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February 3, 2021

Via Electronic Mail
Christian Boenisch
Yamhill County Counsel

RE: Yamhelas Westsider Trail

Dear Christian:

Please share this letter with your client, the Board of Commissioners. You called Monday to see if my clients would “mediate” about allowing the county to complete the Stag Hollow Trail Bridge. The rationale, you explained, is that county officials wish to avoid repayment obligations arising from contracts they signed and ignored, that require them to repay the substantial public money they spent on the Trail/Bridge when the county had no reasonable expectation that the Trail/Bridge could be lawfully established. The county’s problem is ironic given the county deceit, name calling (to include Ms. Martin “flipping off” John Van Dyke when he was on his own property) and intimidation you, county staff and a majority of the Board personally and unapologetically directed at my clients (and me) for years for the sin of anticipating and bringing this very problem to the county’s attention. My clients decline to “mediate” the further breaking of Oregon’s farm laws that make clear the Trail/Bridge are illegal, or aid county actors in avoiding the natural consequences of their wrongful actions.

The county’s lack of candor predictably led to the predicament the county finds itself in – ODOT quipped in May 2019:

Alternatively/additionally, we could also clarify that the prior versions of RFCOs were not executed or approved because of the lack of qualified staff to forward the project, because Yamhill Co. had not retained its consultant (OBEC), as a result of the LUBA case which the County hid from us for months. We didn’t accept those RFCOs/MPRs because there was no basis for projecting dates

I attach three letters (January 17, 2019, February 7, 2019, February 5, 2019), sent by me years ago articulating the risks of county decisions moving the Trail/Bridge forward despite significant repayment liabilities, which letters have always been consistently ignored and dismissed. These are not the only ones either – there is countless testimony by many people warning the county that it risked the problem you called about today -- if it continued to spend and commit to spend, public money on the Trail/Bridge, given the undeniable possibility that objective was unlawful. Instead of considering that concerned public testimony, key staff and a majority of the Board deployed inappropriate tactics and outright dirty tricks so the Trail/Bridge might be built regardless of the law. The intimidation and marginalizing efforts we’ve been on the receiving end of, have never masked the grossly inappropriate actions of these officials.

I note just a few below and then a timeline, so we are on the same page about why I am certain that there are no surprises here.

Staff put the Trail/Bridge on the Board's January 17, 2019 agenda. I warned the county of the consequence of that hubris in my January 17, 2019 letter (attached):

Thus, the applicant for the trail is in no better position than *any developer* who elects to take a very big risk and to move forward, knowing full well that the project may be appealed and the approval may be lost, where it is appealed and it is lost, which is what happened here. The only difference is there, the risk-taking developer is probably spending a *bank's* private money and here, the County staff applicant is spending *federal, state and local public* money.

I explained:

Further, we understand that County staff is asking the Board of Commissioners to authorize letting even more contracts to oblige the County to spend the 2016 ConnectOregon VI

grant to Yamhill County for the trail for a whopping \$1 million plus, even though the County must know that at this point there is no legal basis for such expenditures:

Yamhill County	Yamhelas Westsider Trail: Bridge Construction	\$1,012,185.71	The project will encompass the planning, design and engineering of three new pedestrian bridges and the construction of a bridge over the Stag Hollow Creek. All proposed bridges will be located along the future Yamhelas Westsider Trail near Yamhill, Oregon. The project area is parallel to OR 47 and this is the first phase of development creating Yamhill County's first multi-modal regional trail.
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If the Board of Commissioners did so, that would seem to expose them to the consequences of spending public money on a project known to be unlawful – whatever those consequences are – but seemingly to include having to repay the money, pay any indemnification or defense of a grantor, being liable to pay the contractors per their agreements with the County, and whatever other liabilities there are.

The Board should not authorize expending any public money on the Yamhelas Trail until and unless it is known that the trail can be lawfully constructed. Our clients, who are the owners and operators of large and small commercial farms – the ones who are adversely affected

You refused to forward my time sensitive letter to the Board, as I asked. Instead, you asserted it was only about the merits of the Trail/Bridge remand, which of course was wrong.

Rather, on January 17, 2019, the Board proceeded to approve the expenditure with no one pointing out the significant financial liabilities outlined in my letter. In fact, the details of the reality of the county's exposure, seemingly was being hidden.

Instead, you called my letter an unlawful "ex parte contact," and had Mr. Sadlo admonish me for sending it, which he did in an unprofessional and inappropriate email:

Christian has asked me to respond to your letter dated January 17, 2019. As you must know by now, I am the attorney in this office handling land use issues related to the trail. Your letter purports to be about "spending money on an illegal project," as you have called it, but it also appears to comment directly on the application that is now before the county on remand. As such, it will be placed in a folder containing pre-remand hearing testimony, and will be delivered to the Board along with other testimony received, well in advance of the remand hearing. We are hoping to schedule the remand hearing for March 7, 2019. You are on the notice list and will receive the same notice everyone else receives

I suppose that you will keep manufacturing bogus legal analysis and asking the county to follow it, as long as your clients keep paying you to do so, but some of your analysis is painfully hard to swallow, and looks like it is calculated to deceive. That's your prerogative, to circulate unsupported theories about what the county can and cannot do with its property. I am simply asking that you follow the rules regarding *ex parte* contacts, and stop encouraging your clients to make *ex parte* contacts. In the future, you and your clients should submit your/their testimony to the Planning Department for inclusion in the remand record and delivery to the Board through established channels.

At the Board of Commissioner's January 17, 2019 meeting, Farmer Bryan Schmidt appeared and testified that the county should not approve the Trail/Bridge contract commitment to OBEC. He was cut off. Confused why that was so, Commissioner Starrett had the following exchange with you:

"Commissioner Starrett: Excuse me. Just as clarification, Christian. My concerns are related to that juxtaposition of these two considerations and is what I was going to make comment about. And I'm wondering how we divorce the two when they are apparently connected.

"Christian Boenisch; Well, as I said on Tuesday, if, for purposes of awarding the contract, there is no connection. They are two separate, uh, two separate processes, they're sort of operating on parallel tracks. But there is no element or aspect of what's being remanded from LUBA that is having a, or would have a direct impact on the award or discussion or consideration of the award by the Board of the engineering services agreement under a separate grant agreement."

Mr. Schmidt tried again and was repeatedly cut off but did make the point that the county was taking a serious risk of having to repay the money. You, Mr. Huffer and Ms. Martin scoffed at his concerns:

"Christian Boenisch: Well, we've already received the grant. The question now is whether or not the county wants to proceed with the contract with OBEC, using grant funds for that purpose.

"Bryan Schmidt: Yeah, so that's my question—what would happen if we can't go forward with this project? We don't know if we can go forward with it or not yet.

"Christian Boenisch: At this point we have no indications that the project's not going forward. We do have another step in the process, but there's nothing prohibiting or limiting the county from proceeding with this step in the process at the moment.

"Bryan Schmidt: That wasn't my question.

"Christian Boenisch: I'm sorry.

"Bryan Schmidt: What if the county cannot go forward? Let's say there's just a .15% chance that it cannot go forward? What if then, then what?

"Christian Boenisch: Again, there, that that is really a separate question as to as to whether or not we can or want to proceed with the grant. If the county wants to proceed with the grant, there's no limitation on its ability to do that. If the commissioners want to go ahead and award this contract to OBEC, there's no

limitation. And whether or not the trail ultimately proceeds, isn't really a factor in that discussion. It could be a factor in terms of what we might have to do with the grant money, and if you want to ask Carrie about that, I don't know that detail, and maybe that inform and answer your question.

"Bryan Schmidt: Yeah, I think we ought to know that. If I do something, I want to know the outcome and what the risks are."

Ms. Martin assured the Board there was little risk of having to payback grant money:

"Carrie Martin: And while there is always the possibility, like Ken [Huffer] mentioned, we have a very specific statement of work that is tied to milestones. As we complete each of those pieces of really the broader agreement and then we receive those reimbursements, we are not defaulting on any of those activities to that point. So, if there is a point at which we cannot go further, that doesn't necessarily mean that we have in some way defaulted on the previous work. So that is, it's more of a step by step process. So, it would be my opinion that it would be unlikely that there would be a request from ODOT to reimburse those funds, because those activities had occurred just as agreed."

