

AGENDA BILL

**Beaverton City Council
Beaverton, Oregon**

6/19/18: Hearing was held and closed; record was left open. Council deliberation on July 17, 2018.

SUBJECT: Council Deliberation on Appeals (APP 2018-0001, APP 2018-0002) of the Director's Interpretation Decision that the Beverage Container Redemption Center Use is Permitted in the Community Service Zoning District DI 2017-0003

07/17/18
FOR AGENDA OF: ~~06-19-18~~ **BILL NO:** 18135

Mayor's Approval: Denny Dale

DEPARTMENT OF ORIGIN: CDD CT

DATE SUBMITTED: 06-12-18

CLEARANCES: City Attorney PL
Mayor's Office AS
Planning AS

PROCEEDING: PUBLIC HEARING

- EXHIBITS:**
1. City Council Memo
 2. Director's Interpretation
 3. Attachment A to DI 2017-0003
 4. Appellants' Submittal Materials
 5. Applicant's Submitted Materials

BUDGET IMPACT

EXPENDITURE REQUIRED \$0	AMOUNT BUDGETED \$0	APPROPRIATION REQUIRED \$0
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RECOMMENDED ACTION:

Based on the facts and findings presented in the Director's Interpretation Decision, the Appeal Information, and staff memoranda, staff Recommends Denial of APP 2018-0001 and APP 2018-0002 Appeals of Director's Interpretation for Oregon Beverage Recycling Collective Beverage Container Redemption Center (DI 2017-0003). This recommendation requires the City Council to make particular findings specifically on the applicable approval criteria found in the Beaverton Development Code, Section 40.25.15.C.1-6.

HISTORICAL PERSPECTIVE:

On April 30, 2018, the Community Development Director issued a decision on an application to determine whether the Beverage Container Redemption Center (BCRC) operating at 9307 SW Beaverton-Hillsdale Highway is permitted by the Beaverton Development Code (BDC) to locate in the Community Service Zoning District.

The BCRC was originally granted a Design Review Compliance Letter on February 22, 2017, for modifications to the exterior of the building. This land use decision was appealed to the Land Use Board of Appeals, which remanded the decision to the City and identified the Director's Interpretation application as the appropriate process for determining whether the BCRC use is permitted by the BDC as a permitted use in the Community Service District.

INFORMATION FOR CONSIDERATION:

The applicant has provided a limited waiver of the 120-day processing period as mandated by the Development Code and State law. The limited waiver extends the 120-day deadline to August 8, 2018. The Council Final Order represents the final written decision of the City on this matter as described by ORS 227.178.



MEMORANDUM

TO: City Council
FROM: Anna Slatinsky, Planning Division Manager
DATE: July 11, 2018
SUBJECT: Open Record on Appeals (APP 2018-0001, APP 2018-0002) of Director's Interpretation for OBRC Beverage Container Redemption Center (DI 2017-0003)

BACKGROUND

On June 19, 2018 the Public Hearing of the appeals of DI2017-0003 was conducted and the public testimony portion of the hearing was closed, but the record for the appeal was left open according to the following schedule:

Open record period	June 20 – June 26
Rebuttal period	June 27 – July 3
Final Applicant arguments	July 4 - July 10

No new testimony or evidence may be submitted unless the Council chooses allow for an additional round of new evidence, rebuttal, and applicant final arguments. At the meeting on July 17, City Council will hear final comments from staff and city attorney, and have the opportunity to deliberate and evaluate options for taking action on the appeal.

MATERIALS SUBMITTED

Planning Division received the materials listed below during the extended open record period identified above. Letters and emails are attached to this memorandum as exhibits. To reduce the bulk of the package and conserve paper, the full record of submissions including additional supporting documentation and exhibits submitted in support of letters and emails are available on the Beaverton website at:

http://apps.beavertonoregon.gov/DevelopmentProjects/projects_byCategory.aspx?cat=DenneyWhitford/RaleighWest

In addition, one paper copy of the complete record will be available to view in person at the July 17 Council Meeting. If a Council Member desires to view a paper copy of any exhibit not provided with this memorandum, please contact Anna Slatinsky at aslatinsky@BeavertonOregon.gov.

Materials submitted during the open record period from June 20-June 26:

- Exhibit 1. Letter from Michael Robinson and Exhibits 1-18
- Exhibit 2. Letter from E. Michael Connors and Exhibits A-I
- Exhibit 3. Letter from Michael Neff and Exhibits A-K
- Exhibit 4. Email from Trisha McPherren dated
- Exhibit 5. Letter From Holly Bridgens
- Exhibit 6. Letter from Ernie Conway

Materials submitted during the rebuttal period from June 27-July 3:

- Exhibit 7. Letter from Garrett H. Stephenson
- Exhibit 8. Letter from E. Michael Connors and Exhibits A-B
- Exhibit 9. Letter from Michael Neff and Attachments A-G
- Exhibit 10. Video from Michael Neff (online only)
- Exhibit 11. Email from Kerrie Trujillo
- Exhibit 12. Letter from Rick Skayhan

Materials submitted by the applicant as final arguments by July 10:

- Exhibit. 13 Letter from Michael Robinson

UPDATED RECOMMENDATION:

Based on the facts and findings presented in the Director's Interpretation decision, the Appeal Information, public testimony, and the Director's memoranda, the Director recommends **Denial of APP2018-0001 and APP2018-0002, subject to the proposed Conditions Of Approval in Exhibit 14.**

In addition, the director recommends that Planning Division undertake a study to determine the appropriate approach to regulating Beverage Container Redemption Centers in the future, and submit an application for a Text Amendment pursuant to Beaverton Development Code section 50.05.

NEXT STEPS

At the conclusion of the hearing on the appeal, the appellate decision making authority shall take one of the following actions:

- A. Continue the hearing to a date, time, and location certain, which shall be announced by the Chair. Notice of the date, time, and location certain of the continued hearing is not required to be mailed, published, or posted, unless the hearing is continued without announcing a date, time, and location certain, in which case notice of the continued hearing shall be given as though it was the initial hearing.
- B. Reverse or affirm the decision under appeal, with or without conditions or changes.
 - 1. If the decision making authority takes action pursuant to Section 50.70.9.B., the decision making authority shall announce a brief summary of the basis for the decision, and that a land use order will be issued as provided in Section 50.70.10.; provided, the proceedings may be continued for the purpose of considering such land use order without taking new testimony or evidence.
 - 2. Provisions for holding a record open or continuing a hearing set forth in ORS 197.763 (6) shall apply under this Ordinance in a manner consistent with state law.
- C. Remand the decision to the decision making authority for further proceedings consistent with the decision on appeal provided that the appellate decision making authority first determines whether the remand would conflict with the City's obligation under ORS 227.178 to issue a timely final decision. If the decision is to remand, the purpose of the remand, including any specific procedures or subjects to be addressed shall be directed to the decision making authority.

June 26, 2018

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VIA EMAIL BEFORE 5:00 P.M.

Mr. Denny Doyle, Mayor
City of Beaverton City Council
12725 SW Millikan Way
Beaverton, OR 97076

RE: Applicant's First Open Record Period Submittal; City of Beaverton File Nos.
DI2017-0003, APP 2018-0002

Dear Mayor Doyle and Members of the City Council:

This office represents Oregon Beverage Recycling Cooperative ("OBRC"). This letter is the Applicant's first open record period letter, timely submitted on Tuesday, June 26, 2018 before 5:00 p.m. While this letter contains both argument and evidence as those terms are defined in ORS 197.763(9)(a) and (b), this letter focuses on evidence responding to issues and evidence raised by opponents to the Planning Director's Decision approving the similar use determination pursuant to Beaverton Development Code ("BDC") Chapter 40.25. The Applicant will reserve the majority of its legal argument without new evidence for its final written argument.

1. Procedural Status.

The City Council opened the initial evidentiary public hearing on the appeal of the Director's Decision on June 19, 2018. The City Council provided an opportunity for everyone who wished to do so to testify. With the exception of an issue concerning the Appellants' right to rebuttal at the public hearing, no party raised any procedural objections.

The Appellants objected to the Mayor's determination that they were not entitled to oral rebuttal. After hearing Appellants' arguments, the Mayor provided each Appellant an opportunity for oral rebuttal, followed by Applicant's response to Appellants' oral rebuttal.

The City Council closed the public hearing but left the written record open as follows:

- Until Tuesday, June 26, 2018 at 5:00 p.m. for any person to submit argument and evidence as those terms are defined in ORS 197.763(9)(a) and (b);
- Until Tuesday, July 2, 2018 at 5:00 p.m. for any person to submit argument and evidence in rebuttal to the first open record period submittal; and

- Until July 9, 2018 at 5:00 p.m. for the Applicant to submit written argument only without new evidence.

The Applicant extended the 120-day period in ORS 227.179(1) by twenty-one days, the period that the written record will remain open.

The Appellants argued that, rather than an open record period submittal, the City Council should continue the public hearing. After hearing argument from both the Applicant and the Appellants, the City Council determined, pursuant to ORS 197.763(6)(c), that it would adopt an open record period schedule and close the public hearing.

2. Factual Description of the OBRC Site and Surrounding Land Uses.

Because much of the opposition testimony focused on external impacts from the OBRC facility, it is important for the City Council to understand how the OBRC facility is located on the site and how surrounding uses relate to the site.

The OBRC facility consists of a single structure, located on a lot of record with two driveways providing ingress and egress to Beaverton-Hillsdale Highway, a major road in the city of Beaverton (the "City") (**Exhibit 1**). The OBRC facility replaced twenty-six retail redemption facilities within 2.8 miles of the facility (**Exhibit 2**). The City Council will recall that at the public hearing not only did several witnesses testify about the value of OBRC's facility in its present location but OBRC also submitted a petition with over 1,400 signatures from those who support OBRC's location and efforts.

Customer access to the facility is provided through a single set of doors on the south side of the building facing the parking lot. No other pedestrian access, with the exception of emergency access, is provided to the building. **Exhibit 3** consists of photographs of the site and surrounding land uses taken on Friday, June 22, 2018 at approximately 10:00 a.m.

The OBRC building is constructed of exterior cinder block walls and, with the exception of the described pedestrian access on the south side, the roll-up loading door on the east and emergency access entrances, the building contains no other windows or doors. The west wall of the OBRC facility is a solid wall adjacent to the Glenwood 2006 property. The OBRC facility's dumpsters are located on the north property line. A stairway connects the Glenwood 2006 property to the OBRC property.

The only loading dock is on the east side of the building. The loading dock is served by a roll-up door from the interior of the OBRC facility (the area known as the "backroom operations"). Trucks pick up redeemed beverage containers by backing to the north end of the loading dock. The loading dock contains a solid fence on its east and south sides. Other activities may cause noise issues, which OBRC cannot control. One person testified about early morning truck traffic. OBRC limits its trucks' access times but cannot control garbage truck times (**Exhibit 4**). However, other noise sources, including garbage trucks, are common throughout the City.

The “backroom operations” consist of a conveyor belt for sorting redeemed cans, a device that compacts cans and a device that compacts plastic containers. The compacted containers are then prepared for transport to trucks through the exterior loading door.

As OBRC told the City Council at the public hearing, the “backroom operations” at the OBRC facility are no different than those conducted at grocery stores that redeem beverage containers; the only difference is size and scale. Nevertheless, redemption is not recycling for the reasons offered in the Applicant’s letter submitted to the City Council and in the Director’s Decision.

The topography between the single family dwelling to the east and the OBRC property somewhat explains the perceived impacts of OBRC by the single family dwelling’s residents. The single family dwelling has a six foot high wooden fence on its west side but the single family dwelling property slopes to the north toward Club Meadow Lane, whereas while the OBRC facility has trees and a berm on its property, its property remains level to Club Meadow Lane. Thus, the height of the dwelling’s fence is reduced adjacent to the OBRC property the further the property line runs to the north to Club Meadow Lane.

The “container drop” door is located on the south side of the building at its southwest corner. The container drop is available to the public only between the hours of 7:00 a.m. and 10:00 p.m., consistent with BDC 20.10.20, note 5, providing that retail uses within 500 feet of a residential use in a residential zone require a conditional use permit to operate between 10:00 p.m. and 7:00 a.m. The Oregon Land Use Board of Appeals (“LUBA”) addressed this issue in its unappealed Final Order and Opinion entitled *Glenwood 2006, LLC v. City of Beaverton*, ___ Or LUBA ___ (LUBA No. 2017-027, September 21, 2017). The Petitioner, Glenwood 2006, argued to LUBA that the container drop window required OBRC to obtain a conditional use permit. LUBA rejected this argument and found that the Planning Director’s Decision prohibits the container drop door from operating between the hours of 10:00 p.m. and 7:00 a.m. *Id.*, slip op 1.

The OBRC property has two driveways to Beaverton-Hillsdale Highway. Beaverton-Hillsdale Highway is a corridor surrounded by commercial zoning on both sides with residential uses behind the commercial uses on the south and the north. A sidewalk is located on the south side of the OBRC property adjacent to Beaverton-Hillsdale Highway. Parking for the facility is located along the east property line and to the south of the buildings adjacent to Beaverton-Hillsdale Highway. A maneuvering area is located in the back of the building on its north side but no parking is provided in that area.

The OBRC facility’s dumpsters are located on the north property line.

The OBRC facility contains landscaping along its east property line (adjacent to the tattoo studio), along the west property line (adjacent to the Glenwood 2006 property) and contains a six foot high metal fence with opaque slats and tall landscaping consisting of trees and scrubs on its north side adjacent to Club Meadow Lane.

Surrounding property uses include the tattoo parlor to the east, the Glenwood 2006 property to the west, one single family dwelling to the west (north of the tattoo studio) accessing Club Meadow Lane and Club Meadow Lane on the north side. The single family homes on the north side of Club Meadow Lane do not abut the OBRC property. The OBRC property does not have vehicular access to Club Meadow Lane but the Glenwood 2006 property does have a driveway to Club Meadow Lane.

The City Council can find that the existing OBRC facility is well landscaped and buffered from its surrounding uses and pedestrian, that vehicular and truck activity is oriented to the south adjacent to Beaverton-Hillsdale Highway. The absence of exterior doors and windows on the north and west sides of the building eliminate the possibility of most noise from the OBRC facility to the adjacent properties to the west and north. The pedestrian access to the south means that most noise, if any, from the facility goes to Beaverton-Hillsdale Highway and not to adjacent residences. Sporadic noise, when the roll-up loading door is opened, is mitigated by the solid fence on the loading dock's south and east sides. Because the OBRC building has few exterior openings and those openings are oriented to the south and to the east but not to the west or north, odor has the opportunity to escape the building only through the pedestrian access and the loading door.

Based on the above factual information and testimony presented to the City Council, the next section of this letter explains mitigation measures proposed by OBRC to address the external impacts.

3. Proposed Mitigation Measures.

OBRC takes its role as a good citizen in the City seriously. OBRC sincerely wants to be a good neighbor to the surrounding property owners and respond to legitimate complaints regarding its operations. However, as noted in the Applicant's testimony to the City Council and in the attached complaint log (**Exhibit 15**), very few complaints have been directed to OBRC. OBRC will promptly respond to those complaints it does receive. While OBRC proposes these mitigation measures, OBRC does not believe that all of the impacts complained of are more than episodic or that they are caused by the OBRC.

OBRC proposes that, in the event the City Council affirms the Planning Director's Decision, that it impose a condition of approval requiring OBRC to make the following on-site improvements no later than six months from the final effective date of the City Council's decision (the final effective date includes the resolution of all appeals that might be filed):

- A. Construction of an appropriately high solid fence with gates around the dumpsters;
- B. Construction of a six foot high solid wooden fence along OBRC's east property line from a point adjacent to Beaverton-Hillsdale Highway (consistent with a sight distance

analysis) to its property line on Club Meadow Lane (to add a barrier for the single family dwelling).

C. Blocking the stairway between the Glenwood 2006 property and the OBRC property at a location reflecting the property line. OBRC will cooperate with Glenwood 2006, to the extent that Glenwood 2006 is willing to do so, on the location and materials for blocking the stairway (to discourage parking on the Glenwood 2006 property).

D. Installation of a sound-proof insulated loading dock door. The insulated loading dock door will further reduce the minimal odor and noise sporadically emitted from the "backroom operations" when trucks arrive for loading of redeemed beverage containers.

E. Installation of a sign at the pedestrian access to the OBRC facility stating, "Please be respectful of our neighbors by not talking loudly, loitering or smoking on this property."

F. Installation of a six foot solid fence on the south and west side of the BottleDrop window.

G. Signing "Employee Only" parking for the parking spaces on the OBRC property east property line adjacent to the single family dwelling.

H. Requiring approval of a "Good Neighbor Agreement" between the City and OBRC that includes the following elements:

1. OBRC's obligation to comply with applicable City noise, odor, hours of operation and truck access requirements now or in future effective versions of the Beaverton Municipal Code. **Note:** Some testimony indicated that OBRC trucks arrived before 7:00 a.m. OBRC has investigated this testimony and determined that the testimony was accurate. OBRC has instructed its trucks not to arrive before 7:00 a.m.
2. A commitment to appear at homeowners associations and recognized neighborhood association meetings when requested to address questions or concerns about operation of the OBRC facility.
3. Production of an annual report to the Beaverton Planning Department containing a log of any complaints received and how those complaints were addressed.
4. Publication of a contact person with an email address for persons to submit complaints or questions about the operation of the OBRC facility and a commitment to respond within 72 hours to the complaint, if at all possible.
5. Implementation of OBRC's trespass policy (**Exhibit 5**).

6. Agreement to cooperate with the City, recognized neighborhood associations and homeowners associations on any City plans to address larger societal issues associated with homelessness and nuisance activities.

7. Agreement to cooperate with Jesuit High School on security issues concerning Jesuit High School's property.

Further, OBRC will add additional staff to ensure faster customer service and to patrol the OBRC property for litter.

The City Council can find that BDC 40.20.15.1.A.a and h authorize minor design changes to existing buildings, including adding or modifying fences and façade changes. The proposed installation of new fencing and the installation of an insulated, roll-up loading door are permitted changes to the facility within the scope of a Design Review Compliance letter.

The City Council can find that while external impacts related to the OBRC facility are unrelated to the legal approval criteria for the Director's Decision, OBRC is nevertheless committed to being a good citizen and to addressing all real and perceived impacts of its facilities through the above mitigation proposals. OBRC waives any objection to the City Council imposing a condition of approval requiring the above mitigation improvements in the event it affirms the Director's Decision.

4. Response to Testimony Regarding Nuisance Issues.

Much of the public testimony against the Director's Decision had to do with real and perceived external impacts assumed to be the cause of the location and operation of the OBRC facility. However, the City Council should consider other issues in response to that testimony.

A. Nuisance activities related to homelessness.

Homelessness and nuisance activities related to homelessness are a societal problem throughout the Portland metropolitan area. **Exhibit 6** is an article from the Oregonian entitled "Opioid Crisis Felt Even in the Libraries", dated June 2, 2018. The article details the experiences of the Multnomah County Library system in addressing opioid users in the library and their impacts on the library and its patrons.

No one would suggest closing the library because of nuisance activities associated with drug users. Instead, a reasonable person would suggest addressing the issue through increased security and other programs to address opioid use. The same response is appropriate here. OBRC will be a partner with its neighbors and the City in addressing nuisance activities in its area. However, as evidenced by the City Council hearing on auto camping by homeless persons (**Exhibit 7**), the issue is unrelated to any particular use or location.

B. Other CS zone uses also emit odor and noise.

Nany of the external impacts relayed to the City Council can be found in any use allowed in the Community Service (“CS”) Zoning District. BDC 20.10.20, “Land Uses”, describes the land uses allowed in the CS zone. Among the permitted uses are drive-up window facility, retail trade (including grocery stores), food cart pods and eating and drinking establishments. With respect to grocery stores where redemption centers are or were formerly located, the same kind of noise and odor issues alleged to be perpetuated by OBRC are found there: carts rolling across driveways, noise associated with bottles going into carts and being redeemed, operation of the redemption machines (which, at grocery stores, are typically located outside without much, if any, noise buffering, as opposed to OBRC’s facility which is located inside), and truck loading. Further, with respect to noise, within a quarter mile of the OBRC facility are four drive-up facilities for eating and drinking establishments, all with speaker boxes which create noise from the vehicle and from the speaker box, and odors associated with the four eating and drinking establishments.

C. Redemption centers are allowed at retail facilities in the CS zone.

Mr. Neff argued in response to the Applicant’s argument that the Director’s Decision is supported because the redemption center use has traditionally occurred at retail facilities in the CS zone that the use was simply an accessory use. While Mr. Neff may or may not be correct about that, the City Council should remember that regardless of whether the redemption use at a grocery store is a primary use or an accessory use, it is an allowed use and no one has argued that a redemption center at a retail facility in the CS zone is not a permitted use in the zone. Further, no one has argued in the past that a redemption center at a retail store in the CS zone was a recycling facility.

