RE: SSDP2016-00415 Segment 2B

My name is Tom Hornish. I live at 1237 E Lake Sammamish Shore Lane SE in Sammamish. In the interest of full disclosure, I am a Council Member of the City of Sammamish, but I would like to make clear that I am giving public testimony today ONLY as a private citizen that owns property next to the proposed development (since Council has delegated its authority to the Hearing Examiner in matters such as this).

I wish to highlight 3 concerns that I believe have not yet been adequately analyzed in the processing of the current SSDP application under the City's code, and request that the Hearing Examiner fully consider these 3 concerns before making a decision.

1. City code requires that the applicant narrow the proposed trail where SMC requires it and the AASHTO recommendations allow it.
2. The City should not be continuing to process this SSDP because there are still numerous questions regarding legal ownership of KC's rights to develop the ROW.
3. The court-ordered crossing at the Mint Grove section was developed and paid for by the residents of Mint Grove using high-quality materials (to prevent slipping, wear and tear, etc.), and KC should be required to replace this crossing using substantially equal quality of materials and construction standards.

1. City code requires that the applicant narrow the proposed trail where SMC requires it and the AASHTO recommendations allow it.

SMC 21A.30.210(1) states:

"Trails should **generally** be located along existing cleared areas ..." *(emphasis added)*

while SMC 21A.30.210(3) states

"The width of the cleared area, trail corridor, surface and shoulder **should** be designed consistent with AASHTO standards ..." *(emphasis added)*

SMC 21A.30.210(5) further states

"**Except** for … trails located on existing corridors consistent with subsection (1) of this section, trails that are proposed in proximity to wetlands or streams or associated buffers may **only** be located in the outer 25 percent of the wetland or stream buffer and should be generally aligned parallel to the stream or perimeter of the wetland." *(emphasis added)*

The existing interim trail is immediately adjacent to wetlands in many cases, i.e. within the ***first*** 25% of the wetland buffers, and is NOT in the outer 25% of the buffers. In fact, it is impossible for the proposed 18-foot trail to be in the outer 25% of the 50-foot buffers because 25% of 50 would only allow a trail width of 12.5 feet.

Obviously, with the cleared area not being as wide as the claimed width needed to meet AASHTO standards, and given that no new trails are allowed with the first 25% of a wetland buffer, there is a conflict within the SMC that requires analysis that I have not yet seen in the record for this application.

I previously raised this potential conflict in the SMC in earlier comments that I submitted, but it appears that my comments were summarized and paraphrased to become more generic concerns, and the specifics of the conflicting SMC requirements appear to have been lost; I wish to ensure the Hearing Examiner is aware of the specifics.

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All of these SMC provisions are somewhat general in nature by using the terms "general" and "should" nd includes exceptions, thus intentionally giving some latitude in their application. However, even though SMC 21A.30.210(5) includes an exception for "existing corridors" (as we have in this application), there is no guidance as to how this exception should or could allow an existing corridor to be widened, as proposed by the current application. Any widening of the current corridor from its existing footprint should be considered and analyzed as a "new" trail, although it should be balanced with trail safety as well.

In resolving these inherent conflicts in the SMC regarding the case at hand, it seems that it should involve a weighing of the city's interests in preserving the environment with the applicant's desire to design a safe trail, and I would argue that the city's environmental interests weigh heavily so that impact of the proposed design should minimize any environmental harm while still addressing the safety of the trail users.

Fortunately, the AASHTO Guide for the Development of Bicycle Facilities, 2012 gives us some guidance in this regard:

1. From page 5-3, the minimum paved width for a shared-use path is 10 feet with a typical range of 10 – 14 feet with the **wider values applicable to areas with high use**. *(emphasis added)*
2. From further down on page 5-3, a path width of 8 feet may be used for a short distance due to a physical constraint such as an environmental feature, bridge abutment, utility structure, fence, and such.
3. From page 5-4, the upper diagram shows the width of the sections to either side of the paved center section as 2 feet.
4. From page 5-5, the minimum width of the graded shoulder areas to each side of a paved trail is 2 feet.
5. Thus, the total minimum width of a trail according to AASHTO is 14 feet (2+10+2), with 12 feet (2+8+2) allowed for a short distance.

Because the AASHTO recommendations allow for the narrowing of a shared-use trail in certain circumstances (which is basically also allowing leniency in its application, similar to the SMC), and these recommendations and allowances from the strict standards still address the safety of the trail users, then the City should require the applicant to narrow the trail to 12-14 feet (including the shoulders and buffers) when adjacent to a wetland.

I acknowledge that the applicant believes that its estimated number of trail users requires a trail on the upper end of the range of AASHTO recommended widths of a shared-use path, as referenced and highlighted in section 1 from the AASHTO manual above. However, as highlighted in Exhibit 66 in the record, this estimate is dubious. As a possible compromise, I would suggest that the current SSDP be approved only for the lesser, minimum AASHTO recommended width, but allow a widening of the trail if/when the actual number of trail users are found to be in the range of 4,000 average users per day.

A similar analysis of weighing the environmental concerns of the City with the safety concerns of the applicant should be done in accordance with the requirements of SMC 21A.50.300 "Wetlands—Permitted Alterations" since the trail crosses the wetland buffers as well.

2. **The City should not be continuing to process this SSDP because there are still numerous questions regarding legal ownership of KC's rights to develop the ROW.**

SMC 20.05.040 Application requirements.

