

BEFORE THE ARBITRATION SERVICE OF PORTLAND, INC.

DAN HARRIS, ARBITRATOR

CITY OF STAYTON,)
)
)
 Plaintiff,)
)
 vs.) ASP No. 141222
)
 JCNW FAMILY, INC.,)
)
 Defendant.)

DEPOSITION OF BILL MARTINAK

Taken in behalf of the Plaintiff

April 24, 2015

1 BE IT REMEMBERED THAT, pursuant to Oregon Rules
2 of Civil Procedure, the deposition of BILL MARTINAK was
3 taken before Lisa J. Pace, Court Reporter and Notary Public
4 for Oregon, on Friday, April 24, 2015, commencing at the
5 hour of 8:55, the proceedings being reported in the law
6 offices of Schwabe, Williamson & Wyatt, PC, Portland,
7 Oregon.

8 -:-

9 APPEARANCES:

10 APPEARING FOR THE PLAINTIFF(S)

11 Wallace W. Lien
Wallace W. Lien, PC
12 PO Box 5730
Salem OR 97304
13 503-585-0105
wallace.lien@lienlaw.com

14 and

15 Richard J. Kuhn
16 Hart Wagner, LLP
1000 SW Broadway, Suite 2000
17 Portland OR 97205
503-222-4499
18 rjk@hartwagner.com

19
20 APPEARING FOR THE DEFENDANT(S)

21 Darien S. Loiselle and Stephanie C. Holmberg
Schwabe, Williamson & Wyatt, PC
22 1211 SW Fifth Avenue, Suite 1900
Portland OR 97204
23 503-222-9981
dloiselle@schwabe.com and sholmberg@schwabe.com

24
25 Also Present: None

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Examinations

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EXAMINATION MR. LIEN:

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BILL MARTINAK,

having first been sworn or affirmed, was examined and testified under penalties of perjury as follows:

EXAMINATION

MR. LIEN:

Q. Good morning. You and I have met on several different occasions, but for the record, I'm Wally Lien, representing the City of Stayton. And could you just state your name and address for the record and spell your last name, please.

A. Yes. My name is Bill Martinak, and I reside at 15556 Coon Hollow Road Southeast in Stayton, Oregon.

MR. LOISELLE: Spell your last name.

THE WITNESS: Excuse me. M-A-R-T-I-N-A-K.

Q. Thank you. Now, you sat through two days' worth of depositions and heard all the ground rules. Do you understand those or do you want me to repeat those?

A. I believe I understand the rules.

Q. Okay. I think just a couple of things, the verbal answers are something that's important because she can't pick up on the head nods and the "uh-huhs," they don't know whether that's a yes or no.

And if we do take a break, then just make sure that you answer the question before we take a break.

1 And you understand about the oath and the
2 impeachment if we have to use it later on at the hearing;
3 is that correct?

4 A. I do understand.

5 Q. Okay. Very good. Anything that would impair
6 your ability to tell the whole truth today?

7 A. No.

8 Q. All right. Let's start with the history of the
9 ownership of the property, because I'm not sure how all of
10 that has occurred, so -- because I was involved with
11 Phillips when we did the original annexation agreement and
12 then I sort of lost touch with it. So pick me up from when
13 you purchased it from Phillips.

14 A. That would have been in 2006, and met with Brian
15 Phillips. And he first came and said that his family was
16 going to develop the property and asked if I would assist
17 him, and then eventually came to me and said that the
18 family would rather sell the property than be involved in
19 the development.

20 Q. And what was the scope of the property? Was it
21 all 20 acres or some lesser part?

22 A. No. The purchase was for all of 20 acres.

23 Q. And at that point, 10 acres was in the City and
24 the other 10 acres was outside the City?

25 A. That's correct.

1 Q. Okay. So you bought both 10-acre pieces?

2 A. Yes.

3 Q. Okay. And what business entity did you purchase
4 the property in?

5 A. JCNW Family, LLC.

6 Q. So there was a deed from the Phillips folks to
7 JCNW?

8 A. Correct.

9 Q. And then, tracking, JCNW has now sold some parts
10 of that property; is that correct?

11 A. That's correct.

12 Q. What have they sold?

13 A. We sold lots in Phase I to a builder, to the home
14 builder that was building there.

15 Q. Is that JDC?

16 A. JDC, LLC. And then we transferred Phase II lots
17 to Emery & Sons Construction.

18 Q. Okay. So in Phase I, there are 20 lots; is that
19 right?

20 A. That's correct.

21 Q. And they all went to JDC Homes?

22 A. Nine of them went.

23 Q. Nine. Okay. So in Phase I, nine lots went to
24 JDC Homes. And when did that sale occur?

25 A. I believe that was in the end of late -- later

1 part of -- latter part of 2013.

2 Q. When you sold to JDC Homes, had we already
3 entered into the development agreement at that point?

4 A. Yes, I believe we had, because we were in the
5 process of building Phase II.

6 Q. Okay. And what kind of declarations or
7 disclosures did you make to JDC Homes about the existence
8 of the development agreement?

9 A. I'm not sure that the development agreement for
10 Phase II had anything to do with the sale of the lots in
11 Phase I. I don't remember anything.

12 Q. Okay. So you don't remember disclosing the
13 existence of the development agreement to the sale of JDC
14 Homes?

15 A. I don't recall that.

16 Q. Do you recall if the development agreement was
17 listed as an exception in the deed or the title policy?

18 A. Well, again, I don't understand how the
19 development agreement for Phase II would be tied to the
20 lots in Phase I.

21 Q. Well, whether you understand or not is
22 irrelevant, I just need to know what your recollection is.

23 A. I don't recall that issue coming up.

24 Q. So nine of the lots went to JDC. Where did the
25 rest of the lots go? Were they sold?

1 A. Well, the rest of the lots had already been built
2 on in Phase I.

3 Q. And sold to individual property owners?

4 A. That's correct.

5 Q. Okay. So the nine lots that you sold to JDC in
6 late 2013 then divested JCNW all of its ownership in Phase
7 I?

8 A. I believe that's correct.

9 Q. Okay. Then let's talk about Phase II. What is
10 the status of ownership of Phase II?

11 A. The lots in Phase II are currently owned by Emery
12 & Sons Construction.

13 Q. When did they get sold to Emery?

14 A. They were transferred, I believe, in September of
15 2014.

16 Q. All of the lots?

17 A. All of the ones that hadn't already been sold. I
18 believe one lot had been sold to a -- a house had been
19 built.

20 Q. Lot 26?

21 A. That sounds familiar.

22 Q. That corner [indicating]?

23 A. I believe that's correct.

24 Q. So the sale of Phase II was to individual
25 builders and then ultimately to Emery?

1 A. Not individual builders.

2 Q. Okay. So it all went to Emery except lot 26?

3 A. That's correct.

4 Q. And who bought lot 26?

5 A. I don't -- a young couple that -- from the
6 Stayton area, I believe.

7 Q. Who did they buy it from?

8 A. Well, the house was built by JDC Homes, so the
9 purchase was from JDC.

10 Q. So JCNW then had sold that lot to JDC who then
11 sold it to a private owner --

12 A. Correct.

13 Q. -- is that right?

14 Okay. So by September of 2014, then, JCNW had no
15 more ownership interest in either Phase I or Phase II; is
16 that correct?

17 A. That's correct.

18 Q. And the sale to JDC of lot 26, when was that?

19 A. Well, the sale actually would have taken place at
20 closing. We would have kept control of the lot, and then
21 basically they -- the payment for the lot would have come
22 at closing.

23 Q. From whoever financed the purchaser?

24 A. Correct.

25 Q. When was that?

1 A. That would have been in the summer of 2014, I
2 don't know the exact date.

3 Q. So the deal with lot 26 and JDC did not involve
4 JDC going into title?

5 A. I'm not sure exactly -- What we did was we held
6 the lot until the sale closed, and I believe we give
7 them -- there's a warranty deed or something like that
8 that's prepared so that it can be included in the sale.
9 Obviously, they build -- buy the house with the lot, and
10 then out of the sale proceeds, the lot is paid for.

11 Q. Okay. Now, when you said we gave a deed to them,
12 who is "them"? Is that JDC or is it the young couple?

13 A. I believe it's to JDC.

14 Q. To JDC, okay.

15 A. And then they in turn...

16 Q. And then what disclosures were made to JDC on lot
17 26 and/or to the couple, if you know, about the existence
18 of the development agreement?

19 A. I'm not sure if any agreement was given to them.

20 Q. Okay. Do you know if the development agreement
21 was accepted in the title policy or on the deed, either
22 from JCNW to JDC or from JDC to the ultimate purchaser?

23 A. I don't know that.

24 Q. Okay. Now, what I'm going to call Tract A, which
25 is everything excluding Phase I and Phase II, who currently

1 owns Tract A?

2 A. JCNW.

3 Q. Okay. Is that the only property, then, that you
4 have left in ownership on what we call the Phillips
5 Estates?

6 A. Everything that's not Phase I and not Phase II is
7 owned by JDC.

8 Q. Okay.

9 A. JCNW. Sorry.

10 Q. Do you retain as JCNW any equity or security in
11 any of the lots in Phase I or Phase II as JCNW?

12 A. Not that I'm aware of.

13 Q. Okay. And we're here over a dispute about the
14 development agreement. You're familiar with the
15 development agreement? We'll go over that in more detail
16 later, but you're familiar that there's a development
17 agreement between JCNW and the City?

18 A. Yes.

19 Q. And maybe, before I move into that, what is your
20 position with JCNW?

21 A. I'm the managing partner.

22 Q. Are you also an owner? Do you own memberships in
23 the LLC?

24 A. I have membership percentage, yes.

25 Q. What is that percentage?

1 A. Thirty-five percent.

2 Q. Who else is owner of membership interests in the
3 LLC?

4 A. My wife.

5 Q. What interest does she have?

6 A. The same.

7 Q. Thirty-five percent? Who owns the remainder?

8 A. The remainder is split equally between my two
9 sons, or our two sons.

10 Q. What are their names?

11 A. Christopher and Nicholas.

12 Q. So they own 15 percent each?

13 A. Correct.

14 Q. That would be right? I think that adds up to
15 100.

16 Does JCNW have any other assets other than Tract
17 A?

18 A. Yes, there's other property that JCNW is involved
19 in.

20 Q. Okay. What are those?

21 A. We're in a partnership with another family LLC,
22 in a subdivision on Golf Club Road near Stayton.

23 Q. And who is that other partner with that you own
24 that one?

25 A. It's JBS, LLC.

1 Q. What other interest does the LLC have?

2 A. Property out near Turner.

3 Q. Just development property?

4 A. No, it's -- it's an old gravel pit that was
5 acquired from the Walling family.

6 Q. Is it active at this point?

7 A. No.

8 Q. Other properties that are owned by JCNW?

9 A. That's all the properties.

10 Q. Any other investments that JCNW is involved in?

11 A. Not that I'm aware of.

12 Q. Okay. In the statement of claim, I got your
13 response, and I want to explore that for a second, if you
14 don't mind.

15 The first claim is a breach of condition 12 which
16 requires drainage to conduct water north to Mill Creek, and
17 the allegation is that there is a weir and an outfall that
18 allows water to discharge west to Salem Ditch instead of
19 north to Mill Creek.

20 And in your response, you admit parts of that,
21 but then your response says, "JCNW is still in the process
22 of performing its duties under Phase II agreement and the
23 overall approval for the property." What does that mean?

24 A. I guess at a later date, the -- there will be
25 more work done to convey the water to Mill Creek.

1 Q. Is the retention facility complete as it stands
2 right now?

3 A. I believe it is.

4 Q. Okay. So what is the process of performing
5 duties that is still left?

6 A. That would be to complete the rest of the
7 pipeline work to Mill Creek.

8 Q. If I understand your answer in the response, you
9 admit that there's a weir, that's an overflow weir?

10 A. Correct.

11 Q. And that there's an overflow pipe?

12 A. Correct.

13 Q. And what's your testimony as to when water is
14 conducted off site through the weir and/or the outfall
15 pipe, where does it go?

16 A. Oh, it goes across the neighboring property, goes
17 out to Golf Club Road, eventually goes to the ditch that's
18 owned, I believe, by the Santiam Water Control District.

19 Q. Okay. So how does that comply with the
20 development agreement that says water, if it leaves the
21 site, has to go north to Mill Creek? I'm puzzling about
22 that, and I don't understand your answer about there's more
23 to come.

24 A. Well, the pipeline to Mill Creek's never been
25 constructed.

1 Q. When is it going to be constructed?

2 A. I'm not sure.

3 Q. Are there current plans to construct it?

4 A. There have been plans that were -- that -- my
5 engineer designed a pipeline to Mill Creek, I believe, in
6 2007.

7 Q. Okay. Historically, it has been understood, I
8 think, and I want you to tell me, that the plan has been
9 for the storm water from Phillips is to go north to Mill
10 Creek. Is that your understanding?

11 A. That's correct.

12 Q. And that is provided for in the Stayton storm
13 water master plan; is that correct?

14 A. That's correct.

15 Q. And it's provided for in this development
16 agreement, correct?

17 A. The development agreement for Phase II?

18 Q. Yes.

19 A. I don't believe it contemplated building the
20 pipeline to Mill Creek.

21 Q. The land use approval for the subdivision
22 provided that any off-site drainage is to go north to Mill
23 Creek, correct?

24 A. I believe it did.

25 Q. Okay. And the development agreement required you

1 to comply with the subdivision approval?

2 A. In part, yes.

3 Q. What part did it not require compliance?

4 A. It -- The development agreement talked about what
5 would be done in Phase II, and the requirement to build a
6 pipeline to Mill Creek was not contemplated to be done
7 during Phase II.

8 Q. In fact, there was anticipated a Phase III,
9 wasn't there?

10 A. There's been some confusion about Phase II A,
11 Phase II B, Tract A, Phase III. Lots of different -- lots
12 of different names have been given to that piece of
13 property.

14 Q. Yeah. And for consistency's sake, let's call it
15 Tract A.

16 A. Okay.

17 Q. For the only reason, because that's in my brain,
18 what I always have called it. So it's just for
19 convenience, and so sort of humor me on that.

20 A. Okay.

21 Q. Let's call it Tract A.

22 The development agreement anticipates at some
23 point in time that Tract A would be developed; is that
24 correct?

25 A. I'm not sure that the development agreement for

1 Phase II really says what's going to happen in Tract A.

2 Q. What is your understanding of what the
3 development agreement said about Tract A?

4 A. That a detention pond was going to be constructed
5 as a temporary solution to the water.

6 Q. And it's your understanding that the development
7 agreement is temporary?

8 A. The development agreement, I believe, would be
9 permanent, but the detention basin would be temporary.

10 Q. And where in the development agreement does it
11 say that the detention basin would be temporary?

12 A. I don't -- not sure.

13 Q. Does the detention basin retain all the water
14 from Phases 1, 2 and Quail Run at this point without any
15 off-site drainage?

16 A. It -- I believe it decontains the water from
17 Phases 1 and 2 of Phillips Estates.

18 Q. The question is: Does it retain, without any
19 off-site drainage, Phase I, Phase II and Quail Run?

20 A. I don't believe it does.

21 Q. In fact, water overtops the weir pretty
22 regularly, doesn't it?

23 A. During a rain event.

24 Q. Do you go out and monitor the pond?

25 A. Pretty much daily.

1 Q. Okay. Do you keep records of what you see on a
2 daily basis?

3 A. Yes.

4 Q. I didn't see any of those in the material that
5 was produced. Are those like handwritten notes that you
6 have --

7 A. There's a graph, and I believe we sent that up,
8 but...

9 Q. All right. In your daily experience, what
10 percentage of the time is there discharge from the pond?

11 A. I'd have to go back and look at the notes to come
12 up with a percentage.

13 Q. Is it a lot?

14 A. Not this year.

15 Q. Is it few?

16 A. Like I said, I'd have to go back and review the
17 notes that I've taken to come up with an accurate
18 percentage.

