

ORDINANCE NO. 1041-A

Introduced by Commissioner: Jeff Hazen

**Amending Ordinance Nos. 911-A and 934-A to the City of Warrenton
Combined Comprehensive Plan and Zoning Ordinance Map
and Changing the Plan and Zoning Designation of Tax Lots 2800, 2802 and 2900
of Tax Map 8-10-27 and Tax Lot 800 of Tax Map 8-10-27 BC
Containing 17.4 Acres from Intermediate Density Residential (R-10) to General
Commercial (C-1) and Adopting Findings of Fact In The Matter
Of City File No. ZC 1-99 (Decision on Reconsideration,
ODOT v. City of Warrenton, LUBA No. 2000-181/182)**

WHEREAS, certain changes are necessary to revise, update and amend the city of Warrenton Zoning Ordinance and Comprehensive Plan combined map; and

WHEREAS, the Warrenton City Commission previously approved this application for a larger area, and

WHEREAS, the Oregon Land Use Board of Appeals remanded the approval to the City on appeal; and

WHEREAS, the Warrenton City Commission reviewed and held a public hearing to obtain public comment on this application on July 12, 2000, closed the public hearing on that date but left the written record open until September 27, 2000 for all parties to submit additional argument and evidence and thereafter found it necessary to revise, update and amend the City of Warrenton combined Comprehensive Plan and Zoning Map, and sets forth Findings which are attached hereto as "Exhibit A" and by this reference made a part hereof; and

WHEREAS, the Warrenton City Commission tentatively approved the application on October 4, 2000; and

WHEREAS, the Warrenton City Commission issued a final decision and mailed the notice of the decision to all parties with standing and to the Oregon Department of Land Conservation and Development on October 24, 2000; and

WHEREAS, the Oregon Department of Transportation and the Oregon Department of Land Conservation and Development filed separate Notices of Intent to Appeal as early as November 8, 2000 challenging the decision; and

WHEREAS, pursuant to applicable Oregon Administrative Rules and Oregon Revised Statutes, the City withdrew its decision for reconsideration on November 29, 2000; and

WHEREAS, pursuant to a notice of public hearing mailed to those entitled to notice on November 16, 2000, the City held a limited evidentiary hearing on December 6, 2000; and

WHEREAS, on December 13, 2000 the Warrenton City Commission closed the public hearing but left the written record open for all parties until December 13, 2000 at 5 p.m. and until December 15, 2000 at 5 p.m. for the applicant to submit written argument only; and

WHEREAS, the Warrenton City Commission has determined to approve this application with the attached findings and conditions of approval,

NOW, THEREFORE, the Warrenton City Commission does ordain as follows:

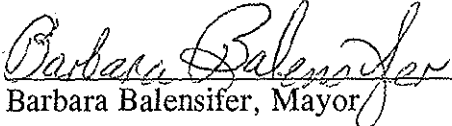
Section 1: The City of Warrenton combined Comprehensive Plan and Zoning Map Zoning and Plan designations is changed on Tax Lots Tax Lots 2800, 2802 and 2900 of Tax Map 8-10-27 and Tax Lot 800 of Tax Map 8-10-27 BC, as shown on Exhibit "B." Said area is located on a 17.3 acre parcel at the northeast corner of US Highway 101 and as Rodney Acres Road (also known as Dolphin Road) in the City of Warrenton, Clatsop County. The Findings adopted by the City Commission supporting this action are in "Exhibit A" and the property location map is "Exhibit B" and both are attached hereto and incorporated by reference herein.

Section 2: This ordinance shall become effective subject to the conditions of approval.

Section 3: If any article, section, subsection, subdivision, phrase, clause, sentence or word in this ordinance shall, for any reason, be held invalid or unconstitutional by a court of competent jurisdiction, it shall not nullify the remainder of the ordinance but shall be confined to the article, section, subdivision, clause, sentence or word so held invalid or unconstitutional.

PASSED by the City Commission of the City of Warrenton, Oregon, this 20th day of December, 2000.

APPROVED by the Mayor of the City of Warrenton, this 20th day of December, 2000.


Barbara Balensifer, Mayor

FIRST READING: December 20, 2000.

SECOND READING: December 20, 2000.



Scott Derickson, City Manager

**Date the Notice of this Decision mailed by the City to parties with standing and to the Department of Land Conservation and Development on the required form:
December 27th, 2000.**

EXHIBIT "A"

FINDINGS OF FACT AND CONCLUSIONS OF LAW

**FOR CITY OF WARRENTON COMBINED COMPREHENSIVE
PLAN/ZONING MAP AMENDMENT, FILE NO. ZC 1-99,
WARRENTON LAND AND INVESTMENTS, LLC**

**DECISION ON RECONSIDERATION PURSUANT TO OAR 661-010-0021;
ODOT V. CITY OF WARRENTON,**

LUBA NO. 2000-181/182

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I. Status of Application.

1. Procedural Status.

LUBA remanded the City's original approval of this application on April 21, 2000. After LUBA's remand, the City mailed notice of an evidentiary hearing limited to the issues identified in LUBA's decision. (Exhibit 1). The notice contained item 8 providing for "any conditions or approval necessary to satisfy the above criteria." LUBA has held that a city governing body is entitled to limit its consideration on remand to correcting the deficiencies identified in LUBA's decision. Wilson Park Neighborhood Association v. City of Portland, 27 Or LUBA 106, 127, aff'd, 129 Or App 33, 877 P2d 1205 (1994); Port Dock Four, Inc. v. City of Newport, ___ Or LUBA ___ (LUBA No. 98-061, March 25, 1999) slip op 9. No party objected to the contents of the notice.

The notice advertised an evidentiary hearing scheduled for May 24, 2000. The City Commission continued that evidentiary hearing at the request of the applicant and without objection by any party to July 12, 2000.

The City Commission opened the continued public hearing on July 12, 2000. The City Commission read the announcements required by ORS 197.763(5)(a)-(c) and considered ex parte contacts. The applicant's attorney asked Commissioner Holman if his ex parte contact with the applicant biased his decision making ability and he said "no". No other party questioned Commissioner Holman or objected to his ex parte contact. No other ex parte contacts were revealed.

Mr. Mo Dichari of ODOT testified that he was present in a "neutral position". He said that he had received a traffic impact study ("TIS") from Kittelson and Associates on July 11, 2000. Mr. Dichari requested that the record remain open for 45 days until August 25, 2000. Mr. Dichari further testified that he had reviewed the TIS and might have concerns with insufficient mitigation of significant affects by the application on area roadways.

At the conclusion of the public hearing, the City Commission voted to close the public hearing and leave the written record open until August 9, 2000 with deliberation on August 16, 2000. Subsequent to August 9, 2000, the City Commission, at the request of the applicant and without opposition from any party, determined to keep the record open until September 13, 2000 with deliberation on September 20, 2000. Finally, the City Commission, at the request of the applicant and without objection by any party, elected to keep the record open until September 27, 2000 with deliberation on October 4, 2000. The applicant submitted a nineteen (19) page letter with sixteen (16) exhibits on September 27, 2000.

The City Commission opened its public meeting for deliberation on this application on October 4, 2000. City Attorney Snow noted that the meeting was not an evidentiary hearing and that the LUBA record from LUBA No. 99-131 and all documents received since April 21, 2000 were physically before the City Commission, including the entire Planning Department file.

Commissioner Hazen moved to approve the application and Commissioner Dyer seconded the motion. The City Commission voted 4-0 to tentatively approve the application and directed the applicant to prepare findings for adoption. Commissioner Lamping abstained until she listens to the tape of the July 12, 2000 public hearing.

The Warrenton City Commission adopted the decision on October 23, 2000 and mailed post-acknowledgment notice of the decision to DLCD on October 24, 2000.

ODOT and DLCD filed separate Notices of Intent to Appeal as early as November 8, 2000 challenging the City's adoption of the decision. Under rules adopted by the Oregon Land Use Board of Appeals ("LUBA"), the City was required to submit the record of the decision to LUBA no later than November 29, 2000. The applicant intervened in the appeal on November 28, 2000.

Pursuant to LUBA's administrative rules, the City filed a Notice of Withdrawal for Reconsideration on November 29, 2000.

The City mailed notice of a limited evidentiary hearing on November 16, 2000 for December 6, 2000. No party challenged the content of the notice of limited evidentiary hearing following withdrawal of decision for reconsideration. No party challenged the scope of the limited evidentiary hearing nor the procedure followed by the Warrenton City Commission in the limited evidentiary hearing on December 6, 2000. The Notice of Public Hearing for December 6, 2000 explained that the City would hold an evidentiary hearing limited to consideration of transportation issues and transportation-related conditions for approval *only*. The City Commission finds that that interested persons have been given fair notice as to the hearing's scope and purpose, that interested persons had an opportunity to appear before the City Commission and make their case and that no party objected to the scope or procedure of the limited evidentiary hearing following withdrawal of the decision for reconsideration.

The Warrenton City Commission opened the limited evidentiary hearing on December 6, 2000. The Commission read the statements required by ORS 197.763(5) and explained the scope of the limited evidentiary hearing. At the request of several parties, the City Commission closed the public hearing but left the written record open until December 13, 2000 at 5 p.m. for all parties to submit argument and evidence. The City Commission further left the record open for the applicant to submit written argument only by December 15, 2000 at 5 p.m. The City Commission determined that it would deliberate to a tentative and final decision at its public meeting on December 20, 2000.

2. Issues on Remand and on Withdrawal of Decision for Reconsideration.

The notice of public hearing lists the issues on remand that the City Commission could consider including the imposition of conditions of approval to address those issues. The City Commission directed that evidence and argument be limited to these issues.

