



**NEHALEM CITY COUNCIL
SPECIAL MEETING
MONDAY, SEPTEMBER 26, 2022 - 6:00 p.m.**

This meeting will be held in-person at City Hall and through Zoom video conference.

Please use the following phone number or Zoom weblink to access the meeting remotely:

Join by phone: Call (253) 215-8782 and enter Meeting ID: 811 9700 1190

Join online: <https://us02web.zoom.us/j/81197001190>

**CALL TO ORDER
PLEDGE OF ALLEGIANCE
ROLL CALL**

UNFINISHED BUSINESS:

1. **PUBLIC HEARING: ORDINANCE 2022-02:** An Ordinance Declaring a Six-Month Moratorium on New Connections to the City Water System in Those Areas North/Northeast of Bob's Creek from North Fork Road, and East of the Intersection of North Fork Road and McDonald Road Due to Lack of Water System Adequacy; And Declaring an Emergency

ADJOURNMENT - Next Regular Council Meeting: October 10, 2022

The meeting location is accessible to persons with disabilities. If you need accommodations to access this meeting, please contact City Hall at least 48 hours prior to the meeting.

September 21, 2022

VIA EMAIL (mthompson@nehalem.gov)

Nehalem City Council
c/o Melissa Thompson-Kiefer, City Manager
Nehalem City Hall
35900 8th St, Nehalem, OR 97131

Dear Council:

At its last hearing, the City Council heard testimony from a number of developers, their representatives, and individuals seeking to halt or otherwise be excluded from the moratorium boundaries for a number of reasons. This memorandum responds to a number of those concerns. As this report will be published before the Stakeholder's meeting on September 21st, it will not include any results from that meeting, but City staff will be prepared to update the Council on that progress at the upcoming hearing.

Introduction

One of the primary objections raised by the opponents is that the City is using this moratorium as a way to avoid its obligation to plan for or provide water to future development when these lands are within its adopted service area. The City can only provide a new water connection when doing so will not result in drawing down the pressure of connections within the existing system to below 20 pounds per square inch (psi) and where fire flow of 1,000 gallons per minute can be provided. OAR 333-061-0025; 2019 Oregon Fire Code Appendix B. NCC 51.10(F)(1). The testimony and evidence from the City Engineer Mr. Kyle Ayers, including numerous hydrant tests, shows that the water distribution system serving this area is inadequate. To address this shortfall, the City has identified installing a pressure sustaining valve (PSV). Although this PSV will be able to balance demand amongst existing customers to avoid current negative pressure conditions, the PSV cannot accommodate any additional demand placed on the system by new users.

As numerous opponents were successful at convincing LUBA, the only way that the City can deny a new water connection request necessary to address the existing utility inadequacy is by declaring a moratorium. Now, these same opponents are before the City Council asking the City to hold off in doing the very thing that they were telling LUBA must be done. Notwithstanding

this change in position, as a domestic service provider, the City has an obligation to ensure the health and safety for its existing customers consistent with state law and rules and it cannot allow connections when doing so would further exacerbate these existing shortcomings.

Additional water system improvements, beyond the PSV, are necessary in order to serve future development. Proceeding with construction of these improvements requires (1) identification of the preferred program to fix the shortfall and its associated cost; (2) allocating the cost of those improvements equitably amongst those who benefit from them; and (3) building the improvements. The City is attempting to move through these steps in coordination and consultation with stakeholders who are directly affected by them. Although some progress has been made, to date, none of these steps have been accomplished and they do not have to be in to declare a moratorium. Rather, a moratorium memorializes the lack of capacity and the need to stop providing connections, nothing more.

Generally, the testimony received from opponents appears to fall into two different groups and, of course, there is some overlap as well. There are those who seek to be excluded from the moratorium boundaries because they believe that providing a new service to their individual lot will not contribute to the identified pressure shortfall. There are others who do not dispute the low pressure conditions but believe that the City should be responsible for covering all or a larger share of any necessary improvement costs.

The Current System Lacks Adequate Capacity

All have expressed dismay that this has come to the point where a moratorium is necessary and City staff shares this dismay but the fact of the matter is that the City's testing shows that water lines within the moratorium area lack adequate water pressure to be extended to accommodate future development. The City's licensed and qualified engineer Kyle Ayers has tested the system, the test results are in the record and they unambiguously show that required pressure levels cannot be maintained within the existing system. Two other licensed engineers have reviewed Mr. Ayers findings – Mr. Jason Morgan and Mr. Ray Moore. Working as consultants in support of the Riverview Meadows Phase 2 development, neither of them have disputed that the pressure shortfall exists or that it will be exacerbated by additional connections. A reasonable person would rely on this expert evaluation of this testing as a basis to conclude that there are deficiencies in the existing system.

As Mr. Ayers explained at the hearing, the HLB Otak, Inc, letter dated August 16, 2012, determined that when closed on both ends, that the newly installed water line could withstand 1.5 times the working pressure of the line for 2 hours to ensure integrity of the new pipeline. This does not test how water pressure within the City's existing lines were affected by this new line. There is no internal inconsistency between this test and the hydrant tests previously discussed.

The Moratorium Boundaries are Constrained to those Areas Affected by the Pressure Deficiency

With respect to the number of properties affected changing between the previous moratorium and the one currently proposed, the City Manager explained at the hearing that this was a clerical error in counting the number of potentially developable properties. The geographic boundaries of the moratorium area have not changed. The extent of the need is as necessary to serve 133 properties that are currently not connected to the City's water system but may seek a connection in the future.

With respect to the benefits realized by a looped system, Mr. Ayers testified that looping helps to maintain the required pressure but it is not the only method for achieving it. Rather, there are other areas of the City that lack looped lines, such as Bayside Gardens, where pressure can be maintained because the length of the service mains are much shorter and do not suffer the same pressure challenges resulting from significant changes in elevation.