19 Q. So the pond does not retain the water from Phase
20 I, Phase II and Quail Run entirely, there's an outfall?

21 A. Correct.

22 Q. And that outfall water, that discharge from the
23 sites goes west to Salem Ditch? Did I get that right?

24 A. Correct.

25 Q. Has there ever been any attempt to construct a

1 facility, whether it's a ditch or a pipe or anything, that
2 would take the water from the outfall or the weir and run
3 it north to Mill Creek?

4 A. To date, there's been nothing done, no.

5 Q. Okay. Who owns the property immediately to the
6 west of Tract A? Do you own that?

7 A. No.

8 Q. Do you know who does?

9 A. I believe the Estate of Dale Emery owns the land
10 that's directly west of Tract A.

11 Q. Does JCNW have any agreement with that owner to
12 put this storm water onto that property?

13 A. Not that I'm aware of.

14 Q. Do you have any agreement with any of the
15 property owners west of Tract A that would allow the
16 discharge of storm water from these sites onto their
17 property?

18 A. No.

19 Q. Okay. The second claim talks about plans not
20 being approved, and I didn't quite understand your answer
21 with regard to the plans not -- you said the plans were
22 submitted, but the allegation is that the plans never
23 received City approval. Is it your claim that the City
24 did, in fact, approve the plans?

25 A. Originally, the -- we submitted plans for the

1 complete development. Those were accepted by the City a
2 long time ago.

3 Q. In 2006?

4 A. I believe it was back in --

5 Q. When the land use approvals were granted; is that
6 correct?

7 A. Yes.

8 Q. Okay. In those plans, where was the storm water
9 to be discharged?

10 A. It was -- there was to be a pipeline and
11 detention ditch constructed to Mill Creek.

12 Q. North to Mill Creek?

13 A. Correct.

14 Q. In 2006, as approved in those original plans?

15 A. Correct.

16 Q. And then the phasing came along, and Phase I got
17 approved and got built, and then Phase II came in. And in
18 particular, I want to focus on the plans for the
19 detention/retention basin. Were those plans ever approved?

20 A. I -- I'm not aware if they were.

21 Q. Who was in charge of submission and obtaining
22 approval for the detention pond plans?

23 A. Steve Ward.

24 Q. Steve?

25 A. Engineer.

1 Q. And you don't at this point know whether or not
2 those construction plans were ever approved?

3 A. Not aware.

4 Q. Do you have a recollection of when the project
5 started, that is, the construction of the pond, that there
6 was conversations that you're going to start whether you've
7 got plans approved or not?

8 A. I never made that statement.

9 Q. Okay. Were you present when Steve Ward made that
10 statement?

11 A. I don't recall that statement.

12 Q. You've done other developments before?

13 A. Several.

14 Q. And you've been in the construction trades for
15 how long?

16 A. About 40 years.

17 Q. What is the industry standard for starting a
18 project when you don't have approved, stamped plans?

19 A. Not all of the projects that we construct have
20 approved plans on the day that we start; some do, some
21 don't.

22 Q. This particular project, did it require City
23 approval for the construction plans for the retention
24 basin?

25 A. I'm not sure what the City meant to approve or

1 not approve before we started.

2 Q. Was it your understanding that the development
3 agreement required those plans to be approved by the City?

4 A. I believe there's language in there that said
5 that.

6 Q. And plans were submitted to the City?

7 A. That's correct.

8 Q. You're familiar with that.

9 Did you submit them or did Steve Ward submit
10 them?

11 A. I believe I submitted the plans to the planning
12 department.

13 Q. The corrections and the dialogue with regard --
14 or from the City's engineer about the changes that were
15 needed to the plans, did those go through you or did they
16 go from the City engineer directly to Steve Ward?

17 A. Both. Sometimes they came to me, sometimes they
18 went to Steve Ward. I normally eventually got a copy.

19 Q. Okay. Do you know how many times the
20 construction plans for the detention basin were submitted
21 and rejected?

22 A. I don't know that they were ever rejected. I
23 only submitted the plans one time.

24 Q. Do you know how many times there were correction
25 notices issued for the plans?

1 A. I do not know.

2 Q. Did you understand when construction started that
3 the plans had not been approved by the City?

4 A. Didn't know that.

5 Q. Who did the construction?

6 A. Emery & Sons Construction.

7 Q. So there was a contract between JCNW and Emery &
8 Sons to do the retention basin construction?

9 A. Correct.

10 Q. And what's your position and role with Emery &
11 Sons?

12 A. I'm the owner of Emery & Sons.

13 Q. So you were contracting with yourself, basically,
14 from one of your entities to another of your entities?

15 A. That's correct.

16 Q. Who was the job foreman or superintendent for the
17 retention basin construction? Was that you?

18 A. No. Brad Kindle.

19 MR. LOISELLE: Brad Kindle? Can you spell
20 his last name for the record?

21 THE WITNESS: K-I-N-D-L-E.

22 Q. Who would have been responsible for making the
23 determination that construction can begin? Would that be
24 JCNW as the contractor or Emery & Sons as the contractee?

25 MR. LOISELLE: I'm going to object to form.

1 Do you understand the question?

2 THE WITNESS: I understood that the City of
3 Stayton would be who would determine when construction
4 could start.

5 Q. And that would be by virtue of stamping the plans
6 as approved?

7 A. Not been the policy of the City of Stayton to
8 stamp plans.

9 Q. How does the City of Stayton approve construction
10 drawings, in your experience?

11 A. It's pretty much been different every time that
12 I've done anything in Stayton.

13 Q. Do you know at the time Emery & Sons started
14 construction whether or not the City had approved the
15 construction plans for that retention pond?

16 A. I don't know that.

17 Q. You don't know. Who would be responsible for
18 knowing whether the plans had been approved? Would that
19 have been JCNW or would that have been Emery?

20 A. I think it would have been the public works
21 director in Stayton.

22 Q. No, I'm talking about between the owner of the
23 property and the construction company.

24 A. It would have been one of those two, but not
25 sure.

1 Q. You don't know -- you don't know which?

2 A. No.

3 Q. Okay. From your standpoint, who authorized Emery
4 & Sons to begin construction?

5 A. The City of Stayton.

6 Q. So who is it that asked the City of Stayton, can
7 we begin construction?

8 A. JCNW asked that question.

9 Q. And who at JCNW asked that question?

10 A. I did.

11 Q. And who did you ask it to?

12 A. The public works director.

13 Q. Who was?

14 A. Dave Kinney.

15 Q. And what was Dave Kinney's response?

16 A. He -- at the time that we had the preconstruction
17 meeting, we gave him a schedule, and he assigned an
18 inspector. And we told him what day we would start, and he
19 said okay.

20 Q. When was that meeting?

21 A. In the summer of 2013, late, late summer, I
22 believe.

23 Q. So it's your opinion that the City gave approval
24 for construction verbally through Dave Kinney?

25 A. Correct.

1 Q. Did you also assume that that approval meant that
2 the plans were approved?

3 A. Normally it would.

4 Q. But in this case?

5 A. As far as I knew, they had accepted what we had
6 sent to them and allowed us to begin construction.

7 Q. Were you aware of the August 22nd memo to Steve
8 Ward from John Ashley saying the plans weren't approved and
9 here's what changes he was asking for?

10 A. That probably went directly to Steve Ward.

11 Q. You weren't aware of that, Steve didn't tell you
12 that?

13 A. He might have, but I don't remember what
14 happened.

15 Q. Okay. And the next claim also relates to
16 condition 12 of the land use approval. And again, your
17 response is that JCNW is still in the process of performing
18 its duties. Can you tell me what that means in
19 relationship to that part of the claim?

20 A. I don't remember offhand what item 12 is.

21 Q. Okay. It is the land use approval to conduct any
22 off-site drainage north to Mill Creek.

23 A. Okay.

24 Q. So is that -- you know, you're talking about
25 you're still in the process of performing that. So my

1 question is: What is left?

2 A. Building a pipeline from the property north to
3 Mill Creek.

4 Q. The development agreement was designed to allow
5 you to have Phase II construction with on-site retention
6 with no off-site drainage because of why?

7 A. I believe the detention basin came about because
8 of a lawsuit by the Santiam Water Control District against
9 the City of Stayton.

10 Q. We go back to 2006 where the storm water from
11 this project has to be conveyed north to Mill Creek,
12 correct?

13 A. That was the design that we were asked to
14 provide.

15 Q. And going into Phase II, you have a land use
16 approval that matches the storm water master plan saying
17 that all the off-site drainage has to go north to Mill
18 Creek, correct?

19 A. I'm not sure I understand that question. Could
20 you repeat it.

21 Q. The land use approval, I think we established
22 earlier, says that off-site drainage of storm water has to
23 go north to Mill Creek. Would you agree with that
24 statement?

25 A. Correct.

1 Q. Okay. So when Phase II starts to be developed,
2 then your land use approval required you to take the storm
3 water north to Mill Creek, correct?

4 A. If we had built all of the rest of the
5 development, yes, but we were only building one phase.

6 Q. So is it your position then that one phase takes
7 you out of the requirements of the land use decision?

8 A. No. It was -- the requirement for the off-site
9 pipeline was delayed until the final phase of the
10 subdivision.

11 Q. And it was delayed to allow you to develop more
12 lots, correct?

13 A. I don't understand what you mean by "to develop
14 more lots."

15 Q. Well, let's go back. You had lots of
16 conversations with Dave Kinney about the location and the
17 pipeline and the discharge of storm water north to Mill
18 Creek, correct?

19 A. Some.

20 Q. And those discussions involved what topics? What
21 subjects were you talking about?

22 A. Mostly, we were talking about money.

23 Q. Money? Was the routing an issue?

24 A. Not that I'm aware of.

25 Q. So the routing wasn't an issue, getting from this

1 property north to Mill Creek, it was sort of understood
2 where it was going to go?

3 A. I don't believe that it ever changed from the
4 first time plans were submitted to the City.

5 Q. Back in 2006?

6 A. Yes.

7 Q. Okay. And in fact, you had Steve Ward draw some
8 maps and easement descriptions that followed that route;
9 isn't that right?

10 A. Yes, we submitted easements to the City.

11 Q. Okay. Did you ever have contact with the
12 property owners of the intervening properties between this
13 property and Mill Creek that would be affected by the
14 drawings that Steve Ward did?

15 A. One of them.

16 Q. Which one?

17 A. Roger Roberts.

18 Q. Did you, in fact, obtain an easement from Roger
19 Roberts?

20 A. No.

21 Q. Did he refuse to give you one?

22 A. The easements were never approved by the City.

23 Q. Did you ask him to grant you an easement?

24 A. No.

25 Q. Did the City provide you with a public utility

1 easement form?

2 A. Yes.

3 Q. Okay. And Steve Ward provided you with a map and
4 legal descriptions to go on those forms?

5 A. Correct.

6 Q. Did you present the potential easements to Roger
7 Roberts?

8 A. No.

9 Q. Okay. Why not?

10 A. Because the City never returned them to us as --
11 they never approved them.

12 Q. And do you know why the City never approved them?

13 A. No.

14 Q. So another topic of these discussions with Dave
15 Kinney was the cost, wasn't it?

16 A. Correct.

17 Q. Tell me your recollection of the conversations
18 with Dave Kinney about the cost of this routing piped north
19 to Mill Creek.

20 A. Well, the issue had -- even before Dave Kinney
21 was involved, where was the City of Stayton going to come
22 up with the money to fund their share of the off-site
23 improvements.

24 Q. So cost was a big discussion item?

25 A. Correct.

1 Q. Do you remember if there was ever an estimate
2 cost of what this pipeline or trench or whatever it was
3 north to Mill Creek would cost?

4 A. I believe there were a couple prepared.

5 Q. Did you prepare those?

6 A. No.

7 Q. Who prepared those?

8 A. I believe one of my project managers prepared a
9 cost estimate at one time.

10 Q. Do you remember what the cost estimate was?

11 A. I do not.

12 Q. Okay. Was it \$1 million or more?

13 A. Probably. I don't remember.

14 Q. So you had discussions with regard to cost, and
15 you had one of your guys do an estimate. Then you had
16 discussions about who was going to pay that cost; is that
17 right?

18 A. Correct.

19 Q. Tell me about those discussions.

20 A. Well, initially, when I bought the property,
21 there was no storm water master plan. We were verbally
22 given an idea of what that was going to be, and we were
23 told that it was going to cover the off-site pipeline work
24 and that there would be costs associated with that in the
25 master plan.

1 Q. When you bought the property, half of it was in
2 the City and half of it out, correct?

3 A. That's correct.

4 Q. And there was no land use approvals issued for
5 any development on either side of the property, either the
6 in or the out?

7 A. The only thing that I knew about was that the
8 Phillips family had a contract annexation agreement with
9 the City of Stayton.

10 Q. Ultimately, you filed for a subdivision
11 application; is that right?

12 A. Correct.

13 Q. Okay. And you received that approval?

14 A. Correct.

15 Q. When did you get that approval?

16 A. I don't recall the exact date. It was obviously
17 after 2006.

18 Q. How close in time after you bought the property
19 did you get the land use approval?

20 A. I'm not sure the exact amount of time. It was --
21 this was a lengthy process.

22 Q. Okay. So when you bought the property, what kind
23 of due diligence did you do with regard to storm water
24 management?

25 A. The Phillips family told me that they had -- I

1 believe they had contacted Boatwright Engineering, and that
2 Boatwright had drawn up a plan which would be constructing
3 a pipeline from the property north a little and then west
4 out to the ditch owned by the water control district.

5 Q. Okay. Did you see those plans?

6 A. I'm not sure if they were provided to us. I
7 believe I went to Boatwright's office and just looked at
8 them.

9 Q. Okay. And did you go to the City and talk to the
10 City about what the permitting requirements would be,
11 wetlands, all of those issues, including storm water
12 discharge?

13 A. We did meet with the City, I believe, prior to
14 the purchase of the property.

15 Q. And do you recall what the City told you about
16 where the storm water would need to go?

17 A. It's -- I don't remember the exact meeting and
18 what was said there. I know that we discussed the fact
19 that there were drawings drawn up to take the water to the
20 west to the water control ditch.

21 Q. So when you had your plans drawn for the
22 subdivision process and those plans show the storm water
23 going north, what was the cause of the change from the
24 Boatwright understanding to the plans that you drew showing
25 a different discharge?

1 A. Mike Faught.

2 Q. So in your due diligence, was this before buying
3 the property, Mike Faught would have told you it needed to
4 go north to Mill Creek?

5 A. No, that was after.

6 Q. So I want to fix in time what your understanding
7 was at the time you bought the property.

8 A. At the time that I bought the property, my
9 understanding was that development would follow the
10 contract annexation agreement that the Phillips family had
11 entered into with the City of Stayton.

12 Q. Okay. And did that agreement provide for a
13 location specifically for the storm water discharge flow?

14 A. It referred to that -- it said that development
15 would be done by the rules that were in place as of 1999.

16 Q. The old existing standards?

17 A. Correct.

18 Q. Yeah. And in fact, that philosophy carried over
19 to the development agreement, didn't it?

20 A. I don't think so.

21 Q. Okay. So, again, let's go back to how it changed
22 from what you perceived as the Boatwright solution going
23 west and the plans that you had drawn that took the pipe
24 north. Tell me about how that change occurred. Other than
25 just Mike Faught, what was Mike Faught's role?

1 A. We had a meeting with Mike Faught shortly after I
2 purchased the property, Steve Ward and myself. Mike Faught
3 told us that he was in the process of creating a storm
4 water master plan, and that we would be required to design
5 pipelines that he was going to place in the master plan.