In addition to the items that LUBA found not satisfied in the City's first decision on this application, LUBA found in the City's favor on the following issues:

- A. The City correctly determined that WCP Policy 3.30(3) and 3.30(4) were satisfied.
- B. The City correctly found that the proposed use will be compatible with residential uses providing certain siting standards are applied during design review.
- C. The City correctly found that the proposed use is or could be compatible with institutional uses.
- D. The City correctly found that the proposed use would be compatible with open space areas and wetlands.
- E. The City correctly determined that the State had waived issues about sewer capacity.
- F. The City correctly found that the application satisfied Statewide Planning Goal 9 and that the Goal 9 administrative rules are inapplicable to the application.

Following withdrawal of the decision for reconsideration, the City Commission held a limited evidentiary hearing to consider transportation issues and transportation-related conditions of approval only. These findings reflect those issues and adopt revised conditions of approval.

3. Site location, existing uses and zoning.

This site is located between US Highway 101 and Rodney Acres Road (also known as Dolphin Road). As explained below, the site for the proposed combined Comprehensive Plan map/zoning map amendment consists of 17.4 acres and does not extend west of Rodney Acres Road. The site is vacant.

The site is designated on the City's combined Comprehensive Plan/zoning map ("Map") as Intermediate Density Residential ("R-10"). This application requests that the property be redesignated and rezoned on the Map to General Commercial ("C-1"). The surrounding zoning is R-10, I-1 and A-5. The property to be rezoned consists of the Tax Lots 8-10-27-2800, 8-10-27-2900, 8-10-27-BC-800 and 8-10-27-2802. The applicant has requested that the City Commission exclude Tax Lot 8-10-28-1900 from this application, the area west of Rodney Acres Road. (Exhibit 1).

As a threshold issue, the City Commission notes that the original application proposed that 41.6 acres be changed, including an area west of Rodney Acres Road. This area west of Rodney Acres Road is zoned both A-5 and C-1. LUBA noted that it was not possible to determine how large the A-5 area was, so it was not possible to determine how much acreage might be commercially developed.

The applicant has proposed that the size of commercial development be limited to one hundred sixty five thousand (165,000) square feet. (See June, 2000 TIS at P.17 and August 4, 2000 letter at p.2 stating that analysis is based on this figure). The applicant has also proposed that the area be limited to the 17.4 acres on the Tax Lots east of Rodney Acres Road (Applicant's oral testimony on July 12, 2000 and in September 27, 2000 letter.) The City Commission finds that this proposal by the applicant will eliminate uncertainty as to the location and size of the commercial development and that the notice of public hearing advised participants that conditions of approval might be imposed to satisfy the remand issues.

II. Approval Criteria.

1. The City has a Combined Plan and Zoning Map.

LUBA agreed with the Petitioners' sixth assignment of error that "remand is necessary for the City to identify whether there is a separate comprehensive plan map and, if so, whether the proposed zoning amendment is consistent with it." DLCD v. City of Warrenton, ___ Or LUBA ___ (LUBA No. 99-152/153 April 21, 2000) slip op 5, 6. For the reasons explained below, the City Commission finds that the City has a combined Comprehensive Plan map and zoning map and that the state has waived this issue.

A. The issue has been affirmatively waived.

Mr. Dale Jordan of the Oregon Department of Land Conservation and Development ("DLCD") submitted a letter dated May 15, 2000 to the City regarding the application by Ocean Crest Chevrolet (City of Warrenton File No. ZC 3-99). Mr. Jordan's letter stated, in part, "The applicant's supplemental documentation (4/19/00) speaks to a single map system. While the best approach to land use maps is to maintain separate comprehensive plan and zoning maps, *we understand Warrenton has only one map that is intended to include both comprehensive plan designations and zoning designations.* The Warrenton map, however, does not specify comprehensive plan designations, it only identifies zoning designations. One must refer to the text of the comprehensive plan and make a determination as to which plan designation is compatible with a particular zoning designation."

This statement is substantial evidence that the City uses the single map system. Moreover, to the extent that DLCD has argued that the City does not use a single map system, this letter is a waiver of that argument because DLCD acknowledges that the City use a combined map.

B. Mr. Pearson's letter confirms the City has a single map system.

Mr. Dick Pearson is the City Planner. Mr. Pearson's letter dated May 23, 2000 confirms that the City has a single combined map.

C. The evidence in DLCD's post-acknowledgment files demonstrates that there is a single combined map system.

LUBA had before it the Land Conservation and Department Commission ("LCDC") January 11, 1983 Acknowledgment Continuance Order addressing the City of Warrenton's then-draft comprehensive plan (1983 Continuance Order). LUBA said that the problem with relying on that continuance order was that it does not necessarily demonstrate that the City now has a unified mapping system since the Plan was significantly amended in 1993. *Id.*, slip op 5. The City Commission finds that the acknowledged Plan map shows a current single designation of R-10 on this property. Further, the City Commission finds that there are no other maps showing a different Plan or zoning map designation physically before it in this proceeding. The City Commission finds that the City maintains a single map.

The evidence shows that the applicant's attorney visited the DLCD offices on May 18, 2000. Mr. Larry French brought the applicant's attorney the entire Warrenton post-acknowledgment file consisting of four (4) binders. The documents reviewed by applicant's attorney and enclosed with its September 27, 2000 letter consist of the following:

- a. A "Notice of Proposed Action" dated March 18, 1994 referring to City of Warrenton File No. A-2-294 and stating that the purpose of the proposed City action was to merge the City of Warrenton/Town of Hammond Zoning Ordinances and that "the preliminary maps are subject to changes as they go through the public hearing process."
- b. DLCD's "Plan Amendment Tracking Sheet" refers to the same City of Warrenton Local File number as above in (i) and describes the proposal summary as "amending the Warrenton and Hammond zoning maps to establish the same criteria in zoning designations" and noting that the proposal was received from the City on March 23, 1994.
- c. An August 17, 1994 "Notice of Proposed Amendment" by DLCD referring to DLCD File No. 002-94, the DLCD file number given for this application in its "Plan Amendment Tracking Sheet."
- d. A "Notice of Adoption" submitted by the City of Warrenton on August 10, 1994 to DLCD stating that the "zoning map now complies with recently merged zoning ordinance adopted on 6/16/93 final maps" and that the maps are "essentially the same as proposed [in the March 28, 1994 proposal]."
- e. An April 18, 2000 letter from DLCD reviewing the proposed mapping without questioning its accuracy.
- f. The zoning map contained in DLCD's post-acknowledgment file shows this entire property zoned as R-10.

Based on this evidence, the City Commission finds that the City has a single combined Comprehensive Plan map and zoning map.

D. The land use “Commercial” designation is compatible with and implemented by the C-1 zoning district.

LUBA also required the City Commission to determine whether the C-1 zoning district is consistent with the Commercial Comprehensive Plan designation. Warrenton Comprehensive Plan (“WCP”) policy 3.320(1)(c) provides: “The purpose of the General Commercial Zone is to allow a broad range of commercial uses providing products and services in the downtown area, the Hammond Business District and along the Highway 101 corridor.” Warrenton Zoning Ordinance (“WZO”) section 3.060 is entitled “General Commercial Zone (C-1).” This section describes the purpose of the General Commercial zone as “to allow a broad range of commercial uses providing products and services in the downtown area, the Hammond Business District and Marina, and along the Highway 101 corridor.”

The City Commission finds that the C-1 zoning district implements the General Commercial Plan designation because the WCP and WZO use the same language to describe the zone and designation. Further, the City Commission finds that this zone is consistent with and implements the Plan designation because this property is located along the “Highway 101 corridor” where the purpose of the zone district is to provide commercial uses along that corridor.

The City Commission also finds that WCP Policy 20.320(3) is satisfied. This policy requires that provisions of the WZO and other land use controls be consistent with the WCP. This substantial evidence demonstrates that the C-1 zoning district is consistent with the General Commercial designation. Further, the Warrenton City Commission finds that as required by WZO 14.080(1)(a) that the proposed amendment to the zoning ordinance is “consistent with the Comprehensive Plan.” The City Commission finds that the zoning map amendment authorizes uses on this site that are allowed under the Commercial Plan map designation, so the zoning map amendment is consistent with the comprehensive plan. No party has raised additional WCP policies that might be applicable to this determination.

2. Applicable Warrenton Comprehensive Plan (“WCP”) Policies Are Satisfied.

LUBA’s decision addressed several WCP policies: WCP Policy 3.320(2), WCP Policy 3.320(3) and WCP Policy 3.320(4). LUBA affirmed the City’s interpretation of WCP Policies 3.320(3) and (4). (*Id.*, slip op 18-19). The City Commission finds that it need not make additional findings on these policies because the state did not appeal LUBA’s decision that the City Commission correctly interpreted these policies. The only WCP policy that the City Commission is required to address in this decision is WCP Policy 3.320(2). WCP Policy 3.320(2) provides:

“Precautions will be taken to minimize traffic congestion associated with nearby commercial uses, particularly on US Highway 101 * * *, East Harbor Drive, Neptune Drive and Marlin Avenue. Groupings of businesses, common access points

and other appropriate techniques will be encouraged. Sufficient parking on either jointly-used lots or individual business sites will be required for new commercial developments.”

LUBA disagreed with the City Commission’s findings on this WCP policy for two reasons. First, the findings failed to explain which conditions of approval the City relied upon to determine that the proposed amendment either complies or will be able to comply with the policy. Secondly, LUBA said that the City failed to explain the measures necessary to minimize traffic congestion.

The City Commission has recently interpreted this policy in the application by Ocean Crest Chevrolet (City of Warrenton File No. ZC 3-99). The City interpreted this policy as requiring it to take precautions to minimize, but not eliminate, traffic congestion associated with the development on Highway 101 and the named local streets in the policy. The policy contains two suggestions for its implementation. First, the policy requires that certain techniques be encouraged, including groupings of business and common access points. Secondly, the policy requires that sufficient parking be required for new commercial development.

