

1 as potentially being eligible to be placed on such a list, but it is not currently on any such list.
2 Therefore the farmhouse is just an old structure, and one not in salvageable condition as will be
3 discussed below. The status of the farmhouse does not involve a single approval criteria in this case,
4 therefore its existence or status or classification is not relevant to this case.

5 The issue of the historic nature of the farmhouse came about because of assertions made by
6 opponent of alleged facts discovered in the ODOT file on the development of the Chemawa
7 Roundabout. That material is similarly not relevant, as it relates to the Roundabout and not this
8 application.

9 The letter of August 5, 2014 from the State Historic Preservation Office (SHPO) to ODOT
10 was done for the sole purpose of determining if the roundabout project at Chemawa Road would
11 potentially have any adverse impacts on surrounding properties. It was not done for any land use
12 purpose, nor in conjunction with any review of the farmhouse for placement of it on the historic
13 registry. In fact this letter simply states that the farmhouse may be eligible for listing on the National
14 Historic registry. Effectively, this letter has no relevancy to this land use application, and provides
15 no evidence that any approval criteria is not satisfied here.

16 The materials provided to SHPO on the Section 106 Documentation Form indicate that the
17 farmhouse is not in its original condition. The form notes that in the 1920's the rear veranda was
18 enclosed. There was an addition to the south end of the house with a hip roof at some unknown time
19 in the 1970's. A partial enclosure of the front porch occurred in 1980. Some of the windows have
20 been replaced with vinyl windows. In essence the farmhouse is significantly different now than when
21 it was originally constructed. All of these factors mean the historic significance of the farmhouse is
22 significantly lessened.

23 **B. House is Not is Salvageable Condition in Any Event**

24 The Herber farmhouse is not in salvageable condition for preservation, even if it were
25 considered to be a historic structure. A careful and detail inspection of the Herber farmhouse was
26 conducted by Multi/Tech Engineering, who found the house to be in extremely poor condition, and

1 not structurally sound enough to preserve or to attempt to move. Multi/Tech confirmed the SHPO
2 report that the majority of the Herber farmhouse sits on a “primitive foundation of uncut stone.” The
3 lack of a solid foundation has allowed sagging in the support walls, particularly the first floor. The
4 house is currently inhabited by caretakers of the property and their family. There is significant
5 evidence of dry rot and termite damage in the joists and supporting structure of the farmhouse.

6 The conclusion of Multi/Tech Engineering is that the Herber farmhouse is not physically or
7 economically able to be preserved or rehabilitated, or structurally sound enough to be moved to some
8 other location. A copy of the Multi/Tech Engineering report, together with photographs of the
9 farmhouse are attached hereto.

10 **C. Herber Family Do Not Consent to any Attempt to Register the Farmhouse.**

11 It is the position of the Herber family that they will not consent to any application to have the
12 farmhouse registered on the list of historic structures. This is based on the information developed by
13 Multi/Tech Engineering in its evaluation of that structure. While consideration was originally given
14 to donating the structure on the condition that it be moved to a more suitable site, that consideration
15 seems no longer relevant given the engineering opinion that the structure can not be safely moved to
16 a different location.

17 For a site to be identified as historic, the City has to apply the Historic Landmark Overlay
18 (HLO) Zone to the site. The Herber property does not carry the HLO designation, therefore the
19 provisions relating to the historic potential of the property remain not relevant to this application.

20 The process for placing a site on the HLO is found at KDC Section 2.127.04A, and requires
21 an entity with standing to initiate the process. The property owner, as an “interested party” also has
22 standing to make this kind of application. Those with standing to bring such an application include
23 the City Council, the City Planning Commission, or an interested party. For purposes of this code
24 section, given the text and context of the HLO, an interested party would be a property owner, or one
25 that is a member of some other board or commission with jurisdiction over historic structures, such
26 as a representative of SHPO.