6 Q. All right. And when was that meeting in
7 relationship to your purchase of the property?

8 A. That would have been after the purchase.

9 Q. And before you submitted your land use
10 application?

11 A. I believe so.

12 Q. Okay. So the -- and I guess for the record, tell
13 me who Mike Faught is.

14 A. Mike Faught was the public works director at the
15 time, for the City of Stayton, at the time that I purchased
16 the property.

17 Q. Okay. In 2006.

18 A. That's correct.

19 Q. Okay.

20 MR. KUHN: F-A-U-G-H-T?

21 THE WITNESS: I believe that's correct.

22 Q. The plans that were approved in the land use
23 case, they do require the storm and show a storm pipe going
24 north to Mill Creek?

25 A. That's correct.

1 Q. Okay. And that was in 2006 when you got the land
2 use approval?

3 A. There or after that. I don't remember the exact
4 date.

5 Q. So at that point in time, you were told by the
6 City that your land use approvals required storm water
7 discharge from your property to go north to Mill Creek?

8 A. That's correct.

9 Q. And that was the precursor to your discussions
10 with Dave Kinney about how are we going to accomplish that?

11 A. Dave Kinney entered the -- back to the City, I
12 believe, in about 2008, and so we began discussions shortly
13 after that because Mike Faught was no longer at the City.

14 Q. And I guess, for the record, we should identify
15 Dave Kinney too.

16 A. Yes. Dave Kinney initially came on, I believe,
17 as the community development director in about 2008, and
18 then I believe after that he was -- his role was changed to
19 public works director.

20 Q. So during the time that we are talking about
21 here, where you're discussing with Dave Kinney this
22 off-site storm discharge to Mill Creek, he was the public
23 works director?

24 A. Correct.

25 Q. Okay. And so we've established that the routing

1 wasn't really an issue, we've established that you talked a
2 lot about costs and you developed an estimate of what that
3 might be, and then we started to talk a little bit about
4 who was going to pay that cost. And tell me what your
5 discussion with Dave Kinney was about that.

6 A. Well, we asked, I believe, the same questions of
7 Dave that we had asked of Mike Faught, who -- how was the
8 City going to pay their share of what they were asking us
9 to build.

10 Q. And what was his response?

11 A. He said that they -- that the City was almost
12 ready to adopt a storm water master plan which proposed to
13 provide funding, articles of how the City was going to
14 raise money to build storm drain facilities.

15 Q. Did he tell you that the City didn't have any
16 money right then to do it?

17 A. He said that there was -- there was no storm
18 water fund of any type established at that time.

19 Q. And did ultimately the storm water master plan
20 get approved?

21 A. I believe it did, in 2009.

22 Q. And did it have mechanisms built in for
23 collection of fees for storm water projects?

24 A. Yes.

25 Q. And do you know if the City has, in fact,

1 implemented those fees at this point?

2 A. Yeah, I was at the meeting Monday night where
3 they finally enacted an SDC fee for storm water.

4 Q. So April of 2015 was the first time there was
5 City authorization for collection of such fees?

6 A. First time for SDC fees.

7 Q. For storm water?

8 A. Yeah.

9 Q. Okay. So was it your understanding that before
10 you could develop Phase II that you had to resolve this
11 issue of taking the off-site storm water discharge north to
12 Mill Creek?

13 A. No.

14 Q. Why not?

15 A. Because in the discussions that we had, we
16 basically kicked the off-site storm water piping can down
17 the road again, and it was not contemplated that we would
18 build the off-site storm drain pipe in conjunction with
19 Phase II.

20 Q. And how, then, do you comply with the provision
21 in the subdivision approval that says there's no off-site
22 drainage unless it goes north to Mill Creek? How is that
23 resolved?

24 A. It would be the same way we complied with it in
25 Phase I.

1 Q. And that's how, retain it on site?

2 A. Correct.

3 Q. Okay. And in fact, in meetings that were
4 conducted to develop in development agreement, the idea and
5 the City's concurrence was that you could comply with the
6 subdivision provision that required off-site drainage to go
7 north to Mill Creek by retaining it all on site; isn't that
8 correct?

9 A. There was a discussion about building a pond --
10 or a detention basin on site.

11 Q. So that if you retained all the water on site and
12 there was no discharge then you, in fact, complied with the
13 land use approval, wasn't that the gist of the discussion?

14 A. I believe that was one of the discussions we had.

15 Q. In fact, that was the key that came up during the
16 course of those negotiations that allowed that development
17 agreement to move forward, wasn't it, that got us off the
18 notion of cost and cost share of the pipe going north, it
19 was the solution to opening the conclusion of the
20 development agreement?

21 A. Well, in -- from my standpoint, the on-site pond
22 was driven by the dispute between the water control
23 district and the City of Stayton.

24 Q. Why?

25 A. Because in order to develop Phase II, the second

1 10 acres of the property had to be annexed.

2 Q. Okay. Tell me about that.

3 A. When I bought the property, I was told that there
4 was a contract annexation agreement between the owner of
5 the property and the City of Stayton.

6 Q. And there was, wasn't there?

7 A. There was when I bought the property.

8 Q. Okay. And it subsequently expired; is that
9 correct?

10 A. The City refused to extend it, yes.

11 Q. Okay. And so it was terminated?

12 A. [Nodding head] I believe it was.

13 Q. Okay. Just a reminder that we need to have
14 everything verbal for our court reporter.

15 After the contract annexation had expired, you
16 went ahead with annexation under a different process?

17 A. The City of Stayton initiated annexation of the
18 10 acres.

19 Q. Okay. And what was that process?

20 A. The City of Stayton initiated that through their
21 mechanism for annexation and put it on the ballot to be
22 voted on.

23 Q. By that period of time, the City had adopted a
24 voter approved annexation; is that right?

25 A. Correct. When I bought the property, there was

1 no such mechanism in Stayton, but they did subsequently,
2 after I bought the property, develop a voter annexation
3 ordinance.

4 Q. Which then applied to you?

5 A. Correct.

6 Q. Okay. But ultimately, your property received
7 approval from the City for annexation and approval from the
8 voters?

9 A. Correct.

10 Q. Okay. There was an appeal in there somewhere.
11 Tell me about the appeal.

12 A. Basically, the Santiam Water Control District,
13 while they were arguing with the City, appealed every land
14 use application that came before the City.

15 Q. And did you have one that they appealed?

16 A. They -- not personally, but they appealed the
17 annexation that the City of Stayton initiated for my
18 property.

19 Q. Okay. And how was that LUBA case on the
20 annexation of your property resolved?

21 A. I entered into an agreement with the water
22 control district and asked them to drop the appeal.

23 Q. And what was the result of that?

24 A. They dropped the appeal.

25 Q. And what were you required to do in order for

1 them to drop the appeal?

2 A. They asked us to -- for the -- for Phase II, they
3 asked us to construct a detention pond that would detain
4 the water from the Phillips Estates development.

5 Q. Do you remember the date of the agreement?

6 A. I don't.

7 Q. I want to read something to you, and tell me
8 whether this is your understanding of the agreement. That
9 JCNW agrees not to undertake any future development, other
10 than construction of the dwellings and accessory structures
11 and landscaping, on any of the 16 existing subdivision lots
12 on the property that would materially increase the amount
13 of impervious surface on the property without constructing
14 a City approved storm water system that would convey the
15 storm water from the property to Mill Creek before such a
16 development or concurrently with such development. Does
17 that sound right?

18 A. That's -- doesn't sound like the agreement that
19 we signed.

20 Q. Okay.

21 A. But I don't remember.

22 Q. Well, I want to show it to you. While I'm
23 getting that out, let me ask you, did the agreement ever
24 get modified?

25 A. I'm not sure if it did.

1 Q. Who would know, if you wouldn't?

2 A. My counsel.

3 Q. Okay. [Handing].

4 MR. LOISELLE: Are we going to mark it?

5 MR. LIEN: I'm not sure I'm going to make it
6 an exhibit, but he had a question about whether or not the
7 language was there. I wanted him to take a look at it.
8 Maybe we'll mark it, maybe we won't, I don't know, I
9 haven't decided.

10 MR. LOISELLE: For the record, we have an
11 un-Bates labeled document, it's titled settlement agreement
12 between Santiam Water Control District and JCNW Family,
13 LLC, and it appears to be dated January 11, 2013. There's
14 two pages to the settlement agreement, and then after the
15 settlement agreement there appears to be two more pages of
16 email exchanges in August of 2013. And then there's a
17 final page that, again, not -- well, it is Bates labeled
18 but the copy is not clear, but it's amendment to settlement
19 agreement between Santiam Water Control District and JCNW
20 Family, LLC, and up on the right-hand corner there's a
21 handwritten note that says it's dated August 9, 2013.

22 The document has a client matter number and
23 a document number down on the bottom left side, and the
24 document number is 1664482.1.

25 BY MR. LIEN: [Continuing]

1 Q. So I want to look at the first two pages.

2 A. Okay.

3 Q. Do the first two pages appear to be the
4 settlement agreement that JCNW entered into with Santiam
5 Water Control District?

6 A. Yes.

7 Q. And looking at recital C, there's a legal
8 description. What property does that legal description
9 cover?

10 A. I'm not sure.

11 Q. So you don't know what property you were
12 encumbering by this settlement agreement?

13 A. I don't remember. I can't tell by reading that
14 what property it describes.

15 Q. And would you look at number two at the bottom of
16 the first page and read that for me.

17 MR. LOISELLE: Do you want him to read it
18 into the record?

19 MR. LIEN: No, just read it.

20 MR. LOISELLE: Okay.

21 THE WITNESS: Okay.

22 Q. Is that a true and accurate statement of what the
23 agreement entailed between JCNW and Santiam Water Control
24 District?

25 A. Yes, it's an agreement.

1 Q. What are the 16 lots that are referred?

2 A. That would most likely be the remaining lots in
3 Phase I.

4 Q. Okay. So it's your understanding, you agreed
5 with Santiam Water Control District that you could continue
6 with the 16 lots in Phase I, but that anything else had to
7 have a City approved storm water system that would convey
8 storm water from the property to Mill Creek before such
9 development?

10 MR. LOISELLE: Or concurrently with such
11 development.

12 Q. That's your understanding?

13 A. Correct.

14 Q. Okay. And have you, in fact, developed the
15 property in addition to the 16 lots in Phase I?

16 A. Yes.

17 Q. And have you constructed a City approved storm
18 water system that would convey the storm water from the
19 property to Mill Creek?

20 A. No.

21 Q. And looking at page 2, there is a signature there
22 on behalf of JCNW. Is that your signature?

23 A. Yes, it is.

24 Q. And the date of this agreement is what?

25 A. 11th day of January 2013.

1 Q. Have there been any amendments to this agreement
2 since that time?

3 A. Not that I'm aware of.

4 Q. Okay. Now, as your counsel pointed out, there
5 are some other pages attached that involve email
6 correspondence between you and the director of the Santiam
7 Water Control District about a potential amendment to that
8 agreement. Do you remember that?

9 A. Yes.

10 Q. And the last page is an amendment to settlement
11 agreement. Are you familiar with that document?

12 A. Yes.

13 Q. Did this amendment, either in this form or in any
14 form, ever become an agreement signed and entered into
15 between you as JCNW and Santiam Water Control District?

16 A. I believe there was an agreement to amend it that
17 refers to Phase II.

18 Q. So there is an amendment to the agreement that is
19 January 11th?

20 A. I remember discussing it, yes.

21 Q. Okay. Is there a written agreement that amends
22 the January 11th agreement?

23 A. I'm not sure.

24 Q. What was the discussion with regard to amending
25 it?

1 A. That we would want to move ahead with the second
2 phase of the development and that we would want to deal
3 with the storm water the same way that we dealt with it
4 during -- in Phase I.

5 MR. LOISELLE: We've been going for an about
6 an hour and five minutes, do you want to work to a logical
7 point for a break?

8 MR. LIEN: I'm fine to keep going.

9 MR. LOISELLE: I'm not, that's why I'm
10 saying --

11 MR. LIEN: You want to take a break, this is
12 good for me, then.

13 MR. LOISELLE: Okay.

14 [Recess: 10:04 - 10:15]

15 MR. LIEN: Well, let's mark that and make it
16 an exhibit, make it number 1.

17 [Settlement Agreement, EXB. 1, marked]

18 BY MR. LIEN: [Continuing]

19 Q. We took a break after we were talking about this
20 settlement agreement of the LUBA case, and we were trying
21 to determine whether there was a signed written amendment
22 to this agreement. Did you have an opportunity to figure
23 that out while we were on break?

24 A. Just remembering back, I would assume there would
25 be, because we went ahead with the development of Phase II.

1 And there were quite a few discussions about Phase II and
2 how we would be handling the water from Phase II, so I'm
3 guessing that if there wasn't an amendment, I would have
4 heard about it from the water district.

5 Q. And if there is an agreement, it has not yet been
6 produced, and you will, between you and your counsel, will
7 produce it?

8 [INFORMATION-TO-PRODUCE].

9 A. We will look for the agreement, yes.

10 Q. Okay. And you haven't gotten any claims or
11 litigation or any demands from Santiam Water Control
12 District for the breach of this agreement?

13 A. No.

14 Q. You indicated that you had not complied with
15 paragraph 2, and is your noncompliance a result of just
16 noncompliance or is it the result of your understanding
17 that there's an amendment?

18 MR. LOISELLE: I'm going to object. You've
19 mischaracterized his testimony, one; and two, I'm going to
20 object to the form of the question.

21 If you can answer the question, go right
22 ahead.

23 THE WITNESS: Could you repeat the question
24 again.

25 BY MR. LIEN: [Continuing]

1 Q. Before we took a break, you indicated that you
2 were not in compliance with paragraph 2, correct?

3 A. I don't remember saying that. I remember saying
4 that the storm water system had not been constructed to
5 Mill Creek.

6 Q. And that you had, in fact, increased the amount
7 of impervious surface beyond the 16 lots allowed without
8 constructing a City approved storm water system. You
9 testified to that earlier.

10 A. We have constructed more --

11 Q. So you have constructed impervious surface beyond
12 the 16 without a City approved storm water system, correct?

13 A. The system that we built, we understood that the
14 City approved it.

15 Q. Does the system that you built convey storm water
16 from the property to Mill Creek?

17 A. No.

18 Q. So again, my question is: Are you in compliance
19 with paragraph 2 of this agreement?

20 MR. LOISELLE: I'm going to object; the
21 question's been asked and answered, and you're being
22 argumentative. You don't like the response.

23 MR. LIEN: He's changed his response. I
24 want to get a clear response.

25 MR. LOISELLE: Counsel, he hasn't changed

1 his response.

2 MR. LIEN: Well, we can go back and read the
3 transcript of that, of course.

4 MR. LOISELLE: You go right ahead.

5 MR. LIEN: So I'm going to ask my question
6 and he's going to answer the question, just like we
7 normally will.

8 MR. LOISELLE: Counsel, I will make my
9 objection on the record. And if he can respond, he will
10 respond, and if he can't, he won't. That's the way we're
11 going to play the game.

12 So, court reporter, please read the question
13 back.

14 And then if you can answer the question, go
15 right ahead.

16 THE WITNESS: I would say not.

17 BY MR. LIEN: [Continuing]

18 Q. Have you entered into any other written signed
19 agreement that would relieve your responsibility for
20 compliance with paragraph 2?

