



TUALATIN RIVERKEEPERS.

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September 9, 2021

Kenneth Gibson
King City Mayor
City of King City
15300 SW 116th Ave
King City, OR 97224

King City Council
City of King City
15300 SW 116th Ave
King City, OR 97224

Submitted via Email

Re: Public Comments on the Master Planning Process & the Draft TSP

Tualatin Riverkeepers (TRK) is a community-based organization that protects and restores the Tualatin River watershed. We build watershed stewardship through engagement, advocacy, restoration, access, and education. As you rescope the work for the Master Plan, we would like to follow up on the verbal information we provided during your field trips to the Bankston, Meyer, and O'Halloran properties on April 23rd, June 21st, July 10th, and August 21st. We want to thank everyone from the city and the consultant team who took the time to join us on one of these trips to see the terrain firsthand. We hope you found the experience valuable. However, we realize we raised several issues and concerns in the field, and we wanted to take the time to provide a more detailed written explanation of our concerns as a follow up for review at your leisure.

As we mentioned, Tualatin Riverkeepers had several concerns about the Draft TSP and master planning process generally. First, TRK applauds the city for taking a pause to rescope the rest of the planning process and in the spirit of collaboration, we hope by raising these concerns now, while a pause is occurring, will allow these to be addressed so that the process can proceed without any additional

regulatory or political hurdles. At the core, our major concerns are with the planned road network as laid out in the Draft TSP and the public participation process generally for both the Master Plan and the Draft TSP. With the currently favored road network as shown in the Draft TSP King City is potentially setting itself up for failure by creating a road network that does not comply with Oregon Land Use Goals, the Clean Water Act, or Metro Ordinance 18-1427. Additionally, the overall process could be more open, transparent, and foster more opportunity for meaningful discussion on committees and in other public forums.

Below we have addressed each issue separately for ease of understanding after a brief recap of the environmental conditions on the visited sites. This list of issues is not necessarily an exhaustive list, just those issues that have jumped to the fore for TRK as the planning process has unfolded.

I. Recap of Environmental Conditions of Creeks & Ravines in the Planning Area

As a refresher, the five creeks passing through the planned development site are continually eroding due to stormwater impacts from past poorly-planned development by the surrounding communities. If these creeks are not carefully dealt with by the city, they will create future costly erosion problems and negatively impact the water quality of the Tualatin River. In other nearby municipalities some of the impacts in addition to reducing water quality, have included damages to residential properties and sewer damage.¹ The massive erosion sites that have already been identified have been estimated to cost in the multimillion-dollar range to restore. We therefore urge the city to take this process slowly and thoughtfully from here on to avoid long-term negative impacts to the environment and community.

Additionally, TRK would like to remind everyone of the nature of the soils in the planning area. Much of the land around the creeks, in the ravines, and near the river has been identified by the State as having high landslide potential. The map that was shared in person has been attached to this letter. You might remember seeing one example of such a slide on the O'Halloran property, the third property on your tour. We hope you will keep these existing conditions, the erosion, the deep ravines, and the landslide potential, in mind as the planning process continues. We also hope you will make it a goal of the planning process to restore sites that are currently eroding and more generally have a goal to create a sustainable, equitable community that works with nature instead of against it.

II. Proposed Road Network in Draft TSP Would Not Comply with the Clean Water Act

The Clean Water Act and complimentary state laws have several provisions that will apply to development in the planning area including remove and fill requirements and water quality certifications. Although these requirements are usually not addressed until the design and permitting phase, given the nature of the terrain, TRK feels it is important to raise these compliance issues early in the process to avoid major permitting problems later. The Clean Water Act at its core is a law to protect

¹ For more information on this topic please refer to TRK's letter to Mike Weston last fall, re: King City Transportation Plan Survey Comments. Submitted via email Oct. 25, 2020.

the integrity of the nation’s waterways and restore them when they are not meeting standards.² Because the road network will impact creeks, the Tualatin River, and wetlands, King City³ will be required to obtain several different permits and certifications before constructing the east to west connector. The comments in this section are specifically geared to discuss the permitting problems associated with an east-west connector, particularly an alignment that would follow the River Lane elevation across the expansion area.

