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VIA ELECTRONIC DELIVERY

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Re: Rebuttal Testimony for *Ex Parte* Communication (PGE E-mail)

Board of Commissioners of Columbia County:

The following rebuttal testimony is submitted in response to the Board of Commissioners of Columbia County's ("Board") receipt and apparent acceptance of an *ex parte* communication that consists of an e-mail from Portland General Electric ("PGE") Director and Associate General Counsel Kristin Ingram to Port of St. Helens ("Port") Executive Director Doug Hayes, Port Deputy Executive Director Paula Miranda, and PGE staff member Rebecca Carey-Smith. This rebuttal testimony is submitted on behalf of 1000 Friends of Oregon and Columbia Riverkeeper. Both 1000 Friends of Oregon and Columbia Riverkeeper strongly oppose this proposed rezone and requested exception to Statewide Planning Goal 3. As explained below, because the Port has failed to carry its burden to establish that its application for roughly eighteen proposed uses on high-value farmland meets the applicable criteria for an exception to Statewide Planning Goal 3 and rezoning under the Columbia County Zoning Ordinance ("CCZO"), we recommend the Board deny the Port's application.

On October 19, 2017, Board Chair Henry Heimuller issued a public notice that postponed the Board's deliberation on the proposed zone change and goal exception for the second time. The notice provided that the Board had received an *ex parte* communication, and explained that the Board would hold a public hearing to allow for rebuttal testimony on the *ex parte* communication for interested parties prior to deliberating on the proposed zone change and requested exception.

The substance of the *ex parte* e-mail included several responses to an apparent request made by the Port to PGE regarding the transfer and assignment of "certain infrastructure properties" from PGE back to the Port. *Ex Parte* Communication at 1. The Port apparently also requested that a more certain access route to an existing port dock be established. *Id*. As explained below, the *ex parte* communication supports many of the arguments made in our prior comments, including that the Port has failed to identify necessary transportation networks, services and facilities for its suite of proposed uses, and to the extent the Port has identified those things, extension of those networks, services and facilities onto rural land is prohibited absent an exception to Statewide Planning Goals 11 and 14.

I. Denial of the Application is Required Because the Port Failed to Carry its Burden under State Law and Local Zoning Code Notwithstanding Repeated County Accommodations

The County's actions during these proceedings have not occurred as initially scheduled, and have resulted in the County taking additional evidence outside of the open record period. This has essentially resulted in the applicant receiving the ability to submit a rolling application, rather than requiring a complete application at time of submission, in contravention of ORS 215.427.[1] The County has taken several notable steps during these proceedings that appear to improperly benefit the applicant, and contradict the basic framework of the State's land use decision-making process. *See Fasano v. Board of County Commissioners of Washington Cnty*., 264 Or 574, 507 P2d (1973).[2] Those missteps include: (1) the repeated errors in issuing

[1]ORS 215.427(2) requires the County to review the remand application for completeness, and if determined to be incomplete, notify the applicant within thirty days of exactly what information is missing.

[2] In the landmark case *Fasano*, the Oregon Supreme Court clarified that:

> "Parties at the hearing before the county governing body are entitled to an opportunity to be heard, to an opportunity to present and rebut evidence, to a tribunal which is impartial in the matter -- i.e., having had no pre-hearing or ex parte contacts concerning the question at issue -- and to a record made and adequate findings executed."

notices;[3, 4] (2) Commissioner Heimuller's direct request to county staff to draft testimony in response to citizen-submitted testimony, which resulted in county staff directly contacting, collecting additional information from, and inquiring about the veracity of testimony submitted by the applicant and other entities;[5] (3) reopening the record after it had closed to allow county staff to introduce new additional facts and proposed amendments to conditions of approval in support of staff's insufficiently developed recommendation of approval; and (4) the most recent reopening of the record to address an *ex parte* communication that appears to be supplied by the applicant, and includes representations from the adjacent lessor PGE and relates to applicable criteria. These actions by the County are inconsistent with the requirement that it is the

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Fasano, 264 Or at 588 *citing Zoning Amendments -- The Product of Judicial or Quasi-Judicial Action*, 33 Ohio St L J 130-143 (1972).