21 A. I would assume we have received some agreement
22 with the water district to modify this.

23 Q. The question was: Do you have a signed written
24 agreement?

25 A. Not in front of me.

1 Q. Okay. Do you believe one exists?

2 A. Yes, I believe we have an agreement.

3 MR. LIEN: Okay. I just want to be on the
4 record that we want a copy of that, if it exists.

5 [INFORMATION-TO-PRODUCE]

6 MR. LIEN: The land use approval, let's mark
7 it as Exhibit 2.

8 [8/3/13 Emails/Settlement Agreement, EXB. 2, marked]

9 BY MR. LIEN: [Continuing]

10 Q. Are you familiar with that document?

11 A. Yes.

12 Q. You are the applicant rather than JCNW. Can you
13 tell me why that's the case?

14 A. No.

15 Q. Has the property ever been in your name
16 individually?

17 A. Not that I remember.

18 Q. And you understand that this land use approval is
19 what allows development of Phases 1 and 2?

20 A. Yes.

21 Q. Okay. And you're familiar with the findings and
22 conclusions and the conditions?

23 A. Yes.

24 Q. And would you look on page 7, condition number
25 12. Could you read that into the record for us.

1 A. You want me to read this out loud?

2 Q. Yeah. Number 12, just read number 12.

3 A. Yes, number 12.

4 MR. LOISELLE: Slowly.

5 THE WITNESS: "The developer shall construct
6 a storm water drainage system that conducts surface water
7 drainage north to Mill Creek. The final plat shall include
8 engineered plans for the storm water system meeting
9 approval of the public works director."

10 Q. And you knew that was the case when you received
11 this approval --

12 A. Yes.

13 Q. -- is that true?

14 And in fact, the plans that you had submitted as
15 a part of this process showed piping on your property that
16 was eventually to go north to Mill Creek?

17 A. That's correct.

18 Q. Okay. And when development occurred on the
19 property, did you construct a storm water drainage system
20 that conducts surface water drainage north to Mill Creek?

21 A. No.

22 Q. Is there a final plat that includes engineering
23 plans for a storm water system that meets the approval of
24 the public works director?

25 A. I don't believe the final plat has been drafted

1 at this time.

2 Q. You have a final plat for Phase I?

3 A. Yes.

4 Q. You have a final plat for Phase II?

5 A. Yes.

6 Q. And Phase II includes Tract A?

7 A. No.

8 Q. The plat does not include Tract A?

9 A. I believe there may be a drawing that shows some
10 land there.

11 Q. So what is your understanding of what the status
12 of Tract A is?

13 A. It's an undeveloped piece of property west of
14 Phase II.

15 Q. Are you in compliance with condition number 12 to
16 construct a storm water drainage system conducting surface
17 water north to Mill Creek?

18 A. We have not built the storm drainage north to
19 Mill Creek.

20 Q. Do you have storm water drainage that leaves the
21 site?

22 A. Do I have storm water drainage --

23 Q. Yeah. Is there storm water drainage from
24 Phillips 1, 2 or Tract A that leaves the site?

25 A. I can't determine that.

1 Q. Okay. You built a weir, and water's going over
2 the weir, you testified to that earlier?

3 A. Correct.

4 Q. And you testified that the water that leaves the
5 site goes west to Salem Ditch?

6 A. Correct.

7 Q. And that doesn't comply with condition 12, or
8 does it?

9 A. Well, the second half of condition 12 says that
10 this will -- the drainage north to Mill Creek will occur
11 when the final plat's done. We haven't done the final plat
12 yet.

13 Q. What is left?

14 A. Everything west of Phase II.

15 Q. And that does not have a plat yet, but that is
16 your understanding of what the final plat is?

17 A. It's hard for me to tell what they were referring
18 to in here, I didn't write this.

19 Q. But what's your understanding? That's what I'm
20 looking for.

21 A. My understanding of the final plat is what's left
22 to do that hasn't been platted to this date.

23 Q. Is the phasing that ultimately occurred on the
24 property, was it approved in this land use action that
25 we've identified as Exhibit 2?

1 A. No, there was not a phasing contemplated in the
2 original...

3 Q. So Exhibit 2 is the approval for the entire
4 20-acre property, correct?

5 A. I believe so, yes.

6 Q. All right. Phasing came later. When did it come
7 in?

8 A. I'm not sure of the exact date when we proposed
9 to construct Phase I, I don't remember.

10 Q. And the City agreed to allow you to develop in
11 phases?

12 A. Correct.

13 Q. But at the time that this language was adopted
14 and approved, there was no phasing?

15 A. That's correct.

16 MR. LIEN: This is the development
17 agreement, let's mark this as Exhibit 3.

18 [Developer-City Construction Agreement, EXB. 3, marked]

19 Q. Take a quick look at it and see if you agree that
20 this is a copy of the development agreement that you
21 entered into.

22 A. Yes, I believe it is.

23 Q. And the document was signed and notarized by you;
24 is that correct?

25 A. Yes.

1 Q. And it was recorded in the Marion County deed
2 records?

3 A. Yes.

4 Q. Tell me how you came to engage in negotiation and
5 ultimate agreement with the City on this development.

6 A. I started discussing Phase II with Dave Kinney, I
7 believe, shortly after we completed Phase I.

8 Q. So what led up to the need for a development
9 agreement?

10 A. It was a requirement of the City.

11 Q. So Dave Kinney said, you're not going to be
12 allowed to do anything beyond Phase I unless we have a
13 development agreement?

14 A. I believe he suggested that we have a new one for
15 Phase II.

16 Q. Okay. Was there a development agreement for
17 Phase I?

18 A. I believe there was.

19 Q. Okay. Do you have a copy of it?

20 A. If I do, it would have been -- I believe it would
21 have been sent in.

22 Q. So the fact that none was produced, would that
23 indicate that there was no written development agreement
24 for Phase I?

25 A. It -- it just means that we haven't produced one.

1 I don't -- you know, I don't know. We can look.

2 Q. What is your understanding of the scope of this
3 agreement?

4 A. Well, that this was the agreement that we entered
5 into in order for us to be able to construct Phase II.

6 Q. And to do so without conveying the water north to
7 Mill Creek?

8 A. Yes. There was -- During all the discussions, I
9 thought everyone that was involved in the discussions
10 understood that there would not be anything done going to
11 Mill Creek in Phase II.

12 Q. Okay. What is your understanding of what is to
13 happen with storm water that leaves Tract A -- or let me
14 rephrase that.

15 What is your understanding of if there is storm
16 water allowed to leave the site?

17 A. I assumed it would be handled the same way it's
18 been handled since 2009.

19 Q. Which is what?

20 A. Nothing.

21 Q. Nothing. What does that mean, "nothing"?

22 A. Storm water has been leaving the site since 2009,
23 and nothing has been done about it.

24 Q. Okay. Except that the City, in its land use
25 approval, required storm water leaving the site to go north

1 to Mill Creek, correct?

2 A. At one time, that was what they wanted to have
3 happen, yes.

4 Q. Okay. Is it your understanding that this
5 development agreement allows for storm water to leave the
6 site and not go north to Mill Creek?

7 A. Yes.

8 Q. And point out to me in the agreement where that
9 impression -- you get that impression from.

10 A. Well, I guess I would look at item D, which says,
11 item D, storm sewers, developer will install the following
12 storm drainage improvements in conjunction with Phase II of
13 the development: 507 feet of 30-inch storm sewer pipe,
14 Phase II on-site; two 60-inch manholes. Item 3, Tract A,
15 on-site storm detention/retention basin and outfall
16 structure.

17 Q. So that --

18 A. I don't --

19 Q. To you, that meant what?

20 A. That that was what was supposed to be constructed
21 during Phase II.

22 Q. Okay. And the 507 linear feet of 30-inch storm
23 pipe, where was that to go?

24 A. Well, the 30-inch storm pipe is mostly in Junco
25 Street.

1 Q. And the two manholes?

2 A. Those are -- there would be 60-inch manholes in
3 Junco Street.

4 Q. Okay. And the Tract A, which we've been talking
5 about on the site, storm detention/retention basin, what
6 did you understand that to be?

7 A. That there was going to be, basically, a
8 detention pond constructed in the northwest corner of the
9 property.

10 Q. Okay. And what does the retention mean to you?

11 A. Well, retention means to keep things, to me.

12 Q. Okay. So it's to keep the water on Tract A?

13 A. Well, it says it's going to be a detention/
14 retention basin, it doesn't elaborate.

15 Q. And then it says outfall structure. What did you
16 understand "outfall structure" to mean?

17 A. That the engineer was going to design something.
18 An outfall structure is normally something that lets water
19 out, and so I assumed that they would design something that
20 would let water out.

21 Q. Wasn't, in fact, that outfall structure the
22 outfall structure that you as Emery & Sons constructed from
23 Quail Run onto Tract A? Isn't that the outfall structure
24 that was referred to there?

25 A. This doesn't mention Quail Run.

1 Q. Okay. What was your understanding?

2 A. That we were going to construct some type of a
3 pond in the northwest corner of the property.

4 Q. You had, in prior years, constructed a pipe
5 extension from the Quail Run storm water system onto Tract
6 A; isn't that correct?

7 A. That's correct.

8 Q. And it, in fact, has an outfall structure that
9 goes onto Tract A; is that correct?

10 A. That's correct.

11 Q. All right. Where else in here -- is that the
12 only place that you believe that gives you the ability to
13 allow water to leave the site?

14 A. Far as I can tell, that item B, storm sewers, is
15 really about all that addresses storm water.

16 Q. Take a look on page 3 at section 10,
17 particularly, the last couple of sentences with regard to
18 the easement.

19 A. Okay.

20 Q. It requires a public utility easement. Did that
21 public utility easement ever get developed?

22 A. I believe it did.

23 MR. LIEN: Let's mark that as Exhibit 4.

24 [Public Utility Easement, EXB. 4, marked]

25 Q. Tell me what your understanding was with regard

1 to Quail Run storm water discharge.

2 A. In 2009, the City of Stayton approached myself
3 and Steve Ward and asked if they could begin discharging
4 water onto my property from Quail Run.

5 Q. And did you agree?

6 A. I -- We agreed that we would allow that with some
7 conditions.

8 Q. Okay. And what were those conditions?

9 A. That Mr. Kinney would enter into an agreement to
10 somehow finance the construction of the off-site storm
11 drain system to Mill Creek.

12 Q. Is that agreement in writing anywhere?

13 A. There's an email exchange between Steve Ward and
14 Dave Kinney. I believe the two of them discussed it and
15 then Steve memorialized it with an email to Dave.

16 Q. Okay. And based on that, then, you as Emery did
17 the construction?

18 A. The City of Stayton contracted with Emery & Sons
19 to put in some pipe and let the water flow out onto my
20 property, our property.

21 Q. Describe for me in a little more detail what that
22 construction entailed to take the Quail Run water.

23 A. When the final phase of Quail Run was
24 constructed, there were pipelines installed to the northern
25 terminus of Quail Run Avenue, so -- but that was all

1 blocked off when the subdivision was constructed. So what
2 the City of Stayton contracted with Emery & Sons to do was
3 to dig down and basically pull the plug out of that
4 pipeline, construct a manhole just north of the end of
5 Quail Run, and then lay about -- somewhere around 100 feet
6 of pipe north, out onto the JCNW property, and then just
7 dig a ditch out into the brush.

8 Q. So the pipe daylighted into a ditch that just
9 channeled the water that came out of the pipe?

10 A. That's correct.

11 Q. And the pipe transmitted storm water drainage
12 from Quail Run?

13 A. Storm water, yes.

14 Q. Okay. Did it transmit storm water from any other
15 source than Quail Run?

16 A. I'm not sure. I couldn't tell you if it picked
17 up water anywhere else or not.

18 Q. Okay. And Emery & Sons was paid for that work?

19 A. That's correct.

20 Q. In the development agreement, then, you agreed to
21 take the water and to manage the water?

22 A. That's correct.

23 Q. Okay. And that's provided in section 10, and
24 then it's manifested in the public utility easement as
25 well, correct?

1 A. Yes.

2 Q. Okay. And I understand you've had some second
3 thoughts about making that agreement?

4 A. Well, originally, when I allowed the City of
5 Stayton to discharge the water onto my property, Mr. Kinney
6 said that the City of Stayton would do something to acquire
7 financing to construct the final off-site solution.

8 Q. Ultimately, to take it north to Mill Creek?

9 A. Correct. He -- he never said that the City of
10 Stayton would use that issue to issue a stop work order on
11 the rest of the project.

12 Q. Okay. But you did understand that no building
13 permits for any structure were to be issued until all the
14 required improvements were constructed and approved by the
15 City?

16 A. You're reading it from the development agreement?

17 Q. Yes. Paragraph 9.

18 A. Correct.

19 Q. And this agreement requires you to comply with
20 the land use approval you received in 2006, correct?

21 A. I think in some place it may refer back to that
22 agreement. I don't remember exactly where it does that.

23 Q. Your understanding, that this agreement was
24 implementing the land use approval, not changing it,
25 correct?

1 A. Well, it would have been changing it because the
2 initial land use agreement didn't contemplate phasing, and
3 this is obviously for a phase, so it's modifying it to some
4 extent.

5 Q. If you would, look at section 15, requires
6 construction plans for Phase II that identifies Tract A.

7 A. Correct.

8 Q. Has that been done?

9 A. I believe so.

10 Q. Have those plans been approved by the City
11 engineer?

12 A. I'm not sure.

13 Q. Who is the City engineer?

14 A. I'm not sure who the City engineer is today.

15 Q. At the time that this agreement was entered into,
16 do you know who the City engineer was?

17 A. Oh, it would have been John Ashley at that time.

18 Q. And Dave Kinney is not the City engineer?

19 A. No.

20 Q. Never has been?

21 A. Not that I'm aware of.

22 Q. And Mike Faught's not the City engineer?

23 A. No.

24 Q. Never has been?

25 A. No, not that I'm aware of.

1 Q. Did you have conversations with John Ashley, the
2 City engineer, during this process?

3 A. A couple.

4 Q. Okay. And what were the substance of those
5 conversations?

6 A. John asked me to submit some submittal
7 information on the storm drain pipe, on the water service
8 core or meter stop, and he asked me to submit some testing
9 on the aggregate that we were using.

10 Q. Is that what we heard the other day about the
11 rock finds that Mike Brash was talking about?

12 A. That's correct, that's one of the items.

13 Q. Looking at the development agreement, look at
14 section 17 and read that for me.

15 A. It says, "This agreement shall be binding on any
16 assigns or successors in interest of the development."

17 Q. This ties back to my earlier questions about how
18 much of this agreement was disclosed or incorporated when
19 you subsequently sold those lots, or property within the
20 development.

21 A. Well, I -- if this was recorded in the Marion
22 County deed of records, I assume that Marion County
23 would -- it would stay there, it would follow whatever.

24 Q. So you do understand that anyone who purchased
25 property after this agreement was recorded on June 13th of

1 2013 would be bound by the terms of this agreement?

2 MR. LOISELLE: You're asking him for his
3 legal interpretation?

4 MR. LIEN: I'm just asking him what he
5 understands.

6 THE WITNESS: I guess I didn't understand
7 that this would come into play after the lots had been --
8 after the plat had been signed and recorded at the City. I
9 didn't understand that an individual homeowner that
10 built -- purchased a lot and built a house would have
11 anything to do with this agreement.

12 Q. When you transferred the property to Emery &
13 Sons, did you provide to Emery & Sons that they would be
14 bound by this agreement as per section 17?