It is important to note that there are special provisions, sometimes additional requirements, and extra scrutiny for permit applications when an impacted waterbody is listed as “impaired.” The Tualatin River in the expansion area is impaired and fails to meet water quality standards. Two of the impairments the Tualatin River suffers from are low Dissolved Oxygen (DO) levels and water temperatures too high for salmonids. Increased sedimentation and erosion negatively impact DO and water temperature. It should be noted that the proposed road network, especially the proposed extension of Fischer Road on the alignment closest to the river, would potentially increase sedimentation along with other negative impacts to wetlands and waterways.

A. Clean Water Act Section 404 & Department of State Lands Wetland Fill Permits

Section 404 of the Clean Water Act requires entities to obtain permits before conducting fill and removal activities near water bodies and wetlands. Oregon has a similar permit requirement in the Remove and Fill Law.⁴ In Oregon, the Department of State Lands (DSL) and the US Army Corps. of Engineers (USACE) review applications to determine whether the proposed fill and removal activities comply with state and federal requirements to avoid impacts to wetlands and waterways whenever practicable. Failure to obtain either a 404 or DSL permit will prevent an entity from engaging in activities that would result in material being added or removed to a wetland and/or waterway(s). In other words, if King City’s application for 404 and/or DSL permits are rejected, then King City will not be able to build the east-west connector on the selected alignment.⁵ While King City will not need to obtain 404 & DSL permits until well after completing its master plan, its road network in the draft transportation plan would face many challenges in obtaining the necessary 404 & DSL permits. We therefore urge King City to think about these challenges when selecting a final preferred alignment for the east-west connector.

One requirement for obtaining 404 & DSL permits is to create a list of practicable alternative plans that can be implemented at a different site that would avoid the impacts to wetlands and waterways entirely. The Remove and Fill Guide from DSL states that “[d]uring the project development phase, every

² There are state laws with a similar core focused on waters of the state instead of waters of the United States. *See* ORS 468B.010, ORS 196.795-990.

³ TRK acknowledges that King City might not be the entity that ends up building the east-west connector. The city is used as the expected permittee for ease of explanation. These permitting problems will be relevant for whoever is trying to construct the east-west connector.

⁴ ORS 196.795-990

⁵ Note even though bridges have less impacts than a culvert, pilings for the bridges in wetlands would still be “fill” activities requiring both a federal and state permit.

reasonable opportunity to avoid and minimize impacts must be explored.”⁶ King City has yet to show the community stakeholders any concrete adequately explored alternative east-west connectors. Therefore, the mandate to explore alternatives that would avoid impacts has not yet been compiled with. King City will need to produce a more detailed analysis of alternative alignments, other than small changes to the currently favored Fischer Road extension along the river, in order to obtain 404 & DSL permits. In other words, King City must seriously look at and consider selecting a more northern route that avoids crossing as many of the creeks and ravines as possible. Failure to seriously look at alternatives that would avoid impacts to waterways and wetlands is a sufficient reason for USACE and/or DSL to deny the permit applications.

TRK recommends that King City select an east-west connector alignment in the uplands near the northern portion of the urban expansion area to meet remove and fill requirements. By choosing a more northerly alignment between 137th and Roy Rogers Rd, King City would be at less risk of a 404 or DSL permit denial. Additionally, such a plan would likely be more cost-effective and a relief to taxpayers. The current transportation plan’s extension of Fischer Road will require bridges to cross all the very deep and wide ravines that you all experienced on your field trips. A local civil engineer estimated that these bridges would cost approximately \$4 million each, drastically increasing the funding needed for the connector. The ravines are narrower further north, so the bridges, if any, that would need to be built in such an alternative would be much less expensive. Indeed, a route could be selected which would avoid all but one of the ravines and still meet the needs of the city to have an east-west connector through the expansion area.

B. Clean Water Act 401 Water Quality Certification

Section 401 of the Clean Water Act has significant overlap with section 404. This section requires entities to apply for a certification of water quality from the state when activities requiring a federal permit or license, like a 404 permit, are proposed. In Oregon, the Department of Environmental Quality (DEQ) reviews 401 applications alongside the 404 & DSL permit applications to determine whether such plans comply with state water quality standards. Like with 404 permits, failure to obtain a water quality certification will prevent the project at issue from obtaining the necessary approvals. In other words, if King City does not obtain a 401 certification before construction, DEQ can block the project entirely. Thus, while King City does not yet need to apply for a 401 certification for its draft transportation plan, just like with section 404 and DSL permits, TRK recommends it consider the challenges that the current draft transportation plan would face once in the design and permitting phase.