Some individuals have testified that they should be excluded because their land has been previously platted for development, either in Riverview Meadows Phase I, Twin Lakes, by virtue of other private agreement or because an exemption was given to others. The problem is that any additional new connection within the moratorium will exacerbate the already inadequately pressurized system. The City staff appreciates that this may seem inequitable when other geographically comparable owners were allowed to connect in the past. Actions occurring in the past, rightly or wrongly, have no bearing on the existing water system inadequacies. All of the expert testimony indicates that there is a water pressure shortfall that will be exacerbated if any of the mapped 133 properties are permitted to connect to the City's system without further pressure sustaining improvements. Because the City's system, without improvements, cannot safely serve these properties without compromising the safety of its existing system, it must declare a moratorium.

Housing Needs have been Taken Into Account

When proceeding with a moratorium, a local government has an obligation to accommodate housing and economic development to the degree that it can do so. With respect to the existing moratorium area, the requirement of ORS 197.520(2)(c) that housing needs be accommodated as much as possible in any program for allocating any remaining key facility capacity is inapplicable where a moratorium is based on a finding that existing key facilities are inadequate to meet current needs, as there is no remaining key facility capacity available. *Schatz v. City of Jacksonville*, 21 Or LUBA 149 (1991). As explained, any new connections create additional demand or draw on the system contributing to the pressure fluctuations that reduce the pressure below 20 psi, in violation of certain statewide water quality rules. As such, no additional housing within the moratorium can be accommodated.

With respect to larger demand for housing citywide, counsel for Riverview Meadows argues this development makes up 14.07% of the units and 14.5% of the buildable acres available within the UGB to accommodate housing. Those numbers have no relevance until they are applied to the City's housing needs analysis identifying projected demand for housing on zoned residential land over time. As noted, the City's 2019 Housing Needs Analysis projects a need for 162 dwelling units or approximately 40.5 acres needed within the 2038 planning horizon. Removing 14.07% of the Riverview Meadows lots not available by virtue of the moratorium to the total 270 units possible, would leave a 233 unit potential, far over the 162 dwelling units needed. This same outcome results when you consider land area. The City has a total of 150.36 buildable acres. Taking 14.5% of those acres out of development circulation by virtue of the moratorium leaves 129 acres available for development. 129 acres of buildable land is sufficient to meet the projected housing demand for approximately 40.5 acres.

Counsel for Riverview Meadows argues that the proposed plan to provide domestic water to the subdivision with the 20 psi and 1000 gpm fire flow requirements should be adequate for the City to exclude this area as part of its obligation to accommodate housing. Although the experts agree that this plan may be sufficient to support approval of the proposed subdivision with a condition requiring construction,¹ it cannot serve as a basis for exclusion of the moratorium boundaries as the system inadequacy will continue until these improvements are installed. What the City can commit to is timely reformation of the moratorium in coordination with improvements to ensure no delay needed connections will, in fact, occur.

Funding the Improvements

The starting point for allocating the cost of providing improvements will be that all parties must contribute to the cost of the solution to the same degree as they benefit. In other words, if there are existing customers whose water pressure shortcomings are resolved by certain improvements, then the City must be responsible for these costs to be recovered through rate payers. As opponents correctly note, the City cannot obligate future development to fix problems that were caused by demand resulting from existing users. The flip side is also true, existing water customers cannot be obligated to pay for water improvements that provide water pressure or fire flows necessary to serve future development.

Although work has begun on planning facilities necessary to address this shortfall, no cost estimate or projected cost share allocation between affected parties has been identified. Until such allocation has been identified, any challenge to the moratorium about how funding will be allocated is premature. This moratorium makes no predictions about how the improvements will be made and who will pay for them. Rather, all this moratorium does is acknowledge that the

¹ It appears that the domestic water extension solution provided into the record for the moratorium proceedings is not the same design that was submitted with the subdivision proposal. This inconsistency will need to be resolved as the subdivision review process continues.

low-pressure zones create a water capacity shortfall and sets the City on a trajectory to moving forward with planning, funding and building a solution.

The Fixed Goal Post Rule Precludes Application of the Moratorium to Riverview Meadows 2

Counsel for Riverview Meadows has argued that even if the City proceeds with adoption of this moratorium, it will not apply because it was not in place before the application for the Phase 2 development was filed. The land use approval in and of itself does not exacerbate the existing deficiency but rather it is the actual water connection that will follow that triggers the limitations imposed under the moratorium. As such, the proposed moratorium does not halt the issuance of water availability letters or the land use approvals that may require them. As a result, the moratorium, in and of itself, is not a standard or criteria that is subject to the “fixed goal post” rule provided in state law.

Adopting a Program to Solve the Water Pressure Deficiency

As explained in the moratorium ordinance findings, state law allows a local government 60 days after the effective date of a moratorium to identify a program to resolve an identified deficiency. This means that the solution does not have to precede moratorium adoption. There is no question that the City could and must, pursuant to this moratorium, adopt a plan to resolve the concern. The reason for the stakeholder meetings is to allow those who are ultimately responsible to pay their fair share of the necessary improvements the opportunity to guide the scope of those solutions and nothing more.

An argument has been put forward that this solution must be clear and objective pursuant to a state law that protects housing developments from discretionary, value-laden decision-making. As noted, this moratorium does not include a program to resolve the concern. It may be that the Riverview Meadows proposed plan will be sufficient. Its sufficiency will be evaluated against two criteria: whether its function will maintain a 20 psi pressure for all of the connections that are affected by the extension of service, both off-site and on-site (but need not necessarily serve the entire moratorium area) and whether it will result in fire flows to the new homes of 1,000 gallons per minute. These are clear and objective criteria that satisfy state law.