Commissioner Starrett was not convinced and moved the county to deny entering into the OBEC contract for the Trail/Bridge, explaining:

"Commissioner Starrett: Mr. Chair, I've long had concerns about the liability that the county would definitely incur should there be stalling of this project or complete cancellation of it. *** So the *two concerns I have is whether or not we're going to incur more liability when we don't know what's going to happen with this trail. It's incurring some challenges.* And we also need to make have a sort of a policy where we say in this county the things that are a priority need to be funded and encourage the state to do that. Taking this kind of money for these particular projects does not encourage the state to fully fund projects like critical needs ***.

"Commissioner Starrett: My motion was for us to delay the authorization of this intent to award of the Yamhelas Westsider Trail Pedestrian Bridge Project OBEC Consulting Engineers engineering services *until such time as we have a clear indication of the challenges that are ahead for this project.*"

And Commissioner Starrett clarified later:

"Commissioner Starrett: On the advice of county counsel, I would like to restate my motion and that would be a motion to deny the authorization of notice of intent to award the Yamhelas Westsider Trail Pedestrian Bridge Project to OBEC Consulting Engineers for engineering services."

Commissioners Kulla and Olsen overruled her and voted instead to approve.

Despite my letter, staff again moved a Trail/Bridge public money spending proposal forward to the Board of Commissioners' February 7, 2019 agenda. I provided another letter to

the Board of Commissioners, dated February 7, 2019, copying you, warning against spending and committing the county to spend public money as staff proposed; the consequences and why there was concern. Again, my letter to the Board was recast by county counsel as something else and it is unclear if counsel allowed it to be seen by the BOC. As an outside observer, it seemed evident you and your office did not want the Board to know the scope of its liabilities if it continued to spend money on the illegal trail. But please do not forget that it was **county officials** who **kept putting on the Board's agenda** that the Board should spend public money on the Trail/Bridge before they had any right to know if that construction was lawful and **before the land use process was concluded**. The public, including me and my grossly affected clients, had the right to object and point out that if the Board approved the expenditures staff was putting in front of them, that the county would have significant liability to include the problems that the county now faces. The county's censorship of views it did not want to hear is stunning.

At that February 7, 2019 Board meeting, many of the farmers who are hardworking county citizens and also my clients, again appeared and attempted to object to the county committing to spend more than a million dollars on the Trail/Bridge before the county had any way to know if land use approval would ever happen. My clients tried to provide my January 19, 2019 letter to the Board and my February 7, 2019 letter and as noted it is unclear whether either of those letters were allowed to go to the Board. Rather, Mr. Sadlo, representing the county, sitting on the dais, and also the "applicant" for the trail, objected to the Board's receipt of those letters, falsely claiming my letters were for something else:

"Todd Sadlo: Mr. Hammer, those letters, I believe it states in that letter that it's to be added to the record in the proceedings on the land use remand, and I believe that's the appropriate way to handle that material. So, that's the way I would like for that to be handled. That has already been delivered, it will be provided to the commissioners in a packet of material that of all the material that we receive pre-hearing, for the remand hearing to be held on March 7th. So that's the way we would like to handle it."

My letters had no such restriction, a fact I believe was not reasonably open to doubt. My February 7, 2019 letter clearly stated in its "RE:" line ":

RE: Connect Oregon Bridge Grant

It further stated:

This letter is to clarify information presented at the Board's Informal Session on February 6, 2019 regarding the interface of the Connect Oregon Grant (Grant) and the land use process regarding the proposed Yamhelas Trail. The Grant was scheduled to be on today's agenda for consideration. The Board pulled it off today's agenda as a result of discussions at the Informal Session, in favor of private discussions between county officials, ODOT and the private contractor who apparently will build and design the bridges – OBEC. It was evident that it was assumed by some, that building the bridges and thus the trail, was a foregone conclusion; that it was just a matter of time and so the Grant should be preserved. We write to clarify that it is an incorrect to presume that the trail will be built.

It is a correct assumption that if the county governing body authorizes spending federal, state and county public money to design and build trail bridges now, at a time when the Board is well aware that it is at least equally possible (and I think more possible) that the trail and its bridges cannot be lawfully established and maintained, then it would appear that the county is entertaining the possibility of knowingly misspending public dollars. I don't believe there can be a reasonable dispute that the Grant money is for trail bridges to support the trail as it was represented in the application. But, the fact is, the Grant application was premature. Our clients pointed this out last year when the last grant was up for approval and in years prior and they were ignored. Given the legal posture of the trail now, however, they should not be ignored.

My January 17, 2019 letter was the same – its “RE:” line was:

RE: Spending Public Money on an Illegal Project /Subsequent Events

And clearly stated:

proposed Yamhelas Trail and who successfully overturned its approval in December. This letter is written to ask the Board of Commissioners to please direct staff to immediately halt spending public money on the Yamhelas Trail, and to not authorize even more expenditures and, instead, to focus on whether the trail can be approved in the first place, after conducting a full and fair hearing applying correct legal standards, as LUBA required.

And the thing it said about the LUBA remand, was:

Finally, Christian, as you also know, on January 11, 2019, I asked about the County's intentions concerning remand proceedings. I have heard nothing from you in response. It would be appreciated if we could have a sense of how the county plans to proceed, so we can prepare. I hope to hear from you. Thank you for your anticipated courtesies.

On February 7, 2019, these citizens tried to testify on the topic of the unlawful grant spending proposal and why it was unlawful. Yet, they were repeatedly cut off and told they could not talk about the contract being an unlawful expenditure of public money because the Trail/Bridges they were for may very well be illegal. They were cut off on the county claim that their words were an unlawful “ex parte contact.” But the words of staff advancing the Trail/Bridge spending proposal before the Board on February 7, 2019 were allowed.

To recap, in my February 7, 2019 letter captioned about the Connect Oregon Bridge Grant on their agenda:

Dear Chair Olson and Members of the County Commission:

This letter is to clarify information presented at the Board's Informal Session on February 6, 2019 regarding the interface of the Connect Oregon Grant (Grant) and the land use process regarding the proposed Yamhelas Trail. The Grant was scheduled to be on today's agenda for consideration. The Board pulled it off today's agenda as a result of discussions at the Informal Session, in favor of private discussions between county officials, ODOT and the private contractor who apparently will build and design the bridges – OBEC. It was evident that it was assumed by some, that building the bridges and thus the trail, was a foregone conclusion; that it was just a matter of time and so the Grant should be preserved. We write to clarify that it is an incorrect to presume that the trail will be built.

Among other things, I explained:

7. Unless the applicant is able to prove that the trail meets all standards, the trail will be denied. This is a tautology. Thus, on behalf of my clients whose livelihoods (which represent a chunk of the county's agriculture economic engine) are significantly harmed by the proposed trail, I ask you to please table the Grant and, if the time expires, to let the Grant go because expending it under the circumstances poses unacceptable risks.
8. There is another reason not to design and build part of the trail before it is approved. Once you spend a lot of federal, state and local public money, the applicant will turn around and argue in the land use process "you spent all this money, now you have to approve the trail or risk having to give the money back or worse." Putting the applicant's thumb on the decisional scales that way is completely inappropriate and undermines the validity and fairness of the entire land use process. You should not participate in such.

Thank you for your consideration.

My clients and I are not the only ones who expressed concerns over the years and were ignored or cut off. Commissioner Starrett has long expressed concern about the county's financial liability to repay public money spend on the Trail/Bridge when it may well never be approvable. In my May 30, 2018 letter, I explained the problem:

The failure to be forthright with grant funders supplying public money to the proposed rail project was an issue that the Chair of the County Board of Commissioners acknowledged to be a significant problem on May 15, 2018:

"Commissioner Starrett: Part of the approval process [inaudible] they were not told that there was no significant opposition to this trail. Just for the record, I

want to go on record as saying that's what they were told as part of the process by which they approved the grants –and yet there has been significant opposition to this trail. That's been one of my biggest concerns is that you talk about transparency and you talk about government process and you did not appraise them of that and I think that shame on us.”³

Further, on May 15, 2018, after a long public hearing on whether the trail was appropriate on its land use [de]merits, a majority of the Board DENIED the trail proposal (Starrett/Olsen). But undaunted, in the following days staff spent hours “ex parte” with Commissioner Olsen to persuade him to change his vote to approve the Trail/Bridge at the next meeting. And their “ex parte” efforts worked. Yet, nothing can unring Commissioner Olsen’s wise words spoken on May 15, 2018:

I’ve heard a couple times that the purpose for bringing this to our attention and in having this public hearing on the amendments to the Transportation System Plan was in order so we’d not; it was precipitated by the potential that if we don’t do this now, that we we will lose the grant money we have gotten to build the bridge.