In its current state, King City’s draft transportation plan will likely fail to satisfy DEQ’s certification requirements for section 401 of the Clean Water Act. As mentioned above the Tualatin River is listed as impaired for dissolved oxygen (DO) and water temperature.⁷ An increase in sedimentation resulting from cleared land and new impervious surfaces will likely further decrease DO levels and increase water

⁶ Remove and Fill Guide, Chapter 4, Exploring Alternatives to Avoid and Minimize Impacts

⁷ Tualatin River Total Maximum Daily Load (2001, Oregon DEQ); Tualatin Total Maximum Daily Load (TMDL) and Water Quality Management Plan, Table 2. Geographic Coverage of Designated Management Agencies (2001, Oregon DEQ).

temperature, DO, water temperature, and pH, all of which may be affected by King City's new road network, are all important water quality parameters DEQ will examine when determining whether to issue a 401 certification. Thus, unless King City can adequately address the short-term water quality issues that will be caused by the road's construction and the long-term changes in water quality caused by a roadway over every creek in the expansion area, DEQ is unlikely to approve any alignment which extends Fischer Road using the currently favored southernly route without substantial protective conditions.

DEQ will likely require that King City provide a Stormwater Management Plan (SWMP) describing how stormwater runoff resulting from short- and long-term changes to the site will conform to water quality standards and what measures the city will take to avoid and/or mitigate stormwater impacts. King City's current plans make a realistic and cost-effective SWMP likely infeasible. Indeed, the number of bridge crossings needed for each ravine and stormwater mitigation methods required to prevent further head cutting in the creeks within the ravines will possibly make King City's current preferred alternative too expensive to be feasible. Therefore, if King City selects an east to west connector that is too far south, DEQ will possibly deny King City's 401 certification unless substantial, and likely expensive, work to mitigate all impacts to water quality are undertaken. Special management to avoid impacts will be needed and probably required for the southernmost route given the difficult nature of the ravines.

TRK would like to note that many of the challenges of obtaining a 401 certification can be mitigated by constructing the east to west connector much further north, ideally on an alignment that avoids almost all of the creeks and ravines. By constructing the roadway nearer to Beef Bend Road rather than extending Fischer Road over every ravine in the expansion area, runoff from stormwater will be easier to manage, leading to less impacts to water quality and a more realistic, and likely less costly, SWMP for the east to west connector.

III. Proposed Road Network in Draft TSP Does Not Comply with Metro Ordinance 18-1427

When Metro approved the expansion of King City they included the following condition specific to King City in Exhibit C Section E.:

The Columbia Land Trust holds a conservation easement over portions of the Bankston property, which King City's concept plan identifies as the intended location for a key transportation facility serving the expansion area. King City shall work with the Columbia Land Trust to protect, to the *maximum extent possible*, the portion of the Bankston property covered by the conservation easement. (Exhibit C, Section E.8) (emphasis added).

Metro Ordinance 18-1427 requires King City to avoid impacting the Bankston property to the "maximum extent possible." Maximum extent possible is a strong standard of care in environmental law, imposing a non-discretionary duty on entities like King City to adopt the highest standard possible

for their projects which have environmental impacts, ignoring factors such as profit.⁸ This standard is distinct from the “maximum extent practicable” standard, which is the greatest possible avoidance of environmental impacts while considering factors such as profit and deadlines. The practicable standard is a much more flexible approach which would have allowed both regulatory agencies and entities like King City more discretion in deciding whether their mitigatory actions are sufficient.⁹