15 A. Didn't think it would apply to them.

16 Q. And what was the sale price when JCNW sold to
17 Emery?

18 A. I'm not sure what the price was.

19 Q. Okay. But you control both entities?

20 A. Correct.

21 Q. Okay. What does the face of the deed say?

22 A. I don't recall.

23 Q. And you can't tell me how much Emery & Sons paid
24 for what they purchased from JCNW?

25 A. I don't have that information in front of me now.

1 Q. Did you receive money from Emery & Sons and put
2 it into a JCNW bank account?

3 A. I'm not sure. I don't remember that.

4 Q. Okay. And the contractor on the job was Emery &
5 Sons?

6 A. The general contractor, yes.

7 Q. And what was the contract price?

8 A. I don't remember exactly what the price was.

9 Q. And did JCNW pay the contract price, whatever it
10 was, to Emery & Sons?

11 A. I'm not sure how that was handled.

12 Q. Did money change hands? I guess that's what I'm
13 asking.

14 A. I don't recall.

15 Q. Who would know?

16 A. There would be some financial records that are at
17 either JCNW or Emery & Sons.

18 Q. So it's your understanding that between the
19 development agreement and the public utility easement, that
20 you are now responsible for accepting and managing storm
21 water from all City sources including Phase I, Phase II,
22 which would also include Quail Run?

23 A. That's what the PUE says, yes.

24 Q. Okay. And you knew that's what it said when you
25 signed it?

1 A. Correct.

2 Q. And do you believe something has changed now
3 where you are no longer responsible for managing and
4 accepting storm water from all other City sources?

5 A. I believe there's been a change in the amount of
6 water that is entering my property from the external
7 sources other than the subdivision.

8 Q. And what is that change?

9 A. Just appears to be a tremendous amount of
10 groundwater that's coming out of the Quail Run Subdivision.

11 Q. Groundwater.

12 A. Correct.

13 Q. Explain that for me.

14 A. Well, there's water that falls from the sky on
15 the streets and runs down the pipes, out onto the
16 subdivision. Then there's water that basically is in the
17 ground, that level rises and falls each year.

18 Q. Okay.

19 A. So by observation of the Quail Run system,
20 recently it appears that a tremendous amount of that water
21 is entering the piping system from -- in Quail Run, and in
22 turn flowing onto the Tract A.

23 Q. The method whereby Quail Run storm water enters
24 Tract A is that outfall pipe. Is there another place that
25 that water enters Tract A from Quail Run besides that

1 outfall pipe?

2 A. Well, it's possible that there's some water
3 coming out of the back yards of some of the lots in Quail
4 Run and just flowing out across the ground.

5 Q. Okay. As far as constructed facilities, the only
6 facility on Tract A that connects storm water to Quail Run
7 is the outfall pipe that Emery & Sons built?

8 A. That's correct.

9 Q. Is there a gauge or a monitor on that to
10 determine how much water is coming through that pipe?

11 A. No.

12 Q. So what is it that gives you the impression that
13 the volume of water out of that pipe onto Tract A has
14 increased?

15 A. Observation.

16 Q. Okay. Have you recorded those observations
17 anywhere?

18 A. Yes, in the report, which if -- we agreed that
19 we'd give to you if you don't have it, so...

20 Q. Okay. And how do you measure it coming out of
21 that outfall structure?

22 A. Well, last year we installed a gauge out in the
23 pond to read the level.

24 Q. Okay. Let me stop you for a second. I'm only
25 interested in the measurements of the water coming out of

1 the pipe from Quail Run. How do you measure that?

2 A. Well, it's -- it's difficult to do in the
3 wintertime because the -- that pipe is surcharged, so --

4 Q. Now, for the record, tell us what surcharging
5 means.

6 A. Well, it means that the end of the pipe is at all
7 times under water.

8 Q. Okay. Okay. So when it's under water, there's
9 no way for you to measure how much water is coming out of
10 it?

11 A. That's correct.

12 Q. So again, I'm curious about your observations and
13 how you have come to the conclusion that more water is
14 coming out of Quail Run than before.

15 A. Well, by going up into the Quail Run Subdivision
16 and pulling the lids off of the manholes and looking down
17 into the existing storm water system.

18 Q. And what have you seen?

19 A. Well, the manhole out near Kindle, I believe,
20 runs 30 or 40 gallons a minute, and then as you proceed
21 west and north, each subsequent manhole has more and more
22 water flowing down the pipeline.

23 Q. And did you do that same analysis before so that
24 you have a before and after?

25 A. Before what?

1 Q. Before you entered into the agreement, or Emery
2 did, to discharge that water onto Tract A.

3 A. I didn't do that analysis. I knew a little bit
4 about how much storm water was in the Quail Run system
5 because the City regularly called Emery & Sons in the
6 winter to help pump the water so that the existing houses
7 didn't flood.

8 Q. And in fact, the problem with the pumping is what
9 generated the pipe extension, isn't it?

10 A. Yes. As Mr. Brash testified, the pump station
11 wore out, and rather than the City spending a bunch of
12 money to build a new pump station, they came to me and
13 asked if they could dump the water onto my property.

14 Q. Once the outfall structure was built on Tract A
15 from Quail Run, did you monitor the amount of water that
16 was being put on Tract A from Quail Run at that point in
17 time?

18 A. Nothing other than just observation.

19 Q. What was your observation?

20 A. That consistently, all winter long, water ran
21 across the property and onto the property to the north and
22 west.

23 Q. Did you have a ditch from the end of the outfall
24 structure that would point the water in a certain
25 direction?

1 A. Well, that ditch was existing because water had
2 flowed across that property since long before I purchased
3 it.

4 Q. So when the water came out of the outfall
5 structure, then, as a part of the contract, though, I think
6 you testified earlier that you built a ditch out 100 feet
7 or something?

8 A. Yeah, about that. And at the time it was just
9 out into the brush.

10 Q. Okay. And so when the water would come out of
11 the Quail Run outfall structure, it would go down this
12 trench and then dissipate, or what would happen to it?

13 A. No. Mostly it just ran across the ditch and onto
14 the neighboring property to the north and west.

15 Q. Okay. And did you measure the amount of water
16 that was coming out of the outfall structure at that point
17 in time?

18 A. No.

19 Q. Okay. The perceived increase in the amount of
20 water that is coming out of the outfall structure currently
21 as opposed to what it was when the outfall structure was
22 first built, can you quantify that for me?

23 A. When it was first built, there was no reason to
24 pay much attention to it, however, last fall, we had -- or
25 last summer, we had been asked by the City engineer to

1 provide some type of a study to talk about how the
2 detention basin was working, so we began a lot more
3 rigorous observation of the amount of water coming out of
4 Quail Run.

5 Q. And how did you measure the water coming out of
6 Quail Run then?

7 A. Visually. So at the first rainstorm, I went down
8 that day and watched as water came out of the pipe from
9 Quail Run, and also the pipe from the Phillips Estates
10 Subdivision.

11 Q. Are there limitations to your obligation to take
12 care of storm water from Phase I, II and Quail Run or other
13 City sources in either the public utility easement which
14 we've marked as Exhibit 4 or the development agreement we
15 marked as Exhibit 3?

16 A. I would say it's fairly unlimited.

17 Q. Okay. So then my question is: When you perceive
18 an increase in the water that you're accepting from the
19 outfall structure from Quail Run, is that really relevant
20 to your obligation to take care of it and manage it under
21 these two contracts?

22 A. I'm not sure what I have -- that I can answer
23 that.

24 Q. You mentioned that John Ashley, the City
25 engineer, wanted some testing. How did that come up?

1 A. In, I believe it was in April of 2014, it
2 appeared that we were -- that we were going to get the plat
3 for Phase II signed. And I called Dave Kinney and I said,
4 Dave, I would like to immediately begin discussing how we
5 are going to deal with the storm water and deal with Phase
6 III, because the PUE has an item that discusses the
7 termination of this agreement.

8 And basically, you know, once the -- my
9 understanding was once we built Phase III and the off-site
10 storm drain, then this easement would terminate.

11 Q. Okay. So the idea was that Tract A, which acted
12 as the retention facility for the water from Quail Run and
13 Phase I and Phase II, would then -- the pond would go away
14 because you'd be putting lots on it, correct?

15 A. If the off-site storm drain system was
16 constructed.

17 Q. Okay. Because obviously, if you put lots in the
18 pond, then the pond wouldn't be there any more, correct?

19 A. Well, I'm kind of guessing that the City would
20 not allow me to build lots until the pond went away.

21 Q. And in fact, it was anticipated that when it came
22 time to develop Tract A, there would be a new replacement
23 development plan, wasn't it?

24 A. I believe so.

25 Q. And in fact, that requirement for a new

1 development agreement for Tract A, which is referred to, I
2 think, as Phase III, is included in the development
3 agreement?

4 A. There was a discussion about that, yeah.

5 Q. And at that point in time, then water would be
6 conveyed north to Mill Creek, is that your understanding?

7 A. Yes.

8 MR. LOISELLE: Let's go ahead and take a
9 break.

10 MR. LIEN: Okay.

11 [Recess: 11:06 - 11:17]

12 BY MR. LIEN: [Continuing]

13 Q. When we took a break, we were talking about the
14 outfall, the weir thing. What is your understanding of the
15 function of the weir?

16 A. You're talking about what's at the far northwest
17 corner of the detention pond?

18 Q. Yeah. The rock structure that is --

19 A. That was a design element that Steve Ward
20 incorporated in that. I mean, it's just something that he
21 did to -- it's armored with rock so in case there is the
22 huge event, it doesn't wash the pond out.

23 Q. Do you know what the reasoning was for the
24 elevation that it was set at?

25 A. Well, it's a design element. I mean, Steve would

1 have picked -- Yeah, something you'd ask him, I guess.

2 Q. Very good. Was your understanding about the
3 ability you had to allow water to discharge from the
4 site -- storm water to discharge from the site?

5 A. I believed it would be the same that it has been
6 since 2009.

7 Q. So you didn't believe that it was tied to a storm
8 event, a ten-year storm event, a 25?

9 A. Well, in the discussion that I had with the water
10 control district, we were talking about water from Phillips
11 Estates development.

12 Q. Okay.

13 A. Because at the time we were talking, the PUE
14 didn't exist.

15 Q. Okay.

16 A. So that was when I met with the -- I believe I
17 met with the board once and with Brent several times. Our
18 discussion was talking about my development, meaning
19 Phillips Estates.

20 Q. Okay. Was there discussion about water leaving
21 the site only at certain points in storm years? I'll just
22 give you an example to try to nail it down. In Exhibit 1,
23 the email that you have with Brent Stevenson who is the
24 executive director of Santiam Water Control District, he's
25 talking about if the storm water pond, as finally designed,

1 ever failed to hold a 50-year storm event that you would
2 stop further development.

3 Now, did you understand that to say that your
4 pond, as finally designed, would hold everything up to a
5 50-year storm event?

6 A. Well, again, we were talking about the water from
7 the subdivision, so --

8 Q. But the question is: Is it your understanding
9 that it would hold everything up to a 50-year event?

10 A. I believe that's what it says, yes.

11 Q. And did you have any discussion with Steve Ward
12 about the elevation that the weir was constructed at and
13 what level of storm capacity the pond would hold?

14 A. I don't ever remember getting into that kind of
15 detail.

16 MR. LIEN: Okay. There is a pipe in the
17 weir, and let's look at couple of pictures, might make it
18 easier.

19 [Photos, EXB. 5, marked]

20 Q. Take a look at the packet of photographs and
21 describe each photograph for me, if you will.

22 A. Okay. First two photographs look like they were
23 taken during the construction of the detention phasing.

24 Q. And in fact, there's a date stamp?

25 A. Yeah, 18th of -- October 18th.

1 Q. Of 2013?

2 A. Yes.

3 Q. Okay. And does that look to you like what the
4 construction status was at that time?

5 A. Well, it's a picture of it, so, yeah, as far as I
6 remember, that's what was going on.

7 Q. Okay. And there's a pipe with some rocks on the
8 top. Can you describe what that facility is?

9 A. Yeah, that's just a -- looks like a piece of
10 10-inch ductal iron, and then there was some armoring rock
11 that was put over the top of it, part of the weir.

12 Q. Do you know if that 10-inch pipe was shown on the
13 construction plans?

14 A. I don't remember if it was or not.

15 Q. What was the purpose of that pipe?

16 A. I'm not really sure what the purpose of that pipe
17 was.

18 Q. Okay. Now, it appears that there's another pipe
19 that's above the weir, I don't know if you can identify it
20 in that picture.

21 A. Well, it shows up better in this picture.

22 Q. Yeah. So that is the third page in. So the pipe
23 that's in the lower left-hand corner is the pipe that we
24 talked about earlier, the 10-inch ductal iron; is that
25 correct?

1 A. Yes.

2 Q. Okay. And then the rock on top of it, actually,
3 is this entire rock structure, what we've been referring to
4 as the weir?

5 A. I believe so.

6 Q. Okay. So then there's another pipe, sort of in
7 the center of the picture to the right of the 10-inch
8 ductal iron, what is that pipe?

9 A. That's another piece of 10-inch ductal iron that
10 was placed there, I believe that was put in shortly after
11 2009, so that if someone came out to look at the amount of
12 water flowing there, they would have a form of reference;
13 they could say, hey, the pipe is flowing, it's a 10-inch
14 pipe, it's flowing two inches deep, four inches deep. It's
15 just some form of reference rather than just an open ditch.

16 Q. And are both of those pipes still installed
17 today?

18 A. Correct. The only difference that I can see from
19 today is that there's a plug in the upstream end -- or the
20 pond side end of the one that goes through the weir.

21 Q. In this case, that would be the one to the lower
22 left?

23 A. Correct, the one you're pointing to.

24 Q. This picture shows, I guess this would be, the
25 outfall of these pipes, and that in the Tract A would be

1 that portion of the property that would be in the top
2 right-hand portion of this picture?

3 A. Well, the person that took this picture is
4 basically standing out on Tract A. This picture is looking
5 a little northwest, but mostly looking west.

6 Q. So these two open ends, are they facing into the
7 retention pond, or are they facing out?

8 A. In.

9 Q. Okay.

10 A. Yeah, they're -- they're east.

11 Q. Okay. So using this third photograph, as the
12 water in the retention pond rises, it will first hit the
13 lower pipe and start going to the west?

14 A. Correct.

15 Q. Okay. And then as the water continues to rise,
16 it would then hit the second pipe?

17 A. Those two pipes are on roughly the same
18 elevation.

19 Q. Okay. They look different in the picture, but
20 the testimony is that they're on the same elevation?

21 A. Roughly the same elevation, yes.

22 Q. And these are sort of the inlets. Where are the
23 outlets? Where does the water go -- when it goes into
24 these pipes, where did it come out?

25 A. This, above the second pipe, is the Roberts

1 property, there's a brushy swale out across his property,
2 and it eventually gets into a ditch that goes all the way
3 out to Golf Club Road.

4 Q. At the -- one more page back, underneath that
5 one, one more page.

6 A. [Complied].

7 Q. There we go. Now, we're looking at, I guess it
8 is -- it's a photograph that has a notation 12/24/2014 on
9 it. Do you see that?

10 A. Yes.

11 Q. Okay. And again, it's a part of what we have
12 marked as Exhibit 5?

13 A. Yes.

14 Q. Can you tell me what that picture shows?

15 A. That's a picture of the weir with the water
16 flowing over it.

17 Q. And again, for the record, the weir is the rock
18 structure that we see running through the middle of the
19 picture?

20 A. Correct.

21 Q. And the retention pond is on the right-hand side
22 of the weir?

23 A. That's correct.

24 Q. And the -- I think you called it the Roberts
25 property, is on the left-hand side?

1 A. That's correct.

2 Q. Okay. In this picture, where would we find those
3 10-inch pipes?

4 A. Well, the first pipe is underwater, it has a --
5 by this time, it has a plug in it.

6 Q. Okay.

7 A. I don't remember the day that someone from the
8 City requested that a plug be put in the line.

9 Q. And you did that, you plugged it?

10 A. That day.

11 Q. Did you plug it on the pond side or on the
12 outfall side?

13 A. On the pond side.

14 Q. On the pond side.

15 A. Correct.

16 Q. And do you know if that plug is actually working
17 so that there's no water going through that 10-inch pipe?

18 A. Yes, it's a solid plug.

19 Q. Was there a plug put in the other 10-inch pipe?

20 A. No.

21 Q. Okay. That one's still flowing?

22 A. Correct.

23 Q. And where is it in relationship to this picture?

24 A. It's probably off the left-hand side about two to
25 three feet.

1 Q. Under the water?

2 A. No -- well, I don't know. It's not in the
3 picture, but it's located about two to three feet left of
4 where this picture stops.