[3] The recently-issued notice, like prior notices, fails to adequately describe the nature of the application, because it provides that the proposal is to "Reclassify and Rezone Property from Primary Agriculture (PA-80) to Resources Industrial Planned Development (RIPD)" for 837 acres, rather than identifying that the Port is requesting eighteen discrete uses. Notice of Public Hearing and Rescheduled Deliberations at 1. Moreover, the most-recent public notice violates ORS 197.732(5) because it fails to summarize the issues in an understandable manner. The notice fails to disclose the nature and content of the *ex parte* contact, does not include a copy of the *ex parte* communication, does not address how the Board came into possession of the communication, and does not identify what applicable criteria the communication relates to.

[4] *See also* Testimony of 1000 Friends of Oregon and Columbia Riverkeeper (August 30, 2017) at 3–4 (noting deficient and over-broad notice); and Testimony of 1000 Friends of Oregon and Columbia Riverkeeper (August 2, 2017) at 4–5 (explaining that the County's notice failed to list relevant criteria, improperly described LUBA's remand decision, improperly included non-applicable criteria, failed to identify the major issue of whether the decision could be approved based on the "significantly dependent on a unique resource" reasons exception," failed to identify the proposed uses, and improperly described the burden of proof that the applicant faces).

[5] The actions by Commissioner Heimuller of directing staff to develop and submit into the record response testimony to applicant-submitted information that resulted in county staff contacting the applicant, collecting information from the applicant and verifying the veracity of submitted information raises a concern of whether Commissioner Heimuller had an additional *ex parte* contact with the Port via his proxy Planning Director Todd Dugdale. Memorandum to Board of County Commissioners from Land Development Services Department (August 22, 2017) at 1.

applicant's initial burden to demonstrate that its application fulfills all the applicable criteria when requesting a comprehensive plan amendment. *Hess v. City of Portland*, 23 Or LUBA 343 (1992). For example, it was the applicant's burden to initially identify what adequate transportation networks were needed for its proposed uses under CCZO 1502(1)(A)–(B). It also was the applicant's burden to rebut transportation testimony provided by Chip Bubl during the final rebuttal period, not the County's burden to proactively contact the applicant and other entitles to respond to Mr. Bubl's testimony. Now, the County is again improperly taking evidence that was submitted after the close of the record, in contradiction of the principle set out in *Fasano*.

Considering all actions made by the County during these proceedings, there is a concern that the County has made exceptions for this applicant in a manner that is inconsistent with the County's statutory obligations to process land use applications in a fair manner that places the initial burden on the applicant and allows robust citizen involvement. *See* Statewide Planning Goal 1 (requiring robust citizen involvement, effective two-way communication with citizens). Nonetheless, as explained in our prior comments and below, the Port has failed to demonstrate that its application fulfills all the applicable criteria. Accordingly, we recommend denial.

II. The Ex Parte Communication Clarifies that the Port has not Demonstrated that the Property and Affected Area are Presently Provided with (or are Planned to be Provided Concurrently at the Time of Development with) Adequate Facilities, Services and Transportation Networks to Support the Numerous Proposed Uses.

CCZO 1502(1)(A)–(B) requires that the Board finds adequate evidence that has been presented at a public hearing that substantiates that:

> "[t]he property and affected area are presently provided with adequate facilities, services, and transportation networks to support the use, or such facilities, services, and transportation networks are planned to be provided concurrently with the development of the property."

Based on the *ex parte* communication and prior submissions by the Port, it is clear that the Port has not and cannot demonstrate that existing or planned facilities, services, and transportation

networks are adequate to support the roughly eighteen discreet uses proposed by the Port.[6] The *ex parte* communication itself states that PGE has not met all of the Port's requests for certain infrastructure to be transferred and assigned to the Port, and that detailed discussions regarding water intake infrastructure, discharge system infrastructure, rail infrastructure and dock access have not yet occurred. *Ex Parte* Communication at 1.

Simply put, the Port has not established its needed transportation networks, facilities and services because it does not know what uses will actually occur on the property. Like many of the other shortcomings in the Port's application, the Port's inability to demonstrate that its application fulfills this applicable criterion is due to the Port's request for five vague use categories that include roughly eighteen discrete uses, where those individual uses each require differing types, ranges and quantities of transportation networks, facilities and services. As noted by LUBA and in our previous comments, the Port's inability to adequately address all of the applicable criteria is a problem of its own making. The Port is simply biting off more than it can chew by requesting too many uses to be approved via an exceptions process.