To me that’s a total ass backwards way of doing things, but that’s ok. That’s just my own opinion.

Based on the ex parte contacts of the staff advocates, at the next meeting, Olsen changed his vote to approve. And the matter was only brought forward at a meeting for which Commissioner Starrett had a long planned vacation away.

But my May 30, 2018 letter is still a part of the public record and it explained the serious problems the county faced, if it persisted:

Grant Representations in Tuesday May 29, 2018 “Informal” Session Packet are Inaccurate

On May 15, 2018, a majority of the Board of Commissioners denied a county staff request to adopt a pro-trail ordinance similar to that which is. Prior to the May 15, 2018 vote denying the above proposed ordinance, County Counsel, Christian Boenisch noted that approval would require two ordinance readings, the first of which would occur on May 31, at a time when Commission Chair Starrett would be out of town and offering to schedule the ordinance readings for a time after she returned. *See Exhibit 4.* Thus, it was well-known to the County that Commission Chair Starrett, who expressed grave concerns about grant misrepresentations and who most vigorously opposed the proposed trail, would be away this week including on May 29 and including on May 31, and returning June 4, 2018. Apparently, that made this week while she was known to be away on a prearranged absence, an attractive time to bring back the trail in a second run.

Accordingly, two days after Chair Starrett left, on May 29, 2018 an “informal session”, occurred regarding funding the trail. On the May 29 agenda for this “informal” session, was a State of Oregon Transportation and Growth Management Program (TGM) application for a \$110,000 state grant to fund the trail’s “master plan”, and another grant application to be considered - even though the trail in its entirety had been denied by a majority of the County’s governing body just 14 days before and even though Commission Chair Starrett strongly opposed the trail on the basis that the County had not been accurately reporting the fact of significant opposition to the trail in grant applications. *See Exhibit 3 (May 29, 2018 Board of Commissioners’ “Informal Packet”).*

At this May 29, 2018 “informal” meeting no change was suggested to the erroneous premise of the grant applications - to support the trail. Instead and noteworthy is the fact that the TGM grant application made the following additional statements in answer to questions on the key “eligibility requirements” on the grant application that are misleading or inaccurate:

- The County answered that the trail is “envisioned to support regional agricultural tourism.” With all due respect, this is wrong: a very large segment of the County’s agricultural base, and the Oregon Farm Bureau, testified that the proposed trail will significant undermine - a long way from “support” - “regional agriculture” that exists along the corridor. Nowhere is this so much as mentioned.
- The County answered that the “master plan” “shall include” the “mitigation strategies identified in the 2018 Farm Impact Findings * * *”. However on May 15, 2018, a majority of the governing body *denied* the adoption of those “farm impact findings” based on the strong opposition of farmers who testified the “Farm Impact Findings were inadequate to mitigate for anything. Since the “Farm Impact Standards” were denied by the governing body, they cannot be promised to be carried forward in a trail “master plan.” This is basic land use law. They also do not mitigate for the need for farmers to cross back and forth across the rail “Corridor” every five minutes during harvest, to the significant safety and

cost problem associated with fires which are from time to time a normal part of farming; it does not deal with the problem of spooked farm animals charging fences. And so forth.

- As an eligibility prerequisite, the grant application requires the “Support of Local Officials.” Specifically, under the heading of “Support of Local Officials,” the grant application stated: “A proposed project must clearly demonstrate that local officials, both the primary applicant and any co-applicants, understand the purpose of the grant application and support the project objectives.”

The County dodges answering this question. Instead of being forthright that there was significant dissent among the Board of Commissioners, the application claims “The Yamhill County Board of Commissioners authorized the submission of this application.” This is not true. The proposal has not been authorized for submission by at least one member of the governing body and the trail that was the basis of the grant application had been denied by a majority of the Board of Commissioners on May 15, 2018. An accurate answer to the grant application would require explaining these facts. Even if a majority of the Board is garnered to support the trail on May 31, it is only a majority of three members of the governing body - with one member – the chair – very much opposed. This is required to be disclosed.

3. Support of Local Officials

A proposed project must clearly demonstrate that local officials, both the primary applicant and any co-applicants, understand the purpose of the grant application and support the project objectives. A letter or resolution of support from the governing body of the applying jurisdiction (e.g. City Council, Board of Commissioners, or Transit Board) must be submitted with the application to meet this requirement. 400 character limit.

The YWT Master Plan is widely supported across Yamhill and Washington Counties. Letters of support from educators, businesses, economic development groups, and Friends of the Yamhelas Westsider Trail are attached to this application. The project is also supported by the cities of Carlton, Yamhill and Gaston. The Yamhill County Board of Commissioners authorized the submission of this application.

In fact, the county has **always** been under **no illusion** that if it continued to spend public money on the Trail/Stag Hollow Trail Bridge, it was gambling. Mr. Huffer acknowledged as much at a February 5, 2019 “informal session”:

Mr. Huffer: “*** That being said and, you know, I’m going to look at Christian [Boenisch, County Counsel], but you know, there’s going to be risk with this and I can’t say there’s, you know, no risk associated with, you know, meeting the deadlines and getting the, you know, I can’t say that.”

The county was gambling with hard earned tax dollars even though the Trail/Bridge county public contracts, federal and state law, then made and still make clear that the county had no right to gamble with that money. The county gambled that:

- (1) the illegal Trail/Bridges would somehow be approved regardless of their illegality;

- (2) the county could avoid acknowledging the very real possibility that the Trail/Bridge was illegal, by spinning, ignoring, and recasting LUBA's five opinions to the contrary and the hundreds of pages of farmer testimony (yes, including papers I wrote) establishing that even wearing the rosier glasses, it was probable that the trail could not be lawfully approved;
- (3) the repayment obligation clearly stated in the contracts the county signed would be overlooked; and
- (4) signed contracts that imposed clear repayment obligations would never be understood or seen or ODOT and OPRD would (or could) just let the county off the hook.

Now that it is clear to any reasonable legal observer that the Trail/Bridge cannot ever be lawfully approved, the county seeks the reward of the right to finish the Stag Hollow Bridge feigning shock that the Board's quite intentional gamble under the leadership of its professional staff, could have any consequence.

You now ask about "mediation" with the most adversely affected farmers, so the county professionals can finish the Stag Hollow Bridge and escape liability. My clients decline. If the county needs repayment money, many of the adjacent landowners will buy the portions of the ROW transecting/adjoining their properties and that would be adequate to solve the county's grant problem. Your arguments attempting to persuade my clients of the merits of letting the county finish the bridge are exactly as I foretold two years ago:

approved at all. Otherwise, the applicant is merely trying to stack the deck with millions in expenditures of public money so to make the claim that, with so much money spent, the Board is obliged to approve the trail. Such a claim will not demonstrate compliance with legal standards

Your arguments are Exhibit A why my clients, so terribly treated and affected, must decline.

My clients and I wish to point out the following timeline so it is clear that there should be no surprise that the county finds itself where it does:

- **October 5, 2015** – County signed an ODOT grant application promising local support to convert the old RR ROW to a public recreational trail. The County never once discussed the matter with the adjoining farmers most adversely affected.
- **November 2017** – In a non-public process, some would say in secret, the county acquired the old RR ROW from UPRR for the purpose of converting it to a public trail, spending federal public money to do so and, so far as I know, never once advised the federal government of the significant land use hurdles, controversy and risk in that objective.
- **May 3, 2018** – Public hearing on the trail at county planning commission. Notice was only published. No individualized notice to affected landowners. Many landowners testified this was the first they'd heard of it and they'd heard via word of mouth only. Planning commission splits evenly on whether to approve or deny. They forward to BOC with no recommendation.
- **May 15, 2018** – Staff rushed the matter to the Board of Commissioners a week later. So, on May 15, the BOC held a hearing. A majority of the county Board **voted to deny the Yamhelas Trail after public hearing.**

- **May ?** In a completely behind-closed-doors process, staff rushed to ex parte Commissioner Olsen to get him to change his vote from denial to approval. They were successful.

After the meeting i met with staff and legal counsel for several hours to go over my vote and once again the reasons for my vote. After our discussions staff made several changes to the amendment and added conditions

And

They rejected it two to one. Commissioners Rick Olson and Mary Starrett cast the opposing votes, defeating Commissioner Stan Primozich’s vote in favor.

However, Olson is now requesting a “reconsideration” of the vote.

County Administrator Laura Tschabold said Olson met with her, County Counsel Christian Boenisch and Deputy Administrator Ken Huffer last week to discuss the amendment, and review possible changes.

