

EXHIBIT A

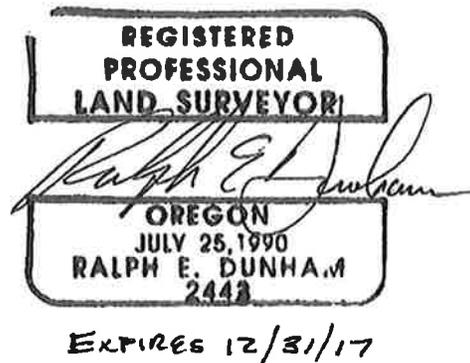
CURRY COUNTY LEASE AREA LEGAL DESCRIPTION

That certain tract of land lying in the Southwest Quarter of Section 29, Township 32 South, Range 15 West of the Willamette Meridian, Curry County, Oregon, described as follows:

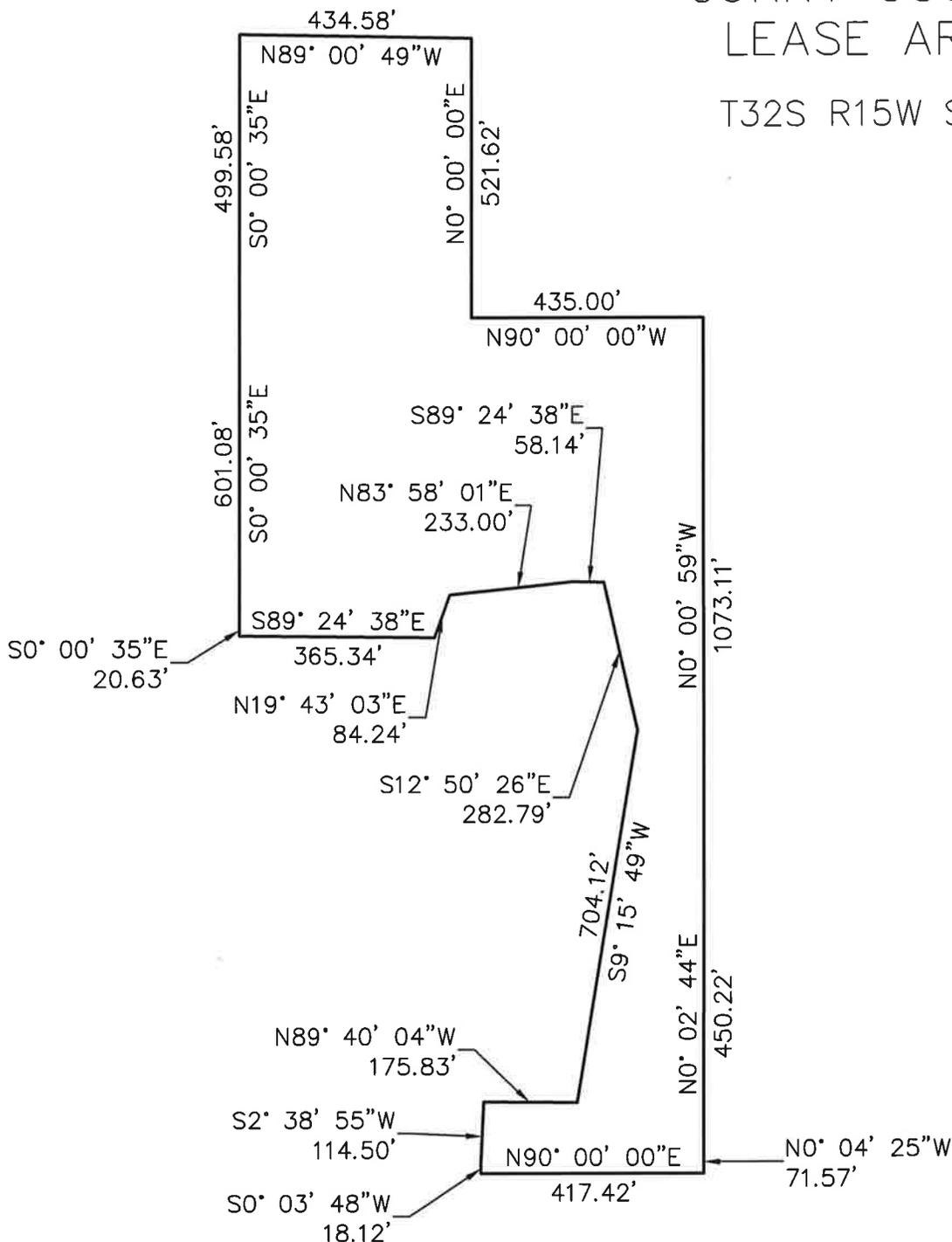
Beginning at a point 1043.56 feet North and 870 feet West of the South Quarter (1/4) Corner said Section 29 (said point based on that certain deed recorded in Volume 24, Page 307, Deed Records of Curry County), thence North 00°00'59" West 1073.11 feet to a 5/8" iron rod per CS 32-367;  
thence West 435.00 feet to a 5/8" iron rod per said CS 32-367;  
thence North 521.62 feet (deed) to a 5/8" iron rod per said CS 32-367;  
thence North 89°00'49" West 434.58 feet to a 5/8" iron rod per said CS 32-367;  
thence South 00°00'35" East 1100.66 feet to a 5/8" iron rod per said CS 32-367;  
thence continuing South 00°00'35" East 20.63 feet;  
thence South 89°24'38" East 365.34 feet;  
thence North 19°43'03" East 84.24 feet ;  
thence North 83°58'01" East 233.00 feet;  
thence South 89°24'38" East 58.14 feet;  
thence South 12°50'26" East 282.79 feet;  
thence South 09°15'49" West 704.12 feet;  
thence North 89°40'04" West 175.83 feet;  
thence South 02°38'55" West 114.50 feet to a 5/8" iron rod per said CS 32-367;  
thence South 00°03'48" West 18.12 feet to a 5/8" iron rod per said CS 32-367;  
thence North 90°00'00" East 417.42 feet to a 5/8" iron rod per said CS 32-367;  
thence North 00°04'25" West 71.57 feet to a 5/8" iron rod per the Kreiger Subdivision Plat (Sub 1985-04);  
thence North 00°02'42" East 450.21 feet to the point of beginning.