5 Q. Okay. From the weir, then, that pipe extends out
6 how far?

7 A. Well, between the weir and the second 10-inch
8 pipe, I think there's a gap of about 10 or 12 feet where
9 there's no pipe.

10 Q. Okay. And how far from the end of that pipe is
11 it to the property line?

12 A. From the end of which pipe?

13 Q. The end of the pipe that's still running, that's
14 still open.

15 A. Oh, I'm not sure how it -- where it is, how it
16 relates to the property line.

17 Q. Okay. What about the weir, do you know where the
18 weir is in relationship to the property line?

19 A. It's 10 or 15 feet, I think, back onto Tract A.

20 Q. Okay. And the water that's overtopping the weir
21 at this point in time, it runs onto the Roberts property?

22 A. Correct.

23 Q. And where does it go from the Roberts property?

24 A. Well, it goes out across Roger's property,
25 there's some wooded swale area there, then there's more of

1 a ditch that heads westerly out to Golf Club Road.

2 Q. Okay. And then it gets into the public ditch on
3 Golf Club Road?

4 A. Correct.

5 Q. And where does it go from that public ditch?

6 A. Then it goes northerly for a few hundred feet,
7 then there's an 18-inch line that crosses Golf Club Road,
8 then it goes north again, and then there's an open ditch
9 west, which I assume goes out to the Santiam water control
10 ditch. I've never been on that property.

11 Q. All right. On December 24th of 2014, do you know
12 if that was a big storm event?

13 A. Looks like it.

14 Q. Do you keep track of five-year storm events,
15 ten-year storm events?

16 A. No.

17 Q. Okay. Do you know how much water would be
18 generated in a 25-year storm event?

19 A. How much water -- I guess, where?

20 Q. Well, on your --

21 A. You mean inches of rainfall?

22 Q. Yeah, on your property.

23 A. No.

24 Q. Okay. In 2006, there was a big flood, do you
25 remember that?

1 A. Very well.

2 Q. Okay. Do you remember how much water was
3 standing on Tract A during the 2006 flood?

4 A. Yes. In fact, I have photographs of what Tract A
5 looked like during the 2006 flood.

6 Q. How much water was there?

7 A. Well, there was enough water to completely
8 inundate that property. It completely flooded Mr. Emery's
9 property, and Mr. Emery had water inside his office during
10 that flood.

11 Q. Do you know what year flood that was classified
12 as, a ten-year flood, ten-year storm?

13 A. I do not.

14 Q. You don't know?

15 A. [Shaking head]

16 Q. You have known about this property for a long
17 time because it's so close to the Emery property; is that
18 right?

19 A. Correct.

20 Q. And you have worked with Emery for how long?

21 A. I started working for Mr. Emery in 1973.

22 Q. And his property and the facility that you worked
23 in is how close to Tract A?

24 A. Well, the west boundary of Tract A is the east
25 boundary of the Emery property.

1 Q. Okay. So you had pretty good knowledge over a
2 long period of time about what was going on with this
3 property?

4 A. Correct.

5 Q. Did you have any concern about its ability to
6 discharge or retain storm water?

7 A. In my observation, water just flowed across the
8 property, so there was -- I mean, whether it retained or
9 discharged water I don't -- I mean, it never made -- would
10 have -- Nothing I would have really thought about.

11 Q. When it came time to build this retention
12 facility, you had occasion to employ Steve Ward to design
13 it; is that right?

14 A. That's correct.

15 Q. And you employed Carlson Testing to do some
16 preliminary infiltration tests?

17 A. That's correct.

18 Q. And how did that go? Did Carlson come out and do
19 their testing?

20 A. Carlson came out twice.

21 Q. Twice? Okay.

22 A. Mm-hmm [affirmative response].

23 Q. Tell me about the first time.

24 A. Well, the first time, Carlson dug -- or caused a
25 test pit to be dug basically right where the Quail Run

1 pipeline exited onto the property and did some testing, and
2 then subsequently they came back and moved farther north to
3 the area where the -- actually where the pond was -- or
4 where the detention basin was going to be constructed.

5 Q. So the first time, how many test pits did they
6 dig?

7 A. I don't remember the exact number.

8 Q. Okay. And it's your testimony that those pits
9 were not in a location where the retention facility was
10 going to be built?

11 A. They were, I think, south of where the detention
12 basin was going to be built.

13 Q. Okay. So what did those infiltration tests in
14 those pits show?

15 A. I don't remember. That information would have
16 probably been sent to Steve, and then, to the best of my
17 knowledge, Carlson was asked to come back out again and
18 actually do tests out in the area where the detention basin
19 was going to be constructed.

20 Q. Okay. So why were they asked to come back again?
21 Did the tests the first time not turn out right?

22 A. I'm not sure. I just think that they were asked
23 to come back out to actually do test pits in the area where
24 the pond was going to be built, not somewhere else.

25 Q. And did they do that?

1 A. Yes.

2 Q. And did they charge you for doing that?

3 A. Oh, I'm sure they charged either myself or Steve
4 Ward.

5 Q. Okay. And what did the results of the second
6 test show?

7 A. I don't -- I don't remember. I mean, those
8 results don't mean a whole lot to me.

9 Q. Were you given copies of them?

10 A. There's probably -- were copies supplied.
11 Mostly, that information would be sent directly to Steve.

12 Q. To Steve. Did Steve ever communicate to you what
13 the test results were?

14 A. I don't remember talking to Steve about -- in
15 detail. I'm sure he said that he got them done and he was
16 working on the design.

17 MR. LIEN: Let's mark this as Exhibit 6.

18 [June 2013 Emails/Carlson Report, EXB. 6, marked]

19 Q. Can you, for the record, tell us whether you
20 recall this email?

21 A. I don't recall it specifically, but I can see
22 that it was between myself and Steve.

23 Q. And it's dated June 28th, and it appears to be an
24 email string, and attached is the report from Carlson?

25 A. Yes.

1 Q. Can you read me what Steve Ward said to you in
2 that email dated June 28, 2013?

3 A. You want me to read the top part of this?

4 Q. Yeah.

5 A. Yes. It says, "Bill, this report is extremely
6 damaging to our cause. If I were the City, I would not
7 allow additional development without the new storm drain
8 outlet to Mill Creek. There's nothing in this report that
9 I can use to satisfy the City. How do you wish to
10 proceed?"

11 Q. What was your response?

12 A. I'm not sure how I responded to that. I think I
13 possibly questioned the location of the test pits, because
14 I do remember that the first test pits were generally south
15 or -- of where we were talking about building the detention
16 basin. I don't remember how I responded after that.

17 Q. Did you have any control over where Carlson dug
18 their test pits?

19 A. Well, generally, test pits are dug in the area
20 where something is going to be constructed, so I don't
21 remember how they picked the site the first time.

22 Q. They picked the site, not you?

23 A. You know, I don't remember exactly. I know I was
24 out there one time with Carlson. I think I was out there
25 for sure the second time, and I could have been out the

1 first time too.

2 Q. Did Emery & Sons equipment dig the test pits --

3 A. Probably.

4 Q. -- for Carlson?

5 A. Probably.

6 MR. LOISELLE: Be a little patient. You're
7 starting to talk on top of each other. I want to make sure
8 we get a good record.

9 THE WITNESS: Sorry.

10 Q. Carlson relied on Emery to use its equipment to
11 dig the holes?

12 A. I believe so.

13 Q. Okay. And who at Emery would have designated
14 where the holes were to be dug?

15 A. Generally, the backhoe operator would not choose
16 that site, that's normally between the engineer and the
17 testing company.

18 Q. Okay. So it's your understanding that perhaps
19 Steve Ward was the one who directed the location of the
20 test pits?

21 A. It's possible, yes.

22 Q. Okay. But you didn't?

23 A. I don't remember directing the test pits.

24 Q. Okay. And the results of this report which Steve
25 Ward characterizes as extremely damaging, what does it say?

1 What's the result of this test as far as infiltration goes?

2 A. I don't know what -- I would assume that it says
3 that they're -- that it doesn't infiltrate as well as what
4 Steve would need for the detention basin.

5 Q. In fact, looking at page 3 of the report, under
6 discussion, it says, "We did not observe discernible
7 infiltration into the subsurface materials at the test
8 depths and locations described." Do you see that?

9 A. You're on page 3 of 4?

10 Q. Yeah. At the bottom, under section 8.

11 A. That's what it says.

12 Q. You received this report. Did you read it at the
13 time you got it?

14 A. I probably did.

15 Q. Okay. Infiltration, in your mind, is what? What
16 does that mean?

17 A. Well, generally that's -- that's a liquid moving
18 from one area to another area.

19 Q. And why would you be testing for that in a
20 retention pond?

21 A. I'm not sure why that...

22 Q. If the water is going to be retained on site,
23 then it's either got to evaporate or it's got to infiltrate
24 into the groundwater, correct?

25 A. Correct.

1 Q. And isn't the infiltration testing that you were
2 doing determining how much of the water would go -- would
3 infiltrate through the ground down to the water table?

4 A. That sounds reasonable. It's probably a question
5 more for Steve than for me.

6 Q. All right. Did you not understand the concept of
7 infiltration at the time?

8 A. I believe I did.

9 Q. Okay. And infiltration was important in this
10 retention facility, why?

11 A. Well, I believe the design would be to allow the
12 pond to hold water in a storm event and then release it
13 down into the ground.

14 Q. Okay. And what was your understanding as to what
15 that storm event level was that it had to retain?

16 A. Oh, I don't remember. Again, that's stuff that
17 Steve would have dealt with.

18 Q. So on June 28th, then, you get the report and
19 your engineer says it's extremely damaging and I can't use
20 it to satisfy the City. And the report itself says you
21 have no discernible infiltration at that section. So then
22 what happened after that?

23 A. I believe Steve asked Carlson or asked me to ask
24 Carlson to go out and dig holes in the area where the pond
25 was going to be dug.

1 Q. Looking at the test itself, which is figure 2 --

2 A. Mm-hmm [affirmative response].

3 MR. LOISELLE: Is that a "yes"?

4 THE WITNESS: Yes.

5 Q. -- did Carlson identify for you the test pit
6 locations?

7 A. Yes.

8 Q. And are those accurate, as far as you can recall?

9 A. Far as I remember.

10 Q. And is it your testimony that those pit locations
11 are not within the constructed retention pond?

12 A. They're either at the far south end or they're --
13 or two of them are off to the east.

14 Q. If we were to overlay the retention pond on
15 figure 2, it's your testimony that the pond would not
16 extend to those locations?

17 A. Oh, it would come -- it could come close.

18 Q. Come close --

19 A. But the main part of the pond is north of that.

20 Q. Okay. Can you identify from this map how far
21 north of the property line test pit two is?

22 A. How far north of which property line?

23 Q. Of your Tract A's southern boundary.

24 A. Well, I can't read this, but I know that the lots
25 are generally 80 feet wide, so I would say that using that

1 math, test pit two would be 320 feet north of the south
2 boundary, north of the end of Quail Run.

3 Q. And test pit three?

4 A. Oh, that's what I was talking about, was its -- I
5 saw the IT2. Yeah, that's test pit three that I was
6 referring to.

7 Q. So test pit three is 300 and how many feet,
8 approximately?

9 A. Well, if the lots are 80 feet wide, it's
10 basically, one, two, three, four lots up, so 320 feet.

11 Q. And test pit two then would be how far north of
12 the south property line?

13 A. About 240 feet.

14 Q. And test pit one?

15 A. 250-ish.

16 Q. And where is the Quail Run outfall in
17 relationship to the south property line?

18 A. There's -- we constructed a manhole at the
19 intersection of Quail Run and Oriole, and then we extended
20 the pipe out. I would say, looking at the pictures, that
21 the staff is roughly about out from where test pit one is.

22 Q. Now, you used the word "staff." I'm not sure
23 what that means.

24 A. The measuring staff that's been constructed.

25 Q. Oh, okay. And that shows in the pictures, we'll

1 get back to that in a second.

2 A. Yeah.

3 Q. I'm more interested in the location of the end of
4 the pipe that comes from Quail Run.

5 A. Yeah. I would say that that pipe now roughly
6 ends where test pit roughly in that --

7 Q. Test pit which?

8 A. Two.

9 Q. Test pit two?

10 A. Correct.

11 Q. And in relationship to test pit two, which is the
12 farthest south, is it your testimony that test pit two is
13 not in the retention pond?

14 A. It's close to the very southern tip of the pond.

15 Q. What about test pit one? It's a little bit
16 farther north and to the east. Is it in the retention pond
17 as constructed?

18 A. It looks to me to be to the east of the detention
19 pond.

20 Q. Outside?

21 A. Yeah.

22 Q. And test pit three?

23 A. That looks to be on the westerly side of the
24 detention basin.

25 Q. Outside of the basin?

1 A. Well, it's -- without having the basin overlaid
2 on the map, pretty hard to tell.

3 Q. Okay. And this report says that there's no
4 discernible infiltration in that area. Is that right?

5 A. That's what it says, yes.

6 Q. Okay. And that was -- and you wanted -- or you
7 discounted, I should say -- or did you discount this report
8 because of the location of those holes, the pit holes?

9 A. The -- you know, from my observation, the water
10 that has always flowed across this property -- Those pits
11 were basically at the low point of that swale, and they
12 were roughly where water had been discharging onto the
13 property since 2009. So to me, the test pits should have
14 been farther north, I guess.

15 Q. Okay. So the fact that in that area of Tract A,
16 there was no infiltration, that didn't raise any concern
17 for you?

18 A. The report went to Steve, I mean, so that's -- I
19 guess to me, that was not the main area of the detention --
20 where the detention basin was going to be built.

21 So I think if you had the next report, it's
22 possible -- I'm pretty sure that the second set of pits
23 were farther north.

24 Q. Okay. Do you know why Steve said that this was
25 such a damaging report, then?

1 A. Well, I think he was looking for ground that
2 would -- that water could infiltrate down into the ground.
3 So if Carlson is saying this area isn't going to work, then
4 he would need something else to design the pond with.

5 Q. Was it you or him that ordered the second set of
6 tests?

7 A. I don't remember.

8 Q. Okay.

9 A. One of us.

10 Q. But there was a second set of tests?

11 A. As I remember, yes, there was.

12 MR. LIEN: Let's mark this as Exhibit 7.

13 THE WITNESS: Before we start that, can we
14 take a quick break?

15 MR. LIEN: Sure.

16 MR. LOISELLE: We're getting pretty close to
17 lunch, so how long will you be with Exhibit 7?

18 MR. LIEN: I don't know, five, ten minutes.

19 MR. LOISELLE: Do you need to take a break
20 right now?

21 THE WITNESS: Yeah, real quick.

22 MR. LOISELLE: Give us two minutes.

23 [June/July Emails/Carlson Testing, EXB. 7, marked]

24 [Recess: 11:55 - 12:00]

25 BY MR. LIEN: [Continuing]

1 Q. All right. We'll try to get through this one and
2 then take a break for lunch.

3 Did you get an opportunity to look at what we
4 marked as Exhibit 7?

5 A. Yes.

6 Q. Can you describe that for the record?

7 A. Well, this is my follow-up to Steve, and the
8 first time -- and it's reminding me that I was actually out
9 on the site when the first test pits were there. And I'm
10 saying that I didn't understand why the Carlson guy was
11 digging the test pits basically at the end of where the
12 storm drain from Quail Run had been dumping out onto the
13 property, and that I'm basically saying that if we move
14 farther north, we would probably get different results.