1 Not just any member of the public can initiate consideration for the application of the HLO
2 to a piece of property. The applicant has to be an “interested” party. Interest in the technical sense
3 means an interest in the property. A legal interest. Ownership is a legal interest. One that has leases
4 or is buying a property has an equitable interest. A lienholder has such a right. A representative of
5 SHPO would fall into this category, again due to that agency’s jurisdictional interest in historic
6 preservation. Someone off the street does not qualify as being “interested.” Neighbors, or even area
7 residents do not qualify as being “interested.”

8 The scope of applicant’s for the HLO designation by necessity has to be limited to an entity
9 or person that has a specific interest in the subject property. If there were not such a limitation, then
10 anyone could make an application with the City for the HLO designation of any other property, if they
11 own it or not. Neighbors could use this application process as a tool to intimidate and fight neighbors
12 as is want to happen when residents get opposed to one another. Effectively, this application process
13 could create a battle ground for warring neighbors, and inundate the City with ridiculous applications
14 that by mandates in the code would have to be dealt with. The concept limiting the application
15 process to certain entities and interested parties eliminates this potential, and restricts applications to
16 those that come from legitimate interested parties or entities.

17 No entity has applied for the Herber property to have the HLO designation applied to it. Not
18 the City Council. Not the Planning Commission. Not SHPO or any other governmental agency.
19 Given that the Herber family does not consent to or make application for the HLO designation means
20 that the entire HLO issue is moot.

21 **2. Development Conditions Attached**

22 As was pointed out in the hearing, the Herber family are not developers and in all likelihood
23 will not be the developers of the subject property. The project will no doubt be marketed to a local
24 developer to actually construct the project. It is anticipated that the engineering and design work
25 completed by Multi/Tech and presented as part of this case will be used by the ultimate developer in
26 building the development.

1 In order to assure the public and the City that the finished product is in compliance with and
2 substantially similar to project represented in this hearing process, Multi/Tech has developed a series
3 of development standards that match the presented design. Compliance with these development
4 standards can be made a condition of approval to this application to assure that the end product will
5 be constructed in accordance with the design and renderings present in this process.

6 The Special Development Conditions drafted by Multi/Tech are attached hereto, and are
7 recommended to be adopted as conditions of approval.

8 **3. Rebuttal to Specific Issues Raised by Opponents at the Hearing**

9 Although many citizens testified during the course of the remand hearing, there were
10 opposition themes that were repeated. Two issues (historic structure and assurances) have already
11 been addressed above. Rather than address each persons testimony, this Memo will address the
12 common issues raised in no particular order.

13 **A. Herber Land Donation Proposal.**

14 The Herber family has offered to donate a parcel of land to the City. This land is the lower
15 portion of the property that abuts the wetland. The offer is made in order to enhance the City's
16 wetland inventory, and to add stormwater storage area. The area is not economically buildable,
17 therefore it adds little to the proposed project except open space. The open space can be put to better
18 public use if it is in the hands of the City. The offer is a logical and legitimate part of this
19 development, and is not done as a bribe to the City as was characterized. It is often the case that when
20 a property is reviewed for a master development, that certain lands are dedicated to the public, and
21 this is no different. To imply a motive for this proposed donation is anything less than honorable is
22 ridiculous.

23 **B. Traffic.**

24 The only testimony in this Record regarding traffic from a professional comes from the City's
25 planning and public works staff. While many neighbors feel that traffic is already bad; that the new
26 roundabout will make traffic worse; and that this project will overwhelm the traffic in the area; none

1 of those folks have any credentials in planning or traffic management or planning. This case is truly
2 one where the professional expert evidence is un-refuted that the streets can handle the traffic that will
3 be generated from this development. The Herber family have submitted traffic analysis by two
4 different registered professional traffic engineers. Both of these experts have determined that the
5 volume of traffic to be generated here will not significantly impact the local transportation system.
6 This standard means the Transportation Planning Rule (TPR), which is the controlling criteria, has
7 been complied with. Compliance with the TPR means that the applicant has complied with the
8 approval criteria relating to transportation.

