



## MEMORANDUM

TO: Planning Commission  
FROM: Steve Regner, Senior Planner  
DATE: May 8, 2019  
SUBJECT: APP2019-0001 Appeal of Willamette Water Supply Program (DR2018-0134) Continued Public Hearing

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### **Background Information:**

On February 28, 2019, the Planning Director issued a decision of approval for a segment of regional waterline along SW Scholls Ferry Road and SW Tile Flat Road. The city received an appeal from an impacted property owner, Mr. Ed Bartholemy.

The first appeal hearing before the Planning Commission occurred on April 10, 2019. At the first hearing date, the appellant's representative, Mr. Dave Hunnicutt, requested that the record remain open to provide additional time to review the application and submit additional evidence. The applicant, Willamette Water Supply Program (WWSP), agreed and the Commission continued the appeal hearing to May 8, 2019.

### **Exhibits:**

11. Applicant's additional testimony dated April 17, 2019.
12. Appellant's additional testimony dated April 17, 2019.
13. Applicant's rebuttal dated April 24, 2019.
14. Appellant's rebuttal dated April 24, 2019.
15. Applicant's final written argument dated May 1, 2019

### **Summary of Appeal:**

Criterion 1 – CDC 344-4.1(R)(5): The appellant asserts that it has not been demonstrated that it is necessary to site the facilities in the AF-20 zone, as opposed to siting the facilities in the right of way

Criterion 2 – CDC 403-3: The appellant asserts that responses to CDC 404-419, 421-423, 427, and 429 should be included in the decision, and that no findings are provided.

Criterion 3 – CDC 416-1.4: The appellant asserts the applicant has not demonstrated that the design, installation, and maintenance would be carried out with minimum feasible disturbance, specifically the appellant's ability to secured adequate sewer and storm water service to the property from SW Scholls Ferry Road.

Criterion 4 – CDC 430-105.5: The appellant asserts that the applicant has not demonstrated that the siting of the proposed utility facility will be compatible with existing surrounding uses and uses allowed by the plan designation.

Criterion 5 – ORS.275(2)(d): The appellant asserts that the applicant has not demonstrated why the proposed utility facility cannot be sited in the existing SW Scholls Ferry Road right of way, thus eliminating the need to site the facility in the AF-20 zone.

Staff cites the staff report dated April 3, 2019 for staff response to the appellant's appeal points, and Exhibit 5 of said report for the applicants' initial response.

### **Summary of Additional Materials Provided**

Consistent with the agreed upon timeline at the April 10, 2019 Planning Commission Hearing, the applicant and appellant both submitted additional written evidence to the record on April 17, 2019. Subsequently, the applicant and appellant submitted rebutting testimony in writing on April 24, 2019. The record closed at the end of business day April 24, 2019. No new evidence can be entered after this point. The applicant then submitted final written argument on May 1, 2019.

### **Applicant's April 17, 2019 Submittal (Exhibit 11)**

Staff identifies three major pieces of information provided in the applicant's submittal:

1. Location of waterline relative to future right of way. During the April 10, 2019 hearing, the appellant argued that siting of the waterline would cause greater than the minimum feasible disturbance, citing the potentially applicable CDC 416-1.4 (greater discussion of this provision's applicability can be found later in this report.) The Planning Commission requested information on where the water line is proposed to be located relative to the future right of way location when the appellant's property is developed. The applicant provides information from Washington County Transportation System Plan as well as right of way dedications on nearby properties in South Cooper Mountain. Utilizing this information, the applicant demonstrates that the entirety of the proposed water line and permanent easement will be located within the right of way, once the right of way is dedicated for the development of the appellant's property.
2. Consistency with the South Cooper Mountain Plan. The applicant states that South Cooper Mountain (SCM) Sewer and Transportation Concept Plans, as well as specific development plans when available, were considered when developing the waterline alignment. The applicant states that the planned depth of the waterline is intended to be deep enough below the future road bed for utility crossings, providing approximately seven feet of vertical clearance between

the road bed and the water line. Absent specific developments plans for the appellant's property, the applicant cites the adjacent SCM development, The Ridge. For this development, the applicant states that the seven foot vertical distance between the road bed and the water line was sufficient to accommodate the development's needs for utility crossing.