- **May 30, 2018** – WLK letter strongly objects to behind-closed-doors process, staff’s unlawful pressure on the dissenting commissioner and undermining his final “no” vote, explaining that trail is unlawful and warning the BOC about misrepresentations being made to grant funders.
- **May 31, 2018** – County staff nonetheless, brings trail back and Olsen now votes in favor after those significant ex parte contacts from staff. Commissioner Starrett, appears by telephone while she is on vacation and votes “no.”
- **June 15, 2018** – LUBA appeal filed in first trail appeal.
- **December 20, 2018** – LUBA pervasively remands first trail approval (LUBA No. 2018-061).
- **December 20, 2018** – Donna Hinze (ODOT) emails Austin Bloom (OBEC) saying ODOT was having problems working with current county trail lead:

From: HINZE Donna L [mailto:Donna.L.HINZE@odot.state.or.us]
Sent: Thursday, December 20, 2018 11:00 AM
To: Austin Bloom
Subject: RE: Yamhelas - Reference heads-Up

Hopefully you also referenced Phase 1.

Yeah, we were supposed to see the RFP before it went out but...We are having problematic issues in working with the current Yamhill lead. Thanks for any updates.

- **January 7, 2019** – County submits Connect Oregon VI grant monthly progress report to ODOT; says county doesn't expect the remand to affect grant timelines:

The County received notification on December 20, 2018 that the Land Use Board of Appeals rendered a decision to remand the County's farm findings study. This decision will require a procedural change in approving the farm findings, and the County is working with the commissioners to establish a timeline for holding a new public hearing. At this time, the County does not expect the remand and subsequent procedural modifications to have any negative impact on the timelines and milestones established in the COVI grant.

- **January 17, 2019** – WLK sends letter to BOC through Christian Boenish re spending public money on illegal trail, detailing:

Thus, the applicant for the trail is in no better position than *any developer* who elects to take a very big risk and to move forward, knowing full well that the project may be appealed and the approval may be lost, where it is appealed and it is lost, which is what happened here. The only difference is there, the risk-taking developer is probably spending a *bank's* private money and here, the County staff applicant is spending *federal, state and local public* money. Accordingly, our clients are disappointed that the County staff seeks the governing body's approval to spend significant amounts of public money on engineering and construction of bridges that serve no purpose other than the now illegal Yamhelas Trail. Moreover, they are surprised and disappointed to find surveyors, being paid by the County, poking around their farms claiming that they are surveying in the illegal trail. I am no expert in public ethics laws or the laws regarding penalties for the expenditure of public money on projects known to be unlawful, but it seems clear that it is the County Board of Commissioners who are the ones on the hook for whatever liabilities there are and they are entitled to be advised of their peril. The proposals to let even more contracts to spend money to engineer or construct parts of the trail is very much inseparably intertwined with the LUBA remand. With all due respect, claims to the contrary are unsupportable.

AND

Clearly, one of the problems with the County knowing that it was accepting and spending public money before learning whether the trail could legally be established at all (both as a matter of ownership and land use), is that if the County cannot legally establish the trail as, with all due respect seems evident to me and our clients, then at a minimum the County will be required to repay such public funds on contract terms like those found in Federal/State Contract No 29585, which granted the County money for, among other things, “preliminary engineering * * * of abandoned railroad corridor” which contract can be terminated:

- e. If federal or state laws, regulations or guidelines are modified or interpreted in such a way that either the work under this Agreement is prohibited or if State is prohibited from paying for such work from the planned funding source.

As it now sits, state law *has* been interpreted that the work under the agreement may not proceed because it is inconsistent with the County’s own code and state law. That means under the

AND

Moreover, that same Federal/State grant quoted above also makes clear that the County is liable to repay monies it spends on an unlawful project and to indemnify and defend the grantors for misappropriations and other liabilities:

AND

Further, we understand that County staff is asking the Board of Commissioners to authorize letting even more contracts to oblige the County to spend the 2016 ConnectOregon VI

grant to Yamhill County for the trail for a whopping \$1 million plus, even though the County must know that at this point there is no legal basis for such expenditures:

Yamhill County	Yamhelas Westsider Trail: Bridge Construction	\$1,012,185.71	The project will encompass the planning, design and engineering of three new pedestrian bridges and the construction of a bridge over the Stag Hollow Creek. All proposed bridges will be located along the future Yamhelas Westsider Trail near Yamhill, Oregon. The project area is parallel to OR 47 and this is the first phase of development creating Yamhill County's first multi-modal regional trail.
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If the Board of Commissioners did so, that would seem to expose them to the consequences of spending public money on a project known to be unlawful – whatever those consequences are – but seemingly to include having to repay the money, pay any indemnification or defense of a grantor, being liable to pay the contractors per their agreements with the County, and whatever other liabilities there are.

The Board should not authorize expending any public money on the Yamehelas Trail until and unless it is known that the trail can be lawfully constructed. Our clients, who are the owners and operators of large and small commercial farms – the ones who are adversely affected

AND

Our clients ask that the Board of Commissioners please tell staff to stop spending public money on the trail and to please not let even more contracts to engineer and construct multi-million dollar bridges or other trail facilities for the Yamhelas Trail before the proper public hearings have been conducted and before the Board knows whether the project can lawfully be approved at all. Otherwise, the applicant is merely trying to stack the deck with millions in expenditures of public money so to make the claim that, with so much money spent, the Board is obliged to approve the trail. Such a claim will not demonstrate compliance with legal standards but will put, and is probably designed to put, the Board in a tough spot in at least the land use process, risking the creation of unlawful bias in favor of the trail even where it is likely legally doomed. Respectfully, at this point, such expenditures simply have to stop and no new ones should be authorized.

- **January 22, 2019** – At Mr. Boenish’s direction, in a wholly unprofessional, gratuitous and nasty email, Mr. Sadlo dismisses WLK’s concerns about county financial exposure, responds to WLK letter re public monies by accusing WLK of “manufacturing bogus” legal analysis,” and of “circulat[ing] unsupported theories”, and encouraging farmers –his messaging being I am incompetent and the farmers are unable to think or be concerned for themselves. I believe the county well-knew this to be wrong.
- **February 5, 2019** – WLK sends letter to BOC through Christian Boenish detailing that county should not spend public money on Trail/Trail Bridge unless it knows those facilities can lawfully be built. Mr. Boenish did not timely forward to Board when they were considering spending public money on the trail that the letter objected to. Rather, he wrongly claimed the letter’s significance was limited to the county land use action on a remand the county scheduled for more than a month later.
- **February 7, 2019** – WLK sends another letter to BOC detailing county should not spend public money on Trail/Trail Bridge unless it knows the trail can be built. County counsel Sadlo inappropriately recast that letter as something entirely different and insisted it sit with the remand papers coming up for hearing March 7, 2019. It is unclear whether the BOC received it on Feb 7 as a result.
- February 14, 2019 – ODOT assures farmer Chris Mattson that the county is aware that it will be required to repay ODOT grant funds if the trail turns out to be illegal but county keeps spending public money anyway:

Hi Chris:

Thank you for your email and for sharing your concerns with us about the Yamhelas Trail project. We have been in close communication with Yamhill County about the grant, and have been monitoring the land use actions and the LUBA decision. I understand the LUBA decision requires the county to use a quasi-jurisdictional land use decision. It is Yamhill County's responsibility to fully comply with all applicable policies, regulations, rules and statutes. The Connect Oregon funding agreement requires the county to meet all public agency conditions of project approval prior to seeking reimbursement of construction costs for the project. The agreement does contain provisions that would require the county to repay any Connect Oregon funds reimbursed should they not complete the project or should they not continue to operate the project once completed as per the agreement.

Again, thank you for sharing your thoughts with us.

Katie

- **February 21, 2019** – Farmer Bryan Schmidt had the following email exchange with ODOT

The Connect Oregon funding agreement requires the county to meet all public agency conditions of project approval prior to seeking reimbursement of construction costs for the project. The agreement does also contain provisions that would require the county to repay any Connect Oregon funds reimbursed should they not complete the project or should they not continue to operate the project once completed as per the agreement.

Again, thank you for sharing your thoughts with us.