However, because Metro Ordinance 18-1427 requires King City to protect the conservation easement on the Bankston property to the maximum extent possible rather than practicable, King City will need to adjust its plans such that it minimizes impacts to that site regardless of cost or other considerations. Metro could have used a standard which would have allowed for costs and other considerations, but they did not. Instead, Metro chose wording which creates a strong standard of protection in environmental law. In other words, King City will need to avoid damaging the land covered by the conservation easement, even if doing so would be more expensive than other alternatives. Currently, King City’s favored plan which extends Fischer Road through the urban growth area along the elevation of River Lane will harm the land protected by the trust by running directly through the Bankston property in complete disregard for the conservation easement. This will have several negative impacts including but not limited to reducing habitat quality and stormwater impacts. Therefore, TRK recommends that King City adopt a plan whose east-west connector does not pass through the Bankston property to comply with Metro Ordinance 18-1427. Additionally, it’s worth noting that although the city is not allowed to consider costs, a more northern road alignment will be \$25 million dollars cheaper than the route through the easement according to the city’s own very preliminary analysis.¹⁰

IV. King City’s Planning Process Generally Does Not Seem to Meet DCLC Standards

Oregon’s land use policies are driven by a set of objectives that lay the foundation for land use decisions across the state. The proposed King City expansion plan will require careful consideration under at least three of these goals: Goal 1, Goal 5, and Goal 7. These goals set forth guidelines for public participation, the consideration of environmental and cultural resources, and development in areas subject to natural hazards, respectively. Because of the significance of these concepts in Oregon land use policy and the difficult nature of the terrain, we urge planners and policy makers to undertake a site-specific evaluation of the application of these goals to the proposed expansion plan.

A. Oregon Land Use Goal 1 & The Need to Identify Issues and Evaluate Alternatives

Oregon’s land use policies emphasize the importance of citizen involvement in the planning process. Goal 1¹¹ details how governing bodies can facilitate citizen participation by clearly defining objectives and procedures for public involvement in state and local land use decision-making processes. In order to encourage widespread public involvement, governing bodies should establish frameworks for effective communication, provide opportunities for the public to be involved in all phases of the planning process,

⁸ See, e.g., *Friends of the Wild Swan, Inc. v. Thorson*, 260 F.Supp.3d 1338, 1341

⁹ See *Environmental Defense Center, Inc. v. U.S. E.P.A.*, 344 F.3d 832, note 34

¹⁰ DKS Initial Evaluation Summary. Presentation Slides to TSP TAC during Meeting #4

¹¹ OAR 660-015-0000(1)

make technical information available to the public, develop a mechanism to ensure that citizens receive responsive feedback from policymakers, and ensure adequate human, financial, and informational resources are available so that citizen involvement can occur in substantive ways.

Goal 1 suggests that citizens should have the opportunity to participate in the process of identifying public goals, developing land use policy, and evaluating alternative land development plans. In the case of the proposed King City expansion plan, technical information pertaining to site-specific environmental conditions, finances, the decision-making process, and the evaluation of alternatives has so far been inadequate to promote effective citizen involvement in the planning process. The city must take additional steps to improve transparency and ensure public access to planning information, including any data used to construct the draft plans. Transparency is essential for active citizen participation in planning and implementation of development proposals. Citizens must have access to technical information in an understandable form so they can contribute effectively to all phases of the planning process.

Additionally, Oregon's land use goals require that all land use plans include an identification of issues and problems, inventories and information pertaining to each of Oregon's land use goals, and an evaluation of alternative actions and a record of the decision-making process. In the case of the King City expansion, at present, this information is absent or inaccessible, hindering public participation in the planning process. For example, the site-specific, data and analysis behind the Draft TSP has not yet been made available to the public. Initial estimates appear to be unavailable on the TSP or master plan websites.¹² This lack of transparency is concerning and seems to suggest that the city is falling short of their requirements to identify issues and problems and to evaluate alternatives. As you all had the opportunity to note during the field trips, the expansion area has very difficult terrain. The nature of the terrain means successful development will require careful data collection and detailed analysis, more collection and analysis than appears to be initially planned for by the city and the consultants. We appreciate that the city has paused the Master Planning process and we would like to emphasize that any collected data in the future should drive the decision making and not be used as a justification for decisions that have already been made.

