

February 27, 2012

City of Lake Oswego
PO Box 369
Lake Oswego, OR 97034

Re: Lower Boones Ferry Advisory Committee Recommendations and Lower Boones Ferry Refinement Plan

Attn: Planning Commission:

While we know the City's Planning Commission has closed the record to all but two issues, only one of which involves the school district, we asked Dorothy Cofield, our land use attorney, to review the City's plans and provide us additional perspective. To that end, please find attached her letter to me dated February 22, 2012.

While we still believe non-parent through-traffic is inherently incompatible with an elementary school site, we felt it important to have your record reflect the fuller extent of concerns as expressed in Ms. Cofield's attached letter. The letter raises a number of questions which we believe need to be answered before the City finalizes any plans relating to the City's Lower Boones Ferry Refinement Plan. We recognize, assuming the Planning Commission takes action tonight, that those discussions will now shift to the City Council. We look forward to our opportunities to discuss our concerns with the Council as it considers the code amendments and other actions that must precede the implementation of these plans.

Please also know that our position on the depth of the two-lane one-way throat exiting our driveway is it be the minimum length necessary to help traffic exit from the school. We believe this can be accomplished in approximately 90 feet, or thereabouts, which would provide space for approximately 3 automobiles to line up to turn left at a red light and up to 4 when green. Our current practice is to always have buses turn to the right onto Lower Boones Ferry as they exit this driveway, and we do not intend to change that practice.

Thank you for your consideration of our concerns and perspective.

Sincerely,

Stuart Ketzler
Executive Director of Finance

SK:blh

Enclosure

CC: Bill Korach, Superintendent
Sara Deboy, Principal, Lake Grove Elementary

COFIELD LAW OFFICE
Dorothy S. Cofield, Attorney at Law

February 22, 2012

Stuart Ketzler
Executive Director of Finance
Lake Oswego School District
VIA ELECTRONIC MAIL

Re: LU 11-0040 – Planning Commission Public Hearing

Dear Stuart,

You have contacted my law office regarding the planning commission's review of the City of Lake Oswego's draft Lower Boones Ferry Advisory Committee recommendations to change the one-way Lake Grove Elementary driveway that exits onto Boones Ferry Road to a two-way shared access at some time in the future. To that end, you have provided my office with a copy of the testimony letter you presented to the planning commission on January 20, 2012, as well as electronic mail from Dennis Egner, the assistant planning director for the City of Lake Oswego. Additionally, I have reviewed the LU 11-0040 Staff Report to the Planning Commission, dated January 23, 2012 (hereinafter PC Staff Report) and its attachments.

As I understand the School District's concerns, it does not want the current one-lane driveway to become a two-way "street" at Lanewood, due to significant safety concerns with protecting the Lake Grove Elementary students.¹ The District is also concerned about the generalities in the Boones Ferry Refinement Plan (hereinafter "Plan") as they affect future redevelopment of the Lake Grove School. You and the Superintendent put your concerns on the record during a Stakeholder Meeting in July, 2011. Along the same lines, both Caroline Krebs (Neighborhood Representative Boones Ferry PAC) and Cheryl Uchida, (Alternate PAC Member) presented minority reports to the PAC arguing that the school's one-way driveway should remain as a one-way access to Boones Ferry and supported Option 3. See Exhibit F-1 PC Staff Report, p. 1, 7 and 13.

Despite the minority reports, the PAC voted to require the shared access upon school redevelopment. See PC Staff Report, p. 3, Item 7. The planning commission is presently set to vote on recommending a map that will show the school's property "shaded" with the requirement that it provide shared access upon redevelopment. ("CDC Appendix 50.11A.050.B will be amended to shade the Lake Grove Elementary School site adjacent to Boones Ferry Road and the north property line driveway which would then require school redevelopment to be designed to provide shared access with abutting sites.") Redevelopment is *proposed* to be defined as new construction, redevelopment, remodeled buildings,

¹ During my review I discovered other onerous new requirements for the school, such as a "Lake Grove School Drive Area, defined as a Gathering Place (Figure 2, Staff Report) and a pedestrian connection to Douglas. See Attachment "D", Staff Report. I have not discussed these items in this letter since the planning commission's record is closed to all items but the shared access and throat widening.

EXHIBIT G-7
LU 11-0040

building expansion, or site improvement project on a partially developed or developed site. *See Attachment E, PC Staff Report.*²

I have reviewed the Boones Ferry Road Refinement Phase-2 Plan (“Plan”) that is published on the City’s website; the City’s Charter; the City’s East Side Urban Renewal Plan; the LU-11-0040 staff report to the planning commission and selected exhibits as well as the minority report from the Project Advisory Committee (PAC) to understand what the City’s future plans are in regards to the Lake Grove Elementary School’s driveway. As I understand the City’s current review process, it adopted the Lake Grove Village Center (LCVC) as part of its comprehensive plan in 2008. In order to implement the LCVC, the City has set up the PAC to provide traffic recommendations for Boones Ferry. Ultimately, the City has indicated it may adopt an Urban Renewal District to finance the LCVC objectives. The planning commission will be voting on recommending to the city council a series of comprehensive plan amendments and code amendments in order to incorporate the Refinement Plan.