Katie

Thank you Katie, yes this is what we have been told by Ms. Wright a few years ago, and the county lawyers and Ken Friday know this all too well and seem to be using it to setup the BOC into a pressured decision by pushing to spend this money prematurely. The county staff is anything but impartial, and that is our issue here. Anything that you can do is more responsible than taking their word for it. For example two years ago I met with Todd Sadlo, Christian Boenisch, Ken Friday, and the administrator Laura, with a lawyer from Farm Bureau and had invited someone from DLCD. When the county found out the DLCD staff person was coming they threatened to cancel the meeting, so we told DLCD sorry but not to come. When we finally had the meeting Todd Sadlo yelled in the lawyers and my faces "This is only hypothetically a trail, we have not plans to use this property as this time." However they had already accepted a few of your connect Oregon grants.

You see, we are dealing with shenanigans. I reported this meeting to the BOC and I wrote it all out in a letter published in the local (News Register) paper at that time. PLEASE HELP US!

Mr. Schmidt further explained (Feb 13, 2019):

County is attempting to spend a 1.2 million ConnectOregon VI grant on "design and construction" of bridges on a project that has been stopped by LUBA. This is the most expensive part of the project and it does not make sense to build the most expensive component before the project has land-use approval. The county now knows that trail approval has been removed and that the project is illegal. The applicant for this project is the county counsel, and the applicant should not be allowed to pressure the BOC to do the most expensive part before so he can say after the land use hearings: 'you have to give land use approval for the bike path because you have committed so much public money to design it. If you don't then we will say that you spent the public money illegally.'

I do not want the BOC pressured this way nor public money spent so haphazardly. What can you do to order the bike-path applicant to hold off spending until land-use approval is finalized?

- **February 22, 2019** – WLK sends email to Katie Theil (ODOT) requesting grant funding info for trail, informs her of LUBA remand, expresses concern to ODOT about grant funding when trail likely can't be approved.
- **February 28, 2019** – Katie Theil (ODOT) sends letter to Carrie Martin warning about county obligation to pay back grant funds if bridge turns can't be completed according to agreement.

I'd like to reiterate provisions of your agreement that we have discussed by phone as the Yamhill County Board considers awarding the consultant contract:

- Exhibit B. VII. requires the recipient to pay back all of the grant funds if the project is not completed according to the agreement.
- Exhibit B. XIV.a.i. requires that you meet all public agency conditions of approval prior to the reimbursement of any construction costs.

County obviously accepted that risk, pressing forward.

- **March 11, 2019** – County “Request for Change Order” to ODOT:

1. Describe the change requested.

Yamhill County would like to request changes be made to the original Yamhelas Westsider Trail: Bridge Construction project Key Milestone due dates. The changes are as follows:

1. Scoping and Planning - *none*
2. Right of Way and Land Acquisition – **11/11/2017**
3. Permits – **06/01/2019**
4. Final Plans/Bidding Engineering Documents – **09/01/2019**
5. Construction Contract Award – **10/15/2019**
6. Project Completion – **05/19/2020**

- **March 12, 2019** – County BOC meeting was scheduled for March 14, 2019, to award more ODOT grant money to the Trail/Bridge. WLK sends email to BOC re county entering into contract to build Trail/Bridge, detailing county should not spend public money unless it knows the trail can lawfully be built, otherwise the county will have repayment obligations:

Subject: RE: Connect VI Grant Yamhelas Trail -Consideration of approval of a contract for services between Yamhill County and OBEC

above matter. In the above referenced agenda item, you are being asked to bind the county to a contract to construct one pedestrian bridge and design, engineer, and obtain permitting for a total of three bridges – bridges that are the most expensive part of the proposed Yamhelas Trail. You must deny this wholly unlawful end run attempt that truly makes a mockery of the land use process. The land upon which the bridges are proposed is zoned EFU. The proposed trail and its bridges are not allowed uses of EFU zoned land without a conditional use permit. There is no conditional use permit and, with all due respect, one cannot be lawfully granted in light of the proposed trail’s impact on farm uses as outlined by the Oregon Supreme Court in *Stop the Dump*. The county may not lawfully commit the county to construct and permit such bridges when they lack even a scintilla of required land use approval. The bridges will themselves cause significant impacts on farm practices and will add significant costs to

- **March 13, 2019** – Mr. Boenisch sends email to WLK telling her to “immediately cease communication” with BOC and telling her clients to stop contacting the BOC about the trail and apparently its grant funding. This is another example of officials controlling the flow of public inquiry and censoring those who spoke against the county continuing to

spend public money on the Bridge/Trail when it had no way to know that it could be lawfully constructed. Staff and other trail advocates wanted one thing and one thing only and had the means to and did control everything in order to achieve what they wanted.

- **March 14, 2019** – Unsurprisingly, the BOC approved the contract commitment with OBEC for Trail/Bridge design. Yet the county staff scheduled the LUBA remand hearing for later - two weeks later – but forbade timely public discussion about the county committing to fund and construct the Trail/Bridge, claiming the public’s concerns were “ex parte” but trail public money spending and spending commitments advocating was not. County controlled everything to achieve the Trail/Bridge objective.
- **March 15, 2019** – Farmers appeal that March 14, 2019 approval of the county commitment contract to OBEC to LUBA explaining committing public money to the trail that has to be repaid, prejudices trail approval and commits the county to construct the Trail/Bridge.
- **March 18, 2019** – County submits Connect Oregon VI grant monthly progress report to ODOT; says again it doesn’t expect the remand to affect grant timelines:

During the month of February 2019 Yamhill County staff continued to work with the Yamhill County Board of Commissioners (BOC) to negotiate the pricing and terms of the pending contract with OBEC Consulting Engineers, Inc. The BOC requested modifications to the order of design and engineering activities, so allow an earlier construction start date for the Stag Hollow Creek Bridge. OBEC and ODOT project managers agreed these were acceptable alterations to the existing Timeline, and did not require a Request for Change Order.

Yamhill County has scheduled a public hearing for Thursday, March 7, 2019 for in response to the Land Use Board of Appeal procedural remand that was received in December 2018.

At this time, the County does not expect the remand and subsequent procedural modifications to have any negative impact on the timelines and milestones established in the COVI grant.

- **March 21, 2019** – WLK sends letter to BOC (through planning as Mr. Boenish demanded) with the farmers’ final rebuttal on regarding the Trail/Bridge’s insurmountable land use problems expressed by LUBA in its remand.
- **March 28, 2019** – BOC approves trail on remand from LUBA.
- **March 28, 2019** – Carrie Martin emails ODOT saying BOC approved trail on remand from LUBA; will hold Trail/Bridge project kick off meeting the next day.

This morning, the Yamhill County Board of Commissioners voted 2-to-1 to approve the authority of Yamhill County to build a multi-modal trail in the 2.8-mile section of former railroad corridor between the Cities of Carlton and Yamhill. As you know, this was the required action in response to the LUBA remand issued in December 2018.

The County has already executed an agreement with OBEC Consulting Engineers, and we will hold our project kick-off meeting tomorrow.

Thank you,

Carrie

- **April 3, 2019** - County moves to dismiss LUBA appeal of OBEC contract award, asserting that it commits the county to nothing:

16 The attorneys for the petitioners have deliberately mischaracterized the
17 contract that they have appealed. They claim that the contract “commits the county
18 to design three Yamhelas Trail pedestrian bridges and for the contractee to ‘let’ the
19 ‘Stag Hollow Construction Bid,’” (emphasis added) **knowing that claim to be false**
20 **and legally impossible.** Presumably, petitioners mean for the word “let” in their

AND

16 in a file and possibly used in the future, if the trail proposal is pursued again. **The**
17 **decision to approve the contract does not commit the county to construct or improve**
18 **anything, and has no land use impacts whatsoever.** The contract is clear on its face
19 that it does not authorize construction of anything **or include funds** to build anything.

- **April 9, 2019** – County submits monthly progress report to ODOT:

On March 29 the YWT project team held a kick-off meeting with OBEC Consulting Engineers, Inc. The County is proceeding with installing semi-permanent lot line markers along the corridor, as well as scheduling brush clearing around Stag Hollow Creek and the two other tributaries. OBEC has scheduled a full site survey during the month of April, with wetland delineation and high-water marking April 15-19, and geotechnical drilling April 25-26.

- **April 11, 2019** – LUBA appeal filed in second trail appeal.
- **April 17, 2019** – Andrew Blair (ODOT Transportation Project Manager) emails Carrie Martin that county’s plan to mow the ROW is not in compliance with federal regulations:

I have been informed by our Region 2 Environmental Coordinator that the County's plan to clear (mow/cut) the corridor is not in compliance with federal regulations unless the corridor is cleared by APHIS who will be working under ODOT's permit, to ensure areas to be cleared do not harbor nesting birds. Please consider liaising with APHIS to do the needful, if you haven't already, as omitting federal regulations could further delay your project, and could make it subject to fines by ODF&W, et al.