The City Commission finds that the applicant’s suggested conditions of approval (discussed in the July 12, 2000 Warrenton City Commission public hearing and recommended in its September 27, 2000 letter) address these recommendations. First, the applicant has proposed that the application be subject to site plan review. WZO section 7.700 is entitled “Large Scale Developments.” This section requires that the Planning Commission make certain findings on large scale developments. WZO section 1.030(95)(c) defines a large scale development as including a “Commercial * * * development which within two calendar years will use two or more acres of land or will have buildings with 10,000 square feet or more floor area.”

The WZO requires that prior to development of this property, it be subject to the provisions of WZO section 7.700. The City Commission can impose a condition of approval requiring that Large Scale Development review include a review for grouping of business, common access points and other appropriate techniques to minimize traffic congestion on US Highway 101. The City Commission finds that none of the local named streets in WCP Policy 3.320(2) are located adjacent to this site. Further, the applicant has proposed a condition of approval that no direct vehicular access be permitted to US Highway 101 and that all vehicular access from the site be taken either from a state spur highway (should such a spur highway be adjacent to this site) or local streets. The City Commission finds that these conditions of approval are feasible to accomplish through the Large Scale Development review process following approval of this application. This 17.4 acre site is large enough to accommodate parking and buildings, especially where the building square footage on the site is limited to about twenty-five percent (25%) of the site.

The City Commission also finds that this site has about 1200 linear feet of frontage on the north side of Rodney Acres Road. The City Commission finds that such frontage is satisfactory to provide one or more shared driveways.

Additionally, the City Commission can require that the applicant demonstrate that sufficient parking is available for the proposed commercial uses. WZO section 7.083 establishes standards

for the number of required off-street parking spaces. The City Commission can require through a condition of approval that the applicant demonstrate during its Large Scale Development review that there will be sufficient parking. For these reasons, the City Commission finds that the policy's recommendations can be satisfied.

Additionally, the City Commission finds that the mitigation proposed by this applicant will minimize traffic congestion associated with this commercial use on Highway 101 and the other named local streets. The City Commission interprets the phrase "precautions will be taken to minimize traffic congestion" as not requiring elimination of all traffic congestion (either now existing or that may be caused by this application) but rather as requiring the imposition of reasonable conditions of approval, to the extent practicable, that will minimize traffic congestion. The City Commission finds that the evidence before it shows that it is more likely than not that the proposed use will minimize traffic congestion through the mitigation measures imposed as conditions of approval based on the June, 2000 TIS and the August 4, 2000 letter.

Finally, the City Commission finds that this criterion can be satisfied by a finding that (1) an applicable approval standard is satisfied, or (2) it is feasible to satisfy the applicable approval standard through the imposition of conditions so that the standard will be satisfied. Bughardt v. City of Molalla, 29 Or LUBA 223, 236 (1996). For these reasons, the City Commission finds that precautions have been taken to minimize traffic congestion through conditions of approval and that it is feasible to accomplish these conditions through the Large Scale Development review process by requiring that the applicant include groupings of businesses, common access points and other appropriate techniques.

3. Warrenton Zoning Ordinance Criteria Are Satisfied.

A. WZO 14.080(2).

LUBA remanded the decision to the City because it found that the approval did not satisfy WZO 14.080(2), which provides in relevant part:

"Before an amendment to the Zoning Ordinance map is approved, findings will be made that the following standards have been satisfied: * * * "

(b) the use permitted by the amendment is compatible with the land use development pattern in the vicinity of the request."
(Id., slip op 19-26.)

LUBA's decision addressed four (4) types of land uses with respect to this compatibility requirement: Residential uses, business, public/semi-public uses and open space areas and wetlands. LUBA held at pages 23 and 24 that the City's findings on compatibility with open space areas and wetlands were adequate. The City Commission need not readdress this issue. The remainder of this argument addresses compatibility with residential uses, businesses and public/semi-public uses.

The City Commission relies, in part, on the substantial evidence presented by Mr. Mark Barnes in his oral testimony before the City Commission on July 12, 2000 and upon the documents that Mr. Barnes submitted into the record that same day. Further, the City Commission finds that the proposed use, a shopping center containing no more than 165,000 square feet on 17.4 acres [Tax Map 810-27-2800 (8.73 acres) 810-27-2802 (.67 acres) 8-10-27-2900 (3.77 acres) 8-10-277-BC800 (4.28 acres)] either meets this criterion or that it is feasible to satisfy the applicable approval standard with the imposition of conditions to ensure that the standard will be satisfied. The following evidence demonstrates that the proposed use is presently compatible with these uses but, even if it is not, conditions of approval as explained below can make the use compatible.

a. Residential uses.

The residential uses in the vicinity of the request consist of low density single-family development. (*Id.*, slip op 21; testimony of Mr. Mark Barnes). The City Commission finds that the area has no strict separation of uses now; the area is a mixed-use neighborhood, meaning that residential uses are capable of co-existing with a variety of uses. The City Commission re-adopts the findings that it originally adopted regarding compatibility with residential uses. (*Id.*, slip op 21-22). LUBA found that these findings were adequate to conclude that the proposed development can be compatible with these uses, provided certain siting standards are applied during design review. (*Id.*, slip op 22). LUBA rejected the findings, however, because it found that the conditions of approval to establish the required transportation improvements were not supported by substantial evidence.

As explained below, the City Commission finds that the proposed transportation mitigation improvements are not only feasible to complete (as shown by the August 4, 2000 letters but that with mitigation, traffic adequacy will not be degraded. For these reasons, the City Commission finds that the use as proposed with traffic mitigation will be compatible with surrounding residential uses.

One further matter merits comment. In the first phase of this application, the applicant did not propose the precise use, size or location. In this phase, all doubt has been removed about the location of the use and its size. Further, the applicant has agreed to a site review through the Large Scale Development review process. These factors demonstrate that the City Commission's determination that the proposed use is compatible or can be made compatible with residential uses is correct because a site plan review process is required prior to commercial development.

b. Business and public/semi-public uses.

LUBA held that the City's finding did not adequately explain how the proposed development would be compatible with public and semi-public uses (listed at p.22 of LUBA's final opinion and order) because the finding did not show what facts the City relied upon to determine compatibility. (*Id.*, slip op 23.)

The City Commission finds that the proposal compared to public and semi-public uses is limited to 165,000 square feet on 17.4 acres, whereas the proposal in the first phase of this application was between 20 and 25 acres in sized and more than 165,000 square feet. With a condition of approval limiting the size of commercial development to less than that analyzed in the first phase, the City Commission finds that compatibility will be achieved because a smaller project entirely on the east side of Rodney Acres Road has fewer impacts on other uses in the vicinity..

The uses identified are a Pacific Power maintenance facility, an ODOT maintenance facility, the Clatsop County North Coast Business Park and Warrenton High School. The City made adequate findings with respect to all of those uses except as to how the proposed development would be compatible with other public and semi-public uses unrelated to institutional uses. The City Commission finds that the proposed use, a retail shopping center limited to 165,000 square feet on 17.4 acres, will be or can be made compatible with these uses for the following reasons.

(i.) Pacific Power and ODOT maintenance facilities.

The ODOT maintenance facility is on Dolphin Avenue east of Highway 101. The Pacific Power maintenance facility is also on Dolphin Avenue east of Highway 101. The City Commission interprets the word “compatibility” as meaning uses capable of co-existing with one another. The applicant’s land use consultant testified that these two uses have little traffic generation and very little pedestrian traffic.

One issue of compatibility is increased traffic from the proposed use on these uses. The City Commission finds that with respect to traffic impacts, the proposed use will be compatible with these two uses because they generate little traffic, so interference with traffic from this use is unlikely. Neither use has peak-hour traffic generation corresponding to the proposed use, so incompatibility is unlikely. Further, the traffic mitigation required of this application will maintain the performance standards on the affected transportation facilities. Additionally, these uses are separated by wide rights-of-way (Dolphin Road contains at least 60 feet and US Highway 101 is over 100 feet wide), ensuring adequate separation between uses.

Another potential compatibility issue associated with the proposed retail use is stormwater runoff. One proposed condition of approval requires that stormwater runoff be handled on-site and treated before released. Another compatibility issue is noise. The City Commission finds that noise from the retail shopping center is unlikely to interfere with industrial maintenance facilities such as those operated by Pacific Power and ODOT because the City Commission finds that noise does not adversely affect public and semi-public uses like these because they create noise themselves and are not required to be in a quiet area. Even if additional noise is heard, it is not inconsistent with the nature of these uses.

(ii.) Clatsop County North Coast Business Park.

The Clatsop County North Coast Business Park is zoned Industrial. The park is located on the east side of Highway 101. The City Commission finds that the same issues of compatibility (noise, traffic generation and stormwater runoff) might affect this use as might affect the above two

uses. The City Commission notes that the distance between this proposed use and the North Coast Business Park includes the separation of the two uses by US Highway 101 and this separation makes noise and other impacts unlikely. For the same reason as noted above, the condition of approval governing stormwater can control any drainage impacts. As noted above the, City Commission finds that traffic mitigation will reduce the potential that the uses cannot coexist because of traffic impact. Finally, the record contains a letter from the property owner stating that it supports the application. For these reasons, the uses are or will be made compatible.

(iii.) Warrenton High School.

Warrenton High School is located on the west side of the Skipanon River and Rodney Acres Road, to the west of the subject property. The Skipanon River and Rodney Acres Road Avenue separate the two uses, providing a substantial buffer to minimize impacts. Stormwater runoff can be handled as noted above. Further, substantial evidence in the record shows that the proposed use will not have a significant affect on the local street likely used by the Warrenton High School main street. This is so because traffic to and from the site from the south will use Rodney Acres Road, traffic from downtown Warrenton will turn before the high school and traffic from the north will not reach the high school. Therefore, the City Commission finds that traffic will not impact the high school because it will not use Main Street and traffic mitigation measures will maintain the area roadways' capacity. For these reasons, the uses are or can be made compatible.