From my review of the above-cited documents, the District’s concerns are very legitimate. It appears that the City has an extremely generalized plan to turn the Lake Grove School’s driveway into a two-way street to provide connections to the streets north and west of the school in order to relieve Boones Ferry of some of its traffic. Note that the City already has a code provision regarding shared access with a neighboring site to prevent adverse impacts on traffic flow.³ Lake Oswego Development Code 50.57.015(5). The shared access requirement can only be imposed if the proposed new development creates the need for the shared access. Therefore, it appears that the City is contemplating some sort of shared two way access when the school does any redevelopment or remodeling.

Based on my review, it is not clear what kind of shared access will be ultimately required and who will pay for it. The City’s traffic consultant (DKS) has prepared a Traffic and Safety Analysis but it obviously did not do any specific traffic study for the school to demonstrate the proposed two-way access (at some point in the future) would be safe. The city’s code currently requires schools to have an onsite driveway that allows continuous forward flow of vehicles through the site for the loading and unloading of children. LODC 50.58.015(6). Therefore, the City already recognizes that school access requires one-way access due to the special nature of protecting children when arriving or leaving a school.

One concern you have expressed is whether the city could simply take the school’s driveway and expand it through its eminent domain powers. As you are aware, the City has powers of eminent domain which the constitution, statutes, and common law of the United States and Oregon expressly or impliedly grant to cities. In the case of the City, its charter has granted it the powers of condemnation, consistent with all adopted laws. *See* Lake Oswego Charter, Chapter II, Section 4. It is generally held that public property is not subject to condemnation by another public body without specific statutory authority. If a governmental authority seeks to exercise the power with respect to property already devoted to a public use, and the proposed use will either destroy or interfere with it to such an extent as would be tantamount to destruction of the use, the exercise of the power will be denied unless the legislature has authorized the

² Attachment E states that the Overlay District text amendments are “placeholders” and will be revised based on the planning commission direction. I did not find any information that the planning commission has changed or amended the definition of redevelopment.

³ “The City may require shared access with a neighboring site or an extension of residential streets across adjacent properties to provide access to the development if necessary to prevent adverse impacts on traffic flow.”

acquisition either expressly or by necessary implication. *Emerald PUD v. PP&L*, 76 Or App 583, 711 P2d 179 (1985).

Based on the standard cited above, the school could likely defend against a condemnation under two theories: (1) the City does not have explicit statutory authority to condemn the school's property⁴ and (2) the school could also defend on the grounds that a two-way street will significantly increase safety risks and will ultimately make it impossible for the school to provide safe access, thus meeting the *Emerald PUC* test cited above.

Although it is presently very unclear what type of access the City is proposing for the school, its Charter requires an election to approve any "major road". See Charter, Section 40, Major Road Expenditures. A major road is "any road, street or way" that is 32 feet in width, but not a driveway or parking area for a residential use. Since the City is proposed to expand the School's driveway into a two-way road, if it will be 32 feet or wider, the school could require a city-wide election to approve it. See Section 40.E. As for the immediate widening of the "throat", the District could argue it is the beginning of a "street" and requires an election.

It appears that the City is counting on the balance of the driveway being widened upon redevelopment of the school. The school district would have a very good constitutional argument that such a dedication of land for the public's use violates the U.S. and Oregon Constitutions under *Dolan v. City of Tigard*. A City cannot require a dedication of land for the public's use without showing the impacts from the proposed development are roughly proportional to the impacts of the new development, remodeling or addition. It would be very hard for the City to prevail on the *Dolan* test.

In summary, the District's concerns are well-taken. The City's Refinement Plan is ambiguous and over-reaching. It is not clear what type of access the school will ultimately have, or what the immediate "throat" improvement will be. It is not clear who will pay for the improvements to the widened driveway or future two-way street. It is not clear if the City is intending for the school to ultimately use Beasley Way for ingress and egress if the "bus barn" is relocated to another location. There are also maps that indicate the two-way street will have a pedestrian connection to Douglas. Again, who will pay for the improvements and will the school be required to make a land dedication for the connection.

Should you request, I would be pleased to attend a future city meeting to further explain the concerns outlined in my letter.

Very truly yours,

COFIELD LAW OFFICE


Dorothy S. Coffield

DSC:dsc

⁴ The city cannot point to the urban renewal statute (ORS 457) as its statutory authority to condemn another public body's property because the urban renewal statutes require all condemnation to be consistent with ORS 35, the eminent domain statute and all other laws.