

# MEMO

**To:** Jamie Donaldson  
City of Salem Planning Department

**From:** Alan M. Sorem on behalf of Titan Hill Property LLC

**Date:** August 14, 2023

**Re:** Appeal Memorandum – Final Legal Argument for Titan Hill Estates/Titan Hill Apartments  
City of Salem Case No. SUB-UGA-SPR-ADJ-TRV-DR23-02; Application No. 22-119071-PLN



## I. Introduction and Request for Affirmation of Decision

On May 10, 2023, the City of Salem (the “**City**”) issued an approval for a proposed six-lot subdivision for Titan Hill Estates in conjunction with a proposed multi-family development of 436 units for Titan Hill Apartments (the “**Decision**”). The Decision is more particularly identified as City of Salem Case No. SUB-UGA-SPR-ADJ-TRV-DR23-02 for Subdivision Tentative Plan, Urban Growth Preliminary Declaration, Class 3 Site Plan Review, Class 2 Adjustment, Tree Variance, and Class 1 Design Review. On July 24, 2023, the City Council held a public appeal hearing for the City’s review of the Decision. The hearing was closed, and the record was left open until July 31, 2023 at 5:00 p.m. for any party to submit any new evidence or argument. Parties submitted rebuttal on or before August 7, 2023 at 5:00 p.m. This is Applicant’s final written legal argument, which was timely submitted to the City’s Planning Department on or before August 14, 2023.

The City Council must affirm the Decision. The Applicant’s submitted plans and written submissions, together with its oral and written testimony provided during the hearing and open record period, satisfy the Applicant’s burden of proof. The Decision was supported by substantial evidence, and the issues raised by the opposing parties either lack adequate specificity, do not address applicable approval criteria, or request the City to misconstrue its applicable law or apply the local code in a manner that violates applicable state (ORS 197.195 and ORS 197.307(4)) or federal law (Takings Clause, Fifth Amendment, United States Constitution). Moreover, the Decision, as supplemented the supplemental staff reports dated July 24, 2023 and August 1, 2023, provide adequate findings identifying the applicable criteria, evidence relied upon, and the Planning Administrator’s reasoning together with explanations as

Park Place, Suite 200  
250 Church Street SE  
Salem, Oregon 97301  
Post Office Box 470  
Salem, Oregon 97308  
tel 503.399.1070  
fax 503.371.2927  
[www.sglaw.com](http://www.sglaw.com)

to why the issues raised by opponents do not require reversal or remand. There is no basis in law or in fact for the City Council to take any action other than affirming the Decision.

## **II. The City Council Must Respond to the Housing Crisis and Affirm the Decision**

The City Council must affirm the Decision; failure to do so shall exacerbate the current housing crisis. Oregon ranks fourth worst in states in terms of underproduction as a share of total housing units, better only than California, Colorado, and Utah.<sup>i</sup> Oregon state agencies, DLCD and OHCS, identify that over the next 20 years, Oregon must add more than 550,000 units. While the City is working on its housing production study right now to identify how it can best address its share of under production, the City Council has an immediate opportunity to help create 436 new homes (attached multifamily dwellings are homes too). In order to comply with the City's approval criteria and accommodate the concerns of interested parties, the Applicant has already reduced the proposed development from a previous goal of 500 units (the 2022 Comprehensive Plan Map Amendment and Zone Change Decision established a 500-unit trip cap) to just 436 units. This is a loss of 64 homes, which exacerbates the existing crisis. If the City Council were to accept individual demands for preservation of more trees, such action will certainly cause further reductions in the number of dwelling units and delays in permitting. Not only would this create significant additional costs to the Applicant (putting greater pressure on minimum rental rates), but it will also hurt future residents that need these housing units as soon as possible.

## **III. Opponents Mischaracterize the Purpose, Intent, and Text of the Site Plan Review and Subdivision Criteria**

Comments from opponents mischaracterize the evidence required for the City's land use review process. Whether intentional or due to a lack of familiarity with the purpose, intent, and text of the subdivision, site plan review, or other applications, opponents' comments suggest a level of review and approval that is inconsistent with land use review and is more appropriate for engineering or building permit review. For example, the City must approve the application if the proposed design complies with the applicable development standards or can comply with development standards as conditioned. ORS 197.522. The purpose of site plan review and tentative plat review is to make a showing of feasibility of development with the applicable development standards. The City's review as to actual conformance will occur during building permit and engineering review. This is how the City will ensure that conditions of approval are actually enforced throughout the construction process.

#### **IV. Applicant Considered and Made Design Alternatives**

Applicant's original written narrative, testimony during oral argument, and subsequent written submissions demonstrate that Applicant not only considered design alternatives, but incorporated design modifications to address concerns of staff and neighbors. During the rebuttal period, Applicant's engineer submitted updated design sheets to respond to comments made during the open record period. These updates included the following:

- The completeness of the tree conservation plans sheets was questioned. Applicant's engineer resubmitted the plans to ensure that the previously discussed trees along the northern boundary of the subject property were identified on the plan.
- The updated plans adjust the grading along the northern portion of the project, so additional significant trees would not be impacted by more than 30%.
- Adjustments to the parking area near Building No. 6 by eliminating some parking spaces and preserving some additional trees. This change demonstrates compliance with the conditions of approval regarding tree preservation is feasible.
- Adjustments to the location and size of the storm water facility proposed in the southeast corner of the site. This allowed adjustment to the proposed grading and prevents any possible impacts to trees and vegetation in the riparian corridor.
- Clarification that the access easement to the Dalke property was not altered or impacted by the site plan design.