The City Commission also finds, based on Mr. Barnes' December 6, 2000 testimony and his December 13, 2000 letter, that relocated Rodney Acres Road will not crate any issues of incompatibility

c. Conclusion.

The City Commission finds that each of the above uses are capable of coexisting with the proposed use for the reasons described above. Moreover, other parties have not provided any specific reasons why the uses are incapable of coexisting with the proposed use. The City Commission finds, based on its interpretation of compatibility, that there are likely to be no impacts such that the uses are not capable of coexisting and, in any event, conditions of approval recommended for this application will address those potential conflicts through the Large Scale Development review.

B. WZO 14.080(2)(d).

This criterion requires that the City find that: "Public facilities, services and streets are available to accommodate the uses to be provided by the proposed zone designation." The only issue raised by opponents in the prior decision was whether local streets could accommodate the proposed use. The opponents attempted to raise an issue with respect to sanitary sewer capacity but failed to raise the issue below and LUBA deemed the issue to have been waived. (*Id.*, slip op. 26) Other parties have raised no new issues with respect to other public facilities, services and streets.

LUBA held that the City's decision was inadequate because it did not address issues raised regarding local street capacity. LUBA did not reject the finding made by the City that streets be available without respect to capacity.

Affected streets include US Highway 101, a state facility, and several city street intersections with US Highway 101—101/ Harbor Street, 101/Neptune Avenue, 101/Martin Avenue, 101/Dolphin Avenue and 101/Ft. Stevens Highway (Ft. Stevens Highway is also a state facility). The June, 2000 TIS finds that only the local street and Ft. Stevens Highway intersections are affected by this application. As explained elsewhere, the applicant has proposed mitigation, and the City Commission will require such mitigation as conditions of approval, that will ensure that these intersections can accommodate a 165,000 square foot shopping center. The September 27, 2000 Kittelson letter also concludes at page 3 that “. . . the local Warrenton transportation system is not significant affected . . .” by the application and that the local streets are wide enough to accommodate traffic from this development. The City Commission finds that this is substantial evidence that local streets have sufficient width and capacity to accommodate the proposed use of a retail shopping center limited to 165,000 square feet.

The City Commission finds that this criterion also applies to state facilities. As explained elsewhere, this criterion is capable of being satisfied through appropriate conditions of approval that ensure that state facilities are present with adequate capacity to serve the application.

4. The City Commission Finds That Statewide Planning Goal 10, “Housing”, is Satisfied.

Goal 10 requires cities to “provide for the housing needs of citizens of the state.” LUBA found that the City's finding demonstrating compliance with Goal 10 was inadequate because it did not discuss the City's acknowledged Goal 10 elements or explain why relied-upon evidence was consistent with the acknowledged Plan. LUBA agreed with Petitioners that the City could demonstrate compliance Goal 10 by showing either that the acknowledged Goal 10 inventory shows that there is a surplus of at least 41 acres of intermediate residential housing over the relevant planning period or that the rezoning will not affect the City's housing inventory as the equivalent of a Goal 10 inventory. (*Id.*, slip op 14-15.)

The City Commission finds that Goal 10 is satisfied for two reasons. First, one of the proposed conditions of approval requires the applicant to seek a subsequent post-acknowledgment amendment approval to rezone approximately 19.98 acres from C-1 to R-10. The applicant has proposed that this application be conditioned on the rezoning of 19.8 acres. Thus, prior to the development of this property, the applicant must obtain approval of a rezoning of more than 17.4 acres from C-1 to R-10. The effect of this condition of approval means that the City loses no residential inventory and, in fact, the City will gain 2.58 acres of residential inventory.

The City Commission also finds, based upon Exhibits 8 and 16 to the September 27, 2000, letter that there is surplus of Goal 10 land within the City. LUBA required the City to discuss the City's acknowledged Goal 10 element and to explain why this proposed amendment is consistent with that element. As of the 1983 acknowledgment, the City had a deficit of 20.0 acres in the R-10 district and a total deficit of 10.5 acres for Goal 10 land. Since the 1983 acknowledgment, the City has processed four (4) post-acknowledgment amendments involving housing land. Considering these amendments, the City now has a surplus of 23.14 acres of R-10 zone land (341.14 acres of vacant buildable land with 318.0 acres needed), with a total surplus of 29.64 acres of Goal 10 land. Even without the mitigation acreage noted above, the reduction of the R-10 surplus by 17.4 acres leaves a surplus of 5.84 acres.

The petitioners argued, and LUBA agreed, that reliance on the CREST report to comply with Goal 10 was unsatisfactory because the City's finding did not explain how the CREST report complied with Goal 10's requirement that a buildable lands inventory meet present and future needs. (*Id.*, slip op 15.) In this case, the City Commission finds that Exhibit 16 meets this requirement. Exhibit 16 contains the notice of adoption for each of the residential post-acknowledgment applications since 1983 and the 1983 Background Report. Taken together, these documents show that the original Goal 10 acknowledgment continues to be satisfied by providing for a sufficient amount of acreage to meet the city's housing needs.

Page 33 of the Warrenton Background report was approved by the City Commission on April 19, 1982. The Background Report is part of the City of Warrenton's acknowledged Comprehensive Plan. Page 33 of the City's Background Report adopts Tables 24 and 25 relevant to vacant buildable acreage and projected building acres needed by housing type. The R-10 zoning district is an intermediate density residential zone shown in Table 24 as "R-0". The June 29, 1983" LCDC Acknowledgment of Compliance Report; Response to Continuance Granted December 21, 1982" at Page 3, under section IV, "Findings", notes that on December 21, 1982, LCDC reviewed the City's compliance request and found, among other Goals, Goal 10 to be satisfied. This followed the City's request for acknowledgment a second time when it submitted amendments to its Plan and implementing measures on June 15, 1982, which is after the April 19, 1982 approval of the Background Report.

LUBA has approved of this kind of analysis to demonstrate that a city satisfies a Goal requirement for land inventory. In Herman v. City of Lincoln City, ___ Or LUBA ___ (LUBA No. 98-146, August 18, 1999), LUBA upheld a challenge to the City's compliance with Goal 10. In its decision, LUBA described the steps the City took to conclude that the City still satisfied Goal 10 after the challenged decision, including the City's reliance on an approved land use development adding about 1000 residential units. LUBA found that the City's analysis was adequate because a "reasonable person could conclude that the additional [residential units] approved [by the City] was sufficient to ensure that the City meets its obligation to provide [Goal 10 Housing]." (*Id.*)

In this case, the evidence before the City Commission is that at the beginning of the application, there was a surplus of Goal 10 land and that even with this application, there continues to be a surplus. Based upon this evidence, the City finds that Goal 10 is satisfied because there is a present surplus of R-10 land. After this application there will still be a surplus. In any event, the application will add to the City's Goal 10 inventory through the subsequent rezonings.

5. The City Commission Finds that This Application Satisfies Both The Transportation Planning Rule ("TPR") And The Oregon Highway Plan ("OHP").

LUBA made four (4) findings on the issues of compliance with the TPR (OAR 660-012-0060(1)) and the OHP (Action 1F.3):

1. The applicant must describe whether, without mitigation, the proposal will have a "significant affect" on area roadways, as defined in the TPR.
2. If there will be a significant affect, the City must consider which mitigation measures under the TPR are necessary to ensure that the allowed uses are consistent with the function, capacity and performance standards of affected facilities.
3. LUBA held that Conditions of Approval 4-7 adopted by the City Commission were sufficient to establish what the applicants must do to comply with them.
4. The applicant must meet the Oregon Highway Plan ("OHP") standard in Action 1F.6 and its analysis must be based on a volume to capacity ("V/C") ratio that shows no further degradation of state highways.

Kittelson and Associates prepared a June, 2000 TIS. Page 17 of that TIS shows that the analysis is based on a 165,000 square foot retail center as a "worst case" scenario. The applicant has proposed a condition of approval limiting this site to that size. The TIS concluded at page 2 that there would be a significant affect and that mitigation would be required to avoid that significant affect. The TIS described the mitigation necessary to avoid a significant affect at pages 2 and 3.

Kittelson and Associates prepared a subsequent letter dated August 4, 2000. The applicant placed the letter into the record on August 8, 2000. The August 4, 2000 letter looked at mitigation effects if additional lands zoned C-1 were required to be rezoned to R-10. Page 2 of the letter concludes that a 165,000 square foot center based upon rezoning of the described sites as mitigation would not "significantly affect" the transportation system.

ODOT and DLCD have raised the issue of the proper planning horizon for this study. OHP Action 1F.2 provides that “when evaluating highway mobility for amendments to transportation system plans, acknowledged comprehensive plans and land use regulations, use the planning horizons in adopted local and regional transportation system plans or a planning horizon of 15 years from the proposed date of amendment adoption whichever is greater.” In this case, because there is no adopted local or regional transportation system plan, the proper horizon is 15 years from the year 2000, the proposed date of amendment adoption. The City Commission notes that LUBA did not address the 20-year planning period. (*Id.*, slip op 8, n 5.) The City Commission further finds that no party argued that the TIS could not be based upon a 15-year planning period.

The City Commission finds that with the proposed mitigation described in the conditions of approval and based upon Kittelson and Associates’ June, 2000 TIS and August 4, 2000 letter, that any significant affects caused by this application will be mitigated so that intersections will not be degraded. Page 3 of the August 4, 2000 letter states “As indicated in Table 4, the only intersection that does not meet the criteria in Action 1F6 standard in the 1999 Oregon Highway Plan is the Highway 101/Dolphin intersection. To avoid further degradation at the Highway 101/Dolphin intersection a traffic signal will be required at the Dolphin Avenue intersection.” The City finds that with proposed mitigation, OHP Action 1F.6 is met.