I believe you have already been made aware of the need to do this by others?

It is my understanding that your current plan to clear the corridor is not meeting the standard.

- **April 18, 2019** – Andrew Blair (ODOT Transportation Project Manager) emails Mac Lynde (ODOT Deputy Highway Division Administrator) that Connect Oregon VI grantors and Yamhill county are putting everyone at risk:

CO-VI and Yamhill County are putting everyone at risk by the manner in which they have chosen to administer this contract, assuming completion of construction of the Stag Hollow Bridge and design to PS&E of the two (2) other ped. bridges, by April 2020. The County and CO-VI need to heed Donna Hinze's good advice – which seems to be falling on deaf ears. However, we have been telling them what they don't want to hear; this is a federalized project, that's why it's in the STIP. They will start to understand more as we get more involved with OBEC and the environmental permitting, but Carrie Martin isn't really helping much. The county will eventually get it, but multiple points of pressure may need to be applied, to ensure they do.

- **April 18, 2019** – Mac Lynde emails Katie Theil and other ODOT staff “we will never do one of these again this way” (referencing the trail project):

There has been some confusion about what we are doing to support the delivery of this project. Let me first say, that we will never do one of these again this way.

- **May 8, 2019** – County submits monthly progress report to ODOT with conflicting statements there is “no other pending litigation” against the Trail, but there is a LUBA appeal:

On Friday, April 19, County Counsel was granted summary judgment in the case filed by Chris Mattson. There is no other pending litigation against Yamhill County's trail project. Pursuant to the LUBA case, Yamhill County submitted all records from the public hearings, as well as additional oral and written testimony, to the Petitioner. The County expects the record to be officially settled in May, which will then begin LUBA's 77-day deliberation period.

- **May 8, 2019** – ODOT notes county still gets ODOT Grant Contract “milestone” dates wrong in latest progress report; voices concern about clearing in the corridor because of bird concerns under the Federal Migratory Bird Treaty Act (MBTA) permit; ODOT notes it appears that county is “**continuing to be evasive**” or does not understand the required rules:

Seems like another reason to get the MOU in place. I think we should send a notice to Ken Huffer – if we believe they are in violation of federal requirements, as per our agreement. It would appear that Carrie Martin is in fact continuing to be evasive, and not listening to our ENV-RECs advice, or she just doesn't understand it well enough to make it a priority.

- **May 29, 2019** – County requests change order for bridge construction key milestones and due dates from ODOT; stag hollow bridge prioritized to allow for construction ASAP; inaccurately saying that LUBA's decision was nothing more than about "procedural discrepancies" which the county claims were "fully addressed" during remand proceedings and trail approved by BOC on March 28, 2019.

Provide justification for the change. As project readiness is a key component to the Project, any delays to the Project will be scrutinized carefully. If this request results in a delay, explain why this Project should still be considered viable as opposed to canceling it or imposing sanctions identified under "ODOT Obligations" of your *ConnectOregon* agreement.

This project was initially delayed due to the time it took to complete the ROW acquisition. This was due, in large part, to the appraisal process and negotiations for the final sale price of the corridor. Yamhill County and Union Pacific Railroad ultimately agreed on a sale price of \$1.4 million, with the remaining market value variance addressed in a tax-deductible receipt.

In March 2018, Yamhill County presented its Farm Findings Study for adoption into the Transportation System Plan (TSP) and Board of Commissioner approval. In April 2018, an appeal was filed with the Oregon Land Use Board of Appeals (LUBA). The County anticipated a 77-day turn-around time for the decision by LUBA, however the time that was taken exchanging documents with the petitioners was much longer than expected. As a result, the official LUBA record did not close until September 2018, and LUBA did not render its decision (a remand) until December 11, 2018.

LUBA's remand was issued on the basis of procedural discrepancies, which were fully addressed during a public hearing process held on March 7, 2019. The Yamhill County Board of Commissioners voted to approve the conditional land use permit on March 28, 2019.

During the time between the ROW acquisition in November 2017 and the approval of the conditional land use permit by the Board of Commissioners in March 2019, Yamhill County worked with ODOT staff to maintain progress with required environmental clearances. Additionally, the County has worked closely with OBEC to ensure the most efficient and timely execution of their design, engineering, and construction management contract.

- **May 29, 2019** – Carrie Martin emails ODOT saying Carlton has concern that trail poses fire hazard:

The County has several pressing trail-related issues in segments of the corridor that are not currently under the *ConnectOregon VI* project scope. Most notably, is the concern the City of Carlton has with the segment of the ROW that passes through the downtown area, and which they feel poses a fire hazard.

- **June 10, 2019** – Katie Theil emails WLK saying the county is committed to constructing one bridge under grant terms; if they don't build the bridge, the county will have to return the grant money.

- **July 19, 2019** – Carrie Martin emails planner Stephanie Armstrong that ODOT requires verification that the Trail/Bridge has met all land use conditions/went through the land use process/complied with all applicable permit conditions; Ms. Armstrong emails that no other land use applications are needed to build bridge:

From: Stephanie Armstrong <armstrongs@co.yamhill.or.us>

Sent: Friday, July 19, 2019 1:27 PM

To: Austin Bloom <ABloom@obec.com>

Cc: Carrie Martin <martinc@co.yamhill.or.us>; Ken Friday <fridayk@co.yamhill.or.us>; Todd Sadlo <sadlot@co.yamhill.or.us>

Subject: RE: YWT - LOMA for FEMA Floodplain Compliance

Hi Donna and Austin: **With a LOMA approved through FEMA to correct the floodplain map, no other land use applications are needed.**

Please let me know if you need any further information.

Thanks.

Stephanie

- **October 11, 2019** – LUBA pervasively remands second trail approval (LUBA No. 2019-047).

November 5, 2019 – County gets a “Programmatic Categorical Exclusion” from otherwise required NEPA, Clean Water Act and other environmentally important federal reviews. But, a cursory look would reveal that the YWT does not qualify for a Programmatic Categorical Exclusion (“PCE”). Rather, the express terms of federal law, and ODOT’s “Agreement” with the FHWA, are clear that PCEs are unlawful for controversial projects like the YWT. 23 CFR 771.117(b). Controversy over land use impacts are among the significant environmental impacts for which PCEs are improper. 23 CFR 771.117(a). Further, where a project is inconsistent with state and local land use law (as a state appellate authority has now twice ruled is the case for the YWT), no exemption may be granted. 23 CFR 771(b)(4). Even where a proposal is merely “anticipated” to be controversial, ODOT’s agreement with FHWA requires it to at least confer before just granting the PCE:

xiii. Is controversial. In cases when controversy is anticipated, ODOT will discuss the potential for controversy with FHWA to determine if the project can be processed under this Agreement.

When ODOT certified the YWT for FHWA funding (November 4, 2019), the YWT had, less than one-month before (October 11, 2020), suffered its second litigation blow in a pervasive appellate remand holding the YWT failed to comply with state and local farm impacts laws (Oregon Land Use Board of Appeals or LUBA). Disappointingly, ODOT was aware of this and granted the PCE anyway. **And with the improperly gained federal money in hand, the county immediately let YWT construction contracts without notifying the public it was doing so, and began illegal YWT construction, violating LUBA’s orders and well-known Oregon land use laws.** The construction funded by the improper PCE is so illegal that in a highly unusual step, on April 10, 2020, LUBA issued a litigation stay prohibiting any more Trail/Bridge construction until it ruled otherwise.

The county got exempted from federal water quality requirements in the PCE by claiming the Stag Hollow Bridge is not a traffic bearing facility:

Water Quality	Water quality treatment is not triggered by this off-roadway multi-use trail project bridge. The bridge is not a traffic bearing facility.
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Yet, the county 2020 decision approving the trail says:

posed by the trail to surrounding lands, and by surrounding lands to the trail, the county has designed and **partially built a bridge across Stag Hollow Creek, just south of the Bus Barn, to hold all legal loads, including a 60,000 pound fire truck.** For reasons explained in the following findings, such a bridge is not needed for the kind of brush fire anticipated in or near the corridor.