In conclusion, the City has proceeded with a process and conducted the required evaluations necessary to satisfy the moratorium law. These tests indicate that the water system in this area suffers from an existing deficiency – one that threatens the health and safety of its current customers and any new customer that might be allowed to connect. In order to respond to this deficiency, it is necessary for the City to take a pause in issuing new water connections until it can identify a solution, put in place a funding scheme that fairly allocates the burden between those who benefit, including existing and new customers, and construct the improvements necessary to address this shortcoming. The City is not doing this in order to shirk any obligations that it has to plan for needed infrastructure, nor is it doing this to unfairly avoid any costs that are attributable to demands created by existing ratepayers. Rather, the purpose for this

Nehalem City Council
September 21, 2022
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moratorium is to resolve an undisputed problem in a way that is transparent, fair and avoids future litigation.

I look forward to discussing these issues at the next hearing to consider these issues.

Very truly yours,



Carrie A. Richter

CAR:kms
cc: Client

Clayton Sellars
P.O. Box 261
Nehalem, OR 97131
cdsconstruction@live.com
Tax lot: 3N1024DC00800

Sep. 21 2022

Via Electronic Mail
City of Nehalem
Att. City Council members
P.O. Box 143
Nehalem, OR 97131

Nehalem City Council,

I just wanted to reach out to the council members and ask for an exemption from the proposed moratorium on new water connections. I have worked to remedy this with the city manager, but it is clear the only way to proceed is directly to city council. I am in a unique situation and could be granted a water connection without affecting any current users, and Nehalem could do the right thing and follow through on a promise and legal obligation to provide my property water.

My lot is in the Twin Lakes development. This was sub divided into 10 lots in the 70s.

In 2012 the city of Nehalem installed their water line on to my property and the adjacent lot in Twin Lakes. This was to extend their water service area to serve the new fire department next door. When this was done there was an easement recorded by attorney Joel Sacks. The consideration paid was nothing except access to utilities. (Easement included and attached to this letter). In addition, the owner of Twin Lakes at the time paid for 50% of the cost to install the water line extension.

The property just before Twin Lakes also had an Easement recorded by attorney Joel Sacks. Consideration paid was \$4,000.00. They received the \$4000 and gave up the easement to Nehalem. The Fire Department had an identical easement to mine. They received access to utilities as promised. My property has received nothing. No renegotiations, no plans to fix, no plans to provide my property with water as they promised to do so. I feel like a 10' strip of my property has been hijacked and Management refuses to try and remedy this.

In fact, every excuse has been made by the city manager and city attorney Lois Albright as to why they will not comply with the agreement. They have said it may not be legal because they didn't sign it (yet they took a strip of my land and put the water line into use), they have said I do not meet the fire flow requirements (NBFR have said I do and have signed off on my building permit) I have included my building approval from the Fire Department as well.

I encourage the Council to ask the city engineer if my connection would affect the system at all. If I need to wait until a pressure sustaining valve is installed or until River View installs their tank, that is understandable. But I am confident that allowing my connection could be done and that I should not have to have 1000g per minute fire flow. The city has routinely approved connections with far less than

that. (2 under construction right now in River View where they have half the pressure and half the fire flow than Twin Lakes.

It is also worth noting that when LUBA invalidated the last moratorium they made sure to mention Twin Lakes and that the City agreed to provide all 10 lots with water. (See attached LUBA decision). I am confident they did this in case we had to move forward with litigation. Taking legal action against the city is the last thing I want to do as it would waste everyone's time and money. I don't think it will be necessary and we can work this out sooner than later. That is why I am appealing directly to the council. I know you all care about doing the right thing and can work this out.

Thank you for your time

-Clay

DEED-ESMAT
\$15.00 \$11.00 \$16.00 \$10.00 - Total = \$52.00



00116418201200029040030031

I hereby certify that the within
instrument was received for record and
recorded in the County of Tillamook,
State of Oregon.



Tassi O'Neil, Tillamook County Clerk

EASEMENT FOR UTILITIES IN FAVOR OF CITY OF NEHALEM, OREGON

Easement made as of May 18, 2012, by and between Roland A. Thompson, hereinafter referred to as Grantor, and The City of Nehalem, Oregon, hereinafter referred to as Grantee.

SECTION ONE CONVEYANCE OF EASEMENT

Grantor hereby grants and conveys to Grantee an easement of a ten foot (10') wide strip of land running along and parallel to Highway 53 over the full length of Grantor's property. This grant of easement shall be for utilities for the public good, to be used in a fashion typically undertaken by the Grantee for its utilities over, above, and across the property owned by Grantors and described as follows, all in accord and including Exhibit A attached:

**Tillamook County Tax Account # 88782; Map #3N1024DC00700
known as Twin Lakes Block 1 Lot 5, Tax lots 700 and 800.**

SECTION TWO MAINTENANCE

The easement described above shall be maintained in good repair by Grantee at their sole cost and expense. Whenever Grantee performs any work on the land that is the subject of this easement the affected portion shall be restored to the same or better condition then it was prior to such work being performed.

SECTION THREE EASEMENT TO RUN WITH LAND

This grant of easement shall run so long as Grantee provides utility services for the City of Nehalem, Oregon, as well as other areas serviced by Grantee. Such easement shall be binding on and shall inure to the benefit of the parties to this easement, their respective heirs, successors,

After recording return to:
City of Nehalem, OR.
PO Box 143
Nehalem, OR. 97131

ZERO CONSIDERATION PAID TO GRANTOR.

or assigns. Should the City of Nehalem, Oregon abandon its usage this easement shall terminate and no longer be of benefit to anyone or any entity other than grantor.