3. Transmission lines versus distribution lines. The applicant argues that CDC 416-1.4 is not applicable to this development, as the project is a transmission line and not a distribution line. Elsewhere in CDC 416-1, the code specifically refers to distribution lines. Planning Commission and staff discussed the definition of transmission versus distribution. Staff noted that the neither the Washington County Code nor the Beaverton Development Code define these words. Consistent with provisions Chapter 10 of the Beaverton Development Code and Section 106 of the Washington County Community Development code, staff cited definitions from Webster's Third Edition Dictionary (see Exhibit 9). In this submittal, the applicant provides a definition from *Oregon Revised Statute 215.276 Required consultation for transmission lines to be located on high-value farmland*, a statute dealing with planning in exclusive farm use zones. Under this statute, the term Transmission Line is defined as"

"a linear utility facility by which a utility provider transfers the utility product in bulk from a point of origin or generation, or between transfer stations, to the point at which the utility product is transferred to distribution lines for delivery to end users."

The applicant provides two exhibits demonstrating that the project is consistent with this definition, Applicant's Exhibit C, Agreement for Design and Construction of Willamette Water Supply Program, and Applicant's Exhibit D, Map of Willamette Water Supply System Transmission Lines and Participant Distribution Systems.

#### Appellant's April 17, 2019 Submittal (Exhibit 12)

Staff identifies four major pieces of information identified the appellant's submittal:

1. Applicant's Ability to File. The appellant cites BDC 50.05.1.C, which says, among other things: "An application subject to a... Type 2... procedure may be filed by:

c. ...Public agencies that own the property or have passed a resolution declaring they intend to exercise their statutory authority to condemn the property."

The appellant cites a Tualatin Valley Water District (TVWD) Resolution 20-18 dated July 18<sup>th</sup>, 2018 declaring public necessity to acquire permanent and temporary construction easements through real property for the subject segment of the regional water line. The appellant argues that this resolution is insufficient, as it does not explicitly state TVWD's intention to exercise their authority to condemn the property, and therefore should not have been able to file the land use application. The appellant cites Section 5 of the resolution, which states that the applicant can attempt to acquire easements through negotiation, but they must "return to the Board to obtain authorization to file a complaint of condemnation. The appellant argues that this demonstrates that the applicant has not declared their intention to exercise their right to condemn the property, and therefore fails to meet the standard described in BDC 50.05.1C stated above.

2. Applicability of CDC 416-1.4. The appellant addresses the use of the terms "distribution" and "transmission". The appellant makes several arguments. First, the appellant states that there is

no distinction made in the specific subsection between the two terms, and that the subsection applies to all utility lines. The appellant continues that the term transmission line is absent from this code section, and notes that neither term is defined in the county code. The appellant concludes the subject subsection is applicable.

Second, the appellant argues that if the distinction between the two terms is relevant, than the proposed water line does in fact fit the definition of a distribution line. The appellant cites a definition of distribution from Webster's Third International Dictionary, used by the Oregon appellate courts (staff notes that this is the same dictionary referenced in Beaverton Development Code). The definition of distribution provided by the appellant is "spreading out or scattering over an area or throughout space" or "the position, placement, or arrangement (as of a mass or members of a group) over an area or through a space or time unit," or a "device, mechanism, or system by which something is distributed (as from a main source)". The appellant argues that in the final definition, the main source is the Willamette River, and the applicant's pipes deliver water to a treatment plant, and then from there to a variety of other locations. Therefore, the appellant argues that this is a distribution system.

Third, the appellant states that the argument by staff and the applicant that this provision does not apply because of superseding language as described in BDC 10.40.1 is inaccurate. The appellant notes that the staff report shows there is no superseding provision in BDC for CDC 416, and as such this argument fails.

3. Negotiation Imbalance. The appellant argues that the negotiating process is imbalanced, as the power of eminent domain prevents the appellants' ability to disengage with the process.
4. Siting conflict and ability to develop. The appellant argues the terms of the easement under negotiation gives WWSP and TVWD complete discretion to approve or deny development through the easement, potentially threatening the appellant's ability to develop his property. The appellant further argues that any future review process for the WWSP to review utility conflicts will be through construction permits, which does not include a public process. The appellant expresses concerns that this could threaten to "screw up" the South Cooper Mountain Community Plan. The appellant also notes that sewer master plan does not show the appellant's property can be served except for directly

#### Applicant's April 24, 2019 Rebuttal (Exhibit 13)

The applicant addresses three points raised by the appellant:

1. Consistency with the Sanitary Sewer Plan for SCM. The applicant argues that the appellant has not demonstrated that there is any conflict between the proposed water line and the appellant's ability to develop his property. The applicant notes that the Beaverton Sewer Master Plan (partially excerpted in applicant's Exhibit A) notes that developer plans are integrated into the model and that future plans must be informed by specific development. In the absence of specific development, the Sewer Master Plan will not show lines serving that property. Therefore, the applicant argues, there are no planned sewer lines for the waterline to conflict with.