A. Rail Transportation Network

The *ex parte* communication clarifies that the availability of existing and planned rail transportation networks for the proposed uses has not been determined. The *ex parte* communication notes that PGE must retain the right to use existing rail infrastructure located on the Port Westward property, and that PGE needs to retain approval rights regarding use and improvements of the rail. *Ex Parte* Communication at 1. The communication clarifies that PGE will continue to have the power to withhold consent for certain rail improvements, changes or uses if PGE determines that proposed uses would have a material adverse impact on PGE operations or the airshed. *Id*. PGE is essentially indicating that it will not transfer or assign any rail infrastructure given the hazardous and unknown nature of some of the uses proposed by the Port, and PGE's sensitive operations. Not only do these statements by PGE demonstrate that the Port has failed to identify what transportation networks it needs for its numerous uses; it also demonstrates that the Port has failed to demonstrate that its proposed uses (including

[6] The Port's remand application fails to analyze this code section for its proposed uses.

transportation uses) are compatible with adjacent uses at PGE and in the affected area. OAR 660-004-0020(2)(d). Clearly, the Port cannot establish access to existing or planned rail infrastructure for all of its proposed use categories in violation of CCZO 1502(1)(A)–(B).

B. Dock and Port Facility Access and Use

Throughout this process, the Port has struggled to demonstrate that it has access to the existing dock infrastructure that is located over the Columbia River and on land located on the prior-approved exception area at Port Westward, although the dock and port facilities are its sole basis for why the Port believes it is entitled to a reasons exception under OAR 660-004-0022(3)(a). The *ex parte* communication addresses dock access, and states that, with conditions, PGE is "willing to assign and transfer both access legs as well as the connector to the Port[.]" *Ex Parte* Communication at 1. What the communication fails to address is the actual use of the dock, a required determination under CCZO 1502.

Moreover, this non-binding e-mail from PGE does not provide substantial evidence to demonstrate that dock and port facility access is available. As noted in our previous comments, PGE's binding lease agreement already addresses dock and port facility access, and gives PGE considerable discretion as to what uses can occur on the dock. Even if access is available, the Port still has failed to demonstrate if it can use the existing dock and port facilities in a manner that can accommodate the most intense of its many proposed uses, considering the restriction of PGE's Master Lease Amendment. *See* Testimony of 1000 Friends of Oregon and Columbia Riverkeeper (August 16, 2017) at 3. The Port has also failed to identify any planned expansions for the dock and port facilities, and any planned expansions would necessitate a compatibility analysis, which has not occurred. OAR 660-004-0020(2)(d). Accordingly, the Port has failed to demonstrate that it has adequate existing or planned water-oriented transportation networks to serve all of the proposed uses.

The *ex parte* communication also appears to indicate that the road to the dock will need to be improved to accommodate the Port's uses. *Ex Parte* Communication at 1 (requiring a condition that the Port improves the dock access road). Based on this, the Port has not demonstrated that the existing road to the dock is adequate to serve the proposed uses, or that

there are any planned improvements to accommodate the many proposed uses in violation of CCZO 1502(1)(A)-(B).

As noted in our previous comments, even if PGE would grant the Port full access and use of the port and dock facilities, the Port still cannot receive an exception for several reasons. First, the port and dock facilities constitute transportation facilities, and transportation facilities cannot provide a basis for an exception to a planning goal. *See* OAR 660-12-0060(5).[7] Second, even if, as the Port previously argued, that the prohibition at OAR 660-012-0060(5) does not apply to this application, the Port cannot receive an exception based on the existing port and dock facilities, because they are not located "on agricultural or forest land."[8] LUBA has recently made it abundantly clear that the "significantly dependent" reasons exception must be read narrowly, and requires the unique resource to be located on agricultural or forest land. *See 1000 Friends of Oregon vs. Jackson County and OR Solar 7, LLC*, __ Or LUBA __ (LUBA No. 2017-066, October 27, 2017) at slip op 26–27 (LUBA noting that a resource that is not located on agricultural or forest land "cannot possibly constitute a 'resource' for purposes of OAR 660-004-0022(3)(a).")

The Port cannot demonstrate that any unique resources are located on agricultural or forest land that would entitle it to an exception. The port and dock facilities are located over the Columbia River and the exception land at existing Port Westward. Lands located within an acknowledged exception area for Goal 3 are not agricultural lands. OAR 660-033-0020(1)(c). Accordingly, even if the *ex parte* communication could be read to support a determination that

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[7] OAR 660-012-0060(5) provides:

> "The presence of a transportation facility or improvement shall not be a basis for an exception to allow residential, commercial, institutional or industrial development on rural lands under this division or OAR 660-004-0022 and 660-004-0028."

OAR 660-012-0005(30) and -0020(2)(e) further clarify that a port facilities are transportation facilities.