**SECTION FOUR
CONSIDERATION FOR GRANT OF EASEMENT**

No consideration shall be paid by Grantee to Grantor other than the benefit received by Grantor by having access to utilities not currently enjoyed by him.

In witness whereof, Roland A. Thompson, owner, has executed this easement.

Dated 5/12/2012 2012

Roland A. Thompson, grantor *Roland A. Thompson*

Colorado
STATE OF ~~OREGON~~)
 Lanier) ss.
County of ~~Fillmore~~)

Roland A. Thompson, grantor, has appeared and sworn before me this 18 day of May, 2012, that he is conveying this easement to the city of Nehalem, Oregon.

Elizabeth King
NOTARY PUBLIC FOR ~~OREGON~~
Colorado

My commission expires 3/11/2013

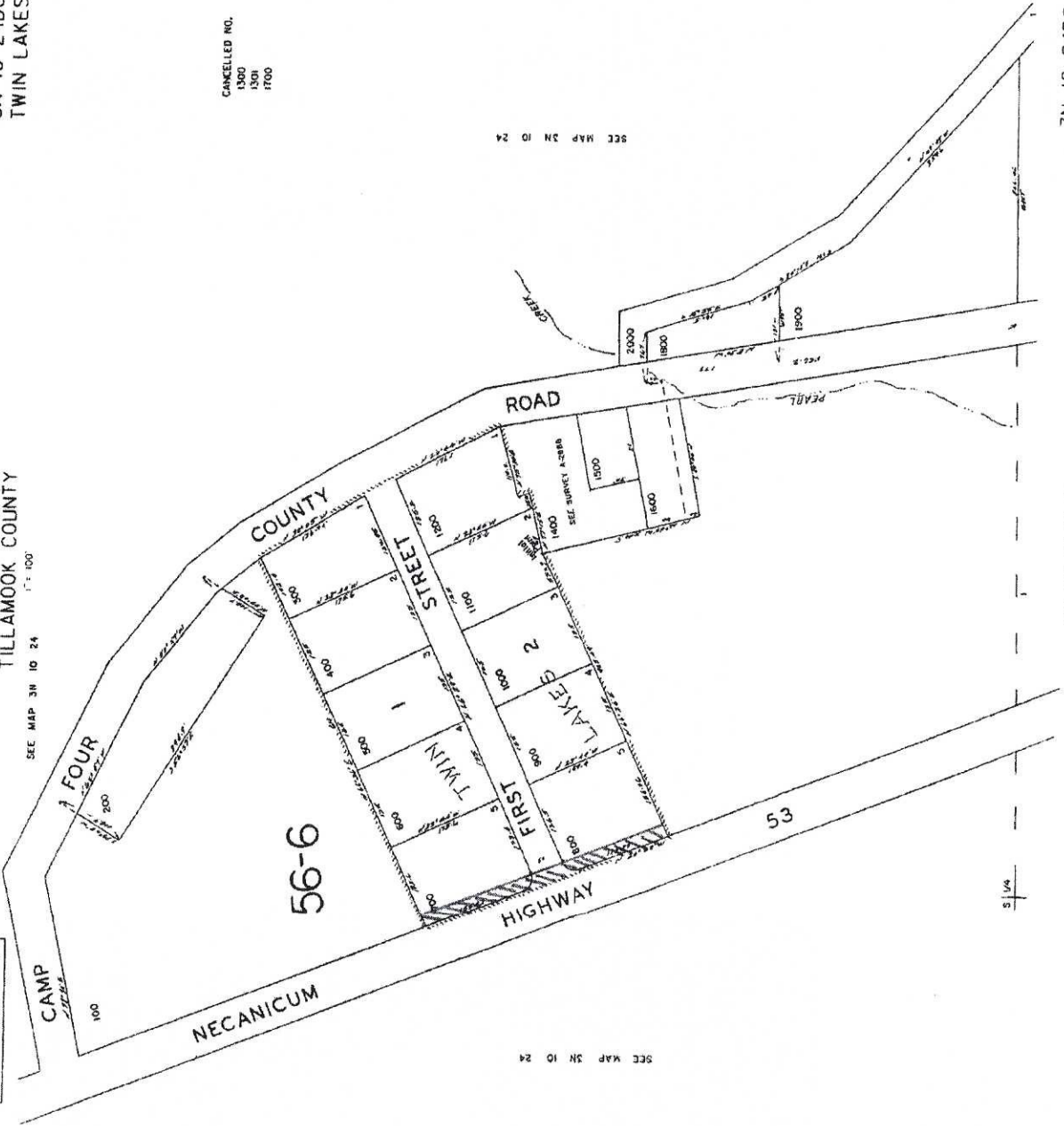
EXHIBIT A

3N 10 24DC
TWIN LAKES

CANCELLED NO.
1300
1301
1700

SE1/4 SE1/4 SEC.24 T.3N. R.10W. W.M.
TILLAMOOK COUNTY
SEE MAP 3N 10 24 1" = 100'

THIS MAP WAS PREPARED FOR
ASSESSMENT PURPOSE ONLY



SEE MAP 3N 10 24

SEE MAP 3N 10 24

3N 10 24DC
REVISED 10/09/08, #5

SEE MAP 3N 10 25

Nehalem Bay Fire & Rescue District Building Review & Approval Form

36375 Hwy 101 N.
Nehalem, OR 97131
Office 503-368-7590
Fax 503-368-7580

This form must be completed and signed by the Fire District prior to applying for a Building Permit or Manufactured Dwelling Placement Permit.