D. The use is not appropriate in the IND zone.

The Appellants also argued that OBRC’s use should be classified as recycling use and located in the Industrial (“IND”) zone. However, the City Council need only review the uses allowed in the IND zone (BDC 20.15.20; **Exhibit 8**) to conclude that mixing pedestrians and vehicles with inherently dangerous industrial land uses, heavy trucks, forklifts and other industrial equipment, is poor public policy. Retail and service uses are not allowed in the IND zone and are expressly prohibited. Moreover, the City has long guarded its industrial land for job creation. Suggesting that retail trade facilities unrelated to industrial uses should be located in industrial zones is inconsistent with this purpose.

E. Glenwood 2006, LLC argued to LUBA that the Type 2 process was appropriate.

Appellant Glenwood 2006 argued that the proper course for determining if the OBRC facility should be allowed in the CS zone is through a legislative amendment. However, Glenwood 2006

took exactly the opposite position in its Petition for Review in the LUBA appeal. LUBA's decision noted at Page 5 that:

“Petitioner argued to the City that the only procedural mechanism the City has under the BDC that might allow it to conclude that a BCRC may be approved in the CS district is BDC 10.50, which authorizes the City to find unless the uses are ‘similar to allowed uses.’” *Id., slip op 5.*

In other words, Glenwood 2006 made the opposite argument to LUBA that it made to the City Council.

F. LUBA did not agree with Glenwood 2006's recycling argument.

Petitioner Glenwood 2006 also made the recycling argument to LUBA and LUBA declined to rule in its favor. Petitioner did not appeal LUBA's decision to the Oregon Court of Appeals. In declining to agree with Petitioner, LUBA held:

“The term ‘recycling center’ is not defined in the BDC, and we are unprepared to say based on the current state of the briefing that the term could not be interpreted to exclude BCRCs. Although the Planning Commission would not be entitled to any particular deference regarding such an interpretation, we believe the City should have an opportunity to address that question in the first instance. In addition, the BDC 40.25.15(1)(C)(4) authority to permit uses that are ‘substantially similar to a use currently identified in the subject zoning district’ is a sufficiently subjective exercise that we are also unprepared to say that the City Council could not determine that the proposed BCRC is substantially similar to [permitted uses] in the CS zone.” *Id., slip op 10-11.*

In other words, LUBA left it to the City to decide if the use is a similar use to other uses allowed in the CS zone, rejecting Petitioner Glenwood 2006's argument to the contrary. Petitioner Glenwood 2006 should have appealed LUBA's decision to the Oregon Court of Appeals but having failed to do so, it is bound by its argument that a Type 2 similar use determination is appropriate and that the OBRC use is neither a recycling use nor is it excluded from the CS zone as a matter of first impression; that decision is up to the City Council in this proceeding.

5. Additional Testimony in Support of the Redemption Center.

Enclosed the following additional testimony in support of the Redemption Center:

- a. **Email from Joel Simon**, explaining how the location of the Redemption Center makes it ideal for returning beverage containers (**Exhibit 9**).
- b. **Letter from Chuck Furham**, landlord of the Salem Redemption Center, explaining that OBRC has been an outstanding tenant (**Exhibit 10**).
- c. **Letter from Gerald Kolve**, landlord of the Tigard Redemption Center, explaining that there have been no issues with the Redemption Center in that location (**Exhibit 11**).
- d. **Letter from Bob Smith**, landlord of the Sunnyview Salem Redemption Center, in support of OBRC's application (**Exhibit 12**).

6. OBRC Has and Continues to Work with the Surrounding Recognized Neighborhood Associations to Address Their Concerns.

Appellants and the Five Oaks/Triple Creek NAC (the "FOTC NAC") testified that OBRC was not forthcoming with the NACs and surrounding property owners about the Redemption Center. Such testimony ignores the fact that OBRC has been engaged with surrounding property owners and the Denny Whitford/Raleigh West NAC (the "DWRW NAC") before the Redemption Center began operating.

a. OBRC has been in contact with the Denny Whitford/Raleigh West NAC.

OBRC first met with the DWRW NAC in March of 2017, and met with the NAC on a number of other occasions, including on March 8 and June 14, 2018 (**Exhibit 13**). It also met with Washington County CPO-3 on March 16, 2017 (**Exhibit 14**).

b. OBRC was never invited to speak before the Five Oaks/Triple Creek NAC.

OBRC did not address the FOTC NAC prior to opening the Redemption Center because it is not located within the NAC. In fact, the nearest boundary of the FOTC NAC is more than 2.5 miles from the Redemption Center. Nonetheless, the FOTC NAC submitted a letter opposing the Project, apparently at the behest of legal counsel for Jesuit High School. OBRC was neither invited to nor notified of either the NAC's April 10th or May 8th meetings at which OBRC's application was discussed, but certainly would have attended if it had been.

c. OBRC offered to meet with Jesuit High School but was initially rebuffed.

At the beginning of the year, OBRC sought to meet with Jesuit High School to discuss ways in which it could address Jesuit's security concerns. It was initially rebuffed, as demonstrated by the enclosed email to OBRC staff from Tom Arndorfer, Jesuit President (**Exhibit 15**). As Mr. Arndorfer explained in his response to OBRC's offer to meet, Jesuit has generally been uninterested in discussing ways in which OBRC could help ensure the safety of its students and

seeks only that the BottleDrop is shut down. A meeting with Jesuit was finally held on June 7th, 2018, at which time OBRC offered to assist Jesuit with security (**Exhibit 16**).

d. OBRC has worked with individual neighbors to address their concerns.

The enclosed emails demonstrate how OBRC has worked with two neighboring property owners, Holli and Brandon Bridgens, to address their concerns with noise and customer behavior near the rear of the site (**Exhibit 17**). This included discussions related to fencing, relocation of parking, and additional sound deadening in the facility. Fencing and sound deadening have not been constructed yet because it is uncertain whether the Redemption Center will be able to keep operating in this location, but OBRC is willing to provide such mitigation if the Council affirms the Director's Interpretation, as explained above.

A complete log of neighborhood complaints and OBRC's response is enclosed as **Exhibit 18**.

7. Response to Certain of Appellants' Legal Arguments Raised During the City Council Public Hearing.

OBRC will provide a complete response to all legal arguments made during its final written argument, but offers the following general points regarding Appellants' main arguments.

a. The issue in this appeal is whether the Planning Director correctly concluded that the Redemption Center is "substantially similar" to other uses permitted in the Community Service ("CS") zoning district.

Appellant Glenwood 2006, LLC argued that the central question in this appeal is whether the redemption center is most similar to a recycling center. That is an incorrect statement of the applicable criteria. The central question in this appeal is whether the redemption center is substantially similar to other uses in the CS Zone.

The redemption center is a less-than 10,000 square-foot, fully-enclosed retail building¹ that is open to the public during normal business hours. The purpose of a redemption center, unlike a recycling center, is to quickly and efficiently refund deposits to customers. It accepts only empty beverage containers that customers present for their entitled 10 cent refund value, and then forwards those containers on to recycling centers for actual processing. It does not accept any curbside recycling. It does not generate a substantial amount of truck traffic. It is intended, by State statute, to be located as close as possible to the beverage retailers and their customers. In this way, it is very much *unlike* the common understanding of a recycling center, transfer station or a salvage yard.

Glenwood argued that the Redemption Center should be considered a "recycling center" simply because it handles a recyclable material. This is not a realistic or appropriate indication of how

¹ Note that the building was constructed and used for retail sales even before its sale to OBRC.

the use should be defined because it would lump a number of commercial uses into a category which can only be permitted as a conditional use in the City's industrial zone.

Take, for example, the very similar use of EcoBinary Electronics Recycling (10120 SW Beaverton-Hillsdale Hwy), which is located less than one-half mile from the Redemption Center and within the CS zone. This facility consists of over 40,000 square feet² and focuses on the recycling, refurbishment, and resale of e-waste, as indicated by the following description on the company's website:

"EcoBinary is an e-waste collector, refurbisher, reseller, and recycler. Our company vehicles come onsite, we load your e-waste items, and can handle all your data destruction needs. Your items are securely transported back to our facility and remain under lock and key during the entire process. e-waste items are then sorted and processed for re-utilization or recycling."³

EcoBinary does not bill itself as a general-purpose recycling center, nor should it. Just like the Redemption Center, it collects small amounts of discarded materials from each individual patron, sorts it, packages it, and sends it offsite for actual processing. It includes a small retail component that sells repurposed electronics, but under Glenwood's theory, the great bulk of the facility would have to be moved to an industrial zone. So too would any business that primarily deals with recycled materials, no matter how small or customer-facing. There is no reasonable argument that a business like EcoBinary, Play-It-Again Sports, or the Goodwill Store should have to move to an industrial zone simply because they receive and handle discarded or recyclable materials. These uses are permitted in the CS zone for the same reason as the Redemption Center should be: because they are similar in scale to other commercial businesses in that zone. For this reason, the Council should reject Glenwood's argument that the simple act of receiving a recyclable makes the Redemption Center a "recycling center."

b. The Director correctly considered the scale of the Redemption Center's building and activities in her decision.

Both the Comprehensive Plan and the BDC provide that the CS Zone is intended for uses that will be compatible with and of a similar scale to other uses along the City's main streets.⁴ The terms "compatible" and "scale" both require some understanding of the external impacts of the redemption center. By looking to see whether the Redemption Center is of a similar scale to other uses in the CS Zone, the Director's analysis is entirely consistent with those policy statements. Moreover, in the absence of any specific analytical methodology required by the BDC, the Director applied best planning practices by analyzing the elements of a land use which

² Washington County Assessor's Data.

³ <http://www.ecobinary.com/>, retrieved June 25, 2018.

⁴ Comprehensive Plan Policy 3.7.3.a provides that Community Commercial area should "allow commercial uses at a range of scales, including large-format retail, to address community needs. BDC 20.10.10.1 provides that the purpose of the CS zone is to "to provide for a variety of business types compatible with and of similar scale to commercial activities found principally along the City's major streets."

can be readily measured and which actually matter for land use purposes, such as the size of the Redemption Center, the type of customers it attracts, the traffic that it generates, as well as the need for convenient access to a bottle return in commercial areas.

c. There is no “plain language” definition of “recycling center” that requires the Council to find that the Redemption Center is a recycling center.

Jesuit argued that the plain language of the BDC requires the Council to find that the redemption center is a recycling center. This simply is not the case. There is no one-size-fits-all “plain language” definition of recycling center and there is no definition of recycling center in the BDC. There is also no dictionary definition of recycling center and Jesuit has not offered one. As a matter of fact, the Land Use Board of Appeals recognized the ambiguity of the term when it rejected Glenwood’s argument and declined to find that the Redemption Center is a recycling center in its 2017 decision.

The BDC provides for the Director’s Interpretation process where an ambiguity in the Code has been identified. This process is all the more appropriate here, where the legislature effectively created an entirely new “Redemption Center” use.

For these reasons, the Council should reject Jesuit’s argument.

8. Conclusion

For all of the reasons contained in this letter and the Applicant’s prior oral and written testimony, the City Council can find the Director correctly complied with the requirements of BDC Chapter 40.25 in finding that the redemption center is a similar use to uses permitted in the CS zone. Further, for the reasons contained in this letter, the City Council can find that the external impact issues raised in the public hearing can be addressed by the proposed mitigation measures voluntarily offered by the Applicant. Finally, for the reasons contained in this letter, the City Council can find that the redemption center is not a recycling use and should not be required to be located in the City’s IND zone. At the conclusion of the open record period, the City Council will be able to affirm the Director’s Decision and reject the appeals based on substantial evidence in the whole record.

Very truly yours,



Michael C. Robinson

MCR:jmh
Enclosures

Mr. Denny Doyle, Mayor

June 26, 2018

Page 13

cc: Mr. John Andersen (*via email*) (*w/ encls.*)
Mr. Jules Bailey (*via email*) (*w/ encls.*)
Mr. Garrett Stephenson (*via email*) (*w/ encls.*)
Mr. K. C. Safley (*via email*) (*w/ encls.*)
Mr. Michael Connors (*via email*) (*w/ encls.*)
Mr. Michael Neff (*via email*) (*w/ encls.*)
Ms. Anna Slatinsky (*via email*) (*w/ encls.*)
Mr. Peter Livingston (*via email*) (*w/ encls.*)

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HATHAWAY LARSON

Koback • Connors • Heth

EXHIBIT 2

June 26, 2018

VIA EMAIL

City Council
c/o Anna Slatinsky, Planning Division Manager
City of Beaverton
12725 SW Millikan Way
Beaverton, OR 97005

Re: Oregon Beverage Recycling Cooperative - 9307 SW Beaverton Hillsdale Hwy
Appeal of Director's Interpretation Decision
Post-hearing Supplemental Submission
Our Client: Glenwood 2006, LLC

Dear Mayor Doyle and Councilors:

As you know, this firm represents Glenwood 2006, LLC ("Glenwood"), the owners of the Laurelwood Animal Hospital and the Oregon Veterinary Specialty Hospital located adjacent to the above-referenced Oregon Beverage Recycling Cooperative ("OBRC") beverage container redemption center ("BCRC"). At the June 19, 2018 appeal hearing, the City Council left the record open to allow the parties the opportunity to submit additional evidence into the record on or before June 26, 2018. Glenwood is submitting this letter, the June 21, 2018 letter from Dr. Robert Franklin, Dr. Lynn Erdman and Dr. Ron Earp, attached as Exhibit A, and the other attachments as additional evidence for the City Council to consider.

A. The legislative history of the 2011 Oregon Bottle Bill demonstrates that the legislature rejected a proposal to treat BCRCs as commercial uses and site them in commercial zones.

OBRC has repeatedly claimed that the 2011 Bottle Bill intended for the BCRCs to be treated as commercial uses and sited in commercial zones. Notwithstanding the lack of any language in the adopted bill to support that theory, OBRC claims that the legislature *intended* this outcome when it adopted the 2011 Bottle Bill. OBRC based this claim on the April 11, 2018 letter from two Oregon legislators and Jules Bailey's testimony regarding his personal experience working on the 2011 Bottle Bill as a former legislator. These claims, however, are a classic example of why Oregon courts reject post-enactment statements of legislators as relevant to the legislative intent, especially when one of those legislators has a vested interest in the outcome of the case. *Salem-Keizer Ass'n of Classified Employees v. Salem-Keizer School Dist.* 24J, 186 Or App 1961 P3d

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970 (2003). The legislative history of the 2011 Bottle Bill proves the opposite of OBRC's claim – the Oregon legislature specifically rejected a proposal to treat BCRCs as commercial uses and require them to be sited in commercial zones.

The originally introduced House Bill 3145 (2011 Bottle Bill) is attached as Exhibit B. Section 9 through 11 of the introduced bill included specific language that does precisely what OBRC claims the legislature intended to do when it adopted the 2011 Bottle Bill:

“LAND USE

SECTION 9. { + Section 10 of this 2011 Act is added to and made a part of ORS chapter 197. + }

SECTION 10. { + A redemption center certified under ORS 459A.735 is a commercial use. A local government shall allow the siting of a redemption center on the same or substantially similar basis in areas planned or zoned for commercial use as the local government allows a place of business of a dealer of similar size. + }

SECTION 11. { + A local government shall adopt changes, if necessary, to the acknowledged comprehensive plan or land use regulations to implement section 10 of this 2011 Act within six months after the effective date of this 2011 Act. + }.”

However, these provisions never made it into the final bill. The legislature rejected this proposed language and it was removed from the final bill that was adopted.

The legislature's consideration and rejection of this proposal demonstrates that it did not intend for the BCRCs to be treated as a commercial use and sited in commercial zones. *Doe v. Chao*, 540 U.S. 614, 623, 124 S.Ct. 1204, 157 L.Ed.2d 1122 (2004); *Nuclear Information and Resource Service v. U.S. Dept. of Transp.*, 457 F.3d 956, 962 (9th Cir, 2006); *State v. Supanchick*, 354 Or. 737, 751 (2014). That is why the OLCC process requires the applicant to obtain local government approval and demonstrate that the BCRC complies with the local zoning requirements and ordinances. OAR 845-020-0020(f) & OAR 845-020-0025(8). As the appellants have demonstrated, other local jurisdictions have permitted BCRCs based on their local zoning code and/or adopted legislative code amendments to determine where they will be allowed.

The legislature clearly did not intend what OBRC claims it intended when it adopted the 2011 Bottle Bill. The legislative history and OLCC regulations demonstrate that the legislature intended the opposite. Local governments must determine where these facilities can be sited based on their local zoning codes. It is troubling that Mr. Bailey, who must have known about this legislative history and the rejection of this language in the introduced bill, withheld this information from the City Council and misrepresented the true legislative intent.

B. Even if the City Council wants to allow BCRCs in commercial zones, it should require a conditional use permit.

Although most of the focus of the appeal has been whether or not the BCRC should be allowed in commercial zones or limited to industrial zones like other Recycling Centers, the City Council

must also consider if *any* limitations or restrictions should be imposed on these facilities. As we previously explained, the Director's decision would allow BCRC facilities in every Commercial zoning district and the Office Industrial District without any public notice or process, or any restrictions. At a minimum, the City Council should require a conditional use permit.

Based on the nature of the BCRC and the testimony of the neighbors who have had to live with this facility in their area, requiring a conditional use permit is clearly necessary. BDC 40.15.05 provides: "The purpose of a Conditional Use application is to *review uses that may be compatible in the underlying zoning district but because of their size, operation, or other characteristics require review on a case-by-case basis*. These uses are subject to the regulations in this Section because they may, but do not necessarily, *result in significant adverse effects upon the environment, overburden public services, alter the character of the surrounding area or create nuisances*." (Emphasis added). The BCRC is the type of use that at a minimum requires a conditional use permit to address unique impacts on the surrounding community.

A conditional use permit would enable the City to put reasonable restrictions and limitations on the facility to limit its impacts on the surrounding area. Conditional uses "may be approved, *approved with site specific conditions designed to minimize or mitigate identified adverse impacts*, or denied." BDC 40.15.05. (Emphasis added). The applicant is required to demonstrate that the "location, size, and functional characteristics of the proposal are such that it can be made reasonably compatible with and have a minimal impact on livability and appropriate use and development of properties in the surrounding area of the subject site." The conditional use process would require OBRC to demonstrate that it will minimize impacts on the surrounding areas *before* it starts operating and will provide the City some authority to restrict or limit the impacts in some manner.

This is yet another example of why the City Council should not adopt the Director's interpretation and allow these BCRC facilities without limitations or restrictions. The proper way for the City Council to decide this important and consequential issue of first impression is to undergo a legislative process to determine both where these facilities should be allowed and what limitations or restrictions should be imposed on these operations to mitigate the impacts on the surrounding community.

C. OBRC attended NAC meetings after the City approved the BCRC and the meetings were designed to promote the BCRC not address neighborhood concerns.

At the appeal hearing, Mr. Bailey testified that OBRC attended multiple Neighborhood Association Committee ("NAC") meetings prior to opening the BCRC in an attempt to address neighborhood concerns. Mr. Bailey's testimony mischaracterizes the NAC meetings and is misleading. OBRC only attended these meetings after the City had approved the BCRC, which was made clear at the meetings, and OBRC did not actually respond to neighborhood concerns. OBRC attended these meetings to promote the new BCRC, not to address neighborhood concerns.

A copy of the Denney Whitford/Raleigh West NAC minutes for the March 9, 2017 meeting is attached as Exhibit C. The NAC chair made clear at the beginning of the meeting that “OBRC has already filed their permits with the City and has been approved to move into that space” and it was only “an informational presentation to let people know how the new center will work and to give them a chance to ask questions.” Exhibit C, p.2. Although several participants raised concerns about the lack of public notice and impacts from the BCRC, the City planner at that meeting (Scott Whyte) responded that “OBRC’s permits have already been processed and they have met the conditions required by City code.” Exhibit C, p.4.

A copy of the Washington County Community Participation Organization District 3 (“CPO3”) minutes for the March 16, 2017 meeting is attached as Exhibit D. Once again, in response to concerns raised about the BCRC Mr. Whyte responded that the property “is zoned commercial on a commercial street, and all requirements were met by them.” Exhibit D, p.6. When neighbors asked what they should do in the event they have problems with the BCRC, Mr. Whyte advised them to call the “Beaverton Police” or “Washington County Sheriff.” Exhibit D, p.6. The City made it clear at these meetings that the BCRC had already been approved and future neighborhood concerns needed to be addressed by the police.

D. OBRC’s claim that it is willing to work with the neighborhood is disingenuous and inconsistent with OBRC’s actions.

OBRC claimed at the appeal hearing that it wants to be part of the solution and is willing to work with the neighbors to address their concerns, but it is unable to do so because the neighbors are not willing to engage with OBRC. That claim is wholly inaccurate. OBRC has known about the neighbors’ concerns for over a year and one-half, whom have communicated their concerns directly to OBRC, but it has consistently ignored these concerns and not engaged with the neighbors.

As reflected in the January 24 and January 31, 2017 emails to Mayor Doyle, attached as Exhibit E, Glenwood reached out to both the City and OBRC months before the BCRC opened to explain its concerns and attempted to generate a dialogue to determine how to address those concerns. And yet, when Glenwood scheduled a site meeting with the City and OBRC on January 30, 2017 to discuss these issues, the City and OBRC started the meeting by stating that they were only there to review if the proposal fits the Design Review Type 1 threshold and were not willing to consider Glenwood’s use related concerns. Exhibit E, p.1.