As already noted, the public requires access to this additional detailed information in order to make meaningful contributions to site-specific implementation plans. Detailed analysis provided by consultants like Clean Water Services and others should be vetted by the public and outside experts to help ensure good decision making. King City is fortunate to have several local engineers, ecologists, and other relevant experts willing and able to help critically examine any data and analyses produced. Thus, we urge King City planners and policymakers to facilitate public participation to the fullest extent possible by providing timely, up-to-date detailed information on the expansion plan. This is necessary to allow stakeholders and community members the opportunity to participate meaningfully in all stages of the planning process, create a productive dialogue with community leaders, and receive feedback from decision makers throughout the process. In this way, the community can better understand how the

¹² TRK received the initial estimate numbers regarding the Draft TSP from someone attending the TSP TAC Meeting #4. That information has not been provided to us in any formal way and that presentation does not appear to be available on the TSP's website.

policymakers are evaluating alternative actions, analyze the data upon which decisions are being made, and ensure that thorough considerations of alternatives are included in the planning process.

B. Oregon Land Use Goal 5

In order to comply with the objectives set forth in Oregon's Statewide Planning Goals and Guidelines (OSPGG), Goal 5¹³ the protection of natural resources, must be considered as a part of the planning process. Goal 5 pertains to conservation of Oregon's natural resources, scenic and historic areas, and open spaces. This goal requires local governments to adopt programs to protect these resources for present and future generations in order to promote a healthy environment and natural landscape. To address Goal 5 one of King City's policies states:

The City will coordinate with other jurisdictional entities to protect fish and wildlife habitats by managing riparian habitat impacts, controlling erosion, and by requiring that areas of standing trees and natural vegetation along natural drainage ways, wetlands, and rivers be maintained to the maximum extent possible, while allowing the use of private property as permitted by the Comprehensive Plan. (King City Comprehensive Plan Ord. O-92-15 § 1, 1992; Ord. O-95-05 § 1, 1995).

The existing natural features in the planning area and the city's own Goal 5 policy support extensive conservation of the waterways and wildlife corridors present, especially those near the southern boundary of the urban growth area. Although the city has a policy to protect natural resources to the maximum extent possible, the policy alone is not enough to ensure compliance with Goal 5. In order to implement development plans in accordance with Goal 5, the conservation of natural resources and the physical characteristics of the land should constitute the foundation for "determining the quantity, quality, location, rate and type of growth in the planning area."¹⁴ To comply with this and other requirements mandated by Goal 5, local governments must pursue one of two options: a standard approach that includes an Economic, Social, Environmental, and Energy (ESEE) analysis, or utilize the safe harbor approach, in which the local government will undertake an inventory process and strategy for protection of impacted resources.

If the city opts to take the standard approach, the resulting ESEE analysis will lead to the development of a local protection plan intended to safeguard some or all resources identified in the analysis. Conversely, King City may choose to pursue the safe harbor approach which entails an inventory process to develop programs to protect potentially impacted resources. These processes will detail information about the quantity, quality, and significance of resource sites, the adequacy of information about the resources, and aid in the development of a record of determination. Because this evaluation is necessary for gathering crucial information to assist King City in determining its eventual course of action, this process should be commenced early in the planning process so that, on the basis of this

¹³ OAR 660-015-0000(5)

¹⁴ Land Use Goal 5, Guidelines B.2

information, stakeholders have the opportunity to participate in this process in a meaningful way and so the decision makers can make decisions based on good information and data. So far it is not clear from information on the Master Plan website whether any work on Goal 5 has happened for the expansion area or what approach the city plans to take.

In summary, in evaluating Goal 5 requirements against the current plans for an east to west connector along the River Lane elevation, TRK believes such an alignment fails to conform with the objectives set forth in state and local land use policy around protecting natural resources. To ensure compliance with Goal 5 the city should undertake their Goal 5 work now and let that information inform the alignment choice for the east-west connector and it should inform the placement of other development.

C. Goal 7 Areas Subject to Natural Hazards

According to Oregon’s Natural Hazards Mitigation Plan, Washington County’s transportation networks may be vulnerable to natural hazard events, particularly seismic hazards. Additionally, the region may experience flooding, landslides, and wildfires. Because of this danger, local transportation planning should conform with the objectives set forth in Goal 7 of Oregon’s Statewide Planning Goals and Guidelines. Goal 7 requires local governments to address natural disasters and hazards in land use plans and advises local governments to require site-specific natural hazard reports when reviewing development proposals. Additionally, local governments should take measures to limit stormwater runoff to prevent flooding and landslides. These objectives are consistent with local governments’ responsibility to consider “the effects of development and mitigation measures in identified hazard areas on the management of natural resources.”¹⁵

