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Clatsop County Board of Commissioners  
Clatsop County  
800 Exchange Street  
Astoria, OR 97103-4641

**Re: Response to the October Oregon LNG Letter**

Dear Board:

This letter addresses issues raised by the attorney for Oregon LNG, the Warrenton project, on October 22, 2007. An August letter from Oregon LNG was addressed in Bradwood Landing's August 14, 2007 submittal. As a direct competitor of Bradwood Landing it is not surprising that Oregon LNG opposes our project and has submitted letters arguing for denial. Oregon LNG has not, however, applied to Clatsop County for any permits related to its project. As a result, it is possible that Oregon LNG is not familiar with much of the underlying authority for Bradwood Landing's requests. We address their October comments below and provide citations to relevant authority.

**1. Consistency with the Northeast Community Plan and the Bradwood Subarea Plan**

Like staff, Oregon LNG seeks to elevate the language small to medium size or small or moderate scale development to approval criteria. This issue is addressed in detail in the response Bradwood Landing filed to the questions from Commissioners Samuelson and Roberts. As the County explains clearly in the Comprehensive Plan section on using the plan, narrative is not approval criteria. As LUBA has held use of a "mandatory" term, such as shall, does not transform advisory language into approval criteria. The project is consistent with the applicable policies, which when the plan is reviewed as a whole, addresses issues such as highway access and proximity to the wildlife refuge.

**2. Dredging**

Bradwood Landing has requested that the AC2 area proposed to be used for the training basin be rezoned to Aquatic Development (AD). A final mitigation plan has been submitted and the Commission can determine that its standards of mitigation are met.



### **3. Dredging Disposal**

Oregon LNG argues that no more than 420,000 cubic yards of dredge material may be deposited on the Bradwood site. This is inconsistent with the language in the CREST plan, the source of the 420,000 cubic yards, providing that the “capacity” numbers in the plan are informational and not regulatory. The “capacity” number represents at most the amount of dredge material to be deposited on the site before the site may be put to a use that will preclude further dredge material disposal.

CREST staff has noted that if dredge material is compacted, more than the capacity number in the CREST plan may be physically accommodated on a site. Property owner Ken Leahy has confirmed that 314,000 cubic yards of dredge material was deposited on the site in 2002. These cubic yards are not reflected in the 420,000 cubic yards of capacity in the CREST table.<sup>1</sup> Therefore, 106,000 cubic yards of the 420,000 cubic yard number remain. Once an additional 106,000 cubic yards is placed on the site, the 420,000 cubic yard number is met.

Bradwood Landing will be compacting the deposited material and requested authorization to place up to 700,000 cubic yards on site. Bradwood Landing will deposit at least 350,000 cubic yards onsite prior to terminal construction. It is Bradwood Landing’s preference to place all the material on site but Bradwood Landing seeks to retain flexibility given the request of some federal agencies that some of the material be disposed of in water. Evidence in the form of the dredge material disposal plan has been submitted establishing that deposit of 700,000 cubic yards will not exceed the carrying capacity of the site. Bradwood Landing has identified numerous options for disposal of maintenance dredging material.

Oregon LNG also claims that the Bradwood Landing project will completely exhaust a Priority One Dredge Material Deposit site. The County amended its code years ago and no longer has Priority One or Priority Two sites. As the Planning Commission found, the Bradwood Landing development does not constitute an incompatible and preemptive use of the site under the applicable code because the dredge material disposal site will be filled to capacity before the terminal is constructed. Bradwood Landing is not a preemptive use of the site and has no duty to evaluate the adequacy of remaining DMD site to accommodate 5 years of expected disposal needs.

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<sup>1</sup> The CREST capacity table is from 2002 and states that the site had not been used for deposit in the previous ten years. Therefore, the 420,000 cubic yards did not reflect the 300,000 cubic yards deposited that year.