Around this same time, I personally reached out to OBRC’s attorney at the time, Dave Sweeney at Brownstein Rask, to explore if OBRC was willing to consider a good neighbor agreement and mitigation measures to address the impacts, such as onsite security, removing the stairs between the two properties, measures to maintain the landscaping, pick up trash, and keep people from loitering. Mr. Sweeney never returned my call or otherwise responded.

As explained in the June 21, 2018 letter from Dr. Robert Franklin, Dr. Lynn Erdman and Dr. Ron Earp, Glenwood continued to communicate with OBRC before it opened the BCRC in an attempt to address Glenwood’s concerns. Among other requests, Glenwood asked OBRC to provide security guards to address security and criminal incidents associated with the BCRC.

Even though OBRC acknowledged that it has security guards at some of its BCRC facilities, OBRC was unwilling to provide them at this location or address the other concerns. Exhibit A, p.3.

As reflected in the March 2017 NAC and CPO3 meeting minutes, Glenwood and other neighbors made their concerns very clear to OBRC prior to opening the BCRC. OBRC did not offer any proposals or mitigation measures to address these concerns at the meetings or subsequent to these meetings. Exhibits C & D.

Shortly after the BCRC opened, Glenwood sent a June 1, 2017 email to OBRC, attached as Exhibit F, describing a series of problems that had already started, including customers parking in the Glenwood parking lot, litter, abandoned shopping carts, etc. OBRC never responded to this email. Glenwood subsequently asked OBRC to post no-parking signs to address the parking lot conflicts, clean up the trash and take other measures to address continuing problems with the BCRC. OBRC has routinely ignored these requests. Exhibit A, p.2-3.

After LUBA remanded the City's original approval, Glenwood and other appellants requested a NAC meeting to address what OBRC intended to do to respond to the remand and neighborhood concerns about the BCRC. A copy of the Denney Whitford/Raleigh West NAC minutes for the March 8, 2018 meeting is attached as Exhibit G. Once again, Glenwood and other neighbors made their concerns about the BCRC very clear at this meeting. Exhibit G, p.2-3. Mr. Bailey "acknowledged the need to consider how to address the issues raised," admitted that "grocery stores are dealing with similar issues and have been asking for bottle drop facilities as a potential solution to their issues" and indicated that "vagrancy is not acceptable." Exhibit G, p.4. And yet, neither Mr. Bailey nor anyone else from OBRC followed up with the neighbors or proposed any solutions.

At the June 14, 2018 Denney Whitford/Raleigh West NAC meeting, OBRC actually admitted that it was not following through with proposals it had discussed with some neighbors because it did not want to invest in the site unless the City approved it. The June 14, 2018 meeting minutes, attached as Exhibit H, provided:

"A representative from OBRC explained that the public hearing is trying to resolve ambiguity in the City code. It's possible that the City will adopt a code amendment that bars this kind of business in a commercial zone (*this is one reason OBRC has not moved forward with some of the improvements it has discussed with neighbors; OBRC does not want to invest in the site if they will soon have to move*)." (Emphasis added).

For over a year and one-half, Glenwood and other neighbors have been trying to engage OBRC to get them to take their concerns seriously and do *something* about it. OBRC is well aware of the issues, but instead of offering mitigation measures or proposals to address these issues it continues to feign ignorance about what to do. It is up to OBRC as the applicant, not the affected neighbors, to propose solutions to the problems its facility is creating. OBRC's promise at the appeal hearing to be a good neighbor and work with the neighbors rings hollow and is nothing more than a public relations ploy to get an approval. If OBRC has been unwilling to

work with the neighbors while the legality of the use was still uncertain, they will surely ignore the neighbors if the City Council approves the Application with no restrictions.

E. The Beaverton Police Department analysis and other evidence supports the neighborhood claims that the increase in criminal and security problems is a direct result of the BCRC.

At the appeal hearing, OBRC and the City staff suggested that there is no evidence that the criminal and security related issues are a result of the BCRC. They relied in part on the Beaverton Police Department's analysis of complaint calls in the area surrounding the BCRC, claiming that the analysis determined that there was insufficient evidence that the increase in incidents was caused by the presence of the BCRC. This claim is not an accurate or complete description of the Beaverton Police Department's analysis ("BDP Analysis"), which noticeably was not included in the City Council agenda packet. Therefore, we enclosed a copy of the BDP Analysis, dated April 9, 2018, attached as Exhibit I, so the City Council can review it itself.

The BDP Analysis concluded that there has been a significant increase in reported criminal incidents in the area since the BCRC began operating last year. Exhibit H, p.6. Reported criminal activity has increased 42.86% within 0.25 miles and 73.68% within 0.5 miles of the BCRC since it opened. The analysis also notes that this increase in rates is "greater in the analyzed radius than rates experienced throughout the entire jurisdiction of the Beaverton Police Department," demonstrating that this increase is not due to general increases in criminal activity throughout the City. The BDP Analysis concluded that "this data supports a possible explanation" that this activity is connected to the BCRC. The BDP Analysis noted that additional analysis of other factors "would need to be explored for a more accurate understanding of this data," but the factors cited are ones that would likely increase the number of incidents (the willingness of the public to report incidents, additional incidents reported to the Washington County Sheriff's Office). The BDP Analysis did not conclude that there was insufficient evidence that this increase was caused by the presence of the facility as suggested in the Decision.

The direct correlation between the BCRC and increased criminal activity in the surrounding area is further supported by the testimony of Glenwood and other neighbors. Virtually all of the neighbors testified that there has been a dramatic increase in criminal activity since the BCRC opened and many have connected specific incidents to the BCRC. The June 21, 2018 letter from Glenwood describes numerous criminal and security related incidents they reported to the Beaverton Police Department since the BCRC opened for business in May of 2017. Exhibit A, p.1-2. In the prior 11 years they have operated at this location, there was not a single criminal or security related incident that required them to contact the police. Therefore, there is clearly substantial evidence that the BCRC created a significant and persistent increase in criminal and security related incidents.

F. OBRC is violating the 7 am to 10 pm operating hours restrictions.

In the CS zone, the BDC requires most commercial uses to obtain a conditional use permit if it will operate between the hours of 10 p.m. and 7 a.m. BDC 20.10.20.27.5 & 20.10.25.7. Since

the BCRC is within 500 feet of an existing residential use in a residential zone, there is no question that OBRC must limit the hours of operation from 7 am to 10 pm. OBRC claims that it has been limiting the operating hours to 7 am to 10 pm, but new evidence indicates otherwise.

The City Council heard testimony at the appeal hearing from a Jesuit High School representative that OBRC has been regularly violating this operating hours restriction. The Jesuit representative noted a truck that regularly parks and/or leaves the BCRC prior to 7 am. Glenwood has noticed the same regular violations. The June 21, 2018 letter from Glenwood describes these violations and includes pictures time stamped between 6:30 and 6:42 am to corroborate the statements. Exhibit A, p.4. Since OBRC has not been willing or able to comply with the operating hours restriction, at a minimum the City Council should require a conditional use permit.

G. The City Council should do a site visit and see the back area of the BCRC.

One of the key issues of contention in this appeal is whether or not OBRC is doing any recycling processing activity in the back area of the BCRC. As Councilor San Soucie noted at the appeal hearing, none of the Councilors have seen the back area of the BCRC so it makes it difficult for the Councilors to judge for themselves. Given the importance of this issue, the City Council should do a site visit and see the back area of the BCRC in order to judge for themselves. The City Council has the authority to do so by either doing it as part of this post-hearing record process or reopening the record. Glenwood is confident that if the City Council were to see the back area of the BCRC, you would all agree that OBRC is clearly doing some processing on site. This is too important of a case and too critical of an issue in this case for the City Council not to take this opportunity to see the back area operations.

We appreciate your consideration of these additional comments and evidence.

Very truly yours,

HATHAWAY LARSON LLP



E. Michael Connors

EMC/mo
Attachments

cc: Glenwood 2006, LLC



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EXHIBIT 3

Michael E. Haglund
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Michael G. Nelf
Julie A. Weis
Christopher Lundberg
Matt Malmshemer
Joshua Stellmon
Eric J. Brickenstein
Christopher T. Griffith

LeRoy W. Wilder
Retired

June 26, 2018

VIA EMAIL

City Council Members and the Honorable Denny Doyle
c/o Anna Slatinsky, Planning Division Manager
City of Beaverton
12725 SW Millikan Way
Beaverton, OR 97005

Re: Oregon Beverage Recycling Cooperative (Beaverton BottleDrop)
APP 2018-0001 and APP 2018-0002 (Appeal of DI2017-0003)

Dear Council Members and Mayor Doyle:

This letter and attached materials represent additional evidence submitted on behalf of Brendan and Holli Bridgens and their family, Michael Matschiner, Joseph Conrad, Trisha McPharren and her family, Jesuit High School, and Rick Skayhan and his family.

1. Attachment A – Written Comments Submitted by Neighbors During Director’s Interpretation Comment Period

Attachment A includes written comments made in response to Director Twete’s Notice of Pending Director’s Decision. All are taken from Exhibit 3 of the Staff Report issued in response to Director Tweet’s Notice. Director Twete’s Notice was the first acknowledgement by the City of Beaverton that the public would be allowed to provide input concerning whether the use being made by the BottleDrop owners is a legal use and compatible with surrounding residential, educational, and commercial uses. It is unfortunate that this process and request for public input did not occur until more than eight months after the BottleDrop opened for business, an approach completely contrary to Beaverton Development Code (“BDC”) 40.25 (requests for DI should be made prior to or concurrent with applications for development).

2. Attachment B – OLCC Local Government Notification Form

Attachment B does not appear to be in the record for this appeal even though it should be. This is a second version of a completed OLCC Local Government Notification Form filed by the City of Beaverton for the BottleDrop project. In this form, Beaverton Senior Planner Scott Whyte annotates the form to make clear he believes the Beaverton Municipal Code “does not address such facilities directly.” The “such facilities” referenced are the OBRC’s BottleDrops. Beaverton’s code at BDC 40.25 directs that this would have been the time for issuance of a Notice of Director’s Decision given that staff believed the code did not directly address the use being made at BottleDrops.

3. Attachment C – Letter of March 16, 2018 to Director Twete

Evidence in the record establishes that Senior Planner Scott Whyte, who staffed the initial determination that the BottleDrop was a Service Business and therefore a commercial use, did not realize processing took place in the back end of a BottleDrop facility. Despite our request Director Twete visit the site and see the backend (see Attachment C), nothing in the record establishes Director Twete or any of her staff inspected the backend of the facility. You have in the record a declaration which describes the backend operations of the BottleDrops located in Bend and Redmond. My clients respectfully request you conduct a site visit to determine if the backend operation of the Beaverton BottleDrop is similar to the description of the Bend and Redmond BottleDrops. City Council clearly has authority to conduct this site visit if it chooses.

4. Attachment D – Safety/Security Incidents Documented by Jesuit High School

Attachment D is a list of safety and security incidents compiled by Cathe Kent, the Jesuit High School (“JHS”) Chief Security Officer. Record testimony previously has been submitted through JHS President Tom Arndorfer, JHS Dean of Students and Security Khalid Maxie, and others that Ms. Kent has documented a significant increase in security and safety incidents in and around Jesuit High School since the BottleDrop began operating in May 2017.

5. Attachments E-G – The BottleDrop is Not an Accessory Use

The Beaverton Development Code defines an “Accessory Use” as a use “incidental, appropriate, and subordinate to the main structure or use.” BDC Chapter 90. The BDC provides accessory uses customarily associated with the principal use of a property “shall be permitted” where the principal commercial use type is authorized, and allows structures or uses incidental and subordinate to the uses allowed as Permitted and Conditional Uses. BDC 60.50.05 (1) and (4). Consistent with this code provision, Beaverton historically has treated reverse vending machines and the storage of redeemable recycled containers as a use accessory to retail beverage sales. This can be inferred from a review of City of Beaverton files CU2012-0002, which represents the land use review files identified by the City of Beaverton for the Walmart store at 17275 NW Cornell Road. Nowhere in this file is any reference made to reverse vending machines or beverage container recycling needing review or approval by the City of Beaverton. Because the Walmart store is an allowed use in the commercial zone where it is located, reverse vending machines and storage of crushed glass, aluminum, and plastic beverage containers is an accessory use allowed as of right because it is incidental and subordinate to and customarily associated with the retail sale of beverages. That this use is incidental is readily evident when one compares the portion of the facility dedicated to container redemption and recycling with the portion of the facility dedicated to actual display and retail sale of merchandise. Compare Attachments F-G to Attachment E.

At the Beaverton BottleDrop, however, the recycling and redemption of beverage containers is the Principal Use made on that property. See BDC Chapter 90 (“the main or primary purpose of which land or a structure is designed . . . or intended”). As such, the Beaverton BottleDrop must qualify as a Principal Use allowed under the BDC before it can be sited in Beaverton. BDC 10.20(5) (“Uses of land not expressly allowed or not incidental to a Permitted or Conditional Use are Prohibited”).

To equate the BottleDrop – which is a Principal Use under the BDC, which is responsible for providing off-site service to 25 grocery stores within its convenience area, and which processes in excess of 80,000 beverage containers every day of the year – to recycling and redemption of beverage containers at grocery stores is a false analogue. The analogy is inapt both legally and on the facts. Grocery store recycling and redemption is an Accessory use which is subordinate and incidental to the Principal use. The BottleDrop is a centrally-located facility that serves one function, stands alone as a Principal use, and in scale and intensity dwarfs the reverse vending machines found at individual grocery stores. To suggest these incidental and subordinate Accessory uses provides justification for concluding a BottleDrop is commercial in nature is not persuasive or logical.

6. Attachments H-I -- Additional Testimony from Brandon and Holli Bridgens

Brandon and Holli Bridgens live immediately across the fence and east of the BottleDrop. The Bridgens live in an area that borders the Beaverton Community Service Commercial zone. While the Bridgens have lived next to the building that now houses the Beaverton BottleDrop for 17 years, their letters (Attachments H and I) relate that the noise, smell, trash, and safety/security issues they have faced since the BottleDrop opened are fundamentally different and significantly more invasive than any issues now or previously caused by nearby fast food restaurants and other nearby commercial businesses.

7. Attachment J – Additional Testimony from Trisha McPherren

Attachment J is email correspondence from Trisha McPherren recounting her latest BottleDrop-related problems and her decision to contact Beaverton Code Compliance about these problems.

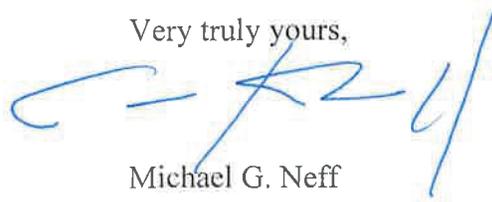
8. Attachment K – Declaration from Richard Skayhan

Attachment K is a declaration from Richard Skayhan, one of the appellants. Mr. Skayhan articulates that despite testimony from OBRC representatives they have attempted to engage neighbors about livability issues caused by BottleDrop operations, that OBRC representatives have not made any effort to reach out to him. Given this fact, and given that OBRC representatives have encountered Mr. Skayhan at NAC meetings and City Council meetings multiple times in recent months, Mr. Skayhan is skeptical that OBRC’s management is serious about its claims that it wants to work in good-faith to achieve a real solution with those affected

City Council Members and the Honorable Denny Doyle
c/o Anna Slatinsky, Planning Division Manager
June 26, 2018
Page 4 of 4

by BottleDrop operations. Mr. Skayhan believes that re-siting the facility in a location where it satisfies the BDC is the best solution for Beaverton's citizens.

Very truly yours,



Michael G. Neff

MGN/akt
Attachments

From: Trisha McPherrren <mcpherrrent@gmail.com>
Sent: Saturday, June 23, 2018 3:11 PM
To: Anna Slatinsky
Cc: Mike Neff
Subject: Recent incidents at the Bottledrop

June 23, 2018

Dear Ms. Slatinsky,

I would like to tell you about the two incidents this week that had me calling the Bottledrop supervisor, Claire Schmidt. One of those incidents resulted in a call to the code compliance John Douglas, and I am waiting for a response.

In the first incident on the afternoon of June 20, 2018, I observed that several shopping carts had been lined up in the shrubbery along the front of the property. They sat in such a way that would constitute a trip hazard to pedestrians. I called Claire, and she promised to talk to the employees about it.

The second incident involved a nuisance odor that was above and beyond the usual mixed drink smell. On the afternoon of June 21, 2018, my children and I were in our yard at 9115 SW Club Meadow Lane, when the odor of a chemical solvent and artificial pine scent reached us. Personally, artificial pine fragrance is an asthmatic trigger for me, so I went in search of the source. Walking several yards west on Club Meadow, we realized that the source was Bottledrop, who had all doors (including the side roll-up) open for cleaning. I called and left a voicemail with Claire. About an hour later, the smell had lessened, so again, I walked to where I could see the building, and the doors had all been shut. We could still smell the solvent as far away as the adjacent property, 9240 SW Club Meadow Ln. I again called and left a voicemail advising Claire that I would now be calling the Beaverton Code Compliance Program for advice about this use of cleaning products. I did call and leave a voicemail with John Douglas, but I also wrote him an email that explained the issue. I can provide a copy if you would like it. About an hour after all of this, Claire returned my call, told me that the facility cleans with Pine Sol, and promised to look into it.

These are just two examples of the daily offerings that my neighbor Bottledrop provides. At the City Council, neighbors were asked why we never complained, called code compliance, or tried to work with the Bottledrop to come to a solution. I appreciate their advice. I am now calling nearly every day.

Thank you for your consideration of this matter.

Sincerely,

Trisha McPherrren

Holli Bridgens
9240 SW Club Meadow Lane
Portland, OR 97225

June 24, 2018

Anna Slatinsky
Planning Division Manager
City of Beaverton
Community Planning Department
12725 SW Millikan Way
Beaverton, OR 97005

RE: DI2017-0003 Oregon Beverage Recycling Cooperative (OBRC) Beverage Container Redemption Center (BCRC) Director's Interpretation

Dear Ms. Slatinsky,

I attended the City Council Meeting on June 19th and appreciate being able to discuss our experiences we have had since the Bottle Drop has opened. I understand the difficulty in reviewing this issue but feel the correct action to take is to reverse the Director's Interpretation.

While I, like many others, appreciate the convenience of stores/businesses being close by, I don't think convenience outweighs those issues of personal safety, livability and what is appropriate in a commercial zone. Given that we border numerous businesses and have not had any issues until the Bottle Drop has opened is something that can not be ignored. This is impacting our life here and others in the neighborhood, and while the Bottle Drop representatives feel there is no noise or they mitigate what noise there is, that is simply not true. We live here and we know what we hear and smell on a daily basis, especially because we share a property line. What happens in the Bottle Drop, happens in my front and backyard.

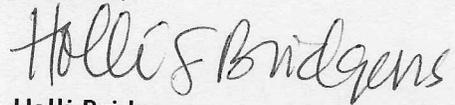
I am all for supporting recycling as are others. In fact, I don't think you would find someone in our neighborhood who doesn't support any recycling efforts. The question is where the Bottle Drop is located and how it came to be that the Bottle Drop would be viewed as a *service business rather than a recycling center*. The issue is *why weren't neighborhoods properly notified, both business and residential, of the Bottle Drop opening?* Why is it that other businesses in the area making any changes to their property, send out a notice to the neighborhood while the Bottle Drop did nothing?

The sounds of the Bottle Drop are extraordinary. Not only is there processing noise of bottles and cans being compacted and running on conveyor belts, we also have noise from the parking lot as patrons are moving the bottles and cans around, someone is always dropping a bag and then we listen to it rolling down the hill. The carts are loud, the patrons are loud and that is going on starting from 6:30 am some days till 7:00 pm. Then until 10:00 pm, we are listening to patrons dropping off the green bags. I have cleaned up garbage from both our front and back yard and have seen the garbage that is left in the parking lot. Brandon Bridgens, in his letter, will discuss a smoldering pile of bark dust that was found on Father's Day - last Sunday just on the other side of our fence. We deal with litter, noise and smells daily. I have had to bring my children indoors because patrons have been peering over our fence line making them uncomfortable. We have had people parking on our street claiming that there is no available parking in the Bottle Drop parking lot. The smells are not contained either. On warm days, the smell of stale alcohol and soft drinks is overwhelming. Why is it

that we have numerous businesses around us and the Bottle Drop is who we hear and smell daily?

This simply can not continue. The Bottle Drop needs to be relocated and sited in an appropriate location. The needs of other neighborhoods and businesses must be taken into account. Thank you for allowing us to comment. If you have any questions, please feel free to contact me at 503-348-0238.

Sincerely,

A handwritten signature in cursive script that reads "Holli Bridgens". The signature is written in black ink and is positioned above the printed name and phone number.