15 Q. And you dug at least one or more test pits for
16 the Carlson retesting?

17 A. Yeah. I think what I said here is that I would
18 go out and use the backhoe out there over the weekend and
19 just see if the soil looked different than what Carlson
20 came up with the first time.

21 Q. Going back to Exhibit 6 for a second, and that
22 figure 2, when you engaged Carlson for the retesting, where
23 were the test pits on the retest?

24 A. As I remember, they were farther north than
25 these.

1 Q. Did you dig the test pits yourself?

2 A. I don't remember if I dug them. I remember going
3 out there on the weekend when the Carlson guy wasn't there,
4 but I don't remember if I went back whenever we got him
5 back out a second time or not.

6 Q. For the second set of testing, you specifically
7 selected the test pit location?

8 A. Well, I suggested that they be farther north than
9 these.

10 Q. Okay. And you observed the second set of tests?

11 A. I think I was out there part of the time. I'm
12 trying to remember. That's been a long, long time ago.

13 Carlson -- I remember we needed to have a water
14 truck out there, because he needed to fill the holes with
15 water and then time and measure. And as I remember the
16 second time, if I was out there for a little bit, and then
17 had one of the water truck drivers out there, but I don't
18 remember exactly how that happened.

19 Q. Okay. And looking at figure 2 on Exhibit 6, can
20 you approximate where the test holes were?

21 A. The second time?

22 Q. Yes.

23 A. I would say they were closer to -- up near lot,
24 say, 57, 58 and 60.

25 Q. Okay. Now, go back to Exhibit 7. And look at

1 page 2 of Exhibit 7, and there is an email dated July 11th
2 from Kyle Smetana to you?

3 A. Yes.

4 Q. And he indicates the test was located about 900
5 feet west of the west end of Junco Street. Does that help
6 you to be able to go back to figure 2 and tell us where
7 that test pit was located?

8 A. No, because Junco Street is the northerly street,
9 so 900 feet... so that would mean 900 feet back to the east
10 would be the end, so that's clear up here somewhere off the
11 map [indicating].

12 Q. Looking at the figure 2 on Exhibit 6, where is
13 the end of Junco Street?

14 A. It's -- I don't think it's even on that map.
15 It's clear back over here somewhere, it's clear off to the
16 east of that map [indicating].

17 Q. In 2013 when this testing was going on, had Junco
18 Street been developed to the west of Pheasant Avenue?

19 A. No.

20 Q. Okay. So it was back towards Cardinal?

21 A. Back to the end of Phase I.

22 Q. And that was at the intersection of Cardinal and
23 Junco?

24 A. Well, Junco would have been built for the length
25 of one lot west of Cardinal, so about 100 feet.

1 Q. Okay. So 900 feet from that location out, does
2 that help you identify for us where that pit would be?

3 A. Not without having another drawing. I mean, I
4 have no idea why he would have tied it to that.

5 Q. And it's your understanding that the pit was
6 close to the northern property boundary?

7 A. Yes. And if they did that, this report, the
8 first time, I don't know why they wouldn't have done the
9 same report the second time with another copy of the map.

10 Q. You don't know why they didn't?

11 A. I don't know why or if they did it.

12 Q. Well, looking at 7 again, the last several pages
13 of that exhibit appear to be a supplemental report. Have
14 you seen that? It's Bates stamped JCNW 2559.

15 A. Okay.

16 Q. Have you seen this report?

17 A. I don't remember seeing it, but that's -- I mean,
18 it's almost two years ago.

19 Q. Okay. Do you remember observing the Carlson
20 folks doing the testing?

21 A. No. This says that this guy met with Brad, which
22 was probably my -- probably my on-site superintendent or
23 something. So I'm guessing that if I'd been there that he
24 would have said he met with Bill.

25 Q. This report, did it go to you or to Steve Ward?

1 A. I'm not sure.

2 Q. You ended up --

3 A. One or both of us.

4 Q. You ended up getting it as a part of this string
5 of emails?

6 A. Correct.

7 Q. So you did see it?

8 A. I'm guessing that I did, yes.

9 Q. Okay. Did you believe that the testing was
10 adequate?

11 A. I have no opinion on whether it was adequate or
12 not. It was --

13 Q. Did you have any conversations with Steve Ward
14 about whether it was adequate?

15 A. I don't remember.

16 Q. Okay. Did you have any concerns about the high
17 water table in the area that was reported in both of these
18 Carlson reports?

19 A. Any concerns?

20 Q. Yes. About infiltration, given the high water
21 table.

22 A. I'm not sure if I did. I wasn't, you know, doing
23 the design, so...

24 Q. You didn't share any concern about the level of
25 the water table that you might have with Steve Ward?

1 A. Oh, we may have talked about it, sure, because,
2 you know, I had dug around the area a lot, and I knew that
3 from one area to another out there, the water table varies
4 considerably.

5 Q. Did Steve express to you any concern about the
6 design, given the high water table?

7 A. Not that I remember.

8 Q. Okay. You relied on Steve for the design of the
9 retention pond?

10 A. Correct.

11 Q. And all the engineering?

12 A. Correct. I'm not an engineer.

13 MR. LIEN: You're not an engineer. Okay.

14 Shall we take a break?

15 [Recess: 12:10 - 2:48, at which time Ms.

16 Holmberg was no longer present]

17 BY MR. LIEN: [Continuing]

18 Q. I've just got some scattered and not cohesive set
19 of questions, and then we'll be done.

20 A. Okay.

21 Q. As the City and JCNW were trying to work through
22 the issues leading up to the stop work order, who were you
23 talking to during those periods of time, say, from -- I
24 think using Steve's notion of the spring of 2014?

25 A. Well, I was talking to Dave Kinney. He and I

1 discussed how we were going to move forward. And the -- I
2 believe it's the May 8th meeting was a meeting that was, I
3 felt, at my request to -- When I requested the meeting, it
4 was between Dave Kinney and the new City administrator and
5 myself.

6 Q. Okay. And did this have to do with testing,
7 trying to figure out how to test the pond?

8 A. No, because when I got to the meeting, John
9 Ashley was there, Mike Brash was there, I'm not sure who
10 else, maybe -- I don't remember if Christine was there.
11 So -- Dan Fleishman was there, so it was a completely
12 different meeting than what I had asked Mr. Kinney to
13 generate.

14 Q. What was discussed at that May 8th meeting?

15 A. Well, we started out discussing how to basically
16 develop around the pond, around the detention basin, what
17 if we could modify Phase II A, how many lots the City would
18 allow us to build in the next phase of the development.

19 Q. Had the plat for Phase II been signed at that
20 point?

21 A. Yeah, we -- I believe the City signed the plat
22 for Phase II in, I'm going to say, late April.

23 Q. Of 2014?

24 A. Correct.

25 Q. Okay. So at this meeting, the plat had already

1 been put into place, and now you're talking about
2 additional development?

3 A. Correct. I thought they were done with Phase II
4 and moving onto the next phase.

5 Q. All right. And did the issue of the pond and its
6 performance come up during that meeting?

7 A. Yes. John Ashley brought it up.

8 Q. Okay. What did John say?

9 A. He said, I want you to do a study.

10 Q. Study of what?

11 A. That's what I -- that was my question to him,
12 what do you want me to study, John.

13 Q. And what was his response?

14 A. He said, well, I want you to study how the pond's
15 working, we don't think it's working right.

16 Q. Is that the first time you'd heard anybody say
17 they didn't think the pond was working right?

18 A. Well, I believe that's the first time anyone from
19 the City of Stayton made that comment.

20 Q. Now, you qualified that by, first person from the
21 City of Stayton. Had there been anybody from the City of
22 Stayton that had said the pond isn't working right?

23 A. I'm not sure. It could have been the first time
24 anyone said that.

25 Q. Okay. The discussions that you and Steve Ward

1 had about the pond not performing at zero discharge, when
2 were those?

3 A. I believe we talked about it a little bit during
4 the winter. We probably talked about it in December; I
5 think there was a substantial rain event.

6 Q. December of 2013?

7 A. Correct.

8 Q. Okay. Did you share Steve's frustration about
9 what the City was asking for testing-wise?

10 A. I did. I asked John in the meeting to put his
11 request in writing because Steve Ward was not there. I
12 didn't want anything to be lost in translation between John
13 just speaking in a meeting and me relaying it to Steve, so
14 I asked John to put his request in writing, send it to me,
15 copy Steve, and we'd try to figure out what it was that he
16 wanted.

17 Q. And in fact, he did that?

18 A. He sent an email out real soon.

19 Q. Where he put it in writing?

20 A. Yes, where he put in writing that he wanted us to
21 do a study.

22 Q. Okay. And did you respond to that email?

23 A. I don't remember.

24 Q. Okay. And we heard Steve testify that he didn't
25 do any further study or create any testing protocols. Did

1 you do any further study or create any testing protocols?

2 A. At that time, I don't believe so. It was heading
3 into summer and I was getting ready to leave for a month
4 when I wouldn't have -- I wasn't sure if I was going to
5 have communication. So basically what I was trying to do
6 was get the plat done and then get some comments back from
7 Mr. Kinney as to what we were going to do moving forward.

8 Q. Okay. The staff gauge that was put in, did you
9 put that in?

10 A. I did.

11 Q. You personally, or did you have somebody --

12 A. With one of my workers.

13 Q. Okay. And Steve Ward was not sure about ground
14 elevation. The measurements that we see, that 6.65, is
15 that from ground level?

16 A. No.

17 Q. What is the measurement on the staff level at
18 ground level?

19 A. The 7 would correspond to the elevation of 427.

20 Q. So 7 equals 427? And what's the significance of
21 427?

22 A. Well, what I tried to do was to match the staff
23 elevations given an elevation in the pond as it was
24 designed.

25 Q. And the weir is set at 426.5, correct?

1 A. I'm not sure what the weir elevation is.

2 Q. So if you set the staff so that 7 equals 427
3 feet, when the water level hits 7, assuming that the weir
4 design elevation is 426.5, you'd be overtopping the weir;
5 is that correct?

6 A. Yes.

7 Q. Okay. At some point in the fall of 2014, you had
8 occasion to have a conversation with Keith Campbell in his
9 office, do you remember that, in October?

10 A. I had several conversations with Mr. Campbell.

11 Q. This would have been the one the week before the
12 issuance of the stop work order. Do you remember that one?

13 A. I believe that was October 17th.

14 Q. Okay. Tell me what happened in that October 17th
15 meeting.

16 A. Well, Mr. Campbell, I believe he sent me an email
17 that week and said, we need to talk, when can you come in.
18 And so we met that Friday afternoon.

19 Q. Okay. And what did you tell him?

20 A. Well, we talked about a lot of different things.
21 He asked again about the detention basin and asked me again
22 if it was working the way it was designed.

23 Q. And what was your response?

24 A. Same as it had been the first five times he asked
25 me: No.

1 Q. And he testified that you had a discussion about
2 further creation of impervious surfaces. Do you remember
3 that?

4 A. I don't remember that.

5 Q. You don't remember that? Did he talk to you at
6 all about what future construction or building permits, the
7 status of those was going to be?

8 A. Not that I remember.

9 Q. Did you at some point after that October 17th
10 meeting with Mr. Campbell have occasion to talk with any
11 members of the City Council?

12 A. Oh, yes.

13 Q. Who did you talk to at the City Council?

14 A. The first person I talked to was Hank -- I mean,
15 Henry Porter.

16 Q. Was he mayor at that point? He was --

17 A. No, he wasn't.

18 Q. He was just a councilor, wasn't he?

19 A. Correct.

20 Q. And what conversation did you have with Councilor
21 Porter?

22 A. Actually, at that point in time, it was a fairly
23 one-sided conversation. It was in Mr. Porter's gun shop,
24 and mostly he listened.

25 Q. Did you seek him out?

1 A. I went down to his gun shop and asked him a
2 question.

3 Q. He didn't call you and say, come down, I want to
4 talk about this?

5 A. No.

6 Q. So you went to his place to talk about --

7 A. [Nodding head].

8 Q. And was this after the issuance of the stop work
9 order?

10 A. That's correct.

11 Q. Any other members of the City Council you talked
12 to?

13 A. I don't believe that I talked to anybody, any
14 other council member -- Oh, excuse me. No other -- I
15 talked to the mayor at some point.

16 Q. Mayor Vigil, Scott Vigil?

17 A. Mayor Vigil, yes.

18 Q. And did you seek out Mayor Vigil or did he --

19 A. No, I went to his place of business and asked him
20 questions.

21 Q. And what was his response?

22 A. He didn't understand why the City issued a stop
23 work order to completely stop every bit of construction in
24 the subdivision.

25 Q. Okay. Anything else?

1 A. He said I -- when I talked to him, he said he
2 hadn't seen the stop work order so he really didn't have...

3 Q. Any other councilors?

4 A. Not that I remember.

5 Q. And then after the election when we had new
6 councilors, you came to a City Council meeting and sent a
7 letter; is that right?

8 A. When I -- Yes.

9 Q. And what was the purpose of that letter?

10 A. When I met with Mr. Porter, it became extremely
11 clear to me that the City Council was not being provided
12 copies of the stop work order, other pertinent information.
13 And I was asking to have a discussion, I was asking for the
14 councilors to visit the site, because during one of the
15 council meetings, one of the council members asked for
16 somebody to tell her where Phillips Estates was located in
17 Stayton.

18 Q. During the council presentation?

19 A. Correct.

20 Q. And then did you have occasion to talk to any
21 councilors after that?

22 A. I don't remember talking to any of the
23 councilors. It's possible that I had another conversation
24 with Mr. Porter, because from time to time I buy bullets
25 from him, and so I probably talked to him one more time

1 after, or two, after that.

2 Q. Then after the election, there was a changeover
3 in some of the councilors and the mayor, you're aware of
4 that?

5 A. Yes.

6 Q. Did you have occasion to talk to any of the new
7 councilors after they were elected?

8 A. Not that I recall.

9 Q. Okay. And then after the new councilors got
10 sworn in, did you have occasion to talk with any of the
11 councilors after that January meeting where the new people
12 take office?

13 A. I don't remember having any conversations with
14 anyone.

15 MR. LIEN: As a part of the discovery, we
16 got a document I want to ask you about, see if I can find
17 it here. Let's mark this as 13.

18 [5/13/12 Payment & Disbursements, EXB. 13, marked]

19 Q. Is that a document that's familiar to you?

20 A. I don't remember seeing this.

21 Q. You don't know who created this?

22 A. I do not.

23 MR. LIEN: Okay. That makes that easy.

24 Let's mark this one as Exhibit 14.

25 [Questions for Bill - Detention Pond, EXB. 14, marked]

1 Q. Have you seen Exhibit 14 before?

2 A. I have.

3 Q. What was this document created for?

4 A. These were some questions that a friend of mine
5 created who was assisting me in putting the files from the
6 Phillips Estates together.

7 Q. Who is your friend that did this?

8 A. Jane Epperson.

9 Q. Say that again.

10 A. Jane Epperson.

11 Q. You probably have to spell it for her.

12 A. E-P-P-E-R-S-O-N.

13 Q. Is she a lawyer?

14 A. I don't believe so.

15 Q. Okay. And when did she create this?

16 A. I don't remember the date.

17 Q. Do you remember when you received it?

18 A. I don't.

19 Q. Up in the upper right-hand corner it says, I
20 think, "emailed to Bill 9/9/14"?

21 A. Okay.

22 Q. Does that sound like about the date that you
23 would have received it?

24 A. I have no idea. That doesn't appear to be my
25 writing.

1 Q. There is typewritten information and then there's
2 handwritten information. Is the handwritten information
3 your handwriting?