Said tract containing 21.10 acres.

Bearings and distances per CS 32-367, Curry County Survey Records.



CURRY COUNTY  
LEASE AREA  
T32S R15W S29C

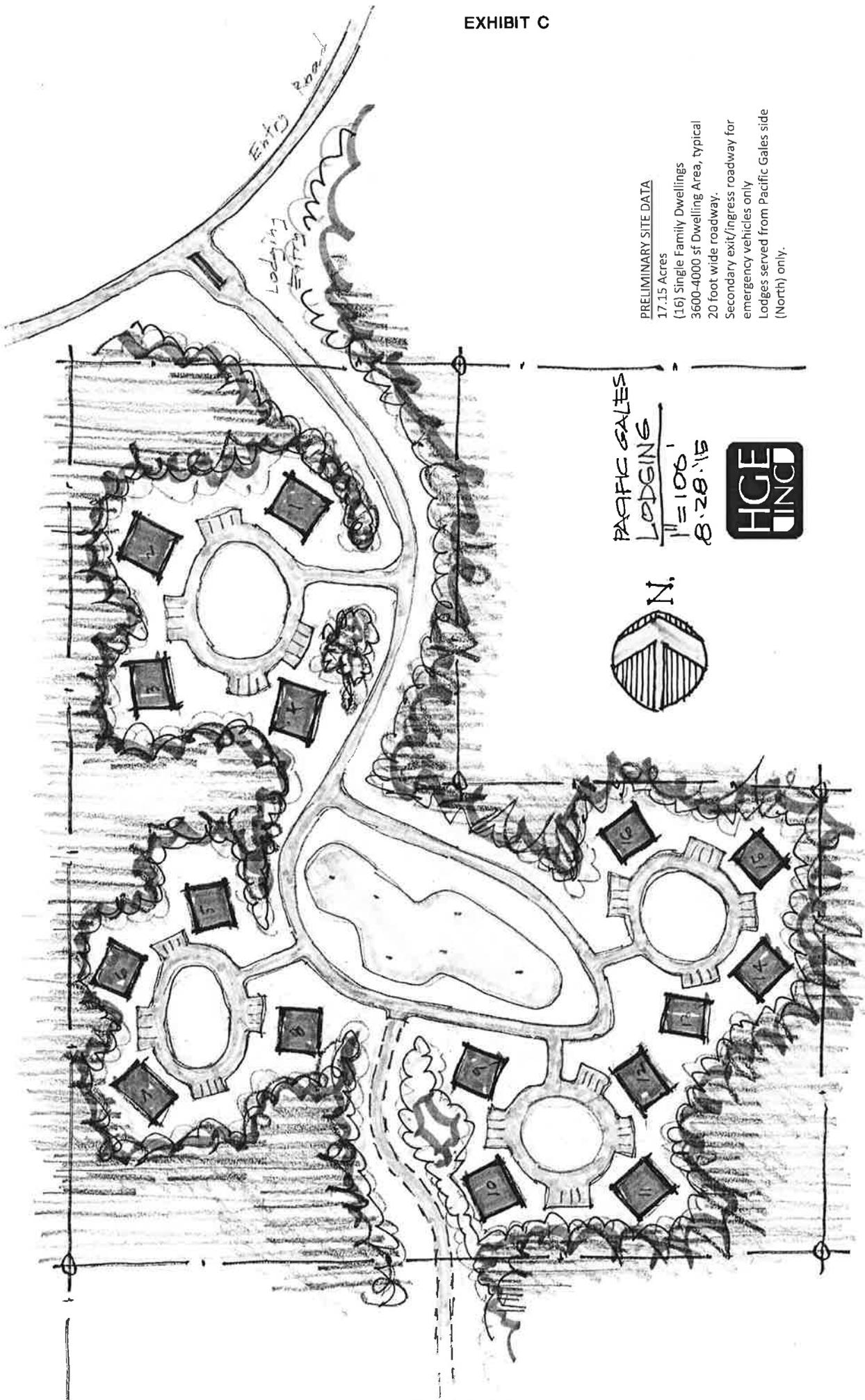


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CURRY CO. LEASE AREA	
JOB NAME:	ELK RIVER DEV., LLC
DATE: OCT. 2016	
JOB NO: XX-XXX	DESIGN BY: CDH
PAGE: 3 OF 3	DRAWN BY: AER

EXHIBIT C



PRELIMINARY SITE DATA

17.15 Acres

(16) Single Family Dwellings

3600-4000 sf Dwelling Area, typical

20 foot wide roadway.