9 In addition, staff pointed out at the hearing that the local streets in this area have significant
10 excess capacity as measured by the City's metrics.

11 That many folks do not like the roundabout under construction is evident, however ODOT and
12 City Traffic Engineers have studied the local traffic patterns and volume, and the result is the
13 construction of the roundabout, which in their opinion will enhance the capacity and flow of traffic
14 in the area. Where a layman's opinion conflicts with that of several expert qualified engineers, a
15 reasonable decision maker will in every case follow the opinion of the expert and not the layman.

16 **C. Impact on Schools.**

17 There will be little impact on the local school system from this development. It must be
18 remembered that there is currently a subdivision already approved for the site, which if built would
19 provide homes for families. Those families will have school age children. The number of living units
20 is more with this proposal than with the subdivision, but the kinds of living units proposed here will
21 not all be filled with families, like a single family subdivision would be. Many of the units will be
22 occupied by singles, or young marrieds without children or with children too young for school.

23 The School District has stated that its estimate of the number of school age children can be
24 accommodated within the existing capacity at Kennedy Elementary and Claggett Creek Middle
25 School. While there is determined to be a lack of capacity for students at McNary High School, that
26 issue is one for the School District to address, not the City. Remember that a single family

1 subdivision could be built now under current regulations and approvals, and some high school age
2 kids would reside in those single family homes. The lack of capacity would still exist even under the
3 existing conditions, so that issue is not relevant to this development. There is no question that the
4 School District would not turn away a high school kid living in this development when they went to
5 enroll.

6 Finally, there is no element of the approval criteria that is not satisfied by the evidence
7 presented with regard to the estimated number of students (recall that the estimates came from the
8 School District, not the Herber family).

9 **D. The Site Should Become a Park.**

10 A universal theme of the neighbors is to leave the Herber property in its natural state as a park
11 or open space. In the first hearing proceedings, much discussion was held on this topic, including the
12 City acquiring the site to make it an official City Park, or to enlarge the adjoining park. Nearly two
13 years have passed since that proposal was made and absolutely nothing has been done by the
14 neighbors or the City to initiate acquisition of the site, or to raise the funds to actually purchase the
15 property from the Herber family.

16 It simply is not realistic for the City to pay for this site for a park. The cost alone is
17 prohibitive, and there is no money in any budget, or in any grant funding to pay for the acquisition
18 of this site.

19 The Herber family owns and controls the site and its future. Had the City the desire and the
20 funding to make this land a park it would have already occurred over the last 24 months.

21 Finally, whether the Herber land is desired for a park by the neighbors is not relevant to this
22 proceeding as it does not relate to any specific approval criteria. This kind of quasi-judicial land use
23 has to be decided on the criteria, not the unrealistic desires of a few neighbors.

24 **E. There Are Enough Multi-Family Units There Already.**

25 Many neighbors expressed a desire to limit the number of multi-family projects to be allowed
26 in this area. Cited were several multi-family projects in the general area. However, the City planning

1 program is based on inventories and availabilities, not the desires of area residents, no matter how
2 well meaning they are. The City has an adopted Housing Need Analysis (HNA) that was
3 acknowledged by DLCD in a public process. The HNA has identified a need in the City for 362
4 multi-family living unit in order to accommodate the growing population over the next 20 years. The
5 Herber proposal will fill nearly one-third of that need. There still is a significant need in the City for
6 more multi-family, but this project goes a long ways to begin to fill the City's need for more housing.

7 In addition, the professional planners have identified that filling the need in a more central part
8 of the City makes much more sense than putting multi-family projects at the periphery of the City.
9 The proximity to shopping and transportation is much more available in the interior of the City, and
10 much easier to provide City services this population than if the units were on the outskirts where there
11 is no transportation and no ability to walk to shopping. These public needs, identified by the
12 professionals outweigh the wants and desires of a few neighbors who don't like, and don't want
13 anything to change.