OAR 660-012-0060(1)(a)-(d) authorizes four measures to mitigate traffic impacts. LUBA has recognized that these measures may be used to mitigate significant affect through conditions of approval. Marine Street LLC v. City of Astoria, ___ Or LUBA ___ (LUBA No. 99-068, January 28, 2000.) In this case, the applicant proposes that this approval be conditioned upon a condition of approval based upon OAR 660-012-0060(1)(a): “Limiting allowed land uses to be consistent with the planned function, capacity and performance standards of the transportation facility.” As proposed below, the applicant proposes that allowed land uses in two C-1 zoning district be restricted to residential uses by rezoning the properties to the R-10 zoning district. The applicant controls both parcels.

The record also contains an August 4, 2000 letter from Mark Barnes demonstrating why it is feasible to accomplish the rezonings, a September 5, 2000 letter from the City Planning Director explaining that it is feasible to accomplish the rezoning, a September 26, 2000 memorandum regarding the feasibility of obtaining wetland fill permits and a September 26, 2000 memorandum responding to DLCD and ODOT. The City Commission adopts these three (3) documents and the conclusions within and incorporates them by reference herein.

A. Response to August 9, 2000 ODOT and DLCD Letters.

The August 9, 2000 letter responds to the June, 2000 TIS. The City Commission rejects the arguments contained in the letter for the following reasons, including those

contained in the September 27, 2000 letter from Kittelson & Associates incorporated in these findings by reference.

First, the TIA at page 2 expressly notes that under existing conditions, 2001 conditions and 2015 total traffic conditions, there will be a significant affect without mitigation. LUBA has not required a particular form for finding whether OAR 660-012-0060(1) is applicable. Nevertheless, the City Commission finds that the TIS is sufficient to demonstrate a significant affect by this application and that such significant affect can be mitigated by appropriate conditions of approval.

Secondly, the City Commission finds that ODOT has misread LUBA's decision when it argues that the City may not consider mitigation as a means of avoiding the conclusion that an amendment significantly affects a transportation facility. These findings conclude that there is a significant affect and that significant affect will be mitigated by appropriate conditions of approval allowed under OAR 660-012-0060(1)(a)-(d). The City has chosen to limit allowed land uses pursuant to OAR 660-012-0060(1)(a) on other parcels along US Highway 101 so that this proposal is consistent with the planned function, capacity and performance standards of Highway 101.

In addition to the responses by Mr. Vandehey of Kittelson & Associates in the September 27, 2000 letter, the City Commission also finds that the August 9, 2000 ODOT letter fails to take into consideration the refinements contained in the August 4, 2000 letter by Kittelson. The record was open until September 27, 2000. ODOT did not submit an additional response to the August 4, 2000 letter by Kittelson which changed the proposed mitigation based on rezonings. However, the August 4, 2000 letter shows that all intersections significantly affected by this application will satisfy the applicable TPR and OHP standards, with the exception of the US Highway 101/Dolphin Avenue intersection, with mitigation by limiting land uses and the two improvements. The applicant has proposed that a traffic signal be installed at the US Highway 101/Dolphin Avenue intersection. A traffic signal is an appropriate requirement for mitigation, and as Mr. Vandehey explained, the traffic signal at the US Highway 101/Dolphin Avenue intersection will meet ODOT's spacing standard. Other traffic signals proposed in the June, 2000 TIS would not be installed because of the proposed mitigation by rezoning.

The City Commission finds that OHP Action 3A.3 is not relevant to this application for several reasons. First, it is not an approval criterion for the post-acknowledgment plan/rezoning map amendment. Secondly, the applicant proposed traffic signals as mitigation in the first phase of this application, which the City Commission adopted as conditions of approval. ODOT could have, but did not, raise Action 3A.3 at that time and for this reason, the City Commission believes that this issue has been waived. With respect to the paragraph labeled second, third and fourth on pages two and three of the August 9, 2000 letter, the City Commission finds that because of the proposed mitigation involving rezoning, that these issues are no longer relevant and additional signals and lane improvements will not be required to

mitigate the significant affect of the application. Further, the September 27, 2000 letter confirms that all site trips were included in the TIS and that no vehicular access to Highway 101 was assumed, nor is any allowed by the conditions of approval. The City Commission finds that the TIS is substantial evidence and rejects the ODOT letter based on the applicant's substantial evidence.

The City Commission also rejects the argument that the August 4, 2000 letters from Kittelson and Mr. Barnes constituted a "substantial change to the application." The TPR allows mitigation of significant affects through limitation of allowed land uses. Moreover, the original notice of public hearings apprised parties of the potential for conditions of approval to address the remand issues from LUBA. The City Commission notes that nothing prohibited the applicant from submitting evidence demonstrating that it is feasible to satisfy criteria through conditions of approval. The August 4, 2000 letters do this and the City Commission finds this to be appropriate evidence. The City Commission also notes that the September 27, 2000 submittal by the applicant demonstrates that the applicant controls both the Marlin Avenue and Harbor Drive parcels. Further, to the extent that ODOT argues that its substantial rights to a full and fair hearing have been prejudiced, the City Commission rejects this argument. ODOT had between August 8, 2000 and September 27, 2000 to fully consider the evidence contained in the August 4, 2000 letters. The City Commission utilized this time to do so. The City Commission finds that none of ODOT's substantial rights have been violated nor does ODOT explain why the information should not have been accepted and considered.

Additionally, the City Commission rejects the argument that conversion to residential development is not feasible. The August 4, 2000 from Mr. Barnes shows that it is feasible to rezone each of the properties from C-1 to R-10 and that each is capable of being developed for commercial uses. Mr. Pearson, the City Planner, also reached the same conclusion. Additionally, Mr. Flynn, an attorney with experience in wetland fill permits, determined that it is feasible to fill the wetland areas on the property. The City Commission finds that because these areas are within the City's acknowledged Urban Growth Boundary, are zoned now for C-1 development and are feasible to develop (according to both Mr. Barnes and Mr. Flynn) for commercial development, that is both appropriate and feasible for the applicant to conclude that these sites could be rezoned to a lower land use designation, such as R-10, to reduce traffic impacts on the US Highway 101 corridor caused by this application.

The City Commission also rejects the argument that the rezoning is not appropriate mitigation that limits allowed land uses. OAR 660-012-0060(1)(a) allows land uses to be limited in order to take into account significant affects of an amendment to an acknowledged comprehensive plan. Nothing in the administrative rule requires that land uses be limited on the site subject to the amendment to the acknowledged comprehensive plan. In this case, the evidence before the City Commission demonstrates that with the two proposed rezonings, traffic impacts created by this application will be mitigated. In other words, while additional traffic will be generated from the 17.4 acre site, less traffic will be generated from the Marlin Avenue and Harbor Drive site under the R-10 zone. The land uses along the affected portion

of US Highway 101 will be limited so that the impact on US Highway 101 will be no different than current impacts with the two additional improvements.

The City Commission finds that both August 4, 2000 letters demonstrate that by rezoning the two parcels to R-10, under worst case development for each of the parcels (as single-family development), substantially less traffic will use US Highway 101 than would be the case if the parcels were developed as shopping centers in the C-1 zoning district. The City Commission relies on the analysis performed by Mr. Barnes to demonstrate the potential commercial development of each of these sites. For these reasons, the City Commission finds that it is both feasible and consistent with the TPR to require the applicant to rezone through subsequent post-acknowledgment amendments the Marlin Avenue and Harbor Drive sites so that the limitation of allowed land uses will mean that even with this application, there will be no significant affect on US Highway 101 or local streets, including the requirement for a signal at the US Highway 101/Dolphin Avenue intersection and a lane improvement on Ft. Stevens Highway.

The City Commission rejects DLCD's argument in its August 9, 2000 letter that it had inadequate time to review the August 4, 2000 letters. As noted above, the City Commission held the record open until September 27, 2000. DLCD submitted no substantial comments after August 9, 2000 on the August 4, 2000 letters. The City Commission finds that DLCD's substantial rights have not been prejudiced.

Finally, DLCD notes Goal 12 on page 1 of its August 9, 2000 letter. No party raised Goal 12 as an applicable approval criterion in the first phase of this application. Under the law of the case doctrine, the City Commission finds that the Goal 12 argument could have been raised but since it was not, it is waived in this phase of the application process.

For these reasons, the City Commission finds that the applicant has satisfactorily addressed the remand requirements and has addressed the applicable requirements of the TPR and the OHP.

B. Response to September 13, 2000 DLCD Letter.

The DLCD letter raised a number of issues. This portion of these findings responds to those issues.

a. DLCD argues, without explaining why, that the TIS and supplemental TIS are "fundamentally flawed." Opponents have an obligation under ORS 197.763(1) to raise issues with sufficient specificity to allow the local government to respond and under 197.610(3)(b) to provide advisory recommendations. In this case, the statement that the TIS assumptions and supplemental TIS are fundamentally flawed is not sufficient to raise an issue to allow the local government to address. Moreover, DLCD objected in the first LUBA appeal because it believed the TIS did not explain the use it was analyzing. In this case, both

the original TIS and the August 4, 2000 letter expressly identified the proposed use. DLCD cannot complain that the TIS did not analyze traffic impacts based on a precise use. Further, the City Commission believes that the lack of advisory recommendations after having received the August 4, 2000 letter precludes DLCD from raising the issue.

b. DLCD argues that the application does not satisfy OAR 660-012-0060(1). As explained elsewhere in this letter, the applicant has determined that the proposal without mitigation has a significant affect but with proposed mitigation allowed by the TPR, the City Commission finds that the application satisfies the TPR and the OHP.

c. DLCD argues that the application does not address funding of the improvements. DLCD cites no applicable law in either the TPR or the OHP that requires funding to be identified. Further, the City Commission finds that an issue of funding is outside of the law of this case. The City imposed conditions requiring traffic mitigation measures in the first phase of this application. No party raised an issue of funding and it may not now be raised. Moreover, the conditions imposed are a burden for the applicant to satisfy; no other party is required to fund the improvements.

d. DLCD argues that the proposed conditions provide for approval in advance of satisfaction of applicable approval criteria. The proposed conditions expressly require subsequent post-acknowledgment plan map amendments subject to applicable public notice and public hearing. The City Commission notes that the rezonings, if relied upon to mitigate the traffic impacts, must be accomplished first.

e. DLCD argues that the application presupposes Plan amendments that may or not be achieved. The conditions of approval require the applicant to go through a subsequent post-acknowledgment Plan map amendment subject to required public hearing and notice. The conditions are structured so that until these approvals occur, no commercial development may occur on this property.

f. DLCD suggests that the conditions contemplate new transportation facilities without a Plan amendment. There are only two transportation facilities proposed as the mitigation described in applicant's August 8, 2000 letter: a signal at either the existing or realigned intersection of US Highway 101 and Dolphin Road and the potential realignment of Dolphin Road with US Highway 101. DLCD has not explained why a Plan amendment is required for a signal. ODOT has acknowledged in the past that it may remove or add signals on its facilities without the local government's approval.