6.2.5 The Board finds that the bridge being constructed across Stag Hollow Creek is designed and being constructed to allow access, in an emergency, by emergency vehicles including police cars; **police four-wheel off-road vehicles (currently available and maintained by the Sheriff's Office); all ambulances; a 60,000 pound 'residential and commercial building-grade' fire truck and trucks commonly owned by fire districts to transport water and firefighting crews to battle brush fires.** Two additional culverts are necessary within the trail corridor. It is a feasible,

And the county tried to get out of a LUBA stay saying the bridge was not for the Trail but for a fire road:

all manner of fire suppression vehicle. **The bridge was designed and is being built to hold the heaviest of fire engines,** and is suitable for conveyance of county

maintenance vehicles and all manner of fire engine and other emergency vehicle.

Following receipt of the Letter of Map Amendment from FEMA in **September, 2019, county staff determined that no additional land use approvals were necessary, under state law or county ordinances, to construct the bridge for use only for county fire control and maintenance access.**

- **November 20, 2019** – County advertises Call for Bids for Yamhelas Westsider Trail (Phase 2) Project. Despite promising LUBA that before any construction started the Trail/Bridge would first have to receive proper land use permissions, no public notice or hearing of land use approval, happened.
- **January 16, 2020** – County awards contract to Farline. The county gave no notice to anyone.
- **Circa March 2, 2020** – Construction of Stag Hollow Bridge begins.

- **March 12, 2020** – The farmers see it and file LUBA appeals for bridge construction decision and construction started with no land use permission whatsoever. (LUBA No. 2020-032/033).
- **March 27, 2020** – Applicant initiates remand on Trail, despite nasty county findings in the county’s 2019 decision attempting to approve the trail, that no bridges will be built “prior to obtaining land use permission.”;

10.16 Attachment 9 to the opponents’ March 14 submittal is an e-mail from the attorney for the organized opposition, falsely claiming that the county has proposed to sign a contract for pedestrian bridge construction within the corridor segment under consideration in this proceeding, prior to obtaining land use authority. It is clear that she did not read the contract (also included in Attachment 9), which is for design services, and construction oversight if and/or when the county has land use authority allowing it to construct one of three bridges that we have asked the chosen contractor to design. There is no construction authorization or funding under the contract, and it is not a land use decision under state statutes or under the “significant impact” test. Local governments and private parties routinely enter into contracts with vendors for design services. There is no law—land use law or otherwise—that prohibits a government or private party from entering into an agreement for design services and for possible future construction oversight services, prior to obtaining such services. In this case, the county owns the corridor, and has the right to allow its consultants to enter the corridor to gather information for possible future bridge construction. The county has not proposed to build any bridges prior to obtaining the land use approval requested in this proceeding.

And

Representation to LUBA (County’s motion to dismiss, LUBA No. 2019-038/040):
 anything. As in both of those cases, the construction of the bridges in this case is “contingent on subsequent land use approvals and would have, at most, a potential effect on future land uses.” Id. at 322, quoting McKenzie River Guides Assoc. at

- **April 3, 2020** – County submits proposed code amendments that would permit trail without farm impacts analysis to DLCD.
- **July 9, 2020** – Planning Commission unanimously votes not to adopt the code changes until all appeals related to the Trail are completed and Trail is demonstrated to be lawful.
- **April 9, 2020** – Motion for Stay filed in bridge construction contract appeal.
- **April 23, 2020** – County opposes the stay claiming the Trail Bridge is an access road and the county can do whatever it wants:

anything—the county is trying to finish the creation of, and use for county access, not public access, an access bridge and road, neither of which required land use permits or even building permit to build. Exhibits 5, 7, and 8 strongly support a

- **April 10, 2020** – LUBA grants interim stay on bridge construction.
- **April 16, 2020** – WLK sends letter to BOC re scheduling remand on Trail for April 30, 2020.
- **April 23, 2020** – WLK requests audit of ODOT and county for the “programmatic categorical exclusion” from federal environmental laws. (Letter attached.)
- **April 24, 2020** –LUBA issues a permanent stay stopping Trail Bridge construction and observing that the county had not been forthright in its federal “programmatic exclusion” to get NEPA review exclusion:

⁴ We also note that in the Approval’s “Land Use” section, the Approval states that the board of county commissioners approved a conditional use permit for the trail in March, 2019. Response to Motion for Stay, Exhibit 7, page 1. In the “Public Outreach” section, the Approval states: “Yamhill County LUBA oral arguments (2019-047) – 8/20/2019.” Response to Motion for Stay, Exhibit 7, page 3. However, the Approval does not reference LUBA’s subsequent remand of that March 2019 decision on October 11, 2019 in *Van Dyke II*.

After a land use decision is remanded, it is no longer effective. *NWDA v. City of Portland*, 58 Or LUBA 533, 541-42, *aff’d*, 229 Or App 504, 213 P3d 590 (2009); *Western States v. Multnomah County*, 37 Or LUBA 835, 842-43 (2000).

- **April 30, 2020** – WLK sends letter to BOC re remand, explaining:

Local Budget Law Consequences

Either as a personal county maintenance facility and fire road, or as the YWT Bridge, the county’s construction of the YWT Stag Hollow Bridge and its accesses, seem at a minimum to violate local budget law. The construction of the YWT Stag Hollow Bridge was well- known to be unlawful at the time the expenditures for its illegal construction were authorized. LUBA made that abundantly clear. LUBA pointed out in its order approving the stay in *Van Dyke IV*, LUBA’s October 11, 2019 decision invalidated any county approval for YWT Stag Hollow construction. It is not plausible that the approving commissioners were unaware that the YWT Stag Hollow Bridge construction they approved was wholly illegal as a matter of state and local law.

This creates personal liability for those commissioners who gave that authorization to spend public money unlawfully. ORS 294.100(2).

Moreover, if on the other hand, the county now truly intends to do something completely different with the YWT Bridge than authorized in the federal and state grants that paid for the YWT Stag Hollow Bridge and accesses, then that too is an unlawful expenditure triggering not only local budget law penalties, but also likely state and federal penalties.

It is worth the commissioners thinking twice before proceeding with this program.

To all appearances, the scaffolding for the YWT project is deceit and misrepresentation. And again, if that is the only way it can move forward, then it lacks legitimate merit under the applicable legal standards and should be denied.

AND

Bias

Having committed the county to spend more than \$1mm of state and federal grant money for the YWT, committed some unknown large number of county taxpayer dollars, and actually authorized the construction of the trail knowing after LUBA twice advised that it was unlawful to do so, it seems plain that a majority of the commissioners are incapable of considering evidence and argument presented and denying the YWT.

The fact that the county started YWT construction first, after it promised that it would only begin construction if and after land use approval had been given; then did the exact opposite and, that, when caught tried to call YWT construction something else in order to try to save the YWT, demonstrates bias.

Commissioner Olsen's view that approving illegal YWT construction in January 2020, as being necessary to meet county "requirements and our deadlines," also demonstrates bias to approve the trail to meet those "requirements and deadlines".

Initiating the LUBA remand only after getting caught illegally constructing the YWT Stag Hollow Bridge, demonstrates bias.

The county's legal papers filed in *Van Dyke IV* are so rude, over the top and accuse the farmers of lying about the serious adverse farm impacts of the proposed trail, (only to be proven wrong of course), that county has demonstrated that it is incapable of taking the farmers concerns seriously. Rather, the county pleadings demonstrate the county is at a most basic level, biased against any farmer suggestion the trail does not meet farm impact standards. It is impossible to believe that the same county that filed those rude, disparaging legal papers against farmers to try to get away with illegal trail construction, is capable of fully and fairly consider the Farmers' evidence and argument against the trail.

- **April 30, 2020** – Virtual public hearing held; decision made to continue hearing to May 14, 2020 when WLK unavailable.
- **April 30, 2020** – WLK sends letter to BOC asking to postpone hearing until June 30, 2020.
- **May 5, 2020** – WLK sends letter to BOC asking to reconsider motion to have hearing on May 14, 2020.

This requests that you make a motion to reconsider your motion from April 30, 2020 to have the hearing on the above matter on May 14, 2020 and then to set the hearing over to at least May 21, 2020 and preferably later. Your authority to do so is clearly specified in your code:

5.02 A motion to reconsider any item may be made only by a commissioner who voted with the majority on the question or a commissioner who was absent for the vote. Such a motion can be made only at the same meeting that the original motion was adopted, or at the next formal session.

than 2 years in this matter. I cannot attend a hearing on May 14, 2020 because I am giving presentations for the American Bar Association on that day. Moreover, the applicant submitted voluminous materials after hours the evening of April 29, 2020, including a traffic study and we have only today been able to hire a traffic engineer to review it. A week is inadequate time for a comprehensive review of and report responding to, the applicant's 29-page traffic report. Further, the applicant submitted 69 pages of new findings the evening of April 29, 2020. These must be reviewed and require both evidentiary and legal analysis and response. Providing that by end of day on May 13, 2020 to provide on May 14, 2020 is inadequate time and prejudices the Farmers rights to a full and fair chance to present their case. The county is not hurt at all by the requested delay, but the Farmers are hurt by a refusal. We are ware of no reason to refuse our request other than spite and we ask that you please make the requested motion. Thank you.