Holli Bridgens
503-348-0238

June 26, 2018
E-Citizen@Consistency.Net

Mayor Denny Doyle,
Council President Lacey Beaty
Councilor Betty Bode
Councilor Mark Fagin
Councilor Cate Arnold
Councilor Marc San Soucie

Subject: Public Hearing on Appeals (APP 2018-0001, APP 2018-0002) of Director's Interpretation for OBRC Beverage Container Redemption Center (DI 2017-0003)

Mr. Mayor and members of the Council,

As a NAC Chair, Traffic Commissioner, citizen advisory committee member for both city-county TSP, CIP, and other projects, as well as a long-time volunteer in the Beaverton area, I was moved to provide some additional thoughts after hearing the testimony at City Council regarding the appeal of the Planning Director's decision about the siting of the OBRC facility.

The following are my opinions and mine only and do not represent the city of Beaverton, any board or commission I serve on, or any other organization, group or person. I would like to present three points for your consideration.

Redemption not Recycling

First, there is a difference between redemption and recycling, and it's a difference that is fairly intuitive: When you recycle, you put a mix of items into your curbside bin where it will be hauled off to a facility to be processed, with no further expectation. But when you collect items and return them to a location for the express purpose of getting cash back in return, that is an act of redeeming.

Opponents of the OBRC facility continue to ignore the director's observation that "processing" is something done when recycling. But one theme is clear, whether implicit or explicit by the testimony on both sides: When you drop things off at a recycling center, such as Far West Recycling (more on that below), you drop it off in order to avoid having materials like scrap iron and newspaper go directly into the landfill. That's "recycling," and you expect nothing more. Some of the people who gave testimony, such as the scout leader and the mother who lets her children carry a bag of cans, clearly noted that they are "redeeming" deposit identified bottles and cans. That is, they are returning items with the expectation of getting something back—in this case, money. People are not using OBRC in the same way that they used FWR.

A digression about Far West Recycling: In order to have meaningful dialogue, I believe people should understand the area and its history when arguing an appeal. When Councilor San Soucie asked if the appellants were familiar with FWR and the work it did in Beaverton, not only did they not know about recycling in the area, they had not even heard of FWR, which had been in Beaverton for 37 years. The people of Beaverton naturally understand the difference between a recycling center (FWR) and a redemption center (OBRC's BottleDrop) because we've had the opportunity to use both. For the appellant to insist that the OBRC facility is a recycling center akin to FWR shows a lack of understanding about our city's makeup. In addition, his insistence that recycling centers (which by his definition includes BottleDrop) should be sited in industrial zones where they would be welcomed and a better fit is simply false given that FWR did not want to close its facility but was forced to when the new property owner did not renew their lease in that particular industrial zone. For 37 years, FWR was such an important facility in our community that the Mayor himself engaged with them to try to find them a new home (<https://pamplinmedia.com/bvt/15-news/342763-222174-recyclers-need-to-relocate>). That the city of Beaverton was unable to find a suitable new location within the city demonstrates that the appellant should not be making a blanket statement that the applicant can simply move to an industrial zone.

Incorrect use of public safety

Second, the appellant and those opposing the OBRC facility have made arguments regarding public safety as a negative effect and direct cause of the OBRC site. Nearly every comment about personal safety and quality of life presented at this city council meeting is similar to those presented to Council only weeks prior about homelessness and overnight camping. These same comments have been used over and over for many local and citywide issues — even in our NAC, we heard the same concerns before regarding changes involving an unpopular grocery store chain, adult-themed shops, a new section of the Fanno Creek Trail, and, most recently, when a drive-thru fast-food restaurant announced it would be opening in our NAC. This indicates that the root cause of these concerns is not a particular business but instead a range of complex and ongoing citywide problems. In other words, when numerous citizens have the same reaction to completely different situations in different locations, we have to consider that these are not isolated concerns but a general theme the city needs to address; perceived correlation does not equate to direct causation. Hearing about issues of crime and safety are not new to those of us who are continually active in our community, but these issues have been becoming more numerous and visible. Social media, online forums such as Nextdoor.com, and news outlets reflect a general sense of “this didn't used to happen before in my neighborhood.” Problems the citizens and businesses of downtown Portland have faced for decades now seem to be spreading outward into our area, something the surge in overnight camping seems to confirm. Beaverton never had campers on the streets and homeless overflowing areas or our city, now we do. But homelessness, overnight camping, increased crime, and drug use need to be addressed at the city, county, or even state level rather than asking a single business to bear the burden of an array of complex problems. Everyone in our community needs to become part of the solution.

Equal input for a decision

Finally, I feel that you should consider how heavily to weigh testimony submitted by organizations or representatives of large groups if their conclusions were reached without all interested parties in attendance. At the City Council meeting, the City Attorney pointed out that anytime you let an appellant enter a statement, the applicant is not only allowed to speak again but must always be allowed the final word. So if OBRC was never invited to a meeting to present or explain their goals and purpose, how can a board make an informed decision about whether to endorse, oppose, or take a neutral stance on a matter such as this appeal? Only after hearing all of the parties involved can that board reach an informed decision or verdict.

For instance, when our NAC was approached to host a meeting on this very issue, we did so only after making sure all interested parties could attend, and we welcomed representatives from both the applicant and appellant. In the testimony submitted to Council, it is clear that another NAC did not follow that process. The other NAC only heard one side of this discussion, which is unfair to the participants in this appeal process. How can a NAC successfully facilitate meaningful, transparent, and accurate dialogue if they are known to make decisions hearing with incomplete information. The NACs job with regards to this process, is to educate the community about this land use processes, not undermine businesses as they seek to use that process. As a long-time NAC chair, I pride myself on making every effort to facilitate meetings that allow the presentation of the position of all parties so everyone can make an informed decision. As noted at the Council meeting, our NAC (Denney Whitford/Raleigh West), having hosted multiple meetings, facilitated discussions that heard from both parties in this issue, still did not take a position on this appeal. This is because during our discussion our longtime board members believed the system was working as it should; to take a position would be to undermine the efforts of both parties as they engage with the city on this issue.

In closing I realize reaching a decision about this or any city affair can be difficult, especially where there is a lot of information to review, and this case is no different. However, I gratefully appreciate your time and consideration of the points above as they apply to this case, because I stand by my belief that only by continually taking part in the process can we help to become part of the solution.

Sincerely,

Ernie Conway

July 3, 2018

Garrett H. Stephenson
Admitted in Oregon
T: 503-796-2893
C: 503-320-3715
gstephenson@schwabe.com

VIA EMAIL BEFORE 5:00 P.M.

Mr. Denny Doyle, Mayor
City of Beaverton City Council
12725 SW Millikan Way
Beaverton, OR 97076

**RE: Applicant's Second Open Record Period Response; City of Beaverton File
Nos. DI2017-0003, APP 2018-0002 (Oregon Beverage Recycling Cooperative)**

Dear Mayor Doyle and Members of the City Council:

This office represents Oregon Beverage Recycling Cooperative ("OBRC"). This letter is timely submitted on Tuesday, July 3, 2018 before 5:00 p.m. While this letter contains both argument and evidence as those terms are defined in ORS 197.763(9)(a) and (b), this letter focuses on responding to issues and evidence raised by Appellants in their respective second open record period letters. As we stated in our letter dated June 26, 2018, the Applicant will reserve the majority of its legal argument without new evidence for its final written argument.

On June 26, 2018, appellants, Brendan and Holli Bridgens and their family, Michael Matschiner, Joseph Conrad, Trisha McPharren and her family, Jesuit High School, Rick Skayhan and his family, and Glenwood 2006, LLC (collectively, the "Appellants") submitted arguments and new evidence as part of the first open record period in the above referenced case.

Appellants' arguments generally focus on the perceived external impacts of the Redemption Center and whether OBRC adequately responded to neighborhood concerns. Below is a summary of each of the Appellants' arguments contained in their submittals, together with our responses to each argument raised. However, OBRC iterates that it has responded to neighborhood concerns and has offered mitigation measures to ensure that it is a good neighbor. These were detailed in OBRC's letter for the first open record period and include the following proposed mitigation measures:

"A. Construction of an appropriately high solid fence with gates around the dumpsters;

B. Construction of a six-foot high solid wooden fence along OBRC's east property line from a point adjacent to Beaverton-Hillsdale Highway (consistent with a sight distance analysis) to its property line on Club Meadow Lane (to add a barrier for the single family dwelling).

C. *Blocking the stairway between the Glenwood 2006 property and the OBRC property at a location reflecting the property line. OBRC will cooperate with Glenwood 2006, to the extent that Glenwood 2006 is willing to do so, on the location and materials for blocking the stairway (to discourage parking on the Glenwood 2006 property).*

D. *Installation of a sound-proof insulated loading dock door. The insulated loading dock door will further reduce the minimal odor and noise sporadically emitted from the "backroom operations" when trucks arrive for loading of redeemed beverage containers.*

E. *Installation of a sign at the pedestrian access to the OBRC facility stating, "Please be respectful of our neighbors by not talking loudly, loitering or smoking on this property."*

F. *Installation of a six-foot solid fence on the south and west side of the BottleDrop window.*

G. *Signing "Employee Only" parking for the parking spaces on the OBRC property east property line adjacent to the single family dwelling.*

H. *Requiring approval of a "Good Neighbor Agreement" between the City and OBRC that includes the following elements:*

1. *OBRC's obligation to comply with applicable City noise, odor, hours of operation and truck access requirements now or in future effective versions of the Beaverton Municipal Code. Note: Some testimony indicated that OBRC trucks arrived before 7:00 a.m. OBRC has investigated this testimony and determined that the testimony was accurate. OBRC has instructed its trucks not to arrive before 7:00 a.m.*
2. *A commitment to appear at homeowners associations and recognized neighborhood association meetings when requested to address questions or concerns about operation of the OBRC facility.*
3. *Production of an annual report to the Beaverton Planning Department containing a log of any complaints received and how those complaints were addressed.*
4. *Publication of a contact person with an email address for persons to submit complaints or questions about the operation of the OBRC facility and a commitment to respond within 72 hours to the complaint, if at all possible.*
5. *Implementation of OBRC's trespass policy.*

6. *Agreement to cooperate with the City, recognized neighborhood associations and homeowners associations on any City plans to address larger societal issues associated with homelessness and nuisance activities.*

7. *Agreement to cooperate with Jesuit High School on security issues concerning Jesuit High School's property.*

Further, OBRC will add additional staff to ensure faster customer service and to patrol the OBRC property for litter."

After reviewing Appellants' arguments and testimony contained in the first open record period submittal, OBRC has decided to include two additional elements as part of the proposed "Good Neighbor Agreement":

1. Agreement to provide professional security during the OBRC's operating hours, seven days a week.

2. Agreement to construct an "air knife" at the entrance to the OBRC facility, which is the most effective way to prevent odors from escaping from the facility.

As explained below, the Council has the authority to impose these as conditions of approval on this Director's Interpretation and OBRC would support these conditions.

RESPONSE TO APPELLANTS' ARGUMENTS OFFERED DURING THE FIRST OPEN RECORD PERIOD

1. Response to arguments raised by Glenwood 2006, LLC.

Glenwood 2006, LLC ("Glenwood") raised a number of arguments through its attorney, Mr. E. Michael Connors, in a letter dated June 26, 2018. Glenwood's arguments are summarized below and each is followed by OBRC's response.

- a. **"The legislative history of the 2011 Oregon Bottle Bill demonstrates that the legislature rejected a proposal to treat BCRCs as commercial uses and site them in commercial zones."**

RESPONSE: Glenwood 2006 argues that because language in the original pilot project bill that would have required local governments to allow the redemption centers in commercial zones did not make it into the final program approved in 2015, the legislature did not intend for the redemption centers to be commercial uses. In so doing, Glenwood offers no evidence that this provision was discussed or any explanation of why it was removed. Certainly, if this legal requirement were still in place, a Directors Interpretation might not have been necessary. Thus, the most plausible reason for the legislature not retaining that provision in the final legislation is

that it simply did not wish to preempt local government decisions regarding their own land use regulations. It does not mean that they Redemption Centers are not commercial uses.

More importantly, though, is that no matter how one views the legislative history, it is clear that the legislature did not view redemption centers as industrial uses and also did not view them as “recycling centers.” What the legislature clearly did want, as explained in OBRC’s initial appeal response, was for the redemption centers to be located in convenient locations near beverage retailers, which supports OBRC’s position that the CS zone is entirely appropriate for a redemption center.

b. “Even if the City Council wants to allow BCRCs in commercial zones, it should require a conditional use permit.”

RESPONSE: BDC 10.50 provides that a similar use authorization is used to determine whether a use is a “Permitted” use in a given zone “if the use is of the same general type and similar to the allowed uses.” Therefore, the Director’s Interpretation process is not intended to establish a new *conditional use* allowance, and such action would be inconsistent with LUBA’s direction that the Council determine whether the Redemption Center is a permitted use in the CS zone.

However, to the extent that the Council wishes to impose conditions on this Director’s Interpretation, it may do so pursuant to BDC 40.25.15.1.E and BDC 10.65(1). In fact, OBRC has proposed mitigation measures based on public testimony and private concerns and recommends that the City require these as conditions of approval. This includes a “Good Neighbor Agreement.” Thus, a separate conditional use process would yield little more than a fresh recitation of the same concerns and responses raised during this Appeal.

c. “OBRC attended NAC meetings after the City approved the BCRC and the meetings were designed to promote the BCRC not address neighborhood concerns.”

RESPONSE: Glenwood argues that City Planner Scott Whyte’s explanation at the NAC and CPO-3 meetings that the use was already permitted evidenced some sort of callousness of OBRC to neighborhood concerns and that its appearance at these meetings was for promotional purposes only. The Council can reject this argument for three reasons. First, Mr. Whyte was a City employee and his response to neighborhood concerns is irrelevant to the question of whether OBRC wished to hear and respond to such concerns. Second, substantial evidence submitted by OBRC during its first open record response demonstrates that it did then, and continues now, to follow up with neighborhood concerns. In fact, it was not required to attend the NAC meeting but did so in order to be a good neighbor. Third, most of the concerns raised during the March 9, 2017 meeting were raised by Glenwood itself.

d. “OBRC’s claim that it is willing to work with the neighborhood is disingenuous and inconsistent with OBRC’s actions.”

RESPONSE: OBRC offered a substantial amount of correspondence into the record in its first open record response, which demonstrates that it is responsive to neighborhood concerns, including emails between OBRC and the Bridgens family and Jesuit High School. OBRC also offered a substantial number of mitigation measures and a “Good Neighbor Agreement” in its first open record response, which is excerpted above.

As explained above, the Council has the authority to impose these measures as conditions of approval and OBRC would support such a decision.

e. “The Beaverton Police Department analysis and other evidence supports the neighborhood claims that the increase in criminal and security problems is a direct result of the BCRC.”

RESPONSE: Glenwood argues that the Police Department letter demonstrates that an increase in police calls are due to the Redemption Center. This point is contradicted by the very letter that Glenwood offers, which explains that the data yield no conclusion as to whether this increase in police activity was caused by the Redemption Center: “Without in-depth analysis of specific public demand requests for police services, I am unable to draw causal conclusions regarding the presence of the business located in question.” The letter goes on to explain that “in some cases above, the sample size of reported calls is very small and may contribute to significantly high percentage changes.” At bottom, the Police Department is unable to conclude that an increase in calls has been caused by the redemption center and that given the small number of calls in several categories, it does not claim that these increases are all statistically significant.¹

Further, OBRC submitted the information that the City Council had before it on the camping issue. The Police Report did not say that OBRC’s location was the cause of the increase. It is equally possible that the increase in homelessness and camping, especially given the nearby location of homeless camps to this area, is responsible for the increase, a possibility that Connors ignores. The fact is that no reasonable person can conclude that OBRC is responsible for problems affecting society in general, especially whereas here, the City Council is well aware of a camping problem that is likely the cause of the problems that Connors complains of.

¹ For example, the incidence of an “unwanted person” call went from six (6) between 5/15/16 and 3/15/17 to nine (9) between 5/15/17 and 3/15/18 within a ¼ mile radius. The incidence of a “disturbance” went from four (4) to five (5); “theft from vehicle” went from one (1) incidence to five (5) incidences; and “noise complaint” went from two (2) incidences to five (5) incidences, during the same period and within the same radius. However, several categories of calls saw no increase at all within the same ¼ mile radius. These include “behavioral health,” “vice-drugs,” “theft-shoplifting,” “littering,” and “prowler.” Finally, at least one category, “suspicious vehicle,” saw a substantial decrease.

f. “OBRC is violating the 7 am to 10 pm operating hours restrictions.”

RESPONSE: The Redemption Center’s normal operating hours are from 8:00 AM to 6:00 PM, and the Green Bag drop door is available between 7:00 AM and 10:00 PM. Outside of those hours, the public-facing portion of the facility is locked and inaccessible. And, as of the first open record period submittal date, there have been no official noise complaints of any kind submitted to the City. As for the testimony regarding trucks arriving at the OBRC facility prior to 7:00 AM, we note that trucks are generally free to move up and down Beaverton-Hillsdale Highway directly adjacent to the site at all hours of the day and night, and are likely far louder than a parked truck. Nevertheless, OBRC has instructed its pick-up service to ensure that trucks do not arrive before 7:00 AM and will continue to address any instance of an early pickup if they occur in the future. For these reasons, the Council can find that the Redemption Center operates within the allowable times permitted in the CS zone.

2. Response to arguments raised by Jesuit High School and certain individuals.

Jesuit High School and a number of individuals (together, “Jesuit”) raised a number of arguments through its attorney, Mr. Michael Neff, in a letter dated June 26, 2018. Jesuit’s arguments are summarized below and each is followed by OBRC’s response.

a. “The City Council should do a site visit to see the back area of the BCRC.”

RESPONSE: OBRC has provided a full description of its back-room operations, which includes the use of machines to sort and package the containers for delivery. OBRC has proposed installation of a new soundproof loading door that will prevent most sounds of this equipment from being audible outside the building. While OBRC is happy to host any City Councilor on a tour of the facility, a site visit this late in the process would further delay the Council’s decision on the Application. Therefore, OBRC does not believe that a quorum of Councilors should visit the facility before issuing a decision. And, any such visits would require new *ex-parte* declarations by the Councilors with an opportunity for appellant’s to raise objections, which would further delay the Council’s decision.

b. Pursuant to BDC 40.25, the public comment period should have occurred prior to OBRC opening for business.

RESPONSE: Appellants have attached copies of letters and emails that have already been submitted to the record and addressed by OBRC, so we do not re-address them in this letter. As to the thrust of Jesuit’s argument—that a public comment period should have been required before the Redemption Center opened—both City staff and the Applicant believed in good faith that the Redemption Center could be approved through a Type I Design Review and it was not until LUBA decided otherwise that there was any reason for either OBRC or the City to require a public approval process. At any rate, the Council can find that all Appellants have had an opportunity to be heard through this Appeal process.

c. Beaverton Municipal Code does not address BCRCs; thus, OBRC should have pursued a Director's Decision from the beginning.

RESPONSE: Because Senior Planner Scott Whyte scribbled “[t]he Beaverton Municipal Code does not address such facilities directly” on a Local Government Notification Form, Mr. Neff argues that a Director’s Decision should have been sought from the beginning. Putting aside that such a writing on the form does not determine that a Director’s Interpretation should be required, both City staff and the Applicant believed in good faith that the Redemption Center could be approved through a Type I Design Review and it was not until LUBA decided otherwise that there was any reason for either OBRC or the City to require a public approval process. As explained above, this Appeal process has given all Appellants ample opportunity to raise and explain their concerns.

d. City Council should conduct a site visit to determine if the backend operations at the Beaverton BCRC are similar to those at the BCRC Redmond and Bend locations.

RESPONSE: The Bend and Redmond locations are not subject of this appeal and the operations of different facilities in different cities have no relevance here.

e. There has been a significant increase in security and safety incidents in and around Jesuit High School since BCRC began operating in May of 2017.

RESPONSE: As the record demonstrates, at the beginning of 2018, OBRC attempted to meet with Jesuit High School to discuss ways in which it could address Jesuit’s security concerns. Jesuit initially rebuffed OBRC’s offer to meet. Eventually, Jesuit agreed to meet with OBRC to discuss ways in which OBRC might assist Jesuit employees with security. Despite its efforts, Jesuit has generally been uninterested in working with OBRC and has instead sought to shut the facility down. Even so, OBRC would still like to collaborate with Jesuit in creating the Good Neighbor Agreement discussed above.

f. To equate the BCRC to a recycling and redemption center at grocery stores is a false analogue because BCRCs are not accessory uses.

RESPONSE: Mr. Neff refers to an unrelated land use decision, CU2012-0002, which concerns the Beaverton Wal-Mart facility, to support his claim. That land use decision is not the subject of this appeal. Furthermore, regardless of whether the redemption use at a grocery store is a primary or accessory use, it is an allowed use. OBRC acknowledges that more bottles are processed at the BCRC location than traditional grocery store redemption facilities, but the fact remains: the bottle redemption use has always been part of the uses allowed in the CS zone.