Moreover, the realignment of a local street does not require a Plan map amendment. WCP Policy 8.320 (1)-(5), "Street Design", requires that new or relocated streets meet certain standards. Provided the relocated streets meet these standards, nothing in applicable WCP or WZO criteria requires a Plan amendment. Further, WCP Policy 8.320(4) provides that new intersections shall be designed so that, among other factors, the intersection of streets meet at

right angles. Should Rodney Acres Road be realigned, the new intersection would meet at a right angle thus implementing this policy. The City Commission notes that DLCD cites to no applicable criteria requiring a Plan amendment for realignment of a local street. Additionally, any transportation improvements must be approved as part of the Large Scale Development review.

g. DLCD argues that the conditions allow development inconsistent with the notice provided by the City. The notice provided by the City indicated that the City Commission would limit its review to the conditions on remand and any other issues necessary to satisfy remand. Thus, the reader of the notice was apprised that the issues on remand, including requiring the TIS to be based upon an identified use, would be raised in this hearing. The revised and supplemental TIS prepared by Kittelson and Associates identifies the particular use which it analyzed. The proposed use, including conditions of approval, is not inconsistent with the notice provided by the City. Additionally, the notice described a C-1 rezoning on 41.6 acres. The approval is for C-1 rezoning on less acreage. No parties' substantial rights are prejudiced because the notice explained the issues on review and that conditions could be imposed to address these issues. In any event, the City Commission notes that a city may review a particular use in its TIS. ODOT v. City of Oregon City, ___ Or LUBA ___ (WBA No. 97-046, January 22, 1998.)

h. DLCD argues that the conditions contemplate site design and other approvals not provided for by Warrenton's Zoning Ordinance. DLCD has overlooked the Large Scale Development provision in WZO 7.700. Moreover, nothing prohibits the City from imposing a design review requirement, subject to public notice and an opportunity to request a hearing, especially where the applicant has requested that such a condition be imposed.

i. To the extent DLCD argues that Goal 1 is implicated, it is incorrect. LUBA has consistently held that a City violates Goal 1 only when it fails to follow its acknowledged Citizen Involvement Program or where it amends its Citizen Involvement Program. Casey Jones Well Drilling, Inc. v. City of Lowell, 34 Or LUBA 263 (1998); Church Hill v. Tillamook County, 29 Or LUBA 68 (1995). In this case, Goal 1 is not implicated by this application.

6. Response to April 28, 2000 Letter from Mr. Atkins.

Mr. Ronald Atkins submitted a one-page letter dated April 28, 2000 to the City Commission at its public hearing on July 12, 2000. The City Commission finds for the reasons explained below that Mr. Atkins letter does not require denial of this application.

A. Point one in the letter is not relevant to the issues on remand. The City Commission finds that the evidentiary hearing was limited to the issues on remand. Moreover,

even if relevant, the letter presents no substantial evidence that such an issue is either present or is related to a relevant condition of approval.

B. The City Commission finds that traffic lights are unlikely to be the proposed mitigation measure with one exception. Kittelson has concluded that this light meets ODOT spacing standards.

C. The City Commission rejects this argument for the same reason as above.

D. The City Commission finds that the issue of heavy hauling delivery trucks could have been raised in the first phase of this application but since it was not, it has been waived. However, even if it is relevant to an issue on remand, the City Commission finds that nothing in the applicable approval criteria requires the City to expressly consider the impact of heavy hauling delivery trucks. The City Commission has found that the applicable approval criteria in the WZO, the TPR and the OHP demonstrate that with appropriate mitigation, this application will not significantly affect affected transportation facilities and that there are adequate local streets and capacity within those streets to accommodate the development.

E. The City Commission rejects this argument for the same reason as above.

F. The City Commission finds that there is no substantial evidence that natural wildlife creates a safety problem with traffic. Additionally, the infrequent movements of wildlife are not sufficient to overcome the substantial evidence that with mitigation, this application will not significantly affect applicable approval criteria.

7. Response to Issues Raised in Limited Evidentiary Hearing on Reconsideration.

The purpose of the withdrawal of decision for reconsideration was to provide all parties an opportunity to consider revised conditions of approval that might address issues raised in the prior decision. The applicant has agreed to construct a relocated Rodney Acres Road at its expense, and it will provide an improved connection between U.S. Highway 101 on the east and Spur No. 104 on the west. Additionally, the improvement of the intersection of U.S. Highway 101 and Spur No. 104/101 will result in a better-functioning intersection. The City Commission has before it a December 6, 2000 letter from Mark Vandehey of Kittelson & Associates. Mr. Vandehey's letter states:

"I have reviewed the proposed conditions of approval dated December 6, 2000 [the conditions of approval dated December 6, 2000 are substantially the same as those adopted

with this decision] for the Warrenton Land and Investment Zone Change in Comprehensive Plan Amendment. The previously conditions of approval presented to the Warrenton City Council were adequate to satisfy the requirements of the Oregon Transportation Planning Rule and the 1999 Oregon Highway Plan. The revised conditions of approval include additional transportation system improvements along U.S. 101 at its intersection with the Spur No. 104 and provide a new intersection along U.S. 101 that will replace the existing intersection with Rodney Acres Road.

“Based on our review of the proposed conditions of approval, we have concluded that the proposed conditions adequately mitigate the transportation impacts that may result from the proposed zone change and comprehensive plan amendment and fully satisfy the zone change and comprehensive plan amendment approval criteria set forth in the Oregon Transportation Planning Rule and the 1999 Oregon Highway Plan.”

The City Commission finds that the applicant has further satisfied the relevant provisions of the OHP and TPR by agreeing to undertake certain improvements intended to increase the capacity of affected roadways. These improvements are consistent with the August, 2000 Kittelson letter which explained why mitigation measures allowed by the TPR and OHP would result in no significant affect from this application on affected roadways. The City Commission finds that the improvements required by the conditions of approval will mitigate impacts from the development of additional commercial uses at this site by providing for better connections between U.S. Highway 101 and Spur No. 104, less interference with left-turn movements on U.S. Highway 101 and Spur No. 104/101 and additional capacity on the highway through the improvements, including the signalization of the relocated Rodney Acres Road and U.S. Highway 101 intersection.

Further, a representative of the Oregon Department of Transportation testified before the Warrenton City Commission on December 6, 2000. Mr. Mo Dichari told the City Commission that the proposed realignment of Rodney Acres Road with its intersection at U.S. Highway 101 will greatly enhance safety, function and operations of the facilities.

Additional issues raised and addressed in the limited evidentiary hearing include the following:

A. Although the record contains a draft intergovernmental agreement (“IGA”) and a letter from ODOT references the IGA, the City Commission has not adopted the IGA in this decision and there is no guarantee that the City Commission will adopt the

IGA. Moreover, none of the conditions of approval in this decision rely upon the IGA and there is no obligation on the City Commission's part to adopt the IGA. If the IGA is adopted, it will be adopted in a separate procedure as a separate decision. The City Commission finds that the IGA is outside of the scope of this decision and is not part of this decision.

B. One witness raised the issue of whether the revised road would affect persons on the other side of the road. The City Commission finds that the relocated Rodney Acres Road will have no affect on other properties (properties other than those owned by the applicant that are the subject of this application) for two reasons. First, the City Commission relies upon and adopts in its entirety the two page December 13, 2000 letter from Mr. Mark Barnes addressing the compatibility criterion in Warrenton Zoning Ordinance 14.080(2)(b). Mr. Barnes wrote and testified before the City Commission on December 6, 2000 that the relocated road would have no issue with respect to compatibility on other property. Additionally, the City Commission finds that the only property owner with property on the relocated Rodney Acres Road is the applicant. The City Commission finds based on this evidence that property owners other than the applicant will have the same access with the same traffic impacts that they do now. The City Commission further finds that existing property owners will have access to this new road either as a city street or a state facility. The City Commission notes that condition of approval 10 requires the road to be a public road.

C. One witness asked whether the relocated Rodney Acres Road would change access to Dolphin Avenue on the east side of U.S. Highway 101 and whether the amount of traffic would be changed. The City Commission finds based on evidence before it, including the testimony of Mr. Dichari, that access to Dolphin from the west across U.S. Highway 101 will be improved. Furthermore, the City Commission relies on and adopts in its entirety the two page December 11, 2000 memorandum from Mr. Vandehey addressing this and other issues associated with the realignment of Rodney Acres Road and the improvements to the intersection of U.S. Highway 101 and Spur No. 104. Mr. Vandehey concluded on page 1 of his memorandum that all turning movements would be "significantly easier (and less hazardous) to make than crossing U.S. 101" because of the relocated road. Further, the City Commission finds that this decision does not affect Dolphin Road on the east side of U.S. Highway 101, because that road will not change.