Secondary exit/ingress roadway for

emergency vehicles only

Lodges served from Pacific Gales side

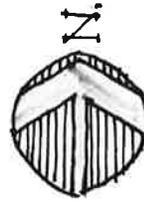
(North) only.

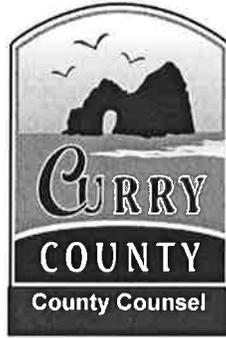
PACIFIC GALES

LODGING

1" = 100'

8.28.15





## MEMORANDUM

FROM John R. Huttl, Curry County Counsel; Risk Manager

TO Board of Commissioners

RE: Proposed Lease Elk River Development Supplemental

DATE: October 19, 2016

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### **Summary**

This memorandum supplements the memorandum of September 23, 2016. This memorandum primarily responds to the information contained in the September 28, 2016 letter from Oregon Coast Alliance (ORCA), the October 17, 2016 letter from Sean T. Malone, Attorney at Law, and the October 18, 2016 email and attachments from Penny Sues.

The documents for the most part describe perceived environmental risks and perceived liability for the County associated with the lease, as well as land use planning process questions. As set forth below, the concerns have been addressed by the lease, to the extent the concerns even arise from the lease itself, instead of some future land use action contemplated under the lease.

### **Discussion**

The correspondence touches on the same subject matter: The location of the property both within the urban growth boundary and its proximity to the pre-existing Port Orford Landfill. The letters raise issues with impacts as a result of development on the landfill and compliance with Oregon's land use laws. And that is the key.

The lease itself does not allow any development. Instead, the lease is a legal document that allows developer, Elk River Development (ERD), to show others, including the County Community Development Department, that ERD has the legal authority to apply for development permits on the land. To that end, the lease says that if development is approved in the future – subject to the County's public processes for development – then it must take place in a certain area and in a certain pattern.

But the lease grants no development permits. The concerns expressed with Oregon's land use processes involving the public or Port Orford or the County or others will be addressed during the application process for the development contemplated under the lease. If those are not granted, ERD would have the same appeal rights that exist for any developer in Oregon's land use decision-making process.

But without the lease or some similar document, ERD could not even apply for a permit. If the future development permits are not granted then ERD has the option to terminate the lease. There is no liability to the County if permits are not granted, unless the denial is for some wrongful reason.

The letters describe issues that could arise from soil disturbances from development, including development of the future project's water and sewage treatment through a well and septic system. However, the lease itself does not grant approval of a well or septic system. And in Curry County, septic systems are approved by the Department of Environmental Quality, the same department that is supervising the monitoring of the decommissioned solid waste facility.

As described above, many of the concerns in the two letters are premature. To the extent the lease allows for any of the environmental concerns to be realized, the lease requires ERD to:

- Indemnify and hold the county harmless from claims of others regarding claims;
- Provide an insurance policy to defend the County in the event of a lawsuit, including a requirement for an environmental hazards policy;
- Cover costs associated with increased monitoring and mitigation of the landfill site in the event ERD's activities result in disturbances to the monitored site; and
- Notify persons including guests of the neighboring landfill.

As such, the County has protections built into the lease in case of adverse impacts to the landfill and its surrounding area.

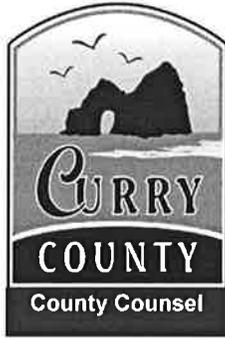
### **Conclusion**

As described in the Memorandum of September 23, 2016, and as supplemented above, the Board of Commissioners can find that the lease has benefits to the County, and to the extent there are detriments, those have been mitigated; therefore, the lease overall is in the public interest.

Respectfully,



John R. Hutt  
Curry County Legal Counsel and Risk Manager



## MEMORANDUM

FROM John R. Hutt, Curry County Counsel; Risk Manager

TO Board of Commissioners

RE: Proposed Lease Elk River Development

DATE: September 23, 2016

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### **Summary**

Elk River Property Development (ERPD) is developing the Pacific Gales Golf Course project. The Board of Commissioners has approved that project and the Board's decision was approved by the Oregon Land Use Board of Appeals. Pacific Gales intends to market its golf opportunities to a similar customer base as the existing Bandon Dunes golf complex in Coos County. However, Bandon Dunes has multiple on-site lodging options for its clients; Pacific Gales currently has none. ERPD desires to provide lodging options to its golf customers and others. The attached draft lease is intended to provide ERPD the option of constructing and providing lodging options to its customers through Elk River Development (ERD). As set forth below, the Board of Commissioners can find that the lease agreement is has a public benefit for the County and its citizens.