#### **4. Replacement of Hunt Creek Bridge**

The Project includes the proposed replacement of Hunt Creek Bridge. Oregon LNG states that “[t]he definition of ‘maintenance and repair’ is limited to ‘routine upkeep of an existing structure or remedial restoration of a damaged structure in current use or operation.’” Oregon LNG neglects to quote the second sentence of the definition which states “maintenance and repair may involve changes in the structure’s location, configuration, orientation, or alignment if these changes are limited to the minimum amount necessary to retain or restore its operation or function or to meet current building, engineering or safety standards.” The Planning Commission has interpreted this language to allow replacement given that location, configuration, orientation and alignment may be changed. This reading is consistent with the treatment of bridges in the Standards document.

S4.210(2) provides that “maintenance and replacement of bridges shall be permitted regardless of the plan designation through which the road or railroad passes, provided:

- (A) The same alignment is maintained; and
- (B) The same width is maintained, except that necessary enlargement to meet current safety and engineering standard may be permitted; and
- (C) The number of travel lanes is not increased.”

Bridge abutments may also be approved. S4.210(3). This is consistent with L3.035(1)(A) allowing maintenance of existing transportation facilities as well as the fact that bridge spans are permitted outright in the AN zone and the abutments may, by this provision, be allowed in the F80 and MI zones.

Bradwood Landing’s work is to restore the function of the bridge of providing necessary access to an industrial site with industrial loads on the bridge. Given the zoning of the site for Marine Industrial use, it is reasonable to interpret the code to allow the bridge to be replaced with a structure capable of bearing industrial loads.

#### **5. Marine Railway**

Bradwood Landing advised staff that it planned to seek a rezone of the AN area to MI to allow realignment of the railroad. Staff advised applicant that given its proximity to the water, staff believed the use could be approved as a marine railway. Applicant submitted an application for the marine railway and also a conditional use permit application for approval as a land



transportation system. No concerns with staff's recommendation were raised at the Planning Commission level and the Planning Commission recommended approval as a marine railway. At the Board level concern has been raised that the use should not be allowed as a marine railway because the rail is not water dependent. The rail will bring construction materials to the site and as evidence in the record establishes serves the deep draft Port of Astoria but conservatively may be approved as a conditional use as a land transportation system if the Board so chooses. A Memorandum of Agreement between ODOT, Portland Western Railroad, Ken Leahy and Bradwood Landing regarding realignment of the road has been placed in the record.

#### **6. Concrete Batch Plants**

The plants will be located in the MI zone as illustrated on the site plan placed in the record. Water dependent uses are allowed outright in the MI zone. Water related uses are conditionally allowed in the MI zone. Approval of the concrete batch plants is appropriate as is other construction related activities such as storage and laydown and permitted as part of the marine industrial use. The concrete batch plants may also be approved as a water related use because it provides a good, concrete, directly to the water dependent terminal for its use during construction. Following construction, the batch plants will be removed.

The plants will be located in the laydown area and with the footprint illustrated on the submitted site plan. Concrete batch plants are 60 feet or less in height and will be located on MI land not subject to a height limitation.

#### **7. Employee Park and Ride and Transportation Impact**

The Planning Commission properly determined that the park and ride was a bus station and allowed under the code. The site plan was submitted in June 2007 and Bradwood Landing has requested that it be reviewed. Our engineer's response to the critique of his traffic report submitted by Oregon LNG has been submitted into the record. The Planning Commission did not attempt to defer questions about the safety of Rulyville Road to a later date. To the contrary, it concluded based on evidence in the record that action such as widening Rulyville Road, installation of a stop sign at the intersection of Taylorville and Rulyville Roads, clearing the existing vegetation coupled with intersection warning speeds setting an advisory speed of 30 mph would result in an adequate and safe transportation access to the site. By specifically identifying necessary improvements, the County is not deferring compliance. Rather, it is deferring the technical implementation measures until they are required.

Further, we have submitted an extensive memorandum on the applicability



of \$6,000 generally and the applicability of the rough proportionately standard to identifying the appropriate improvements to Clifton Road. If the Board determines a variance is needed, it may clearly find that, based on staff's analysis, any development could be subject to the full \$6,000 standards. Because the constraints to improvement of Clifton Road are primarily a result of the character of the property underlying the road and its relationship to environmentally constrained, adjacent lands, a variance is appropriate.

