings will serve to treat and detain storm water prior to release to the City's storm sewer line in N. Redwood Street. The planter strip will have plantings such as sedges, red-twig dogwood, and coastal strawberry that provide both an attractive landscape treatment, but also serve to provide effective filtering of street runoff. Street trees will also be planted within this planter strip. Fencing on the adjoining lots would be located on the right-of-way line, behind and adjacent to the sidewalk. There will not be any plantings area between the sidewalk and fence.


I spoke with Bryan Brown regarding maintenance of the landscaping within the planter strip. He said that since this is a design encouraged by the City's ordinances and because it is a part of the storm drainage system for runoff from streets, the City of Canby Public Works Department will have responsibility for maintenance of this area. He noted, however, that City code also requires property owners to be responsible for maintenance of landscaping between the sidewalk and the curb adjacent to their properties. Icon Construction and Development, LLC also plans to include a provision in the CC&Rs for the project that notes that lot owners are responsible for the maintenance of the planter strip adjacent to their properties. This will serve to provide notice of this requirement to the home buyers and will provide for a means for home owners in Redwood Landing to enforce the maintenance of this strip should the City and/or property owners fail to provide for proper care of this landscaping. We believe that the three layers of protection provided by Canby Public Works, City code requirements for home owner care of landscaping of planter strips abutting their properties, and the CC&Rs to be recorded with this subdivision will serve to ensure that maintenance is provided and that there are effective means to enforce maintenance should there be a lapse in care. Watering of planter strips will be done as needed. The plants to be used are native varieties that typically do not require watering once established.

Icon Construction and Development, LLC (Icon) will build a uniform fence with some masonry columns on the right-of-way line for the lots abutting Redwood Street. Icon will landscape the planter strip and put the fence up before the start construction on the home on the adjoining lot. You have asked whether there will be a half-foot of space between the sidewalk and fence. I have been unable to contact the project engineer this morning to discuss this point. However, if there is a narrow strip of space between the sidewalk and the curb, Icon will provide an appropriate treatment to ensure that such an area is neatly maintained. Our initial thought would be a weed barrier with compacted gravel so that weeds are not an issue.

We are copying Bryan Brown at the City of Canby on this letter so that the City is aware of our discussions with the Postlewaite HOA.

Thank you for your concerns about keeping your neighborhood maintained in an appropriate manner. Icon shares these concerns and will commit to providing effective CC&Rs to ensure that the planter strips are appropriately maintained. If you would like to speak with Mark Handris, the owner of Icon, to get further assurance that your concerns are being taken care of, feel free to call him at (503) 657-0406.

Sincerely yours,

A handwritten signature in black ink that reads "Rick Givens". The signature is written in a cursive, flowing style.

Rick Givens

Cc: Mark Handris, Mike Robinson, Susan Myers, Bryan Brown

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