Mr. Denny Doyle, Mayor
July 3, 2018
Page 8

- g. The noise, smell, trash, and safety issues are different and significantly more invasive than those caused by nearby fast food restaurants or other commercial uses.**

RESPONSE: In support of its assertion, Appellants include additional written testimony from Holli and Brandon Bridgens. OBRC has previously met with the Bridgens to address their concerns with noise, smell, and safety, as demonstrated by emails included as part of the record. OBRC and the Bridgens discussed fencing, parking relocation, and sound deafening in the BCRC. As mentioned above, OBRC is willing to provide these and other mitigation measures if the Council affirms the Director's Interpretation. Further, OBRC acknowledges it is bound by the noise and odor BDC provisions that apply in the CS zone.

- h. OBRC has not made effort to reach out to Richard Skayhan.**

RESPONSE: Prior to his declaration submitted as part of the first open record period, OBRC is unaware of any request made by Mr. Skayhan to meet with OBRC. Mr. Skayhan states that no request to meet with him has been made through his attorney, and that he has asked his attorney to advise him if such a request is made. Now that OBRC has been made aware that Mr. Skayhan would like to meet, it would be happy to meet with him to discuss any issues he may have.

3. Conclusion

For the above reasons, the Council can reject arguments raised by Appellants during the second open record period.

Sincerely,



Garrett H. Stephenson

GST:jmh

cc: Mr. John Andersen (*via email*)
Mr. Jules Bailey (*via email*)
Mr. Garrett Stephenson (*via email*)
Mr. K. C. Safley (*via email*)
Mr. Michael Connors (*via email*)
Mr. Michael Neff (*via email*)
Ms. Anna Slatinsky (*via email*)
Mr. Peter Livingston (*via email*)

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HATHAWAY LARSON

Koback · Connors · Heth

EXHIBIT 8

July 3, 2018

VIA EMAIL

City Council
c/o Anna Slatinsky, Planning Division Manager
City of Beaverton
12725 SW Millikan Way
Beaverton, OR 97005

Re: Oregon Beverage Recycling Cooperative - 9307 SW Beaverton Hillsdale Hwy
Appeal of Director's Interpretation Decision
Post-Hearing Rebuttal Submission
Our Client: Glenwood 2006, LLC

Dear Mayor Doyle and Councilors:

As you know, this firm represents Glenwood 2006, LLC ("Glenwood"), the owners of the Laurelwood Animal Hospital and the Oregon Veterinary Specialty Hospital located adjacent to the above-referenced Oregon Beverage Recycling Cooperative ("OBRC") beverage container redemption center ("BCRC"). At the June 19, 2018 appeal hearing, the City Council left the record open to allow the parties the opportunity to submit rebuttal argument and evidence into the record on or before July 3, 2018. Glenwood is submitting this letter and the attached exhibits as rebuttal for the City Council to consider.

A. OBRC's proposed mitigation measures are too little, too late and demonstrate that OBRC has never taken the neighborhood complaints seriously.

At the appeal hearing, OBRC claimed that it wanted to work with the neighbors but has been unable to do so because the neighbors will not engage with OBRC. According to OBRC, it is the neighbors' fault that it has been unable to address their concerns. As we demonstrated in our June 19 submission, OBRC has known about the neighbors' concerns for over a year and one-half. Many of the neighbors communicated their concerns directly to OBRC. It is OBRC who ignored these concerns and has been unwilling to engage with the neighbors. OBRC's June 19 submission proves that OBRC had sufficient information to propose mitigation measures but it chose not to do so until it was concerned that the City's approval was in jeopardy as a result of this appeal.

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Glenwood initiated contact with OBRC before the City approved the design review application, explained its concerns and proposed some of the same mitigation measures OBRC is now proposing, only to be ignored. Letter from E. Michael Connors, dated June 19, 2018, p.4. As reflected in the minutes of the various neighborhood meetings before and after LUBA's remand, Glenwood and other neighbors explained the problems they were experiencing with the BCRC but OBRC refused to offer any proposals or mitigation to address these concerns. Letter from E. Michael Connors, dated June 19, 2018, p.5. OBRC admits that it never followed through on its agreement with the only neighbor that OBRC agreed to work with (Holli and Brandon Bridgens) back in August of 2017. Letter from Michael C. Robinson, dated June 26, 2018, p.10 & Exhibit 17. OBRC's neighborhood complaint log does not show a large number of complaints because OBRC obviously did not log all of the complaints it received, as evident by the lack of any reference to Glenwood's multiple communications and complaints.¹

OBRC's last minute mitigation proposals only demonstrates that it has not worked in good faith to address neighborhood concerns and is only doing so now for self-preservation. OBRC could have proposed these mitigation measures before it commenced operating and forced Glenwood to appeal the design review decision. It could have proposed these mitigation measures as part of its Director's Interpretation Application since it knew by that time that other neighbors were concerned about the impacts as well. It could have come to the appeal hearing with these proposed mitigation measures so that the neighborhood and the City Council had an opportunity for a discussion about these measures in a public forum.² Instead, OBRC waited to the very last stage of this one and a half year long process – the post-hearing submission process – to dump a list of mitigation measures for the first time into the record. With all due respect, OBRC is simply attempting to salvage its application, not engage with the neighbors or address their concerns.

B. The central question in this appeal is whether the BCRC qualifies as a Recycling Center.

OBRC disputes Glenwood's argument that the City must determine if the BCRC qualifies as a Recycling Center and claims that "[t]he central question in this appeal is whether the redemption center is substantially similar to other uses in the CS zone." Letter from Michael C. Robinson,

¹ As an example, Glenwood sent a June 1, 2017 email to OBRC describing a series of problems, including customers parking in the Glenwood parking lot, litter, abandoned shopping carts, etc. Letter from E. Michael Connors, dated June 19, 2018, Exhibit F. Glenwood also repeatedly asked OBRC to post no-parking signs to address the parking lot conflicts, clean up the trash and take other measures to address continuing problems with the BCRC. Letter from E. Michael Connors, dated June 19, 2018, Exhibit A, pp.2-3. None of these complaints, which OBRC ignored, are reflected in the complaint log.

² There are a number of questions about OBRC's proposed mitigation measures that could have been addressed at the appeal hearing. For example, OBRC agreed to cooperate with Jesuit on security issues but did not propose anything similar for Glenwood even though Glenwood has had several security related incidents and has similar concerns. OBRC could also agree to provide an onsite security guard like it provides at some of its other BCRC facilities.

dated June 26, 2018, p.10. OBRC's position is inconsistent with the express language of the Beaverton Development Code ("BDC") 10.50 and 40.25.15.1.C.4. ORS 197.829(1)(a).

The BDC expressly prohibits the City from approving a use as a substantially similar use if it already qualifies as a use addressed elsewhere in the BDC. BDC 10.50 provides that: "the Director may *not* permit a use already allowed in any other zoning district of this Code." (Emphasis added). BDC 40.25.15.1.C.4 limits the authority of the Director's Interpretation to interpreting "a use *not identified* in the Development Code is a Permitted, Conditional, or Prohibited Use." (Emphasis added). If the BCRC qualifies as a Recycling Center, or is more similar to a Recycling Center than allowed uses in the CS zone, it may not be approved as "substantially similar" use in the CS zoning district because Recycling Centers are limited to the Industrial ("IND") zoning district. BDC 20.15.20.

If the Director erred in determining that the BCRC does not qualify as a Recycling Center, the City Council must deny the Application pursuant to BDC 10.50 and 40.25.15.1.C.4 regardless of what it thinks about the substantially similar analysis. Therefore, the central question in this appeal *is* indeed whether the BCRC is a Recycling Center.

C. OBRC has been forced to repeatedly change its position on the legal standards for determining the nature of the use and the substantially similar test because its underlying claim is fundamentally flawed.

The flaws in OBRC's case are perhaps most apparent from OBRC's continually changing position regarding the standard for determining the nature of the use and the use category for which the BCRC is substantially similar. Every time Glenwood and the other appellants point out flaws in OBRC's position, OBRC is forced to change its position to compensate for these problems.

In its Application, OBRC argued that the nature of the BCRC use should be determined based on the BDC, dictionary and regulatory definitions. Exhibit A, pp.1-4.³ Using this definition approach, OBRC argued that the BCRC does not meet the relevant definitions of "recycling," and therefore is not a Recycling Center. Exhibit A, pp.2-4. OBRC argued that the BCRC is substantially similar to a "Service Business or Professional Services" use based on the BDC definition of that term. Exhibit A, pp.1-4.

After Glenwood and other appellants demonstrated that the BCRC does in fact meet the dictionary, regulatory and industry definitions of a Recycling Center, OBRC changed tactics in response to the written appeals. Although OBRC admitted that the BCRC conducts "recycling" as that term is defined, OBRC claimed that is not enough to demonstrate that the BCRC is a "recycling center." Letter from Garrett Stephenson, dated June 11, 2018, p.7. OBRC claimed that the BCRC does not qualify because it is not a "center" even though it refers to the facility as a center (beverage container redemption *center*) and the BCRC exclusively handles recyclable material. OBRC also changed its position regarding the regulatory definitions, claiming that

³ Glenwood attached relevant portions of OBRC's Application Narrative, dated December 21, 2017, as Exhibit A.

these definitions are no longer relevant. Letter from Garrett Stephenson, dated June 11, 2018, p.8. Instead, OBRC relied predominately on the impact-based test used by the Director. Letter from Garrett Stephenson, dated June 11, 2018, pp.10-12.

After the testimony at the appeal hearing demonstrated that the BCRC is causing substantial external impacts on the surrounding neighborhood, OBRC changed its position again and is now backing off the impact-based test. OBRC claims that “external impacts related to the OBRC facility are unrelated to the legal approval criteria for the Director’s Decision.” Letter from Michael C. Robinson, dated June 26, 2018, p.6. Instead of determining the nature of the BCRC based on its external impacts, OBRC is now proposing that the City Council allow the use and address these impacts through a series of conditions of approval to mitigate these impacts. Letter from Michael C. Robinson, dated June 26, 2018, pp.4-6.

OBRC also abandoned its original argument that the BCRC is substantially similar to a “Service Business or Professional Services” after the appellants demonstrated that it is nothing like the uses listed as examples in that definition.⁴ OBRC now claims it does not matter what particular use category the City selects so long as the BCRC is generally similar to other commercial uses. Letter from Garrett Stephenson, dated June 11, 2018, p.13.

OBRC’s constantly evolving position on the core legal issues demonstrates the legal flaws with its case. There is no need for such a convoluted approach - this case is straightforward. The BCRC is a stand-alone facility that exclusively accepts, processes, stores and transports recyclable material. It meets the dictionary, regulatory and industry definitions of a Recycling Center. The BCRC shares the same core characteristics as *all* of the uses listed as industrial uses in BDC 20.15.20 (Recycling Centers, Salvage Yards and Solid Waste Transfer Stations) – they all exclusively handle waste material. The BDC does not recognize a purely impact-based test for determining the nature of the use. Based on these undisputed facts, there is no question that the BCRC is a Recycling Center and therefore is prohibited in the CS zone.

D. OBRC failed to provide evidence to support the claim that the City treated grocery store recycling facilities as a retail use or that the BCRC is the same as these grocery store facilities.

As the applicant, OBRC bears the burden of proof to demonstrate compliance with all of the applicable criteria and standards. *Rochlin v. Multnomah County*, 35 Or LUBA 333, 348 (1998), *aff’d* 159 Or App 681, 981 P2d 399 (1999). OBRC is required to demonstrate compliance based on “substantial evidence” in the record. ORS 197.835(9)(a)(C); *Younger v. City of Portland*, 305 Or 346, 358-60, 752 P2d 262 (1988). As part of its evolving arguments in this case, OBRC is now relying heavily on its assertion that the City approved grocery store recycling facilities as retail uses and the BCRC is the same as these grocery store facilities. However, OBRC failed to provide any evidence, let alone substantial evidence, to support these claims.

⁴ Service Business or Professional Services are defined as: “Uses engaged in providing services to the general public: *such as small dental and medical offices, real estate, insurance, administrative facilities, personal care, business, professional, and similar services.*” BDC Chapter 90. (Emphasis added).

While grocery stores have had beverage container recycling facilities associated with their stores, there is no evidence in the record regarding if or how the City treated those facilities. The only City approval of a grocery store in the record, Mr. Neff's submission of the Cornell Walmart store, makes no reference to the beverage container recycling facility associated with that store. In the absence of *any* evidence, it is unclear if the City overlooked these ancillary components of the grocery store, allowed them as accessory uses only, approved them under some other use category or approved them under a prior version of the BDC.⁵ Without any supporting evidence, OBRC cannot demonstrate based on substantial evidence that the City approved these facilities as a "retail trade" use.

Similarly, OBRC did not provide any evidence to support its assertion that the BCRC is the same as these grocery store facilities. There is no evidence in the record regarding these grocery store facilities, such as their size, operations, machinery, etc. Nor did OBRC provide any details about the backroom operations in the BCRC. As a result, there is no evidentiary basis for the City Council to determine the extent to which the two types of facilities are the same or substantially similar.

To the extent there is evidence in the record, it undermines OBRC's claim. The BCRC is a large stand-alone recycling facility while the grocery store facilities are smaller, ancillary facilities that are part of the grocery store itself. The standard grocery store facilities are nothing more than a few reverse vending machines. The size of the smaller grocery store facilities pale in comparison to the 10,889 sq. ft. BCRC building, loading dock and 16,000 sq. ft. parking lot with 41 parking spaces. Unlike the grocery store facilities, the BCRC has a large backroom facility that looks like a mini-manufacturing plant and does processing onsite. The BCRC is intended to replace 24 grocery store facilities, and therefore will do 24 times the volume of these grocery store facilities. The BCRC processes approximately 80,000 containers per day or *30 million* beverage containers per year, well beyond the volume that one of these grocery store facilities could possibly do.

E. OBRC failed to provide evidence to dispute the appellants' evidence that the BCRC includes processing activity in the backroom area.

One of the key issues of contention is whether or not there is any processing activity taking place in the back area of the BCRC. OBRC claims there is no processing activity, but they failed to provide any specific evidence regarding the backroom operations to support their claims. OBRC's attorneys statements that there is no processing is not evidence, it is simply their opinion on an issue they are obviously biased on. It would have been easy for OBRC to put this issue to rest by providing more details about the backroom operations, especially since Councilor San Soucie specifically asked about it at the appeal hearing, so the City Council should question why they have not done so. The obvious answer is that OBRC does not want to provide this

⁵ As Mr. Neff explained, the BDC treats accessory uses and principal uses differently. Letter from Michael G. Neff, dated June 26, 2018, p.2. There is a significant difference between the smaller beverage container recycling facilities associated with grocery stores and a 10,889 square foot stand-alone recycling facility.

information or let the Councilors see the backroom because it knows the evidence would undermine their claim.

In contrast, Glenwood and other appellants submitted far more detailed information about the backroom operations which demonstrates that the BCRC is in fact processing the containers on site. Mr. Neff submitted the Declaration of Gage Bergeron, a former Site Supervisor of the BCRC facilities in Bend and Redmond, which clearly shows there is significant processing activity taking place in the backroom area, including mechanical sorting machines, conveyer belts, crushing machines, augers that perforate or shred material, and other equipment that consolidates the processed material.⁶ Memorandum from Michael Neff, dated June 15, 2018, Attachment B. Although OBRC has not been willing to allow appellants to access the backroom, we included several pictures of various BCRC backroom areas that were publically available, attached as Exhibit B. These pictures only show a small portion of the backroom area, but it is clear that there are significant processing machines that looks like a mini-manufacturing plant.

As previously noted, OBRC bears the burden of proof in this case. OBRC failed to provide any evidence to support their claim that there is no processing on site. Appellants provided far more evidence regarding the processing activity in the backroom area notwithstanding their limited access to such information. Given the burden of proof, the weight of the evidence and OBRC's unwillingness to be more forthcoming about the backroom operations, the City Council has no choice but to conclude that there is processing activity taking place in the BCRC backroom.

F. LUBA did not reject Glenwood's claim that the BCRC is a Recycling Center, LUBA remanded that issue to allow the City to consider it first.

OBRC's claim that LUBA rejected Glenwood's argument that the BCRC qualifies as a Recycling Center is a gross mischaracterization of LUBA's decision. LUBA declined to decide one way or the other if the BCRC is a Recycling Center because LUBA concluded that the City should have an opportunity to consider that issue first since it did not address the use issue in the design review decision.

After remanding the City's design review decision because the City failed to address if the BCRC is an allowed use in the CS District pursuant to the required Type 2 Director's Interpretation process, LUBA addressed Glenwood's additional argument that it should reverse the City's decision if LUBA concludes that the BCRC qualifies as a Recycling Center:

“Petitioner asks that we go further and determine that the proposed BCRC is a ‘recycling center,’ which is allowed in the Industrial District but not the CS District, and that it does not qualify as a “service use,” as planning staff suggested while the application for design review was pending. Petitioner asks that we reverse the city's decision. We decline to do so. The term ‘recycling center’ is not

⁶ The Metro Code defines “processing” broadly as “a method or system of altering the form, condition or content of wastes,” and includes a broad category of activities such as “separating,” “shredding,” and “pulverizing.” Metro Code Section 5.00.010.

defined in the BDC, and *we are unprepared to say based on the current state of the briefing that the term could not be interpreted to exclude BCRCs*. Although the planning commission would not be entitled to any particular deference regarding such an interpretation, *we believe the city should have an opportunity to address that question in the first instance.*” *Glenwood 2006, LLC v. City of Beaverton and Oregon Beverage Recycling Cooperative*, LUBA No. 2016-026/027, dated September 21, 2017, Slip Op. p.8. (Emphasis added).

The italicized language makes it clear that LUBA determined it was premature to decide if the BCRC is a Recycling Center based on the parties’ LUBA briefings and that the City should have the opportunity to make that determination in the first instance. That is why the Director addressed this issue as part of her decision. Therefore, the question of whether the BCRC qualifies as a Recycling Center is an open issue and must be decided by the City Council as part of this appeal.

G. Glenwood’s assertion that the City should address where BCRCs should be allowed in the City through a legislative amendment is not inconsistent with its position before LUBA.

Once again, OBRC mischaracterizes Glenwood’s argument regarding the legislative amendment in an attempt to confuse the City Council about the issues. At LUBA, Glenwood argued that the City was required to consider if the BCRC is an allowed use in the CS zone pursuant to the Type 2 Director’s Interpretation process. LUBA agreed and remanded the case to require the City to follow the Type 2 Director’s Interpretation process. That is what led OBRC to file the Director’s Interpretation Application that is on appeal before the City Council.

As part of the appeal, OBRC is arguing that the City Council should allow BCRCs in commercial zones because that zone is more appropriate zone for these facilities than the IND zone. But OBRC’s approach is flawed because this appeal is not a policy making decision process – the sole issue before the City Council is whether or not the BCRC qualifies as an allowed use in the CS zone based on the existing language in the BDC. If the City Council believes that the BCRCs *should* be allowed in some or all commercial zones, the appropriate process for addressing that question is a legislative code amendment. The legislative amendment process would not only clarify where BCRC facilities are allowed and avoid these types of disputes, but it would provide a public process and opportunity for all citizens to weigh in on the proposal. There is nothing inconsistent between this argument and Glenwood’s arguments before LUBA.

H. The BCRC is an appropriate use in the IND zone.

OBRC’s claim that it would be inappropriate to locate the BCRC in the IND zone is erroneous for multiple reasons. OBRC currently operates three BCRCs in industrial zones in other jurisdictions (Oregon City, Redmond and Medford) so it clearly is capable of operating these facilities in industrial zones. Letter from Garrett Stephenson, dated June 11, 2018, Enclosure 2. The supposedly “inherently dangerous” conflicts between pedestrian/vehicles and “heavy trucks, forklifts and other industrial equipment” will be an issue regardless of where the BCRC is

located since the BCRC uses heavy trucks, forklifts and industrial equipment. OBRC and the City staff cited Far West Recycling as an example of a Recycling Center under the BDC, but just like the BCRC the general public bring their recyclable material directly to the Far West Recycling facility. Finally, reserving industrial lands for other types of uses is not a legal or appropriate basis for ignoring the BDC and allowing a use not permitted in the CS zone. If the City Council wants to allow BCRC in commercial or other non-industrial zones, it can certainly do so through a legislative amendment process.

I. Other uses in the CS zone have not generated near the level of complaints and opposition due to impacts after commencing operations.

OBRC's claim that the external impacts of the BCRC are no different than the typical impacts of uses allowed in the CS zone is undermined by one simple fact – none of these other uses have generated near the level of complaints and opposition as the BCRC. While it is not uncommon for neighbors to question or oppose a use at the time it is being proposed, it is unprecedented for a use to generate so many complaints and opposition as the BCRC has long after it has commenced operations. After operating for more than a year, and having multiple opportunities to refine its operations and address neighborhood concerns, OBRC has been unable quell the mounting complaints and opposition. Virtually all of the neighbors, including commercial, residential and institutional uses, have complained about the same impacts and lack of response from OBRC. The City Council must know from the written and oral testimony that these are not trivial complaints - the impacts are real and severe. Although there are restaurants, bars, drive-up windows and retail uses in the area, none of same neighbors have complained about these uses because they do not generate nearly the level of impacts. The extensive level of complaints that the BCRC has generated in comparison to other uses allowed in the CS zone is proof positive that the BCRC is not an appropriate use in the CS zone.

