BEFORE THE HEARING OFFICER

FOR WASHINGTON COUNTY, OREGON

In the Matter of: Application of Tess Properties for Preliminary Plat approval of the LAURELWOOD ESTATES SUBDIVISION on property located at T2S, R3W, Section 05, TL 2400 (151.55 acres)	County File No.: L2400303-S MOTION TO REOPEN THE RECORD TO RESPOND TO A LATE STAFF REPORT

The applicant moves to reopen the record pursuant to ORS 197.797(6)(c) to allow the applicant to provide evidence responsive to a procedurally-inappropriate and late staff report submitted Washington County staff member Kofi Nelson-Owusu on April 9, 2025.

On that date, Mr. Nelson-Owusu submitted a memorandum entitled "*Staff Comments on Onsite Stormwater Management in Response to Applicant Submittal during Open Record-1 for the 30-Lot Subdivision (Laurelwood Estates) in the AF-5 District*." Despite professing to be a timely response to evidence submitted by the applicant during the First Open Record Period (March 27, 2025), Mr. Nelson-Owusu's memorandum substantively focuses on alleged errors in the applicant's "Preliminary Stormwater Report" dated January 28, 2025. As such, Mr. Nelson-Owusu's memorandum constitutes nothing more than a late staff report submitted in violation of state law. ORS 197.797(4)(b) requires staff reports to be published at least seven (7) days prior to the first evidentiary hearing. The applicant submitted the January 28, 2025 Preliminary Stormwater Report well in advance of the first evidentiary hearing conducted on March 13, 2025.

Mr. Nelson-Owusu's memorandum is of a technical / engineering nature. For the first time in the proceeding, Mr. Nelson-Owusu expresses disagreement with some very specific factual assumptions made by Mr. Roper in his January 28, 2025 Preliminary Stormwater Report. As a result, Mr. Nelson-Owusu demands that the applicant build what we believe to be an unnecessary

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second "sub-regional" stormwater facility. This requirement is set forth in proposed Condition V, which is in the record. While it is expected that engineers will have some differing approaches to factual issues, it is not appropriate for staff to raise a new issue at a point in the proceeding when it is too late to respond. The Hearings Officer limited the Second Open Record period to *rebuttal* evidence responsive to information submitted on March 27, 2025, not a new staff report.

LUBA has stated that a late staff report is a procedural violation that may or may not constitute grounds for reversal or remand of the local government's decision. The person alleging error must demonstrate prejudice to his or her substantial rights. ORS 197.835(9)(a)(B)[1]. To establish that its substantial rights were prejudiced by a late staff report, a petitioner needs to identify ways in which its written and oral responses at the local hearing would have been different or more complete if the staff report had been available earlier. *Forest Park Estate v. Multnomah County*, 20 Or LUBA 319 (1990).

In this case, that burden is easily met. The applicant's substantial rights to a fair hearing have been violated because the applicant has not been given an opportunity to respond to the critique presented in the late staff report. ORS 197.797(6)(c) provides:

> ***(6)(c) If the hearings authority leaves the record open for additional written evidence, arguments or testimony, the record shall be left open for at least seven days. Any participant may file a written request with the local government for an opportunity to respond to new evidence submitted during the period the record was left open. If such a request is filed, the hearings authority shall reopen the record pursuant to subsection (7) of this section.***

Had the applicant been aware that Mr. Nelson-Owusu was taking issue with certain input parameters set forth in the January 28, 2025, Preliminary Stormwater Report, the applicant could

[1] ORS 197.835(9)(a)(B) – "[T]he board shall reverse or remand the land use decision under review if the board finds: The local government . . . [f]ailed to follow procedures applicable to the matter before it in a manner that prejudiced the substantial rights of the petitioner[.]"

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have either (1) revised the report prior to the hearing, or (2) provided further clarification as to why those input parameters were selected. By improperly submitting the late staff report at a point in time when no further factual evidence is allowed by the "14-14-10" schedule, the applicant is deprived of these opportunities unless the record is re-opened.

Furthermore, Mr. Nelson-Owusu cites to certain code provisions which are not set forth in the zoning code, in violation of the codification rule. ORS 215.416(8)(a) requires that permits be decided based on text and maps adopted into zoning codes:

> ***Approval or denial of a permit application shall be based on standards and criteria which shall be set forth in the zoning ordinance or other appropriate ordinance or regulation of the county and which shall relate approval or denial of a permit application to the zoning ordinance and comprehensive plan for the area in which the proposed use of land would occur and to the zoning ordinance and comprehensive plan for the county as a whole.***

The best way to resolve this issue is for the Hearings Officer to allow a Third Open Record Period to the applicant only, limited to the issue of providing responsive evidence to Mr. Nelson-Owusu's April 9, 2025 memorandum as part of the applicant's final argument. Doing so will not delay the ultimate resolution of the case.

Conclusion.

For all of the reasons set forth above, this MOTION TO REOPEN THE RECORD TO RESPOND TO A LATE STAFF REPORT should be GRANTED.

Respectfully submitted this 15th day of April 2025.

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/s/ *Andrew H. Stamp*

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