Finally, as explained in our engineer's response, the traffic analysis did analyze site development and construction traffic as a "worst-case" scenario, in addition to the long-term analysis required by the Transportation Planning Rule. That analysis concluded that peak traffic generation for only the 3-year construction period associated with the proposed LNG facility would "significantly affect" existing and planned transportation capacities for US Highway 30/Clifton Road and as such, has identified transportation improvements that will be required before ODOT issues an access permit. These improvements will satisfy the applicable highway performance standards throughout the planning period as required by OAR 660-012-0060. Traffic impacts related to the proposed park and ride at the Taylorville Road interchange were not found to represent a potentially significant impact.

## **8. Electrical Power Line**

LWDUO section 1.035 provides that the definition of any word or phrase not listed in the chapter which is in question when administering the Ordinance shall be defined from one of the following sources. The sources shall be consulted in the order listed.

- (1) Clatsop County Comprehensive Plan
- (2) Any other Clatsop County resolution, Ordinance, codes or regulation
- (3) Any statute or regulation of the State of Oregon (including the Uniform Building Code and LCDC Goals and Guidelines
- (4) Legal definition from case law or law dictionary.

Clatsop County has not defined transmission or distribution line so sources (1) and (2) are not available in this case. Transmission and distribution lines are also undefined in state law, including the LCDC Goals and Guidelines and the 2003 International Building Code, so source (3) is not applicable. Source (4), however, supports the conclusion that the proposed line is a distribution line. While no Oregon case law was found on point, courts in other states have held



that “(e)lectrical transmission lines are those which transfer large quantities of electrical energy in bulk from one place to another but do not divide or apportion it among consumers, while distribution lines are those engaged in only the latter function.” 29 Corpus Juris Secundum Electricity section 1, see *State v. North Itasca Electric Cooperative* 247 Minn 534 (1956) and *Oklahoma Gas and Elec. Co. v. Kay Elec. Co-Op* 519 P2d 905 (1974). The latter function characterizing distribution lines is that distribution lines deliver electrical energy to customers. The proposed line transfers electricity from BPA’s system to one customer, Bradwood Landing. There is no apportionment among multiple customers. The key element of a distribution line is that it delivers power to the customer. Since Clatsop County’s code provides that case law is among the sources to be considered and the sources relied upon the County are not among the sources authorized by its code, the County should determine that the proposed lines are distribution lines.

There is no consensus about how long a transmission line is other than it is generally recognized that transmission lines are large cross-country linear features. Distribution lines are local to individual customers.

Given that the County chose not to specify the voltage when writing the code, voltage is not a valid criterion that the County can use to determine that the new distribution line is otherwise.

The most persuasive determining factor is the position of the new Bradwood distribution line in relation to the other electrical power infrastructure. It is universally accepted that the relative position of the various infrastructure elements is generating station, transmission line, distribution line, customer. The common element of all definitions of a distribution system is that it transports the power to the customer. This is the situation at Bradwood.

The Planning Commission interpretation of the height provision’s inapplicability is correct. The court held in *PGE v. BOLI*, 317 Or at 610, that

“[i]n interpreting a statute, the court’s task is to discern the intent of the legislature. To do that, the court examines both the text and context of the statute. That is the first level of our analysis.”  
(Citations omitted.)

Therefore,



“the text of the statutory provision itself is the starting point for interpretation and is the best evidence of the legislature’s intent.”  
(*Id.* at 610.)

The applicable aids to construction at this level require applying the following rules that bear directly on how to read the text and include:

“the statutory enjoiner ‘not to insert what has been omitted, or to omit what has been inserted.’ ORS 174.010.” *Id.* at 611.