### **The Lease**

The lease begins by describing the parties and the property. It then describes an annual rental amount. The lease explains that the annual rental amount is not triggered until several events occur. In an exchange of promises, ERD would only be entitled to "quiet enjoyment" (possessory rights) to the property after it had completed several development deliverables. In this way, the County would still enjoy primary rights in the property until ERD had developed its project to the satisfaction of the County's public process for development. The lease is intended to provide ERD rights in the property for the described development purposes. If the development is not realized, the lease is terminable.

///

### Development Deliverables

The different public development approvals required of ERD under the lease are among others: construction of the golf course project; approval of a site development; construction of lodging units; obtaining financing. Deadlines are imposed that describe a conservative estimate of the maximum times anticipated for the development deliverables.

### Protection of the County's ownership interests

The property consists at least in part of land that is on the same parcel as the Port Orford Landfill of which the County currently monitors with the State Department of Environmental Quality. The lease requires ERD to acknowledge the existence of the landfill and the nature of the plume that is being monitored. The lease requires ERD to defend, indemnify and hold the County harmless in any event, including any claims related to the landfill. The lease also requires ERD to include in its lodging agreements a provision whereby lodgers also acknowledge the existence of the landfill and agree to not make any claims against the County for those or other reasons. The lease requires ERD to obtain a policy of insurance naming the County and its officers, employees and representatives as additional named insureds.

### Benefits to the County

The lease site comprises approximately 21 acres adjacent to the landfill site. The lease mechanism allows the County to benefit from its landfill property without going through the expensive and time-consuming partition and sale process. The lease mechanism allows the County to realize revenue streams in at least three ways: First, annual rents after project completion; second, lodging fees of 6% of the total lodging rentals; and third, real property taxes for the improvements on the property.

The Board has been provided with a recent Economic Impact Analysis from the Bandon Dunes development. While not an apples-to-apples comparison, that report describes the benefits to the County as a community, aside from the above-described revenues to the County as an organization.

### Public Participation

In addition to the County's publicly-noticed work-session of September 28, 2016, approval of the lease, if any, would come only after the Board considers it after a public hearing during its October 4<sup>th</sup> or 19<sup>th</sup> meeting. Further, if the lease is approved, it requires ERD to publicly process an application for a master site plan, as well as all other permitting for project development.

### Conclusion

Based on the above, the Board can find that entering the lease with ERD is in the public interest.