J. Glenwood and others are concerned about criminal activity and drug use associated with the BCRC, not the homeless.

Once again, OBRC's mischaracterizes Glenwood and other neighbors' complaints about criminal and safety related incidents by accusing them of criticizing the homeless. OBRC is the one that is assuming that these incidents have been caused by homeless individuals, not Glenwood and the neighborhood. Since several of these incidents involved individuals in automobiles parking in the Glenwood parking lot or trespassing on the Jesuit High School grounds, it is unclear why OBRC keeps assuming all of the incidents are related to homeless. Regardless of who is causing these incidents, it is not right or fair to say that these legitimate safety concerns should be ignored because it is part of a larger "societal problem."

OBRC also makes the ridiculous claim that "the issue is unrelated to any particular use or location." Letter from Michael C. Robinson, dated June 26, 2018, p.6. The evidence proves otherwise. Glenwood, who has been at its location for 12 years, never had any of these problems until the BCRC started operating and now it has become a pervasive issue. Many other neighbors testified that the BCRC has changed the entire character of the neighborhood. The significant increase in criminal and safety related issues in this neighborhood since the BCRC

started operating, as supported by the Beaverton Police Department's own analysis, is no coincidence. It is a direct result of this particular use in this particular location.

Conclusion

Based on the evidence in the record, there is no question that the BCRC is a Recycling Center and therefore is not an allowed use in the CS zone. The BCRC is a standalone center that exclusively accepts, processes, stores and transports recyclable material and satisfies the applicable BDC, dictionary and regulatory definitions. The BCRC processes 30 million containers per year and is at least 24 times the intensity of the smaller grocery store facilities that operated as accessory uses in conjunction with the grocery stores. Even if the City Council considers the external impacts, despite the lack of any authority in the BDC to determine the use based purely on impacts, there is extensive evidence that the BCRC generates significant impacts on the surrounding area and is not appropriate for this CS zoned location. OBRC can site the BCRC in the industrial zone or initiate a legislative code amendment process to determine what other zones are appropriate, so the City Council's decision will not prohibit these facilities. Accordingly, we respectfully request that the City Council grant the appeals and deny the Application.

Very truly yours,

HATHAWAY LARSON LLP



E. Michael Connors

EMC/pl
Attachments

cc: Glenwood 2006, LLC



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EXHIBIT 9

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July 3, 2018

VIA EMAIL

City Council Members and the Honorable Denny Doyle
c/o Anna Slatinsky, Planning Division Manager
City of Beaverton
12725 SW Millikan Way
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Re: Oregon Beverage Recycling Cooperative (Beaverton BottleDrop)
APP 2018-0001 and APP 2018-0002 (Appeal of DI2017-0003)

Dear Council Members and Mayor Doyle:

This letter and attached materials represent the rebuttal argument and evidence submitted on behalf of Brendan and Holli Bridgens and their family, Michael Matschiner, Joseph Conrad, Trisha McPharren and her family, Jesuit High School, and Rick Skayhan and his family. The submitted evidence includes two video clips which I urge you download and review via ShareFile, which is a secure content file sharing service. Both of the video clips were taken from the Bridgens family's backyard. If the ShareFile download is not accessible to you, I can provide a flashdrive copy at your request. I also have provided several flashdrive copies to the Beaverton Community Development Department.

A. INTRODUCTION.

This is a straight-forward case about the Beaverton City Council's interpretation of its own development code – the Beaverton Development Code (“BDC”). City Council's decision will affect not just the neighbors of the Beaverton BottleDrop, but will establish a citywide precedent. If City Council adopts staff's recommendation, other BottleDrops or facilities “substantially similar” to the BottleDrop can be sited as of right in all of Beaverton Commercial Districts and many of Beaverton's Multiple Use Districts without notice to neighboring property owners.

Most of the arguments made by the BottleDrop owners in support of staff's determination are distractions. The fundamental question before City Council is whether the BottleDrop is a “Recycling Center” as that term is used in the BDC. Appellants submit there are multiple principled reasons which support this plain language interpretation, and if you do find the BottleDrop is a “Recycling Center” it is highly unlikely any appeal of that decision will be successful. As explained further below, City Council also can reject staff's determination even if it determines the word “Recycling Center” is ambiguous.

B. ROADMAP FOR CITY COUNCIL AND SUMMARY OF KEY EVIDENCE AND ARGUMENT.

This section sets out appellants' summary of these legal proceedings and provides a roadmap for how the City Council can best protect its citizens, schools, and businesses within the letter of the law.

The evidence and legal argument in the record for the two appeals before City Council establishes the following:

- (1) The interpretation and construction of the term "Recycling Centers" in the Beaverton Development Code ("BDC") is a question of first impression. See testimony of Anna Slatinsky (responding to Council Member Mark San Soucie during the June 19, 2018 Beaverton City Council hearing). So, too, is the question of whether the Beaverton BottleDrop is a use "substantially similar" to a use allowed in the Community Service District. If City Council determines the Beaverton BottleDrop is a "Recycling Center," as a matter of law it cannot be "substantially similar" to a use in the Community Service District. BDC 20.15.20 ("use not identified in the Development Code").
- (2) All of the occupants of the residences and business located on parcels adjacent to the BottleDrop testified that operation of the facility creates tangible negative externalities which are unlike and distinct from the externalities caused by other nearby operating businesses. See, e.g., Declaration of Brandon and Holli Bridgens, Attachment A. Owners and/or occupants of other nearby parcels provided similar testimony.
- (3) The notion that redemption centers like the Beaverton BottleDrop should be classified as a "Service Business" is a staff suggestion that need not be adopted by City Council. The BDC and caselaw clearly provides City Council has the authority to reject the argument offered by staff and the BottleDrop owners. Church v. Grant County, 187 Or. App. 518 (2003)(rules governing statutory construction apply to interpretation of local ordinances). This can be done by finding the BottleDrop is a "Recycling Center" as a matter of plain language. If City Council rejects appellants' argument and determines the term "Recycling Center" is ambiguous, it still can reject staff's proposal by adopting one of two possible approaches: (a) the BottleDrop is substantially similar to a "Recycling Center" and not substantially similar to a "Service Business" or another use allowed as of right in the Community Service District; or (b) by simply determining a Bottle Drop is not "substantially similar" to any of the commercial uses articulated by staff, the BottleDrop owners, or allowed in the Community Service District (without determining the BottleDrop is a "Recycling Center").
- (4) If City Council does adopt the staff suggestion, City Council's decision will set an unfortunate precedent which will allow siting of one or more other BottleDrops without land use review in Beaverton. This precedent will allow BottleDrop siting as of right

without conditions in all of Beaverton's Commercial Districts and many of its Multiple Use Districts. Ratifying staff's interpretation would be an acknowledgement by City Council that the plain language of the BDC does not protect Beaverton citizens, schools, and businesses.

- (5) The evidence before City Council demonstrates several mistakes made by staff in determining the BottleDrop is a "Service Business." Staff made factual mistakes, procedural legal mistakes and mistakes in judgment. Most important was the initial evaluation of the use by a Beaverton planner. Not only did the planner fail to consider the possibility that the BottleDrop could be a Recycling Center, but he also erroneously believed no processing would occur on site. See Minutes of the Denney Whitford/Raleigh West NAC Meeting of March 9, 2017 (Attachment E to June 15, 2018 Memorandum of Michael G. Neff to City Council). These mistakes resulted in the BottleDrop being sited without the knowledge of nearby property owners and occupants or input from these property owners and occupants.
- (6) City Council has an opportunity to correct these mistakes while minimizing any difficulty for the BottleDrop owners and its customers. This follows from the fact that all appellants to both appeals before City Council are willing to agree to a reasonable amount of time for the BottleDrop owners to relocate their facility to a location in Beaverton where it legally can be sited under the BDC. None of the appellants I represent are insistent that the BottleDrop close its doors, but they do not believe the BDC contemplates the Community Service District is an appropriate and legal zone for this use.
- (7) If current existing sites zoned Industrial in Beaverton are not practical locations for the BottleDrop owners and convenient for their customers, this reasonable time of additional operation at the Beaverton-Hillsdale Highway site can be used to effect a legislative amendment to the BDC. If necessary, this legislative amendment process can identify locations in the Commercial, Multiple Use, and Office Industrial zones, where the BottleDrop would be compatible with both existing and future uses. This legislative amendment process also could define any appropriate conditioning authority necessary to ensure compatibility with existing and future uses in areas deemed appropriate for BottleDrops and similar uses.
- (8) If City Council follows staff's suggestion it will validate an approach to land use review that greatly discounts public notice and involvement and a plain language reading of the BDC.

C. SPECIFIC RESPONSES AND REBUTTAL TO THE BOTTLEDROP OWNERS' POST-HEARING EVIDENTIARY SUBMISSION

- (1) BottleDrop Owners' Suggestion That "Backroom Operations" are no Different Than What is Conducted at Grocery Stores is Incorrect

The proposition that a stand-alone facility nearly 11,000 square feet in size, which is specifically designed to collect, sort, and process for transport more than 100,000 beverage containers a day, is no different than the accessory-use reverse vending machines historically found at grocery stores defies common sense, logic, and the fundamental reasons local governments regulate land use through zoning codes. That BottleDrops are fundamentally different from grocery store reverse vending machines is illustrated by the legal and factual differences that distinguish these concepts.

- (a) BottleDrops are a Principal Use and Grocery Store-Based Reverse Vending Machines are an Accessory Use

The reverse vending machines at grocery stores are customarily associated with grocery stores and incidental to the commercial retail sales use under which Beaverton grocery stores are categorized for land use purposes. The City of Beaverton's land use approvals for a conversion of the Ashley Furniture building to a Walmart grocery store in the Five Oaks area provides no discussion or evaluation of the three reverse vending machines which are part of the Walmart operation. See Discussion of and Attachments E-G in June 26, 2018 Correspondence of Michael G. Neff). The machines simply are allowed without review because they are a customarily associated accessory use which is incidental and subordinate to the principal use of grocery stores as retail sales. BDC 60.50.05(4) and BDC Chapter 90.

BottleDrops, on the other hand, must be analyzed as a principal use which has characteristics fundamentally different from the reverse vending machine accessory uses found at grocery stores. To suggest that there are no differences between grocery store reverse vending machines and BottleDrops ignores the functional reality of why BottleDrops are being used to replace grocery store reverse vending machines.

- (b) The Sole Function of a BottleDrop is the Recycling of Beverage Containers and the Redemption of Containers

BottleDrops are a central repository for redeemable beverage containers where these containers are sorted, counted, processed, and stored prior to being hauled away. Consumers returning beverage containers to the central repository may redeem the container deposits paid at the time the beverage was purchased. Unlike grocery stores, where commercial retail is the primary function of the business, BottleDrops serve no other function than the recycling and redemption of beverage containers.

- (c) A Primary Purpose of BottleDrops is to Consolidate and Centralize Beverage Container Returns and Create a Primary Stand-Alone Use Separate and Apart from Grocery Stores

As the ORBC has conceded, one important benefit BottleDrops provide for grocery stores is consolidation of beverage container recycling at stand-alone centers that are physically separated from the grocery stores themselves. OBRC Stewardship Officer Jules Bailey's comment to appellant Richard Skayhan at paragraph 4 to Exhibit K submitted with the June 26, 2018 letter of Michael G. Neff. (Beaverton and Southwest Portland grocery stores were clamoring for the Beaverton BottleDrop to open so that they could solve their "vagranacy problem")

- (d) BottleDrops are Substantial Compared to Grocery Store Reverse Vending Machines

The most recent quarterly report filed by the BottleDrop owners with the Oregon Liquor Control Commission relates that in the first three months of 2018 the Beaverton BottleDrop collected, sorted, and processed an average of 104,608 beverage containers a day. See <https://www.obrc.com/Content/Reports/OBRC%20Quarterly%20Report%20Q1%202018.pdf>. Evidence submitted by the Beaverton BottleDrop owners established the size of the building is nearly 11,000 square feet *see* Ex. I to Dec. 21, 2017 Application for Director's Interpretation for Oregon Beverage Recycling Cooperative. The substantial nature of the Beaverton BottleDrop is easy to grasp when it is compared to the three reverse vending machines and container storage area at the Walmart grocery store on NW Cornell in the Five Oaks area (Attachment F and G to June 26, 2018 correspondence of Michael G. Neff) or the 360-square-foot area that formerly house the reverse vending machines at the Raleigh Hills Fred Meyer on Beaverton Hillsdale Highway (Attachment B to this letter). This substantial nature also is evidenced when one compares grocery store reverse vending machines to the description of a BottleDrops' backend operation. See the Declaration of former BottleDrop employee Gabe Bergeron submitted with material filed by Michael G. Neff on June 15, 2018 (describing the backend operations at the Bend and Redmond BottleDrops).

There simply is no comparison between these incidental and subordinate accessory uses connected to grocery stores and the central recycling and redemption facility operated under the BottleDrop brand. That there is a significant difference between BottleDrops and grocery store reverse vending machines is not a surprise when one considers that the Beaverton BottleDrop is designed to consolidate consumer recycling of redeemable beverage containers for a 25-store area at a single location. The BottleDrop concept specifically is intended to replace grocery store collection of containers with central high-volume collection centers.

- (2) The BottleDrop Owners Ignore the BDC's Requirement that Ambiguity Be Resolved Prior to or Concurrent with Applications for Development

The BottleDrop owners argue that "Recycling Center" is an ambiguous term and that the BDC provides for the Director's Interpretation process where ambiguity . . . has been

identified.” Even assuming the term is ambiguous, the BottleDrop owners still completely ignore and fail to explain why they did not abide by BDC 40.25, which provides all requests for Director’s Interpretations should be made “in advance of, or concurrent with, applying for approval of an application, development, permit, or other action.” BDC 40.25.05. By ignoring this provision of the BDC, the BottleDrop owners were able to obtain approval of the BottleDrop as a use allowed in the Community Service District without notice to neighboring and nearby property owners. See the Declarations of Declaration of Brandon and Holli Bridgens and Tom Arndorfer, Attachments A and C.

(3) The BottleDrop Owners at No Time Have Been Willing to Engage in a Genuine Discussion About Voluntarily Relocating the Beaverton BottleDrop

The BottleDrop owners spend a great deal of effort describing their efforts to reach out to nearby property owners who have been negatively impacted by operation of the BottleDrop. The neighbors view this narrative as an attempt by the BottleDrop owners to divert attention from the fact that all efforts to reach out to the neighbors occurred after the BottleDrop was illegally approved, established, and began operating. The BottleDrop owners’ narrative also ignores the fact that at no time have the BottleDrop owners told any of their neighbors or appellants in this matter that they are willing to engage in any serious discussion about relocation of the BottleDrop to a more suitable location.

Jesuit High School on multiple occasions asked the BottleDrop owners to engage in a serious discussion about voluntary relocation of the Beaverton BottleDrop. As set out in the attached Declaration of Tom Arndorfer, all attempts to engage the Oregon Beverage Recycling Cooperative in a meaningful discussion about relocation to a more suitable spot have been unsuccessful. Attachment C.

In their declaration, Brandon and Holli Bridgens speak to the BottleDrop owners’ ineffectiveness in addressing their concerns. Declaration of Brandon and Holli Bridgens, Attachment A. The fact that efforts by the BottleDrop owners to address the Bridgens concerns have been ineffective is corroborated by the two video clips submitted contemporaneous with this letter. One video was taken on July 1, 2018, at approximately 6 am. The men in this video can be seen sitting in the Beaverton BottleDrop parking lot near the loading dock roughly 40 feet from the Bridgens’ backyard. Toward the end of the video, one of the men pulls out a syringe. The second video, taken at 6:35 pm on June 30, 2018, also from the Bridgen family’s backyard, captures noise created by the BottleDrop. Both of these video recordings are submitted for the record with this letter.¹

¹ These two video clips taken by Branden Bridgens from his backyard during the last several days are further described in the Declaration of Michael G. Neff which is Attachment D. These video clips can be accessed via ShareFile, which is a secure content file sharing service. Copies of the video clips also have been provided to the

Lastly, Joseph Conrad, the owner of the house directly across SW Club Meadow from the Bridgens, relates in his declaration that at no time has anyone associated with the Beaverton BottleDrop contacted him to inquire if he experienced any problems with the location of the BottleDrop. Declaration of Joseph Conrad, Attachment E.

(4) The Beaverton BottleDrop Operation is Fundamentally Different from EcoBinary Electronics Recycling, Play It Again Sports, or Goodwill

The BottleDrop owners identify three retailers of used products which they argue will need to move to the Industrial District if City Council determines the BottleDrop is a Recycling Center. The BottleDrop owners' argument fails to account for the differences between operations at the BottleDrop and these retail establishments.

Importantly, each of the businesses identified by the BottleDrop owners have a significant or predominant retail sales component that is not part of the Beaverton BottleDrop's operation. Members of the City Council no doubt are familiar with the fact that Goodwill stores and Play It Again Sports rely heavily upon retail sales and maintain large retail display areas. This also is true for EcoBinary Electronics Recycling. See e-mail from Ecobinary owner Ryker Bax at Attachment F and images of retail display area at Attachment G.

Second, none of these businesses engage in the large-scale processing of discarded material like the Beaverton BottleDrop, which every day processes more than 100,000 beverage containers by using industrial machines to pulverize or crush these containers. In fact, no processing of recycled electronics takes place at EcoBinary Electronics Recycling. See email from Ecobinary owner Ryker Bax at Attachment F. As for Goodwill and Play It Again Sports, there is no evidence in the record that either of these businesses engage in the large-scale processing of waste products similar to the Beaverton BottleDrop.

(5) Honest Mistakes By Staff Should be Rectified by City Council

It is clear the planner who determined the BottleDrop is a commercial use believed no processing would occur at the facility. See Minutes of the Denney Whitford/Raleigh West NAC Meeting of March 9, 2017 (Attachment E to June 15, 2018 Memorandum of Michael G. Neff to City Council). As the Declaration of former OBRC employee Gabe Bergeron establishes, this conclusion is a mistake of fact.

It also is true that the BDC specifically provides that Recycling Centers must be sited in the Industrial District if they are to be established in Beaverton. As the Land Use Board of Appeals has made clear, Beaverton's Community Development staff at a minimum should have determined through a Director's Decision whether the BottleDrop is or is not similar to a Community Service District permitted use. Glenwood 2006, LCC vs. City of Beaverton, LUBA

Beaverton Community Development Department. I also can provide a copy of the video clips to any Council Member or Mayor Doyle upon request.



No. 2017-027 at p. 10. The decision by staff not to require a Director's Decision prior to allowing the BottleDrop owners to push the design review process forward was an error in judgment and law that prevented meaningful public input on the BottleDrop proposal.

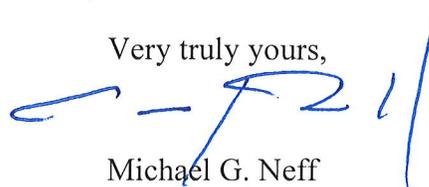
Closely related to this mistake was staff's erroneous decision to ignore BDC 40.25.05, which states that all requests for Director's Interpretations should be made "in advance of, or concurrent with, applying for approval of an application, development, permit, or other action." This also was a mistake in judgment and law. City staff had a last chance to correct the error of failing to require a Director's Interpretation before design review when Scott Whyte recognized the need to amend the OLCC Local Government Notification Form by adding the note that the "Beaverton Municipal code does not address such facilities directly" on Dec. 6, 2016. This amendment of the OLCC form demonstrates Mr. Whyte's recognition that the BDC did not directly address BottleDrops. Given the language of BDC 40.25.05, this recognition by Mr. Whyte also should have caused him to recognize the need to utilize the Director's Decision process. (6)

Lastly, it appears Mr. Whyte did not understand that as a principal use a BottleDrop is fundamentally and legally different than accessory use "stand-alone" bottle return areas at Fred Meyer stores. See Minutes of the Denney Whitford/Raleigh West NAC Meeting of March 9, 2017 (Attachment E to June 15, 2018 Memorandum of Michael G. Neff to City Council)("Scott noted that this usage is already done in commercial areas").

D. CONCLUSION

Appellants respectfully request the City Council enforce the plain language of the Beaverton Development Code to protect those who live, learn, educate, and conduct business in the areas adjacent to or near the Beaverton BottleDrop. The plain language of the BDC clearly provides City Council a principled basis to reject the conclusions in the Director's Decision and correct the mistakes made early in the development process. City Council's affirmation of the BDC's plain language not only will protect your citizens who are directly impacted by the Beaverton BottleDrop, but also will protect citizens in other parts of Beaverton through the precedent your decision will set. Given that all appellants are willing to allow a reasonable amount of time for owners of the BottleDrop to identify a new location for the BottleDrop, protection of Beaverton's citizens can be effected with a minimum of disruption to the BottleDrop's owners and patrons.