#### **V. The City Cannot Reverse or Remand the Decision without Complying with ORS 197.522**

The proposal is for residential housing, and it is entitled to procedural protections under ORS 197.522. The proposal was approved by the City's Planning Administrator after making findings of fact and conclusions of law that the proposed development is consistent with the applicable approval criteria and standards. The City Council may not reverse the underlying Decision denying the proposal without first providing the Applicant notice and an opportunity to cure. The City Council's explanation of its reasoning must adequately specify the criterion or criteria in question and provide a brief explanation as to what the Applicant must do to cure such alleged issues. City Council must then reopen the record and provide the Applicant an opportunity to modify the proposal or propose a condition to address the issues. *Icon Construction and Development, LLC, v. City of Oregon City*, LUBA No. 2022-100 (May 19, 2023) WL 3968361, at \*9. Only in the event of such a notice of need to cure the application, Applicant requests a

minimum of thirty (30) days to modify or propose conditions and conditionally grants a corresponding extension to the City's 120-day rule obligations.

**VI. Applicant Renews its Arguments in the Alternative that City's Site Plan Review, Subdivision, and UGA Criteria Violate State and Federal Law**

Denial of the Applicant's proposal would violate state and federal law. The City bears the burden of proof that the UDC, as applied in this case, complies with state and federal law. ORS 197.831 states: "[i]n a proceeding before the Land Use Board of Appeals or an appellate court that involves an ordinance required to contain clear and objective approval standards, conditions and procedures for needed housing, the local government imposing the provisions of the ordinance shall demonstrate that the approval standards, conditions and procedures are capable of being imposed only in a clear and objective manner." ORS 197.796(4) states "[i]n any challenge to a condition of approval that is subject to the Takings Clause of the Fifth Amendment to the United States Constitution, the local government shall have the burden of demonstrating compliance with the constitutional requirements for imposing the condition."

The UDC unlawfully incorporates development standards from uncodified elements of the City's Comprehensive Plan. The City's Urban Growth Preliminary Declaration criteria requires conformance with SRC 200.055 through SRC 200.075. All of these criteria require conformance with the uncodified plans: SRC 200.055(a) requires conformance with the TSP; SRC 200.060 requires conformance with sewer master plan; SRC 200.065 requires conformance with stormwater management plan; SRC 200.070 requires conformance with water master plan; and SRC 200.075 requires conformance with parks master plan. Reversal of the Decision and denial of the application based on non-conformance with elements of the City's Comprehensive Plan would violate ORS 197.195. *Oster v. City of Silverton*, LUBA No. 2018 (May 7, 2019). The City Council must affirm the Decision.

The UDC includes ambiguous and unclear standards, criteria, and procedures. For example, SRC 220.005(f)(3) requires approval of a site plan once the applicant provides evidence that a site plan as submitted complies with the following or can comply with the following subject to conditions of approval:

- (A) The application meets **all applicable** standards of the UDC;
- (B) The transportation system provides for the **safe, orderly, and efficient** circulation of traffic into and out of the proposed development, and negative impacts to the transportation system are mitigated adequately;
- (C) Parking areas and driveways are designed to facilitate **safe and efficient** movement of vehicles, bicycles, and pedestrians; and

(D) The proposed development will be **adequately served** with City water, sewer, stormwater facilities, and other utilities appropriate to the nature of the development.

Criteria requiring an applicant to prove a design is “safe and efficient” or a property can be “adequately served” require subjective, value-laden analyses that are designed to balance or mitigate impacts.” *Rogue Valley Assoc. of Realtors, Rogue Valley Assoc. of Realtors v. City of Ashland*, 35 Or LUBA 139 (1998), aff’d 158 Or App 1, 970 P2d 685, rev den 328 Or 594 (1999). These criteria are inherently ambiguous and cannot be a basis for denial as a matter of law. Moreover, requiring compliance with all other “applicable” standards can be both ambiguous and result in unreasonable cost or delay. The City has not adopted an alternative clear and objective tract for land division and development of the subject property. Reversal of the Decision and denial of the application based on non-conformance with unclear or ambiguous standards, criteria, or procedures violates ORS 197.307(4). *Warren v. Washington County*, 296 Or. App. 595 (2019).

Reversal of the Decision and denial of the application based of the City’s tree regulations (UDC Chapter 808) or other criteria would violate the Applicant’s Fifth Amendment rights under the United States Constitution and the unconstitutional conditions doctrine. It is the City’s burden to establish that its tree ordinance has an adequate nexus to a legitimate interest and to make an individualized determination that the burdens on the Applicant are roughly proportionate in both nature and extent to the impacts of the proposed development. *F.P. Development, LLC v. Charter Twp. of Canton, Michigan*, 16 F4th 198, 208 (6th Cir 2021); citing *Nollan v. California Coastal Commission*, 483 U.S. at 835–37, 107 S. Ct. 3141; *Dolan v. City of Tigard*, 512 U.S. at 386–88, 114 S. Ct. 2309; *St. John’s River v. Koontz*, 570 U.S. at 604, 133 S. Ct. 2586. In this case, the City has failed to both identify what the legitimate interest is and how the conditions of approval are roughly proportional to those interests.

A reversal of the Decision and denial of the application based on the stated reasons of the opponents would violate local, state, and U.S. Constitutional law. The City could be subject to 42 U.S.C. § 1983 and/or ORS 197.796 for damages incurred together with an award for attorney fees and costs incurred.

## **VII. Conclusion**

The Applicant requests the City to affirm the Decision without new conditions of approval. Further delays or conditions would only harm the new residents of this much needed housing project.