Township	Range	Section	1/4 Sect	1/16 Sect	Tax Lot # (00500)	Legal Property Owner:	Clayton Sellers	
3N	10	24	D	C	00800			
Street Address:	Twin Lakes Block 2 Lot 5		Mailing Address:	PO Box 261				
Phone #:	503-440-1029		City:	Nehalem	State:	OR	Zip Code:	97131
Proposed Development / Construction:	Residential		Water Source:	Water District		Water District:	Nehalem	

* You will need to provide documentation from the Water Resources Department showing the gallons per minute (GPM) available to your property and a copy of your Well Report or Residential Water Right to your water source.

Fire District to Complete Information Below

1. Review of road access for the fire district use to the property resulted in the following:

- The road access is passable for Emergency Vehicles
 The road access is not passable for Emergency Vehicles

2. Review of water supply for fire district use to the property resulted in the following:

- There is adequate water available to the property for fire suppression.
(Minimum of 250 GPM for a 4 hour duration. ISO Rural Water Supply Requirement)
 There is not adequate water available to the property for fire suppression

Comments:

3. Action Taken:

- I have reviewed the information regarding the property listed above and Approve.
 I have reviewed the information regarding the property listed above and do not Approve.

Printed Name: Chris Beswick, Fire Chief



Signature:

Date: 7/6/2021

1 BEFORE THE LAND USE BOARD OF APPEALS
2 OF THE STATE OF OREGON

3
4 RIVERVIEW MEADOWS LLC, ALEX REVERMAN,
5 and VERN SCOVELL,
6 *Petitioners,*

7
8 vs.

9
10 CITY OF NEHALEM,
11 *Respondent.*

12
13 LUBA No. 2021-124

14
15 DAVID VANDEHEY and
16 ROLL TIDE PROPERTIES CORP. 401K PSP TRUST,
17 *Petitioners,*

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19 vs.

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21 CITY OF NEHALEM,
22 *Respondent.*

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24 LUBA No. 2021-125

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26 CLAY SELLARS,
27 *Petitioner,*

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29 vs.

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31 CITY OF NEHALEM,
32 *Respondent.*

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34 LUBA No. 2021-126

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36 CAREY SHELDON,
37 *Petitioner,*

38

1 vs.
2

3 CITY OF NEHALEM,
4 *Respondent.*
5

6 LUBA No. 2021-127
7

8 FINAL OPINION
9 AND ORDER
10

11 Appeal from City of Nehalem.
12

13 Wendie L. Kellington filed the petition for review and argued on behalf of
14 petitioners. Also on the brief was Kellington Law Group PC.
15

16 No appearance by City of Nehalem.
17

18 RYAN, Board Member; ZAMUDIO, Board Chair; RUDD, Board
19 Member, participated in the decision.
20

21 INVALIDATED 04/19/2022
22

23 You are entitled to judicial review of this Order. Judicial review is
24 governed by the provisions of ORS 197.850.

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NATURE OF THE DECISION

Petitioners appeal a city resolution (Resolution) declaring a moratorium on new connections to the city’s water system for areas located outside the city limits.

FACTS

Riverview Meadows is an approved subdivision that is located outside the city limits but inside the city’s urban growth boundary (UGB) and that is owned, in part, by some of the petitioners. In 2010, the city accepted the installation of a water line in Riverview Meadows. Record 50.

Twin Lakes is an existing subdivision that is located outside the city’s UGB and that is owned, in part, by some of the petitioners. In 2012, the city extended a six-inch water line approximately 2,500 linear feet from its then-existing terminus to provide water service to a new Nehalem Bay Fire and Rescue District substation located outside the city’s UGB. As part of that extension, the city installed a water line in Twin Lakes pursuant to an easement granted by the subdivision owner to the city. Record 98-100. As consideration for that easement, the city allowed the subdivision owner to connect to the extended water line. *Id.* Both the water line in Riverview Meadows and the water line in Twin Lakes are depicted on the city’s Water Management and Conservation Plan map. Record 161.

1 Problems with periodic low water pressure for some existing connections
2 to the city’s water system occurred.¹ In 2021, the city council adopted the
3 Resolution, which imposes a one-year moratorium on new connections to the
4 city’s water system for properties in an area identified on a map attached to the
5 Resolution (Moratorium Area). The Moratorium Area includes properties located

¹ OAR 333-061-0025(7) requires the city, as a “water supplier,” to maintain a pressure of “at least 20 pounds per square inch (psi) at all service connections at all times.” The Resolution recites:

“[T]he City of Nehalem has discovered certain areas along its water lines where this standard of 20 psi may not be maintained at all times for all service connections if additional water service connections are made, without additional improvements of water reservoirs, water pumps and other recognized tools to increase water pressure within an area, and

“* * * * *

“* * * the City has discovered that there are properties currently on the City water system where there may be periodic low water pressure below the required water pressure of 20 psi at all times at all properties. The City had additional testing of certain fire hydrants done, in the affected area, which resulted in a dramatic drop in water pressure at a hydrant at the elevation of 118’ within the proposed moratorium area. Allowing additional water service connections in the proposed moratorium area would exacerbate any low-pressure issue which may be periodically experienced at the higher elevations in the proposed moratorium area. These areas have been identified as those properties north/northeast of Bob’s Creek on North Fork Road and east of the intersection of North Fork Road and McDonald Road[.]” Record 9-10.

1 both inside the city's UGB (including Riverview Meadows) and outside the city's
2 UGB (including Twin Lakes).