Respectfully,



John R. Huttel  
Curry County Legal Counsel and Risk Manager

CURRY COUNTY  
LEASE AREA

T32S R15W S29C

CURRY COUNTY  
GROUNDWATER  
MONITORING AREA



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**CURRY CO. LEASE AREA**

JOB NAME: ELK RIVER DEV., LLC

DATE: OCT. 2016

JOB NO: XX-XXX DESIGN BY: CDH

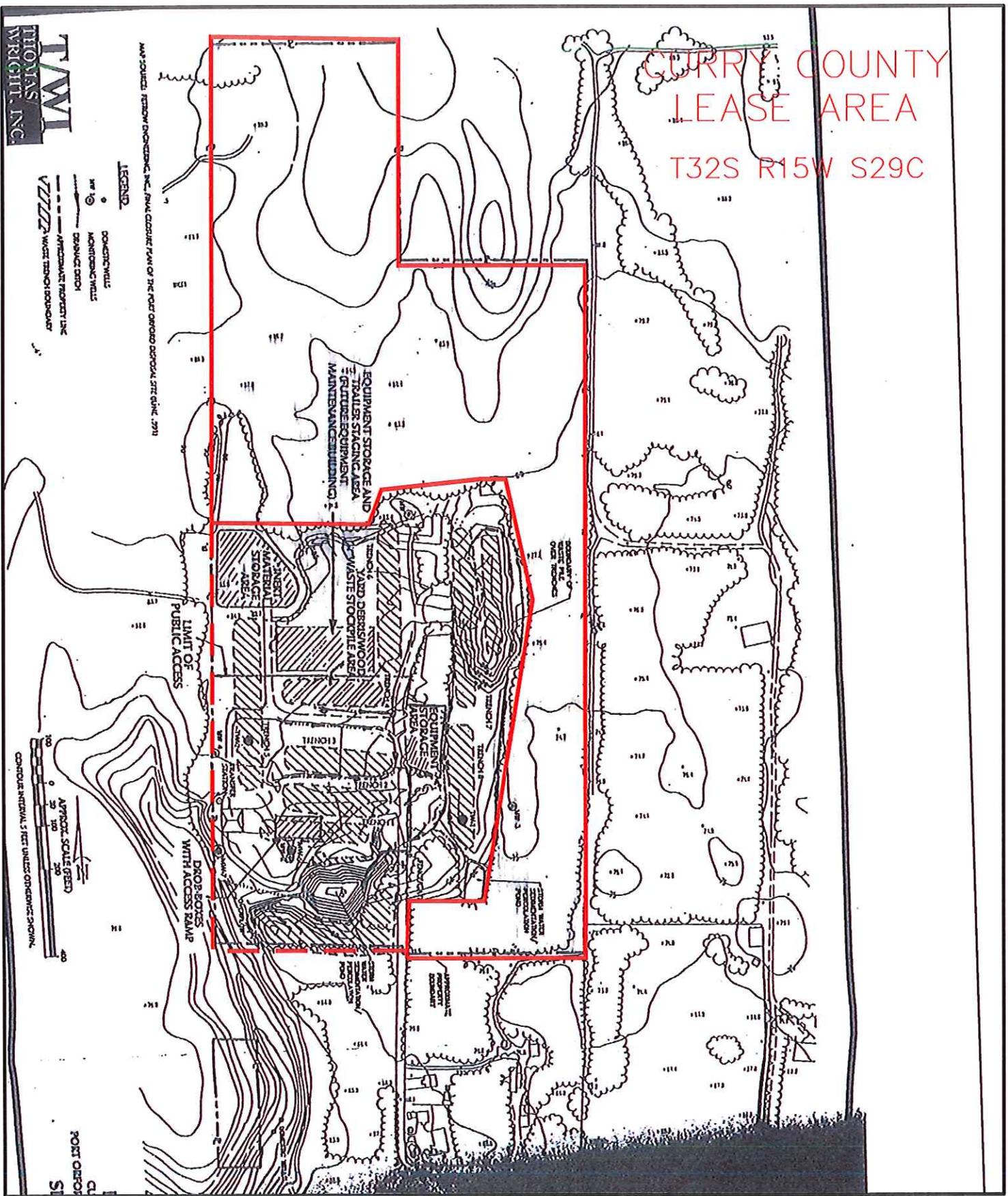
PAGE: 1 OF 3 DRAWN BY: AER

ANY SOURCE, REMOTE PRODUCTION, FINAL DESIGN PLAN OF THE ROAD DEPENDS UPON THE DATE OF THE SURVEY. 1971

**LEGEND**

- POWER WELLS
- MONITORING WELLS
- DRIVEWAY DRIVE
- APPROXIMATE PROPERTY LINE
- ~~~~~ WEST TRENCH BOUNDARY

**CURRY COUNTY  
LEASE AREA  
T32S R15W S29C**



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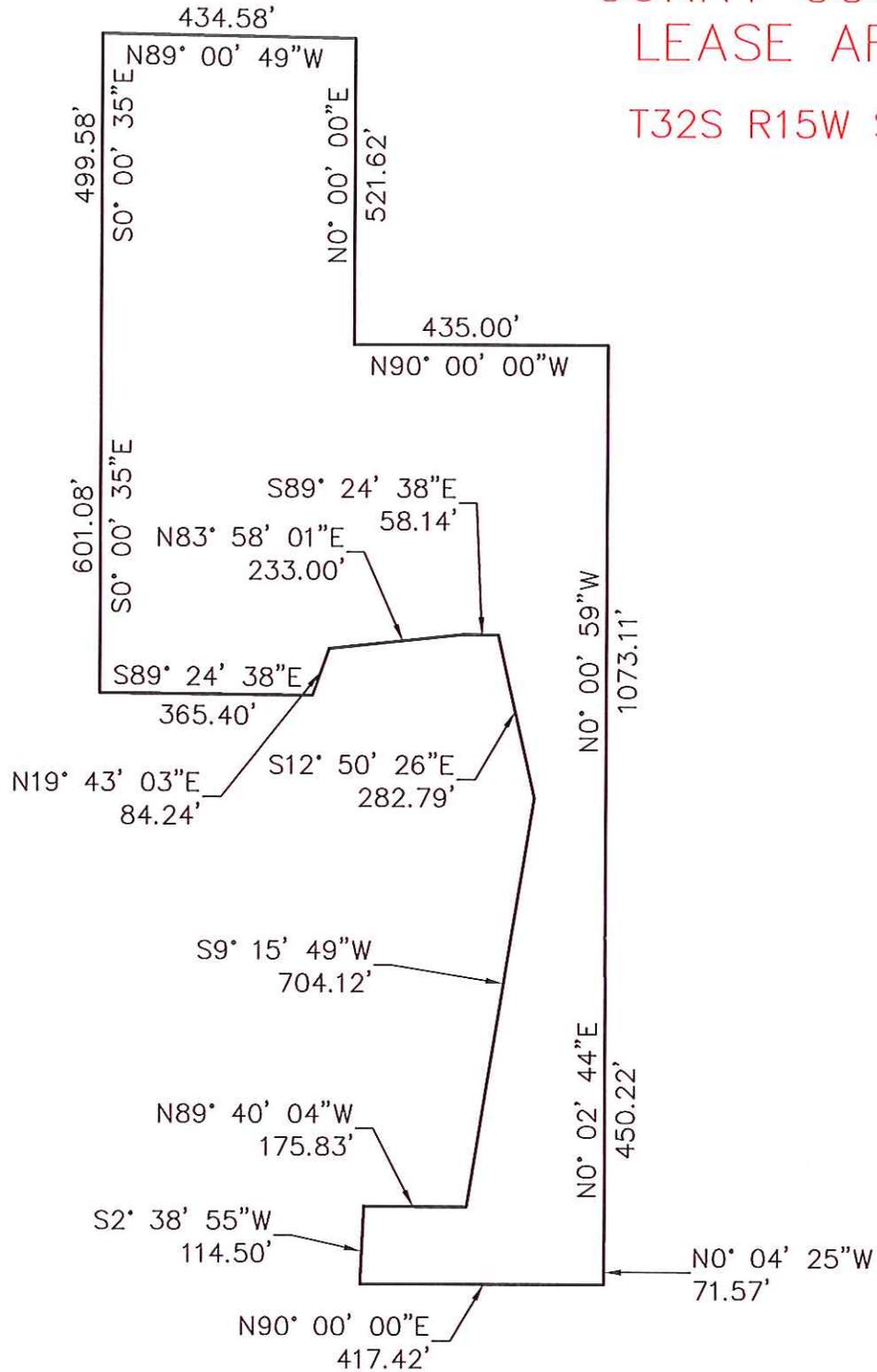
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DATE: OCT. 2016

JOB NO: XX-XXX DESIGN BY: CDH

PAGE: 3 OF 3 DRAWN BY: AER

**From:** [Penny Suess](#)  
**To:** [Thomas Huxley](#); [Susan Brown](#); [David Brock Smith](#); [John Huttli](#)  
**Cc:** [BOC Office](#)  
**Subject:** Public Hearing, 10-19-16 - AGENDA Item 6  
**Date:** Tuesday, October 18, 2016 8:24:46 PM  
**Attachments:** [BOC - ERD lease comment 10-19-16.docx](#)

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October 19, 2016

To: Curry County Board of Commissioners **Via e-mail**  
Tom Huxley, Chair - [huxleyt@co.curry.or.us](mailto:huxleyt@co.curry.or.us)  
Susan Brown, Vice-Chair - [browns@co.curry.or.us](mailto:browns@co.curry.or.us)  
David Brock Smith, Commissioner - [smithd@co.curry.or.us](mailto:smithd@co.curry.or.us)  
John Huttli, Counsel - [huttli@co.curry.or.us](mailto:huttli@co.curry.or.us)  
administration: [coc\\_office@co.curry.or.us](mailto:boc_office@co.curry.or.us)

From: Penny Suess, [REDACTED] Port Orford, OR 97465

RE: Agenda Item 6. PUBLIC HEARING: Lease with Elk River Development LLC

I oppose this lease on several grounds.

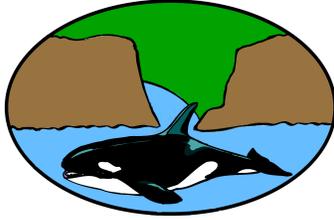
1. The county has not followed the requirements of the Urban Growth Area Management Plan. The City of Port Orford Planning Commission has not reviewed the lease for compatibility with its Comprehensive Plan, nor assessed its ability to provide the urban facilities that are likely to be required if the lease is granted and the projected development occurs.
2. The lease has not been reviewed by the Port Orford City Council. The city must be given the opportunity to modify or ratify the decision of its Planning Commission.
3. Nothing in the language of the lease states the rights of the City of Port Orford regarding development within its Urban Growth Boundary. It is as if Port Orford does not exist. If the lease is approved without Port Orford's involvement, what is the county's liability if the city declines to provide requested services in the UGA, or otherwise blocks development?

**I respectfully request that the Board of Commissioners postpone a decision on the lease for at least another month so that Port Orford Planning and City Council can be involved.**

4. Further, the terms of the lease are excessively favorable to the lessee, to the county's disadvantage. ERD is allowed years to obtain development permits, during which time the county does not realize any income, yet it is barred from making any other economic use of the property. Standard Conditional Use Permits don't allow such extended timelines for performance. Precedent will be set for other overly favorable agreements, with this applicant and others.

Thank you,

*Penny Suess*



**ORCA: Oregon Coast Alliance**  
*Protecting the Oregon Coast*

P.O. Box 857, Astoria OR 97103  
(503) 391-0210  
[www.oregoncoastalliance.org](http://www.oregoncoastalliance.org)

September 28, 2016

Curry County Board of Commissioners  
94235 Moore St., Suite 122  
Gold Beach, OR 97444

Via Email:

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David Smith: [smithd@co.curry.or.us](mailto:smithd@co.curry.or.us)  
John Huttli: [huttlj@co.curry.or.us](mailto:huttlj@co.curry.or.us)  
Administration: [bc\\_office@co.curry.or.us](mailto:boc_office@co.curry.or.us)

Port Orford Mayor and Members of City Council:

Mayor Jim Auburn: [jauborn@portorford.org](mailto:jauborn@portorford.org)  
Jim Billings: [jbillings@portorford.org](mailto:jbillings@portorford.org)  