The applicant also argues that the Conceptual Future Sanitary Sewer System for SCM (applicant's Exhibit B) is conceptual in nature, and does not show precise locations, and only that the sewer line will generally follow SW Scholls Ferry Road. The applicant states that

feasibility to accommodate the sewer line has already been demonstrated in developments west of the appellant's property.

2. The proposal preventing development of the appellant's property. The applicant has included two conceptual alignments, a north and south alignment, for sewer service to be extended to the appellant's property, originally provided by the appellant. The applicant's analysis notes that the conflict identified in the south alignment can be avoided by modifying the slope of the sewer line. The north alignment avoids the water line entirely, but does require easements from a neighboring property or waiting until that that portion of the property is dedicated as right of way. The applicant argues that without a more specific development plan from the appellant from his property, these concepts provide the clearest evidence that the proposed water line does not preclude the development of the appellant's property.
3. Minimizing disturbance of the appellant's property. The applicant argues that the location of the water line does present the minimum reasonable disturbance of the appellant's property. The applicant notes that there are two types of easements, permanent and temporary. Permanent easements will be required for the water line corridor itself. The applicant notes in their April 17, 2019 memo that this corridor will be entirely within the right of way when the appellant's property is developed. Temporary easements are needed for construction and staging, and will terminate upon completion of construction. The applicant states that the temporary easements have been reduced to the minimum possible. The applicant also notes that the trenchless method for crossing SW Schools Ferry Road does require a wider construction easement at the crossing for the pipe jacking shaft, but is much less impactful than the original approach, which consisted of rerouting SW Scholls Ferry Road onto the appellant's property. The trenchless approach impacts about 1 acre less than the road reroute approach (63,993 square feet vs. 102,481 square feet.) The applicant notes that the smaller size of the temporary easement has with trenchless approach can be seen when comparing the original proposal (appellant's April 17, 2019 memo) and the newest easement offer (applicant's Exhibit E)

#### Appellant's April 24, 2019 Rebuttal (Exhibit 14)

The applicant addresses two point raised by the applicant:

1. Accommodating Development and Burden of Proof. The appellant argues that the applicant's statements of accommodating future development is not backed up by factual information. The appellant further argues that the language of the proposed easement makes the choice of accommodation entirely at the discretion of the applicant. The appellant further argues that the burden of proof to demonstrate the ability to accommodate development is on the applicant, and goes on to argue that without a specific development plan to work from, the applicant cannot meet this burden.
2. Sewer Conflict. The appellant presents evidence that they argue demonstrates conflicts with proposed sanitary and storm lines in the right of way. A second cross section is provided showing the proposed water line south of Scholls Ferry Road, demonstrating how that alignment would eliminate said conflict. The appellant again argues that the proposed easement language creates a power imbalance, and the ability for the appellant to develop his property rests "entirely upon the whim of the applicant".

Applicant's May 1, 2019 Final Written Arguments (Exhibit 15)

The applicant addresses five topics in their final written argument:

1. Authority to Submit the Application. In prior submittals, the appellant challenged the applicant's ability to submit the application, as they have not declared intent to exercise their right of condemnation. The applicant states this argument does not acknowledge language elsewhere in the resolution, and it mischaracterizes the condemnation process. The applicant quotes Section 2 of the resolution (TVWD Resolution 20-18), which reads:

"It is necessary for the preservation of economic well-being, public health, safety and welfare of TVWD and Hillsboro and members of the public served by TVWD and Hillsboro, that TVWD commence the acquisition process for the easement interests in the properties of the Willamette Program Pipeline Section\_5.2 as shown on Exhibits 1-3, attached hereto and incorporated by reference, through exercise of the power of eminent domain."

