



900 S.W. Fifth Avenue, Suite 2600
Portland, Oregon 97204
main 503.224.3380
fax 503.220.2480
www.stoel.com

February 3, 2011

DAVID E. FILIPPI
Direct (503) 294-9529
defilippi@stoel.com

VIA ELECTRONIC AND U.S. MAIL

Phillip C. Ward
Director
Oregon Water Resources Department
725 Summer Street NE, Suite A
Salem, OR 97301-1271

**Re: Response to Petition for Reconsideration of Final Order and Permit for
Application G-17395 (Seven Hills Properties, LLC)**

Dear Director Ward:

This Response to Petition for Reconsideration is filed on behalf of Seven Hills Properties, LLC ("Seven Hills"). Seven Hills requests that the Oregon Water Resources Department ("OWRD") deny the Petition for Reconsideration ("Petition") filed by the City of Milton-Freewater (the "City"). First, the City lacks standing to file a petition for reconsideration because the City did not protest the Proposed Final Order. Second, the City's position in the Petition is inconsistent with the 2005 settlement agreement between OWRD, the City, and Seven Hills (the "Settlement Agreement"). *See Settlement Agreement, In the Matter of Proposed Water Management and Conservation Plan for the City of Milton-Freewater, Umatilla County, Oregon (2005)* (copy attached). Third, contrary to the City's contention in the Petition, it does not have a full-time conservation program in effect. Fourth, issuance of the Permit for Application G-17395 does not affect the City because the Permit does not increase the amount of water used by Seven Hills.

I. BACKGROUND

We do not repeat all of the background information provided in the Petition. Rather, in this section, we simply provide additional context to explain why OWRD should deny the Petition.

On July 20, 2010, OWRD gave public notice of Seven Hills' application in its weekly notice and requested comments on the application. The notice contained a link to OWRD's Initial Review Determination, which included OWRD's initial conclusion that Seven Hills' proposed use of water was "allowable under the Umatilla Basin Program." Initial Review Determination at 1. The City could have commented if it disagreed with this initial conclusion, or the City could

RECEIVED

FEB 03 2011

WATER RESOURCES DEPT
SALEM, OREGON

70528379.4 0063091-00001



Phillip C. Ward
February 3, 2011
Page 2

have commented regarding the proximity of Seven Hills' wells to the City's wells. The deadline for comments was August 19, 2010, but the City submitted no comments.

On October 26, 2010, OWRD gave public notice of the Proposed Final Order in its weekly notice and explained that any person who disagreed with the Proposed Final Order could file a protest. The Proposed Final Order stated: "Protests must be received in the Water Resources Department no later than **December 10, 2010.**" Proposed Final Order at 5. It also stated: "*If you do not protest this Proposed Final Order and if no substantive changes are made in the Final Order, you will not have an opportunity for judicial review, protest or appeal of the Final Order when it is issued.*" *Id.* at 6. The City did not file a protest, despite the fact that one of the conclusions of law provided: "The proposed use requested in this application is allowed in the Umatilla Basin Program, or a preference for this use is granted under the provisions of ORS 536.310(12)." *Id.* at 3.

After the City failed to comment on Seven Hills' application by August 19, 2010, and failed to protest the Proposed Final Order by December 10, 2010, the City filed this Petition on January 28, 2011.

II. ARGUMENT

A. The City lacks standing to file a petition for reconsideration.

The City lacks standing to file a petition for reconsideration because the City is not a party to the case. The right to appeal a final order or to file a petition for reconsideration is limited to "[a]ny party adversely affected by a final order other than contested case issued by the Water Resources Commission or Water Resources Department." ORS 537.075(1) (emphasis added); *see* ORS 183.484 (permitting a party to file a petition for reconsideration before it files an appeal). Where the opportunity to protest a final order is available, the parties to a final order in other than a contented case are limited to the *applicant* and any *protestant*. *See* ORS 537.625(2); *see also* *Pete's Mountain Homeowners Ass'n v. Or. Water Res. Dep't*, 238 P3d 395, 401 (Or Ct App 2010). Therefore, only the applicant or a protestant is permitted to file an appeal or a petition for reconsideration.

Because the City is not the applicant and did not file a protest, the City is not a party to the case and lacks standing to file a petition for reconsideration. OWRD should deny the City's petition.

Even if an exception to the standing requirement were to apply when a final order includes a substantive modification to the proposed final order, OWRD did not make a substantive change

RECEIVED

FEB 03 2011



Phillip C. Ward
February 3, 2011
Page 3

to the Proposed Final Order. The Proposed Final Order stated as a conclusion of law: "The proposed use requested in this application is allowed in the Umatilla Basin Program, or a preference for this use is granted under the provisions of ORS 536.310(12)." Proposed Final Order at 3. The Final Order simply explained why the proposed use was allowed: "The City's water management and conservation plan expired on October 1, 2010; therefore, OAR 690-507-0060(3)(a)(B) will not affect this application."¹ Final Order at 2.