(2) (d) For all applications for land use permits requiring Type 2, 3, or 4 decisions, (*emphasis added)* a title report from a reputable title company indicating that the applicant has either sole marketable title to the development site or has a publicly recorded right to develop the site (such as an easement); if the title report does not clearly indicate that the applicant has such rights, then the applicant shall include the written consent of the record holder(s) of the development site.

- No title report in record; no consent of record holders. Instead, city relies on Kenyon opinion Exhibit 67.
- Kenyon opinion says Pechman final decision, that has not been stayed, is better than a title report. To some extent, I would agree were it not for the following 4, significant issues that were seemingly ignored by this opinion.
    1. **Jurisdiction** of Federal Courts is in question
        - Highlighted by another Fed District Court judge in Western WA in connection with another Rails-to-Trail case
        - Now briefed in the 9th Cir Appeal of Pechman case
            - Hearing Examiner should review it (not clear that Kenyon opinion did)
    2. Clear error in Pechman case regarding whether KC or the adjacent landowners have been **paying taxes** on the ROW
        - Issue was raised during KC's motion for Summary Judgment, but Pechman opinion said there was no issue of fact regarding this, and issued Summary Judgment to KC
            - Since then, additional facts have come to light as to how the property taxes are assessed by KC on the adjacent landowners that seriously undermine KC's contention and sworn statement that it has been paying such taxes on the ROW (which by the way it's exempt from paying since it's a Governmental Agency)
        - This issue has now been addressed by filing supplemental information with the 9th Cir
        - Hearing Examiner should review it (not clear that Kenyon opinion did)
    3. Other **Factual Issues** for many adjacent landowners were ignored. Title report would likely show that there is a real question regarding many of the parcels as to whether KC holds a marketable title to the ROW in order to develop it as proposed
        - KC may have "a publicly recorded right to develop the site (such as an easement)", but this publicly recorded deed conflicts with other recorded deeds and there are improvements by adjacent landowners, until these issues are settled, city may be exposed to liability to allow KC to develop land for which their right to do so is still in question—which is the intent of this code provision (to not allow development and expose the city to potential liability when there's a question as to the right to develop between parties). In fact, there is ongoing litigation between some of the adjacent landowners and KC in state court to quiet title to many of the parcels at question in this permit application. See

Neighbors vs King County, Case No. 15-2-20483-1 SEA, IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON FOR KING COUNTY. THIS CASE IS IGNORED, not even mentioned, in Kenyon opinion.

- After the Kenyon opinion was issued, the City has been made aware of View Point Park Community Beach (VPP) issues—and THEY HAVE A DEED!! THIS DEED, AND OTHERS LIKE IT, WERE NOT EVEN IN EVIDENCE OR CONSIDERED IN PECHMAN DECISION (contrary to what others may think or assume). This has not yet been resolved and city can only expect the VPP deed holders, and other adjacent landowners in similar situations, with different facts, to bring suit.
- Hearing Examiner should review and consider these issues (clear that Kenyon opinion did NOT)

4. Kenyon opinion ignores due process concerns of the application of the Pechman decision to ALL adjacent landowners, even if they were not party to that federal case, including those now party to a state court case to quiet title in the Neighbors case mentioned above.
    - Raises real due process issues—typically a court decision only decides on a dispute between 2 parties, here KC and each of the named plaintiffs in the Pechman decision; unless and until a court decides definitively as to all the other adjacent landowners' parcels, e.g. the VPP dispute, as long as the city is aware of this uncertainty, it should not be required to expose itself to potential liability from the adjacent landowner by continuing to process the permit application
    - By not addressing the Neighbors state court case, Kenyon opinion implicitly concludes that the Federal Pechman case is precedent and controlling in the state court Neighbors case—THIS IS CLEARLY WRONG and apparently the state court also does not agree since it's not granted summary judgment to KC.
    - Hearing Examiner should review and consider whether or not the current state court case raises concerns about KC's rights to develop the ROW (clear that Kenyon opinion did NOT)

3. The court-ordered crossing at the Mint Grove section was developed and paid for by the residents of Mint Grove using high-quality materials (to prevent slipping, wear and tear, etc.), and KC should be required to replace such crossing using substantially equal quality of materials and construction standards

May not be an issue re issuance of the processing of an SSDP, but would like to ensure this issue remains highlighted. Years ago, after the Superior Court granted the residents of Mint Grove the right to use the westerly 10-foot of the railroad ROW, the residents designed, developed, and financed a high-quality crossing to minimize wear and tear, prevent cars and pedestrians from slipping, and aesthetics. If KC needs to tear up this crossing to improve the trail, it should be required to reconstruct this crossing in substantially similar design and material standards.

For all the above reasons, I respectfully request that the Hearing Examiner either 1) deny the applicant's application for an SSDP, or 2) condition the issuance of this SSDP to address these concerns. Such conditions should include (A) keeping the centerline of the improved trail aligned with the prior railroad tracks when next to a wetland, and (B) narrowing the improved trail when adjacent to a wetland, In addition, such conditions should include what happens if the Pechman decision is stayed and/or the 9th Cir does not affirm the Pechman decision in the following instances depending on when such decision is rendered: (A) **before** KC begins its work under the SSDP, (B) **during** such work, and (C) **after** KC has completed its construction (which I would posit should be to restore the trail to its current condition, i.e. prior to construction and destruction that should not have been approved, although it's not clear how to restore the mature trees that will have then been destroyed).