Caroline Clancy: [cclancy@portorford.org](mailto:cclancy@portorford.org)  
Pat Cox: [pcox@portorford.org](mailto:pcox@portorford.org)  
Francie Macleod: [fmacleod@portorford.org](mailto:fmacleod@portorford.org)  
Tim Pogwizd: [tpogwizd@portorford.org](mailto:tpogwizd@portorford.org)  
Brett Webb: [bwebb@portorford.org](mailto:bwebb@portorford.org)

Re: Potential Lease of County-Owned Property inside Port Orford Urban Growth  
Boundary to Elk River Development

Dear Chair Huxley and members of the Board of Commissioners,

You have before you at the September 28th workshop a draft lease to Elk River Development (ERD) for twenty-one acres of County-owned land in the vicinity of the Port Orford landfill. County Counsel in its September 23rd memo to the Board indicates that “the Board can find that entering the lease with ERD is in the public interest,” based on the possibility of three streams of revenue from annual rents, lodging fees and property taxes.

However, there are many questions involved that the Board should consider before moving ahead with this proposal from Elk River Development. There is a potentially serious public health and safety issue with this property due to its proximity to the closed Port Orford landfill and the DEQ-monitored leachate plume. Though initial consideration of the lease is not a land use issue, ORCA strongly advises the County to consider these issues now with an eye towards potential County liability, and the larger policy question of whether this lease is in the public interest.

An initial list of questions the County must consider include:

1. **How liable is the County if they approve this lease?** Curry County is the owner of the closed Port Orford landfill, as well as the adjacent land proposed for this lease. The draft lease seeks to shield the County from liability associated with leasing the property for development of housing. There is extensive language by which Curry County hopes to avoid liability resulting from any damages due to the land's proximity to the landfill and the associated leachate plume. However, it is not clear that the County or its employees and agents can gain immunity from liability by such language if they *knowingly* lease potentially contaminated land to a third party for the *known* purpose of residential development, as in this instance.
2. **Is the landfill area safe for housing?** The landfill was used for disposal of waste since before 1960, both by burning and burial in trenches. The landfill was closed about 1990. In 1996 the landfill area was covered with dirt and seeded, but monthly inspections, as well as monitoring, are required. The current post-closure permit expires in June 2017. Note the permit states, "The permittee is liable for all acts and omissions of the permittee's contractors and agents." (*Solid Waste Disposal Site Closure Permit: Municipal Landfill for the Port Orford Disposal Site, August 2007, Sec. 3.4, page 4*).
3. **How will ERD handle provision of potable water and waste disposal?** Under the circumstances, this is not a question to be deferred to future planning processes. The County should require ERD *now* to show, in detail, how they propose to provide these essential services to a location at the far edge of Port Orford's Urban Growth Boundary, which is also a contaminated site.
4. **Has a groundwater, aquifer and geology study in the area been done to map the movement of water?** Given the landfill and leachate plume, such a study is vital. At least a part of the leachate plume is known to move in a southwesterly direction, towards Garrison Lake, a secondary water source for Port Orford and the water or groundwater source for wells in the vicinity.
5. **Has a comprehensive study been done of well and ground contamination in the vicinity of the landfill and the aquifer, including the proposed lease property?** Recollections of area residents indicate the landfill was used for unregulated disposal of hazardous waste for decades, including such things as herbicides and other unknown organophosphate contaminants with possibly long lives, thus remaining for years in soil and/or water without stabilizing. Contaminant levels can fluctuate based on rainfall, quantity, chemical changes, soil moisture content and many other factors.