Because the City lacks standing, OWRD should deny the Petition.²

B. The City's contention that it has a full-time conservation program in effect is contrary to the Settlement Agreement.

The City contends in its Petition that OAR 690-507-0030(3)(a)(B) does not require an approved WMCP; rather, any full-time conservation program will satisfy the rule. The City also contends that it has had a full-time conservation program in effect "[f]or at least the last decade" and that the "implementation of its conservation program did not begin with approval of the Water Management and Conservation Plan by OWRD, and it did not cease or 'expire' on October 1, 2010." Petition at 4.

The City's contentions directly contradict the Settlement Agreement. As part of the Settlement Agreement, the City (and OWRD) stipulated and agreed to the following:

If the Department were to issue a final order approving the City's WMCP prior to the issuance of Seven Hills' groundwater permit, then the Seven Hills' Application would be subject to a different classification under the Umatilla Basin Program rules in the midst of the review process. The application of a new and

¹ We agree with the Petition that the citation in the Final Order should have been to OAR 690-507-0030(3)(a)(B).

² If OWRD concludes the City has standing because the Final Order constituted a substantial modification to the Proposed Final Order, reconsideration should be limited to the only modification relevant to the Petition: whether OAR 690-507-0060(3)(a)(B) applied once the City's Water Management and Conservation Plan ("WMCP") expired. As explained in Part II.B, the answer is no.



Phillip C. Ward
February 3, 2011
Page 4

different classification could substantially alter and severely delay review of the Seven Hills' Application.

Thus, the City admitted and agreed that the applicability of OAR 690-507-0030(3)(a)(B) *does* depend on OWRD's approval of a WMCP. Put differently, whatever conservation program the City had in effect prior to the approval of its WMCP in 2005 did not satisfy the requirement that the City "have a full-time conservation program in effect." OAR 690-507-0030(3)(a)(B). If approval of a WMCP means a conservation program is "in effect," then expiration of a WMCP means the conservation program is *not* "in effect." As such, the City has not had a full time conservation program in effect since October 1, 2010.

Because the City and OWRD both agreed in the Settlement Agreement that OAR 690-507-0030(3)(a)(B) applies only when a City has an approved WMCP in effect, OWRD should deny the Petition.

C. Even if an approved WMCP is not necessary to satisfy OAR 690-507-0030(3)(a)(B), the City's current conservation program would not satisfy the rule.

The City seems to assume that any program that is designated a "conservation program" necessarily satisfies OAR 690-507-0030(3)(a)(B) because the rule does not explicitly require an "approved" conservation program. However, mere absence of the word "approved" from the rule does not eliminate OWRD's obligation to determine whether the City has "a full-time conservation program in effect." OAR 690-507-0030(3)(a)(B).

The rule provides cities with a powerful tool to protect municipal wells from interference. Yet, that tool is not absolute. In order to exercise it, a city must have "a full-time conservation program in effect." *Id.* This ensures that the city is doing its part to conserve water. The requirement would be meaningless if OWRD lacked any role to play in determining whether a city's conservation program satisfied the rule. That is, a program that does not actually conserve water would not satisfy the rule. Further, use of the term "in effect" also implies that the program must have an effect on water conservation. Thus, implicit in the rule is a requirement that OWRD determine whether a City has such a program in effect.

As evidenced by the City's Draft WMCP that was received by OWRD on November 30, 2010, the City's current conservation program is not effective. For example, the City acknowledged that "[a] system that has tight controls on its water consumption generally maintains at least 90 percent accountability for all water." Draft WMCP at 2-13. Yet, the City's unaccounted for

RECEIVED

FEB 03 2011



Phillip C. Ward
February 3, 2011
Page 5

water regularly exceeds 10%, which is evidence that the City lacks tight controls on its water consumption. In 2007, the City's percentage of unaccounted for water was 19.8%—a higher percentage than in 2002 or 2003. Numerous other deficiencies exist in the Draft WMCP. Until those deficiencies are remedied, OWRD cannot determine whether the City's conservation plan satisfies OAR 690-507-0030(3)(a)(B).

Further, even though the City's WMCP had not yet *expired* when Seven Hills filed its application, it is likely that the City's WMCP, as it was being implemented, did not satisfy OAR 690-507-0030(3)(a)(B) at that time either. That is, approval of a WMCP satisfies the rule only so long as it is being implemented as specified therein. For example, a city's WMCP would not satisfy the rule if the city failed to implement many of the conservation measures specified in its WMCP because the city would no longer "have a full-time conservation program in effect." OAR 690-507-0030(3)(a)(B).