The applicant argues that this statement alone indicates the intention to exercise condemnation. The applicant further argues that the appellant's focus on Section 5 of the resolution, requiring Board approval to file a complaint, misstates the condemnation process. The applicant argues that the condemnation process begins with a resolution of need, which is in fact the purpose of TVWD Resolution 20-18. The applicant goes on to cite ORS 35.235 (1), which states that a complaint to condemn cannot be filed until the need is expressed in a resolution. The applicant concludes that the TVWD resolution clearly states that it is necessary to acquire easements through eminent domain, therefore it has standing to submit the land use application.

2. Standards Applicable to the Farm Zone. The applicant notes that the property is currently zoned Washington County Interim Zone AF-20, an exclusive farm use zone (EFU). As such, it the applicant argues one must be consider what is not permitted in the AF-20 zone, and what must be permitted in the AF-20 zone. The applicant notes that uses in the EFU zones are governed by ORS statute, specifically ORS 215, and that a "utility facility necessary for public service is allowed by statute". The applicant notes that this use falls in the subsection category ORS 215.213(1), which must be permitted outright subject only to statutory criteria. The applicant cites two LUBA cases, *WKN Chopin LLC v. Umatilla County*, 66 Or LUBA 1 (2012) and *Brentmar v. Jackson County*, 321 Or 481, 496 (1995) supporting this argument. The applicant argues that the city, applying county code, must approve the project if it satisfies the criteria in ORS 215.275, and that all regulations at the local level, including the provisions appealed by the applicant, are not applicable.
3. Application Satisfying CDC 344-4.1 (R)(5) and ORS 215.275. The applicant argues above that the standards for approval are described in ORS 215.275. A portion of that statute is implemented by CDC 344-4.1 (R)(5), which identifies provisions for utility facilities necessary for public service that must be situated in an agricultural district in order for the service to be provided. The applicant refers to previous material submitted demonstrating the analysis conducted to establish that no alternative alignment avoided the EFU zone, and notes that once the need to cross EFU zoned land is established, no additional analysis is needed for minimizing impacts. The applicant notes that the appellant does not challenge the need for the pipeline cross EFU land, only that the alignment impacts his EFU land. The applicant argues that the LUBA case *WKN Chopin LLC v. Umatilla County* establishes that this factor cannot be considered.

4. CDC Section 403-3 and 430-105.5. The applicant argues, based on the analysis of Section 2 above, that the local jurisdiction cannot apply additional regulations on this use in an EFU zone, as it is an outright permitted use pursuant to ORS 215.213(1). However, the applicant continues by noting that the applicant has still demonstrated the project is not subject to or satisfies or the Article 4 regulations in the county code raised by the appellant in his initial filing. This information was provided in the applicant's pre-hearing submittal dated March 26, 2019 (Exhibit 5 of the initial appeal staff report dated April 3, 2019).
5. CDC Section 416-1.4. The applicant states that the bulk of the appellant's argument relates to CDC 416-1.4, which states:

"The location, design, installation and maintenance of all utility lines and facilities shall conform to ORS Ch. 92 and be carried out with minimum, feasible disturbance of soil and site."

The applicant makes two arguments, first that the provision is not applicable, and second, if Planning Commission determines that it is applicable, then the provision has been satisfied by information in the record.

Argument A: CDC Section 416-1.4. Is Not Applicable. The applicant argues that this provision is not applicable for several reasons. First, referring back to the analysis of Section 2 above, the applicant argues that the proposed water line can only be regulated through ORS 215.275, and cannot be subject to additional regulations outside of the statute. The applicant argues that the subject CDC provision must be consistent with state law, as laid out in CDC Section 104-1, which reads in part:

"CDC 104-1 All use or development of land or structures in unincorporated Washington County shall comply with the Washington County Comprehensive Plan, the Washington County Charter, and applicable Regional, State, Federal and Local laws."

The applicant also argues that the Planning Commission can determine the provision does not apply based on distinction between "distribution" and "transmission" line. The applicant first argues that the language throughout Article 4 of CDC addresses servicing development, which is inherent to a distribution system, whereas a transmission system is intended to bypass the development it traverses.