3 The Resolution explains that the city has sufficient water to serve
4 properties "along its water lines" but that there are "an estimated potential 122
5 properties within the proposed moratorium area" that could request new water
6 connections that could result in the city being unable to maintain sufficient water
7 pressure at all times, that some areas outside the city limits have experienced low
8 water pressure, and that allowing new connections in the Moratorium Area would
9 exacerbate low pressure issues. Record 9. The Resolution posits:

10 "[T]he proposed moratorium area's water pressure issue has several
11 solutions available to property owners in the area. The City would
12 encourage property owners in the affected area to arrive at a
13 comprehensive solution for the area which would include a reservoir
14 and a looped system, which will provide higher water pressure and
15 more stable water pressure in the proposed moratorium area. For any
16 remedies that will ultimately be connected to the City water system,
17 the City will have to approve the solution. Without a comprehensive
18 solution, if properties in the proposed moratorium area are allowed
19 to connect to the City water system, it may adversely affect many
20 existing users along the water line by lowering the water pressure of
21 existing users. Further, if booster pumps were allowed, then at some
22 point in the future, the pump usage would likely cause a vacuum in
23 the system and negative pressure, thereby collapsing the line or
24 adversely affecting existing users[.]” Record 10.

25 The Resolution “declares an immediate moratorium for new service connections
26 to the City water system for [the Moratorium Area]” and states that the city will
27 rescind the moratorium “[u]pon satisfactory resolution of the low water pressure
28 problem in [the Moratorium Area].” Record 10. The Resolution provides that the

1 moratorium can be renewed for successive one-year periods “until such time as
2 there are one or more water system improvements which resolves the low water
3 pressure problem in the [Moratorium Area].” Record 11. These appeals followed.

4 **MOTION TO DISMISS**

5 After the petition for review was filed, on February 24, 2022, the city filed
6 a motion to dismiss these appeals, arguing that the Resolution is not a moratorium
7 over which LUBA has jurisdiction pursuant to ORS 197.505 to 197.540.
8 Petitioners addressed jurisdiction in their petition for review and filed a response
9 to the city’s motion to dismiss. For the reasons explained below, we conclude
10 that the Resolution is a moratorium that is subject to ORS 197.505 to 197.540.

11 ORS 197.520(1) provides, in relevant part:

12 “No city, county or special district may adopt a moratorium on
13 construction or land development unless it first:

14 “(a) Provides written notice to the Department of Land
15 Conservation and Development [(DLCD)] at least 45 days
16 prior to the final public hearing to be held to consider the
17 adoption of the moratorium;

18 “(b) Makes written findings justifying the need for the moratorium
19 in the manner provided for in this section; and

20 “(c) Holds a public hearing on the adoption of the moratorium and
21 the findings which support the moratorium.”²

² There is no dispute that the city did not provide notice of its consideration of the adoption of the moratorium to any of the referenced 122 property owners or to DLCD.

1 ORS 197.520(2) provides that, “[f]or urban *or urbanizable* land, a moratorium
2 may be justified by demonstration of a need to prevent a shortage of public
3 facilities which would otherwise occur during the effective period of the
4 moratorium,” and the statute requires findings to support a demonstration of the
5 need to prevent a shortage.³ (Emphasis added.)

6 ORS 197.524(1) provides:

7 “When a local government engages in a pattern or practice of
8 delaying or stopping the issuance of permits, authorizations or

³ ORS 197.505(1) defines “public facilities” to mean “those public facilities for which a public facilities plan is required under ORS 197.712.” “Urbanizable land” is not defined in ORS chapter 197, but it is generally defined by the statewide planning goals as follows:

“Urban land that, due to the present unavailability of urban facilities and services, or for other reasons, either:

- “a) Retains the zone designations assigned prior to inclusion in the [UGB], or
- “b) Is subject to interim zone designations intended to maintain the land’s potential for planned urban development until appropriate public facilities and services are available or planned.”

Similarly, Statewide Planning Goal 14 (Urbanization) provides:

“Land within [UGBs] shall be considered available for urban development consistent with plans for the provision of urban facilities and services. Comprehensive plans and implementing measures shall manage the use and division of urbanizable land to maintain its potential for planned urban development until appropriate public facilities and services are available or planned.”

1 approvals necessary for the subdivision or partitioning of, or
2 construction on, any land, including delaying or stopping issuance
3 based on a shortage of public facilities, the local government shall:

4 “(a) Adopt a public facilities strategy under ORS 197.768; or

5 “(b) Adopt a moratorium on construction or land development
6 under ORS 197.505 to 197.540.”

7 In the petition for review, petitioners argue that, in adopting the Resolution, the
8 city has engaged in, or plans to engage in, a “practice of delaying or stopping the
9 issuance of permits, authorizations or approvals necessary for the subdivision or
10 partitioning of, or construction on, [land in the Moratorium Area] * * * based on
11 a shortage of public facilities” within the meaning of ORS 197.524(1).
12 Specifically, petitioners argue that subdivisions, partitions, and building permits
13 require proof of service by adequate public facilities, including public water.
14 Accordingly, petitioners argue, pursuant to ORS 197.524(1), the city is required
15 to either adopt a public facilities strategy or adopt a moratorium on construction
16 or land development by following the procedures and meeting the standards in
17 ORS 197.505 to 197.540. Petitioners argue that the city has done neither.

18 The city takes the position that the Resolution is not “a moratorium on
19 construction or land development” within the meaning of ORS 197.520(1)
20 because the city does not process or approve building permits or land use
21 applications for property *outside its UGB*. Motion to Dismiss 8. The moratorium
22 itself expressly recognizes that fact. Record 10. However, as noted, the
23 Moratorium Area includes land located inside the city’s UGB, and city water
24 lines extend to properties inside the city’s UGB. The city does not dispute that it

1 processes jointly with the county building permits and land use applications for
2 land outside the city limits but inside the city's UGB, or explain how its argument
3 withstands those undisputed facts.