14 **F. Property Values Will Drop.**

15 Several area residents made the argument that property values will drop when the Herber
16 project is completed. No empirical data was presented, and none of the speakers presented any
17 credentials for expertise in property valuation.

18 The Herber family submits that these neighbors are simply wrong. This project will not
19 adversely impact property values. In fact, it may be that the establishment of this beautiful new
20 project could have a positive affect on surrounding valuations. While it is recognized that many
21 people like the "cow pasture" look of the property now, as many, if not more folks find the current
22 condition of the property to be unpleasant. Those would much prefer to live in an area where a new
23 beautiful and well designed project existed.

24 This issue is moot in any event. Oregon land use case law is clear that the rise or fall of
25 property values is not a relevant consideration in a quasi-judicial land use decision. An applicant has
26 to satisfy the approval criteria, and only the approval criteria. There is no approval criteria in this case

1 that mandates no project may impact property values.

2 **G. There Will Be an Increase in Crime.**

3 A few speakers argued that the Herber development will result in an increase in crime. No
4 data was presented to support this argument. No justification or rationale was given for why a brand
5 new up-scale project like is proposed here would increase crime.

6 The fact of the matter is there is no data or logical justification for such an argument. There
7 is no more potential for increase crime emanating from this project than from any a single family
8 project. The newer the project the more expensive will be rents, which will attract a higher quality
9 of the renter, one not prototypically a criminal.

10 It is understood the neighbors do not like or want a change. But, argument made out of fear
11 have no place in the land use process. There is no evidence of a potential for higher crime rate than
12 any other kind of development. Finally, as will most of these fear based arguments, they do not relate
13 to an approval criteria and therefore are not relevant to this decision in any event.

14 **H. Potential for Increased Risk of Flooding.**

15 The issue of a potential risk for flooding was raised. This is a moot point as all the proposed
16 development on the Herber property is on the upper tax lot out of the floodplain. The lower tax lot,
17 that is under consideration for donation to the City, which is adjacent to the floodplain, is not a part
18 of this application. No changes or construction is proposed or at issue here on that lower tax lot.

19 There is nothing about the development on the upper portion of the Herber property that will
20 have any impact on the flow of water in Claggett Creek. This is simply a non-issue.

21 **4. Conclusion**

22 No relevant evidence has been submitted that properly addresses the approval criteria in this
23 case that would warrant any decision other than an approval of this application. The Herber family
24 has worked hard, and spent considerable funds in redesigning the project to meet the original concerns
25 of the City.

26 The project is a good one for the City. The redesign addressed all the Concerns raised by the

1 prior Council. Herber consultants have worked closely with staff to modify the project in such a way
2 as to gain their favor. As modified, and as conditioned by the assurances proposed by Multi/Tech,
3 the City is assured of a project that meets all the approval criteria, and will be constructed in the
4 manner presented in this process.

5 On behalf of the Herber family, I urge the City to approve this application with the suggested
6 conditions.

7 DATED this 1st day of August, 2016, at Salem, Marion County, Oregon.

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Wallace W. Lien

Wallace W. Lien, OSB No. 793011
of Wallace W. Lien, P.C.
Attorney for Herber Family

**ENGINEERING REVIEW OF
HERBER FARMHOUSE**

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Attached under separate cover

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PAGE *11 - Applicant's Open Record Memorandum*

WALLACE W. LIEN

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1 staff.

2 **Special Condition No. 11:** A minimum 36" berm and block wall (brick or decorative block) shall
3 be provided above sidewalk grade.

4 **Special Condition No. 12:** A minimum 54" berm and block wall (brick or decorative block) shall
5 be provided above parking lot grade.

6 **Special Condition No. 13:** Green Stormwater Infrastructure shall be provided. Stormwater quantity
7 shall be done to not adversely impact Claggett Creek Basin or flooding.

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