D. One witness asked whether the relocated Rodney Acres Road would have an impact on any wetlands on the property. The City Commission finds based on the testimony of Mr. Barnes that most of the wetlands are on the east side of existing Rodney Acres Road and that the proposed development can avoid wetlands. Moreover, the City Commission notes that condition of approval 4 requires a site review under the City's "Large Scale Development" approval process which is required to include wetland review and condition of approval 6 requires subsequent grading or site preparation activity to comply with city standards for erosion control and any erosion control program administered by the Oregon Department of Environmental Quality.

E. DLCD's December 6, 2000 letter raised several issues regarding Goal 10, "Housing" and Goal 12, "Transportation." DLCD asserts that these goals have not been satisfied by this application. The City Commission finds that Goal 10 is outside of the scope of this limited evidentiary hearing and, in any event, DLCD's letter provides no additional argument or evidence that has not already been addressed by these findings elsewhere. The City Commission also finds that Goal 12 was not previously raised, may not be raised in this remand proceeding and, in any event, DLCD has failed to raise with specificity how Goal 12 is relevant to the amended conditions of approval.

DLCD also asserted that the City has failed to satisfy OAR 660-012-0060(1), (3) and (6), provisions of the Transportation Planning Rule. The City Commission finds the December 6, 2000 letter from DLCD suggests that the City has failed to comply with OAR 660-012-0060(3). This provision of the Oregon Transportation Planning Rule provides: "Determinations under subsection (1) and (2) of this section shall be coordinated with affected transportation facility and service providers and other affected local government."

The applicant, the City and the Oregon Department of Transportation ("ODOT") have made extensive efforts to coordinate on OAR 660-012-0060(1) and (2) with and between DLCD, ODOT and the City. The fact that DLCD does not agree with the proposed conditions of approval demonstrating compliance with OAR 660-012-0060(1) and (2) does not mean that the City has failed to coordinate the application as required by this administrative rule. The Land Use Board of Appeals ("LUBA") has held in a case, where the decision found that the City "actively coordinated" with ODOT, that the coordination requirement was satisfied. Melton v. City of Cottage Grove, 28 Or LUBA 1 (1994). Among the coordination efforts in this case were many meetings between the applicant's attorney, representatives of the City and representative of both DLCD and ODOT, including a November 22, 2000 letter to both DLCD and ODOT outlining proposed conditions of approval. Moreover, DLCD was fully aware of the proposals because ODOT shared all of the proposals with the agency. LUBA has held "that coordination does not require affected units of government to agree with the decision ultimately adopted by another government." ODOT v. Clackamas County, 23 Or LUBA 370, 378 (1992); Melton, Id.

The City Commission finds that DLCD has failed to explain why the revised conditions of approval do not satisfy OAR 660-012-0060(1). Finally, OAR 660-012-0060(6) could have been raised in the first phase of this proceeding and is therefore waived. Moreover, DLCD fails to explain how OAR 660-012-0060(6) was relevant to the amended conditions of approval which was the subject of the limited evidentiary hearing.

The City Commission further finds that this administrative rule provision, if applicable, is satisfied. OAR 660-012-0020(2)(b) and 0045(3) are required to be implemented by this provision. The City Commission finds that this provision allows any number of actions to require on-site alignment of streets or accessways with existing and planned arterial, collector and local streets surrounding the site. The City Commission finds that the conditions of approval, including conditions of approval 10(a)-(d) accomplish a binding requirement for on-site alignment to the streets or accessways. Further, DLCD fails to explain why it could not have raised this issue in

the first phase in the context of a limited evidentiary hearing in which DLCD failed to explain how this criterion is relevant to the scope of that hearing. Further, the City finds that the provision is inapplicable in any event because the proposed amendment will not significantly affect a transportation facility.

Additionally, the City Commission finds that OAR 660-012-0045(3)(a)-(e) are satisfied by this application. This provision requires that bicycle parking facilities be part of new retail developments, that on-site facilities be provided with safe and convenient pedestrian bicycle access, that bikeways be provided along arterials and major collectors and that sidewalks be required along arterials, collectors and most local streets but sidewalks are not required along controlled access roadways, and that internal pedestrian circulation within new commercial development be provided through clustering of buildings, construction of accessways, walkways and similar techniques. The City Commission finds that conditional of approval 4, as previously adopted by the City Commission, and as proposed to be adopted in this decision, addresses these requirements.

Moreover, the City Commission will amend conditional of approval 4 to provide that the "large scale development" approval process include the requirements of OAR 660-012-0045(3). The City Commission finds based on the evidence before it and the representations of the applicant that it is feasible to satisfy these requirements through the large scale development process.

Finally, the City Commission finds that OAR 660-012-0020(2)(b) is satisfied because OAR 660-012-0060(6) provides for the on-site alignment of streets or accessways with existing and planned arterial, collector, and local streets surrounding the site as necessary to implement the requirements in Section 0020 to (b) * * *." The City Commission finds that there are no existing streets necessary for extension nor are any additional connections required to existing or planned streets and that connections to neighborhood destinations exist via Rodney Acres Road (existing and as proposed to be relocated) and U.S. Highway 101.

F. Several of the City Commission members acknowledged ex parte contacts with the applicant. The City Commission members, pursuant to ORS 227.180(3)(a)-(b), announced the substance of the oral ex parte communications concerning the application and concluded that such communications did not cause them to prejudge the application. The ex parte communications were revealed at the first public hearing following the communication. No party requested an opportunity to rebut the substance of the ex parte communications nor did any party object to the disclosure of the ex parte communications.

G. One witness raised the issue of impact on existing sanitary sewer and waterlines in Rodney Acres Road. The City Commission finds that that issue can be adequately dealt with through a public street vacation process, should such an application be submitted in the future.

III. Conditions of Approval.

The City Commission approves this application with the following conditions of approval:

1. This application shall be limited to 17.4 acres on the east side of Rodney Acres Road (also known as Dolphin Road), consisting of Tax Lots 8-10-27-2800, 8-10-27-2900, 8-10-27-BC-800 and 8-10-27-2802. In the event that a condition of approval is implemented to require dedication of right-of-way for the relocation of Rodney Acres Road to US Highway 101 through the northern portion of this property and such relocation would result in a land area less than 17.4 acres, this condition shall allow the applicant to amend this condition of approval through a subsequent post-acknowledgment application process to include additional acreage up to 17.4 acres, subject to the process in Conditions of Approval 8, 9, and 13, below.

2. The use on the site shall be limited to a retail shopping center consisting of no more than 165,000 square feet.

3. No direct vehicular access to US Highway 101 shall be permitted from this site. Vehicular access shall be to adjacent local streets (including but not limited to Rodney Acres Road) or, in the event that Rodney Acres Road is realigned to cross or abut this site, as shown in Exhibit A attached hereto and as described in Condition 10(b), below, to that street, subject to condition 10, below. This condition shall not prohibit access to a state right-of-way for pedestrians or bicyclists or for construction of a transit pullout.

4. Prior to approval of building permits for buildings, the applicant shall submit an application for "Large Scale Development" approval under WZO section 7.700. The Large Scale Development application shall include the requirements of WZO section 7.700, and the location and grouping of buildings, building setbacks, amount and location of off-street parking, common vehicular and non-vehicular access points, transportation improvements, height of buildings, design features to ensure compatibility with near-by residential, business, public and semi-public, open spaces areas and wetlands, and other information that may be required by the City, including the requirements of OAR 660-012-0045(3). The applicant shall also be required to facilitate bicycle/pedestrian/transit (Sunset Transit District) "friendly" development that includes but is not limited to a bus pullout and bus shelter, convenient and safe pedestrian connections between street frontages and buildings, convenient and safe bicycle connections to the site, bicycle parking, and building orientation, where practicable, to streets. The review shall require that issues related to compatibility shall be addressed through at least the consideration of the design features on pages 21 and 22 of LUBA No. 99-153. The City shall process the Large Scale Development application with notice to ODOT, DLCD and property owners as required by state and local law prior to the required Planning Commission hearing.

5. The applicant shall mitigate transportation impacts as required by the TPR and OHP by undertaking those specific mitigation measures described in the August 4, 2000 letter from Kittelson & Associates, a copy of which is attached hereto. These mitigation measures are described as follows:

- a. A subsequent post-acknowledgment combined comprehensive plan map/zoning map amendment to change the existing plan map and zoning map designation on a 11.9 acre parcel from its current C-1 zoning to the R-10 zone or a lesser-intense zone. (the "Harbor Site")
- b. A subsequent post-acknowledgment combined comprehensive plan/zoning map amendment to change the existing comprehensive plan map/zoning map designation on a 8.18 acre parcel from its current C-1 zoning to the R-10 zone or a lesser intense zone. (the "Marlin Site".)
- c. The installation of a traffic signal at the intersection of relocated Rodney Acres Road and U.S. Highway 101 pursuant to condition of approval 11, below.

This post-acknowledgment amendment (a combined comprehensive plan map/zoning map amendment) shall be final but not effective and no commercial building permits (except for site preparation permits for construction subject to condition of approval 6, below) shall be approved until the applicant completes the mitigation measures described herein except that the applicant is not required to install the traffic signal to relocated Rodney Acres Road/U.S. Highway 101 until such time as the traffic signal is warranted and approved pursuant to condition of approval 11, below. The applicant shall be responsible for obtaining the subsequent post-acknowledgment comprehensive plan map/zoning map amendment of the two parcels and acreage as described above and in the August 4, 2000 Kittelson letter and in a subsequent post-acknowledgment application (enclosed) which shall be subject to required notice and public hearing process consistent with the post-acknowledgment process. No commercial building permits may be issued for this site (except that the City may allow the applicant to prepare the site for construction is noted above.) Until those applications are finally approved by the Warrenton City Commission, applicable appeal periods have ended and the applications are deemed acknowledged.