By generating a report on natural hazards in the project area, King City would have access to current, accurate information on the potential impacts of natural hazards in the area and would have the opportunity to evaluate whether the proposed development will exacerbate hazardous conditions. We believe this is an essential component of the decision-making process, allowing leaders to consider the best path forward by formulating plans to avoid or mitigate potential impacts of natural hazards and to amend any current plans that would allow development in areas where the risk to public safety and property cannot be adequately mitigated. A landslide hazard map from the Department of Geology and Mineral Industries is attached to this letter. We would like to note that this should be a starting point for a Goal 7 analysis, not the only data collection done to address natural hazards.

As a part of this process, we urge the city to take natural hazards into account when selecting the alignment for the east-west connector. More generally, we urge the city to consider the inclusion of plans that maintain open spaces in natural areas as a method of mitigating hazards, such as landslide risk, where possible and appropriate.

¹⁵ Land Use Planning Goal 7, Guidelines A.c.

V. King City Must Do More to Protect Cultural Resources

Prior to the finalization of the transportation plan, we believe a cultural resources inventory should be conducted. This process should include consultation with Tribal Historic Preservation Officers (THPO) for relevant Tribal Nations. Additionally, consultation with the Confederated Tribes of Grand Ronde and Confederated Tribes of Siletz Indians, representing the Tualatin peoples, may yield knowledge of specific places in the project area. Because the project area includes or is proximal to an elevated landform overlooking the river and its floodplain and the five freshwater streams and ravines directly to the north of the Tualatin River, this area has a high probability of containing potentially significant archaeological sites. We believe that a thorough survey of the cultural and historic resources present in the area, including an extensive effort to identify any currently unknown resources, is a crucial part of the city's legally mandated responsibility to conserve these resources and should be undertaken early in the planning process.

Like with the Clean Water Act, there are requirements within the National Historic Preservation Act that will have to be complied with before construction can begin, and we encourage the city to take these requirements into account early to avoid issues later. Section 106 of the National Historic Preservation Act (NHPA) requires that federal agencies¹⁶ must take into account the potential effects of a project on historic and cultural resources in the project area, consult with the State Historic Preservation Office (SHPO), and allow the Advisory Council on Historic Preservation (ACHP) an opportunity to comment before issuing a license for the project. This process entails determining the likely effects of the project on cultural resources and developing a plan to mitigate adverse effects on these resources. Because the preferred strategy to protect cultural resources is to avoid impacts entirely, King City should implement the master and transportation plan in such a way as to circumvent cultural resources in the project area.

Compliance with NHPA will likely require a complete survey of cultural and historic resources in the area and should be undertaken early in the planning process to facilitate efficiency and to assist King City in meeting its legal obligations to protect cultural resources. In other words, because cultural resources are likely to be in the area, we urge the city to do more now to avoid permitting problems in the future.

VI. Conclusion

In summary, King City's plan in its current state would not comply with several state and federal laws. Specifically, TRK believes the road network will have challenges obtaining necessary Clean Water Act permits and certifications; the plan currently ignores Metro's condition regarding the Bankston property's conservation easement; it fails to comply with state land use goals, specifically regarding public involvement, natural resources, and natural hazard zones; and the city is not being proactive enough in preserving the cultural resources almost certainly located near the riverbank.

¹⁶ For example, the U.S. Army Corps. of Engineers when deciding whether to approve a CWA 404 permit.

While these are all significant challenges, TRK has confidence in King City's ability to consider and address these challenges in an appropriate fashion. To reiterate these comments are meant in the spirit of cooperation and as a follow up to the field trips and site visits by King City staff, Councilors, Mayor, and consultants. Please feel free to reach out if you have any follow up questions. We look forward to working together to create a sustainable, equitable community.

Sincerely,

A handwritten signature in black ink, appearing to read 'AS', with a long horizontal stroke extending to the right.

Ashley Short
Tualatin Riverkeeper & In-House Counsel
Tualatin Riverkeepers
Ashley@tualatinriverkeepers.org

cc:

Michael Weston, King City Manager;
Steve Faust, Community Planning Director, 3J Consulting

Attachment: Landslide Hazard Map, Oregon Department of Geology and Mineral Industries