[8] OAR 660-004-0022(3) provides that industrial development can be sited on resources land if the proposed use is "significantly dependent upon a unique resource *located on agricultural or forest land*." Emphasis added.

the Port may have access to the existing dock and port facilities, that cannot provide a basis for the Port to receive a reasons exception.

III. The *Ex Parte* Communication Demonstrates that an Exception to Goal 11 is Required

The *ex parte* communication supports our prior arguments that the Port's proposed uses necessitate an exception to Statewide Planning Goal 11 Public Facilities and Services. As noted above, when considering a rezone, the county must identify evidence that all necessary facilities, services and transportation networks exist or are planned to be provided concurrently with development. CCZO 1502(1)(A)–(B). Based on the nature of the proposed uses, and representations made in the *ex parte* communication, it is clear that the proposed uses necessitate extension of public facilities onto resources land. Therefore, an exception to Goal 11 is required. An exception to Goal 3 does not relieve a jurisdiction from remaining goal requirements and does not authorize uses, densities, public facilities and services or activities other than recognized by the applicable exception. OAR 660-004-0018(1).

Here, the *ex parte* communication indicates that PGE is planning to assign and transfer the water intake infrastructure and discharge system infrastructure to the Port. *Ex Parte* Communication at 1. The *ex parte* communication also alludes to the Port building discharge infrastructure including a discharge piping system from the existing pump station to the river, and developing vehicular access to the outfall facility. *Id*. The infrastructure that may likely be transferred to the Port is located on the existing exception site, and includes a water supply system located on the southeast end of the property, a water distribution system serving the PGE facility and dock, water treatment facilities, and sewage treatment facilities including a sewage collection system. Columbia County Comprehensive Plan at 118. Use of these existing facilities and development of new public facilities and services such as sewer infrastructure for uses located on the subject property necessitates an exception to Goal 11.

The Port's ability to obtain an exception to Goal 11 for sewer infrastructure is extremely compromised. Extension of sewer service by a private or public service provider onto rural land is prohibited absent a demonstration that such extension is necessary to mitigate a public health hazard, or to avoid an imminent significant public health hazard. OAR 660-011-0060(4)–(9). As

defined by administrative rule, sanitary sewer includes both treatment facilities systems and primary collection systems. OAR 660-11-0005(7)(b). Sewage includes industrial waste. OAR 660-011-0060(1)(e). A sewer system includes pipelines, conduits, pump stations, all other structures and facilities used for treating or disposition of sewage or collecting or conducting sewage to an ultimate point for treatment and disposal. OAR 660-011-0060(1)(f). The *ex parte* communication supports our prior arguments that the Port is seeking to extend public facilities, including sewer lines onto rural lands, although the Port has not requested an exception to Goal 11. Moreover, the Port's ability to obtain an exception to Goal 11 clearly is constrained by the limited allowances under Goal 11 for extensions of sewer. OAR 600-011-0060(4)–(9). Relatedly, disclosure of required services and facilities for the rezone is required for both an adequate *Shaffer* analysis[9] and CCZO 1502(1)(A)–(B).[10] Simply put, the Port cannot ignore the needed and probable services and facilities associated with its most intensive proposed uses when seeking an exception to rezone agricultural land. Because the Port has failed to identify the suite of services and facilities necessary for the proposed uses, this application should be denied. To the extent, the Port has demonstrated that it needs sewer services, and other public facilities and services, it is clear that extension of facilities and services requires an exception to Goal 11, which the Port has not requested, and is prohibited from receiving absent a demonstration of a public health hazard. Accordingly, this provides another basis to deny the Port's application.

For the reasons explained above and in previous testimony, 1000 Friends of Oregon and Columbia Riverkeeper urge the Board of Commissioners to deny the Port of St. Helens'

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[9] One of the *Shaffer* Factors requires an inquiry of the intensity of facilities and services provided. Rural Uses must require "no or hardly any public services[.]" *Shaffer v. Jackson County*, 70 Or LUBA 922, 933 (1989) *quoting Conarow v. Coos County*, 2 Or LUBA 190, 193 (1981).

[10] Columbia County Zoning Code 1502(1)(B)(3) requires that the Board of Commissioners find adequate evidence that has been presented at a public hearing that substantiates that:

> "the property and affected area are presently provided with adequate facilities, services, and transportation networks to support the use, or such facilities, services, and transportation networks are planned to be provided concurrently with the development of the property."

application. Thank you in advance for considering our organizations' input on the Port's application and the *ex parte* communication.

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