6. **Does current groundwater monitoring adequately reflect the movement and interaction of groundwater and leachate?** Groundwater well monitoring began at the landfill in 1992. DEQ is the oversight agency. The 2015 Monitoring Report for the landfill indicates that only three wells, # 1, #4 and #7, were sampled. Well #2 was dry, #3 is “not currently sampled” (no reason given), #5 was removed because it was in the landfill boundary; and #6 is not discussed. In 2010, four of the seven were tested. Two testing wells are in the vicinity of the leased property (#1 and #3), but only #1 was sampled in 2010 and 2015. In other words, the efficacy of leachate and groundwater monitoring is highly questionable, and there is ample room for doubt whether the test results reflect a true picture of the toxicity of the soil, aquifer and groundwater.
7. **What will the effects of the proposed ERPD wastewater pipeline be?** Elk River Property Development is pursuing the use of Port Orford wastewater for irrigation of the proposed golf course at Knapp Ranch. According to initial maps in the DEQ application, ERPD plans to run the pipeline in the same vicinity, through and/or adjacent to the landfill leachate plume. How will that pipeline affect the local hydrology, the test wells, the leachate movement and housing plans proposed for the leased area?
8. **What is Port Orford’s opinion of the proposed lease?** This property is in the Urban Growth Boundary, and thus subject to the 1978 Urban Growth Area Joint Management Agreement between Port Orford and Curry County. As is clear from the Agreement, Port Orford has many concerns about providing urban services to the UGB area, and seeks to ensure the City has an adequate part in the planning and approval for urbanization. Port Orford would likely have to extend services to the leased property if the landfill and/or its leachate made other water and waste removal options impractical, or triggered a public health emergency.

For the sake of County residents, ORCA suggests that County Counsel’s recommendation that this lease would be in the public interest be weighed against the strong likelihood of problems the County will face if the lease is approved.

Please place this testimony in the record for this matter, and let ORCA know the date of the Board’s consideration of the lease at public hearing.

Thank you,

*/s/ Cameron La Follette*

Cameron La Follette  
Executive Director

**Sean T. Malone**  
**Attorney at Law**

259 E. Fifth Ave.,  
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Fax (650) 471-7366  
seanmalone8@hotmail.com

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October 17, 2016

Via Email

Curry County Board of Commissioners  
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Gold Beach OR 97444

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Jim Billings: [jbillings@portorford.org](mailto:jbillings@portorford.org)  
Caroline Clancy: [cclancy@portorford.org](mailto:cclancy@portorford.org)  
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Francie Macleod: [fmacleod@portorford.org](mailto:fmacleod@portorford.org)  
Tim Pogwizd: [tpogwizd@portorford.org](mailto:tpogwizd@portorford.org)  
Brett Webb: [bwebb@portorford.org](mailto:bwebb@portorford.org)

Re: proposed lease of County-owned property inside Port-Orford Urban Growth  
Boundary to Elk River Development

Dear Chair Huxley and members of the Board of Commissioners,

Please accept these comments on the proposed lease to Elk River Property  
Development (ERD). The proposed lease is unequivocally not in the public interest  
given that significant questions exist as to the health, safety, and well being of those that  
will apparently live within the leased area. These questions were posed, and have

apparently been left unanswered, by ORCA in its September 28, 2016, testimony and are incorporated herein.