4 We agree with petitioners that the Resolution is "a moratorium on
5 construction or land development" within the meaning of ORS 197.520(1) that
6 was not adopted under ORS 197.505 to 197.540.⁴ The Resolution explains that
7 the city is concerned about 122 properties located outside the city limits that may
8 request a new water connection in the future. Properties inside the city's UGB
9 cannot receive building permits or subdivision approval without confirmation
10 that public water will be supplied to the property. Record 106 (Intergovernmental
11 Agreement between the city and the county providing that the city is responsible
12 for determining and reporting whether public water is available to a proposed
13 structure by providing a Water Availability Letter to the county). A request for a
14 new water connection is almost certainly made in pursuit of "construction or land
15 development." Although it is not clear whether the intent of the Resolution is to

⁴ "Development" is not defined in ORS chapter 197, so we look to the plain, ordinary meaning of the word. *Webster's* defines "development" as follows:

1 : the act, process, or result of developing : the state of being developed : a gradual unfolding by which something (as a plan or method, an image upon a photographic plate, a living body) is developed <a new ~ in poetry> : gradual advance or growth through progressive changes : EVOLUTION <a stage of ~> : a making usable or available <well worth ~>." *Webster's Third New Int'l Dictionary* 618 (unabridged ed 2002) (boldface in original).

1 address an existing low water pressure problem or to prevent a future problem, it
2 is clear that the effect of the Resolution is to prevent construction on or
3 development of lands located in the Moratorium Area.

4 The city also argues that the Resolution is not a moratorium within the
5 meaning of ORS 197.524(1) because, according to the city, “[t]he City has no
6 legal duty or obligation to serve properties outside of the City limits.” Motion to
7 Dismiss 2. We reject that argument. The city’s water ordinance, at Nehalem City
8 Code (NCC) chapter 51, establishes rules and regulations governing the city’s
9 “water system.”⁵ NCC 51.02. NCC 51.04(A) provides that “[t]he city shall grant
10 an application of service,” subject to a priority scheme, if there is “sufficient
11 water supply to satisfy all the customers within the group described below to
12 which the customer belongs and all the customers within all groups having a
13 higher priority than the customer’s group.”⁶ The second-priority group is

⁵ “Water system” is defined as “[a]ll piping, reservoirs, filtration equipment, buildings, water intakes, water sources, main valves, hydrants, meters and all other equipment, materials or buildings used to produce, treat, store and deliver water to city customers.” NCC 51.03.

“Customer,” in turn, is defined as “[t]he owner of record of the property which is served by the city water system. Also, a person or persons purchasing property under contract, deed of trust, mortgage or other such instruments, will for the purposes of this subchapter, be deemed to be the CUSTOMER.” *Id.*

⁶ The phrase “sufficient water supply” is not defined. The city does not explain how the potential or occasional low water pressure at some areas served by city water means that there is not “sufficient water supply,” and we do not address that issue here.

1 “[i]ndividual service on existing lots and parcels, at this time, on existing
2 adequate mains outside of the incorporated city limits[.]” NCC 51.04(A)(2).
3 Water customers within Riverview Meadows and inside the city’s UGB fall
4 within the second-priority group. While NCC 51.05(F)(2) allows the city to
5 “*discontinue* service * * * where excessive demand by one customer may result
6 in inadequate service to others,” that provision does not allow the city to refuse a
7 service connection in the first instance if the connection is consistent with the
8 priority scheme. (Emphasis added.) That is because no “excessive demand” may
9 be established without initial service having first been provided. The NCC
10 demonstrates that the city is obligated to provide water service to properties
11 outside the city limits through the city’s water system if sufficient water supply
12 is available at the time of an application. Other sources of law may also require
13 the city to provide water service to properties outside the city limits.

14 In conclusion, we agree with petitioners that the Resolution is a
15 “moratorium” over which LUBA has jurisdiction because the effect of the
16 Resolution is a “practice” of stopping the issuance of authorizations—namely,
17 water service connection authorizations—necessary for construction on and
18 development of land that it is based on an alleged shortage of water. As such,
19 ORS 197.524(1) requires the city to either “[a]dopt a public facilities strategy” or
20 “[a]dopt a moratorium on construction or land development under ORS 197.505
21 to 197.540.” We do not understand the city to argue that it has adopted a public
22 facilities strategy.

1 The city’s motion to dismiss the appeals is denied.

2 **ASSIGNMENT OF ERROR**

3 The city did not file a response brief. In their assignment of error,
4 petitioners argue that the Resolution was not adopted in accordance with the
5 procedures in ORS 197.520(1) and does not include the findings required by ORS
6 197.520(1)(b) and 197.520(2).⁷ The city does not dispute that, if the Resolution
7 adopts a moratorium on construction or land development, the city did not
8 comply with the procedures in ORS 197.505 to 197.540. Motion to Dismiss 8.

9 The assignment of error is sustained.

⁷ ORS 197.530(1) requires a city, county, or special district that adopts a moratorium under ORS 197.520 to “adopt a program to correct the problem creating the moratorium” within 60 days after the effective date of the moratorium. ORS 197.530(2) further provides that a moratorium adopted under ORS 197.520(2) cannot be effective for longer than six months.

ORS 197.530(2) and (3) together provide that a moratorium can be extended three times, for up to six months each time, after the local government holds a public hearing on the extension and adopts written findings that:

- “(a) Verify that the problem giving rise to the moratorium still exists;
- “(b) Demonstrate that reasonable progress is being made to alleviate the problem giving rise to the moratorium; and
- “(c) Set a specific duration for the renewal of the moratorium.”

1 **DISPOSITION**

2 ORS 197.540(2) provides, “If the board determines that a moratorium or
3 corrective program was not adopted in compliance with the provisions of ORS
4 197.505 to 197.540, the board shall issue an order invalidating the moratorium.”