This is sent via Ken Friday and Christian Boenish. The BOC ostensibly never got it, since on May 7, they professed to asking me an hearing nothing about whether I could attend a May 14 hearing..

- **May 7, 2020** – Issue of whether BOC should move public hearing date from May 14 discussed at BOC meeting. Commissioner Kulla said he had not heard from WLK about that date. No one not specifically invited was allowed to testify or address the Board at the meeting due to BOC imposed pandemic restrictions. General public like WLK or farmers not invited. Counsel Boenish was at the meeting, however. WLK attempted to address this issue during the open comment period by emailing county attorney Mr. Boenisch and asking him to provide the commissioners with a copy of her May 5, 2020 letter. Mr. Boenisch refused. WLK asked him to summarize her comments to BOC. Mr. Boenisch refused.

Christian,

This requests you (1) advise the governing body of the attached letter, to clarify their misperception it does not exist and (2) read it to them. This is time sensitive. Wendie

The BOC sets the hearing for May 14.

- **May 7, 2020** – WLK sends letter to Attorney General Rosenblum to report violations of public meetings law committed by the county, and requests that she investigate such violations, which include:

Arbitrarily Establishing Unlawful Hearing “Rules”

Features of the “hearing” the Commissioners set for May 14, 2020:

1. Only one “designated” representative of the public opposed to their application may attend.
2. No other opponent may be heard.
3. They were aware the designated “opponent” “spokesperson”¹ is unable to attend on May 14, 2020 due to teaching an ABA State and Local Government Section Webinar that day.
4. They are aware that date is inadequate time for the public to prepare and present an evidentiary and legal response to the county’s voluminous April 29, 2020 after-hours submittals.
5. They refuse to change the date or time.
6. There is no legitimate reason not to extend the hearing date to enable public participation.
7. Today one commissioner opined he thought a good reason to have the hearing on May 14, 2020 was so as not to improve the opponents’ litigation position.

May 7, 2020 Board of Commissioners “Meeting”

On May 7, 2020, the Board of Commissioners conducted their weekly “Formal Session.” The agenda is attached. Two days before this meeting, I submitted a time sensitive request to the Commissioners asking that they reconsider the decision to set the hearing on their application to May 14, 2020 and reset it for at least one-week to May 21, 2020 when I could attend or preferably later to a date when the Commissioners would allow the public to participate. There is no harm to anyone to grant such an extension.

Per county meeting rules, a request to reconsider that decision had to be made on May 7, 2020.

At the May 7, 2020 “Formal Session,” the Commissioners first heard a lengthy presentation over the telephone from a person they wanted to hear from. Staff presentations in person were also allowed throughout the meeting.

After hearing the telephonic testimony of their authorized speaker, the Commissioners turned to the “Public Comment” portion of the agenda. Persons whom the county does not invite

to speak, may only address the Commissioners in written communications, that must come through staff. I provided my letter as instructed. My letter was not included in the Commissioners agenda or meeting materials. It was obvious that the Commissioners had not received my request for reconsideration and were unaware that anyone had requested reconsideration. The Commissioners made statements along the lines that they did not understand that they could change the hearing date or why opponents cared. I emailed the county attorney during the designated public comment segment of the agenda and asked him to read my letter to the Commissioners, underscoring that it was important and time sensitive that he do so.

He refused. He refused to advise the Commissioners even of the substance of my request.

It is clear to me that the county is using COVID-19 as a sword to violate the public meetings law. They will continue to do so unless stopped. We would like your help. Thank you.

- **May 14, 2020** – WLK associate attorney attends hearing on May 14. Is blown off, hearing reset to May 21.
- **May 20, 2020** – WLK sends letter to BOC re May 21, 2020 remand hearing.
- **May 22, 2020** – County files response brief in LUBA No. 2020-032/033; argues in September 2019, county staff determined no additional land use approvals were necessary to build bridge for fire control and property access/maintenance; no public trail use of bridge; serves only the county

September, 2019, county staff determined that no additional land use approvals were necessary, under state law or county ordinances, to construct the bridge for use only for county fire control and maintenance access.

Approval of the bridge construction was an administrative decision, and no part of it purported to approve a use of the bridge for public trail purposes. No land use laws prevent the construction and use of a bridge for lawful uses. Access for maintenance and fire control are uses allowed outright in the county's EFU zones.

federal laws). The county, as owner of EFU property, has the same rights to access its property for maintenance and fire control—allowed outright uses—as every other owner of EFU property.

The answer then is that the county intends to employ the bridge for use as a trail if it ever obtains and maintains permission to do so, and intends to employ the bridge right now to access its own property for maintenance and fire control purposes within a floodplain. County staff was reasonable to conclude, in September, 2019, that as long as the county prevented public use of the bridge—until permission to use it for that purpose was obtained—it could nevertheless be constructed and used for county fire control and maintenance access.

design review. A bridge used for maintenance and fire control access, on land owned by the county and serving only the county, does not require land use permit authority bridge, designed for all legal loads, to be used, at least temporarily if not permanently, as a bridge for county maintenance and fire control access only. Certainly, the county hopes to salvage a useful piece of infrastructure, to use in the interim for its own needed access, in the hope that public trail use will eventually be

No land use approval was required, in this case, for the county to build a bridge and to restrict use of that bridge to allowed uses in the zone pending possible land use approval for public trail uses. The county has articulated a public policy in and of itself, a “land use,” it is a bridge. The use the county proposes to make of the bridge—access for maintenance and fire control, are legitimate public purposes.

- **June 11, 2020** – County approves trail yet again.
- **June 12, 2020** – LUBA appeal filed for latest BOC trail approval.
- **June 15, 2020** - WLK files for attorney fees against county for its game playing on stay and bridge construction appeal. That motion is still under consideration at LUBA. Farmers may still recover some of their attorney fees against county if LUBA agrees that county positions are ones that “no reasonable lawyer” would have taken.
- **December 30, 2020** – LUBA pervasively remands trail in its fifth adverse trail order (LUBA No. 2020-066/067).
- **January 28, 2021** – I am advised that in a 4-hour proceeding that I was not a part of and did not watch, that the county admitted that it always understood that if it did not build the Trail/Bridge, that it would have to pay back all the taxpayers money it spent on the gamble. Apparently, the spin of the actors who got the county to this moment is that the county is now committed and has to finish the Trail/Bridge. But that is wrong. The record demonstrates instead that key staff and a majority of the BOC for years knowingly, intentionally, and purposefully took a gamble by repeatedly continuing to pursue spending public money on this project that it 1000% had to know may not ever be allowed to be lawfully established. The record establishes that these actors hoped to get their way by pursuing a campaign of intimidation, censorship, and deceit, using their substantial power to prevent the public from weighing in against the significant peril of the gamble.

Accordingly, the place the county finds itself in, is one the county worked hard to get to; always being a distinct possibility of the course charted. High level staff and a majority of the Board affirmatively accepted the possibility that their gamble would not succeed, and public money would have to be repaid. Now, the gamble ends with responsible government officials exercising long-overdue and ethical discretion acknowledging that it is evident that there are no set of circumstances in which the trail in the old ROW can comply with land use rules; putting a stop to the bleeding.

Please understand that our clients are in no position to waive those important land use rules that protect their legitimate interests under state and federal law. The county and perhaps

the directly involved government actors who orchestrated the past gamesmanship will experience whatever consequences follow the described malfeasance, but can mitigate by (1) putting the Stag Hollow Bridge on a lowboy destined for some other place where it is allowed (perhaps an access or viewing platform in the wildlife refuge that is starved for a public access, or in a park), (2) sell parts of the trail to abutting landowners, the Belts, and others, (3) learn from this terrible experience, (4) decide in the future to listen to citizens and never again rely upon the tactics deployed here, and (5) follow required rules and processes before promising federal and state funders county Christmas Trees. An apology is also in order.

Very truly yours,

A handwritten signature in black ink, appearing to read "Wendie L. Kellington". The signature is fluid and cursive, with a prominent loop at the end.

Wendie L. Kellington

WLK:wlk

CC: Clients