4 A. Looks like it, yes.

5 Q. Okay. And the typewritten material is something
6 that Jane Epperson created?

7 A. I believe so.

8 Q. And the purpose of this was for what, again?

9 A. Jane was organizing files from JCNW for the
10 Phillips Estates Subdivision, and she sent this to me
11 because she wanted to more fully understand what she was
12 putting together.

13 Q. And so you put the handwriting -- Then did you
14 send the document with the handwriting back to her?

15 A. I don't remember how I sent it back to her or
16 even if I sent it back to her, because -- I just don't
17 remember if it even went back to her.

18 Q. Did she end up producing a report for you?

19 A. She didn't produce a report, no. She organized
20 files for the -- for me.

21 Q. She didn't generate anything new except this list
22 of questions?

23 A. This was just her questions, yes.

24 MR. LIEN: Okay. I have one more exhibit I
25 want you to talk to me about.

1 Let's mark this one as 15, is that right?

2 THE REPORTER: Yes.

3 [5/9/14 Email, EXB. 15, marked]

4 Q. We talked earlier about the meeting you had and
5 that then you got an email from John Ashley. And I'd like
6 for you to look at this email and tell me if this is the
7 follow-up email that you testified about earlier.

8 A. Yes, I believe this is what John sent out the
9 next day.

10 Q. Okay. And you don't recall whether you had an
11 email reply to him?

12 A. I don't recall replying to this.

13 Q. Steve Ward is copied on this email. Did you have
14 occasion to talk to Steve Ward about the content of this
15 email after he had received it?

16 A. It's possible that we had a conversation, but I
17 don't recall.

18 Q. You don't recall?

19 A. No.

20 MR. LIEN: Okay. Can we take about five
21 minutes, and then I think we'll be pretty close to being
22 done.

23 THE WITNESS: Okay.

24 MR. LOISELLE: Okay.

25 [Recess: 33:11 - 3:16]

1 BY MR. LEIN: [Continuing]

2 Q. All right. Let's go back on the record and see
3 if we can wind this up.

4 Is it your understanding that when Tract A is
5 redeveloped into Phase III that there is an anticipation of
6 a new development agreement for that property?

7 A. I believe so.

8 Q. Okay. Have you had any discussions with the City
9 about the negotiation of the Phase III property?

10 A. No. I submitted a set of plans for Phase III to
11 the City and filled out an application.

12 Q. Did that application include a draft form
13 proposed development agreement?

14 A. No.

15 Q. And I understand those plans got sent back to
16 you; is that right?

17 A. Multiple times.

18 Q. Okay. Have you had any discussions with anybody
19 at the City about starting negotiations for a development
20 agreement for Phase III?

21 A. Lately?

22 Q. Well, I guess maybe ever. Let's start with ever.

23 A. Well, the last time that the Phase III came up
24 was when I -- Back in May, I asked Dave Kinney to set up a
25 meeting with himself and Mr. Campbell to begin that

1 discussion.

2 Q. Okay. Is that reflected in the email that we
3 made Exhibit 13, I guess? No. Exhibit --

4 MR. LOISELLE: 15?

5 Q. 15.

6 A. Well, again, what happened when I got to the
7 meeting, instead of it being between myself, Mr. Kinney and
8 Mr. Campbell, the meeting was John Ashley, Dan Fleishman,
9 Mike Brash, and we spent very little time talking about how
10 we were going to move forward.

11 Q. Okay. Look at Exhibit 14 for a second. And
12 under number 11, Jane Epperson says, "What was the cost of
13 the detention pond and did you pay the entire cost with a
14 verbal agreement from the City to reimburse you for half of
15 the cost."

16 And part of your answer says, "We had a written
17 agreement with PW director for City," and then it's a plus
18 sign, I think, "pay 42 percent."

19 A. Yeah, when -- one of the items on Mr. Kinney --
20 the public works director's to-do list, in order for me to
21 get the plat approved, was to agree on the reimbursement
22 for Phase II.

23 And I felt that because we had been directed to
24 build a detention pond, which was detaining a significant
25 amount of water from Quail Run, that the City should

1 participate in the construction and cost of building that
2 detention basin, and Mr. Kinney agreed.

3 Q. And do you have a written agreement?

4 A. Well, Mr. Kinney provided me a spreadsheet
5 breakdown of costs that he generated, and I believe at one
6 point in time that 42 percent was what was on one of the
7 spreadsheets that he produced.

8 Q. And you would deem that would be a written
9 agreement with Dave Kinney?

10 A. Well, he provided it to me as his proposal for
11 doing the reimbursement, so I assumed that was an
12 agreement, yes.

13 Q. Okay. You heard Mr. Ward when we were talking
14 about what can be done to make the pond zero discharge, and
15 he said a potential would be to enlarge the size of the
16 pond. Do you remember him testifying to that?

17 A. I remember his testimony.

18 Q. And he wasn't sure how much land there was, so he
19 really couldn't answer whether that was possible on the
20 vacant land that you have left. Do you have an opinion
21 about that?

22 A. I'm not sure that there's enough land to build a
23 pond. And I share the same sentiment that he did; we have
24 no idea how much water is coming out of the Quail Run
25 Subdivision, so until that would be determined, there's no

1 way to know if two acres will do it, if it will take five
2 acres, there's no way of knowing.

3 Q. How much land is there from the berm on the -- I
4 guess it would be the berm on the eastern side of the pond,
5 how much land is there from that to the plat lots 36
6 through 40?

7 A. I'm not certain how big that is. Trying to
8 remember if it's six or seven acres, I guess.

9 Q. The Tract A is six or seven acres?

10 A. Yes.

11 Q. And how many acres -- well, yeah, how many acres,
12 or maybe it's better expressed in square foot, is the
13 actual pond?

14 A. It's -- I think it's between an acre and a half
15 and two and a half acres.

16 Q. We saw in one of those earlier drawings like 7500
17 square feet or something. Does that sound about right?

18 A. 7500 square feet? It's way bigger than that.

19 Q. No. 75,000, I'm sorry.

20 A. Oh.

21 Q. Which would be, what, a little less than two
22 acres.

23 A. Correct.

24 Q. And so the Tract A is, according -- Just make
25 this assumption. I'm looking at an assessor's map that

1 says it's 7.11 acres.

2 A. Okay. Well, then you already have the answer.

3 Q. And then let's assume that the pond, as currently
4 constructed, is two acres. Then there's another five acres
5 on Tract A that is not developed with anything. Is my math
6 about right?

7 A. Correct.

8 Q. So I guess my question is: Is it possible, in
9 your mind, to enlarge the square footage of the pond onto
10 that remaining vacant land to the extent that it would make
11 the design of the pond zero discharge again?

12 A. I have no idea.

13 Q. Okay. Have you had any occasion to talk with
14 Mr. Ward about redesigning the pond so that it would be
15 zero discharge?

16 A. Well, one of the -- the last discussion that I
17 had with Mr. Ward centered around building a pump station
18 to convey the water north to Mill Creek. That was the last
19 discussion that we had.

20 Q. And the City rejected that?

21 A. Someone rejected it.

22 Q. Okay. You've got a letter from the City saying
23 that that proposal was not acceptable, or did you see a
24 copy of it?

25 A. I'm not sure. I remember you wrote a letter that

1 said it was not acceptable, but that's just my remembrance.

2 Q. No, you're correct. The plan to pump the water
3 north to Mill Creek, did you have easements in place in
4 order to run a pipe from the site north to Mill Creek?

5 A. No easements.

6 Q. Okay. What was the proposal to obtain easements
7 in order to make your pumping plan work?

8 A. Well, step one was to gain approval from the City
9 on the concept.

10 Q. Okay.

11 A. Step two would have been to approach the various
12 land owners to see if they would be willing to allow an
13 easement across their property of a surface pipe.

14 Q. And what location would you use for the pipe?

15 A. Well, those locations were detailed out on large
16 drawings that --

17 Q. From two thousand --

18 A. Well, I brought them up to my attorney, and I --
19 and then he forwarded them on.

20 Q. Okay. So was the original location from the 2006
21 plan that Steve Ward had drawn for you?

22 A. Well, it's in that general location, yes.

23 Q. Okay. So the idea was not to create new legal
24 descriptions or new maps, but to use the ones you already
25 had?

1 A. The legal descriptions that we created would not
2 necessarily be in the same location for the surface pipe
3 that we proposed.

4 Q. Oh, okay. So there would have been a requirement
5 to identify a different route, perhaps?

6 A. Same general route, just could vary a little bit.

7 Q. Okay. Did you have discussions with Mr. Ward
8 about enlarging the pond?

9 A. There was some discussion previously with
10 Mr. Kinney in one of the discussion sessions that we had
11 about the City acquiring property. There was some,
12 apparently, some discussion going on with the City about
13 acquiring a detention basin somewhere, and then we had a
14 discussion about, okay -- I think I made a proposal to the
15 City and said, hey -- you know, offering to sell a piece of
16 property to the City, develop a park. There was a fairly
17 lengthy proposal made.

18 Q. I want to focus on that time frame from when the
19 City said to you, we don't think the pond is working as
20 designed, and we want to test it. And so I'm looking for
21 what is the discussions, if any, that related to correcting
22 the problem?

23 And you identified the pump was one potential
24 solution. And then when I talked with Mr. Ward, he said
25 maybe enlarging the footprint was a solution. And I'm just

1 wondering if you and Mr. Ward had a conversation after the
2 City raised the question, if that would work, since you had
3 another four or five acres there to deal with?

4 A. I think we did. You know, Steve asked some
5 questions about the property because we've obviously dug
6 quite a bit out there, and the ground varies dramatically
7 from one area to another.

8 The infiltration tests that were done show that,
9 that within -- by moving a couple hundred feet, the
10 infiltration goes from nothing to the 4.1.

11 So in my opinion, I don't remember that Steve
12 ever proposed that. I think the discussions that we've had
13 since the City raised that mostly had been about, okay,
14 what does John Ashley want us to test.

15 And I sent -- I sent a couple emails out on the
16 16th and the 20th of October to Mike Brash, because we
17 were -- Steve was asking me to get as-built information
18 from the Quail Run Subdivision so that he could start
19 thinking about things like -- I guess I would be thinking
20 about things like expanding the pond, but he wanted as much
21 information as he could get.

22 Q. Do you know who it was at the City that provided
23 you with the information about the storm discharge from
24 Quail Run?

25 A. No one.

1 Q. No one from the City provided you with that data?

2 A. No.

3 Q. Do you know where Steve got the data?

4 A. Steve got the data from me.

5 Q. From you? Where did you get it from?

6 A. I got it from Boatwright Engineering.

7 Q. And what was Boatwright Engineering's role?

8 A. Way back when, when Quail Run was built?

9 Q. Well, I mean, you went to Boatwright because he
10 was a former City engineer; is that correct?

11 A. I went to Boatwright because the City of Stayton
12 refused to give me information in their files from Quail
13 Run.

14 Q. Okay. And so why did you go to Martin?

15 A. Well, I was involved in the Quail Run Subdivision
16 when it was built, as a contractor. I was involved in
17 building the pump station in Quail Run, I was involved in
18 rebuilding the pump station in Quail Run, I was involved in
19 temporary pumping every winter when Quail Run flooded,
20 so...

21 Q. You knew the problem of the storm water discharge
22 from Quail Run almost intimately?

23 A. Correct. When I bought the property from the
24 Phillips Estates, they showed me drawings that were done by
25 Boatwright Engineering showing pipelines going out to and

1 across Golf Club Road and out to the Santiam Water Control
2 District's ditch.

3 Q. My question, I guess, is: You are -- you
4 remember that Martin Boatwright was the Stayton City
5 engineer for a period of time --

6 A. Correct.

7 Q. -- correct?

8 And that Martin Boatwright also was a private
9 engineer offering engineering services to private clients?

10 A. Correct.

11 Q. And so when you had identification with Martin
12 Boatwright with regard to Quail Run, was it your notion
13 that he had that information because he was the City
14 attorney?

15 MR. LOISELLE: City attorney or city --

16 Q. City attorney. -- city engineer, or did Martin
17 Boatwright design the storm water discharge of Quail Run
18 and that's why you were getting the information from him?

19 A. I don't believe Martin did any design of the
20 discharge. I believe he designed the temporary water
21 pumping station that the City built after Quail Run was
22 built.

23 Q. In his capacity as City engineer?

24 A. I believe that's what his designation was.

25 Q. Do you have information to verify if it was Bill

1 Renalda that was the project engineer for Quail Run?

2 A. I believe he was.

3 Q. So Bill Renalda designed Quail Run, and Martin
4 Boatwright then designed the pump station fix, if you will?

5 A. That's correct.

6 Q. Okay. And Martin had files, then, that you were
7 able to get a hold of?

8 A. That's correct.

9 Q. And what did those files show?

10 A. Well, they showed that, one thing, that
11 Boatwright Engineering reviewed Bill Renalda's design and
12 said that during a -- during a flood event there was going
13 to be a substantial stretch of Quail Run Avenue that was
14 going to be subject to street flooding, and that if the
15 storm drain was -- didn't work the way it was designed,
16 there's going to be some serious problems out there.

17 Q. When you went to Martin Boatwright's office, did
18 you copy some of his files and bring them back to your
19 office?

20 A. I believe we did.

21 Q. Okay. And were those files that you'd copied
22 from Martin Boatwright included in the materials that you
23 provided in this case?

24 A. I'm not sure if those have been sent or not.

25 Q. We didn't see anything in there that related to

1 Martin Boatwright.

2 MR. KUHN: There was some Boatwright
3 letters, but I didn't see any calculations or flow rates or
4 anything like that.

5 Q. If you could make a little notation on there that
6 if you find anything that you got from Martin Boatwright's
7 file when you went there, we'd like to see that.

8 [INFORMATION-TO-PRODUCE]

9 A. Okay.

10 Q. Now, when you got the information from Martin
11 Boatwright, did it have a storm water and charge flow rate?

12 A. I don't remember seeing that.

13 Q. Okay. Steve Ward testified earlier that he was
14 using, I think he said, 13.3 -- I think it was CF --

15 MR. KUHN: S.

16 MR. LIEN: Pardon me?

17 MR. KUHN: CFS.

18 Q. CFS. Would that refresh your recollection about
19 what you might have found out from Martin Boatwright?

20 A. Well, I think Steve got his information from the
21 City long after Martin Boatwright was no longer the
22 engineer. I -- The one document I saw, that was, I think,
23 from Keller or somebody that Steve was given.

24 Q. Okay. That's where the 13.3 came from?

25 A. Probably from the storm water master plan. I

1 don't know.

2 Q. And when you went to Boatwright's office, did you
3 find any documents that showed a flow rate different than
4 13.3 CFS?

5 A. I didn't look at -- I don't remember seeing
6 anything like that.

7 MR. LIEN: Okay. I don't have any further
8 questions.

9 MR. KUHN: No questions.

10 MR. LIEN: Thank you very much.

11 [Deposition adjourned at 3:37]

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C E R T I F I C A T E

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State of Oregon)

) ss.

County of Clackamas)

I, Lisa J. Pace, Court Reporter and Notary Public for Oregon, do hereby certify that BILL MARTINAK personally appeared before me at the time and place mentioned in the caption herein; that the witness was by me first duly sworn on oath and examined upon oral interrogatories propounded by counsel; that said examination, together with the testimony of said witness, was taken down by me in stenotype and thereafter reduced to typewriting; and that the foregoing transcript, Pages 1 to 129, both inclusive, constitutes a full, true and accurate record of said examination of and testimony given by said witness, and of all other oral proceedings had during the taking of said deposition, and of the whole thereof.

Witness my hand at Lake Oswego, Oregon, this 3rd day of May 2015.

Lisa J. Pace
Court Reporter
Notary Public for Oregon