5 The moratorium is invalidated.



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August 24, 2021

Via Electronic Mail
Melissa Thompson-Kiefer
City Manager
City of Nehalem
PO Box 143
Nehalem, Or 97131

RE: Twin Lakes Subdivision - Clayton Sellars

Dear Ms. Thompson-Kiefer:

This firm represents Clayton Sellars, who owns TL 800 in the Twin Lakes residential subdivision. He advises that the City has suggested it will be unable to provide water service to his residential lot on which he will establish housing, unless he provides a large and expensive water storage tank. This is mistaken. The City may be unaware that Mr. Sellars' predecessor has a recorded easement with the City, for which the City paid nothing other than its recorded promise to allow the property to connect to city water.¹ I attach a copy of this recorded easement. The City is bound by the promise reflected in that recorded easement and is not at liberty to refuse to comply. *See Wiggins v. Barrett*, 295 Or 679 (1983) (city is bound by promises it made to induce property owner to give sewer easement).

Moreover, Mr. Sellars' predecessor paid \$35,000 and Nehalem Bay Fire & Rescue paid a similar amount to the City, to bring the water line to the subject property and it was the City that installed the line - presumably to the specifications in the City's code. Nevertheless, Mr. Sellars reports that the City has suggested that the water main that the City constructed and to which Sellars is entitled to connect "does not have available fire flow capacity to meet current requirements." This too is mistaken. Nehalem Bay Fire & Rescue has reported in a letter and supplied related calculations, that there is adequate fire flow capacity to meet all applicable requirements. There is no evidence otherwise.

State law provides that the city may only apply codified city standards to approval of Mr. Sellars' application for a water connection. ORS 227.173(1). There is no codified City standard that Mr. Sellars fails to meet, and none has ever been cited. The standard I am advised that the City cites for its position, does not support it. Rather, the provision merely says that the developer is responsible for "that portion of the water system to be located on the subject property unless a separate agreement with the city is made in regards to paying for the actual installation of each connection at the time the connection is made." A separate agreement has been made and has been recorded. Moreover, nothing in the City's code says a property owner to

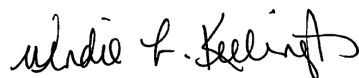
¹ Among other things, this easement says: "CONSIDERATION FOR GRANT OF EASEMENT. No consideration shall be paid by [the City] to [Sellars' predecessor] other than the benefit received by [Sellars' predecessor] by having access to utilities not currently enjoyed by him."

whom the City has given a promise of water service, taken property from the owner, and required payment of \$35,000 to construct the line to serve them, must provide a storage tank that was never contemplated in the foregoing transactions. Rather, the City code addresses situations where more water is needed in a section captioned "larger water main required" and says that the City can require a larger water main only if the City's Master Water Plan calls for the same. That is not the case here.

While per the fire department's letter, Mr. Sellars meets all applicable building code fire flow requirements, state building code requirements are not an applicable standard that the City may apply to Mr. Sellars' residentially zoned property in the City. *Legacy Development Group, Inc. v. City of The Dalles*, __ Or LUBA __ (LUBA No. 2020-099, Feb. 24, 2021) (if city relies on standards or definitions referenced elsewhere to satisfy the "clear and objective" requirement, the provision at issue must "clearly incorporate" those standards/definitions).

We hope that this letter clarifies matters and that Mr. Sellars' request to connect to city water will be swiftly approved. Please feel free to call with any questions.

Very truly yours,



Wendie L. Kellington

WLK:wlk
Enclosure
CC: Client

December 6, 2022

Via Electronic Mail to:
Melissa Thomson-Kiefer, City Manager
mthompson@nehalem.gov

Mayor & City Council
City of Nehalem
P.O. Box 143
Nehalem, OR 97131

RE: Exception to Moratorium allowing my water connection

Dear Honorable Mayor and City Council Members:

This letter is to reiterate my request for a water connection. My lot 3N1024DC00800 is located in Nehalem and currently has a city water line installed on the property. When this line was installed, the city promised to provide the property with a water connection in return for use of my property. (See attached easement).

I have made several attempts to remedy this with the city to no avail. I am not a developer. I am just trying to build my personal home for my son and I on this lot I purchased in 2017. This water request is for my one lot with the RECORDED easement only. NOT all 10 lots behind. I and many others are confident that this one connection will have no adverse effects on the city water system.

It is my understanding that only the city Council Members can allow a water connection during the moratorium. If that is the case, I am more hopeful than ever that this will be remedied. I encourage the council members to ask questions to the city engineer and public works director to understand how my one water connection will affect the city water system.

I am incredibly surprised this has gone on this long. I feel blatantly ignored and feel like my situation is not being taken seriously. After I was denied a water connection the first time, simultaneously and after that request several homes in Riverview Meadows were allowed water. This is where the alleged water problems exists and there is LESS pressure and flow there than at my property. (This has always been true in Riverview Meadows this is not a new issue). That is extremely unfair.

The city Attorney is saying that this easement may not be legal because it was not signed by the grantee. That is absurd to me. The water line is there, there are other easements for this water line without the signature of the grantee. All of these easements were recorded at Tillamook County by Attorney Joel Sacks and returned to the city. At that time the city followed through on every obligation but mine. They did not raise any red flags when the easement was returned to them, nor did they try and renegotiate the terms of the easement. Rather they installed the water line into the property and put it into use.

Nehalem Bay Fire and rescue have approved my build stating that there is sufficient water pressure and flow.

The city has made no attempts to address my easement. I am either completely ignored, or I am given a very generic response. I have made it clear if the city does not abide by the terms of the easement, I wish the water line to be removed from the property.

I ask the Council to approve my one water connection. I am attaching the recorded easement, most recent water request, Nehalem Bay Fire and Rescue building approval, and hydrant flow test in front of my property.

Thank you all for your consideration

Sincerely,

-Clayton Sellars