The applicant also notes CDC Section 416-1.4, which refers to "all utilities" includes a reference to ORS 92, which is specific to the subdivision of land and "continuing utility service to structures on the property being subdivided or partitioned", and regulates how the utility lines that directly serve the properties are. The applicant argues that these provisions clearly are intended for distribution lines serving immediately adjacent development, not a transmission line simply traveling through or adjacent to property

The applicant then addresses the definitions of "distribution" and "transmission". First, the applicant addresses the appellant's cited definitions including "spreading out or scattering over an area or throughout space". The applicant notes that the system map shows a single source, the Willamette River, and a small number of destinations. In contrast, the city water systems function as the distribution lines for providing end users with the water. Secondly, the applicant cites CDC Section 106-1.4 which reads:

“Where words or terms are defined by ORS or OAR and are applicable to this Code, those definitions shall apply as defined herein”

The applicant provides the definition for transmission from ORS 215.276, a statute dealing with planning in exclusive farm use zones

“A linear utility facility by which a utility provider transfers the utility product in bulk from a point of origin or generation, or between transfer stations, to the point at which the utility product is transferred to distribution lines for delivery to end users.”

Finally, the applicant notes that in County decisions for other segments of the water line, county staff did not make findings for this provision, which indicates it was deemed not applicable. The applicant argues that the Planning Commission finding that this county provision does apply, contradicting county staff, would be an extreme outcome.

Argument B: CDC Section 416-1.4. Has Been Satisfied. The applicant provides arguments if the Planning Commission finds this provision is applicable. The standard to be met is that the development is “carried out with minimum, feasible disturbance of soil and site.” The applicant makes several points to show this has been satisfied.

First, the applicant notes the corridor is located in an area of future right of way, which cannot be developed by the appellant for any use outside of facilities appropriate for right of way, such as transportation facilities and utilities. The applicant also notes that the waterline is located at the extreme edge of the appellant’s property, maximizing the developable portion of the site.

The applicant also argues that impacted area of the site has been reduce by approximately 40%, as discussed in item 3 of the applicant’s April 24, 2019 rebuttal (see above).

The applicant counters the appellant’s argument to locate the waterline on the south side of SW Scholls Ferry Road by arguing that said alignment is not feasible. The applicant notes that the waterline must cross Scholls Ferry at some point, and crossings are limited. Additionally, the presence of wetlands south of Scholls Ferry and the fact that the suggested alignment by the appellant is outside of the UGB all make propose alignment a superior option.

The applicant counters the appellant’s argument regarding utility conflicts by first noting that there are not solid development plans, so there are no actual conflicts demonstrated. The applicant argues that the conceptual conflict identified by the appellant in his April 24, 2019 rebuttal can be resolved by modifying the slope of the sewer line, or relocating the alignment to the north of the water line. The applicant further notes that west of the undeveloped properties, where specific development plans exist, the seven foot vertical distance between the water line and road bed was sufficient to serve the abutting development.

The applicant addresses the appellant’s argument regarding easement language by noting the negation process outside of a public hearing is the appropriate venue to sort through issues. The applicant continues that totality of the easement language demonstrates that the applicant has no interest in “exercising unfettered discretion” as argued by the appellant by noting easement language that says the applicant’s approval “cannot be unreasonably withheld, delayed, or conditioned”.



## **Staff Analysis**

1. **Applicant's Ability to File the Application.** The appellant has argued that the applicant does not have standing to file the Design Review application subject to this appeal, as it has not declared their intent to "exercise their statutory authority to condemn the property", consistent with BDC 50.05.1.C. The applicant responds by noting Section 2 of the resolution (TVWD Resolution 20-18), which explicitly acknowledges the intent through its power of eminent domain:

"It is necessary for the preservation of economic well-being, public health, safety and welfare of TVWD and Hillsboro and members of the public served by TVWD and Hillsboro, that TVWD commence the acquisition process for the easement interests in the properties of the Willamette Program Pipeline Section\_5.2 as shown on Exhibits 1-3, attached hereto and incorporated by reference, through exercise of the power of eminent domain." (staff emphasis)."

The applicant also argues that the resolution of need referenced above is the first required step in exercising the power of eminent domain. The applicant goes on to cite ORS 35.235 (1), which states that a complaint to condemn cannot be filed until the need is expressed in a resolution.

Staff agrees with the applicant's assertion that the resolution declares their intent to exercise their statutory authority to condemn the property, and had the ability to submit the Design Review application currently under appeal.