Very truly yours,



Michael G. Neff



July 2, 2018

Anna Statinsky
Planning Division
City of Beaverton
P.O. Box 4755
Beaverton, OR 97076

RE: City of Beaverton Notice re Oregon Beverage Recycling Cooperative Beverage Container Redemption Center,

Dear Ms. Statinsky:

I am a 15-year resident of the Royal Woodlands neighborhood, just south of the Bottle Drop recycling center. I am writing to bring your attention to how the siting of the Bottle Drop has affected my neighborhood and my family's quality of life.

First, I am very sympathetic to the low-income and homeless population. I am the board president of Farmers Market Fund, a non-profit that raises money to help low-income and underserved communities buy fresh fruits and vegetables at area farmers markets. I also contribute to various organizations throughout the year that assist the homeless. Also, I am a big fan of the Bottle Bill.

Since the Bottle Drop has opened, we have experienced car prowls, suspicious people drinking and loitering in our neighborhood, and trash and human feces on sidewalks. We have found needles in MacMillan Park, just three houses down from our home. Other neighbors have reported suspicious strangers ringing their doorbells late at night, going through their trash and intimidating them while out walking in the neighborhood. My husband noticed a homeless man with a shopping cart full of bottles and cans loitering in our neighbor's back yard while they were away at work. We recently had to install security and doorbell cameras because we simply do not feel safe.

My daughter is 17 and takes the public bus from Fred Meyer on Beaverton Hillsdale Highway to our house in the Royal Woodlands neighborhood. Several weeks ago, a homeless man with a sack full of cans and bottles intimidated her at the bus stop and she had to call my husband to pick her up.

I do not understand why the City and the ORBC failed to engage the community in the decision to site the Bottle Drop on Beaverton Hillsdale Highway. It appears to us that the lack of public transparency was intentional. We had no idea the center was going into the former Pier One location until the sign was installed. The Bottle Drop takes the place of approximately 19 former drop off locations. Having this amount of activity concentrated in a small location, near

residential neighborhoods, businesses and a high school, is a public safety concern for me, my family and my neighbors.

I hope that you will agree that Beaverton City code should be enforced and that the Bottle Drop Center should be relocated to Beaverton's industrial area.

Thank you for your consideration.

A handwritten signature in black ink that reads "Karie Trujillo". The signature is written in a cursive style with a large, stylized initial 'K'.

Karie Trujillo
4770 SW Chestnut Place
Beaverton, OR 97005

From: Rick Skayhan <ricks@lacoinsurance.com>
Sent: Friday, June 29, 2018 9:28 AM
To: Anna Slatinsky
Subject: FW: Bottle Drop City Council Meeting Last Tuesday

Mayor Doyle & City Council Members,

Last week's meeting regarding the siting of the Bottle Drop revealed two things:

- 1) City planners can make mistakes. Had your staff planner known the impact of the current Bottle Drop location to the neighborhood at large I doubt she/he would have let them proceed without proper neighborhood input and the appropriate impact studies. It's obvious from the testimony that consolidating that many neighborhood households down to one single drop site has caused resident safety issues, an increase in traffic, increased noise levels, terrible smells, rodents, et al.
- 2) The Grocery lobbyist admitted that this process hadn't gone well. The impact to the people who live behind the Bottle Drop and across the way in Royal Woodlands is far beyond what they (OBRC) expected. In his own words, "we have work to do". OBRC cannot afford to be tone deaf to our appeal. This entire thing is a mistake that needs to be corrected by you - our political leadership.

The Bottle Drop is not "similar use" when it's the only location available. If it were a restaurant, professional office, or other retailer we who live here have choices of whether or not to patronize the business. Our neighborhood has many "retail" options but only one bottle/can recycle location. The fact that there's no accurate definition for what this type of recycle facility really is (using plain language) speaks volumes as to why this entire mess is a mistake.

Please do the right thing - fix this siting error. The negative impact to our neighborhood is real. The remedy should focus on relocating OBRC's Bottle Drop to the most appropriate industrial location. As our civic leaders, this is your duty. Proper siting results in a return to living/working in a safe place for our neighbors, school children, and businesses.

I vote, so please implement the proper code. It's the right thing to do.

Susan Skayhan
4820 SW Chestnut Place
Beaverton, OR 97005
susanskayhan@gmail.com

July 10, 2018

Michael C. Robinson

Admitted in Oregon

T: 503-796-3756

C: 503-407-2578

mrobinson@schwabe.com

VIA EMAIL BEFORE 5:00 P.M.

Mr. Denny Doyle, Mayor
City of Beaverton City Council
12725 SW Millikan Way
Beaverton, OR 97076

RE: Applicant's Final Written Argument; City of Beaverton File Nos. DI2017-0003,
APP 2018-0002 (Oregon Beverage Recycling Cooperative)

Dear Mayor Doyle and Members of the City Council:

This office represents Oregon Beverage Recycling Cooperative ("OBRC"). This letter is timely submitted on Tuesday, July 10, 2018 before 5:00 p.m. This letter constitutes the Applicant's final written argument in the above-referenced matter.

1. Introduction and Summary of Argument in favor of affirming the Director's Decision.

This is the Applicant's final opportunity to communicate with the City Council and the public about why the Director's Interpretation should be affirmed. The Applicant has three initial comments before explaining in more detail why the City Council can affirm the Director's decision and approve the application.

First, the Applicant appreciates the Director's support for the application and the Director's finding twice that the redemption center is a similar use to permitted uses in the Community Service ("CS") zone. The Director's decision is well-reasoned and is supported by substantial evidence in the whole record. The City Council is well within its discretion to affirm the Director's decision.

Second, the Applicant appreciates the testimony of all of its neighbors and other persons, including persons who use and benefit from the redemption center, the various social programs the center supports, and also the neighborhood associations. While it's clear that many persons support the application, as evidenced by the written and oral testimony in support of the application, it's also clear that many persons believe that the Applicant can do a better job of managing the center and external impacts from the center. The Applicant will commit to being as transparent as possible about the redemption center's operation and to aggressively respond to any and all timely complaints about the operation. The Director's proposed conditions of approval – which the Applicant will agree to – are appropriate and are feasible to be implemented.

Third, the redemption center is part of this state's long legacy of environmental stewardship. The record amply demonstrates that the redemption center is the most important and effective way that the state keeps beverage containers out of landfills and off of our streets. In order to function successfully, redemption centers like this one need to be located conveniently to the public and not in dangerous and inconveniently located industrial zoning districts. An industrial zoning district would not only be inappropriate, but would present a danger to individuals using the redemption center and would compete with industrial businesses for precious industrially-zoned ground.

The City Council can affirm the Director's decision for the following reasons:

- a. The Director correctly found that the approval criteria for the determination are satisfied by substantial evidence in the whole record. The redemption center is another business, just like the many other businesses allowed in the CS zone.
- b. The redemption center is not a recycling use. The center redeems beverage containers to return deposits to consumers, and prepares them for transport to plants where the containers are recycled. "Recycling" is turning something into a different product, which does not occur at this location. Further, the "back room" operations have been occurring for years at grocery stores in the CS zone, in addition to the actual redemption activity.
- c. The redemption center is not similar to uses allowed in the IND zone and because it is not a recycling use or other type of industrial use, it is inappropriate to direct it to the IND zone.
- d. If the redemption center is not allowed in the CS zone and is not an industrial use, then the City's citizens, who use and rely on the redemption center, will be deprived of a convenient location to redeem their beverage containers.
- e. Some activities described by and objected to by some of the redemption center's neighbors have already been addressed and can be further addressed through the implementation of the reasonable and feasible conditions of approval, including a "Good Neighbor Agreement", which will foster conversation between the redemption center and its neighbors. The conditions include, among other things, a sound-blocking wall on the east property line, a new insulated door at the loading door, an "air knife" to control odors at the front door, blocking the stairway on the west property line, additional security on the property during business hours and regular security patrols during other hours, a limitation on how long loading and unloading activities can occur (thus limiting the time during which the loading door is open and minimizing noise and odor from the loading door), obtaining a noise study that may contain other recommendations, and a commitment to promptly respond to all complaints.

The City Council has the authority to impose the conditions of approval and the City may enforce them. OBRC has been working closely with Staff on these conditions, which will be fully detailed in a Staff Report, and supports them.

- f. Other issues, like drug use, are clearly societal problems that will occur anywhere and are unrelated to the redemption center. For the sake of discussion, if those activities are linked to the redemption center, then moving the redemption center simply moves the undesirable activities rather than addressing them. But the City Council can find that the societal problems, including drug use, are not caused by the redemption center; the record shows that the City has had to address camping on public streets and the attendant problems associated with camping and that drug use occurs in many locations, including libraries. The solution is not to punish the innocent business owner who also wants to address the problem but to impose conditions of approval that allow the Applicant, its neighbors and the City, to address the issue and to assure that the business is not a location where such activities are tolerated. Even Jesuit High School, a respected member of the community, must police its property to avoid these incidents. This is no different than what is proposed for this use.
- g. The Redemption Center can and has responded to complaints when those complaints were brought to its attention but many if not most of the complaints in this record were not presented to the Applicant and it had no opportunity to correct them. The Applicant cannot be expected to respond to concerns that it is unaware of. It can and will be held accountable if the City Council adopts conditions of approval that mandate prompt responses to complaints. Further, the record shows that prior to the City Council hearing, no complaints were received by the Code Enforcement office and the Police Department had issued no citations. Further, the Police Department's report does not conclude that the redemption center is responsible for the small increase in the number of violations in the area nor that those incidents would not have occurred but for the redemption center's presence in the area.
- h. OBRC has a comment on the videos included in the record. The June 30 video shows the roll up door and the main door to the back of house operations open while not actively in use. Signage inside already tells employees to shut those doors when not actively in use. OBRC plans to install an automatic door to ensure that the door remains closed when not actively in use.

The July 1st video is obviously very concerning. These individuals are in a spot that makes it very difficult to see their activity from OBRC's cameras. This kind of activity is far too common in the community, and has a very negative effect on businesses, including ours. OBRC will commit to provide additional security to ensure this sort of behavior no longer occurs. Denying the application or requiring the use to be in another zone does not address the issue; it only shifts its

location. We should instead focus on how conditions can address these issues, like conditions of approval can do.

But, the better answer is that the drug use is unrelated to this beverage container redemption use or its location. It's a fact that drug use is all around use, in places like libraries and coffee shops. Drug users will not disappear from Beaverton or this area if the application is denied. It's unfortunate that the response to a video taken of private property didn't result in a call to OBRC to make it aware of the issue.

- i. Finally, this will be a decision that will leave some persons unhappy but the right conditions of approval will largely address their concerns. This CS zoned property will always have some impacts regardless of the use because of the proximity of residences to the property. The goal should be to approve the use with conditions that addresses identified issues. The correct and lawful action for the City Council to take is to affirm the Director's Decision because it meets the approval criteria with responsible and stringent conditions of approval that address the issues that City Council believe warrant addressing. A denial does not solve the problems identified that people are most concerned about and it does not provide the citizens with an appropriately located redemption center as intended by Oregon's Bottle Bill.

The remainder of this letter provides more detailed responses to issues raised in testimony to the City Council. This letter contains no new evidence.

2. Legal Conclusions

The Beaverton Development Code ("BDC") requires that, when a use does not clearly fall into one or more of the categories of uses permitted in Beaverton, the Planning Director must determine whether that use is permitted in the zone proposed for it.

"Authorization for Similar Uses. The Director may authorize that a use, not specifically named in the allowed uses, be Permitted if the use is of the same general type and is similar to the allowed uses; provided, however, that the Director may not permit a use already allowed in any other zoning district of this Code. Application for such a decision shall be processed as a Director's Interpretation, as provided by Section 40.25. of this Code."

BDC 10.50. (emphasis added).

In response to a remand order by the Oregon Land Use Board of Appeals ("LUBA"), OBRC applied for a Director's Interpretation to determine whether its Beaverton Redemption Center is permitted in the CS zone. As noted above, the Director's Interpretation is the proper and required process by which the City makes this determination; a legislative code amendment is neither necessary, nor appropriate.

The approval criteria for a Director's Interpretation are set forth in BDC 40.25.1.C; of these, the two substantive criteria are as follows:

“3. That the interpretation is consistent with the City's Comprehensive Plan and other provisions within the Development Code.

4. When interpreting that a use not identified in the Development Code is a Permitted, Conditional, or Prohibited Use, that use must be substantially similar to a use currently identified in the subject zoning district or elsewhere in the Development Code.”

There has been little debate in this Appeal that allowing the Redemption Center in a CS zone is consistent with applicable provisions of Beaverton's Comprehensive Plan (the “Plan”). Plan Goal 3.7.3 establishes the following policies for “Community Commercial” areas:

"a) Allow commercial uses at a range of scales, including large-format retail, to address community needs.

...

c) Prohibit land-intensive vehicle sales and service uses and uses requiring extensive outdoor storage.

d) Use development standards and/or conditional use review to address potential issues related to compatibility of commercial uses with adjacent housing, including noise, access and parking."

The Director and OBRC have provided substantial findings explaining why finding the CS zone to permit the Redemption Center is consistent with these and other provisions of the Plan. *See*, Application 13–16; Exhibit A of the April 30, 2018 Notice of Decision at 1-3; June 12, 2018 Staff Report at 4-5; OBRC June 11, 2018 Letter at 10–11.

The key legal issue in this Appeal is Criterion 4: whether the Redemption Center is “substantially similar” to other uses permitted in the CS zone. OBRC has offered substantial evidence to support a finding that Criterion 4 is met, which includes:

- A complete application, dated December 21, 2017, which explains why the City can find that the Redemption Center is substantially similar to a “service business or professional services use” and explains why allowing the Redemption Center in the CS zone is consistent with applicable goals and policies of the Comprehensive Plan;
- Photographic and written evidence demonstrating that the term “recycling center” is ambiguous and that the Redemption Center is not a “recycling center” as that term is properly construed in the BDC.

- A complete Transportation Impact Study, dated March 20, 2018, which demonstrates that the Redemption Center will not adversely impact the existing transportation system and is similar in terms of traffic generated to a variety of other retail and service uses;
- OLCC approval for the Redemption Center and its convenience area, dated December 9, 2016 (**Exhibit 1**);
- A map of the convenience zones for the Tigard and Beaverton Redemption Centers (**Exhibit 1**);
- A list of zoning designations of all redemption centers, which demonstrates that all but three are located in commercial or mixed-use zones;
- A Metro Solid Waste Facility License Application demonstrating the difference between an actual recycling center (Environmentally Conscious Recycling), which handles some 90,000 tons of mixed recyclables and organic debris per year, and the Redemption Center;
- A letter dated March 6, 2018 that explains why, in addition to finding that the Redemption Center is similar to a “service business or professional services use,” the Council can also conclude that it is substantially similar to the “retail trade” category;
- Examples of recycling centers and transfer stations, including the Hillsboro Landfill and Tualatin Valley Waste Recovery facility and Metro South Transfer Station; and
- Letter from Sen. Mike Dembrow and Rep. Ken Helm, chairs of the legislative committees responsible for the BottleDrop program, which explains that those committees understood the Redemption Centers to be commercial uses, not industrial uses.

The Director considered the evidence before her and found that the Redemption Center is “substantially similar” to other uses permitted in the CS zone for a number of reasons, which include the following:

- The Redemption Center is a new type of use recently created by the legislature (Exhibit A to Decision at 4);
- The Redemption Center does not fit within the use category of Salvage Yards, Recycling Centers and Solid Waste Transfer Stations because that use category denotes uses with a substantially higher external impact than the Redemption Center (Id. at 4–5);
- That the Redemption Center is not similar to other examples of recycling centers and transfer stations, and does not meet the City’s definition of “Salvage Yards” (Id.);
- That the Redemption Center is substantially similar to three use categories permitted in the CS zone, “Service Business and Professional Services,” “Eating and Drinking Establishments,” and “Retail Trade,” based on the following factors (Id. at 6–7):
 - The users or customers that the establishment services;
 - Noise, odors, and other potential impacts;
 - Whether the use is outdoors or enclosed; and
 - The volume and type of traffic generated by a use;
- In addition to the above, the Director observed that the “specific activity of beverage container redemption that takes place at the OBRC facility has been part of ordinary

grocery store operations since the bill was passed in 1971,” and that the Redemption Center is most similar in terms of its essential characteristics to a grocery store. *Id.* at 8.

In so doing, the Director applied Criterion 4 consistent with the purpose statement for the CS zone, which is to "provide for a variety of business types compatible with and of similar scale to commercial activities found principally along the City's major streets." BDC 20.10.10.2. Thus, the Director properly focused on whether the Redemption Center is of a “similar scale” and, based on its physical and operational characteristics, is “compatible with” other uses in the CS zone.

The Director never characterized her decision as an “impacts analysis,” but even if she had, there is nothing in the BDC that would prohibit an interpretation based on the physical and operational characteristics or “impacts” of a use. As explained in OBRC’s June 26 letter at 11–12, if one were to make any use that handles a recyclable material a “recycling center,” as Glenwood would have it, several permitted uses in the CS zone would now only be allowable with Conditional Use permits in the IND zone. At bottom, the Council can find that in the absence of any specific analytical methodology required by the BDC, the Director applied best planning practices by analyzing the elements of a land use that can be readily measured and that actually matter for land use purposes, such as the size of the Redemption Center, the type of customers it attracts, the traffic that it generates, as well as the need for convenient access to a bottle return in commercial areas.

In conclusion, the Director made a well-reasoned decision, and as described herein and in OBRC’s prior testimony, there is no basis upon which to reverse the Director’s decision. The Redemption Center is well supported – the Council heard a substantial amount of positive testimony and received a petition signed in support of the Redemption Center by hundreds of OBRC patrons. The Council should find that the Decision was correctly decided, but with the proposed conditions of approval and Good Neighbor Agreement, discussed above, it can also find that the Beaverton Redemption Center can continue to provide its important service while being a good neighbor.

3. Response to Arguments Raised by Glenwood 2006, LLC

In Mr. Connor’s July 3, 2018 letter, Glenwood 2006, LLC purports to respond to Applicant’s first open record response. However, Glenwood spends the vast majority of its ink repeating and repurposing arguments it raised during the hearing and before. Despite Glenwood’s escalating stridency, its July 3 letter has little, if anything, to add. It does, however, make a number of fallacious arguments that mischaracterize OBRC’s prior testimony, incorrectly defines the approval criteria, and attempts to misdirect the Council from fairly applying the approval criteria.

a. “OBRC has never taken the neighborhood complaints seriously.”

RESPONSE: Glenwood repeats its arguments that OBRC ignored it and is only now offering mitigation measures that Glenwood requested before. The Council should reject this argument for a number of reasons.

First, OBRC's specific dealings with Glenwood have no bearing on the approval criteria.

Second, this assertion is patently false. OBRC has spent countless hours attending meetings with neighborhood groups and Appellants, and corresponding with individuals who have contacted OBRC about the Redemption Center. These interactions were explained in detail in OBRC's June 26, 2018 letter.

Third, Glenwood is simply incorrect when it asserts that OBRC "never followed through on its agreement with the Bridgens." OBRC's mitigation proposals to the Bridgens (moving employee parking to the rear, installing additional sound proofing, and installing new fences) are virtually identical to the mitigation measures that OBRC proposed in its June 26 letter. Moreover, OBRC *did* install new window glass at the Redemption Center, as demonstrated by Exhibit 17 of OBRC's June 26 letter. It did not yet restripe the parking lot because ultimately, it was unclear that this would have any impact. The new fencing has not yet been installed because OBRC was initially advised by City staff that additional fencing would require a modification to its site design approval. Also, once the project was remanded by LUBA, OBRC was understandably reticent to spend additional money on further mitigation measures until this Appeal is resolved. However, new fencing is part of OBRC's proposed conditions of approval.

Finally, to the extent Glenwood previously requested many of the mitigation measures OBRC proposes, it is unclear why Glenwood would continue to object to the Application.

b. "The central question in this appeal is whether the BCRC qualifies as a Recycling Center."

RESPONSE: Glenwood again attempts to make the argument that whether the BCRC is a "recycling center" is the key issue in the appeal. On the contrary, it is not at all what the approval criteria require.

It is absolutely true that BDC 10.50 and 40.25 prohibit the Director from making a similar use determination for a use that is identified elsewhere in the zoning code. However, neither staff, OBRC, nor LUBA agreed with Glenwood that the Redemption Center fits within the use category "Salvage Yards, Recycling Centers and Solid Waste Transfer Stations." This is for three reasons that have been fully explained in the record, and are summarized below:

First, there is no definition of "recycling center" in the BDC that would compel the City to find that the Redemption Center is permitted in another zone.

Second, the Oregon legislature deliberately defined the use as a "redemption center," and for good reason: unlike a "recycling center" that takes a wide variety of discarded materials for any purpose, a "redemption center" is a single-purpose facility. That purpose is to return deposits to people who return beverage containers, and redemption centers must be located in sufficiently close proximity to beverage retailers to make those container returns convenient. The Redemption Center can be compared to EcoBinary's specific-purpose facility, which the City apparently determined not to be a "recycling center" and which is also located in the CS zone.