Therefore, OWRD should deny the Petition because the City does not have a full-time conservation program in effect.

D. The issuance of the Permit for Application G-17395 will not affect the City because the Permit will not increase the amount of water used by Seven Hills.

In Application G-17395, Seven Hills proposed to use a portion of the water authorized by Permit G-15883 (now Certificate 86441) for storage to protect reservoir liners. As Seven Hills explained in its application:

This application only involves STORAGE of water in five existing storage reservoirs/bulges. Water will be held in reservoirs/bulges on year-round basis to protect integrity of reservoir liners. All stored water will be used for irrigation of 1528 acres already authorized by Permit G-15883.

The total maximum rate requested in Application G-17395—16.82 cfs—is the same rate specified in Certificate 86441. Further, the Permit for Application G-17395 includes the same conditions regarding seasonal drawdown as those contained in Certificate 86441, ensuring that the use of water under Application G-17395 will not cause any new or additional impacts. Thus, the Permit for Application G-17395 will not increase the amount of water used by Seven Hills, and there will be no adverse impact on the City's municipal wells. If Seven Hills did not use the water for storage, Seven Hills would still use the water for irrigation.

RECEIVED
FEB 03 2011
WATER RESOURCES DEPT
SALEM, OREGON



Phillip C. Ward
February 3, 2011
Page 6

The temporary storage of water in the bulges/reservoirs *during the irrigation season* is already authorized by Certificate 86441. Therefore, the Permit for Application G-17395 only authorizes storage during the additional period of time outside of the typical irrigation season (i.e., fall and winter months) when net evaporation from the ponds is zero (or even negative).

Permit G-15883 (now Certificate 86441) was issued to Seven Hills as a result of the Settlement Agreement. The City did not protest issuance of that Permit. The City should not now be permitted to object to use of that water in a manner that will have no adverse impact on the City.

III. CONCLUSION

Seven Hills respectfully requests that OWRD deny the Petition. The City lacks standing to file the Petition, the City's position is contrary to the Settlement Agreement, the City does not have a full-time conservation plan in effect, and the City is not affected by issuance of the Permit to Seven Hills. Each of these reasons is sufficient for OWRD to deny the Petition.

Very truly yours,

David E. Filippi

cc: Tom Paul, OWRD
Dwight French, OWRD
Patricia McCarty, OWRD
Martha Pagel, Schwabe, Williamson & Wyatt
Client

RECEIVED

FEB 03 2011

WATER RESOURCES DEPT
SALEM, OREGON

BEFORE THE OREGON WATER RESOURCES DEPARTMENT

In the Matter of Proposed Water)
Management and Conservation Plan for the) **SETTLEMENT**
City of Milton-Freewater, Umatilla County,) **AGREEMENT**
Oregon)

The Oregon Water Resources Department (the "Department"), the City of Milton-Freewater (the "City"), and Norm McKibben and Seven Hills Properties, LLC (collectively, "Seven Hills"), do hereby stipulate and agree as follows:

Background

- A. On August 21, 2000, the City submitted a proposed Water Management and Conservation Plan ("WMCP") to the Department for review and consideration. The proposed WMCP was modified in part on November 10, 2004.
- B. On December 6, 2004, OWRD issued a Proposed Final Order ("PFO") recommending approval of the City's proposed WMCP.
- C. On January 5, 2005, Seven Hills submitted a timely protest and appeal of the PFO for the City's WMCP.
- D. On or about October 5, 2004, Seven Hills filed an application for a groundwater permit (App. No. G-16322) (the "Seven Hills' Application"). The public comment period for the Initial Review of the Seven Hills' Application closed on December 30, 2004. Other than a submittal by Seven Hills in response to a request for additional information by the Department, no comments were filed during the Initial Review public comment period. On January 18, 2005, the Department issued a PFO for the Seven Hills' Application and a draft groundwater permit. The period within which to file a protest to the PFO for the Seven Hills' Application closes on March 4, 2005. Assuming no protests to the PFO for the Seven Hills' Application are filed, a final groundwater permit may be issued to Seven Hills as early as mid-March 2005.
- E. If the Department were to issue a final order approving the City's WMCP prior to the issuance of Seven Hills' groundwater permit, then the Seven Hills' Application would be subjected to a different classification under the Umatilla Basin Program rules in the midst of the review process. The application of a new and different classification could substantially alter and severely delay review of the Seven Hills' Application.
- F. The Department, the City, and Seven Hills agree that the issues raised in the Seven Hills' protest and appeal of the PFO recommending approval of the City's proposed WMCP can be resolved solely on the following terms.