**Therefore, staff finds that the applicant had the ability to file the application.**

2. **Imbalance of Negotiations.** The appellant has made the argument in several places that the process of negotiating the terms of the easements is not even, as the WWSP is a public agency who can utilize eminent domain to force a resolution. The appellant argues that this results in their inability to disengage from negotiations, and therefore places the appellant in a disadvantageous position. The applicant has noted in oral and written testimony that easement negotiations are not under the purview of city staff or the Planning Commission, and that the land use process is not the proper venue to hold negotiations.

Staff agrees with the applicant's assertion that the easement negotiations are not within the purview of the city or its decision making bodies. An easement negotiation, regardless of the role eminent domain may play, is a private legal matter between two parties. City staff and the Planning Commission are not and cannot be party to these negotiations. Staff further notes that there are no applicable approval criteria that can influence or nullify the negotiated easement. In the case where private property development is made costlier by the installation of the water line, it is appropriate for the negotiation process to address this impact. It is inappropriate for a limited land use decision to regulate the easement or the negotiating process.

**Therefore, staff finds that the issue of easement procedures is not applicable to the decision making process for this land use action.**

3. **Approval Criteria are Limited to ORS 215.275.** In their May 1, 2019 final written argument, the applicant argues that the provisions of *ORS 215.275 Utility facilities necessary for public service, criteria, rules, mitigating impact of facility*; and rulings of two LUBA cases should limit the

applicability of local regulations on the proposed water line. The appellant cites both *WKN Chopin LLC v. Umatilla County*, 66 Or LUBA 1 (2012) and *Brentmar v. Jackson County*, 321 Or 481, 496 (1995). *Brentmar v. Jackson County* states:

“After our review of the text, context, and legislative history of ORS 215.213(1), we conclude that the legislature intended that the uses delineated in ORS 215.213(1) be uses “as of right,” which may not be subjected to additional local criteria. In conclusion, under ORS 215.213(1) and 215.283(1), a county may not enact or apply legislative criteria of its own that supplement those found in ORS 215.213(1) and 215.283(1)”. (Emphasis by staff)

*WKN Chopin LLC v. Umatilla* makes the same findings, except in situations that require the consideration of siting standards. In those cases, it must be applied concurrently with ORS 215.213 (1). Staff cites the following provisions of ORS 215.275:

“(5) The governing body of the county or its designee shall impose clear and objective conditions on an application for utility facility siting under ORS 215.213 (1)(c)(A) or 215.283 (1)(c)(A) to mitigate and minimize the impacts of the proposed facility, if any, on surrounding lands devoted to farm use in order to prevent a significant change in accepted farm practices or a significant increase in the cost of farm practices on the surrounding farmlands.”

Staff refers to the remaining unaddressed CDC provision cited by appellant, CDC 416-1.4, which says in part:

“the location, design, installation and maintenance of all utility lines and facilities ... shall be carried out with minimum, feasible disturbance of soil and site.”

As this CDC provision addresses utility facility siting standards as described in ORS.275 (5), it can be argued that this provision is not exempted according to *WKN Chopin LLC*. However, ORS.275 (5) states that the conditions set by the governing body must be “clear and objective”. Staff has some question whether the phrase “minimum, feasible disturbance of soil and site” found in CDC 416.1-4 is clear and objective. While LUBA may find that the provision is not clear and objective, and that CDC 416-1.4 does not apply, staff recommends that Planning Commission review other arguments below addressing the applicability of, and consistency with, CDC 416-1.4

**Therefore, staff recommends Planning Commission evaluate subsequent arguments below to determine the applicability of or consistency with CDC 416-1.4.**

4. Applicability of CDC 416-1.4. The appellant has argued that the applicant has not satisfied the terms of CDC 416-1.4, which requires that development be designed with minimum feasible disturbance of the site and soil. In the February 28, 2019 Director’s Decision, the applicant and staff provide analysis as to why this provision is not applicable because it does not regulate transmission lines. First, while staff acknowledges that the terms “distribution” and “transmission” are not defined in Washington County Code or Beaverton Development Code, it is defined in ORS 215.276 as”

“A linear utility facility by which a utility provider transfers the utility product in bulk from a point of origin or generation, or between transfer stations, to the point at which the utility product is transferred to distribution lines for delivery to end users.”