Third, aside from the semantics of the word “center,” a redemption center cannot squarely be considered a “recycling center,” as that term is interpreted in the context of that use category; that is, even if a redemption center were a “recycling center” of some kind, is not the kind of recycling center that is similar to a “salvage yard” or “solid waste transfer station,” both of which are considered very high-impact uses.¹ This point is further supported by the fact that “Salvage Yards, Recycling Centers and Solid Waste Transfer Stations” are permitted in only one zone—IND—and even then, only with an approved conditional use permit. It strains credulity to suggest that a 10,000 square foot redemption center, which operates entirely indoors and is used by retail end-point customers, should require a *conditional use permit* to operate in the IND zone, which allows, among other things, warehousing, distribution, “fuel oil distributors,” “manufacturing, fabricating, assembly, processing, packing, and storage,” “heavy equipment sales,” and “wholesale or retail lumber, building and or landscaping materials yard” as uses permitted *outright*. CDC 20.15.20. There is simply nothing similar in scale, impact, or any other measurable attribute of the Redemption Center that makes it similar to a salvage yard, recycling center, or solid waste transfer station.

For the above reasons, the Council should reject Glenwood’s argument.

- c. **“OBRC has been forced to repeatedly change its position on the legal standards for determining the nature of the use and the substantially similar test because its underlying claim is fundamentally flawed.”**

RESPONSE: The Council should reject this argument for several reasons.

First, such arguments fail to clearly address the approval criteria.

Second, OBRC has not “changed its position” on whether the Redemption Center is “substantially similar” to other uses identified in the CS zone, as required by CDC 40.25.15. OBRC has always asserted that these criteria are met. The fact that it explained throughout this process that the Council can find that the Redemption Center is substantially similar to both the “service business or professional services use” and “retail trade” categories lends further support to the Application, it does not detract from it. Moreover, there is nothing in either the BDC or state law that prohibits an applicant from offering multiple legal theories that may support its application.

Finally, many of Glenwood’s characterizations of OBRC’s arguments are disingenuous. First, OBRC did not “admit” that it conducts recycling on page 7 of its June 11, 2018 letter. But at any rate, such argument does nothing to prove that the Redemption Center is not substantially similar to other uses in the CS zone. Second, OBRC never “changed its position” regarding other regulatory definitions; it has always explained that other jurisdictions’ definitions of “recycling center” are not binding on the City. Third, Glenwood’s assertion that OBRC is “now backing off

¹ Courts have long interpreted meanings of words based on the surrounding terms in the same statute or ordinance by using the interpretive doctrine of “*noscitur a sociis*,” which roughly translates as “a word is known by the company it keeps.”

the impact-test” is a gross mischaracterization of ORBC’s prior testimony. The point that OBRC has made from the beginning is that the Redemption Center should be judged by its intrinsic aspects: its size, scope, traffic generation, compatibility with other commercial uses, etc. As a service that is required to be open to all, it should not be judged by the behavior of a small minority of people who might engage in petty nuisances.

Finally, Glenwood’s statement that the Redemption Center “meets the dictionary, regulatory and industry definitions of a recycling center is plainly false because it has failed to identify a single accepted dictionary, regulatory, or industry definition of “recycling center” that is binding on the City. In fact, it has failed to identify a dictionary definition or industry definition of “recycling center” at all.

d. OBRC failed to provide evidence to support the claim that the City treated grocery store recycling facilities as a retail use or that the BCRC is the same as these grocery store facilities.

RESPONSE: There can be no serious question that grocery stores have accepted and in some cases continue to accept returned beverage containers and refund deposits. There is also no question that retail trade, which includes grocery stores, is permitted in the CS zone.² As the Director explained, bottle returns have been part of grocery store uses since the beginning of the bottle bill and grocery stores are permitted in the CS zone.

Secondly, in making such an argument, Glenwood uses inconsistent, fuzzy logic. On the one hand, Glenwood has continually argued that it is the act of returning a bottle that should determine the use, and not the scale of that use or its similarity to other uses in the CS zone. *See, e.g.* Mike Connors letter, dated May 14, 2018 at 5 (“the similarity of the uses depends on the nature of the use itself, not just its size or impacts”). Now it argues that the Redemption Center is different than a bottle return in a grocery store precisely *because* of its size and impacts.

Putting aside Glenwood’s scattershot analysis of the issue, the fact that bottle returns have been a common feature in Beaverton’s commercial zones and the fact that the Redemption Center is similar in scale to other permitted commercial use categories are relevant to, and support, the Director’s Decision. The Council should reject Glenwood’s arguments for these reasons.

e. OBRC failed to provide evidence to dispute the appellants' evidence that the BCRC includes processing activity in the backroom area.

RESPONSE: Glenwood argues that “one of the key issues of contention is whether or not there is any processing activity taking place in the back of the BCRC.” That statement is simply incorrect. Again, regardless of whether the Council finds that there is “processing” occurring in

² See BDC 20.10.20. The BDC defined a “retail store” as “a place of sale to the ultimate consumer for direct consumption and not for resale.” BDC Ch. 90, pg. DF-44.

the back of the Redemption Center, that fact does nothing to disturb the Director's conclusion that the Redemption Center is "substantially similar" to other uses in CS zone.

And, the Council can find that the sorting and packaging of returned beverage containers is not the kind of "processing" that Glenwood implies. In fact, the inputs (unsorted bottles and cans) and outputs (sorted and crushed bottles and cans) are no different than the inputs and outputs of the bottle return machines that are common in grocery stores. The fact that these outputs are taken to OBRC's processing center for actual recycling after being deposited at its redemption centers belies the assertion that the Redemption Center is a recycling or processing center. Finally, the appearance of the equipment at the Redemption Center, which includes conveyor belts and other sorting machinery, does no more to make the Redemption Center an industrial use than does the mechanical equipment and conveyor systems behind the lanes at a bowling alley make a bowling alley an industrial use.

For these reason, the Council should reject Glenwood's argument.

f. "LUBA did not reject Glenwood's claim that the BCRC is a Recycling Center, LUBA remanded that issue to allow the City to consider it first."

RESPONSE: It is true that LUBA did not conclude that the Redemption Center is allowed in the CS zone and remanded the issue to the Council. However, Glenwood and Jesuit have both argued that the Redemption Center obviously meets a "plain language" definition of recycling center. The fact that LUBA did not agree contradicts Appellants' "plain language" argument.

g. "Glenwood's assertion that the City should address where BCRCs should be allowed in the City through a legislative amendment is not inconsistent with its position before LUBA."

RESPONSE: Glenwood ties itself into knots to argue that it did not really mean what it said when it argued before LUBA that a Director's Interpretation is necessary to allow the Redemption Center to continue its operations. The Council can summarily reject this argument because it is inconsistent with Glenwood's position before LUBA, but more importantly, because BDC 10.50 requires a director's decision in this instance, as explained above.

h. "The BCRC is an appropriate use in the IND zone."

RESPONSE: The issue in this case is whether the Redemption Center is "substantially similar" to uses permitted in the CS zone, not whether it is "substantially similar" to uses permitted in the IND zone. In fact, only if the Council concludes that the Redemption Center falls within the definition of "Salvage Yards, Recycling Centers and Solid Waste Transfer Stations" are the use allowances in the IND relevant at all.

Glenwood's assertion that OBRC operates its redemption centers in industrial zones in other jurisdictions is also incorrect in any relevant sense: of 25 redemption centers, only three are located in zones that allow industrial uses, and of those, two are co-located with OBRC's

recycling plants. The third is located in a mixed industrial/commercial zone that also allows “retail sales and services.” *See* Applicant’s June 11, 2018 Letter at Exhibit 2.

OBRC’s reasons for not wanting its Redemption Centers to be located in the IND are practical ones. First, the Redemption Center generates a relatively large amount of single-occupancy vehicle traffic, similar to a grocery store, that would certainly conflict with truck traffic in the City’s IND zone. Second, the legislature intends that redemption centers be close to bottle retailers to ensure that they are convenient for consumers, as explained in OBRC’s March 6, 2018 letter. Finally, the OLCC has already approved two convenience zones around the Redemption Center, which the OBRC would likely violate if it had to move the Redemption Center to an IND-zoned property, even assuming it could secure a different site (*see* OBRC’s January 12, 2018 letter at Exhibit 1). And, doing so would violate the many contracts OBRC has with Beaverton’s beverage retailers, as it testified at the June 19, 2018 hearing.

The Council should reject Glenwood’s argument for these reasons.

- i. **“Other uses in the CS zone have not generated near the level of complaints and opposition due to impacts after commencing operations.”**

RESPONSE: Glenwood offers absolutely no evidence to support this argument, but even if it had, the argument is meaningless for two reasons. First, whether other businesses have generated complaints is irrelevant to the approval criteria. Second, according to the City’s code enforcement officer, there have been no official complaints registered against the Redemption Center as of June 11, 2018. *See* OBRC’s June 11, 2018 letter at Exhibit 4. OBRC recognizes that a number of individuals are concerned about undesirable people and behavior they believe to be attracted by the Redemption Center and to the extent that OBRC can take steps to ensure that its customers do not cause nuisances, it has offered take such steps as conditions of approval and a Good Neighbor Agreement. *See* OBRC’s June 26, 2018 letter.

The Council should reject Glenwood’s argument for these reasons.

4. **Response to Arguments Raised by Jesuit High School, Brendan and Holli Bridgens and their family, Michael Matschiner, Joseph Conrad, Trisha McPharren and her family, and Rick Skayhan and his family (collectively, “Jesuit and Certain Individuals”)**

Similar to Mr. Connor’s letter, Mr. Neff’s July 3, 2018 letter for the most part reiterates arguments already raised and addressed during the hearing and before. Nevertheless, what follows is a summary of each of Mr. Neff’s arguments followed immediately thereafter by OBRC’s response.

- a. **The Redemption Center creates “tangible negative externalities which are unlike and distinct from the externalities caused by other nearby operating businesses.”**

RESPONSE: Putting aside the fact that Mr. Neff's argument does not address the relevant approval criteria, the record demonstrates that the City's code enforcement officer has indicated that there have been no official complaints registered against the Redemption Center. *See* OBRC's June 11, 2018 letter at Exhibit 4. Further, there is simply no evidence in the record that supports a claim that noise, odor, trash, trespassing, and the like are unique and distinct to the Redemption Center. Even so, OBRC recognizes that there are several neighbors, including the Bridgens, who have experienced unfortunate behavior from a few patrons of the Redemption Center. OBRC is committed to mitigating the negative externalities experienced by the neighbors, as evidenced by the Good Neighbor Agreement outlined above.

b. If the City Council adopts the Director's decision, they will set an "unfortunate precedent" that will allow siting of one or more redemption centers without City of Beaverton land use review or conditions of approval.

RESPONSE: Mr. Neff's concerns are overblown. Establishing a new Redemption Center will almost certainly require a new Type I Design Review, and the City may require conditions of approval for Type I applications. BDC 50.35(3)(D). And, if a new redemption center was to be sited in a new building, an applicant may need to go through a Type 2 or even a Type 3 review process, which would certainly provide the City with opportunities to require conditions of approval.

c. The City planner failed to consider that the Redemption Center is a "Recycling Center" and erroneously believed no processing would occur on site.

RESPONSE: First, the approval criteria do not require a determination of whether the Redemption Center is a "Recycling Center." But even if they did, for the reasons stated above, the Council should find that the Redemption Center is clearly not a "Recycling Center" – not in size, not in intensity, not in purpose.

Second, as explained in depth above, the Director's conclusion that the Redemption Center is "substantially similar" to other uses in the CS zone does not require a determination of whether "processing" is occurring in the back of the Redemption Center. More to the point, the sorting and packing of returned beverage containers is not the kind of "processing" occurring in OBRC's processing centers.

d. A legislative amendment should be enacted in order to approve OBRC redemption center locations.

RESPONSE: As explained above, BDC 10.50 states that a Director's Interpretation is required in this instance.

e. If the City Council follows staff's suggestion, it will encourage an approach that "greatly discounts public notice and involvement and a plain reading of the BDC."

RESPONSE: Mr. Neff states that “assuming [‘Recycling Center’] is ambiguous, the BottleDrop owners still completely ignore and fail to explain why they did not abide by BDC 40.25...” OBRC has not ignored or failed to explain this issue. In its letter dated July 3, 2018, OBRC explained that before the Redemption Center opened, both City staff and the applicant believed in good faith that the Redemption Center could be approved through a Type I Design Review and it was not until LUBA decided otherwise that there was any reason for either OBRC or the City to require a public approval process. Mr. Neff’s assertion also fails to recognize that the Council can easily find that Appellants have now had a thorough opportunity to be heard during this Appeal.

f. The Redemption Center must be analyzed as a principal use instead of an accessory use because it has characteristics different from reverse vending machines found in grocery stores.

RESPONSE: Like his July 3 Letter, Mr. Neff refers to an unrelated land use decision, which concerns the Beaverton Wal-Mart facility, to support his claim. That land use decision is not the subject of this Appeal. Furthermore, regardless of whether the redemption use at a grocery store is a primary or accessory use, it is an allowed use. OBRC acknowledges that more bottles are processed at the BCRC location than traditional grocery store redemption facilities, but the fact remains: the bottle redemption use has always been part of the uses allowed in the CS zone.

g. “The BottleDrop owners at no time have been willing to engage in a genuine discussion about voluntarily relocating the Beaverton BottleDrop.”

RESPONSE: Nothing in the BDC requires OBRC to voluntarily offer to relocate its premises. OBRC has invested tremendous resources in the Redemption Center and has many contracts with grocery stores in the surrounding area. As the petitions in the record illustrate, thousands of people in the surrounding area use the Redemption Center to redeem their bottle deposits and consider it part of their monthly routine. OBRC would never propose as a solution to the alleged problems that Appellants voluntarily relocate their businesses. Instead, OBRC believes the better solution would be to enter into a Good Neighbor Agreement, which the record demonstrates OBRC is willing to do.

h. The Redemption Center is fundamentally different from EcoBinary Electronics Recycling, Play It Again Sports, or Goodwill.

RESPONSE: In support of this argument, Mr. Neff states that OBRC identifies “three retailers of used products which they argue will need to move to the Industrial District if City Council determines BottleDrop is a Recycling Center. The BottleDrop Owners’ argument fails to account for the differences between operations at the BottleDrop and these retail establishments” See Mr. Neff’s letter dated July 3, 2018. This argument fails for two main reasons.

First, OBRC is not required to demonstrate that there are no differences between the Redemption Center and these businesses. Rather, it simply offered them as examples of other businesses—especially EcoBinary—that deal with reusable or recyclable material and are permitted in the CS zone.

Second, Council is not tasked with trying to determine whether there are perceived differences between uses in the CS zone. If that were the case, one could find that there are many fundamental differences between Starbucks and the neighboring tattoo parlor, but no one is suggesting that because differences between the two commercial businesses exist, that one should move to an IND zone. The key legal issue in this Appeal is Criterion 4: whether the Redemption Center is “substantially similar” to other uses permitted in the CS zone. As this letter demonstrates above, OBRC has offered substantial evidence to support a finding that Criterion 4 is met.

5. Conclusion

OBRC has provided substantial evidence and findings to support a Council decision affirming the application. The real issue animating Appellants is not that the Redemption Center fails to meet the criteria, but it is that certain property owners around the Redemption Center believe that it attracts undesirable people and behavior. However, it is simply not the case that these broader societal problems, which have long been a part of life in larger cities but are now reaching Beaverton, are caused by OBRC or that petty nuisances occurring in the neighborhood are intrinsic to the Redemption Center. There is also no evidence that forcing the Redemption Center to cease operations will be a solution to these problems, even as they manifest in this neighborhood. If the availability of beverage recycling facilities does draw individuals engaged in problematic behavior, moving the Redemption Center somewhere else will simply induce such individuals to congregate elsewhere.

Nevertheless, such concerns can be addressed in this application. OBRC takes neighborhood concerns very seriously and has been in close contact with its neighbors, both directly and through the Denny Whitford/Raleigh West Neighborhood Association. It offers conditions of approval and a Good Neighbor Agreement which it believes will address many, if not all, of Appellants’ concerns. Affirming the Director’s approval with these conditions in place will allow Beaverton’s residents to continue to use the Redemption Center while minimizing its impact on its neighbors.

Mr. Denny Doyle, Mayor
July 10, 2018
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For the above reasons, the Council should affirm the Director's decision with

Very truly yours,

A handwritten signature in black ink, appearing to read "Michael C. Robinson". The signature is fluid and cursive, with a long horizontal flourish extending to the right.

Michael C. Robinson

MCR:jmh

cc: Mr. John Andersen (*via email*)
Mr. Jules Bailey (*via email*)
Mr. Garrett Stephenson (*via email*)
Mr. K. C. Safley (*via email*)
Mr. Michael Connors (*via email*)
Mr. Michael Neff (*via email*)
Ms. Anna Slatinsky (*via email*)
Mr. Peter Livingston (*via email*)

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Proposed Conditions of Approval for OBRC Director’s Interpretation (DI2017-0003):

Continued operation of the Bottle Drop located on BCRC 9300 Beaverton Hillsdale Highway as a permitted use pursuant to DI2017-0003 is contingent on compliance with the following conditions of approval. Failure to comply with the conditions of approval could result in a revocation of the Director’s Interpretation and an order to vacate the premises.

- A. The applicant shall continually comply with the following conditions:
 - 1. Roll down door accessing the loading dock on the east side of the building shall remain closed while back room machinery is in operation, except during active loading and unloading not to exceed a total of 60 minutes per day. All doors to the building shall be used only for entry and exit of persons and materials only and shall not be propped open at any time.
 - 2. All improvements and agreements required below must be kept current and/or in good repair to perform the intended function.
 - 3. Prior to January 15th of each calendar year, provide and produce an annual report to the Beaverton Community Development Department for the previous calendar year containing a log of any neighborhood complaints received and how those complaints were addressed.
- B. Prior to September 1, 2018:
 - 4. The applicant shall enter into a “Good Neighbor Agreement” with City of Beaverton for the benefit of neighboring property owners and tenants. A draft of the agreement shall be provided to the City Attorney and Planning Director for review and approval by 8/7/2018. The agreement shall describe mitigations and ongoing measures to ensure the operation of the BCRC does not create undue impact on surrounding uses. The Agreement shall include the following elements:
 - a. Mitigation measures consistent with recommendations of the noise study.
 - b. Provide full time on-site security during all business hours;
 - c. Provide regular security patrols on an hourly basis outside business hours.
 - d. Implementation of OBRC’s trespass policy.
 - e. Publication of a contact person with an email address for persons to submit complaints or questions about the operation of the OBRC facility and a commitment to respond within 72 hours to the complaint, if at all possible.
 - f. Agreement to cooperate with the City, recognized neighborhood associations and homeowners associations on any City plans to address larger societal issues associated with homelessness and nuisance activities.
 - g. Agreement to cooperate with Jesuit High School on security issues concerning Jesuit High School’s property.
 - h. A commitment to appear at homeowners associations and recognized neighborhood association meetings when requested to address questions or concerns about operation of the OBRC facility.
- C. Prior to October 15, 2018:

5. The applicant shall perform the following measure related to noise mitigation, including completing any necessary permitting and construction activities related to these improvements.
 - a. Provide a noise study prepared and stamped by acoustical engineer registered in the state of Oregon that details measures needed to achieve compliance with BC 5.15 and minimize impacts on neighboring properties, including details for a noise attenuating fence as required by (b) below.
 - b. Construct a solid fence or wall a minimum of six feet in height along OBRC's east property line from a point adjacent to Beaverton-Hillsdale Highway (consistent with a sight distance analysis) to its property line on Club Meadow Lane. The material, construction details, location and size of the fence or wall shall be consistent with the noise study recommendations.
 - c. Installation of a sound-proof insulated loading dock door.
 - d. Installation of a sign at the pedestrian access to the OBRC facility stating, "Please be respectful of our neighbors by not talking loudly, loitering or smoking on this property."
 - e. Installation of a six-foot solid fence on west side of the Bottle Drop window.
6. The applicant shall perform the following measure related to odor mitigation, including completing any necessary permitting and construction activities related to these improvements.
 - a. Measures to ensure the BCRC complies with BC 5.05.050 F. These shall include but not be limited to installation of an "air knife" at main building entrance, and operational measures such as a schedule for regular cleaning of interior and exterior areas.
7. The applicant shall perform the following measure related to circulation and parking, including completing any necessary permitting and construction activities related to these improvements.
 - a. Remove stair connection to the neighboring commercial property and construct fence, as desired by property owner.
 - b. Signing "Employee Only" parking for the parking spaces on the OBRC east property line adjacent to the single family dwelling.
 - c. Signing the balance of the parking spaces not designated in (c) above to be occupied a for a maximum of 20 minutes or while active container redemption is occurring.
8. The applicant shall permit and construct a solid waste enclosure that complies with the standards of Section 60.05.20.2 of the Beaverton Development Code and provides adequate gated access for the solid waste facilities to be accessed by the hauler.