The County is taking a significant risk if it approves the proposed lease because it doing so subjects the County to liability. The proposed lease area has been used for waste disposal since 1960, including burning and burial of waste, and was subsequently closed in 1990. The landfill was then covered with a layer of dirt in 1996 and seeded. However, monthly inspections and monitoring of a leachate plume are required given the history of the property. It is important to understand whether the individuals that reside on the property will be notified of the history of the property, as well as the ongoing inspections and monitoring. Such a disclosure would be necessary given that post-closure permit for the site states that “[t]he permittee is liable for all acts and omissions of the permittee’s contractors and agents.” *Solid Waste Disposal Site Closure Permit: Municipal Landfill for the Port Orford Disposal Site*, August 2007, Sec. 3.4, p. 4). In other words, even if the County leases the property to another entity, the County is still liable for any acts or omissions. The County appears to have shortsightedly focused on revenue streams (e.g., annual rents, lodging fees, and property taxes), but failed to address other issues, including the effect on public health and well-being, the most important of which are the availability of water and waste disposal. As it currently stands, these services would have to be provided by well water and septic system, respectively. Given the leachate plume, it is entirely unclear how the County believes that such services can be safely provided.

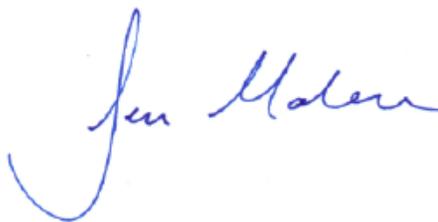
The possibility of County liability here is much akin to *Vokoun v. City of Lake Oswego*, 335 Or 19, 56 Pd 396 (2002), where the City of Lake Oswego built a drainage pipe and authorized a subdivision that resulted in significant erosion. There, the city’s decision to fix and patch the drainage pipe was not covered by discretionary immunity. Discretionary immunity protects governmental defendants from liability for certain types of decisions, namely, those that require supervisors or policy makers to assess costs and benefits, and to make a choice among competing goals and priorities. *McBride v. Magnuson*, 282 Or 433, 437, 578 P2d 1259 (1978). The doctrine of discretionary immunity does not immunize a decision not to exercise care at all, if action of some kind is required. See *Garrison v. Deschutes*, 334 Or 264, 274, 48 P3d 807 (2002). To qualify for discretionary immunity, the city must show that it made a decision “involving the making of policy” as opposed to a “routine decision[] made by employees in the course of their day-to-day activities[.]” See *Moseley v. Portland School Dist. No. 1J*, 315 Or 85, 89, 843 P.2d 415 (1992) (stating test for discretionary immunity). The burden is on the governmental defendant to establish immunity. *Stevenson v. State of Oregon*, 290 Or 3,

15,619 P2d 247 (1980). Given the obvious issues related to water availability and waste disposal, the County is simply failing to exercise care. Furthermore, leasing property is not a policy decision, and, is, instead, the type of routine decision the County engages in throughout the course of its daily activities. As such, the County will be subject to liability for the proposed lease when issues arise about the health and safety of those that reside on the leased property.

The County should further protect itself from liability and the public from adverse conditions resulting from the existing leachate plume by engaging in a comprehensive groundwater, aquifer, and geologic study. At the very least, the County could rely on such a study to gauge the likelihood of adverse conditions, and, furthermore, such a study would be an example of the County taking great care with its leased lands. A comprehensive study of the known pollution can only assist the County in the likely event that the County must defend its decision to lease the property to ERPD. The fact of the matter is that, regardless of how extensively the County purports to transfer liability to ERPD in the lease, the County's transfer still exposes the County to unspecified and potentially large liability because the applicant has not assumed *all* liability.

For the health, safety, and well being of County residents, I respectfully request that the County not lease the property to ERPD. Without engaging in a comprehensive study to better understand where the existing pollution is and its potential effects on groundwater and the leachate plume's movement, the County should not consider such a lease. Its own liability is at stake, in addition to the public safety.

Sincerely,



Sean T. Malone  
Attorney for ORCA

Cc:  
Client