RECEIVED

FEB 03 2011

WATER RESOURCES DEPT
SALEM, OREGON

Terms of the Agreement

1. The City requests, and the Department, the City, and Seven Hills agree, that the Department will take no further action on the City's WMCP until the Department issues a final order approving the Seven Hills' Application and a final groundwater permit to Seven Hills. However, this Settlement Agreement does not bind the Department to issue a final order approving the Seven Hills' Application or to issue a final groundwater permit.
2. Upon the Department's issuance of a final order approving the Seven Hills' Application and the issuance of a final groundwater permit to Seven Hills, Seven Hills agrees to withdraw its protest and appeal of the PFO for the City's WMCP. While Seven Hills agrees to the proposed conditions set forth in the PFO, Seven Hills reserves the right to challenge any final order related to the Seven Hills' Application to the extent that the final order is not consistent with the PFO and/or the draft groundwater permit.
3. Upon Seven Hills' withdrawal of its protest and appeal of the PFO for the City's WMCP, the Department agrees to issue a final order approving the City's WMCP, with the final order substantially similar to the PFO recommending approval of the City's WMCP.
4. The City and Seven Hills request, and the Department, the City, and Seven Hills agree, that pending issuance of a final order approving the Seven Hills' Application and the issuance of a final groundwater permit to Seven Hills, the Department will hold the Seven Hills' protest and appeal of the PFO for the City's WMCP in abeyance, and the Department will take no action with respect to the Seven Hills' protest and appeal.
5. Following Seven Hills' withdrawal of its protest and appeal of the PFO to the City's WMCP, the Department agrees to refund in full Seven Hills' protest fee.

R.L. Ry For Norm McKibben Date 2/26/05
Norm McKibben
In his individual capacity and on behalf of
Seven Hills Properties, LLC

Howard Moss
On behalf of the City of Milton-Freewater

Date

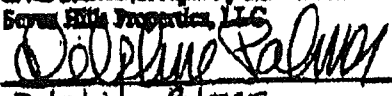
Dwight French
Dwight French
On behalf of the Oregon Water Resources
Department

3-3-05
Date

RECEIVED
FEB 03 2011
WATER RESOURCES DEPT
SALEM, OREGON

Terms of the Agreement

1. The City requests, and the Department, the City, and Seven Hills agree, that the Department will take no further action on the City's WMCP until the Department issues a final order approving the Seven Hills' Application and a final groundwater permit to Seven Hills. However, this Settlement Agreement does not bind the Department to issue a final order approving the Seven Hills' Application or to issue a final groundwater permit.
2. Upon the Department's issuance of a final order approving the Seven Hills' Application and the issuance of a final groundwater permit to Seven Hills, Seven Hills agrees to withdraw its protest and appeal of the PFO for the City's WMCP. While Seven Hills agrees to the proposed conditions set forth in the PFO, Seven Hills reserves the right to challenge any final order related to the Seven Hills' Application to the extent that the final order is not consistent with the PFO and/or the draft groundwater permit.
3. Upon Seven Hills' withdrawal of its protest and appeal of the PFO for the City's WMCP, the Department agrees to issue a final order approving the City's WMCP, with the final order substantially similar to the PFO recommending approval of the City's WMCP.
4. The City and Seven Hills request, and the Department, the City, and Seven Hills agree, that pending issuance of a final order approving the Seven Hills' Application and the issuance of a final groundwater permit to Seven Hills, the Department will hold the Seven Hills' protest and appeal of the PFO for the City's WMCP in abeyance, and the Department will take no action with respect to the Seven Hills' protest and appeal.
5. Following Seven Hills' withdrawal of its protest and appeal of the PFO to the City's WMCP, the Department agrees to refund in full Seven Hills' protest fee.

 Norm McKibben
 In his individual capacity and on behalf of
 Seven Hills Properties, LLC

 Delphine Palmer
 On behalf of the City of Milton-Freewater

Date

Date

 Dwight French
 On behalf of the Oregon Water Resources
 Department

Date

RECEIVED

FEB 03 2011

WATER RESOURCES DEPT
SALEM, OREGON

Kerry Kavanagh

From: Filippi, David [DEFILIPPI@stoel.com]
Sent: Thursday, February 03, 2011 4:55 PM
To: Phillip Ward
Cc: Tom Paul; Dwight French; particia.e.mccarty@state.or.us; Kerry Kavanagh; mpagel@schwabe.com
Subject: Response to Petition for Reconsideration re App G-17395
Attachments: 2011-02-03 Seven Hills Properties LLC Response to Petition for Reconsideration of Final Order.PDF

Please see attached response.

David E. Filippi

Stoel Rives LLP | 900 SW Fifth Ave., Suite 2600 | Portland, OR 97204

Direct: (503) 294-9529 | Fax: (503) 220-2480 | defilippi@stoel.com | www.stoel.com

RECEIVED

FEB 03 2011

WATER RESOURCES DEPT
SALEM, OREGON