This amendment shall be final but not effective and no commercial building permits (except for site preparation permits for construction subject to condition of approval 6, below) shall be approved until the applicant completes the mitigation described in the August 4, 2000 letter from Kittelson and Associates. The applicant shall be responsible for obtaining the rezoning of the acreage described in the Kittelson letter in a subsequent post-acknowledgment application(s) which shall be subject to required notice and public hearing process. No commercial building permits may be issued for this site, except that the City may allow the applicant to prepare the site for construction and may issue such site preparation permits, until the subsequent post-acknowledgment applications are finally approved by the Warrenton City Commission, applicable appeal periods have ended and the applications are deemed acknowledged.

6. Any grading or site preparation activity shall comply with City standards for erosion control and, if applicable, with the erosion control program administered by the Oregon Department of Environmental Quality ("DEQ"). A copy of the completed DEQ permit application and any supporting documents shall be provided to the City. To the extent that any standards for erosion control imposed by the City or DEQ do not so provide, erosion control measures will be implemented as necessary to prevent soil, sediment, and construction debris from being discharged off-site during all clearing, grading, excavation and other site preparation work. Such erosion control measures shall be maintained in place until all landscaping work on the site is complete.

7. A stormwater mitigation plan shall be required at the time of Large Scale Development review. At a minimum, this plan shall include stormwater mitigation measures that address oil and grease and flow volume.

8. Any activities contrary to these conditions shall require prior modification of the conditions of approval requiring public notice and public hearing before the Planning Commission and City Commission as an amendment to this decision. OAR Chapter 734, Division 51 shall apply to any change of use of an approach road to a state highway.

9. Any improvements to local streets or state highways required as mitigation in these conditions shall be made (a) prior to commercial development of the site, or (b) concurrently with commercial development of the site, or (c) after commercial development of the site but in the event of (c), subject to traffic monitoring and development agreement between the City, ODOT and the applicant. Alternatively, the applicant may submit a revised traffic impact study to the City and ODOT demonstrating that some or all of the mitigation measures listed in the June, 2000 traffic study or the August 4, 2000 letter are not warranted. The City shall coordinate its evaluation of a revised traffic impact study with ODOT and DLCD. The modification is subject to the process in Conditions of Approval 8 and 13.

10(a). Applicant shall install at its expense a mountable separator on U.S. Highway 101 to prohibit the following two turn movements: (1) left turns from U.S. Highway 101 to Spur No. 104 and (2) left turns from Spur No. 104 to U.S. Highway 101. Applicant shall install a deceleration lane and acceleration lane on U.S. Highway 101 to and from Spur No. 101. Applicant shall be responsible for obtaining any necessary approvals and permits from ODOT, including authorization to work in the ODOT right-of-way. Applicant shall make the improvements herein subject to applicable ODOT standards. Applicant shall provide any bonds or other assurances of quality of work as typically required by ODOT.

10(b). Applicant shall construct as a city street Phase I of the Rodney Acres Road Realignment in the general alignment shown in Exhibit A attached hereto provided that it meets any applicable city standards and ODOT standards for a District Highway. Applicant shall be responsible for obtaining any necessary approvals and permits from ODOT, including

authorization to work within the ODOT right-of-way. Any driveway, public road or public street connecting to Phase I of the Rodney Acres Realignment shall be 400 feet from U.S. 101 and as shown on Exhibit A, attached hereto. ODOT shall review and approve the plans and specifications for Phase I of the Rodney Acres Road Realignment. Phase I of the Rodney Acres Road Realignment consists of two segments, which are shown in Exhibit A as Phase I West Leg and Phase I South West Leg. The City or property owner agrees to transfer at no cost the Phase I West Leg of the Rodney Acres Road Realignment as shown in Exhibit A to ODOT at such time as ODOT determines it is in the state's interest to include the Phase I West Leg as a state highway facility.

10(c). The Applicant may apply for the vacation of a portion of existing Rodney Acres Road upon the opening of the relocated Rodney Acres Road and ODOT has agreed to consent to the vacation as an abutting property owner.

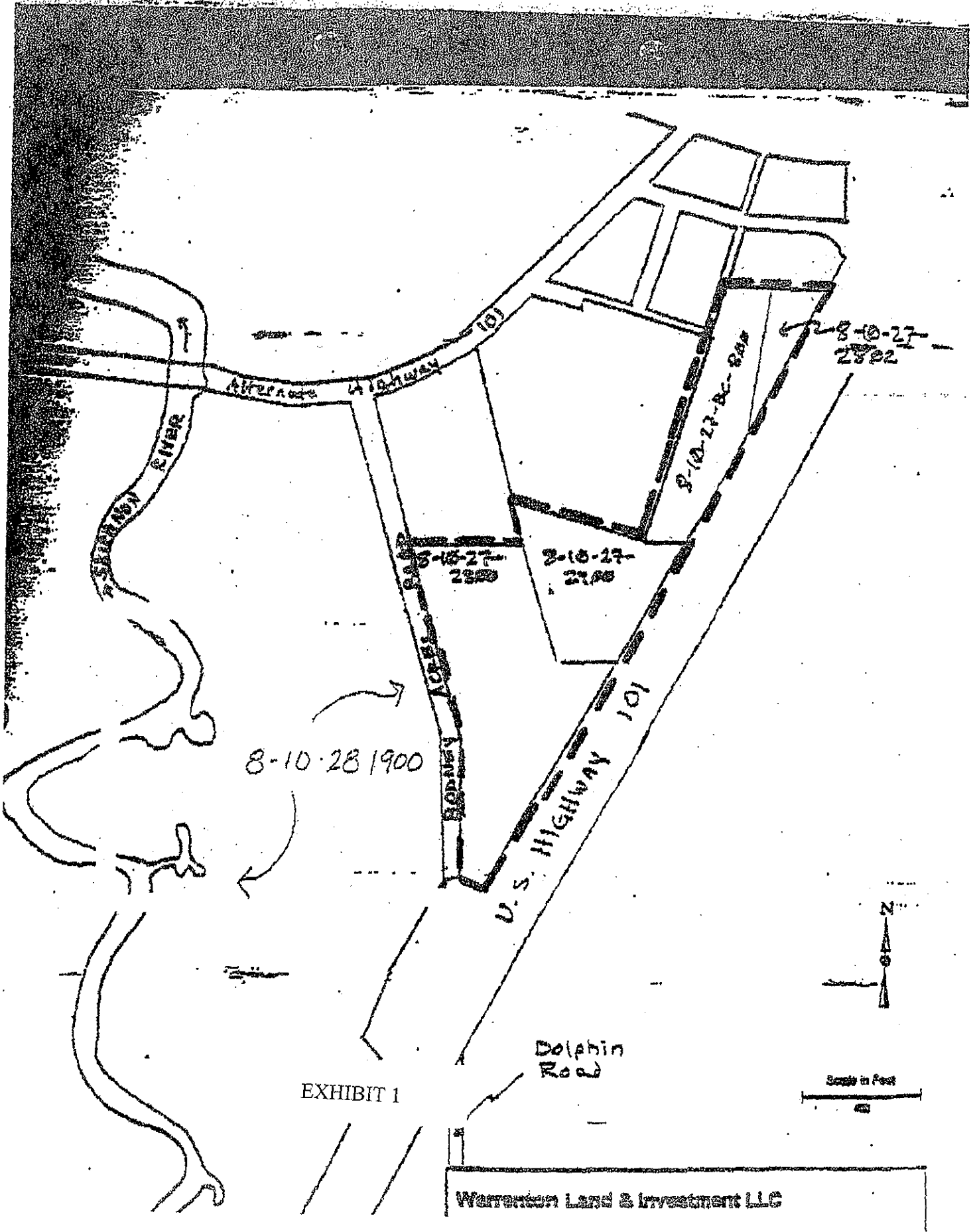
10(d). The specific design and timing of these requirements shall be established in the "Large Scale Development" approval under condition of approval (4), above.

11. A traffic signal at relocated Rodney Acres Road/US Highway 101 shall be installed by Applicant when ODOT determines that the intersection meets standard signal warrants and a signal is approved by the State Traffic Engineer. These improvements shall be made consistent with the timing of the requirements in Condition of Approval 9, above.

12. If the improvements listed in Condition of Approvals 10 and 11 are not to be made until after development and subject to a traffic monitoring agreement between the City, ODOT and the applicant, the City shall require a bond, a letter of credit or other acceptable security device or instrument deemed adequate by the City, prior to commercial development, to assure that such improvements will be made, unless subsequently waived or modified by the City in consultation with ODOT in the process required in Conditions of Approval 8, 9 and 13.

13. Consistent with Condition of Approval 8, above, the City shall not waive or modify the improvements listed in Conditions of Approval 4, 5, 10 and 11, above, without first holding a public hearing and following procedures of public notice and opportunity to be heard of the same dignity as this post-acknowledgment process. Such proceeding shall be pursuant to an application to modify or eliminate a condition of approval of this order and shall be subject to the usual appeal rights to LUBA and the Oregon Court of Appeals and the Oregon Supreme Court."

14. This decision and the conditions of approval shall be recorded in the records of deeds of real property for Clatsop County and shall run with the land.



Alameda Highway

(101)

SERRAN RIVER

8-10-27-AC-808

8-10-27-2802

8-10-27-2200

8-10-27-2100

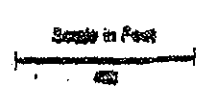
8-10-28-1900

BODNEY ACRES

U.S. HIGHWAY 101

Dolphin Road

EXHIBIT 1



Warrenton Land & Investment LLC

SKERNON RIVER

Alternate Highway

101

8-10-27-2800

8-10-27-2900

8-10-27-2802

8-10-27-BC-800

RODNEY ACRES ROAD

U.S. HIGHWAY 101

Dolphin Road

EXHIBIT B

Scale in Feet

400

Warrenton Land & Investment LLC

Location Map