“the rule that words of common usage typically should be given their plain, natural, and ordinary meaning.” *Id.*

“the court considers the context of the statutory provision at issue, which includes other provisions of the same statute and other related statutes.” *Id.*

“‘where there are several provisions or particulars such construction is, if possible, to be adopted as will give effect to all,’ ORS 174.010.” *Id.*

“‘a particular intent shall control a general one that is inconsistent with it,’ ORS 174.020.” *Id.*

“use of a term in one section and not in another section of the same statute indicates a purposeful omission.” *Id.*

“use of the same term throughout a statute indicates that the term has the same meaning throughout the statute.” *Id.*

If the legislature’s intent is clear from the above-described inquiry into text and context, further inquiry is unnecessary. Only if the proper interpretation is not clear from use of the above rules will the court look at legislative history. *Id.*

Here, the rules of construction providing that

- (1) the court considers the context of the statutory provision at issue, which includes other provisions of the same statute and other related statutes;



- (2) a particular intent shall control a general one that is inconsistent with it; and
- (3) where there are several provisions or particulars, such construction is, if possible, to be adopted as will give effect to all

support the conclusion that the power poles are not subject to the building height restriction.

The Standards Document applies to development within the unincorporated areas of Clatsop County. LWDUO 1.040. S3.020 sets forth height limitations for certain nonhabitable and nonstorage structures. The existence of standards for height limitations for certain nonhabitable and nonstorage structures suggests that nonhabitable and nonstorage structures are not intended to be subject to the general building height limitations in the ordinance. In S3.020(1), Clatsop County has said that flagpoles shall not exceed the maximum height allowed in the zone by more than 10 feet. S3.020(2) limits windmills to no higher than 35 feet above the surrounding tree line or the highest structure within 25 feet of the windmill site. If there is no structure within 25 feet of the windmill site, the height is limited to seventy feet.

The standards for communication facilities describe towers greater than 200 feet as allowed uses subject to a Type IIa procedure in the F80 zone. S4.704. Below 100 feet, towers are subject to a Type II procedure in the F80 zone. In the MI zone, the towers are subject to a Type II process if they exceed 80 feet in height.

Given the above considerations, the best interpretation of the code is that adopted by the staff and Planning Commission that power poles are not subject to the building height limitation.

The described interpretation of the code is consistent with County policy of treating the height of towers and other nonhabitable structures separately from building height. As the code does not limit the height of the power poles, there is no maximum height imposed by the code.



**9. Flood Hazard Overlay**

Oregon LNG contends that Bradwood Landing failed to provide more than a conclusory statement that the deposit of dredge material on site will elevate the buildings above the 500 year flood level without supporting analysis. In fact, Bradwood Landing stated that the 500-year flood elevation is 10.6 NGVD or 13.83 NAVD per the FIS (“flood insurance study”) Report Table 3. Final grade elevation at the site varies from 20 to 25 NAVD. Since final elevation following deposit of the dredge material is at least 20 NAVD, it is above the 500-year flood plain level of 13.83 NAVD.

**10. Processing of Consolidated Applications**

Lastly, Oregon LNG contends that the proposed applications must be processed serially.

An application may be approved under a comprehensive plan that has not yet been acknowledged so long as the statewide goals are addressed specifically in the findings. ORS 197.625. Consistency with the statewide goals is addressed in the application and findings and this requirement is met. *NE Medford Neighborhood Coalition v. City of Medford*, 53 Or LUBA 277, *aff'd* 214 Or App 46, request for reconsideration den. 2007 WL 28782629 (2007) finds that under ORS 227.175, applications for a zone change and the development permits underlying the zone change can be processed in the same proceeding consistent with the goal post rule. While ORS 227.175 applies to cities, there is similar language for counties in ORS 215.416. LUBA held “ORS 227.175(2) and ORS 227.178(3)(a) work together to ensure that development applications that require a zone change are judged by the standards and criteria that apply under the new zoning designation, not the standards and criteria that would apply under the zoning designations that existed when the development applications were filed.” *Id.* at 282. Thus, the fixed goal post rule does not bar consideration of Bradwood Landing’s consolidated application.

Very truly yours,

A handwritten signature in cursive script that reads "Michelle Rudd".

Michelle Rudd

MR:ipc