The applicant’s Exhibit D in their memo dated April 17, 2019, shows the system map for the proposed pipeline, and how it will tie in to participant’s distribution systems. It is clear that the proposed 66” water line is providing product in bulk from a point of origin (Willamette River) to a point at which the product is transferred to distribution lines (operated by Hillsboro, Beaverton, and TVWD) for delivery to end users. The distribution line operators, Hillsboro, Beaverton, and TVWD, are not end users, as they then convey the water in smaller distribution lines to serve individual properties throughout their service area.

Subsection 1.1 and 1.2 of CDC 416 specifically use the “distribution line”. Subsection 1.4, the subject provision, refers of ORS Chapter 92, which outlines the process of dividing land and ensuring proper utility service is provided. Given the context of the other subsections of CDC 416, and the specific reference to ORS provisions detailing utility service to specific pieced of property during a land division, staff argues that the subject provision is not applicable, as there is no land division proposed, and no individual services are being added or modified on any properties where Washington County Code is applicable.

**Therefore, staff finds that CDC Section 416-1.4 is not applicable.**

5. Consistency with CDC 416-1.4. If the Planning Commission cannot find that CDC Section 416-1.4 is not applicable, staff provides the below arguments to demonstrate is has been satisfied.

CDC Section 416-1.4 requires that location, design, installation and maintenance of utility lines be carried out with “minimum, feasible disturbance of soil and site”. Staff notes that the water line corridor has been located at the southernmost edge of the appellant’s property. The location, as demonstrated by the analysis in the applicant’s April 17, 2019 memo, is within future right of way, and will accommodate improvements to a widened SW Scholls Ferry Road, and is not developable for private purposes. Additionally, by locating the water line at the southernmost edge of the appellant’s property, the remainder of the appellant’s property remains intact, allowing for the most flexibility when developed. The remaining direct impact to the appellant’s property is the temporary easement(s) required for construction. Staff cites the construction approach analysis provided in the applicant’s April 24, 2019 memo, discussing the impact of trenched and trenchless construction for crossing SW Scholls Ferry Road. The proposed trenchless approach of using a jacking shaft to cross SW Scholls Ferry Road requires an easement 40% smaller than the original trenched approach. By selecting the less impact construction method, the applicant has demonstrated how it is minimizing impacts.

The appellant’s April 24, 2019 memo demonstrates that locating the water line corridor south of SW Scholls Ferry Road would eliminate utility conflicts to his property, and argues, therefore, that the southern alignment would be the minimum feasible disturbance to his property. While staff agrees that this approach would eliminate this potential utility conflict, staff also notes that this comprehensive impacts must be considered, not just the impacts to one specific property owner. Construction of the water line south of SW Scholls Ferry Road would be more impactful for multiple reasons. First, this alignment would require significantly more construction outside of the Urban Growth Boundary. Staff refers to Exhibit 1.2 of the February 28, 2019 Directors Decision,

observing that the Urban Growth Boundary ends at the south side of SW Scholls Ferry Road. Therefore, any construction south of SW Scholls Ferry Road would be outside of the UGB. Staff notes the general purpose of the UGB is to limit urban development in rural areas. Various provisions of state law and county code prohibit and/or discourage development outside of the UGB. Second, a stream corridor is located south of SW Scholls Ferry Road that would be impacted by a southern corridor alignment. Staff cites Applicant's Exhibit H in the Director's Decision dated February 28, 2019. By locating the street crossing in the proposed location, the applicant avoids directly impacting this stream corridor and other ditches.

Finally, the appellant argues that the waterlines horizontal and vertical location will specifically preclude utility connections to his property. The applicant responds by proving two alignments for sanitary sewer lines to server the appellant's property (see applicant's Exhibit C of applicant's memo dated April 24, 2019. One sewer line alignment (Option 2) presents a potential conflict with the proposed water line. According to the applicant's analysis, this conflict can be avoided by utilizing a shallower slope of the sanitary sewer line. The other sanitary sewer line alignment (Option 1) presents no conflicts with proposed water line.

Based on the above analyzed information, staff concludes that the alignment and construction methods proposed by the alignment present the minimum feasible disturbance to the site and soil.

**Therefore, staff finds that CDC Section 416-1.4 has been met.**

## **RECOMMENDATION**

Staff recommends that Planning Commission affirm the Planning Director's decision to approve the Design Review Two for Willamette Water Supply Program, with conditions as stated in the Notice of Decision dated February 28, 2019, thereby denying the appeal (APP2019-0001).